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Om Pal, Bijender and Kirpal went and demanded Rs.25/- for liquor from PW2 and the deceased—On being refused, they left saying that they would see them—Later in the day, deceased and PW2 went to Om Pal's house to complain about this to his father but Om Pal's father told them he had turned him out of the house—When PW2 and deceased returned home, Kirpal met them and called appellant, Bijender and Om Pal saying that they wanted to talk to PW2 and the deceased—When Kirpal returned there with the said three persons, all of them were armed with lathies—Om Pal exhorted his companions to teach the deceased and PW2 a lesson for complaining against them—Appellant and Bijender started beating PW2 and deceased with danda—Om Pal caught hold of deceased and appellant stabbed him in abdomen and back, killing him on the spot—PW2 ran away from spot as Kirpal and Bijender were shouting that they would not let anyone rescue the deceased, thereafter appellant and all the accused fled away—Weapon of offence, knife, blood stained shirt of the accused and danda were recovered—Bijender and Kirpal were sent for trial before the Juveline Court—Trial Court convicted appellant and co-accused Om Pal u/s 302—Appellant was also convicted u/s 323/34 IPC and u/s 27 Arms Act—During pendancy of appeal filed separately, co-accused Om Pal expired—Held, discrepancies in statement of eye-witness about the knowledge of the death of the deceased were not fatal since 13 years had elapsed since incident when his cross-examination was recorded—Discrepancies do creep in when a witness deposes in a natural manner after a lapse of some time and when discrepancies are comparatively of a minor nature and do not go to the root of the prosecution story then the same may not be given undue importance—Eye-witness PW2 supported case of the prosecution and testified that appellant had given two knife blows to deceased—Autopsy surgeon PW8 opined that two injuries had been caused by the

sharp edged weapon, one of which was sufficient in the ordinary course of nature to cause death—Contradictions in evidence of recovery witnesses very insignificant, considering that same were recorded after more than 13 years—Non-recovery of any incriminating material from an accused cannot be taken as ground to exonerate the accused when his participation in the crime is unfolded in ocular account of the occurrence given by the witnesses whose evidence is found un-impeachable—Merely because arrest of accused persons took place after a couple of days would not benefit the defence—Question with regard to nature of offence has to be determined on the facts and circumstances of each case—The nature of injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury in caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him—Prosecution has not placed any material with regard to any previous enmity or motive in causing death of deceased—Origin of blood found on knife, shirt and danda could not be ascertained—If appellant had intention at initial stage to commit murder of deceased why would he have first inflicted danda blows to the eye-witness, rather he would have given knife blows to the deceased straightaway—Stabbing had taken place out of heat and passion or grappling with each other—From evidence on record cannot be said that appellant had intention to cause death or such bodily injuries to deceased which were sufficient in the ordinary course of nature to cause death of the deceased—Since, there was no pre-meditationor planning, there was no previous enmity between the deceased and appellant, appellant had no motive to commit murder of deceased, injuries were caused to deceased during course of grappling and in a heat of passion on small issue involving Rs.25/-; thus, case covered

— Order VII Rule 11—Defendant had agreed to pay a commission of Rs. 15/- per Kilogram of tea, which amounted to Rs. 1,76,26,500- Rs. 13,00,000/- paid by defendant to Plaintiff leaving Rs. 1,63,26,500 as balance—In liquidation of said outstanding amount a post dated cheque of Rs. 1.15 Crore made over by defendant—Proceedings under FERA were started against defendant—Defendant claimed the cheque of Rs. 1.15 crore unauthorizedly encashed by Plaintiff—Filed FIR against Plaintiff resulting in arrest of Plaintiff for 22 days—Sister of Plaintiff failed to get anticipatory bail—Settlement arrived at between parties—Application filed Under VII Rule 11—Allowed by Ld Single Judge, holding settlement to be not enforceable in view of section 23 and 28 of Contract Act—Appeal filed by Plaintiff—Held by Appellate Court—An application under Order VII Rule 11 to be decided entirely on perusal of plaint and documents filed with it—Plaintiff does not solely rely on "Settlement"—If there had been no commercial or other, dealing between the parties, a settlement to close the FERA proceeding by making favorable statement by Plaintiff and his sister would indubitably would have been hit by section 23 of Contract Act—No illegality found in transaction between the parties—Section 23 of the Contract Act of no relevance—Ld Single erred in going threadbare into defence of Defendant—Proving or disproving cause of action can be considered after the parties have gone to trial—Oder under OVII Rule 11 set aside—Suit restored—Appeal allowed.

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— Order VII Rule 11—Rejection of the Plaint—Suit for Declaration, Partition and Permanent injunction in respect of Plot acquired through a Perpetual Lease by father of the Plaintiff—Construction on the said Plot was carried on the

double storey residential building in 1955—The contribution of funds for the purchase and construction of the building is said to have come from his father, mother and the Plaintiff himself in the proportion of 1/4, 1/4 and 1/2 respectively, though admittedly the Plaintiff was 3-5 years of age at that point in time—It has further been averred that in the Perpetual Lease whereby his father had acquired the said property, had only lent in his name for the purpose of completing the formalities of executing the Lease Deed—Father of the plaintiff was the Karta of the Brar HUF having ancestral property from the proceeds of which the present property was purchased—The said property is said to have been let-out on lease from time to time and the rental income was shared by his parents and the Plaintiff in the ratio of 1/4, 1/4 and 1/2—The shared ownership of the property is said to be duly reflected by the father of the plaintiff by his conduct as well as admissions before Income Tax Authorities, Wealth Tax Authorities and Revenue Authorities—The Plaintiff has filed the present Suit claiming half together with his proportional share in the 1/4 interest/title of his father—The defendant sought the rejection of the suit by means of an application under Order VII Rule 11 of the CPC on the ground that the claim of the plaintiff was that the property was the Benami property in the name of his father and the Benami Transaction Prohibition Act, 1988 specifically barred any suit, claim and action to enforce any right in respect of any property held benami by a person who claims to be the real owner of the property—Learned Single Judge dismissed the application holding that the Plaintiff's case may fall in the exception of Section 4 on the dialectic that the father stood in a fiduciary capacity as the Plaintiff was 3-5 years old when the property was purchased and he acted as a Trustee for the purposes of Section 88 of Indian Trusts Act, 1882—Hence the instant Appeal. Held—Order VI of the CPC only requires the parties to state the material facts and not

the evidence—Pleadings are to contain facts and facts alone and a party is not required to state the law or substantial legal pleas in their respective pleadings—In a case of clever drafting where an illusion of a cause of action is sought to be created, the Court has to nip in the bud such a frivolous suit—Similarly, in the case of shoddy or deficient drafting, the Court should not abort a valid claim that requires Trial—It is the duty of the Court to make a holistic and meaningful reading of the Plaint and only when it is manifestly and uncontrovertibly evident that the requirements of Order VII Rule 11 are met, and that it is plain that the Plaint does not deserve to go to Trial, should it order a rejection of the Plaint—In the instant case since the father is the nominal owner, and it stands clearly pleaded that he used his sons (Plaintiffs) finances for the purchase, Order VII Rule 12 would not be attracted, at the stage of determination of the plea under Order VII Rule 11—Not disputed that the Plaintiff was a minor at the time of acquisition of the property—Section 6 of Hindu Minority and Guardianship Act, 1956 enjoins that in respect of a minor person and property, the natural guardian in case of a minor boy is the father—The property was purchased from the funds that came from an ancestral property belonging to the Brar HUF for the purposes of Income Tax and Wealth Tax—The father had been showing the Plaintiff to be 1/2 owner of the suit property, the rental income was also shared in that proportion by the Plaintiff, his father and the mother—All these averments conjointly prima facie raise a presumption of a fiduciary relationship existing between the father and the Plaintiff with respect to the ownership of the property—These pleadings have to be traversed by the Defendant in a Trial and cannot be adjudicated at Order VII Rule 11 stage—There is no comparison between the relationship of a father/parent and his infant child on the one hand, and of siblings on the other.

Appeal is entirely devoid of merit and is dismissed.

Babli Brar v. *Adesh Kanwarjit Singh Brar* *431*

CODE OF CRIMINAL PROCEDURE, 1973—Section 125, 397, 401 and 482—Petitioner's mother married with respondent on 03.12.1988—Petitioner was born on 22.08.1989—Respondent denied the marriage and paternity—He married with another lady—Petitioner being minor filed petition for maintenance through her mother, natural guardian—Magistrate directed the respondent to pay her a sum of Rs. 1,000/- p.m from 24.09.2011 to 31.03.2005 and a sum of Rs. 1,500/- p.m from 01.04.2005 to 22.08.2007, as maintenance—Petition—Held—No set formula can be laid down for fixing the amount of maintenance payable and the calculation of the same would always depend upon the facts and circumstances of each case—In the facts of the present case, the methodology adopted in the cases of *Annurita Vohra v. Sandeep Vohra* report as 110 (2004) DLT 546 and *S.S. Bindra v. Tarvinder Kaur* reported as 112 (2004) DLT 813 has been found to be a useful tool to determine the monthly salary of the respondent, in order to calculate maintenance payable to the petitioner—In the aforesaid cases, after taking into account the compulsory deductions from the salary, the remaining income was divided equally by the Court between all the family members entitled to maintenance, with one extra portion/share being allotted to the earning spouse solely for the extra expenses that would necessarily occur—In the present case, other than the petitioner and the respondent himself, there are three dependents entitled to maintenance, i.e. petitioner's wife and two children—Therefore, no extra portion needs to be allotted to the respondent as all extra expenses can be accommodated in the separate allotments made to the three dependents and the respondent himself—

As a result, the net monthly salary of the respondent for the relevant years, would be liable to be divided in five equal portions, with one-fifth part of the salary going to the share of the petitioner towards maintenance.

Chandni Sharma v. *Gopal Dutt Sharma* *373*

— Sections 397, 407, 482—Aggrieved by order of learned trial court directing framing of charge for offences punishable under Section 420/468/470 read with Section 120-B, petitioner preferred revision—Petitioner urged, order on charge based upon baseless conjectures and uncertainty and vagueness of charge itself sufficient ground for quashing the same—As per Respondent, at initial stage of framing of charges, truth, veracity and necessary effect of evidence which prosecution proposes to prove not required to be maticulously judged by trial Court—Also, charges can be framed even on basis of strong suspicion found on material collected by investigating agency during course of investigation—Held:- At time of framing of charge, probative value of material on record cannot be gone into and material brought on record by prosecution has to be accepted as true at that stage—Before framing charge, Court must apply its judicial mind to material placed on record and must be satisfied that commission of offence by accused was possible—Whether, in fact, accused committed offence, can only be decided at trial.

Anupam Ranjan v. *State (C.B.I.)* *313*

COMPANIES ACT, 1956—Section 291, 292—Appellant No.3,a Corporate body purchased US 64 from Unit Trust of India (Respondent)—At the time of purchase Appellant complied with stipulation with regard to the submission of certificate of incorporation, memorandum and Article of Association, true copy of resolution passed by Managing body authorizing

investment including Appellant no.2 making application for allotment of units—On 30th May 2001 Appellant No. 3 lodged Units for repurchase after duly discharging the same, signed by Appellant No.2—On 15th June Respondent returned the units with the objection "resolution for disinvestment letter is not there"—Indicating the same should be resubmitted after 30th June 2001—Appellant No.3 re-lodged it with resolution dated 12th May 2001—Unit Trust of India refused to accept the same in view of the decision to not to repurchase US 64 Units from 2nd July, 2001 onwards—Two question before Court—One, whether such resolution was required to be submitted as per terms of brochure—Other, whether there is any such statutory requirement—Held, the question whether the application was incomplete to be decided by examining terms of brochure and not by introducing new terms and conditions, not mentioned in brochure—Not in dispute clauses relating to purchase had been complied with—No stipulation, at the time of repurchase the copies of Certificate of incorporation, Memorandum and Articles of Association, true copy of resolution of Managing Body for repurchase including the authority in favour of official were required to be submitted—Nothing prevented Respondent to stipulate, a certified copy of the resolution and the authority of the person submittng application should be submitted—Not the case, Application for purchase submitted by any person other than the one who submitted application for purchase—Reliance on section 291 and 292 of the Companies Act misplaced—Not the case that to repurchase UNITS any general meeting was required or Articles and Memorandum of Association restrict Board of directors from doing so, to attract section 291—As per Section 292(1) (d) it was not necessary to enclose Board Resolution with application for repurchase—In any case, violation of section 292 may have its impact and effect but a

third person cannot reject application for repurchase on the ground of suspicion that there is non compliance of section 292—There is error in the decision making process—Respondent could not have taken irrelevant material into account—Decision is amenable to Judicial Review and can be corrected in Writ Proceedings.

Jasdev Singh & Ors. v. *Unit Trust of India*..... *185*

CONSTITUTION OF INDIA, 1950—Article 226—Legal propriety of judicial directions for removal of Arbitrators even before publishing of Award challenged in appeals before Division Bench—Objection lodged to maintainability of appeals on ground that such remedy of appeal provided only against granting or refusing to grant interim measures or setting aside or refusing to set aside arbitral award—Per contra plea taken where order is passed de hors The Act, appeal assailing such order be entertained—Held—Aggrieved party could, in deserving cases, approach Supreme Court under plenary powers contained in Article 136 of Constitution of India—Present appeals are incompetent.

Progressive Career Academy Pvt. Ltd. v. *Fiit Jee Ltd.* *286*

— Article 226—Petition challenging the order dated 03.09.2009 passed by the Central Administrative Tribunal, Principal Bench, directing the petitioner to count the erstwhile service rendered by the respondent no.1 with Govt. of Sikkim without insisting on liability, which has been dispensed with as per O.M. Dated 9th October 1986—Respondent no. 1 had worked under the Govt. of Sikkim, Education Department from 2.09.1976 to 09.05.1992—The respondent was appointed to the post of Education Officer through UPSC against the regular vacant

post of Assistant Education Officer on 21.04.1992 with the prior permission of the respondent no.2, with the petitioner—Service certificate/book was transferred by respondent no. 2 to the petitioner—Three advance increments were given to the respondent on account of his past service—Respondent made representations to count his past service for retirement benefits, but the petitioner refused to count the service rendered with the Govt. of Sikkim—Also directed until the amount against pro-rate pension contribution is deposited, case of the respondent no.1 would not be considered—Respondent no.1 filed the writ petition, but same was transferred to Central Administrative Tribunal on account of change of jurisdiction—Held—The petitioner could not have denied grant of complete pension to the respondent No. 1 after computing his service rendered with the Government of Sikkim, on the ground that pro-rata pension contribution of the Government of Sikkim of Rs. 1,38,320/- has not been deposited by the respondent no.2—The item no. 29 of resolution No. 1381 does not contemplate that unless and until the previous employer will deposit their contribution, even if the previous employer is liable for the same, the pension shall not be paid to the absorbed employee on his retirement—The only restriction contemplated under the said item no.29 of resolution No. 1381 is that if the employee had received the benefit from the previous employer then the absorbed employee will surrender the benefit received from the previous employer—Admittedly the respondent No. 1 had not received the pro-rata pensionary benefits from the previous employer, State Government of Sikkim—The petitioner may be entitled to claim the amount from the respondent No.2, but it cannot deny the full pension of combined service to the employee i.e. respondent no.1 in the facts and circumstances.

Municipal Corporation of Delhi v. *R.K.S. Gaur & Ors.* *8*

— Article 136—International Arbitration Act, 1974—Section 16(1), 18A—Uniform Arbitration Act, 1989—Section 12, 13, 14, 15—UNCITRAL Model Law on International Commercial Arbitration—Article 13(3)—Ld. Single Judge referred petition to Division Bench because of existence of two divergent conceptions—One view is assertions as to de jure or de facto incompetence of Arbitral Tribunal must immediately be addressed by Court—Other view is statutorily provided procedure postulates immediate remonstration but a deferred assailment of Award by invocation of Section 34 of The Act—Held—Parliament did not want to clothe Courts with power to annul Arbitral Tribunal on ground of bias at intermediate stage—Act enjoins immediate articulation of challenge to authority of arbitrator on ground of bias before Tribunal itself and ordains adjudication of this challenge as objection under Section 34 of A & C Act—Curial interference is not possible at pre-Award stage on allegations of bias or impartiality of Arbitral Tribunal—Referral order answered.

Progressive Career Academy Pvt. Ltd. v. *Fiit Jee Ltd.* *286*

— Article 226—Land of petitioner was acquired vide award passed in 1963—Petitioner never preferred a reference for enhancement of compensation—Other aggrieved land owners from same village and in respect of same award succeeded in a reference vide decision rendered by High Court in RFA in 1987—Petitioner applied for certified copy and filed application under Section 28A for enhanced compensation in 2008—Application dismissed by LAC for limitation—Order challenged in High Court Plea taken, it is date of knowledge of petitioner which is material for purposes of filing application to claim parity in respect of compensation qua persons who had sought and obtained enhanced compensation—Per contra

plea taken, provisions cannot go beyond what the legislature has stipulated—Proviso to Section 28 A of Act itself makes it clear how period of limitation is to be calculated for purposes of making application—No other period is to be excluded from time stipulated of three months than what is specifically stated in proviso—Petitioner seeks to rely upon judgment of HC for making application for enhanced compensation while benefit is to be made available only on basis of award rendered—Held—It is not open to this Court to extend contours of beneficial legislation any further specifically in view of mode and manner in which legislature in its wisdom has enacted said provision—Relevant date would be date of decision of reference Court and not date of decision of High Court—Petitioner only steps into shoes of his father and original land owner never took steps in accordance with law to seek parity of compensation and petitioner cannot be better off than original land owner—Date of knowledge is immaterial and limitation would begin to run from date of award on basis of which re-determination of compensation is sought—No merit in writ petition.

Yudhvir Singh v. *Land Acquisition Collector* *365*

— Article 226—Petitioners applied for voluntary retirement that they be relieved after 3 months—Their request accepted before expiry of three months—After the acceptance, the petitioner sent a letter withdrawing the request for voluntary retirement but they were relived—Petition—That petitioner were within their rights to withdraw their offer of voluntary retirement before the expiry of three months period, when it was to be effective—Respondent had accepted it with effect from an early date, which is not according to the offer of the petitioner—According to the letter/circular of the respondent, petitioner were entitled to withdrawn the request and the respondent was bound to accede the request and allow them

joining, her name was placed at Sr. no.6—Thus she was entitled to join in the event of any of the first five candidates not joining within 45 days of offer of appointment—Candidates appearing at Sr. no.1, 2 and 5 did not join within 45 days—Their appointment lapsed and she being next on the panel became entitled to appointment—Submitted, mandate of the Selection Committee binding on appointing authority—Held, Section 10(1A) merely provided mode of appointment—Word 'Recommendation' used in Section 10(1A) intended to mean what is ordinarily understood by the use of the word 'Recommendation'—If legislature intended to make recommendation of Selection Committee binding language of Section 10(1A) would have been different—State Government is not bound to accept the recommendations made by the Selection Committee—Act did not provide for preparation of a panel of candidates nor for the selected candidates to join within 45 days—Petitioner did not have any right to appointment—Record produced did not show that Selection Committee was only to make recommendation of names and not the conditions of appointment—It did not show that the Selection Committee had revised panel, it only showed that petitioner was to be appointed in the event of Sh. M.C. Mehra not joining within 45 days and infact Sh. Mehra had joined within 45 days—Petitioner had no right of appointment upon delay in the joining of candidates no.4 and 6—The appointment letter issued thus did not show that they were to join within 45 days—That Respondent no.4 to 6 were in service elsewhere was in contemplation of the appointing authority as well as Selection Committee that they, would not join till relieved by their employers—Appointing Authority was entitled to vary the recommendations of the Selection Committee—For reasons to be recorded—There were reasons on record for relaxing the period of 45 days as recommended by Selection

Committee—No reason for the judicial review of this decision by appointing authority for relaxing the time of 45 days.

Dr. Prem Lata v. *GNCT of Delhi and Ors.* *208*

— Article 32, 226 and 227—Penalty of dismissal imposed upon petitioner as he was found guilty of charge levelled against him—Tribunal refused to interfere in order of punishment—Order challenged before High Court—Plea taken, allegation of interpolation not proved since only witness in this regard is expert witness who had not taken admitted signatures or writings of petitioner and opinion of said expert does not deserve acceptation—Held—Handwriting expert was cross-examined at length by defence and private handwriting expert was permitted to be cited as a defence witness—It can be said with certitude that there has been substantial compliance of principles of natural justice—Tribunal does not sit in appeal on the findings recorded by enquiry officer in departmental proceeding but under certain circumstances a judicial review of fact is permissible—No merit in writ petition.

S.K. Tyagi v. *Union of India & Ors.* *439*

CONSUMER PROTECTION ACT, 1986—Selection Committee made recommendations for filling up vacancies by preparing a panel valid for one year—Selected candidates were to join within 45 days of offer of appointment—In case failure to join, the appointment was to be offered to the second or third person as the case may be in preference—Petitioner did not figure in the name of first five selected candidates—The name of the petitioner however was mentioned as "second person" in the event of one Mr. M.C. Mehra not joining, whose name figured at Sr. no.4 in the list of selected candidates—According to the petitioner panel subsequently revised inspite of her being a candidate in waiting in the event of Mr. M.C.

Mehra not joining, her name was placed at Sr. no.6—Thus she was entitled to join in the event of any of the first five candidates not joining within 45 days of offer of appointment—Candidates appearing at Sr. no.1, 2 and 5 did not join within 45 days—Their appointment lapsed and she being next on the panel became entitled to appointment—Submitted, mandate of the Selection Committee binding on appointing authority—Held, Section 10(1A) merely provided mode of appointment—Word 'Recommendation' used in Section 10(1A) intended to mean what is ordinarily understood by the use of the word 'Recommendation'—If legislature intended to make recommendation of Selection Committee binding language of Section 10(1A) would have been different—State Government is not bound to accept the recommendations made by the Selection Committee—Act did not provide for preparation of a panel of candidates nor for the selected candidates to join within 45 days—Petitioner did not have any right to appointment—Record produced did not show that Selection Committee was only to make recommendation of names and not the conditions of appointment—It did not show that the Selection Committee had revised panel, it only showed that petitioner was to be appointed in the event of Sh. M.C. Mehra not joining within 45 days and infact Sh. Mehra had joined within 45 days—Petitioner had no right of appointment upon delay in the joining of candidates no.4 and 6—The appointment letter issued thus did not show that they were to join within 45 days—That Respondent no.4 to 6 were in service elsewhere was in contemplation of the appointing authority as well as Selection Committee that they, would not join till relieved by their employers—Appointing Authority was entitled to vary the recommendations of the Selection Committee—For reasons to be recorded—There were reasons on record for relaxing the period of 45 days as recommended by Selection

Committee—No reason for the judicial review of this decision by appointing authority for relaxing the time of 45 days.

Dr. Prem Lata v. *GNCT of Delhi and Ors.* *208*

CONTRACT ACT, 1872—Section 73 & 74—Code of Civil Procedure, 1908—Sale of Goods Act, 1930—Section 61 (2)—Suit filed for recovery of Rs. 24,90,665—Defendant Company entered contract for supply of One Lakh liters of weedicide @ Rs.96.98 per liters plus tax in staggered lots commencing October 2005—Contract stipulated in the event of non-supply or non-lifting pre-determined compensation @ Rs. 20/- per liters—Plaintiff supplied 7000 liters of goods on 1st of October, 1995—Defendant informed by letters in November, 1995, it was not in a position to commit the lifting of supplies because of failure of season and market crash or making financial arrangement for further quantities—Plaintiff in reply informed that it has made necessary arrangement for supplies, refusal to lift would result in loss to Plaintiff—Defendant failed to act—Plaintiff sued for unlifted quantity as well as towards the balance payment of 7000 liters—Defendant No1 is a Company controlled by Defendant No.4 and his family—Defendant No.3 wife running business in the name and style of defendant no.2—Held, Suit not maintainable against No. 2 to 4—No privity of contract between the Defendant No. 3 & 4—Contract only with Defendant No.1 company—Defendant No 3 & 4 not personally liable—Defendant No. 2 only a Trade name not a legal entity—Names of Defendant No.2 to 4 Struck off from array of Parties. A party suffering loss as a result of breach of contract which provides for liquidated damages, can claim reasonable damages unless shown no damages suffered, though not more than damages stipulated—In case in hand, no damages shown to have been suffered but it cannot be disputed that some damages were suffered by Plaintiff on account of breach—Damages to the tune of

Rs. 9,30,000/- granted to plaintiff—Though no agreement between the parties to pay interest, however, granted under section 61(2) of Sales of Goods Act as the contract was for sale & purchase of goods.

DELHI ELECTRICITY SUPPLY CODE AND PERFORMANCE STANDARDS REGULATIONS, 2007—Regulation 15, 46 and 49—Petitioner filed writ petition seeking a direction to BSES to take appropriate steps to recover upto date dues with respect to premises from tenant to ensure that petitioner upon being put back into possession of premises is not saddled with liability for dues of electricity consumed by tenant—Plea taken by BSES, relief sought by petitioner is contrary to regulations whereunder BSES is entitled to refuse electricity supply to premises after tenant has vacated premises if any arrears of electricity dues remain—Petitioner ought to have incorporated in lease deed, obligation of tenant to pay electricity dues upto date of vacation of premises—Per contra plea taken, electricity charges are always responsibility of tenant more so when connection itself is in name of tenant—Held—Consumer of electricity is liable to get special reading done at time of change of occupancy or on premises falling vacant and to obtain No Dues Certificate from Distribution Company who is obliged to arrange for such special reading and to deliver final bill including all arrears till date of billing at least three days before vacation of premises—Thereafter, Distribution Company is left with no right to recover any amounts other than those subject matter of bill and is also required to disconnect electricity on its vacancy—Distribution Company cannot be negligent in complying with its obligations and which non compliance may be to prejudice of petitioner—

Distribution Companies cannot afford to be complacent in relief that its dues are secure and will be recovered if not from tenant then in any case from petitioner—If Distribution Companies are permitted to so allow arrears of electricity charges to accumulate and not take timely prompt action for recovery thereof from person liable therefore and then coerce subsequent occupant to pay same, it would be serious clog on transferability of immovable properties—Distribution Companies when warned of likely date of vacation of property by consumer liable for electricity dues, are obliged to ensure that electricity charges do not accumulate and are recovered before consumer vacates property so that electricity dues do not fall on subsequent consumer—Supplier of electricity is required to enforce all its Rules and cannot be selective in same and if found to be negligent in enforcement of Rules against previous occupant and to detriment of subsequent occupant, subsequent occupant would be entitled to resist such claims of supplier of electricity—Writ allowed directing BSES to ensure that claims against electricity meter in name of tenant in premises are paid before date of vacation of premises otherwise it shall not be entitled to deny electricity connection to petitioner or any subsequent transferee/occupant thereof for reason of said dues.

DELHI MUNICIPAL CORPORATION ACT, 1957—Section 115—This appeal has impugned the judgment and decree dated 23.10.2007 which had endorsed the finding of the trial judge dated 06.08.1985 whereby the suit filed by the plaintiff Ramjas Foundation Charitable Trust with a prayer that the defendant be restrained from seeking recovery of the property tax with respect to the building of Ramjas School, Pusa Road New

Delhi be declared null and void had been decreed in favour of the plaintiff. Three suits had been filed by the plaintiff in respect of different periods, seeking restraint against the defendant from recovery of property tax demands—In the written statement, the defense was that the suit was barred by time—Seven issues were framed—Suit of the plaintiff was decreed—In appeal, this finding was endorsed—This is a second appeal—The present suits related for subsequent years; the matter in issue in the earlier suits and matter in issue in the subsequent suits was not the same; applicability of the doctrine of res-judicata was an illegality. The finding returned in the impugned judgment applying this doctrine is thus a perversity; hence, set aside—There was no other evidence to substantiate the stand of the plaintiff that he was running the trust for a charitable purpose. No record had been produced by the plaintiff society i.e. his balance-sheet, statement of account or any other document to substantiate his submission that the school was being running for charitable purpose. The onus is always upon a party to the case to prove his case before he is entitled to the grant of relief. The Supreme Court has noted in the case of Children Book Trust that running of a school is per se not charitable; imparting education sans an element of public benefit or philanthropy is not per se charitable; secondly the society must be supported wholly or in part by voluntary contribution; lastly, the society must utilize its income in promoting its objects and must not pay any dividend or bonus to its members. Tax liability of a registered society running a recognized private unaided school be considered in the light of the above conditions as well as the relevant provisions of Delhi School Education Act and the Rules framed thereunder; transfer of funds by the school to the society even in the name of contribution would amount to transfer by the society to itself and therefore cannot be considered for the purposes of exemption. Applying these

guiding principles to the case of the appellant, it is clear that the plaintiff had not fulfilled this test entitling him to exemption. The finding in the impugned judgment holding that the plaintiff was working for a charitable purpose is a perversity—Plaintiff not entitled to exemption under Section 115(4) of the Act.

DELHI RENT CONTROL ACT, 1958—Sections 25-B (8) and 14 (1) (e)—Petitioner is the landlord in respect of premises bearing no. 2, Satnam Park, Chander Nagar Road, Delhi-110051 admeasuring 190 sq. yds.—Respondent is a tenant at a monthly rent of Rs. 825/-—Respondent running a hair cutting saloon in the premises—Petitioner is a senior citizen and his family consisting of his ailing wife, two married sons and three married daughters—Elder son having one son aged 18 years and two daughters aged about 17 and 16 years—The younger son having two sons aged about 10 years and 5 years—Younger son is a practicing advocate occupying two rooms as his office and library—Three married daughters often pay visits—Their families and their relatives also visit them—Petitioner and his wife are not able to climb stairs and medically advised to stay on the ground floor—Petitioner seeking eviction of the tenanted premises—Same is required bonafide by the petitioner and his family members—Respondent asserted that requirement of the petitioner is for residential purposes and the premise is not fit for residential purpose—He is having two more shops besides the shop of the respondent and there is one more room on the second floor—Leave to defend was granted by the Addl. Rent Controller—Revision filed challenging the order—Held—There is an expansion in the family of the petitioner—The petitioner and his wife both are aged persons and suffering from diseases regarding which the medical documents have been filed by

account of dispute regarding ownership of property so possibility of false implication—Equally possible that deceased was tutored by her husband—Husband of deceased was already present and had a talk with deceased prior to recording of dying declaration Ex. PW3/A—Husband had sufficient opportunity to tutor deceased—Deceased despite being in a position to talk, did not tell anything to police officer who took her to hospital—Since Court unable to identify which out of the family members set deceased on fire, appellants acquitted.

Mohd. Iqbal & Ors. v. *State*..... *35*

— Sections 302/323/34—Arms Act, 1959—Section 27—Case of prosecution that when PW2 and deceased were together, appellant along with one Om Pal, Bijender and Kirpal went and demanded Rs.25/- for liquor from PW2 and the deceased—On being refused, they left saying that they would see them—Later in the day, deceased and PW2 went to Om Pal's house to complain about this to his father but Om Pal's father told them he had turned him out of the house—When PW2 and deceased returned home, Kirpal met them and called appellant, Bijender and Om Pal saying that they wanted to talk to PW2 and the deceased—When Kirpal returned there with the said three persons, all of them were armed with lathies—Om Pal exhorted his companions to teach the deceased and PW2 a lesson for complaining against them—Appellant and Bijender started beating PW2 and deceased with danda—Om Pal caught hold of deceased and appellant stabbed him in abdomen and back, killing him on the spot—PW2 ran away from spot as Kirpal and Bijender were shouting that they would not let anyone rescue the deceased, thereafter appellant and all the accused fled away—Weapon of offence, knife, blood stained shirt of the accused and danda were recovered—Bijender and Kirpal were sent for trial before the Juveline Court—Trial Court

convicted appellant and co-accused Om Pal u/s 302—Appellant was also convicted u/s 323/34 IPC and u/s 27 Arms Act—During pendancy of appeal filed separately, co-accused Om Pal expired—Held, discrepancies in statement of eye-witness about the knowledge of the death of the deceased were not fatal since 13 years had elapsed since incident when his cross-examination was recorded—Discrepancies do creep in when a witness deposes in a natural manner after a lapse of some time and when discrepancies are comparatively of a minor nature and do not go to the root of the prosecution story then the same may not be given undue importance—Eye-witness PW2 supported case of the prosecution and testified that appellant had given two knife blows to deceased—Autopsy surgeon PW8 opined that two injuries had been caused by the sharp edged weapon, one of which was sufficient in the ordinary course of nature to cause death—Contradictions in evidence of recovery witnesses very insignificant, considering that same were recorded after more than 13 years—Non-recovery of any incriminating material from an accused cannot be taken as ground to exonerate the accused when his participation in the crime is unfolded in ocular account of the occurrence given by the witnesses whose evidence is found un-impeachable—Merely because arrest of accused persons took place after a couple of days would not benefit the defence—Question with regard to nature of offence has to be determined on the facts and circumstances of each case—The nature of injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury in caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him—Prosecution has not placed any material with regard to any previous enmity or motive in causing death of deceased—Origin of blood found on knife,

shirt and danda could not be ascertained—If appellant had intention at initial stage to commit murder of deceased why would he have first inflicted danda blows to the eye-witness, rather he would have given knife blows to the deceased straightaway—Stabbing had taken place out of heat and passion or grappling with each other—From evidence on record cannot be said that appellant had intention to cause death or such bodily injuries to deceased which were sufficient in the ordinary course of nature to cause death of the deceased—Since, there was no pre-meditationor planning, there was no previous enmity between the deceased and appellant, appellant had no motive to commit murder of deceased, injuries were caused to deceased during course of grappling and in a heat of passion on small issue involving Rs.25/-; thus, case covered under Exception IV to Section 300—Conviction of appellant altered from Section 302 to 304 Part II—Conviction u/s 27 Arms Act upheld—Sentenced altered to period already undergone—Appeal partly allowed.

— Section 302—Case of prosecution that PW3, PW4, PW5 were going for morning walk—They saw appellant and the deceased in front of appellant's house—Appellant gave knife blows to deceased—PW3, PW4 and PW5 went towards the appellant, however, appellant dragged the deceased inside his house and shut the door—PW3, PW4 and PW5 informed the deceased's family—Trial Court convicted appellant u/s 302—Held, the fact that FIR number was omitted on two documents, also that identification was made one day before the inquest report as well as lack of proof that FIR was sent to magistrate u/s 157 Code of Criminal Procedure, 1973 seen together with the lack of identification of accused in FIR casts a cloud over the timing of the FIR and raises doubt as to

whether it was recorded at the time, it is alleged to have been recorded—Discrepancies in evidence with regard to recovery of knife which could not be proved to be the weapon used to kill deceased—Evidence pertaining to deposit of seized articles in the Malkhana disclose suspicious picture—Postmortem report is said to have been deposited before it was brought into existence—Articles seized were supposed to have been sent to CFSL without any record of it, nor when they were sent back—Prosecution version that seized articles were deposited safely in the Malkhana cannot be believed—Discrepancies in testimonies of prosecution witnesses together with fact that FIR ante-timed and recovery of articles not proved, nor weapon used for committing offence produced, fatal to prosecution—Prosecution failed to establish motive—No material shown to prove why appellant could have murderously attacked deceased—Appellant acquitted—Appeal allowed.

— Sections 392/397/34—Case of prosecution that PW2 along with another person were returning from Mehrauli on their cycles—When PW2 reached B-1, Vasant Kunj, one out of the two boys (accused) going on foot, desired to sit on his cycle—PW2 refused saying that there was a bundle of medicines on the carrier of his cycle—The co-accused gave a push to his cycle and PW2 fell down—The co-accused took out a knife and asked PW2 to hand over the money which he handed over which the co-accused gave to the appellant the thereafter both ran away—In the meantime, the other person accompanying PW2 also came and both of them chased both accused—Only co-accused was apprehended—Pursuant to disclosure of co-accused, appellant arrested and got recovered money—Trial Court convicted appellant for offences u/s 392/397/34 and co-

INDIAN SUCCESSION ACT, 1925—Section 372—Succession Certificate—Dispensation of Security Bond—Petitioner applied for Succession Certificate in respect of shares left behind by her husband—No objection filed by other legal heirs—Application filed for the dispensation of administration and security bonds on the ground that there is no dispute between legal heirs—Held, the requirement of furnishing administration and security bonds dispensed with following earlier Judgment of Court Sambhu P. Jaisinghani's case.

Smt. Gyan Devi Garg v. *State & Ors.* *32*

INTERNATIONAL ARBITRATION ACT, 1974—Section 16(1), 18A—Uniform Arbitration Act, 1989—Section 12, 13, 14, 15—UNCITRAL Model Law on International Commercial Arbitration—Article 13(3)—Ld. Single Judge referred petition to Division Bench because of existence of two divergent conceptions—One view is assertions as to de jure or de facto incompetence of Arbitral Tribunal must immediately be addressed by Court—Other view is statutorily provided procedure postulates immediate remonstration but a deferred assailment of Award by invocation of Section 34 of The Act—Held—Parliament did not want to clothe Courts with power to annul Arbitral Tribunal on ground of bias at intermediate stage—Act enjoins immediate articulation of challenge to authority of arbitrator on ground of bias before Tribunal itself and ordains adjudication of this challenge as objection under Section 34 of A & C Act—Curial interference is not possible at Pre-Award stage on allegations of bias or impartiality of Arbitral Tribunal—Referral order answered.

Progressive Career Academy Pvt. Ltd. v.
Fiit Jee Ltd. *286*

LAND ACQUISITION ACT, 1894—Section 4, 6, 18, 28 and

28A—Constitution of India, 1950—Article 226—Land of petitioner was acquired vide award passed in 1963—Petitioner never preferred a reference for enhancement of compensation—Other aggrieved land owners from same village and in respect of same award succeeded in a reference vide decision rendered by High Court in RFA in 1987—Petitioner applied for certified copy and filed application under Section 28A for enhanced compensation in 2008—Application dismissed by LAC for limitation—Order challenged in High Court Plea taken, it is date of knowledge of petitioner which is material for purposes of filing application to claim parity in respect of compensation qua persons who had sought and obtained enhanced compensation—Per contra plea taken, provisions cannot go beyond what the legislature has stipulated—Proviso to Section 28 A of Act itself makes it clear how period of limitation is to be calculated for purposes of making application—No other period is to be excluded from time stipulated of three months than what is specifically stated in proviso—Petitioner seeks to rely upon judgment of HC for making application for enhanced compensation while benefit is to be made available only on basis of award rendered—Held—It is not open to this Court to extend contours of beneficial legislation any further specifically in view of mode and manner in which legislature in its wisdom has enacted said provision—Relevant date would be date of decision of reference Court and not date of decision of High Court—Petitioner only steps into shoes of his father and original land owner never took steps in accordance with law to seek parity of compensation and petitioner cannot be better off than original land owner—Date of knowledge is immaterial and limitation would begin to run from date of award on basis of which re-determination of compensation is sought—No merit in writ petition.

Yudhvir Singh v. *Land Acquisition Collector* *365*

RECOGNIZED SCHOOLS (ADMISSION PROCEDURE FOR PRE-PRIMARY CLASS) ORDER, 2007-2008—Rule 19—Essentiality of draw of lots in the presence of parents of candidate—Petitioner was not selected for admission Alleged arbitrary conduct of school-holding draw of lots not in the presence of the parents of the Petitioner—Admitted that draw of lots was held in the presence of Admission Committee consisting of two representatives of the parents of the candidates. Held—Petitioner did not contend that no draw of lots was held or there has been any bias or prejudice against him—Admission committee consisted of representatives of parents—Process of draw of lots-transparent and fair.

Master Shikhar Gupta v. *Govt. of NCT of Delhi & Ors.* *241*

SALE OF GOODS ACT, 1930—Section 61 (2)—Suit filed for recovery of Rs. 24,90,665—Defendant Company entered contract for supply of One Lakh liters of weedicide @ Rs.96.98 per liters plus tax in staggered lots commencing October 2005—Contract stipulated in the event of non-supply or non-lifting pre-determined compensation @ Rs. 20/- per liters—Plaintiff supplied 7000 liters of goods on 1st of October, 1995—Defendant informed by letters in November, 1995, it was not in a position to commit the lifting of supplies because of failure of season and market crash or making financial arrangement for further quantities—Plaintiff in reply informed that it has made necessary arrangement for supplies, refusal to lift would result in loss to Plaintiff—Defendant failed to act—Plaintiff sued for unlifted quantity as well as towards the balance payment of 7000 liters—Defendant No1 is a Company controlled by Defendant No.4 and his family—Defendant No.3 wife running business in the name and style of defendant

no.2—Held, Suit not maintainable against No. 2 to 4—No privity of contract between the Defendant No. 3 & 4—Contract only with Defendant No.1 company—Defendant No 3 & 4 not personally liable—Defendant No. 2 only a Trade name not a legal entity—Names of Defendant No.2 to 4 Struck off from array of Parties. A party suffering loss as a result of breach of contract which provides for liquidated damages, can claim reasonable damages unless shown no damages suffered, though not more than damages stipulated—In case in hand, no damages shown to have been suffered but it cannot be disputed that some damages were suffered by Plaintiff on account of breach—Damages to the tune of Rs. 9,30,000/- granted to plaintiff—Though no agreement between the parties to pay interest, however, granted under section 61(2) of Sales of Goods Act as the contract was for sale & purchase of goods.

M/s. Herbicides (India) Ltd. v. *M/s. Shashank Pesticides P. Ltd. and Ors.* *259*

TRANSFER OF PROPERTY ACT, 1882—Section 106—Requirement of notice to sub tenant to quit—Decree passed in favour of respondent under Order XII Rule 6 CPC—Appellant inducted as tenants by previous owners for five years—Respondent acquired title from erstwhile owners by sale deed—Not in dispute, appellant sub-let property to one M/s Bajaj Auto Ltd.—Respondent terminated tenancy by a legal notice—In the suit for possession M/s Bajaj Auto Ltd. inter-alia took the plea, no notice under Section 106 served upon it—Suit decreed in favour of respondent under Order XII Rule 6 CPC—Before the Appellate Court inter-alia plea taken, no notice to quit served on sub tenant who was lawful sub-tenant and admittedly in possession—Held, notice to a tenant is

sufficient to terminate the tenancy—No notice is required to be served on sub-tenant—Appeal dismissed.

Bajaj Electrical Ltd. v. *Dhruv Devansh Investment & Finance Pvt. Ltd.* *343*

UNIFORM ARBITRATION ACT, 1989—Section 12, 13, 14, 15—UNCITRAL Model Law on International Commercial Arbitration—Article 13(3)—Ld. Single Judge referred petition to Division Bench because of existence of two divergent conceptions—One view is assertions as to de jure or de facto incompetence of Arbitral Tribunal must immediately be addressed by Court—Other view is statutorily provided procedure postulates immediate remonstration but a deferred assailment of Award by invocation of Section 34 of The Act—Held—Parliament did not want to clothe Courts with power to annul Arbitral Tribunal on ground of bias at intermediate stage—Act enjoins immediate articulation of challenge to authority of arbitrator on ground of bias before Tribunal itself and ordains adjudication of this challenge as objection under Section 34 of A & C Act—Curial interference is not possible at Pre-Award stage on allegations of bias or impartiality of Arbitral Tribunal—Referral order answered.

Progressive Career Academy Pvt. Ltd. v.
Fiit Jee Ltd. *286*

WORKMEN'S COMPENSATION ACT,1923—(Now called Employees Compensation Act, 1923)—Section 30—Whether there is any liability for payment of interest upon an insurance company and which interest becomes payable by an employer on account of the failure of the employer to pay the compensation to the workmen when it 'falls due'—Deceased workman employed as helper, in the vehicle owned by Sumer Singh—Dependents of deceased workman filed claim under

the Act against employer and insurance company—Submitted on behalf of insurance company, in view of Section 3, 4 and 4A of the Act, insurance company only liable for principle compensation and not for interest awarded by Workmen's Compensation Commission—Also submitted that terms of insurance policy would not make the insurance company liable for interest on compensation awarded as there is no such clause in the policy—Held, the compensation "falls due" on the date of the accident—If the compensation is not paid, after one month of the date of the accident the consequences of penalty and interest flow—Workman will be entitled to interest after one month of the date of accident—In view of Section 147 and 149(1) of Motor Vehicles Act, an insurance policy cannot contract out of the complete liability adjudicated including the interest—Also, once insurance company takes liability with respect to death of a workman, ouster of liability has to be established by insurance company showing a clause in the policy exempting itself from the liability towards interest and not the other way round.

M/s. The New India Assurance Co. Ltd. v.
Satyawati & Others *53*

ILR (2011) IV DELHI 1
RC REV.

SHREE RAM SHARMA ....PETITIONER

VERSUS

MOHD. SABIR ....RESPONDENT

(S.L. BHAYANA, J.)

RC. REV. NO. : 58/2009 DATE OF DECISION : 17.02.2011

Delhi Rent Control Act, 1958—Sections 25-B (8) and 14 (1) (e)—Petitioner is the landlord in respect of premises bearing no. 2, Satnam Park, Chander Nagar Road, Delhi-110051 admeasuring 190 sq. yds.—Respondent is a tenant at a monthly rent of Rs. 825/-—Respondent running a hair cutting saloon in the premises—Petitioner is a senior citizen and his family consisting of his ailing wife, two married sons and three married daughters—Elder son having one son aged 18 years and two daughters aged about 17 and 16 years—The younger son having two sons aged about 10 years and 5 years—Younger son is a practicing advocate occupying two rooms as his office and library—Three married daughters often pay visits—Their families and their relatives also visit them—Petitioner and his wife are not able to climb stairs and medically advised to stay on the ground floor—Petitioner seeking eviction of the tenanted premises—Same is required bonafide by the petitioner and his family members—Respondent asserted that requirement of the petitioner is for residential purposes and the premise is not fit for residential purpose—He is having two more shops besides the shop of the respondent and there is one more room on the second floor—Leave to defend was granted by the Addl. Rent Controller—Revision filed challenging the order—Held—There is an expansion

in the family of the petitioner—The petitioner and his wife both are aged persons and suffering from diseases regarding which the medical documents have been filed by the petitioner—The younger son of the petitioner is a practicing advocate and he requires at least two rooms to use as office and library—The elder son is having one son and two daughters and his wife—Three married daughters with their spouses and children regularly pay visits at their parental home—Considering the aforesaid aspects, the need of petitioner was clearly bonafide—The tenanted accommodation was the most suitable to meet the requirement of the petitioner's expanded family—Accordingly, impugned order set aside and respondent's application seeking leave to defend the eviction petition rejected—Eviction order accordingly passed against the respondent and in favour of the petitioner—Petitioner will not execute the decree of eviction against the respondent for a period of six months from today.

I have heard learned counsel for both the parties and perused the record carefully. As there is an expansion in the family of the petitioner and the petitioner and his wife both are aged persons and suffering from diseases regarding which the medical documents have been filed by the petitioner. The younger son of the petitioner is a practicing advocate and he requires at least two rooms to use as office and library. The elder son is having one son and two daughters and his wife. Three married daughters with their spouses and children regularly pay visits at their parental home. Even the relatives of the petitioner residing in the vicinity of the petitioner oftenly pay visits. **(Para 16)**

Considering the aforesaid aspects, I am of the view that the need of the petitioner was clearly bonafide. The tenanted accommodation was the most suitable to meet the requirement of the petitioner's expanded family. The need of the petitioner as made out appears to be sincere and honest and not a

mere pretence or pretext to evict the respondent/tenant. Viewed in the aforesaid light it can be said that the need of the petitioner to occupy the tenanted premises is natural, real sincere and honest. I am of the view that the respondent did not raise any triable issue which required a trial, and for which the respondent was granted leave to defend the eviction petition. The same has been granted by adopting an erroneous approach and on a perfunctory reading of the submissions of the parties. **(Para 19)**

Accordingly, I set aside the impugned order and reject the respondent's application seeking leave to defend the eviction petition. Eviction order is accordingly passed against the respondent and in favour of the petitioner in respect of the suit premises which is shown in red colour in the site plan filed by the petitioner along with the eviction petition as Annexure P-2. Petitioner will not execute the decree of eviction against the respondent for a period of six months from today. **(Para 20)**

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. K.K. Sharma, Sr. Advocate with Ms. Bhanita Patoway for petitioner.

FOR THE RESPONDENT : Mr. L. Roshmani with Mr. Israr Ahmad for respondent.

CASES REFERRED TO:

1. *Mukesh Kumar* vs. *Rishi Prakash,* MANU/DE/2622/2009.
2. *Gayatri Devi* vs. *Shashi Pal Singh,* (2005)5SCC527.
3. *R.S.Bakshi & Anr.* vs. *H.K.Malhari,* 2003(67) DRJ 410.
4. *Shiv-Shakti Co-opt. Housing Society* vs. *Swaraj Developer,* (2003)6SCC659.
5. *Raghavendra Kumar* vs. *Firm Prem Machinery & Co.,* 2000(1) SCC679.
6. *Sanwal Ram Aggarwal* vs. *Smt. Gianwati,* 1999 (1) RCR529.
7. *Mahavir Singh* vs. *Kamal Narain,* 15 DLT (1979)232.

RESULT: Petition disoposed off.

S. L. BHAYANA, J.

1. The present revision petition under section 25-B(8) of Delhi Rent Control Act, 1958 (for short as "Act") has been filed by the petitioner against the order dated 30.05.2009 passed by Additional Rent Controller (for short as "controller") Delhi, vide which leave to contest has been granted to the respondent tenant.

2. Undisputedly, the petitioner is the landlord in respect of premises bearing No.2, Satnam Park, Chander Nagar Road, Delhi 110051 admeasuring 190 sq. yards. The respondent is a tenant of the petitioner at a monthly rent of Rs. 825/- p.m. excluding the electricity and other charges for the last about 39 years. The respondent has been running a hair cutting saloon in the tenanted premises. The petitioner is a senior citizen aged about 70 years and his family consists of his ailing wife aged about 66 years, 2 married sons and 3 married daughters. The elder son has one son aged 18 years and 2 daughters aged about 17 and 16 years. The younger son of the petitioner has 2 sons aged about 10 years and 5 years. The younger son is a practicing lawyer and has been occupying two rooms as his office and library on the ground floor. His three married daughters often pay visits to their parental house along with their families. Other relatives of the petitioner reside in the vicinity and they also often pay visits. The petitioner is suffering from heart problem coupled with old age related ailments and his wife is also suffering from high blood pressure, lungs disease and acute arthritis. The petitioner and his wife are not able to climb stairs and have been medically advised to stay at the ground floor.

3. The petitioner has two small kitchens and almost 25 sq. yards of un-constructed open area in the premises. There is one pooja room, one drawing room, one dining room and one store room. A servant is also residing in the house in one room. The respondent is using the tenanted premises for the last about 38 years and now the family of the petitioner needs more space for their own use. The property in question i.e. the shop is required bonafide by the petitioner for himself and family

members. The petitioner has no other reasonably suitable accommodation.

4. Learned counsel for the petitioner has contended that the petitioner is a senior citizen aged about 72 years and his ailing wife is aged about 68 years, 2 married sons and 3 married daughters with their minor and major children along with their spouses. Further learned counsel has submitted that the petitioner is suffering from heart ailment coupled with old age related diseases and is not able of climbing the stairs and similarly the wife of the petitioner is suffering from acute arthritis and acute incurable Lungs disease therefore, she is also not able to climb the stairs.

5. Learned counsel for the petitioner has argued that three married daughters of the petitioner along with their kids and husband and relatives of the petitioner visit and reside for couple of days almost every week. Therefore the petitioners need is bonafide and at least one guest room is required to accommodate his daughters, their children and other relatives.

6. Further learned counsel for the petitioner has vehemently argued that the entire family of the petitioner is occupying lesser accommodation than actual requirement of his family. The younger son of the petitioner is a practicing lawyer and has been occupying two rooms as his office and library.

7. Learned counsel for the petitioner has contended that the DRC Act is a complete Code in itself and the present petition is maintainable under section 25-B (8) of the DRC Act which provides with ample revisional powers vested in the High Court to look into the order passed by the Rent Controller whether allowing and disallowing the leave to contest the eviction petition filed by the respondent/tenant as upheld by the High Court in the case **R.S.Bakshi & Anr. V/s. H.K.Malhari,** 2003(67) DRJ 410 in paras 8, 9, and 13.

8. Further learned counsel for the petitioner has argued that no evidences is required to be adduced by the parties when there is no dispute as to the size of the family of the petitioner/landlord and requirement of accommodation as detailed by the petitioner/landlord in the petition as upheld by the High Court in case of **Sanwal Ram Aggarwal V/s. Smt. Gianwati,** 1999 (1) RCR529, Para 11 and Para 15.

9. Learned counsel for the petitioner/landlord has submitted that the petitioner being the landlord is the best judge of his requirement for

residential or business purpose as upheld by the Supreme Court in **Raghavendra Kumar V/s. Firm Prem Machinery & Co.,** 2000(1) SCC679.

10. Learned counsel for the respondent has submitted that the present revision petition is not maintainable as the same is filed against interim order wherein leave to defend has been granted. Regarding maintainability of this revision petition learned counsel for the respondent has relied upon **Mahavir Singh V/s Kamal Narain,** 15 DLT (1979)232 (SN) in which the High Court has observed that order granting leave to defend is not open to revision.

11. Further learned counsel for the respondent has relied upon **Shiv-Shakti Co-opt. Housing Society V/s. Swaraj Developer,** (2003)6SCC659 wherein it has been observed that, no revision lies against interim order under section 115 CPC after the amendment of 2002 except in case where it amounts to disposal of the main matter. Further the said proposition of law has also been upheld by the Supreme Court in the case of **Gayatri Devi-Shashi Pal Singh,** (2005)5SCC527.

12. Learned counsel for the respondent has further submitted that the petitioner has filed eviction petition without giving a true description of his own property as the same is not in accordance with the site plan filed by the petitioner and he has concealed the number of rooms available to him.

13. Further learned counsel for the respondent has asserted that petitioner's requirement is for his residential purposes he is seeking possession of a shop which is not fit for residential purpose.

14. Learned counsel for the respondent has further asserted that the petitioner had refused to receive rent from the respondent in order to term him as defaulter therefore, the respondent has deposited the rent with the Additional Rent Controller under section 27 of the DRC Act, 1958.

15. Learned counsel for the respondent has asserted that the petitioner has concealed that he has only one more tenant besides the respondent. It is incorrect because the petitioner has two more shops beside the shop of respondent. There is one T.V. shop and one tea shop namely "Satya Tea Stall". Besides these shops the petitioner still has one more room on

the 2nd floor which is shown in the photographs filed by the respondent, therefore, petitioner does not have bonafide requirement of the said tenanted premises.

16. I have heard learned counsel for both the parties and perused the record carefully. As there is an expansion in the family of the petitioner and the petitioner and his wife both are aged persons and suffering from diseases regarding which the medical documents have been filed by the petitioner. The younger son of the petitioner is a practicing advocate and he requires at least two rooms to use as office and library. The elder son is having one son and two daughters and his wife. Three married daughters with their spouses and children regularly pay visits at their parental home. Even the relatives of the petitioner residing in the vicinity of the petitioner oftenly pay visits.

17. I may refer to the decision of this court in **Mukesh Kumar V/s. Rishi Prakash,** MANU/DE/2622/2009. The factual situation in that case was very similar to the present case. The eviction petition has been filed by the landlord on the ground of bonafide requirement under section 14 (1) (e) of the Act. Against which leave to defend was filed by the tenant and the learned ARC had granted leave to defend to the tenant against the landlord. The order of the trial court was challenged by the landlord by filing a revision petition. The High Court held that the need of the petitioner/landlord was bonafide. The leave to defend application filed by the respondent in Trial Court has been wrongly granted by the Learned ARC by adopting an erroneous approach.

18. The learned ARC has also not taken into account the fact that the petitioner and his wife being aged and suffering from heart diseases and acute arthritis can't climb stairs and they need accommodation on the ground floor. Moreover, their three married daughters, along with their family, also visit them frequently. The requirement of the petitioner cannot be pegged down at only one room. Whenever they visit them, they would require at least two rooms. The disease of the petitioner and his ailing wife are of such a nature that they are advised not to climb the stairs and not to put pressure on their knees. Therefore the need of the petitioner to stay at the ground floor is genuine and bonafide.

19. Considering the aforesaid aspects, I am of the view that the need of the petitioner was clearly bonafide. The tenanted accommodation

was the most suitable to meet the requirement of the petitioner's expanded family. The need of the petitioner as made out appears to be sincere and honest and not a mere pretence or pretext to evict the respondent/tenant. Viewed in the aforesaid light it can be said that the need of the petitioner to occupy the tenanted premises is natural, real sincere and honest. I am of the view that the respondent did not raise any triable issue which required a trial, and for which the respondent was granted leave to defend the eviction petition. The same has been granted by adopting an erroneous approach and on a perfunctory reading of the submissions of the parties.

20. Accordingly, I set aside the impugned order and reject the respondent's application seeking leave to defend the eviction petition. Eviction order is accordingly passed against the respondent and in favour of the petitioner in respect of the suit premises which is shown in red colour in the site plan filed by the petitioner along with the eviction petition as Annexure P-2. Petitioner will not execute the decree of eviction against the respondent for a period of six months from today.

The Revision petition stands disposed of.

ILR (2011) IV DELHI 8
W.P. (C)

MUNICIPAL CORPORATION OF DELHI ....PETITIONER

VERSUS

R.K.S. GAUR & ORS. ....RESPONDENTS

(ANIL KUMAR & VEENA BIRBAL, JJ.)

W.P. (C) NO. : 6571/2010 DATE OF DECISION: 28.02.2011

Constitution of India, 1950—Article 226—Petition challenging the order dated 03.09.2009 passed by the Central Administrative Tribunal, Principal Bench,

directing the petitioner to count the erstwhile service rendered by the respondent no.1 with Govt. of Sikkim without insisting on liability, which has been dispensed with as per O.M. Dated 9th October 1986—Respondent no. 1 had worked under the Govt. of Sikkim, Education Department from 2.09.1976 to 09.05.1992—The respondent was appointed to the post of Education Officer through UPSC against the regular vacant post of Assistant Education Officer on 21.04.1992 with the prior permission of the respondent no.2, with the petitioner—Service certificate/book was transferred by respondent no. 2 to the petitioner—Three advance increments were given to the respondent on account of his past service—Respondent made representations to count his past service for retirement benefits, but the petitioner refused to count the service rendered with the Govt. of Sikkim—Also directed until the amount against pro-rate pension contribution is deposited, case of the respondent no.1 would not be considered—Respondent no.1 filed the writ petition, but same was transferred to Central Administrative Tribunal on account of change of jurisdiction—Held—The petitioner could not have denied grant of complete pension to the respondent No. 1 after computing his service rendered with the Government of Sikkim, on the ground that pro-rata pension contribution of the Government of Sikkim of Rs. 1,38,320/- has not been deposited by the respondent no.2—The item no. 29 of resolution No. 1381 does not contemplate that unless and until the previous employer will deposit their contribution, even if the previous employer is liable for the same, the pension shall not be paid to the absorbed employee on his retirement—The only restriction contemplated under the said item no.29 of resolution No. 1381 is that if the employee had received the benefit from the previous employer then the absorbed employee will surrender the benefit received from the previous employer—Admittedly the

respondent No. 1 had not received the pro-rata pensionary benefits from the previous employer, State Government of Sikkim—The petitioner may be entitled to claim the amount from the respondent No.2, but it cannot deny the full pension of combined service to the employee i.e. respondent no.1 in the facts and circumstances.

The petitioner could not have denied grant of complete pension to the respondent No.1 after computing his service rendered with the Government of Sikkim, on the ground that pro-rata pension contribution of the Government of Sikkim of Rs.1,38,320/- has not been deposited by the respondent No.2, in case the petitioner is entitled for the said amount from respondent no.2. The item no.29 of resolution No.1381 does not contemplate that unless and until the previous employer will deposit their contribution, even if the previous employer is liable for the same, the pension shall not be paid to the absorbed employee on his retirement. The only restriction contemplated under the said item No.29 of resolution No.1381 is that if the employee had received the benefit from the previous employer then the absorbed employee will surrender the benefit received from the previous employer. This aspect has been further clarified in the office memorandum dated 29th August, 1984, Clause 5(2) which categorically states that when no terminal benefits for the previous service has been be counted as qualifying service for pension only and in no case, the pension contribution liability will be accepted from the employee concerned. Admittedly the respondent No.1 had not received the pro-rata pensionary benefits from the previous employer, State Government of Sikkim and in the circumstances the right of the respondent No.1 to claim pension on the basis of combined service i.e. the service rendered with the State Government of Sikkim, respondent No.2 and the petitioner could not be denied to the respondent No.1 in any manner. Thus the condition that the amount of Rs. 1,38,320/- with interest, should be deposited by the Govt. of Sikkim or by

the petitioner, and then only would his past services be counted while computing the terminal benefits by the petitioner in letter dated 13th November, 2003 cannot be validated under the terms of the policy adopted by the petitioner itself. Nor was any such condition informed to the respondent no. 1 at the time of his absorption. **(Para 20)**

Even if on account of no plea on behalf of petitioner, it is entitled to recover the pro-rata contribution of the pension payable to the respondent No.1 on account of services rendered by him with respondent No.2 on the ground that the office memorandum of 9th October, 1986 does not pertain to Autonomous Statutory Corporations. The petitioner may be entitled to claim the amount from the respondent No.2, but it cannot deny the full pension of combined service to the employee i.e. respondent No.1 in the facts and circumstances. The resolution No.1381 item No.29 also does not contemplate that the absorbed employee in the autonomous statutory corporation will not be entitled for the full pension unless the pro-rata contribution is given by the previous employer to the autonomous statutory Corporation. In the circumstances, on any of the grounds raised by the petitioner, combined service pension to the respondent No.1 i.e. for the period of service rendered with respondent No.2 and period of service rendered with petitioner cannot be denied. **(Para 21)**

Important Issue Involved: MCD can not deny the computation of service rendered with other Govt. or Central Autonomous Body on the ground of non contribution of Pro-rata contribution of the pension.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Himanshu Upadhyay, Advocate.

FOR THE RESPONDENTS : Mr. M.K. Bhardwaj, Advocate for the respondent No. 1 with respondent No.1 in person. Mr. Anurag Mathur, Advocate for the respondent No. 2. Ms. Kailash Golani, Advocate for the respondent No.3.

CASE REFERRED TO:

1. *R.K.S.Gaur* vs. *Municipal Corporation of Delhi and Ors.* TA No.570/2009.

RESULT: Petition disposed off.

ANIL KUMAR, J.

1. The petitioner, Municipal Corporation of Delhi has challenged the order dated 3rd September, 2009 passed by Central Administrative Tribunal, Principal bench, New Delhi in T.A No.570/2009 titled as **'R.K.S.Gaur v. MCD & Ors'** directing the Municipal Corporation of Delhi to count the erstwhile service rendered by respondent No.1 with the Government of Sikkim without insisting on liability, which has been dispensed with as per O.M dated 9th October, 1986.

2. The relevant facts pertinent to comprehend the controversies are that respondent No.1 who is a post graduate teacher (Biology) had worked under the Government of Sikkim, Education Department, respondent No.2 from 2nd September, 1976 to 9th May, 1992.

3. The respondent No.1 pursuant to his application for the post of Assistant Education Officer with the petitioner with prior permission of respondent No.2 was appointed to the post of Assistant Education Officer through UPSC against the regular vacant post of Assistant Education Officer as on 21st April, 1992. The respondent No.2 had tendered technical resignation to respondent No.2 and he was relieved of his services, whereafter he joined the Municipal Corporation of Delhi as Assistant Education Officer from 11th May, 1992 at Headquarter, Education Department, Municipal Corporation of Delhi.

4. The respondent No.1 had been issued a service certificate dated 1st August, 1992 by the respondent No.2. Prior to that on 5th May, 1992 service certificate/book was transferred by respondent No.2. The petitioner had also fixed the basic pay of respondent No.1 at Rs.3300/- per month. While granting the basic pay of Rs.3300/- per month to the respondent

No.1 three advance increments were given on account of his past services.

5. The respondent No.1 contended that he made various representations from 15th March, 1993 till 2005 for counting his past services of 17 years for retirement benefits. On 12th July, 1995 the respondent No.2 had even transferred the GPF balance amounting to Rs.36,061/- to the petitioner. The petitioner, however, also sought transfer of pensionary contribution and other benefits with respect to respondent No.1 for counting his past service of 17 years in calculating his terminal benefits.

6. The respondent No.2 by its letter dated 23rd February, 2002 contended that on account of reciprocal arrangement between the petitioner and Government of Sikkim, and as per standing instructions vide O.M dated 9th October, 1986 issued by the Union of India, the pro-rata pension contribution of the parental department has been dispensed with. The petitioner, however, refused to consider O.M dated 9th October, 1986 and refused to count the services of the respondent No.1 with effect from 2nd September, 1976 to 9th May, 1992 rendered with the Government of Sikkim, respondent No.2 and also directed respondent No.2 that until the amount against pro-rata pension contribution is deposited by respondent No.2 or respondent No.1 himself his case would not be considered. A calculation slip was sent by petitioner to respondent No.1 that on depositing the net amount of Rs.1,38,320.16/- by respondent No.2, the case of the respondent no.1 would be considered.

7. Against the action of the petitioner not to consider the case of the respondent no.1 to count his service with the Government of Sikkim with effect from 2nd September, 1976 to 9th May, 1992 unless a net sum of Rs.1,38,320.16/- is deposited by respondent No.2, respondent No.1 made various representations and also served a legal notice dated 4th October, 2005 on the petitioner. The respondent No.1, thereafter, filed a writ petition in the High Court of Delhi praying inter-alia to issue directions to the petitioner to count the entire length of about 17 years of his service from 2nd September, 1976 to 9th May, 1992 rendered with respondent No.2 so as to consider the claim of the respondent No.1 while calculating his terminal/retiral benefits.

8. The writ petition filed by the respondent No.1 was contested by the petitioner contending inter-alia that the O.M dated 9th October, 1986

is not applicable to the petitioner as it pertained to Central and State Government whereas the petitioner is a local body and has not entered into any reciprocal arrangement either with the Central Government or State Government. The petitioner also contended that even in respect of teachers of petitioners who joined Government of NCT of Delhi, pro-rata pensionary charges were recovered by the Government of NCT of Delhi and reliance was placed on letters dated 7th June, 2005 from Government of NCT of Delhi to DDO, Delhi Development Department. The petitioner also contended that pro-rata pension contribution for the period the respondent No.1 worked with Government of Sikkim is to be deposited with the petitioner either by the Government of Sikkim, respondent No.2 or by respondent No.1 himself and placed reliance on item No.29 in Resolution No.1381 dated 23rd March, 1987.

9. The above noted resolution contemplated that every employee will have an option to retain the benefits received from his previous employer and to get the retirement benefits from the Municipal Corporation of Delhi for the period of service rendered or surrender the benefit received from the previous employer and get the pensionary benefits on the basis of combined service. It further contemplated that every employee who wants to get the benefit of past service for the purpose of retirement benefit will have to exercise his option within one year from the date of absorption in the corporation or from the date of issue of orders whichever is later. The relevant Clause 6 of item No.29 of Resolution No.1381 dated 23rd March, 1987 is as under:-

> "6. Every employee will have an option to retain the benefits received from his previous employer and to get the retirement benefits from the Municipal Corporation only for the period of service rendered or surrender the benefit received from the previous employer and get the pensionary benefits on basis of combined service. Every employee who went to get the benefit of past service for the purpose of retirement benefits will have to exercise his option within one year from the date of absorption in the Corporation or from the date of issue of orders, whichever is later. If no option is exercised within the stipulated period, the employee shall be deemed to have opted to get the retirement benefits only for the period of service rendered in the Corporation. The option once exercised shall be final. The right to count

previous service as qualifying service shall not revive until the amount on account of pro-rata retirement benefits or other terminal benefits already received is refunded along with interest thereon from the date of receipt of their benefits till the date of deposit with the Corporation. The length of previous service may be accepted on the basis of incontrovertible evidence like service certificate and other service record. The past service will not count towards seniority."

10. The stand taken by the Municipal Corporation of Delhi was refuted by the respondent No.1 relying on a communication reference No.F.5/24/83-UT.1 (Vol.1) dated 12th July, 1988 from the Under Secretary to the Government of India to the Director of Education categorically stipulating that counting of service for pensionary benefits will be allowed in respect of those State Governments with which reciprocal arrangements exists which include the Government of Sikkim. It further stipulated that the benefit has been extended by Ministry of Personnel, Public Grievances and Pension, Department of Pension & Pensioners Welfare O.M.28/(10)/84-P&W-Vol.II dated 7th February, 1986 and 27th May, 1988 and these orders will apply to the employees of Central Government moving to State and their autonomous bodies and vice verse who are in service on the date of issue of such orders irrespective of the date of their absorption. The respondent No.1 categorically contended that the reliance has been placed by the petitioner on irrelevant documents including the alleged letter dated 7th June, 2005 from the Deputy Secretary Accounts to the DDO, Delhi Development Department. The Tribunal allowed the petition of the respondent No.1 relying on O.M dated 9th October, 1986 holding that a decision on administrative side is not to be overridden by a policy decision of the Government which would apply even to a body like Municipal Corporation of Delhi.

11. The petitioner has primarily challenged the order dated 3rd September, 2009 passed by Central Administrative Tribunal on the ground that the O.M dated 9th October, 1986 pertains to the Central and State Government whereas the petitioner is a local body having its own account and unless pro-rata pension contributed is deposited by the Government of Sikkim or by the respondent No.1, he is not entitled for the counting of his past services of 17 years with respondent No. 2 while computing his retiral pension. Regarding letter dated 12th July, 1988 of Government

of India it has been contended that it does not relate to issue of pro-rata pension contribution.

12. This Court has heard the learned counsel for the parties in detail and has also perused the record. The petitioner has placed reliance on its Resolution No.1381 dated 23rd March, 1987 which contemplates in Clause 6 of item No.29, regarding counting of past service for pensionary benefits, stipulating that every employee will have an option to retain the benefits received from the previous employer and to get the retirement benefits from the Municipal Corporation only for the period of service rendered. The option was also given to surrender the benefits received from the previous employer and to get the pensionary benefits on the basis of combined service. The option contemplated under the petitioner's resolution had to be exercised within one year from the date of absorption or from the date of issue of orders whichever is later. Clause 6 of the resolution of petitioner also categorically stipulated that the right to count previous service shall not be revived until the amount on account of pro rata retiremental benefits or other terminal benefits already received is refunded along with interest thereon from the date of receipt of benefit till the date of deposit with the Corporation.

13. The said resolution of the Municipal Corporation of Delhi/ petitioner also referred to O.M No.28/10/84-Pension Unit dated 29th August, 1984 which had allowed counting of past service for payment of pensionary benefits. The Office Memorandum of 1984 categorically stipulated that a number of Central Autonomous/statutory bodies have introduced pension scheme for their employee on the lines of the pension scheme available to the Central Government employees. It was also urged by the autonomous statutory bodies that the services rendered by their employees under the Central Government or other autonomous bodies before joining the autonomous bodies may be allowed to be counted in combination with service in the autonomous body, for the purpose of pension, subject to certain conditions. Therefore, after consideration it was decided that the cases of Central Government employees going to Central Autonomous bodies or vice-versa and the employees of Central Autonomous bodies moving to other central autonomous bodies shall be regulated in terms of the office memorandum of 1984. For the autonomous statutory bodies where the pension is in operation it was decided that the employee with CPF benefits on permanent absorption in an autonomous

body will have the option, either to receive CPF benefits which had accrued to it from the Government and start his service afresh in that body or choose to count the service rendered in the Government as qualifying service for pension in the autonomous body by forgoing Government's share of CPF contribution with interest, which will be paid to the concerned autonomous body/the concerned Government department. The option had to be exercised within one year from the date of absorption, if no option was to be exercised within the stipulated period the employee was to be deemed to have opted to receive the CPF benefits.

14. The office memorandum of 1984 also defined "Central Autonomous Body". Relevant paras 4 & 5 of office memorandum dated 29th August, 1984 are as under:-

> "4. "Central autonomous body" means body which is financed wholly or substantially from cases or Central Governments". "Substantially" means that more than 50 percents of the expenditure of the autonomous body is met through Central Governments grants. Autonomous body include Central Autonomous body or a central university but does not include public undertaking.
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> Only such service which qualifies for benefits under the relevant rules of Government/Autonomous body shall be taken the account for this purpose.
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> 5. (i) The employee of a Central Autonomous body or Central Government, as the cases may be who have already been sanctioned or have received pro-rata retirements benefits or other terminal benefits for their past service will have the option either:-
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> (a) to retain such benefits and in that event their past service will not qualify for pension under the autonomous body or the Central Government, as the case may be: or
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> (b) to have the past service counted as qualifying service for pension under the new organization in which case the Pro-rata retirement or other terminal benefits, if already received by them, will have to be deposited along with interest thereon from the date of receipt of those benefits

> till the date of deposit with the autonomous body or the Central Government, as the case may be. The right to count previous service as qualifying service shall not receive until the whole amount has been refunded. In other cases, where pro-rata retirement benefit have already been sanctioned but have not become payable, the concerned autonomous shall cancel the sanction as soon as the individual concerned opts for counting of his previous service for pension and inform the individual in writing about accepting his option and cancellation of the sanction. The option shall be exercised within a period of one year from the date of issue of those orders. If no option is exercised by such employees within, the prescribed time limit, they will be deemed to have opted for retention of the benefits already received by them. The option once exercised shall be final.
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> (2) Where no terminal benefits for the previous service have been received, the previous service in such cases will be counted as qualifying service for pension only, if the previous employee accepts pension liability for the service in accordance with the principles laid down in this office memorandum. In no case pension contribution liability shall be accepted from the employee concerned."

15. The petitioner by another resolution No.1280 dated 6th February, 1986 had decided to implement the office memorandum dated 29th August, 1984 in the Municipal Corporation of Delhi mutatis mutandis with charges as relevant for implementation of this policy and counting/past service rendered by officers/employees of Central Government in MCD for all purposes including pension, gratuity etc. The relevant para 4 of the resolution No.1381 dated 23rd March, 1987 item No.29 is as under:-

> "4. Corporation vide Resolution No.1280 dated 06.02.86 has referred a Resolution that the policy of the Central Government as contained in their O.M.No.28/10/84-Pension Unit dated 29 August 1984 be implemented in the Municipal Corporation of Delhi Mutatis Mutandis with charges as relevant for implementation of this policy and counting/past service rendered by officers/employees of the Central Government in MCD for all

purposes including pension, gratuity etc. to the Commissioner for report."

16. Consequent to the resolution No.1381 item No.29 the petitioner had decided to count the previous service strictly on the terms and conditions as given in the OM dated 29th August, 1984. In the case of respondent No.1, the Government of Sikkim had issued the service certificate on 1st August, 1992 and the petitioner on 5th August, 1992 had also fixed the pay of respondent No.1 at Rs.3300/- per month against his erstwhile pay scale of Rs.3000-4500/- per month and had also granted him three advance increments on the basis of his service with the Government of Sikkim. At the time of absorption it was not clarified that the respondent No.1 shall not be entitled for his pension for the period he had served with the Government of Sikkim until the contribution of pension by the Government of Sikkim shall be deposited by the petitioner. This is also not disputed and cannot be disputed by the petitioner that respondent No.1 had not received any retiral benefits from the Government of Sikkim and consequently in terms of resolution No.1381 dated 23rd March, 1987 item No.29 and office memorandum dated 29th August, 1984, Clause 5(2), the respondent No.1 was not to surrender any benefit to the petitioner as he had not received any such benefits from the State Government of Sikkim and, therefore, the respondent No.1 had become entitled to get the pensionary benefits on the basis of combined services.

17. The basic intent behind the Office Memorandum dated 29th August 1984 was to provide for a pension based combined service, and it required a representation for the same to be made within a period of one year. Since respondent no. 1 was appointed in the Municipal Corporation of Delhi on 21st April, 1992 and due representation to count his past services was made on 15th March, 1993, well within the period of one year as required by the petitioner, the respondent no.1 cannot be denied the benefit of the counting his past services with respondent no.2.

18. The office Memorandum No.14(5)86/TA/1029 dated 9th October, 1986 is regarding simplification of adjustment on account of allocation of leave salary and pension between the Central and State Government whereby it was decided to dispense with the system of allocation of leave salary and pension between the Central and State Government.

19. As has been discussed hereinabove, the petitioner's Resolution No.1381 dated 23rd March, 1987 item No.29 was adopted in order to incorporate the O.M No.28/10/84-Pension Unit dated 29th August, 1984 and to further clarify the petitioners own Resolution No.1280 dated 6th February, 1986. In these circumstances the petitioner cannot deny counting of previous service of the respondent No.1 even on the plea that the OM dated 9th October, 1986 is not applicable to the petitioner.

20. The petitioner could not have denied grant of complete pension to the respondent No.1 after computing his service rendered with the Government of Sikkim, on the ground that pro-rata pension contribution of the Government of Sikkim of Rs.1,38,320/- has not been deposited by the respondent No.2, in case the petitioner is entitled for the said amount from respondent no.2. The item no.29 of resolution No.1381 does not contemplate that unless and until the previous employer will deposit their contribution, even if the previous employer is liable for the same, the pension shall not be paid to the absorbed employee on his retirement. The only restriction contemplated under the said item No.29 of resolution No.1381 is that if the employee had received the benefit from the previous employer then the absorbed employee will surrender the benefit received from the previous employer. This aspect has been further clarified in the office memorandum dated 29th August, 1984, Clause 5(2) which categorically states that when no terminal benefits for the previous service has been be counted as qualifying service for pension only and in no case, the pension contribution liability will be accepted from the employee concerned. Admittedly the respondent No.1 had not received the pro-rata pensionary benefits from the previous employer, State Government of Sikkim and in the circumstances the right of the respondent No.1 to claim pension on the basis of combined service i.e. the service rendered with the State Government of Sikkim, respondent No.2 and the petitioner could not be denied to the respondent No.1 in any manner. Thus the condition that the amount of Rs. 1,38,320/- with interest, should be deposited by the Govt. of Sikkim or by the petitioner, and then only would his past services be counted while computing the terminal benefits by the petitioner in letter dated 13th November, 2003 cannot be validated under the terms of the policy adopted by the petitioner itself. Nor was any such condition informed to the respondent no. 1 at the time of his absorption.

21. Even if on account of no plea on behalf of petitioner, it is entitled to recover the pro-rata contribution of the pension payable to the respondent No.1 on account of services rendered by him with respondent No.2 on the ground that the office memorandum of 9th October, 1986 does not pertain to Autonomous Statutory Corporations. The petitioner may be entitled to claim the amount from the respondent No.2, but it cannot deny the full pension of combined service to the employee i.e. respondent No.1 in the facts and circumstances. The resolution No.1381 item No.29 also does not contemplate that the absorbed employee in the autonomous statutory corporation will not be entitled for the full pension unless the pro-rata contribution is given by the previous employer to the autonomous statutory Corporation. In the circumstances, on any of the grounds raised by the petitioner, combined service pension to the respondent No.1 i.e. for the period of service rendered with respondent No.2 and period of service rendered with petitioner cannot be denied.

22. With these directions the TA No.570/2009 titled **R.K.S.Gaur v. Municipal Corporation of Delhi and Ors** is allowed and the present writ petition is disposed of and the writ petition filed by the Petitioner/ MCD is dismissed. The petitioner shall also be liable to pay a cost of Rs.5000/- to the respondent No.1 in the facts and circumstances.

ILR (2011) IV DELHI 22
W.P. (C)

MRS. ANIL NANDWANI ....PETITIONER

VERSUS

FOOD CORPORATION OF INDIA & ORS. ....RESPONDENTS

(SUDERSHAN KUMAR MISRA, J.)

W.P. (C) NO. : 12843/2009 & 12826/2009 **DATE OF DECISION: 28.03.2011**

Constitution of India, 1950—Article 226—Petitioners applied for voluntary retirement that they be relieved after 3 months—Their request accepted before expiry of three months—After the acceptance, the petitioner sent a letter withdrawing the request for voluntary retirement but they were relived—Petition—That petitioner were within their rights to withdraw their offer of voluntary retirement before the expiry of three months period, when it was to be effective—Respondent had accepted it with effect from an early date, which is not according to the offer of the petitioner—According to the letter/circular of the respondent, petitioner were entitled to withdrawn the request and the respondent was bound to accede the request and allow them to join—Held—The Scheme envisaged an application for voluntary retirement giving three month notice; under it, the respondent had the option of accepting the offer with effect from the date the three month period expired, or even at an earlier date, provided the appropriate payment was tendered to the petitioner for the remaining notice period—It did not vest any right with the petitioner to vary the terms of the Scheme by setting down new or different terms—Even, if it is assumed for a moment

that the acceptance by the respondent was not in terms of the offer made by the petitioner, even then, her conduct thereafter precludes the petitioner from claiming that it does not bind her or that no binding contract came into being—This is because after she received that communication from the respondent, purporting to accept her offer of voluntary retirement from a date which was different from the one specified by her, she applied for, and received, all her dues in terms of the said communication of the respondent—By accepting all her dues without protest, the petitioner has clearly approbated the actions of the respondent and is now estopped from contending otherwise.

What emerges is this; the Scheme envisaged an application for voluntary retirement giving three month notice; under it, the respondent had the option of accepting the offer with effect from the date the three month period expired, or even at an earlier date, provided the appropriate payment was tendered to the petitioner for the remaining notice period. It did not vest any right with the petitioner to vary the terms of the Scheme by setting down new or different terms. The petitioner's action in specifying that she should be relieved from service only after the three months, notice period was complete, meaning thereby, that the respondent was precluded from accepting the same at any time before this, amounted to an attempt to vary the terms of the Scheme. Obviously, the respondents did not agree to this variation and accepted her offer from an earlier date as permitted in the original Scheme. Even if it is assumed for a moment that the acceptance by the respondent was not in terms of the offer made by the petitioner, even then, her conduct thereafter precludes the petitioner from claiming that it does not bind her or that no binding contract came into being. This is because after she received that communication from the respondent, purporting to accept her offer of voluntary retirement from a date which was different from the one specified by her, she applied for, and received, all her dues

in terms of the same communication of the respondent. By accepting all her dues without protest, the petitioner has clearly approbated the actions of the respondent and is now estopped from contending otherwise. To put it differently, if the offer by the petitioner that her voluntary resignation be accepted only from the date on which the three months' notice period expires, and not before, amounted to a fresh offer different from the terms of the Scheme, the response by the respondents retiring her from an earlier date and tendering payment for the remaining period was again a counter offer reiterating the original terms of the voluntary requirement scheme. The petitioner's response to this counter offer by the respondent by asking for, and accepting the payment being tendered for the remaining notice period from the respondents, without protest, amounted to an acceptance of that counter offer by the petitioner and she was bound by the same. For that reason also, she cannot be permitted to resile from this position. **(Para 18)**

Important Issue Involved: The request for voluntary retirement can be accepted before the expiry of period mentioned in the request.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. R.K. Saini, Advocate.

FOR THE RESPONDENTS : Ms. Neelam Singh & Ms. Avni Singh, Advocates.

CASES REFERRED TO:

1. *Food Corporation of India and Ors.* vs. *Ramesh Kumar* (2007) 8 SCC 141.
2. *Gurcharan Singh* vs. *FCI & Anr.,* WP (C) No. 1598/2005.
3. *Vice Chairman and Managing Director A.P.S.I.D.C. Ltd. and Anr.* vs. *R. Varaprasad and Ors.* AIR 2003 SC 4050.

RESULT: Petition dismissed.

SUDERSHAN KUMAR MISRA, J.

1. The common question that arises in these two petitions is whether it was open to the petitioners to withdraw their offer of voluntary retirement in terms of which, their retirement would come in to effect only after three months, and not before; because, instead of accepting the offer on the terms proposed by them, the respondent had purported to accept it with effect from an earlierdate. Alternatively, it is contended that in any case, a later circular of the respondent enabled them to seek its withdrawal and the respondent was bound to accede to their request in terms thereof.

2. Mr. Saini, who appears for the petitioners in both the writ petitions, submits that the relevant facts of both are substantially the same. He therefore, addressed arguments with reference to the relevant facts of Mrs. Anil Nandwani's matter. The only difference is that while Mrs. Anil Nandwani applied for voluntary retirement on 19th July, 2004 praying that she be relieved from the service after three months on 19th October, 2004 and her request for voluntary retirement was accepted by the respondent on 12th August, 2004, Mrs. Neelam Madan applied for voluntary retirement on 13th July, 2004 praying that she be relieved from service after three months on 13th October, 2004 and her request for voluntary retirement was accepted by the respondent on 13th August, 2004. Since nothing turns on the difference between the two set of dates, for convenience, the relevant dates and other facts of Mrs. Anil Nandwani's matter, to which counsel has also referred during his course of argument, have been examined in this judgment.

3. The brief facts of the case are that the petitioner, Mrs. Anil Nandwani, (the petitioner for short), was working as an Assistant Manager (Gen.) with the respondent. On 29th June, 2004, the respondent issued a circular introducing a Voluntary Retirement Scheme for its employees. That scheme was to remain open for a period of three months from the date it was floated, and interested employees could seek voluntary retirement within this period. Under the Scheme, applicants were required to give a three month notice to the respondent for considering their application, and the respondent was obliged to take a decision on that application, within that period. The petitioner applied for voluntary retirement on 19th July, 2004 praying that she be relieved from service

only after three months of applying i.e. with effect from 19th October, 2004. According to the petitioner, notwithstanding the fact that the Scheme itself permitted the respondent to accept the offer with immediate effect; the offer actually made by her precluded the respondent from accepting her offer with effect from any earlier date.

4. Pursuant to her aforesaid request for voluntary retirement, the respondent issued an order, dated 12th August, 2004 relieving the petitioner, with effect from 31st August, 2004. Thereafter on 24th August, 2004, the petitioner requested the respondent to release her final payment in terms of the Scheme. This was duly received by her without protest.

5. After this, the petitioner sent a letter, dated 26th August 2004 to the respondent withdrawing her request for voluntary retirement. Nevertheless, the petitioner was relieved, with effect from 31st August 2004, on the ground that, in terms of paragraph VIII (d), it is not open to any employee to withdraw such a request. The said paragraph reads as follows:

> "VIII. PROCEDURE
>
> (d) Once an employee submits his application for voluntary retirement under this scheme to the competent authority, it shall be treated as final and it is not open to the employees to withdraw the same. The competent authority shall take decision to accept or reject the request for VRS within the notice period (3 months) and communicate the same to the official concerned."

6. After the petitioner was relieved, another circular was issued by the respondent, on 22nd September, 2004 stating that, though the scheme does not permit withdrawal of the application, but the discretion would always rest with the competent authority to accept or reject such an application and therefore, all authorities were advised to decide the applications for withdrawal of voluntary retirement requests on a case to case basis.

7. Counsel for the petitioner submits that, in effect, the aforesaid order of 12th August, 2004 of the respondent does not amount to an acceptance of the petitioner's application for the reason that under the petitioner's offer, the respondent could retire her only on 19th October, 2004 and not before. Consequently, the decision of 12.8.2004 of the

respondent to relieve her from 31st August, 2004 could only amount to a 'counter offer' and nothing more. If the petitioner had allowed that day of 31st August, 2004 to pass without any protest, it would amount to the petitioner accepting that counter offer by her conduct. However, in this case, the petitioner rejected that offer and decided to withdraw her application through her letter dated 26th August, 2004.

8. Counsel for the petitioner also relies on the judgment of the Punjab and Haryana High Court in **Gurcharan Singh v. FCI & Anr.,** WP (C) No. 1598/2005, in which, according to him, the Court has examined the same factual situation and also the same scheme floated by the respondent. In the aforesaid case, the Court held that in withdrawing his application for voluntary retirement within three months, the petitioner was merely exercising a right conferred under the scheme itself. The writ petition was allowed and the petitioner was reinstated.

9. Counsel for the respondent has drawn my attention to paragraph (IV) (2) of the relevant Scheme with the sub-heading Eligibility. The said paragraph reads as follows:

> "IV. ELIGIBILITY:
>
> 2. A regular/permanent employee may seek Voluntary Retirement Scheme by giving three months notice in writing to the competent authority within the prescribed time limit. However, the competent authority may make the payment of notice period of three months or for the remaining period of notice period and may accept the request for voluntary retirement from any date before the date of expiry of notice period."

Counsel submits that, admittedly, under the Scheme, the respondent was empowered to bring the voluntary retirement into effect from any date after the submission of an application for voluntary retirement by an employee, provided that the pay for the remaining notice period is tendered to the employee concerned. In this case, whilst the petitioner applied on 19th July, 2004 seeking voluntary retirement after three months on 19th October 2004, in terms of the aforesaid paragraph, the authority had accepted the same on 12th August, 2004 and relieved her with effect from 31st August, 2004. This acceptance was duly communicated to the petitioner and she was tendered the remaining pay for the notice period.

10. Counsel for the respondent further states that, in fact, after receiving the communication of 12th August, 2004, the petitioner sent a letter to the respondent, dated 24th August, 2004, stating that since voluntary retirement has been granted with effect from 31st August, 2004 under the Scheme, the final payment, in terms of the said Scheme, be made to her. Pursuant to this, the entire payment which was due was, in fact, made to the petitioner. Significantly, in her aforesaid letter of 24.8.2004, the petitioner does not raise any protest with regard to the decision of the respondent to accept her request for voluntary retirement.

11. Counsel for the petitioner states that the petitioner had been constantly sending letters, dated 10th January, 2005, 7th February, 2006, 6th June, 2006, 31st January, 2007, 3rd February, 2007, 9th April, 2007, 4th July, 2007, 18th September, 2007 etc. to the respondent requesting the withdrawal of her voluntary retirement application. However, on 3rd April, 2007, the petitioner received a communication from the respondent that her representations have been examined; and since the option of VRS was given by the employee at her own will, which has already been accepted, and all the consequential retirement dues and benefits stands paid, her application for reinstatement in service has been rejected.

12. Counsel for the respondent relies on a decision of the Supreme Court in **Vice Chairman and Managing Director A.P.S.I.D.C. Ltd. and Anr. vs. R. Varaprasad and Ors.** AIR 2003 SC 4050, paragraph 18 which reads as under:

> "18. ……It is fairly settled now that the voluntary retirement once accepted in terms of the Scheme or rules, as the case may be, cannot be withdrawn. In these appeals from the facts it is clear that the applications of the respondents opting for voluntary retirement under the Scheme were accepted and even the acceptance was communicated to them. Thereafter, they filed the writ petitions. Hence the High Court was no right in allowing the writ petitions holding that they applied for withdrawal before the effective date considering the date of relieving the employees as the effective date."

13. He also relies on a decision of the Supreme Court in **Food Corporation of India and Ors. vs. Ramesh Kumar** (2007) 8 SCC 141 where the same scheme has been examined and it has been held in

paragraph 6 which reads as under:

> "6. ……Now adverting to the present scheme of the Food Corporation, para 8 clearly stipulates that the incumbent has no right to revoke the same and the Management will decide the same within three months. That means the Management still has three months' time to consider and decide whether to act upon the offer given by the incumbent or not. But if the incumbent revokes his offer before the Corporation accepts it then in that case, the revocation of the offer is complete and the Corporation cannot act upon that offer. In the present Clause there is one more additional factor which is that the Management has to take a decision within three months. Therefore, once the revocation is made by the incumbent before three months then in that case the Corporation cannot act upon the offer of voluntary retirement unless it is accepted prior to its withdrawal. "

14. In this case, the application for voluntary retirement was accepted by the respondent on 12th August, 2004 with effect from 31st August, 2004. The petitioner sought the withdrawal of her application for voluntary retirement only thereafter on 26th August, 2004. She was also relieved from duty on 31st August, 2004. Not only that, after she received the communication from the respondent dated 12th August, 2004, accepting her offer of voluntary retirement, she wrote another letter to the respondent on 24th August, 2004 stating that since her offer of voluntary retirement has been granted with effect from 31st August, 2004 under the Scheme, the final payment in terms of the Scheme be made to her.

15. To my mind, the subsequent circular of 22nd September, 2004 of the respondent merely states that the respondent may apply its mind to the question of accepting or rejecting any request for withdrawal of the application for voluntary retirement made by an employee on a case to case basis, and nothing more. This did not oblige the respondent to carry out this exercise after the petitioner's application seeking voluntary retirement had already been accepted. Also, by applying for voluntary retirement, an applicant is approbating the Scheme as framed, and on its acceptance, the transaction is complete. The matter is over and nothing remains on that aspect of the matter between the applicant and his employer. If we were to interpret the circular of 22nd September, 2004,

to mean that the respondent was obliged to apply its mind to the question of acceptance or rejection of the offer of voluntary retirement made by employees in terms of the Scheme, even after their offer had already been accepted merely because, after its acceptance, somebody makes an application to withdraw it, as is being canvassed by the petitioner, it would bring into question every acceptance of voluntary retirement under the Scheme by the respondent before 22nd September, 2004. Inter alia, for that reason also, I am not inclined to accept that proposition.

16. In **Gurcharan Singh's** case (supra) cited by the petitioner which related to the same respondent and the same Scheme and circulars, what is significant is that Mr. Gurcharan Singh applied for voluntary retirement on 28th September, 2004 i.e. after the circular of the respondent dated 22nd September, 2004, permitting the competent authority to also examine the requests for withdrawal of the application for voluntary retirement on a case by case basis, was issued. Furthermore, in that case, the court proceeded on the basis that Mr. Gurcharan Singh's offer of voluntary retirement had not been accepted before he applied for withdrawing the same. Hence, the same has no application to the facts of the instant case where the offer was not only accepted, the same was duly communicated to the petitioner and accepted by her; and the petitioner in turn also requested the respondents on 28th August, 2004 to disburse all her dues in terms thereof. This was also done. Admittedly, till this stage, the petitioner had no grievance.

17. To set all doubts at rest, even in paragraph 6 of the decision of the Supreme Court in **Food Corporation of India and Ors. vs. Ramesh Kumar** (supra) it has been held that the Corporation cannot act upon the offer of voluntary retirement in case the employee revokes his offer within the notice period, provided the corporation had not already accepted it prior to its withdrawal. In this case, indisputably, the acceptance by the respondent took place prior to the withdrawal by the petitioner.

18. What emerges is this; the Scheme envisaged an application for voluntary retirement giving three month notice; under it, the respondent had the option of accepting the offer with effect from the date the three month period expired, or even at an earlier date, provided the appropriate payment was tendered to the petitioner for the remaining notice period. It did not vest any right with the petitioner to vary the terms of the

Scheme by setting down new or different terms. The petitioner's action in specifying that she should be relieved from service only after the three months. notice period was complete, meaning thereby, that the respondent was precluded from accepting the same at any time before this, amounted to an attempt to vary the terms of the Scheme. Obviously, the respondents did not agree to this variation and accepted her offer from an earlier date as permitted in the original Scheme. Even if it is assumed for a moment that the acceptance by the respondent was not in terms of the offer made by the petitioner, even then, her conduct thereafter precludes the petitioner from claiming that it does not bind her or that no binding contract came into being. This is because after she received that communication from the respondent, purporting to accept her offer of voluntary retirement from a date which was different from the one specified by her, she applied for, and received, all her dues in terms of the same communication of the respondent. By accepting all her dues without protest, the petitioner has clearly approbated the actions of the respondent and is now estopped from contending otherwise. To put it differently, if the offer by the petitioner that her voluntary resignation be accepted only from the date on which the thre months' notice period expires, and not before, amounted to a fresh offer different from the terms of the Scheme, the response by the respondents retiring her from an earlier date and tendering payment for the remaining period was again a counter offer reiterating the original terms of the voluntary requirement scheme. The petitioner's response to this counter offer by the respondent by asking for, and accepting the payment being tendered for the remaining notice period from the respondents, without protest, amounted to an acceptance of that counter offer by the petitioner and she was bound by the same. For that reason also, she cannot be permitted to resile from this position.

19. In the light of the above, both the writ petitions are dismissed.

ILR (2011) IV DELHI 32
TEST. CAS.

SMT. GYAN DEVI GARG ....PETITIONER

VERSUS

STATE & ORS. ....RESPONDENTS

(J.R. MIDHA, J.)

TEST. CAS. NO. : 86/2008 DATE OF DECISION: 28.03.2011

Indian Succession Act, 1925—Section 372—Succession Certificate—Dispensation of Security Bond—Petitioner applied for Succession Certificate in respect of shares left behind by her husband—No objection filed by other legal heirs—Application filed for the dispensation of administration and security bonds on the ground that there is no dispute between legal heirs—Held, the requirement of furnishing administration and security bonds dispensed with following earlier Judgment of Court Sambhu P. Jaisinghani's case.

The petitioner has sought dispensation of the administration and security bonds in I.A.No.4825/2011 on the ground that there is no dispute between the legal heirs of the deceased and the petitioner would be holding shares of the deceased with the consent of all the three sons who have given their no objection. The petitioner has referred to and relied upon the judgments of this Court in the cases of Sambhu **P. Jaisinghani v. Kanayalal P. Jaisinghani** 60 (1995) DLT 1 and **Shakuntala Taxali v. State** 61(1996) DLT 267. Following the aforesaid judgments, the requirement of administration and security bonds is dispensed with. **(Para 5)**

[La Ga]

APPEARANCES:

FOR THE PETITIONER : Mr. L.K. Garg, Advocate.

FOR THE RESPONDENTS : Mr. Mirza Aslam Beg, Advocate for Ms. Sonia Sharma, Advocate for R-1.

CASES REFERRED TO:

1. *Shakuntala Taxali* vs. *State* 61(1996) DLT 267.
2. *P. Jaisinghani* vs. *Kanayalal P. Jaisinghani* 60 (1995) DLT 1.

RESULT: Petition allowed.

J.R. MIDHA, J. (Oral)

TEST.CAS.No.86/2008 and I.A No.4825/2011

1. The petitioner is seeking Succession Certificate in respect of the shares left behind by her husband, late Ramesh Chand Garg who died intestate on 8th November, 2002 leaving behind the petitioner and three sons, namely, Dr. Anil Kumar Garg, Arun Kumar Garg and Avinash Kumar Garg.

2. Notice of this petition was given to the respondents as well as general public by means of a citation published in the Statesman on 16th March, 2009. There is no opposition to the petition. All the three sons of the deceased have filed their affidavits on 26th May, 2009 in which they stated that they have no objection to the grant of the Succession Certificate to the petitioner.

3. The petitioner has submitted her evidence by way of affidavit dated 1st May, 2010 in which she has deposed that the deceased died intestate on 8th November, 2002 leaving behind herself and the three sons. The deceased was permanent resident of Delhi at the time of his death and his death certificate was proved as Ex.PW1/1. The details of the share certificates left behind by the deceased have been proved as Ex.PW1/2A to C.

4. The notice of this petition was also issued to the Chief Controlling Revenue Authority in pursuance to which the Tehsildar has submitted letter dated 11th January, 2010 to the effect that since no immovable

property is involved, the valuation report cannot be furnished by them. In that view of the matter, the petitioner has submitted Valuation Report/ certificate with respect to the shares in question from the Chartered Accountant. As per the said report, the valuation of the shares in question is Rs.4,95,660/-.

5. The petitioner has sought dispensation of the administration and security bonds in I.A.No.4825/2011 on the ground that there is no dispute between the legal heirs of the deceased and the petitioner would be holding shares of the deceased with the consent of all the three sons who have given their no objection. The petitioner has referred to and relied upon the judgments of this Court in the cases of Sambhu **P. Jaisinghani v. Kanayalal P. Jaisinghani** 60 (1995) DLT 1 and **Shakuntala Taxali v. State** 61(1996) DLT 267. Following the aforesaid judgments, the requirement of administration and security bonds is dispensed with.

6. In the facts and circumstances of this case, the petition is allowed and the Succession Certificate is granted to the petitioner in respect of 5250 shares of Gujarat Ambhuja Cement Limited, bearing Client ID No.11335216 – DP ID IN 300100 and 750 shares of Gujarat Ambhuja Cement Limited, bearing Folio No. R08330 and Certificate No.0015823 upon furnishing of the requisite Court-fees by the petitioner.

ILR (2011) IV DELHI 35
CRL. A.

MOHD. IQBAL & ORS. ....APPELLANT

VERSUS

STATE ....RESPONDENT

(PRADEEP NANDRAJOG & SURESH KAIT, JJ.)

CRL. A. NO. : 69/1999 DATE OF DECISION: 05.04.2011

Indian Penal Code, 1860—Sections 302—Case of prosecution that deceased was residing along with her husband (PW2)—Mohd. Iqbal, the appellant (who died during pendency of appeal)—Wireless message was received that quarrel had taken place pursuant to which police found deceased lying in burnt condition in an alley near the staircase—As per MLC Ex. PW16/A, history was given by deceased that she was burnt by her husband's brother and mother—ACP PW6 recorded statement Ex. PW3/A of deceased in question-answer form—Trial Court convicted accused persons u/s 302/34—Held, endorsement "Unfit for statement" made on MLC attempted to be contrived—Very unusual for an ACP to have got recorded dying declaration of deceased and got her husband's signatures appended thereon to show genuineness of document—The possibility that ACP who recorded statement of deceased was acquainted with the appellant and was taking personal interest in the investigation of case, particularly recording statement Ex. PW3/A cannot be ruled out—Contradiction in testimonies of prosecution witnesses with regard to scribe of statement Ex. PW3/A, contrivance in the endorsement 'unfit for giving statement' made in MLC Ex. PW16/A of deceased, the

conduct of the doctor of examining the deceased within just five minutes of her examination by the doctor who made the endorsement on MLC Ex. PW16/A of the deceased, the pro-active role of ACP in investigation and in getting recorded statement of deceased Ex. PW3/A, the overzealousness on the part of the ACP to project that the statement Ex. PW3/A of deceased was genuine and discrepancy in evidence regarding scribe of statement Ex. PW3/A casts doubt on veracity of case of prosecution that deceased was in a fit condition to make statement—The Court has to fully satisfy itself that the deceased was in a fit condition to make a statement and where there is even a slightest doubt regarding the fitness of the deceased to make a statement, the Court should reject the dying declaration—Deceased and her husband had enmity with appellants on account of dispute regarding ownership of property so possibility of false implication—Equally possible that deceased was tutored by her husband—Husband of deceased was already present and had a talk with deceased prior to recording of dying declaration Ex. PW3/A—Husband had sufficient opportunity to tutor deceased—Deceased despite being in a position to talk, did not tell anything to police officer who took her to hospital—Since Court unable to identify which out of the family members set deceased on fire, appellants acquitted.

The law relating to a dying declaration may be stated thus: a dying declaration is a piece of evidence. The worth of a dying declaration has to be considered as any other evidence. It stands on a slightly higher footing because law believes that he/she who is going to meet the Almighty would not be telling a lie. But, if there is evidence which discredits statements made in a dying declaration or casts a doubt on the authenticity of the statements made in a dying declaration or where there is evidence that the maker of the dying declaration has a motive to falsely implicate the

person against whom accusations are made or that the maker of the dying declaration was tutored, the court would look into other evidence to corroborate a dying declaration. **(Para 43)**

Important Issue Involved: The Court has to fully satisfy itself that the deceased was in a fit condition to make a statement and where there is even a slightest doubt regarding the fitness of the deceased to make a statement, the Court should reject the dying declaration.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANTS : Mr. K.B. Andley, Sr. Advocate with Mr. M. Shamikh, Advocate.

FOR THE RESPONDENT : Mr. Pawan Sharma, Standing Counsel (Criminal) with Mr. Harsh Prabhakar, Advocate and Mr. Pashupati Sharma, Advocate.

CASE REFERRED TO:

1. *Sawal Das* vs. *State of Bihar* (1974) 4 SCC 193.

RESULT: Appeal allowed.

PRADEEP NANDRAJOG, J.

1. Vide impugned judgment and order dated 27.01.1999, appellants Mohd. Iqbal, Mohd. Haroon, Barkat Begum, Gulzar Begum and Abdul Wahid have been convicted for the offence of having caused the death of Muslima (herein after referred to as the "Deceased") by setting her on fire, for which offence they have been sentenced to undergo imprisonment for life and pay a fine in sum of Rs.2,000/- each; in default to undergo rigorous imprisonment for three months.

2. During the course of hearing of the present appeals, we were informed by the learned counsel for appellant Mohd. Iqbal that appellant Mohd. Iqbal is no more in the world of living, which information was verified by the learned counsel for the State. In that view of the matter qua Mohd.Iqbal the appeal would stand abated.

3. The case set up by the prosecution against the appellants was that the deceased along with her husband Abdul Khaliq used to reside on the first floor of house bearing Municipal No.436, Shehzada Bagh, Delhi; that Mohd. Iqbal, the brother of the husband of the deceased, along with his wife Barkat Begum and son Mohd. Haroon used to reside on the second floor of the said house and that Abdul Wahid, the other brother of the husband of the deceased, along with his wife Gulzar Begum used to reside in a house situated at a distance of three hundred yards from the said house.

4. On 13.06.1996 at about 01.00 PM ASI Rajinder PW-2, received a wireless message that a quarrel is taking place at house No.436, Shehzada Bagh pursuant to which he proceeded to the said house where he saw the deceased lying, in a burnt condition, in an alley near the staircase of the said house. ASI Rajinder removed the deceased to Lok Narayan Jai Prakash Hospital (hereinafter referred to as the "LNJP Hospital") in a PCR van.

5. Upon receipt of the information of the incident, ACP Satender Nath PW-6, ASI Mahipal PW-7, Const. Madan Pal PW-13, SI Veer Singh PW-15 and Inspector Ranbir Singh PW-17, proceeded to the house in question where they learnt that the deceased has been removed to the hospital. Leaving ASI Mahipal Singh PW-7, at the place of occurrence, ACP Satender Nath PW-6, Const. Madan Pal PW-13, SI Veer Singh PW-15 and Inspector Ranbir Singh PW-17, proceeded to the hospital. In the meantime, Abdul Khaliq PW-2, the husband of the deceased, reached the place of occurrence and on learning that the deceased has been removed to the hospital proceeded to the hospital.

6. On reaching the hospital, Inspector Ranbir Singh PW-17, collected the MLC Ex.PW-16/A of the deceased, the relevant portion whereof reads as under:-

> "c/o Alleged H/o burnt by husband brother's and mother, history given by herself. Pt brought to casuality by PCR."
>
> ….
>
> Burns – 100% (approx.)

….." (Emphasis Supplied)

7. On the same day i.e. 13.06.1996 at about 03.00 P.M. the doctor on duty examined the deceased and made an endorsement *'unfit for giving statement'* at point 'D' on the MLC Ex.PW-16/A of the deceased. Be it noted here that the word 'unfit' occurring in the aforesaid endorsement has been scored off and the word *'fit'* has been written above the said word and a signature appears near said cutting at point 'B' on the MLC Ex.PW-16/A of the deceased. These signatures are different that those beneath the certification where *'unfit for statement'* has been recorded and the word *'fit'* written after scoring off *'unfit'* is also in a different hand. Within a span of five minutes from the recording of the aforesaid endorsement, on the MLC Ex.PW-16/A of the deceased, i.e. at about 03.05 PM Dr.Sujata Pande PW-12, purportedly examined the deceased and declared the deceased fit for statement vide endorsement Ex.PW-12/A on the MLC Ex.PW-16/A of the deceased.

8. Immediately, ACP Satender Nath PW-6, recorded the statement Ex.PW-3/A of the deceased in question-answer form. The statement Ex.PW-3/A of the deceased is recorded in Devnagri script. Translated, it reads as under:-

"Q: What is your name?

A: Muslima.

Q: Who burnt you?

A: Haroon, Iqbal, Gulzar, Barkat and Abdul Wahid.

Q: How were you burnt?

A: Kerosene oil was poured on me. Red mug and can were used.

Q: Who lit the matchstick?

A: Barkat set me on fire and she was saying that I should be murdered today.

Q: Who doused the fire?

A: Zafar who works in a plot opposite to my house.

Q: Why were you burnt?

A: There is some dispute regarding a house and they want us to vacate the same."

9. After recording the statement Ex.PW-3/A of the deceased, ACP Satender Nath PW-6, obtained the signatures of Abdul Khaliq PW-2, the husband of the deceased, on the said statement. Thereafter Inspector Ranbir Singh PW-17, made an endorsement Ex.PW-17/A on the statement Ex.PW-3/A of the deceased, and at around 12.45 A.M. handed over the same to Const. Madan Pal PW-13, for registration of an FIR. Const.Madan Pal took the endorsement Ex.PW-17/A to the police station where HC Mohar Singh PW-1, registered FIR No.246/1996 Ex.PW-1/B.

10. Thereafter Inspector Ranbir Singh PW-17, returned to the place of occurrence. On inspecting the place of occurrence, Inspector Ranbir Singh found a plastic can containing very little quantity of kerosene oil, a red colored mug smelling of kerosene oil and some broken pieces of glass bangles from the first floor of the house in question and seized the same vide memo Ex.PW-4/B.

11. On 13.06.1996 at about 07.00 P.M. the deceased succumbed to her injuries.

12. On the same day i.e. 13.06.1996 Inspector Ranbir Singh PW-17, recorded the statement Ex.PW-4/A of Mohd. Zafar under Section 161 Cr.P.C. which purports to implicate the appellants and the deceased appellant Mohd.Iqbal.

13. Since the deceased had indicted accused Mohd. Iqbal, Mohd. Haroon, Abdul Wahid, Barkat Begum and Gulzar Begum as her assailants in her statement Ex.PW-3/A, the police set out to apprehend them. On 13/14.06.1996 the police arrested accused Mohd. Iqbal, Mohd. Haroon, Barkat Begum and Gulzar Begum. The police could not arrest accused Abdul Wahid as he was evading arrest.

14. On 14.06.1996 the body of the deceased was sent to the mortuary where at about 12.15 PM Dr. A.P. Singh conducted the post-mortem of the deceased and gave his report Ex.PW-14/A which records that the death of the deceased was caused due to burn shock consequent upon the burn injuries found on the person of the deceased.

15. Armed with the aforesaid materials, the police filed a charge

sheet against accused Mohd. Iqbal, Mohd. Haroon, Barkat Begum and Gulzar Begum.

16. Needless to state, the aforesaid accused persons were sent for trial. Charge was framed against them for having committed the offence punishable under Section 302/34 IPC. Since the police could not arrest accused Abdul Wahid he was declared as proclaimed offender by the learned Trial Court and we note that he has since expired.

17. During the course of trial, the prosecution examined 18 witnesses.

18. ASI Rajinder PW-2, deposed that on 13.06.1996 at about 01.00 P.M. he received a wireless message that a quarrel is taking place at house No.436, Shehzada Bagh pursuant to which he proceeded to the said house where he saw that the deceased was lying in a burnt condition in an alley near the staircase of the said house. On being questioned about the conversation he had with the deceased on her way to the hospital, the witness stated (Quote):- *'I had asked the name of that lady and she told me her name. Beside this, I had no other talk with lady.'*

19. Abdul Khaliq PW-2, the husband of the deceased, deposed that on 13.06.1996 at about 01.30 P.M. he received the information that the deceased has been burnt whereupon he reached the place of occurrence and on learning that the deceased has been removed to the hospital he proceeded to the hospital. When the police sought to record the statement of the deceased, the doctor first declared the deceased to be unfit to make a statement. After sometime the doctor again examined the deceased at the request of the police and declared her to be fit to make a statement. Pursuant thereto, the police recorded the statement Ex.PW-3/A of the deceased in his presence and that he appended his signatures on the said statement. On being questioned about the presence of cooking gas in his house he stated that (Quote):- *'I have cooking gas in my house so has the Iqbal accd. present in court.'* On being questioned about the relations between him and the appellants, he stated that (Quote):- *'It is correct that a case was regd. against my deceased wife on the complaint of Mohd. Harun accd. U/s. 324 IPC with P.S. Sarai Rohilla. It is correct that proceedings U/s. 107/150 Cr.p.c. were pending before the SDM between myself and accd. Mohd. Iqbal. I have no knowledge whether Iqbal had moved application to the police regarding apprehension of his life and*

property against me. Vol.: My wife Muslima had lodged a complaint against the accd. persons to the police about 2/3 months prior to the occurrence. It is correct that I have filed Again said: My mother has filed a suit for injunction against accd. Iabal which is still pending. It is correct that I am also one of the pltfs. In that suit….It is correct that my relations with my brother are enemical because of the dispute regarding the house in question.'

20. Mohd. Zaffar PW-4, turned hostile and denied having told the police that the deceased had told him that the accused persons had set her on fire. He however deposed that on 13.06.1996 at about 12.45 P.M. he saw the deceased who was engulfed in flames descending from her house situated on the first floor of a house. On seeing the same he rushed to the help of the deceased and doused the fire on the deceased.

21. ACP Satender Nath PW-6, deposed that on receiving the information of the incident, he reached the place of occurrence and on learning that the deceased has been removed to the hospital, proceeded to the hospital. On reaching the hospital, he learnt that the deceased is not fit to make a statement as noted in the MLC Ex.PW-12/A of the deceased. Thereafter he requested the doctor to re-examine the deceased and certify her medical condition upon which the doctor re-examined the deceased and declared her to be fit to make a statement pursuant to which he recorded the statement Ex.PW-3/A of the deceased. On being questioned about the can and mug seized from the place of occurrence the witness stated that (Quote):- *'I did see the spot. Lots of kerosene oil was found spread on the floor, some burnt matchsticks some utensils in which i.e. one Lota and Cane was also found at the spot which gave smell of kerosene oil. It was red colour Lota.'* On being questioned about the scribe of the statement Ex.PW-3/A of the deceased, he stated that (Quote):- *'This Dying Declaration was written by SI Veer Singh on my dictation.'*

22. Dr.Sujata Pandey PW-12, deposed that she had made the endorsement Ex.PW-12/A on the MLC Ex.PW-16/A of the deceased at about 03.05 P.M. on 13.06.1996. On being questioned about the cutting appearing on the MLC Ex.PW-16/A of the deceased, she stated that (Quote):- *'I cannot say who has written unfit for statement and thereafter who made the cutting on it and portion shown at point B on ex. PW12/A…I cannot identify the hand-writing of the doctor who has written the*

portion at point B on ex. PW12/A. I do not know whether these endorsement at point B existed on ex. PW12/A when I gave my endorsement at point A. Q. If you had noticed the endorsement at point B, would you have consulted the doctor who had made that endorsement? A. In case, a patient is declared fit or unfit for statement by a doctor than ideally I would not check the patient again, because the doctor is qualified enough to give that opinion but in case of controversy or if any change has been made for any reason, then I would examine the patient as a Senior doctor and give my opinion. I do not remember if there was any controversy in this case. The controversy may be raised by the Inspector also but the controversy has to be brought to my notice by the concerned doctor… I do not remember if any controversy was brought to my notice by any doctor.'

23. Const. Madan Pal PW-13, deposed that on receiving the information of the incident, he reached the place of occurrence and on learning that the deceased had been removed to the hospital proceeded to the hospital. The statement Ex.PW-3/A of the deceased was recorded in the hospital in his presence. He took the endorsement Ex.PW-17/A to the police station for the purposes of registration of an FIR. On being questioned about the factum of conversation between the deceased and her husband in the hospital he stated that (Quote):- *'Before the ACP had talked with Muslima Khaliq had a conversation with Muslima.'*

24. SI Veer Singh PW-15, deposed that on receiving the information of the incident, he reached the place of occurrence and on learning that the deceased has been removed to the hospital he proceeded to the hospital. On reaching the hospital, he learnt that the deceased is not fit to make a statement as noted in the MLC Ex.PW-12/A of the deceased. Seeing that the deceased was in a condition to talk ACP Satender Nath requested the doctor to re-examine the deceased and certify her medical condition upon which the doctor re-examined the deceased and declared her to be fit to make a statement pursuant to which Inspector Ranbir Singh recorded the statement Ex.PW-3/A of the deceased. On being questioned about the scribe of the statement Ex.PW-3/A of the deceased, he stated that (Quote):- *'Statement of Muslima is in the handwriting of Inspector Ranbir Singh.'* On being questioned about the presence of the husband of the deceased Abdul Khaliq in the hospital, he stated that (Quote):- *'When we reached hospital Khaliq was already present.'*

25. Rattan Singh PW-16, Record Clerk, LNJP hospital deposed that the MLC Ex.PW-16/A of the deceased was prepared by Dr.Shanti Bushan and that he can identify the handwriting of the said doctor. On being questioned about the cutting appearing on the MLC Ex.PW-16/A of the deceased, he stated that (Quote):- *'There are two doctors by the name of Priti in the hospital and point B bears the signatures of one of those doctors. I cannot say whose initials are at point D.'*

26. Inspector Ranbir Singh PW-17, deposed that on receiving the information of the incident, he reached the place of occurrence and on learning that the deceased has been removed to the hospital he proceeded to the hospital. On reaching the hospital, he learnt that the deceased is not fit to make a statement as noted in the MLC Ex.PW-12/A of the deceased. Seeing that the deceased was in a condition to talk, ACP Satender Nath requested the doctor to re-examine the deceased and certify her medical condition upon which the doctor re-examined the deceased and declared her to be fit to make a statement pursuant to which he recorded the statement Ex.PW-3/A of the deceased. On being questioned about the mother-in-law of the deceased he stated that (Quote): *'I do not know if Banu Begum is the mother of Abdul Khaliq and Iqbal accused. I do not remember if in the initial statement made by Muslima to doctor, she had also named 'Mother'. On seeing M.L.C. Ex.PW-16/A, witness states that word 'Mother' is mentioned in the alleged history given by the patient to the doctor. Since in her statement made before me Muslima did not disclose about 'Mother' I did not carry out any investigation in that regard.'* On being questioned about the certification of the medical condition of the deceased by the doctor(s), he stated that (Quote): *'There was time gap of 5 minutes between unfit for statement and fit for statement. No controversy has arisen after Muslima was declared unfit for statement.'*

27. In their examination under Section 313 Cr.P.C. the appellants denied everything and pleaded innocence. The appellants stated that they were not present in the house in question at the time of the occurrence; that they have been falsely implicated in the present case at the instance of Abdul Khaliq, the husband of the deceased, who was inimically disposed towards them as there was a dispute between them regarding ownership of a property and that so-called dying declaration Ex.PW-3/A of the deceased is a false document.

28. In defence, the appellants examined HC Anil Kumar as DW-1. He deposed that on 15.04.1996 appellant Mohd. Haroon got registered the FIR bearing No.162/1996 under Section 324 IPC against the deceased.

29. Holding that the testimonies of the police officers namely ACP Satender Nath PW-6, Const. Madan Pal PW-13, SI Veer Singh PW-15 and Inspector Ranbir Singh PW-17 and the testimony of the husband of the deceased i.e. Abdul Khaliq PW-2 establishes that the deceased made the statement Ex.PW-3/A soon before her death; and that their testimony was trustworthy and that the contents of the statement Ex.PW-3/A of the deceased which is to be treated as dying declaration of the deceased is a reliable piece of evidence the learned Trial Judge has convicted the appellants as also the deceased appellant Mohd.Iqbal.

30. From the above narrative of facts, it is apparent that the case set up by the prosecution against the appellants is based upon the statement Ex.PW-3/A of the deceased.

31. During the course of the hearing of the present appeals, learned counsel for the appellants seriously challenged the veracity of the statement Ex.PW-3/A of the deceased. The first limb of the argument advanced by the learned counsel for the appellants pertain to the fitness of the deceased to have made the statement Ex.PW-3/A. In said regard, the learned counsel drew attention of this court to the MLC Ex.PW-16/A of the deceased. The counsel highlighted that on 13.06.1996 at about 03.00 P.M. one doctor examined the deceased and found her to be unfit to make a statement to the police as recorded in the endorsement made at point 'D' on the MLC Ex.PW-16/A of the deceased however five minutes thereafter i.e. at about 03.05 P.M. another doctor namely, Dr.Sujata Pande PW-12 examined the deceased and found her to be fit to make a statement to the police. Counsel urged that what was the occasion or need for Dr.Sujata Pandey to have examined the deceased and certify her medical condition within five minutes of examination of the deceased by the doctor who made the endorsement at point 'D' on the MLC Ex.PW-16/A of the deceased. Counsel then drew attention of this Court to the circumstance that the endorsement 'unfit to give statement' made at point 'D' on the MLC Ex.PW-16/A of the deceased has been converted to 'fit to give statement'. According to the counsel, the aforesaid two circumstances pointed out by him strongly suggest that the deceased was not fit to make a statement and thus the statement Ex.PW-3/A has

not come from the mouth of the deceased and is a false document. Counsel highlighted that there is contrivance writ large on the MLC by making cuttings and interpolations to show that the deceased was fit for statement. The second limb of the argument advanced by the learned counsel for the appellants pertained to the genuineness of the contents of the statement Ex.PW-3/A of the deceased. Counsel highlighted that the deceased and her husband were inimically disposed towards the appellants on account of the facts that there was a dispute between them regarding the ownership of a property and that various litigations, civil and criminal, were instituted by them against each other. Counsel urged that in such circumstances, the possibilities that the deceased falsely implicated the appellants due to her enmity with them or that the husband of the deceased tutored the deceased to falsely implicate the appellants cannot be ruled out. According to the counsel, in that view of the matter, it is not safe to base the conviction of the appellants on the uncorroborated statement Ex.PW-3/A of the deceased.

32. Per contra, learned counsel for the State submitted that there is no rule of law which requires that a dying declaration cannot be acted upon without corroboration. Once the Court is satisfied that the deceased was in a fit state of mind to give a dying declaration and that the declaration was true and voluntary, it can base its conviction on the same without any further corroboration. Counsel further submitted that in any case, one of the recordings contained in the statement Ex.PW-3/A of the deceased that a can and red mug were used by the appellants to set the deceased on fire is corroborated by the fact that a can containing very little quantity of kerosene oil and a red mug smelling of kerosene oil was found in the place of occurrence, which circumstance lends great credence to the veracity of the statement Ex.PW-3/A of the deceased. Regarding the fitness of the deceased to have made the statement Ex.PW-3/A, the counsel submitted that there is no reason to disbelieve the evidence of Dr.Sujata Pande PW-12, that the deceased was fit to make a statement to the police when nothing has been brought on record by the appellants to show that Dr.Sujata Pande had an animus towards the appellants and thus had a given false evidence to implicate them in the present case.

33. As recorded in the post-mortem report Ex.PW-14/A of the deceased, the deceased died of burn injuries found on her person. The fact that a can containing little quantity of kerosene oil and red mug

smelling of kerosene oil were found from the residence of the deceased suggests that the kerosene oil caused the burn injuries found on the person of the deceased. Whether the deceased committed suicide or is it a case of accidental burning or homicidal burning?

34. The testimony of Mohd. Zaffar PW-4 and Abdul Khaliq PW-2 and the seizure memo Ex.PW-4/B throws light on the said aspect of the matter. As already noted herein above, Mohd. Zaffar PW-4, deposed that on 13.06.1996 at about 12.45 P.M. he saw the deceased who was engulfed in flames descending from her residence situated on the first floor of a house. Obviously the deceased was coming downstairs so that someone would see her engulfed in flames and come to her aid. Had the deceased committed suicide she would not have come downstairs to draw attention to herself but instead remained present in her residence. Abdul Khaliq PW-2, the husband of the deceased, deposed that there was cooking gas in his house. When there was cooking gas in the house of the deceased, there was no occasion for the deceased to have used kerosene oil for cooking and accidentally burning herself in the process. This leaves us with only one possibility i.e. the present case is of homicidal burning. The seizure memo Ex.PW-4/B records that the police found broken pieces of glass bangles of the deceased in the residence of the deceased on the day of the occurrence, which fact strongly suggests that the deceased broke her glass bangles while struggling to save herself when someone or more than one person was/were pouring kerosene oil on her body and setting her on fire. But the question would be as to who is/are the person(s) who did the offending act?

35. This takes us to an analysis of the statement Ex.PW-3/A allegedly made by the deceased.

36. The statement Ex.PW-3/A made by the deceased to ACP Satender Nath PW-6, if voluntarily and correctly made by the deceased soon before her death undoubtedly has to be treated as dying declaration of the deceased for the same records a statement of fact pertaining to the death of the maker of the statement i.e. the deceased. Thus, the first and foremost question to be posed and answered is, did the deceased make any such statement as claimed by the police officers namely ACP Satender Nath PW-6, Const. Madan Pal PW-13, SI Veer Singh PW-15 and Inspector Ranbir Singh PW-17 and the husband of the deceased Abdul Khaliq PW-2 and was she fit to make a statement.

37. In said regards, the first circumstance which is worth noticing is the endorsement made at point 'D' on the MLC Ex.PW-16/A of the deceased at about 03.00 PM on 13.06.1996. As already noted herein above, a perusal of the said endorsement shows that the word 'unfit' has been first written and then scored off and above the said word, the word 'fit' has been written. In other words, the sentence 'unfit for giving statement' has been converted to read 'fit for giving statement'. A further perusal thereof reveals that one signature each appear on the points 'D' and point 'B'. (As already noted in foregoing paras, point B is near the cutting made in the endorsement at point D). The signatures appearing at points 'B' and 'D' are of two different doctors, as deposed to by Rattan Singh PW-16, record clerk, LNJP hospital. A visual comparison of the said two signatures show that signatures appearing at point 'B' is a crude imitation of the free flow of the signatures appearing at point 'D'. From the aforesaid, it is clear that someone has attempted to contrive the endorsement 'unfit for giving statement' made at point D on the MLC Ex.PW-16/A of the deceased.

38. The second circumstance which needs to be noted is that on 13.03.1996, at about 03.00 PM the doctor who made the endorsement at point D on the MLC Ex.PW-16/A of the deceased examined the deceased and declared her to be unfit to make a statement and that within five minutes thereafter i.e. at about 03.05 P.M. Dr. Sujata Pande PW-12, examined the deceased and declared her to be fit to make a statement.

39. ACP Satender Nath PW-6, Const. Madan Pal PW-13, SI Veer Singh PW-15, Inspector Ranbir Singh PW-17 and Abdul Khaliq PW-2, deposed that Dr.Sujata Pande examined the deceased at the request of ACP Satender Nath PW-6. Let us pause here for a minute. It has come on the evidence on record that on receiving the receipt of the information of the incident, ACP Satender Nath PW-6, reached the place of occurrence and on learning that the deceased has been removed to the hospital proceeded to the hospital and recorded the statement Ex.PW-3/A of the deceased. Having dealt with the roster of criminal appeals pertaining to the offence punishable with imprisonment for life and death from the periods 01.01.2009 to 31.05.2010 and 24.01.2011 to till date we have come across at least five hundred appeals, out of which, in at least fifty appeals the dying declarations were purported to have been made by the deceased. Till date, we have not across any matter where the police

officer of the rank of ACP had played a pro-active role in the investigation of a case or taken pains to record the dying declaration of the deceased. What was so special about the instant case that ACP Satender Nath played a pro-active role in its investigation? As already noted herein above, Abdul Khaliq PW-2, the husband of the deceased, appended his signatures on the statement Ex.PW-3/A of the deceased after the recording of the said statement. There was no necessity to have got the statement Ex.PW-3/A of the deceased attested by Abdul Khaliq yet it was done by ACP Satender Nath. Why such overzealousness on the part of ACP Satender Nath to project that the statement Ex.PW-3/A of the deceased is a genuine document? In the instant case, it has come on the evidence on record that the proceedings under Section 107 Cr.P.C. were instituted against the deceased and her husband Abdul Khaliq at the instance of the appellants. In said proceedings the police officer of the rank of ACP has power to bound down the accused in such proceedings. In such circumstances, the possibility that ACP Satender Nath was acquainted with the husband of the deceased Abdul Khaliq prior to the date of occurrence and that there was some liaison between ACP Satender Nath and the husband of the deceased Abdul Khaliq due to which reason ACP Satender Nath was taking a personal interest in the investigation of the present case, particularly the recording of the statement Ex.PW-3/A of the deceased, cannot be ruled out.

40. For the reason that firstly an attempt has been made to make interpolations on the MLC by cutting and overwriting and forging signatures pertaining to the first certification at 3:00 PM that the patient was unfit for statement by trying to show as if the patient was fit for statement and thereafter within 5 minutes thereof getting it recorded from another doctor that the patient was fit for statement and for unexplainable reasons that an officer of the rank of ACP has taken an unexplainable pro-active role in the investigation coupled with the fact that there is some discrepancy as to who is the actual scribe of the statement Ex.PW-3/A compels us to give the benefit of doubt to the appellants on the issue of the fitness of the deceased to make any such statement. Qua the discrepancy in the evidence as to who scribed the statement it needs to be highlighted that ACP Satender Nath PW-6, deposed that he had dictated the said statement to SI Veer Singh who had written ˇthe same, whereas SI Veer Singh PW-15 and Inspector Ranbir Singh PW-17, deposed that Inspector Ranbir Singh had recorded the

statement Ex.PW-3/A of the deceased.

41. The cumulative of trinity of the afore-noted circumstances pointed out by us namely, contrivance in the endorsement 'unfit for giving statement' made at point D on the MLC Ex.PW-16/A of the deceased; conduct of Dr.Sujata Pande of examining the deceased within just five minutes of her examination by the doctor who made the endorsement at point D on the MLC Ex.PW-16/A of the deceased; the pro-active role played by ACP Satender Nath in the investigation of the present case and recording the statement Ex.PW-3/A of the deceased; the overzealousness on the part of ACP Satender Nath to project that the statement Ex.PW-3/A of the deceased is a genuine document and the discrepancy in the evidence regarding the scribe of the statement Ex.PW-3/A of the deceased compels us to doubt the veracity of the case of the prosecution that the deceased was in a fit condition to make any statement. While so stating, we are conscious of the law that the courts ordinarily should not reject the evidence of the doctor that the deceased was in a fit condition to make a statement for a doctor has no animus against the accused persons and thus would not lie to falsely implicate them. However, at the same time, the law also requires the court to fully satisfy itself that the deceased was in a fit condition to make a statement and where there is even a slightest doubt regarding the fitness of the deceased to make a statement the court should reject the dying declaration. In a case predicated upon a dying declaration it is most imperative that the fitness of the deceased to make a dying declaration should emerge with clarity.

42. There is another angle to the issue of the veracity of the statement Ex.PW-3/A of the deceased.

43. The law relating to a dying declaration may be stated thus: a dying declaration is a piece of evidence. The worth of a dying declaration has to be considered as any other evidence. It stands on a slightly higher footing because law believes that he/she who is going to meet the Almighty would not be telling a lie. But, if there is evidence which discredits statements made in a dying declaration or casts a doubt on the authenticity of the statements made in a dying declaration or where there is evidence that the maker of the dying declaration has a motive to falsely implicate the person against whom accusations are made or that the maker of the dying declaration was tutored, the court would look into other evidence to corroborate a dying declaration.

44. In the instant case, it has come on the evidence on record that deceased and her husband were inimically disposed towards the appellants on account of the facts that there was a dispute regarding the ownership of a property and that various litigations, civil and criminal, were instituted by them against each other. Thus, there is a possibility of her falsely implicating the appellants as she had a motive to do so. It is equally possible that the deceased was tutored by her husband Abdul Khaliq to falsely implicate the appellants. SI Veer Singh PW-15, deposed that Abdul Khaliq was already present in the hospital at the time when he and other police officers reached there. Const. Madan Pal PW-13, deposed that Abdul Khaliq had a talk with the deceased prior to the recording of the statement Ex.PW-3/A of the deceased by ACP Satender Nath. From the said two depositions, it is clear that Abdul Khaliq had sufficient opportunity to tutor the deceased.

45. It assumes importance that ASI Rajinder PW-2, was the first police officer who met the deceased after the incident. ASI Rajinder deposed that he removed the deceased to the hospital; that the deceased told her name to him on their way to the hospital and that there was no other talk between him and the deceased on their way to the hospital. The fact that the deceased told her name to ASI Rajinder on their way to the hospital shows that the deceased was in a position to talk at that time. It is natural for ASI Rajinder to have asked the deceased regarding the incident and the fact that the deceased told nothing to ASI Rajinder is of some significance. Another thing of significance is the recording on the MLC by the doctor who examined the deceased at the first instance that the patient gave history of being burnt by husband brothers. and mother, which we read to possibly mean brothers of the husband and his mother. In Ex.PW-3/A there is no reference to the mother and in place, the wives of the two brothers-in-law and the son of one of them finds a mention. This fact is also important keeping in view the fact that the stated dying declaration implicates the entire two families who were inimical towards the husband of the deceased i.e. the two brothers of the husband of the deceased, their wives and the son of one of them. The statement being motivated to seek vengeance and bring within the clutches of law even innocent persons cannot be ruled out.

46. The fact of the matter is that the deceased had died a homicidal death and we are grappling with the question: Who caused the death of

the deceased. There is uncertainty in the facts of the present case as to whether all the appellants or only some of them, and, if so, which of them, caused the death of the deceased. A situation akin to the present case arose before the Supreme Court in the decision reported as **Sawal Das v State of Bihar** (1974) 4 SCC 193. In the said case, the husband, mother-in-law and father-in-law of the deceased were charged with the offence of murder of the deceased. The learned Trial Court convicted the three accused persons whereas the High Court acquitted the mother-in-law and father-in-law of the deceased and convicted the husband of the deceased. Aggrieved by the judgment of the High Court, the husband of the deceased filed an appeal before the Supreme Court. It was held by the Supreme Court that since there was an uncertainty in the facts of the case as to whether all the three persons accused of murder of the deceased or only one of them, and if so, which of them, committed the murder of the deceased the husband is entitled to get benefit of said uncertainty and acquitted him of the charge of the murder of the deceased.

47. In view of the above discussion above, we return the verdict that although the crime took place in the house of the deceased which was on the first floor of the building and the deceased was doused with kerosene and set on fire by some family members, but we are unable to identify as to who they were and thus regretfully we are compelled to acquit all the appellants for the reason law requires that even if one innocent person cannot be identified and hence let off, notwithstanding a few accused being required to be let off, the compulsion of law would be to let off all. The appeal is accordingly allowed. Impugned judgment and order dated 27.1.1999 convicting the appellants is set aside and the appellants, by giving them the benefit of doubt, are set free. The bail bonds and the surety bonds furnished by the appellants at the time they were admitted to bail are discharged.

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FAO

M/S. THE NEW INDIA ASSURANCE CO. LTD. ....APPELLANT

VERSUS

SATYAWATI & OTHERS ....RESPONDENTS

(VALMIKI J. MEHTA, J.)

FAO NO. : 232/2010 DATE OF DECISION: 18.04.2011

Workmen's Compensation Act, 1923 (Now called Employees Compensation Act, 1923)—Section 30—Whether there is any liability for payment of interest upon an insurance company and which interest becomes payable by an employer on account of the failure of the employer to pay the compensation to the workmen when it 'falls due'—Deceased workman employed as helper, in the vehicle owned by Sumer Singh—Dependents of deceased workman filed claim under the Act against employer and insurance company—Submitted on behalf of insurance company, in view of Section 3, 4 and 4A of the Act, insurance company only liable for principle compensation and not for interest awarded by Workmen's Compensation Commission—Also submitted that terms of insurance policy would not make the insurance company liable for interest on compensation awarded as there is no such clause in the policy—Held, the compensation "falls due" on the date of the accident—If the compensation is not paid, after one month of the date of the accident the consequences of penalty and interest flow—Workman will be entitled to interest after one month of the date of accident—In view of Section 147 and 149(1) of Motor Vehicles Act, an insurance policy cannot contract out of the complete liability adjudicated including the interest—Also, once insurance company takes liability with respect to death of a workman, ouster of liability has to be established by insurance company showing a clause in the policy exempting itself from the liability towards interest and not the other way round.

In view of the decision in the case of **Raghubir Singh** in my opinion the decision in the case of **Pratap Narain** being a decision of four Judges will have to be prevail over the decisions of **Ved Parkash, Musabir Ahmad, Palraj and UPSRTC** (all supra). The judgment of **Pratap Narain** in categorical language lays down the ratio that compensation in fact falls due on the date of the accident and penalty, and interest also therefore, would also be payable after one month, if the compensation is not paid within one month of the date of incident/accident. The Division Bench of two Judges in the case of **Oriental Insurance Co. Ltd. Vs. Mohd. Nasir & Anr.** 2009 (6) SCC 280 without referring to the case of **Pratap Narain** has independently come to a similar ratio in holding that interest will be payable definitely at least from the date of filing of the petition before the Commissioner, Workmen's Compensation. **(Para 12)**

The conclusion which therefore emerges is that when a workman is covered under an insurance policy to which the Motor Vehicles Act, 1988 applies, then, an insurer cannot contract out of any liability which would be payable on account of death of the workman caused in a motor vehicle accident as there cannot be any contracting out of a statutory provision as the contracting out would be against public interest and which is protected/provided for by the statute. The insurance policy in question thus cannot contract out of the complete liability adjudicated including interest inasmuch as the statutory provisions as found in Section 147 and 149 (1) of the Motor Vehicles Act, 1988 serve a social purpose. **(Para 17)**

The **second** reason for rejecting the argument of the

learned counsel for the appellant is that the argument put forth seeks to turn the issue of entitlement of contracting out inversely on its head. This is because the issue is that there can be a clause in the policy exempting liability for payment of interest, however, it cannot be argued exactly to the opposite that there is no liability towards interest unless there is a clause in the policy entitling the payment of interest. I am of course adverting to this argument, although in the present case the accident is an accident involving a motor vehicle and as per the decisions ending with **Kamla Chaturvedi** it has already been held that in cases covered by the Motor Vehicles Act, there cannot be contracting out of the statutory provisions. The Supreme Court in the decision of **New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya;** 2006 (5) SCC 192, has held that the liability for interest payable under the Workmen's Compensation Act, 1923 can be contracted out by the insurance company only in non motor vehicle accident cases, inasmuch the liability towards interest is not a mandatory statutory liability which is required to be covered under an insurance policy, as is required to be done with respect to a motor accident under the provision of Section 147 of the Motor Vehicles Act, 1988. The decision in the case of **Harshadbhai** cannot be read in an inverse manner as is sought to be done by the counsel for the appellant by contending that ordinarily an insurance company is not liable unless there is a specific clause making insurance company liable for interest. In my opinion, once an insurance company takes liability with respect to death of a workman, then, in such cases ouster of liability has to be properly established by the insurance company if it claims to be not liable by showing a clause in the policy that there is such a clause whereby the insurance company has exempted itself for the liability towards interest and not the other way round. I therefore hold that the insurance company cannot take up a stand that it is not liable to make the payment of interest on the compensation as calculated because policy is silent in this regard, considering the insurance company takes

complete liability for all compensation which is payable to the dependants of the deceased workman who dies as a result of accident in a motor vehicle. I am informed that normally an insurance policy always states that all legal liabilities of the insured will be indemnified by the insurance company and this insertion is made on the direction of the Insurance Regulatory Development Authority. **(Para 18)**

Important Issue Involved: The Insurance company has complete liability to pay the entire adjudicated amount of compensation including interest and cannot contract out of its liability to pay compensation.

[La Ga]

APPEARANCES:

FOR THE APPELLANT : Mr. D.D. Singh, Advocate with Mr. Navdeep Singh, Advocate.

FOR THE RESPONDENT : Mr. Amit Kumar Pandey, Advocate for the respondent Nos. 1 and 7.

CASES REFERRED TO:

1. *UPSRTC Now Uttarakhand Transport Corporation* vs. *Satnam Singh* 2011 (2) Scale 432.
2. *Palraj* vs. *Divisional Controller North East Karnataka Road Transport Corporation* (2010) 10 SCC 347.
3. *Oriental Insurance Company Ltd.* vs. *Mohd. Nasir and Another;* 2009 (6) SCC 280.
4. *Kamla Chaturvedi* vs. *National Insurance Co.* 2009 (1) SCC 487.
5. *National Insurance Co. Ltd.* vs. *Musabir Ahmed & Anr.* 2007 (2) SCC 349.
6. *New India Assurance Co. Ltd.* vs. *Harshadbhai Amrutbhai Modhiya;* 2006 (5) SCC 192.
7. *P.J. Narayan* vs. *Union of India and Ors.* MANU/SC/1120/2003.

8. *L.R. Ferro Alloys Ltd.* vs. *Mahavir Mahto and Another;* 2002 (9) SCC 450.

9. *Kashibhai Rambhai Patel* vs. *Shanabhai Somabhai Parmar and Others;* 2000 SCC (L&S) 1105.

10. *Maghar Singh* vs. *Jashwant Singh,* (1998) 9 SCC 134.

11. *Ved Prakash Garg* vs. *Premi Devi and Others* 1997 (8) SCC 1.

12. *Pratap Narain Singh Deo* vs. *Shrinivas Sabata and Another;* AIR 1976 SC 222.

13. *Ved Prakash Garg* vs. *Premi Devi and Ors.* MANU/SC/0956/1997 : AIR1997SC3854.

14. *Union of India* vs. *Raghubir Singh;* AIR 1989 SC 1933.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J (ORAL)

1. The issue in this First Appeal under Section 30 of the Workmen's Compensation Act, 1923 (now called as Employee's Compensation Act, 1923, hereinafter referred to as 'the Act') is whether there is any liability for payment of interest upon an insurance company and which interest becomes payable by an employer on account of the failure of the employer to pay the compensation to the workman when it 'falls due'.

2. The facts of the case are that the deceased Sh. Shishupal was a workman employed by Sh. Sumer Singh. Sh. Shishupal used to work as a helper in the vehicle owned by Sh. Sumer Singh. An accident occurred on 20.11.2005 of the vehicle resulting in the death of the workman Sh. Shishupal. The dependants of Sh. Shishupal, therefore, filed a claim under the Workmen's Compensation Act, 1923 against the employer and the insurance company, and which claim has been allowed by the impugned judgment dated 8.4.2010.

3. It is contended by the learned counsel for the appellant that in terms of the provisions of Sections 3, 4 and 4-A of the Employee's Compensation Act, 1923, the insurance company takes liability only with respect to the principal compensation adjudicated and is not liable to pay interest on the compensation which is awarded by the Commissioner, Workmen's Compensation.

4. The Supreme Court way back while deciding the case of **Pratap Narain Singh Deo Vs. Shrinivas Sabata and Another;** AIR 1976 SC 222, had an occasion to consider the issue as to when can the compensation amount be said to have 'fallen due' as per Section 4 of the Act. No doubt, the Supreme Court in the case of **Pratap Narain** (supra) was dealing with the issue of penalty, however, both penalty and interest are consequences of non-payment of the compensation on the date when the said compensation falls due. The Supreme Court, in this judgment of four Judges, in this regard, has observed as under:-

> "6. It has next been argued that the Commissioner committed a serious error of law in imposing a penalty on the appellant under Section 4A(3) of the Act as the compensation had not fallen due until it was 'settled' by the Commissioner under Section 19 by his impugned order dated May 6, 1969. There is however no force in this argument.
>
> 7. Section 3 of the Act deals with the employer's liability for compensation. Sub-section (1) of that section, provides that the employer shall be liable to pay compensation if "personal injury is caused to a workmen by accident arising out of and in the course of his employment". It was not the case of the employer that the right to compensation was taken away under Sub-section (5) of Section 3 because of the institution of a suit in a civil court for damages, in respect of the injury, against the employer or any other person. The employer therefore become liable to pay the compensation as soon as the aforesaid personal injury was caused to the workmen by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due until after the commissioner's order dated May 6, 1968 under Section 19. What the section provides is that if any question arises in any proceeding under the Act as to the liability of any person to pay compensation or as to the amount or duration of the compensation it shall, in default of agreement, he settled by the commissioner. There is therefore nothing to justify the argument that the employer's liability to pay compensation Section 3, in respect of the injury, was suspended until after the settlement contemplated by Section 19. The appellant was thus liable to pay compensation

as soon as the aforesaid personal injury was caused to the appellant, and there is no justification for the argument to the contrary.

8. It was the duty of the appellant, under Section 4A(1) of the Act, to pay the compensation at the rate provided by Section 4 as soon as the personal injury was caused to the respondent. He failed to do so. What is worse, he did not even make a provisional payment under Sub-section (2) of Section 4 for, as has been stated, he went to the extent of taking the false pleas that the respondent was a casual contractor and that the accident occurred solely because of his negligence. Then there is the further fact that he paid no need to the respondent's personal approach for obtaining the compensation. It will be recalled that the respondent was driven to the necessity of making an application to the Commissioner for settling the claim, and even there the appellant raised a frivolous objection as to the jurisdiction of the Commissioner and prevailed on the respondent to file a memorandum of agreement settling the claim for a sum which was so grossly inadequate that it was rejected by the Commissioner. In these facts and circumstances, we have no doubt that the Commissioner was fully justified in making an order for the payment of interest and the penalty." (Emphasis added)

A reading of the aforesaid paragraphs clearly show that the Supreme Court has held that the compensation payable to a workman, in fact, falls due on the date of accident and therefore compensation becomes due after one month of the date of the accident. Therefore, when compensation is not paid after one month of the date of accident, then, the consequences of penalty and interest flow. I have already noted that this is a judgment of four Judges of the Supreme Court, and therefore, unless and until the ratio of this judgment is overruled by a Constitution Bench decision of the Supreme Court, the ratio of Pratap Narain will prevail and which ratio is that the amount falls due after one month of the accident/incident.

5. The next judgment in the chain of decisions is the judgment of **Maghar Singh Vs. Jashwant Singh,** (1998) 9 SCC 134, a decision of a Division Bench of three Judges of the Supreme Court, and as per which, interest was granted from the date of the accident. Though, of

course, there is no detailed discussion in this judgment as to when the amount falls due, however, interest has been awarded from the date of the accident.

6. The next important decision dealing with the aspect as to when the compensation falls due is the decision of the Division Bench of two Judges of the Supreme Court in the case of **Ved Prakash Garg Vs. Premi Devi and Others** 1997 (8) SCC 1. This judgment in the case of **Ved Prakash** (supra) seemingly strikes a discordant note to the ratio in the case of Pratap Narain. However, a reading of this judgment shows that the earlier binding decision of the Supreme Court in the case of **Pratap Narain** was not referred to by the Court. Not only this, when we refer to para 14 of the judgment of **Ved Prakash,** the Supreme Court while holding that the amount falls due from adjudication, yet, holds that interest can be granted from the date of the accident. Para 14 of the said judgment reads as under:-

"14. On a conjoint operation of the relevant schemes of the aforesaid twin Acts, in our view, there is no escape from the conclusion that the insurance companies will be liable to make good not only the principal amounts of compensation payable by insured employers but also interest thereon, if ordered by the Commissioner to be paid by the insured employers. Reason for this conclusion is obvious. As we have noted earlier the liability to pay compensation under the Workmen's Compensation Act gets foisted on the employer provided it is shown that the workman concerned suffered from personal injury, fatal or otherwise, by any motor accident arising out of and in the course of his employment. Such an accident is also covered by the statutory coverage contemplated by Section 147 of the Motor Vehicles Act read with the identical provisions under the very contracts of insurance reflected by the Policy which would make the insurance company liable to cover all such claims for compensation for which statutory liability is imposed on the employer under Section 3 read with Section 4-A of the Compensation Act. All these provisions represent a well-knit scheme for computing the statutory liability of the employers in cases of such accidents to their workmen. As we have seen earlier while discussing the scheme of Section 4-A of the

Compensation Act the legislative intent is clearly discernible that once compensation falls due and within one month it is not paid by the employer then as per Section 4-A(3)(a) interest at the permissible rate gets added to the said principal amount of compensation as the claimants would stand deprived of their legally due compensation for a period beyond one month which is statutorily granted to the employer concerned to make good his liability for the benefit of the claimants whose bread-winner might have either been seriously injured or might have lost his life. Thus so far as interest is concerned it is almost automatic once default, on the part of the employer in paying the compensation due, takes place beyond the permissible limit of one month. No element of penalty is involved therein. It is a statutory elongation of the liability of the employer to make good the principal amount of compensation within permissible time limit during which interest may not run but otherwise liability of paying interest on delayed compensation will ipso facto follow. Even though the Commissioner under these circumstances can impose a further liability on the employer under circumstances and within limits contemplated by Section 4A(3)(a) still the liability to pay interest on the principal amount under the said provision remains a part and parcel of the statutory liability which is legally liable to be discharged by the insured employer. Consequently such imposition of interest on the principal amount would certainly partake the character of the legal liability of the insured employer to pay the compensation amount with due interest as imposed upon him under the Compensation Act. Thus the principal amount as well as the interest made payable thereon would remain part and parcel of the legal liability of the insured to be discharged under the Compensation Act and not dehors it. It, therefore, cannot be said by the insurance company that when it is statutorily and even contractually liable to reimburse the employer qua his statutory liability to pay compensation to the claimants in case of such motor accidents to his workmen, the interest on the principal amount which almost automatically gets foisted upon him once the compensation amount is not paid within one month from the date it fell due, would not be a part of the insured liability of the employer. No question of justification by the insured employer

for the delay in such circumstances would arise for consideration. It is of course true that one month's period as contemplated under Section 4A(3) may start running for the purpose of attracting interest under Sub-clause (a) thereof in case where provisional payment has to be made by the insured employer as per Section 4A(2) of the Compensation Act from the date such provisional payment becomes due. But when the employer does not accept his liability as a whole under circumstances enumerated by us earlier then Section 4A(2) would not get attracted and one month's period would start running from the date on which due compensation payable by the employer is adjudicated upon by the Commissioner and in either case the Commissioner would be justified in directing payment of interest in such contingencies not only from the date of the award **but also from the date of the accident concerned.** Such an order passed by the Commissioner would remain perfectly justified on the scheme of Section 4A(3)(a) of the Compensation Act. But similar consequence will not follow in case where additional amount is added to the principal amount of compensation by way of penalty to be levied on the employer under circumstances contemplated by Section 4A(3)(b) of the Compensation Act after issuing show cause notice to the employer concerned who will have reasonable opportunity to show cause why on account of some justification on his part for the delay in payment of the compensation amount he is not liable for this penalty. However if ultimately the Commissioner after giving reasonable opportunity to the employer to show cause takes the view that there is no justification for such delay on the part of the insured employer and because of his unjustified delay and due to his own personal fault he is held responsible for the delay, then penalty would get imposed on him. That would add a further sum up to 50% on the principal amount by way of penalty to be made good by the defaulting employer. So far as this penalty amount is concerned it cannot be said that it automatically flows from the main liability incurred by the insured employer under the Workmen's Compensation Act. To that extent such penalty amount as imposed upon the insured employer would get out of the sweep of the term ' liability incurred' by the insured employer as contemplated by the

proviso to Section 147(1)(b) of the Motor Vehicles Act as well as by the terms of the Insurance Policy found in provisos (b) and (c) to Sub-section (1) of Section II thereof. On the aforesaid interpretation of these two statutory schemes, therefore, the conclusion becomes inevitable that when an employee suffers from a motor accident injury while on duty on the motor vehicle belonging to the insured employer, the claim for compensation payable under the Compensation Act along with interest thereon, if any, as imposed by the Commissioner Sections 3 and 4A(3)(a) of the Compensation Act will have to be made good by the insurance company jointly with the insured employer. But so far as the amount of penalty imposed on the insured employer under contingencies contemplated by Section 4A(3)(b) is concerned as that is on account of personal fault of the insured not backed up by any justifiable cause, the insurance company cannot be made liable to reimburse that part of the penalty amount imposed on the employer. The latter because of his own fault and negligence will have to bear the entire burden of the said penalty amount with proportionate interest thereon if imposed by the Workmen's Commissioner . Consideration of the judgments of the High Courts"(Emphasis added)

The aforesaid decision in the case of **Ved Prakash** also therefore holds that although compensation falls due on adjudication by the Commissioner acting under the Workmen's Compensation Act, 1923, yet interest can be granted from the date of the accident.

7. The Supreme Court in a Division Bench judgment of two Judges in the case of **National Insurance Co. Ltd. Vs. Musabir Ahmed & Anr.** 2007 (2) SCC 349 came to a conclusion that interest becomes payable not from the date of the accident but only after one month of adjudication by the Commissioner, Workmen's Compensation. I may note that this Division Bench decision of two Judges does not refer to the earlier binding decision of four Judges in the case of **Pratap Narain**.

8. The decision in the case of **Musabir Ahmed** was deviated from the decision reported as **Oriental Insurance Company Ltd. Vs. Mohd. Nasir and Another;** 2009 (6) SCC 280, in which the Supreme Court while accepting the ratio in the case of **Musabir Ahmed** held that interest

can be awarded from the date of filing of the petition till the adjudication by the Commissioner, Workmen's Compensation. It is noted that the decision in the case of **Mohd. Nasir** though does not refer to the decision in the case of **Pratap Narain**, but the same has independently laid down more or less a similar ratio, that interest is payable before adjudication by the Commissioner, Workmen's Compensation. The decision in the case of **Mohd. Nasir** however gives two important conclusions. Firstly, interest is not granted from the date of the accident, but, from the date of filing of the petition before the Commissioner, and secondly for such period interest has to be below 12% per annum as specified in Section 4-A of the Act.

9. The next decision which needs to be referred to is the decision in the case of **Palraj Vs. Divisional Controller North East Karnataka Road Transport Corporation** (2010) 10 SCC 347. In this latest judgment, a Division Bench of two Judges, has laid down the same ratio as in the case of **Musabir Ahmed** by holding that compensation amount becomes due only when the same is adjudicated by the Commissioner, Workmen's Compensation. Paras 6 & 19 of the said judgment reads as under:-

"6. It was also held that the Commissioner had committed an error in awarding interest from the date of filing of the claim petition and the appellant was entitled to interest on the compensation amount only after 30 days from the date of passing of the award. The appeal was, accordingly, allowed in part, and the award passed by the Commissioner, Workmen's Compensation, was modified and reduced from Rs.1,75,970/- to Rs.41,405/- together with interest @ 12% per annum on the said amount from 30 days after the date of the passing of the award. The amount which was in deposit before the Court was directed to be transferred to the Commissioner, Workmen's Compensation, Gulbarga, for disbursement. It is the said order of the learned Single Judge, which has been challenged in this appeal.

19. It will be evident that compensation assessed under Section 4 is to be paid as soon as it falls due and in case of default in payment of the compensation due under the Act within one month from the date when it falls due, the Commissioner would be entitled to direct payment of simple interest on the amount of the arrears @12% per annum or at such higher rates which do

not exceed the maximum lending rates of any scheduled Bank as may be specified by the Central Government. Both the Commissioner, Workmen's Compensation, as also the High Court, therefore, rightly held that interest under the 1923 Act cannot be claimed from the date of the filing of the application, but only after a default is committed in respect of the payment of compensation within 30 days from the date on which the payment becomes due."(Emphasis added)

10. The last judgment in the line of judgments is the judgment reported as **UPSRTC Now Uttarakhand Transport Corporation Vs. Satnam Singh** 2011 (2) Scale 432. A Division Bench of two Judges relying upon the case of **Musabir Ahmed** has held that interest can only be granted one month after the date of adjudication by the Commissioner, Workmen's Compensation.

11. It has been held by a Constitutional Bench judgment of the Supreme Court reported as **Union of India Vs. Raghubir Singh;** AIR 1989 SC 1933, that though the Supreme Court sits in Division Benches of less than five Judges, and though all such Benches are referred to as Division Benches, yet, a decision of a larger number of Judges of a Division Bench will prevail over a Division Bench of a smaller number of Judges. The ratio of the case of **Raghubir Singh** has thereafter been consistently applied by the Supreme Court in a catena of judgments.

12. In view of the decision in the case of **Raghubir Singh** in my opinion the decision in the case of **Pratap Narain** being a decision of four Judges will have to be prevail over the decisions of **Ved Parkash, Musabir Ahmad, Palraj and UPSRTC** (all supra). The judgment of **Pratap Narain** in categorical language lays down the ratio that compensation in fact falls due on the date of the accident and penalty, and interest also therefore, would also be payable after one month, if the compensation is not paid within one month of the date of incident/ accident. The Division Bench of two Judges in the case of **Oriental Insurance Co. Ltd. Vs. Mohd. Nasir & Anr.** 2009 (6) SCC 280 without referring to the case of **Pratap Narain** has independently come to a similar ratio in holding that interest will be payable definitely at least from the date of filing of the petition before the Commissioner, Workmen's Compensation.

13. Following the decision of the Supreme Court in the case of **Pratap Narain**, I hold that the workman will be entitled to interest after a period of one month of the date of the accident/incident.

14. The next issue which was canvassed by the learned counsel for the appellant was that the terms of the insurance policy, which has been issued by the appellant in the present case, would not make the appellant liable for interest on the compensation awarded because there is no clause in the policy that interest will be payable. It is therefore argued that consequently the insurance company/appellant does not have any liability towards interest, and its liability is confined to the principal amount of compensation adjudged by the Commissioner, Workmen's Compensation.

15. In my opinion, this argument is in fact an argument of desperation. The argument needs to be rejected for two reasons. The **first** reason is that it has now been held by a catena of decisions of the Supreme Court that where a workman is affected by a motor accident, then, an insurance company will be liable to pay the complete amount adjudicated upon in view of the provision of Section 147 of the Motor Vehicles Act, 1988. The first case in the line of these cases is the decision in case of **Ved Prakash** where both the provisions of Motor Vehicles Act, 1988 and Workmen's Compensation Act, 1923 were referred to and it was held that when an accident causes the death of a workman in a motor vehicle accident, then, the liability of the insurance company is categorical, absolute and complete to the extent as provided in Section 147, and which is a mandatory provision requiring the insurance company to comprehensively insure the vehicle with respect to the total compensation which is claimed and adjudicated on account of death of a workman who is covered by an insurance policy. Similar is the ratio of the decisions in the cases of **Kashibhai Rambhai Patel Vs. Shanabhai Somabhai Parmar and Others;** 2000 SCC (L&S) 1105, **L.R. Ferro Alloys Ltd. Vs. Mahavir Mahto and Another;** 2002 (9) SCC 450 and **Kamla Chaturvedi Vs. National Insurance Co.** 2009 (1) SCC 487. Paras 6 to 8 of the judgment in the case of **Kamla Chaturvedi** (supra) reads as under:-

"6. In **New India Assurance Co.'s** case (supra) this Court found as a matter of fact that a contract itself provided that the interest and/or penalty imposed on the insurer on account of his/

her failure to make payment of amount payable under the Act is not to be paid by the insurer. This position is clear from the paragraphs 3&4 of the judgment which read as follows:

> 3. The two claim petitions came to be filed by the heirs and legal representatives of the deceased driver and the cleaner under the Compensation Act before the Commissioner for Workmen's Compensation, Rajgarh District, Sirmur, Himachal Pradesh. The said applications were moved presumably by exercising option available under Section 167 of the Motor Vehicles Act which lays down that:
>
> 167. Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both.
>
> Thus these two applications were in substitution and in place of otherwise legally permissible claims before the Motor Accidents Claims Tribunal functioning under the Motor Vehicles Act. In the said claim applications, the claimants joined the appellant-employer as well as Respondent 9-insurance company as respondents. The Workmen's Commissioner after hearing the parties concerned computed the compensation available to the claimant-dependants of the deceased employees. So far as the claim put forward by the heirs of the deceased driver was concerned the Commissioner awarded a sum of Rs. 88,968 as compensation. But as the compensation due was not paid either by the appellant-employer or by the insurance company as and when it fell due the Commissioner awarded a penalty of Rs. 41,984 with interest at the rate of 6% per annum from the date of the accident till the date of payment under Section 4A(3)(a) and (b) of the Compensation Act. The entire amount of

> Rs. 88,968 with penalty of Rs. 41,984 and interest thereon was held payable by the insurance company to the claimants jointly and severally with the appellant- employer. The said amount was made payable by Respondent 9-insurance company on the basis that the insurance company had insured the appellant against his liability to meet the claims for compensation for the death of employees dying in harness giving rise to proceedings against the insured employer under the Compensation Act. Similarly the Commissioner awarded a sum of Rs. 88,548 to the claimants being legal representatives of the deceased cleaner. In addition to the said amount, penalty of Rs. 44,274 with interest from the date of the accident till the date of payment was also made payable by Respondent 9-insurance company.
>
> 4. The claimants were satisfied with the said awards. Similarly the appellant-owner was also satisfied with the said awards. However, the insurance company carried the matter in appeals before the High Court and contended that the insurance company would be liable under the contract of insurance only to make good the claims for compensation so far as the principal amounts were concerned. But it could not have been made liable to pay the amounts of penalties with interest thereon as ordered by the Workmen's Commissioner as these amounts of penal nature were awarded against the insured owner on account of his personal default as per Section 4A(3) of the Compensation Act and for such default on the part of the insured the insurance company was not liable to reimburse the insured. As noted earlier, the said contention of Respondent 9-insurance company appealed to the High Court. The appeals were allowed and the awards of the Commissioner under the Compensation Act insofar as they fastened the liability to pay the penalty and interest on the insurance company were set aside. The amounts deposited in excess by the insurance company were ordered to be refunded to it while the remaining amounts were ordered to be paid to the claimants. It was, however, clarified that

the claimants shall be at liberty to recover the amount of penalty and interest in accordance with law from the employer, appellant herein.

7. In **Ved Prakash Garg v. Premi Devi and Ors.** MANU/SC/0956/1997 : AIR1997SC3854 this Court observed that the Insurance Company is liable to pay not only the principal amount of compensation payable by the insurer employer but also interest thereon if ordered by the Commissioner to be paid by the insured, employee. Insurance company is liable to meet claim for compensation along with interest as imposed on insurer employer by the Act on conjoint operation of Section 3 and 4(A)(3)(a) of the Act. It was, however, held that it was the liability of the insured employer alone in respect of additional amount of compensation by way of penalty under Section 4(A)(3)(b) of the Act.

8. In **New India Assurance Co.'s** case (supra) and **Ved Prakash Garg's** case (supra) was distinguished on facts. It was observed that in the said case the court was not concerned with a case where an accident had occurred by use of motor vehicle in respect whereof the Contract of Insurance will be governed by the provisions of the Motor Vehicles Act, 1988 (in short the `M.V. Act').

"19…….a contract of Insurance is governed by the provisions of the Insurance Act, 1938 (in short the `Insurance Act'), unless the said contract is governed by the provisions of a statute. The parties are free to enter into a contract as per their own volition. The Act does not contain a provision like Section 148 of the MV Act where a statute does not provide for a compulsory insurance or accident thereof. The parties are free to choose their terms of contract. In that view of the matter contracting out so far as the reimbursement of amount of interest is concerned is not prohibited by a statute."

This position has been reiterated in **P.J. Narayan v. Union of India and Ors.** MANU/SC/1120/2003. **In the instant case the position is different. The accident in question arose on account of vehicular accident and provisions of MV Act are clearly applicable.** We have gone through the policy of insurance and we find that no such exception as was the case in New India Assurance Co.'s case was stipulated in the policy of insurance. Therefore, the Insurance Company is liable to pay the interest."(emphasis in this para is mine)

Thus once the workman is a person who dies or is caused an injury because of an accident to a motor vehicle, then, the insurance company cannot avoid its liability to pay interest.

16. I may also, at this stage, profitably refer to Section 149 (1) of the Motor Vehicles Act, 1988 and as per which an insurance company becomes comprehensively liable to pay any amount which is adjudicated by a decree or order of any Court or authority. Section 149(1) of the Motor Vehicles Act, 1988 reads as under:-

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.-(1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (I) of section 147 (being a liability covered by the terms of the policy) (or under the provisions of section 163A) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments." (Emphasis is mine)

In my opinion, the provision of Section 149(1) is one additional reason to hold that the insurance company will be liable also to pay interest on the compensation which is adjudicated to be payable to a workman under

the Employee's Compensation Act, 1923.

17. The conclusion which therefore emerges is that when a workman is covered under an insurance policy to which the Motor Vehicles Act, 1988 applies, then, an insurer cannot contract out of any liability which would be payable on account of death of the workman caused in a motor vehicle accident as there cannot be any contracting out of a statutory provision as the contracting out would be against public interest and which is protected/provided for by the statute. The insurance policy in question thus cannot contract out of the complete liability adjudicated including interest inasmuch as the statutory provisions as found in Section 147 and 149 (1) of the Motor Vehicles Act, 1988 serve a social purpose.

18. The **second** reason for rejecting the argument of the learned counsel for the appellant is that the argument put forth seeks to turn the issue of entitlement of contracting out inversely on its head. This is because the issue is that there can be a clause in the policy exempting liability for payment of interest, however, it cannot be argued exactly to the opposite that there is no liability towards interest unless there is a clause in the policy entitling the payment of interest. I am of course adverting to this argument, although in the present case the accident is an accident involving a motor vehicle and as per the decisions ending with **Kamla Chaturvedi** it has already been held that in cases covered by the Motor Vehicles Act, there cannot be contracting out of the statutory provisions. The Supreme Court in the decision of **New India Assurance Co. Ltd. Vs. Harshadbhai Amrutbhai Modhiya;** 2006 (5) SCC 192, has held that the liability for interest payable under the Workmen's Compensation Act, 1923 can be contracted out by the insurance company only in non motor vehicle accident cases, inasmuch the liability towards interest is not a mandatory statutory liability which is required to be covered under an insurance policy, as is required to be done with respect to a motor accident under the provision of Section 147 of the Motor Vehicles Act, 1988. The decision in the case of **Harshadbhai** cannot be read in an inverse manner as is sought to be done by the counsel for the appellant by contending that ordinarily an insurance company is not liable unless there is a specific clause making insurance company liable for interest. In my opinion, once an insurance company takes liability with respect to death of a workman, then, in such cases ouster of liability has to be properly established by the insurance company if it claims to be not

liable by showing a clause in the policy that there is such a clause whereby the insurance company has exempted itself for the liability towards interest and not the other way round. I therefore hold that the insurance company cannot take up a stand that it is not liable to make the payment of interest on the compensation as calculated because policy is silent in this regard, considering the insurance company takes complete liability for all compensation which is payable to the dependants of the deceased workman who dies as a result of accident in a motor vehicle. I am informed that normally an insurance policy always states that all legal liabilities of the insured will be indemnified by the insurance company and this insertion is made on the direction of the Insurance Regulatory Development Authority.

19. The final argument which was sought to be urged by the learned counsel for the appellant was that the workman, in this case, has disobeyed the direction of the employer and consequently the insurance company would not be liable. Once again, this argument is without any substance because the trial Court has arrived at a finding of fact, and which surely is not a question of law for the purpose of Section 30 of the Employee's Compensation Act, 1923, that, the driver was in fact driving the vehicle as per specific directions of the employer for hill driving and it is not that the driver of the vehicle was disobeying the directions of the employer at the time when deceased/helper died as a result of the accident of vehicle.

20. In view of the above, I do not find any reason to interfere with the impugned judgment which holds that the insurance company will be liable to pay interest @ 12% per annum on the compensation as has been found to be due for the period after one month of the date of the accident. The appeal is accordingly dismissed, leaving the parties to bear their own costs.

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CRL. A.

RAJESH @ RAKESH ....APPELLANT

VERSUS

THE STATE ....RESPONDENT

(BADAR DURREZ AHMED & MANMOHAN SINGH, JJ.)

CRL. A. NO. : 327/1997 DATE OF DECISION: 25.04.2011

Indian Penal Code, 1860—Sections 302/323/34—Arms Act, 1959—Section 27—Case of prosecution that when PW2 and deceased were together, appellant along with one Om Pal, Bijender and Kirpal went and demanded Rs.25/- for liquor from PW2 and the deceased—On being refused, they left saying that they would see them—Later in the day, deceased and PW2 went to Om Pal's house to complain about this to his father but Om Pal's father told them he had turned him out of the house—When PW2 and deceased returned home, Kirpal met them and called appellant, Bijender and Om Pal saying that they wanted to talk to PW2 and the deceased—When Kirpal returned there with the said three persons, all of them were armed with lathies—Om Pal exhorted his companions to teach the deceased and PW2 a lesson for complaining against them—Appellant and Bijender started beating PW2 and deceased with danda—Om Pal caught hold of deceased and appellant stabbed him in abdomen and back, killing him on the spot—PW2 ran away from spot as Kirpal and Bijender were shouting that they would not let anyone rescue the deceased, thereafter appellant and all the accused fled away—Weapon of offence, knife, blood stained shirt of the accused and danda were recovered—Bijender and Kirpal were sent for trial before the Juveline Court—Trial Court

convicted appellant and co-accused Om Pal u/s 302—Appellant was also convicted u/s 323/34 IPC and u/s 27 Arms Act—During pendancy of appeal filed separately, co-accused Om Pal expired—Held, discrepancies in statement of eye-witness about the knowledge of the death of the deceased were not fatal since 13 years had elapsed since incident when his cross-examination was recorded—Discrepancies do creep in when a witness deposes in a natural manner after a lapse of some time and when discrepancies are comparatively of a minor nature and do not go to the root of the prosecution story then the same may not be given undue importance—Eye-witness PW2 supported case of the prosecution and testified that appellant had given two knife blows to deceased—Autopsy surgeon PW8 opined that two injuries had been caused by the sharp edged weapon, one of which was sufficient in the ordinary course of nature to cause death—Contradictions in evidence of recovery witnesses very insignificant, considering that same were recorded after more than 13 years—Non-recovery of any incriminating material from an accused cannot be taken as ground to exonerate the accused when his participation in the crime is unfolded in ocular account of the occurrence given by the witnesses whose evidence is found un-impeachable—Merely because arrest of accused persons took place after a couple of days would not benefit the defence—Question with regard to nature of offence has to be determined on the facts and circumstances of each case—The nature of injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury in caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him—Prosecution has not placed any material with regard to any previous enmity or motive in causing

death of deceased—Origin of blood found on knife, shirt and danda could not be ascertained—If appellant had intention at initial stage to commit murder of deceased why would he have first inflicted danda blows to the eye-witness, rather he would have given knife blows to the deceased straightaway—Stabbing had taken place out of heat and passion or grappling with each other—From evidence on record cannot be said that appellant had intention to cause death or such bodily injuries to deceased which were sufficient in the ordinary course of nature to cause death of the deceased—Since, there was no pre-meditationor planning, there was no previous enmity between the deceased and appellant, appellant had no motive to commit murder of deceased, injuries were caused to deceased during course of grappling and in a heat of passion on small issue involving Rs.25/-; thus, case covered under Exception IV to Section 300—Conviction of appellant altered from Section 302 to 304 Part II—Conviction u/s 27 Arms Act upheld—Sentenced altered to period already undergone—Appeal partly allowed.

It is well settled, that the question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him. **(Para 29)**

Important Issue Involved: (A) The nature of injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him.

(B) When discrepancies in the testimony of witnesses are comparatively of a minor nature and do not go to the root of the prosecution story then the same may not be given undue importance.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Ms. Ritu Gaba, Advocate.

FOR THE RESPONDENT : Ms. Richa Kapoor, Addl. Standing Counsel for the State.

CASES REFERRED TO:

1. *Posuram Deshmukh* vs. *State of Chhatisgarh :* AIR 2009 SC 2482.
2. *Shaikh Azim* vs. *State of Maharashtra :* 2008 (11) SCC 695.
3. *Prakash Chand* vs. *State of H.P. :* 2004 (11) SCC 381.
4. *Sekar* vs. *State:* 2002 (8) SCC 354.
5. *Krishna Tiwary and Anr.* vs. *State of Bihar :* AIR 2001 SC 2410.
6. *Surinder Kumar* vs. *Union Territory, Chandigarh:* AIR 1989 SC 1094.
7. *Virsa Singh* vs. *The State of Punjab:* AIR 1958 SC 465.

RESULT: Appeal partly allowed.

MANMOHAN SINGH, J.

1. This appeal is directed against the judgment and order on sentence dated 05.07.1997 and 07.07.1997, respectively, passed by the Court of Additional Sessions Judge, Shahdara, Delhi, in case No. 21/96, FIR No. 39/84 P.S. Seelampur, Delhi whereby the appellant was convicted under Section 302 read with Section 34 of Indian Penal Code and was sentenced to rigorous imprisonment for life and to pay a fine of Rs. 5,000/-, and in default thereof, to undergo rigorous imprisonment for six months. The appellant was also convicted under Section 323 read with Section 34 IPC

and ordered to pay a fine of Rs. 500/- and in default of payment of fine to undergo rigorous imprisonment for one month and was also convicted under Section 27 of the Arms Act, 1959 and was sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 500/- and in default thereof to undergo rigorous imprisonment for one month.

2. If we synchronize the prosecution evidence and the story, the following chronology of events emerges:-

a. That on 04.02.1984 at about 11:30 a.m./ 12:00 p.m. when PW-2 Kewal Krishan and the deceased Naresh Kumar were at the 'Akhara' across the Railway Line, Kailash Nagar, the appellant along with Om Pal @ Baboo, Bijender and Kirpal went there and demanded Rs. 25/- from PW-2 Kewal Krishan and the deceased for liquor. On being refused they left the Akhara saying they would see them. The deceased and PW-2 Kewal Krishan also left for their houses.

b. Later in the day, at about 3-3:30 p.m., the deceased and PW-2 Kewal Krishan went to Om Pal's house to complain about him to his father, but Om Pal's father told them that he had already turned him out of the house.

c. When PW-2 Kewal Krishan and the deceased were returning home via Railway Line near Shastri Park, Kirpal met them and he called the appellant, Bijender and Om Pal saying that they wanted to talk to PW-2 and the deceased. When Kirpal returned there with the said three persons, all of them were armed with lathis (dandas).

d. Om Pal exhorted his companions to teach the deceased and PW-2 Kewal Krishan, a lesson for complaining against them.

e. The appellant and Bijender started beating PW-2 Kewal Krishan and the deceased with dandas and thereafter, Om Pal caught the deceased and the appellant stabbed the deceased in his abdomen and his back and he died on the spot.

f. PW-2 Kewal Krishan ran from the spot as Kirpal and Bijender were shouting that they would not let anyone

rescue the deceased. Thereafter, appellant and all the other accused persons fled away.

g. PW-2 Kewal Krishan who had suffered injuries walked back to the spot where a patrolling police party had already reached.

h. The date and hour of the discovery of the death was recorded as 04.02.1984 at 4.25 p.m. The dead body of Naresh Kumar S/o Sh. Dhani Ram was identified by Jagdish Prasad Gupta as that of the younger brother of his son-in-law on the same date.

i. In the ruqqa Ex. PW1/A, the statement of eye witness PW-2 Kewal Krishan was recorded by PW-13, S.I. S.K. Rathi of Police Station Seelampur, Delhi, who sent the ruqqa to PW-1 ASI Suraj Bhan. Thereafter, an FIR No.39/ 1984 was registered against the appellant and against three accused persons.

3. After the investigation challan was filed under Section 302 readwith Section 34 of the IPC against Om Pal @ Baboo, appellant Rakesh @ Rajesh and Bijender. Another charge under Section 27 of the Arms Act, 1959, was filed against the appellant Rakesh. A separate challan was filed against Kirpal in the children's Court, as he was under age at that time. The accused persons pleaded not guilty and claimed trial.

4. Subsequently the Learned ASJ by his order dated 11.09.1985 sent Bijender also to the children's jail. Thus the trial continued only against the appellant and Om Pal.

5. The appellant in his statement recorded under Section 313 Cr.P.C. stated that he was falsely implicated by the police and neither he committed any murder nor gave beatings to any person. However, he did not adduce any evidence in his defence. After examination of the prosecution witnesses the trial court held the prosecution case fully established from the evidence of injured eye witness PW-2 and accordingly, convicted the appellant and the other accused Om Pal under Section 302 IPC read with Section 34 IPC. The appellants were also convicted under Section 323 read with Section 34 IPC and the appellant Rakesh was also convicted under Section 27 of the Arms Act, 1959.

6. The appellant, being aggrieved by the said judgment dated 05.07.1997 and order on sentence dated 07.07.1997, filed the present appeal. Similarly, Om Pal, the co-convict also challenged the same by preferring the separate appeal being Crl. A. No. 289/1997. However, during the pendency of his appeal he passed away and his appeal was disposed of in view thereof.

7. The learned counsel for the appellant did not dispute before us the fact that the deceased Naresh Kumar had met with a homicidal death. This fact is even otherwise duly established from the postmortem report of the deceased which was conducted on 05.02.1984 by PW-8 Dr. L.T. Ramani, Civil Hospital, Delhi, which establishes the nature and time of death. In his report, it is stated that all injuries were ante-mortem and injury nos. 1 and 11 were caused by sharp edged weapon and all other injuries were caused by blunt weapon. Injury no.11 was sufficient in the ordinary course to cause death. The report Ex. PW-8/A was prepared in his own handwriting and it bears his signature. The death was due to haemorrhagic shock. These observations leave no doubt that nature of death was homicidal.

8. PW-10 SI Subash Chand, who was posted at Police Station Seelampur as constable on that date, identified the appellant Rajesh @ Rakesh in the court. He deposed that during interrogation, accused Rajesh @ Rakesh made a disclosure statement, which was recorded by SI and the same is Ex.PW2/B which also bears his signatures. The appellant and other accused led the Police Party to the Railway Lines, on the front side of Gurudwara, New Seelampur, where the appellant pointed out the place as being the scene of occurrence. The pointing out memo is Ex.PW-10/A. Thereafter, the appellant led the Police party to his house No.4233, Ajit Nagar, and got recovered one shirt, which was hanging on a 'Khunti' in the front room of his house. He also got recovered a 'knife' and a 'danda' from the same room. The shirt Ex.P2 had blood stains on it. The 'knife' Ex. P1 and one 'danda'/stick Ex.P3 also had blood stains on them.

9. PW-3 Dr. V.K. Goel, Senior Scientific Officer, CFSL, New Delhi, carried out blood examination and prepared his reports and has proved the same as Ex.PW-3/A and PW-3/B. PW-4 Sh. C.K. Jain, Sr. Scientific Officer, Physics CFSL, was also examined and he deposed that on 22.02.1984, he received two sealed parcels through biology

division, sealed with the seal of biology division, which were deposited with him in the Malkhana wherefrom these were sent to CFSL. As per the report, blood was detected on Ex. P-1 Knife, Ex.P-2 Shirt and Ex. P-3 danda/stick recovered from the appellant.

10. PW-13 Inspector S.K. Rathi, Investigating Officer of the case, had deposed that on 04.02.1984 he was posted at Police Station Seelampur as S.I. and at about 4 to 4:30 p.m., he and constable Roshan Lal went to Railway Lines, New Seelampur, on patrolling duty. They saw some persons standing on the Railway Lines and when they went there, they found that one dead body of a person, whose name was later on revealed as Naresh Kumar, was lying near Railway Lines. He further deposed that PW-2 Kewal Krishan was also present in that crowd. On inquiry, he gave him the detail of incident and he recorded his statement and after making his endorsement, he sent the same to the Police Station through Constable Roshan Lal and then initiated proceedings of inquest and prepared the inquest report Ex.PW-13/A which was in his handwriting and bears his signature. He also recorded the statements of Jagdish Prasad and Kailash Chander as Ex.PW13/B and Ex.PW-13/C, respectively. He further deposed that PW-2 Kewal Krishan was in an injured condition and was sent for medical examination. The body of Naresh Kumar was sent to Subzi Mandi mortuary through Constable Roshan Lal and Kashmira Singh. PW-14 Satbir Singh, Record Clerk, Civil Hospital, Delhi, was also examined by the prosecution who proved the MLC Ex.PW-14/A relating to the medical examination of injured eye-witness PW-2 Kewal Krishan.

11. We have heard the learned counsel for the appellant and the learned additional public prosecutor for the State and have also gone through the evidence of material witnesses examined by the prosecution.

12. The learned counsel for the appellant, during the course of hearing of the appeal, has pointed out few contradictions in the testimony of eye witness PW-2 and in the statements of the recovery witnesses. It is further submitted on behalf of the learned counsel for the appellant that the testimony of PW-2 be rejected as his statement has not been supported by the other eye-witness PW-12 Bal Krishan who did not support the prosecution case. Therefore, the present appeal is liable to be allowed.

13. The first contradiction referred by the learned counsel for the appellant is that the testimony of PW-2 Kewal Krishan is not trustworthy and cannot be relied upon as, in his examination-in-chief, he deposed that he ran away from the spot but came back when the accused persons had fled away from there and thereafter Police Party came there and he informed accordingly about the incident and made a statement to the Police who prepared the ruqqa and sent the same to the Police Station at 6 p.m. on 04.02.1984 but in his cross-examination he deposed that after the incident he had left the spot and had come to his house wherefrom he went to a private doctor and then again came back to house when he was informed by his family members about the death of deceased Naresh Kumar. Thereafter he went to the Police Station and made a statement to the Police about 7-8 p.m. and by that time the ruqqa had already been received in the Police Station. Therefore, it was not proved beyond doubt as to whether he was personally present when the ruqqa was prepared at the spot or not. Thus, his testimony cannot be believed.

14. The ruqqa in the present case was prepared and the same was sent to the Police Station prior to 6 p.m. on the same day when the incident took place. Thus, it confirms that PW-2 Kewal Krishan was definitely present at the spot at the time when Police Party arrived there. His statement was recorded at the spot which also corroborates the version of the incident with the statement of Bal Kishan Ex. PW-12/A. We find no force in the submission of the learned counsel for the appellant and are in agreement with the finding of the trial court on this aspect that the said discrepancy has occurred due to the reason that cross-examination of PW-2 was conducted after a gap of thirteen years from the date of incident, therefore, he was unable to retain in his mind the details of sequence after such a long period. The ruqqa was prepared after recording his statement which also bears his signature.

15. No doubt, PW-2 gave a slightly deviated version about the knowledge of the death of the deceased since a time period of about thirteen years had elapsed when his cross-examination was recorded and it is very difficult to keep in mind all minor details of the incident. However, he did not forget the main incident even after the expiry of thirteen years as in the statement made in the ruqqa on 04.02.1984 as well as before the Court he stated that the appellant took out a knife from the right pocket of his pant and inflicted a knife blow to the deceased

Naresh Kumar.

16. It is settled law that discrepancies do creep in when a witness deposes in a natural manner after a lapse of some time and when the discrepancies are comparatively of a minor nature and do not go to the root of the prosecution story then the same may not be given undue importance. In the present case, PW-2, who is the eye-witness, despite of a long gap did not forget the scene of crime that the appellant took out a knife from the right pocket of his pant and inflicted a knife blow in the abdomen towards right side of the deceased Naresh Kumar and inflicted another knife blow in the waist of the deceased, as a result of which the deceased fell down. The contradictions pointed out by the learned counsel for the appellant are insignificant and no benefit can be given to the defence if the main incident was remembered by the eye-witness which would go the root of the case.

17. As already stated by us, and after considering the facts in the matter, we are of the view that these contradictions are not very material as PW-2, the eye-witness, has supported the case of the prosecution and has stated that the appellant has given two knife blows to the deceased Naresh Kumar coupled with the evidence of PW-8 Dr. L.T. Ramani who conducted the post-mortem examination on the body of the deceased Naresh Kumar. PW-8 opined that the injuries nos. 1 and 11 have been caused by sharp edged weapon and injury no.11 was sufficient in the ordinary course of nature to cause the death of a person.

18. We feel, that the contradictions referred to by the counsel for the appellant are not very material, thus no undue importance can be given to the minor contradictions as the main incident was remembered by the eye witness which goes to the root of the prosecution case.

19. The next reason, put forth by the learned counsel for the appellant, for rejecting the prosecution case was that the prosecution had sought to rely upon the recovery of the weapon of offence that is the Knife, Ex. P-1, blood stained shirt Ex.P-2 and danda/stick Ex. P-3 but there are many contradictions and discrepancies in the statement of recovery witnesses. Further no efforts whatsoever were made by the Investigating Officer to make the public witnesses from the neighborhood of the accused persons join the proceedings. According to the learned counsel for the appellant, in fact, nothing was recovered from the

possession of the appellant and all the recoveries were manipulated and proceedings in this regard were fabricated in the Police Station and forged documents were prepared as even in normal course, nobody would keep the blood stained articles and weapon of offence with him for so many days, as the date of incident was 04.02.1984 and the alleged recovery was made on 08.02.1984.

20. The appellant in the present case, was arrested on 08.02.1984 and the recovery was made on the same day. The recovery memos were duly signed by the appellant. There were apparently few contradictions in the evidence of the recovery witnesses. However, the fact of the matter is that the evidence of PW-10 was recorded after the expiry of more than thirteen years. Therefore, we agree with the finding of the trial court that it is very difficult to keep in mind all the minor details after a lapse of such a long period. We are of the view, that in any event, non-recovery of any incriminating material from an accused cannot be taken as a ground to exonerate the accused when his participation in the crime is unfolded in the ocular account of the occurrence given by the witnesses whose evidence is found to be unimpeachable.

21. Considering the overall facts and circumstances of the matter, as also the long gap for recording the evidence of the witnesses, we cannot accept the contentions of the learned counsel for the appellant on these contradictions.

22. The next submission of the learned counsel for the appellant is that the date of incident is 04.02.1984 and the Police did not initiate any action against any of the accused persons before 08.02.1984 and the benefit of this gap be given to the accused persons as it creates suspicion. We feel, that this argument has no force as the accused persons except Om Pal were arrested on 08.02.1984 since the Police carried out search for the accused persons and could not lay its hand on them before 08.02.1984 and, therefore, no arrest of the accused persons were made prior to the said date. Therefore, it does not become a plus point in favour of the defence. Merely because the arrest of accused persons took place after a couple of days, would not give any benefit to the defence. Thus, the said submission of the appellant is also rejected.

23. The last submission of the learned counsel for the appellant is that in any event, the present case does not fall within Section 302 of

the IPC but the same would fall under the Exception IV to Section 300 of the IPC and the appellant be given benefit of Section 304 of the IPC as there was no motive on the part of the appellant to kill the deceased. Even as per the prosecution the appellant and other accused persons had taken lathis and alleged lalkara was given by Om Pal was to teach the deceased and PW-2 a lesson and, in fact, it was a fight which was free for all. Further, there was no plan of anybody to kill anyone and the appellant had no animosity with the deceased. The incident took place because of sudden altercation and the present case is not such in which it can be said that the appellant had inflicted injuries on the deceased with the intention to kill him or he had the intention to cause such bodily injuries to the deceased which would be sufficient to cause death in the ordinary course of nature and, therefore, the case is covered under Exception IV to Section 300 of the Indian Penal Code.

24. To invoke the Exception IV of Section 300 IPC, four requirements must be satisfied by the accused; he must show that (i) there was a sudden fight; (ii) there was no premeditation on the part of the accused; (iii) the act of the accused resulting in the death of the victim was done in the heat of passion; and (iv) the assailant should not have taken any undue advantage of the situation and should not have acted in a cruel manner. Unless all these requirements are fulfilled an accused cannot get the benefit of exception IV to Section 300 IPC.

25. In order to consider the contention of learned counsel for the appellant, it would be fruitful to have a look at the law relating to culpable homicide. The distinction between two types of culpable homicide that is, murder and culpable homicide not amounting to murder has been analysed by the Supreme Court in leading case titled as **State of A.P. v. Rayavarappu Punnayya:** AIR 1977 SC 45. The relevant portion of the judgment is reproduced as under:

> "In the scheme of the Penal Code, 'culpable homicide' is genus and 'murder' its specie' All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder', is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the code practically recognizes three degrees of culpable homicide. The first is, what may be called, culpable homicide of the first degree.

This is the gravest form of culpable homicide which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide' of the second degree'. This is punishable under the 1st part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second Part of Section 304."

26. In **Virsa Singh v. The State of Punjab:** AIR 1958 SC 465, the Supreme Court, after a detailed analyses of the provisions of Section 299 and 300 of the Indian Penal Code, held that:

"The prosecution must prove the following facts before it can bring a case under Section 300, 3rdly.. First, it must establish, quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and, fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

Thus according to the law laid down in **Virsa Singh's** case (supra) even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

27. Let us now examine the present case in the light of abovementioned settled law. The incident in the present case occurred on 04.02.1984 at about 11.30 a.m. / 12 noon when PW-2 Kewal krishan and the deceased were sitting in the Akhara. The relevant extract of the statement of PW-2 Kewal Krishan reads as under:

"At about 3 or 3.30 P.M. I & Naresh went to the house of accused Ompal to make a complaint to his father. His father told

us that they had already turned Om Pal out of the house. When we were returning home via the railway lines, near Shastri Park, Kirpal met us and called accused OmPal, Rakesh & Bajinder Saying us that they would talk to us. All the three accused came with Kirpal. All the four were armed with sticks (dandas). Accused OmPal then exhorted his companions to teach us a lesson for complaining against him. Then accused Rakesh & Bajinder gave me beating with sticks. I received injuries on my left hand and head. Accused Om Pal and Kirpal gave danda blows to Naresh on his legs and hands. Then Om Pal caught hold of Naresh and Rakesh accused stabbed Naresh in his abdomen and on his back. Then I ran away from the spot. Kirpal & Bajinder armed with dandas were shouting that they would not allow any one to rescue Naresh. All the four accused then ran away, slowly I walked to the spot near the railway lines (between two railway tracks). I found Naresh was already dead. Police reached there. I had given my statement EX. PW1/A which is signed by me at point A."

28. PW-12 Bal Krishan, another eye witness, did not support the prosecution case. His evidence was discarded by the Trial Court. In his testimony, he had stated that he did see some persons near railway lines grappling with each other having dandas and lathis with them. Though his evidence confirmed the happening of the incident. He was cross-examined by the APP on the ground of suppressing the truth. In his cross examinatioin, he denied his earlier statement Ex. PW 12/A recorded before the police. He stated that the police had not recorded his statement as per his narration and the same was not read over after recording the same.

29. It is well settled, that the question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him.

30. In the present case, the prosecution has adduced evidence of PW-8, Dr. L.T. Ramani who opined that injuries (external) Nos. 1 and

11 have been sufficient to cause death, the same reads as under:

1. An incised stabbed wound spindal shape placed/wound on the left side front of chest; 10 cm below the nipple. Size of the injury was 1.5 cm x 1 cm. Depth to be ascertained. Margins were regular.

11. Incise stab wound 2.5 cm X 1.5 cm obliquely placed in the right side back of the chest. Margins were regular and both ends were equally tapered.

31. The weapon of offence is pocket button knife, as per the seizure memo Ex. PW-2/D, the length of the blade is 10.5 cms., length of handle is 13.5 cms. and the total length of the knife is 24 cms.

32. The prosecution has relied upon the weapon of offence i.e. knife Ex.P-1, the blood stained shirt of the accsued Ex. P-2, which he was wearing at the time of commission of offence, and the danda Ex. P-3 recovered from the house of the appellant. However, there was no reaction on the grouping of the blood which had been detected on Ex.P-1, P-2 and P-3.

33. Om Pal, one of the accused and the appellant left the 'Akhara' by saying that they would see them. The prosecution has not placed any material on record with regard to any previous grudge or any enmity, pre-planning by the appellant pre-meditation or motive in causing death of deceased Naresh. In fact, it has not come on record that the deceased and the appellant were even known to each other before this incident took place. It was unfortunate that a life has been lost. The origin of blood found on the knife, shirt and danda could not be ascertained. Though, it has come in evidence that the appellant was carrying a knife with him and he was responsible for causing bodily injury to the deceased which is sufficient in the ordinary course of nature to cause death but with no intention of causing death.

34. It cannot be laid down that whenever death occurs, Section 302 IPC is attracted. Each case would depend upon its own facts, the weapon used, the size of it, the force with which the blow was given as also the part of the body where it was given. In this case what has been elicited in the testimony of the eye-witness is that the initial dispute had arisen when all the accused went to Akhara and the appellant demanded Rs. 25/-

from PW-2 and the deceased for liquor and they refused.

35. In **Krishna Tiwary and Anr. v. State of Bihar** : AIR 2001 SC 2410 where the accused inflicted knife blows in the heat of passion without any premeditation and without any intention that he would cause that injury, his case was covered within Exception 4 to Section 300 IPC and he was convicted by the Supreme Court under Section 304 IPC.

In **Prakash Chand v. State of H.P.** : 2004 (11) SCC 381, there was a quarrel between the deceased and the accused when the dogs of the accused entered the kitchen of the deceased. Consequent to the verbal altercation that ensued, the accused went to his room, took out his gun and fired a gun shot at the deceased, as a result of which pellets of the gun shot pierced the chest of the deceased, resulting in his death. It was held by the Supreme Court that proper conviction of the accused would be under Section 304 Part I of IPC and not under Section 302 thereof.

In **Posuram Deshmukh v. State of Chhatisgarh** : AIR 2009 SC 2482, the deceased had blocked the water course to the field of the accused and he refused to remove the blockade despite request from the accused and some altercation took place between them. The accused persons, one of whom was carrying a square iron plate fitted at the one end of a stick and the other who was carrying lathi attacked the deceased with the weapons they were carrying, causing his death. It was held by the Supreme Court that appropriate conviction of the appellant/accused would be under Section 304 Part I of IPC.

In **Shaikh Azim v. State of Maharashtra** : 2008 (11) SCC 695, the deceased and his son were present at their house along with other family members. They noticed some filth thrown in the backyard of their house from the side of the house of the accused and expressed their displeasure in this regard. The family members of the accsued also abused them. One of the accused holding a stick, the other holding an iron rod and the third accused holding a stick, came out of their house and gave blows on the head of the deceased. When his son rushed to his rescue, the accused also gave injuries to him with iron rod and sticks. The deceased succumbed to the injuries caused to him. It was held that the appropriate coviction of the appellant/accused would be under Section 304 Part I of IPC.

In **Sekar v. State**: 2002 (8) SCC 354, there was exchange of hot words between the deceased and accused on release of a sheep which was destroying the crops of the deceased. The accused and others got the sheep untied which led to exchange of hot words between the parties. When the deceased fell down after the accsued had given injuries on his head and left shoulder, the accsued again inflicted another blow on his neck. It was held that the case was covered by Exception IV to Section 300 of IPC.

In **Surinder Kumar v. Union Territory, Chandigarh**: AIR 1989 SC 1094, there was a heated argument between the parties followed by uttering of filthy abuses. The appellant/accused got enraged, picked up a knife from the kitchen and gave one blow on the neck of the witness and three knife blows, one on the shoulder, the second on the elbow and the third on the chest of the deceased. The Supreme Court convicted the appellant under Section 304 of IPC.

36. We feel that, in the present case, the weapon of offence does not strictly qualify as a weapon of offence, as actually it was a pocket knife which was presumably in the pocket of the appellant. If the appellant had the intention at the initial stage to commit the murder of the deceased, then, why he would have first inflicted danda blows to the eye-witness rather, he would have given the knife blows to the deceased straight away, thus it appears that the stabbing have taken place out of heat of passion or grappling with each other. The trial court ought not to have wholly discarded the evidence of PW-12 hostile witness. From the evidence on record, it cannot be said that the appellant had the intention to cause the death or such bodily injury to the deceased which was sufficient in the ordinary course of nature to cause death of the deceased.

37. In the facts and circumstances of the case, we are of the view that there was no premeditation or preplanning, there was no previous enmity between the deceased and the appellant, the appellant had no motive to commit murder of the deceased and the injuries were caused to the deceased during the course of grappling and in a heat of passion on a very small issue involving only Twenty Five Rupees, the case is clearly covered under Exception IV to Section 300 of IPC. We accordingly alter the conviction of the appellant from Section 302 to 304 Part II of IPC.

38. In the result, we set aside the conviction of the accused made under Section 302 IPC. We find the accused guilty of the offence punishable under Section 304 IPC as well as under Section 27 of the Arms Act.

39. After verifying from the record, it appears that the appellant has already spent more than eight years and five months in jail excluding the remission earned by him during the period when he was in jail. Further, the appellant was just above 18 years of age on the date of incident which occurred more than 27 years ago. One of the accused, Om Pal passed away during the pendency of his appeal. The other two accused Kirpal and Bijender were tried by the juvenile court in the year 1985. In view of the background of the present case and taking into consideration all the facts and circumstances of the case, we alter the sentence to the period already undergone by the accused / appellant. The punishment of fine also stands set aside. He is already on bail. The bail bonds stand cancelled and the sureties are discharged.

40. The appeal stands partly allowed accordingly.

ILR (2011) IV DELHI 90
CRL. A.

AJAY GOSWAMI **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(S. RAVINDRA BHAT & G.P. MITTAL, JJ.)

CRL. A. NO. : 67/1998 **DATE OF DECISION: 26.04.2011**

Indian Penal Code, 1860—Section 302—Case of prosecution that PW3, PW4, PW5 were going for morning walk—They saw appellant and the deceased in front of appellant's house—Appellant gave knife

blows to deceased—PW3, PW4 and PW5 went towards the appellant, however, appellant dragged the deceased inside his house and shut the door—PW3, PW4 and PW5 informed the deceased's family—Trial Court convicted appellant u/s 302—Held, the fact that FIR number was omitted on two documents, also that identification was made one day before the inquest report as well as lack of proof that FIR was sent to magistrate u/s 157 Code of Criminal Procedure, 1973 seen together with the lack of identification of accused in FIR casts a cloud over the timing of the FIR and raises doubt as to whether it was recorded at the time, it is alleged to have been recorded—Discrepancies in evidence with regard to recovery of knife which could not be proved to be the weapon used to kill deceased—Evidence pertaining to deposit of seized articles in the Malkhana disclose suspicious picture—Postmortem report is said to have been deposited before it was brought into existence—Articles seized were supposed to have been sent to CFSL without any record of it, nor when they were sent back—Prosecution version that seized articles were deposited safely in the Malkhana cannot be believed—Discrepancies in testimonies of prosecution witnesses together with fact that FIR ante-timed and recovery of articles not proved, nor weapon used for committing offence produced, fatal to prosecution—Prosecution failed to establish motive—No material shown to prove why appellant could have murderously attacked deceased—Appellant acquitted—Appeal allowed.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Mohit Mathur with Mr. Shikhar Sareen, Advocate.

FOR THE RESPONDENT : Mr. Jaideep Malik, APP for the State.

CASES REFERRED TO:

1. *Motilal* vs. *State of Rajasthan* 2009 (7) SCC 454.
2. *Manpreet Singh* vs. *State,* 108 (2003) DLT 551.
3. *Mehraj Singh* vs. *State of UP* 1994 (5) SCC188.
4. *Ramesh Kumar* vs. *Delhi Administration* 1990 Crl. LJ 255.
5. *Dudhnath Pandey* vs. *State of UP* AIR 1981 SC 911.
6. *Mahabir Singh* vs. *State* 1979 Crl. LJ 1159).
7. *Kartarey* vs. *State of U.P.*, 1975 SCC (Cri) 803.

RESULT: Appeal allowed.

S. RAVINDRA BHAT, J.

1. This judgment will dispose of an appeal against the judgment and order of the learned Addl. District and Sessions Judge (hereafter "Trial court") dated 16.01.1998 and the sentence imposed upon the Appellant on 20.01.1988. By the impugned judgment, the appellant was held guilty of committing offence punishable under Section 302 IPC, and sentenced to undergo life imprisonment as well as pay Rs. 1000/- as fine, in default of which to undergo Rigorous Imprisonment for one month.

2. The prosecution alleged that on 07.06.1993, at about 6.15 AM, PW-3, PW-4 Sunil Sagar and PW-5 Inderpal were going for a morning walk. While passing through Mandoli Road, Ram Nagar, Near Tafsil Bakery, they saw the appellant and another boy with him, in front of the appellant's house, at a distance of 10-15 paces. It is alleged that the Appellant was armed with a knife. The appellant allegedly gave a knife blow to Virender Kumar and when they (PW-3, 4 and 5) moved towards the appellant, he dragged the victim inside his house and shut the door. The prosecution alleged that these witnesses informed Virender's family and then reached the appellant's house when they were informed that the injured had been removed to the GTB Hospital, where they went and learnt about his death.

3. The police was informed about the events; it was alleged that a rukka was prepared and some policemen reached the spot and proceeded to investigate the incident. The appellant was arrested for committing the

crime. He was subsequently charged with the offence; he entered the plea of not guilty and claimed trial. The prosecution relied on the testimony of 22 witnesses, which included PW-3, 4 and 5, all ocular witnesses. PW-12, Dr. Anil Kohli had examined the deceased; he proved the Post Mortem Report during the trial. The appellant examined two defence witnesses, which included his father, Rajbir Singh, DW-2. After considering the evidence and materials on the record, the Trial Court, by the impugned judgment, convicted the appellant and imposed the sentence. The judgment and order on sentence have been impugned in these proceedings.

4. Sh. Mohit Mathur, the Appellant's counsel submitted that since the prosecution case is premised on eyewitness testimony, it would be essential to consider the depositions of PWs 3 and 4 carefully since PW-5, the third alleged eyewitness had turned hostile. According to counsel, the said two eye witnesses PW-3 and 4 were unreliable and their depositions could not have inspired confidence to the extent that a finding of conviction could have been returned. It was submitted that PW-3, in his examination-in-chief, deposed that the incident took place in the morning and that the police had recorded his statement in the hospital soon thereafter around 10-11 AM. However, in the cross-examination, he deposed that the statement was recorded on the evening of 07.03.1993 at the spot. PW-3, it was emphasized, was clearly unfamiliar with the surroundings where the occurrence took place though claiming to be a regular in the sense that he used to take a morning walk with his friend in the area. His testimony revealed ignorance about the topography of the area, and various landmarks. Learned counsel pointed to the admission of PW-3 that he had no knowledge about Quality Bakery located near Tafsil Bakery, or about Yadav diary located opposite the appellant's house which used to sell milk from early morning 05.30 AM onwards. Furthermore, he was not sure about the number of bakeries between the Ambedkar Gate and the appellant's house; equally, he was unsure about the location of a tree in front of Tafsil Bakery and where the rickshaw pullers used to park their rickshaws and relax. It as further highlighted that even though PW-3 was accompanied by two others, they did not take any steps to stop the appellant who was allegedly assaulting Virender with a knife. Learned counsel argued that the entire topography of the area indicated existence of shops which included a dairy. Learned counsel stated that the deposition of this witness, i.e. PW-3 read with the testimonies of PW-4 and 9

indicated that they were related to the deceased and they had a motive in implicating the Appellant. It was also argued that a comparison of the examination-in-chief of PW-3 with that of PW-4 would indicate that the sequence narrated by both did not match. Whereas PW-3 stated that after witnessing the incident, he and the other eyewitnesses went to the deceased's house and thereafter to the appellant's house, PW-4 mentioned that they first rushed to the deceased's house, informed his mother about the incident, and then he went to his house and thereafter proceeded to the hospital with his (deceased's) parents. In his case, there was discrepancy in what is said in the examination-in-chief regarding the time and place where the initial statement under Section 161 Cr. PC. (hereafter "police statement") was recorded. In the examination-in-chief, he deposed that the statement was recorded at 10.00-10.15 AM in GTB Hospital whereas in cross-examination, he deposed that the statement was recorded by the police at about 10 -11 am at the spot along with the statements of PW-3 and 5. Learned counsel pointed-out that both the witnesses had deposed about a crowd collecting near the appellant's house when they returned after informed the deceased's mother. It is submitted that this completely falsified their previous statement. Relying upon the prosecution exhibits PW-11/A, the scaled site plan and PW-20/A, it was argued that the depositions of both the eyewitnesses were contradicted by these documents, which established that the presence of no less than three shops in the immediate vicinity of the appellant's house as well as the location of Tafsir Bakery and Quality Bakery just in front of those premises.

5. Learned counsel submitted that the prosecution had initially sought to implicate DW-2, Rajbir, the appellant's father for his alleged involvement in the crime. Both PWs-3 and 4 had stated that the appellant's father Rajbir was present when the deceased was dragged inside his house. However, the prosecution omitted to follow-up its allegation and Rajbir was not charged for the offence. Furthermore, it is argued by the counsel, the evidence on record also revealed that Rajbir had taken the injured Virender to the hospital -a conduct inconsistent with the version given by PW-3 and 4 vis-a-vis his role. It is submitted that the involvement of Rajbir was sought to be established and connected with the seizure of Pajama Ex. PW-4/DB. The prosecution alleged that the seizure was made and PW-4 had also given his statement. However, in his deposition, PW-4 denied these facts upon being confronted. Learned counsel highlighted the fact that Rajbir, who had been initially charged for the offence as a

co-accused, was in fact not sent up for trial. It is urged that the definite case of the prosecution has been disbelieved by the trial court as against co-accused Rajbir, in view of this benefit of doubt ought to have been given to the appellant and the trial court could not have recreated the prosecution version, nor is this permissible in law. Thus, submitted the counsel, the prosecution story was unreliable and could not have been the basis for convicting the appellant.

6. Learned counsel submitted that the evidence in the form of depositions and exhibits clearly point to ante-timing of the FIR and building up a false case. In support of this submission, reliance is placed upon Ex. PW-6/A and Ex. PX, statements of PW-6 and that of Sh. Madan Lal dated 08.06.1993, identifying Virender's body. It is pointed-out that these documents do not bear the First Information particulars, such as the number. Similarly, it is stated that Ex. PW-18/B, the Inquest report, records the name and other particulars of those witnesses, who identified the body. This document is dated 07.06.1993 and does not bear the FIR number. Learned counsel pointed-out that if one compares the exhibit 18/B with Ex. PX and Ex. 6/A, what is striking is that the identification of the body took place on 08.06.1993 whereas the names and particulars were allegedly furnished one day prior to that. It is also argued importantly that the appellant's name was omitted as an accused in the FIR, marked as Ex. 4/A in Column 5. This fact was confirmed by PW-1, who also conceded, in the course of his deposition that the index of the case diaries of 7-6-1993 to 11-06-1993, annexed along with the FIR No. 120/1993 mentioned that Case Diary was not there and the column in S. Nos. 1 to 4 were blank. A copy of the same was also taken on record as PW-1/DA.

7. Learned counsel lastly submitted that the prosecution did not prove that the Special Report was delivered to the concerned Magistrate in the form of any document marked as an exhibit in the evidence. It is urged that the FIR in the matter, i.e. No. 120/93 (Ex. PW-4/A) was ante timed to suit the needs of the prosecution. The counsel submits that the next FIR after FIR No. 120/93 was registered after three days indicates deliberate delay. Further, Constable Ashok Kumar (PW-16) who has deposed about delivering the special reports to the Magistrate concerned and at the office of the DCP and the then to the Police Head Quarters, ITO has not been able to prove any endorsement on the FIR. No special

report to the MM or superior officers is proved by the Public Witnesses.

8. Commenting next on the nature of injuries, learned counsel relied upon Ex. PW-12/A and the deposition of the witness, Dr. Anil Kohli, PW-12. Here it is argued that the nature of the injuries found on the deceased were incompatible with the weapon recovered by the prosecution. Learned counsel argued that according to the medical evidence, particularly PW-12, there were three spindle-shaped injuries and one blunt object injury on the dead body. The spindle-shaped injuries were caused by a double-edged weapon or a sharp double edged weapon, which, in the words of the doctor -*"would be higher from the centre on both sides. I mean by one angle of the wound was more acute than the other means that the weapon was double edged but one edge was not as sharp as the other."* It was submitted that in contrast, the knife, Ex. P-1 was a single-edged weapon. If these facts were taken into consideration, there was no question of the appellant being implicated for the offence, as the injuries found on the deceased did not correspond with those that could be inflicted from the recovered single edged knife.

9. The appellant's counsel urged that PW-22 (Insp. K.L. Meena) deposed in Court about having sent the knife recovered (Ex. P-1) at the instance of the accused and alleged to be the weapon of offence, to the postmortem doctor who after inspecting it orally stated that Ex. P-1 could not be linked with the injuries. PW-22 has deposed in Court that on 20.08.1993, he had sent the pulanda containing the knife to the doctor for his opinion, although no record of this is available either in the judicial file or in the police file. The counsel places reliance on **Manpreet Singh v. State,** 108 (2003) DLT 551 and **Kartarey v. State of U.P.,** 1975 SCC (Cri) 803 where the Supreme Court has emphasized the need to show the weapon of offence to the Doctor/Expert and elicit their opinion in order to associate it with the injuries sustained and by the victim.

10. The counsel for the appellant submitted that recovery of the knife and the disclosure, Ex. PW-5/B were fabricated by the police. It was pointed out that the PW-9 deposed in Court that the accused's disclosure statement was recorded by the police after the alleged recovery of the knife. PW-9, in his deposition, has stated that the accused disclosed in his presence that he could get recovered the knife from the underground drainage in his house and that one churri was with his father but the police did not record this at that time and did so later, only after the

recovery of the knife. In this background, it is urged, that neither the recovery nor the disclosure statement can be believed.

11. The counsel next argues that the prosecution version does not explain the fact that the appellant's father (Rajbir, DW-2) took the deceased to G.T.B. Hospital. DW-2, who was earlier a co-accused, but later discharged, deposed in Court that he took the deceased to the hospital, before leaving for his school. This was not disputed by the prosecution during DW-2's cross-examination. This finds further support from the MLC (at Pg. 431 of the Trial Court record), where the name of DW-2 is recorded as the person who brought the deceased to the hospital and the deposition of DW-1. PW-3, Rakesh Kumar too admitted to seeing Rajbir at the GTB Hospital gate of and coming to know that the deceased was brought there by some residents of the appellant's house, in his cross-examination. All these, according to the appellant's counsel points to the improbability of the prosecution version, where this fact was completely ignored.

12. Counsel also points out that the prosecution failed to establish the motive for the offence. Though PW-7, Maya Devi deposed in Court that 15-20 days prior to the incident, an altercation occurred between her son (deceased) and the appellant, when the deceased tried to stop him from molesting a girl of the mohalla, the counsel submits that she did not provide any particulars for the alleged motive and her conduct during the cross-examination is highly suspicious, and is as such lacking credibility. This witness has, in her cross-examination, deposed as under:

> "I do not know the name of that girl which was allegedly teased by the accused, 15/20 days prior to the occurrence. I also do not know whose daughter she was as well as I donot know her house number. She was not teased or molested in my presence. I do not know the place where the quarrel had taken place between my son and the accused on this issue as I had not been chasing them. My deceased son had told me about this. We had not lodged any report about the said incident neither myself, nor my son deceased, or any other members of the family or mohalla; as it was a petty quarrel. I had not told these facts to the police, with regard to the teasing of the girl and consequently quarrel taken place between my deceased son and accused." The counsel also submits that the the case of the prosecution that the appellant

and his companion dragged the deceased inside the house remains unproved, as PW-20 (Insp. Tej Pal Singh, the then SHO Mansorovar Park P.S.) has deposed that he did not find any blood stains inside the house of the accused.

13. Pointing at the discrepancies in the prosecution case the counsel submits that the Death Report (Ex. PW-18/B) which was prepared and signed on 07.06.1993 mentions the names of Lekh Raj (PW-6, deceased's chacha) and Madan Lal (deceased's mausa) as the persons who identified the body. Whereas, PW-18 (S.I. Jai Singh) and PW-10 (Const. Satish Kumar) have deposed that the post mortem examination could not be conducted on 07.06.1993 as there was no one to identify the body. This is in stark contradiction to the statement of PW-4 (Rakesh Sagar) who has deposed in his cross-examination that on 07.06.1993 when he went to the GTB hospital, he met deceased's uncle, who told him that the police required him at the spot of the occurrence. The conduct of the Police in not asking PW-3, PW-4 and PW-5 to identify the body, when they claimed to be the eye-witnesses and PW-5 was also the informant and they have joined the investigation at every stage, is also questioned by the appellant. Again, the alleged weapon of offence, i.e. knife (Ex. P1) was never sent for CFSL examination. The CFSL report (Ex. 22/B and 22/C) does not mention about the knife being examined.

14. It is argued that PW-19 (Const. Puran Chand) deposed to sending five pulandas to CFSL Lodhi Colony, which is mentioned in the CFSL report too, but the Malkhana Mohrrar (PW-14, HC Kishan Singh) deposed about having received seven sealed parcels, which included the knife, from SHO, Mansarovar Park, which were later sent to CFSL for examination. Furthermore, the Malkhana Register extract (Ex. PW-14/A, at Pgs. 355 to 363 of the trial court record) records the date of deposit of the post mortem report dated 08.06.1993 as 07.06.1993, i.e. a day prior to the making of the report. The said entry in the register has been signed by the SHO Mansarovar Park, as well as the MHC. Furthermore, the CFSL form has not been exhibited, nor is it placed on record. All this only points to the fabrication of records by the police.

15. The counsel, points at the contradictions in the statements of the various prosecution witnesses. It is pointed out that Insp. K.L. Meena (PW-22) has deposed that the investigation in the case was handed over to him on 10.06.1993 by order of the DCP, whereas PW-20 (Insp. Tej

Pal Singh) has deposed that the investigation was handed over on 08.06.1993. Further, PW-3 has deposed that PW-22 was carrying out the investigation on 07.06.1993. PW-3 also stated that after informing them about the occurrence he accompanied the deceased's mother and other relatives to the spot, whereas PW-7 (mother of the deceased) stated that on learning about the incident she fell unconscious and did not move out of the house between 07.06.1993 to 30.08.1993.

16. PW-9 (Rakesh Sagar) deposed that on 11.06.1993 at around 10/11 AM two police persons claiming to be from the special staff visited him and informed him that the appellant had been arrested; they asked him to accompany them to see the accused. He further deposed that on reaching the office of the special staff he was made to wait for some time and in the meantime Inder Pal was called inside, thereafter when he was called he saw the police interrogating the accused and that accused deposed in his presence that he could get the knife recovered. Further, in his cross-examination, this witness has stated that he stayed in the office of the special staff for about an hour. PW-15 (HC Shyam Sunder) deposed that on 11.06.1993 he reached the Court at 12 noon, where the accused was already present and that after obtaining the due permission, the accused was interrogated inside the Court premises for about 15-20 minutes.

17. Lastly, PW-20 (Insp. Tej Pal Singh, the then SHO Mansarovar Park P.S.) deposed that he did not get the place of occurrence photographed, but PW-21 (Const. Ravinder Singh) was examined as the photographer who has deposed about taking four photographs at the place of occurrence on 07.06.1993, viz. Ex. PW21/1, 21/2, 21/3 and 21/4 and further that, the SHO, i.e. PW-22 recorded his statement at the spot.

18. The counsel submits that the trial court has failed in its duty in not giving due credence to the defence witnesses and rejecting the same without appraising the probability of their testimonies, and that their testimony should have been treated at par with the prosecution witnesses, especially in view of the fact the DW-2, Rajbir, who was made an accused by the prosecution, was later discharged by the Court.

19. The learned APP argued that the findings rendered by the Trial court are unimpeachable. It was submitted that even though PW-5 turned

hostile, there is no reason to doubt the credibility of PW-2 and PW-4, who were the other two eyewitnesses. They deposed about the attack by the Appellant, the immediate events which followed it, the removal of the deceased to the hospital, the police recording their statements. Their testimonies corroborated each other, and were in conformity with the events as they unfolded. It was argued that the court should not be swayed by minor lapses in witnesses' memories, such as the inability of PW-3 to identify bakeries in the vicinity of the place of occurrence, or existence of shops. The APP also argued that the possibility of one or the other landmark, such as the diary, not existing, at the time the witness deposed, could not be ruled out. Similarly, it was argued that the two eyewitnesses had deposed why they could not intervene and save the deceased; they had stated that the appellant was a local tough, and they feared for their lives or safety, since he was attacking the deceased with a knife.

20. Contesting the Appellants' arguments about ante timing of the FIR, it was urged that all the materials showed that the incident took place in the early morning, and the police reached the spot fairly early. The FIR too was recorded immediately. It was submitted that often, doctors refuse to conduct postmortem the same day, due to rush of work; this appears to have happened on 07-06-1993. Consequently, the postmortem was carried out on the next day. The mere circumstance that the inquest report, or the request for postmortem contained the names of the deceased's relatives, meant nothing, because their names were known to the prosecution when the documents were made.

21. It was submitted that the Appellant needlessly cast a doubt about the so called discrepancies in statements recorded by the police, as narrated by the eyewitnesses. It was submitted that there is no confusion on this score, because the eyewitnesses – at different places – stated about having been questioned by the police, and their statements having been recorded in the hospital, and at the spot. These were natural witnesses, and even if the police could not establish motive, so long as their deposition was credible, and had withstood the cross examination, the Appellant's conviction was sound and justified. It was further argued that there was no reason for the prosecution witnesses to depose falsely, nor did the Appellant allege such to be the case.

22. The above narrative shows that the attack upon the deceased, according to the prosecution, took place in the early hours of the morning; PW-3, PW-4 and PW-5 witnessed the incident, whereby the deceased was stabbed by the Appellant. PW-5 did not support the prosecution story at all. Initially, the prosecution also appears to have suspected the Appellant's father, because he was named as an accused. Later, however, he was not charged for having committed the offence.

Recording of the First Information Report and attendant circumstances

23. The Appellant has, as an important limb of his argument, submitted that the FIR was ante timed, and relied on several circumstances in support of this. The prosecution, on the other hand, submits that the FIR was recorded at the earliest opportunity, and that the police visited the spot, and also recorded statements of the eyewitnesses, without any delay.

24. The importance of recording the first information report, on time, was underlined, in **Mehraj Singh v State of UP** 1994 (5) SCC188, in the following terms:

> "FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an after thought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR, was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been

> recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr. P.C. is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in embryo and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ate timed to give it the colour of a promptly lodged FIR."

25. Now, the testimonies of PW-3 and PW-4, is that after witnessing the incident, they informed the family of the deceased, as well as their families. They also went to the hospital, where the deceased had been taken. However, there is nothing on the record to suggest who had actually removed him to the hospital. DW-2 Rajbir, the appellant's father, deposed having taken the deceased to the hospital; he was not contradicted on this. The prosecution states that the incident was reported on wireless, and DD No. 2A was recorded at 7:40 AM, on the day of the incident. This has been exhibited as PW-17/A. It is alleged that the FIR was recorded later, at 9:20 AM; it was produced as Ex. PW-4/A. The first informant in the case was PW-5, Inderpal. The prosecution relies on Ex. PW-18/A forwarded by the Sub Inspector, who visited the site, and later the hospital. This letter, timed at 9:00 AM, briefly mentions the incident; it intimates the nature of the incident, as well as the offence.

26. Now, intriguingly, PW-3 mentions having returned to the spot at 7:30 AM; the police had reached the spot soon thereafter. Both the witnesses mention that several persons went to the hospital. The identity of the assailant was known to PW-3 and PW-4. The police too had visited the hospital. Yet, PW-18/A does not mention or name the Appellant, as the accused. Most importantly, the FIR does not name the Appellant. Inderpal, PW-5, denied making any statement implicating the Appellant.

27. Ex. PW-6/A and Ex. PX, are statements of PW-6 and that of Sh. Madan Lal dated 08.06.1993, identifying Virender's body. These exhibits do not bear the First Information particulars, such as the number. Likewise, Ex. PW-18/B, (the Inquest report), records the name and other particulars of those witnesses, identifying the body of Virender. This document (dated 07.06.1993) too does not reveal the FIR number. Ex.PW-18/B, Ex. PX and Ex. 6/A, read together, reveal is that while the identification of the body took place on 08.06.1993, the names and particulars of those identifying the body were furnished one day prior to that.

28. PW-1, admitted in the course of his deposition, that the index of the case diaries of 7-6-1993 to 11-06-1993, annexed along with the FIR No. 120/1993 mentioned that Case Diary was not there and the column in S. Nos. 1 to 4 were blank. A copy was marked as PW-1/DA. The next FIR after FIR No. 120/93 was registered after three days-this indicates deliberate delay. Another very important aspect is that the prosecution did not prove that the Special Report was delivered to the concerned Magistrate in the form of any document marked as an exhibit in the evidence. PW-16 has merely deposed to delivering the special report to the Magistrate concerned and at the office of the DCP and later to the Police Head Quarters. However the prosecution did not prove any endorsement on the FIR. The importance of complying with Section 157 of the Code of Criminal Procedure, and the need for the prosecution to establish it through evidence, was underscored by the Supreme Court in **Motilal v State of Rajasthan** 2009 (7) SCC 454:

> "…There is a purpose behind the enactment of Section 157 of the Code of Criminal Procedure 1973 (in short "the Code"). The statutory requirement that the report has to be sent forthwith that itself shows the urgency attached to the sending of the report. In a given case it is open to the prosecution to indicate reasons for the delayed dispatch or delayed receipt. This has to be established by evidence."

Two Division Benches of this Court too, have emphasized the imperative nature of this provision (Ref. **Ramesh Kumar v Delhi Administration** 1990 Crl. LJ 255 and **Mahabir Singh v State** 1979 Crl. LJ 1159).

29. In view of the foregoing reasons, the facts, (the FIR number

being omitted in two documents, and also the identification being made on 08-06-1993, though the inquest report showing the names of those identifying, as on 07-06-1993 as well as lack of proof that the FIR was sent to the magistrate under Section 157) if seen together with the lack of identification of the accused in the FIR, cast a cloud over the timing of the FIR, and raise doubts as to whether it was indeed recorded at the time it is alleged to have been, by the prosecution.

Recovery of knife

30. In this case, the recovery of the knife is alleged to have taken place on 11-06-1993. PW-9 Rakesh Sagar is one of the witnesses who spoke about it. This weapon is alleged to have been recovered from a drain pipe, in his house, which was dismantled by the Appellant. PW-5 Inderpal is also alleged to have witnessed the recovery. PW9 also deposes that the statement was recorded subsequent to the recovery, which is contrary to PW-15/B and PW-5/B.

31. Now, the postmortem report states that the wounds on Virender's body could have been caused only by a double edged weapon. In fact, the wounds are described as "spindle shaped". PW-4, who is also alleged to have witnessed the recovery on 11-06-1993, mentions about the knife. PW-4 claimed to identify the knife (a "button dar" one) during his deposition. PW-12, the doctor who conducted the post mortem, states, inter alia, as follows:

> "I saw four injuries on the person of the deceased and three injuries stab injuries were in spindle shape and one injury was a blunt object. Spindle shape injury was which is caused by double edged weapon and sharp double edged weapon and the said weapon would be higher from the centre on both sides. I mean by one angle of the wound was more acute than the other means that the weapon was double edged but one edge was not as sharp as the other. In the present case, all the injuries except injury No. 4 have been caused by a double edged weapon and not single and sharp edged weapon. After receiving the stab injuries in this particular case, the deceased could have walked or run slowly for about 15 to 20 paces.."

Interestingly, apart from the above deposition of PW-12 there is another

circumstance, which casts a cloud on the recovery of the weapon, which is that when the knife was to be shown to PW-4, the court noted, during the course of evidence, that date on the the pulanda appeared to have been overwritten, on a plaster; the mark of the person sealing it was not legible. Furthermore, the seal was not intact.

32. If the facts noticed in the preceding paragraph are also seen in conjunction with the circumstance that PW-9 had no connection with the police, as he was not eyewitness to the incident, but was, by his admission, asked for the first time, to witness a recovery, the weapon recovery becomes suspect. The evidence of PW-3, PW-4 and PW-9 establishes that the latter two (PW-4 and PW-9) are cousins, being sons of two brothers. The Appellant had suggested to each of them, that the deceased was the nephew (bhanja) of the fathers of PW-4 and PW-9. Although they denied it, the fact remains that the prosecution has not explained the role of PW-9 who was randomly, and inexplicably asked to witness the seizure of a crime weapon. Intriguingly, the weapon was never sent to CFSL. Therefore, the court is of the opinion that cumulatively viewed, the above evidence is unconvincing regarding recovery of the knife; certainly it was not the weapon used to kill the deceased Virender.

Deposit of the articles, after their seizure

33. The Malkhana register extracts (Ex. PW-14/A) reveals that the Post mortem report dated 08-06-1993, is alleged to have been deposited a day before, i.e. on 07-06-1993. The SHO's signature is shown at the foot of the relevant entry; in column 3 too, the same date is shown, with the SHO disclosed as the officer depositing the case property. Apart from this anomaly PW-14, the Malkhana *Moharrar*, states that seven *pullandas* were deposited. However, PW-19 contradicts, and says that five *pulandas* were deposited. Furthermore, the depositions of PW-14 and the malkhana register extracts show that even though the articles seized were to CFSL on 20th August, 1993, no entry is found in the extracts.

34. In the opinion of the court, the evidence pertaining to deposit of seized articles in the malkhana, which include the deposition of PW-14 and the extracts of the relevant register, disclose a suspicious picture. A document (Post mortem report) is said to have been deposited before it was brought into existence. Similarly, the articles seized are supposed

to have been sent to the CFSL, without any record of it, nor when they were sent back. Therefore, the prosecution version that the seized articles were deposited safely in the malkhana, cannot be believed.

Testimony of prosecution witnesses

35. The main evidence, which persuaded the Trial Court to find the appellant guilty, as charged, was the eyewitness testimony of PW-3 and PW-4. The appellants have attached their credibility, with a view to say that they were not eyewitnesses, but that at best they might have seen the deceased running and collapsing near the Appellant's house. In other words, the Appellant argues that these witnesses had not seen the attack, but were made to say so. A number of contentions have been made by the Appellants' counsel in this regard. One of them was that the witnesses had not intervened, to save the deceased. On this aspect, the court is of the opinion that subjective reactions to facts like witnessing attacks on another, are neither typical nor predictable. They vary from circumstance to circumstance, and person to person. Here, the witnesses deposed that the assailant was armed with a knife, and they did not want to take any risks, or were afraid. That explanation is perfectly plausible, and reasonable. However, there are some more, and substantial questions which arise from their testimonies, and those of other witnesses. These are:

(1) The sequence of the attack, described by PW-3 and PW-4, vary in regard to the fact that whereas the former said that after seeing the incident, both went to the deceased's house, and then to the house of PW-3, this is not corroborated by PW-4.

(2) PW-3 stated that after hearing about the attack on Virender, his mother and other people from the neighborhood went to the spot. However, PW-7 said that she fell down unconscious after hearing the news. In cross examination, she clarified that she remained at home from 07-06-1993 to 30-8-1993. During that period, the police had visited her 7-8 times and recorded her statement.

(3) Neither PW-3 nor PW-4 were the first informants; the FIR alleges that the information was provided by PW-5, who disclaimed having witnessed the incident, in the manner alleged by the prosecution. These, coupled with the absence of the

accused's name in the FIR, also cast a cloud of suspicion on the version of the two eyewitnesses.

(4) The witnesses mentioned that PW-22 was present as the investigating officer; the said witness (PW-22, K.L. Meena) on the contrary, deposed to having been entrusted with the investigation later, on 10th June, 1993.

(5) PW-3, and to a lesser extent, PW-4, are unfamiliar with the neighbourhood, though they claim to belong to the same area, and talking daily early morning walks. A number of landmarks were in fact not known to PW-3 – evident from a comparison of his testimony with the sketches placed on the record by the prosecution. This also applies to PW-4, to a lesser degree.

(5) PW-4 contradicted the prosecution version that his statement (Ex. PW-4/DB) was recorded on 30-08-1993.

(6) PW-4 deposed that he was sent by the deceased's uncle from the hospital. However, PW-10 and PW-11 state that no relative was available in the hospital, on the day of the incident.

(7) PW-9 (whose role has been commented upon previously) deposed to having been called by the Police on the concerned day, when the Appellant was arrested, at around 10-11 AM, when he was present in the police station. However, PW-15 stated that the police reached the court at 12:00 noon, when the permission to interrogate the accused/Appellant was obtained.

(8) The eyewitnesses mention that 30-40 people had entered the house of the Appellant. Yet, no attempt was made to secure the version or the testimony of anyone of them. Also, there is no corroboration as to whether there were blood stains or marks in the Appellant's house. The prosecution version is that some policemen had reached the spot, on receiving the intimation in the morning. Even these policemen do not appear to have attempted to secure the evidence. On the contrary, PW-20 stated that he did not find any blood stains in the house.

(9) The prosecution is silent about how the deceased's was removed to the hospital, and the identity of the individual doing so. On the other hand, the Appellant relies on the testimony of

DW-2 Rajbir, his father, who positively deposed having taken the injured Virender to the hospital. If one looks carefully, it is further seen that this witness was originally investigated, and implicated for having committed the offence; however, charges were dropped. It would be appropriate here to recall the judgment of the Supreme Court in **Dudhnath Pandey v State of UP** AIR 1981 SC 911, where the weightage to be given to defence witnesses was indicated as follows:

> "Defence witnesses are entitled to equal treatment with those of the prosecution. And Courts ought to overcome their traditional, instinctive disbelief in defence witnesses."

The prosecution has not mentioned or proved as to who took the deceased to the hospital; there is nothing to impeach the credibility of DW-2 on this aspect. This also sows suspicion on the prosecution version.

36. These discrepancies cannot be termed as minor or inconsequential. They strike at the root of the prosecution allegations. Seen together with the fact that the FIR was ante timed, and the recovery of articles was not proved, nor was the weapon produced, used for committing the offence, they are fatal to the prosecution. Furthermore, the prosecution has also been unable to establish any motive. It is of course, settled law that if ocular evidence of a crime exists, motive becomes secondary. However, in this case, PW-7 stated that the Appellant had molested a girl, but was unable to give any further fact. PW-3 similarly made a vague and generic allegationabout the Appellant being a local "tough". However, beyond these statements, no material to show why the Appellant could have murderously attacked the deceased was shown to the court.

37. This court is of opinion that in the above conspectus of facts, the finding of guilt recorded by the learned Additional Sessions Judge, against the Appellant, cannot be sustained. The Appeal, therefore has to succeed. The bail and surety bonds furnished pursuant to the court's order made previously are therefore discharged. The appeal is allowed in the above terms.

ILR (2011) IV DELHI 109
CRL. A.

KAUSHALENDER **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(MUKTA GUPTA, J.)

CRL. A. NO. : 257/2000 **DATE OF DECISION: 26.04.2011**

Indian Penal Code, 1860—Sections 392/397/34—Case of prosecution that PW2 along with another person were returning from Mehrauli on their cycles—When PW2 reached B-1, Vasant Kunj, one out of the two boys (accused) going on foot, desired to sit on his cycle—PW2 refused saying that there was a bundle of medicines on the carrier of his cycle—The co-accused gave a push to his cycle and PW2 fell down—The co-accused took out a knife and asked PW2 to hand over the money which he handed over which the co-accused gave to the appellant the thereafter both ran away—In the meantime, the other person accompanying PW2 also came and both of them chased both accused—Only co-accused was apprehended—Pursuant to disclosure of co-accused, appellant arrested and got recovered money—Trial Court convicted appellant for offences u/s 392/397/34 and co-accused was convicted u/s 394/34 IPC—Held, the Court in criminal appeal filed by co-accused had already held that in view of discrepancy in testimony of PW2 as to who showed the knife, trial Court had erred in convicting appellant and co-accused for offence punishable u/s 397—As per seizure memo, currency notes worth 1,500/- were recovered, however, when produced in Court, they were Rs. 1,515/- PW6 (IO) clarified that he had not seized the currency notes nor noted their numbers—

Testimony of PW2 cogent and convincing—Testimony of PW2 corroborated from fact that co-accused apprehended at the spot and beaten by the police, who was medically examined—PW2 had no reason to falsely implicate appellant—Testimony of PW2 corroborated by testimony of PW6 (IO)—Appellant in furtherance of common intention with co-accused committed offence of robbery—Appeal partly allowed modifying conviction of appellant to offence punishable u/s 392/34 and sentenced to the period already undergone.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT **:** Mr. Ashwani Vij, Advocate.

FOR THE RESPONDENT **:** Mr. Manoj Ohri, App for the State.

RESULT: Appeal partly allowed.

MUKTA GUPTA, J.

1. This is an appeal against the judgment of conviction and sentence dated 22nd September, 1999 whereby the Appellant has been convicted for offences punishable under Sections 392/397/34 IPC and directed to undergo a sentence of rigorous imprisonment for seven years and a fine of Rs. 5,000/-. In default of payment of fine, the Appellant is to undergo simple imprisonment for five months.

2. The facts leading to the prosecution filing the charge-sheet are that on 24th October, 1997 at about 1.45 P.M. PW2 Sri Niwas Pandey who was working in R.N. Distributor at Mehrauli had gone to supply the medicines. While he along with Subhash Chand Pandey were returning towards Mehrauli on their respective bicycles, and reached at Vasant Kunj red light, Sri Niwas Pandey crossed over but Subhash Chand Pandey could not do so in view of the red light and followed him on the next green light. When PW2 reached at B1, Vasant Kunj out of the two boys going on foot, one desired to sit on his cycle. However, PW2 Sri Niwas Pandey refused saying that there was a bundle of medicines on the carrier of his cycle. Thereafter, the co-convict Abhay Raj Mishra gave

a push to his cycle and PW2 along with his cycle fell down. The co-convict Abhay Raj Mishra took out a knife and asked him to hand over the money. Sri Nivas Pandey resisted and answered that he had no money with him but later on took out Rs. 3,500/- from the right side pocket of his pant which the co-convict took away and handed over to the present Appellant Kaushlender. Thereafter, both the accused ran away. In the meantime, Subhash Chand Pandey also came and both of them on their cycles chased the accused persons. As they had raised the alarm, at the gate of B-7, Vasant Kunj, public persons apprehended Abhay Raj Mishra however, the present Appellant herein managed to escape. Some public person informed the police about the said incident on which the police reached at the spot and apprehended the co-convict Abhay Raj Mishra. The statement of PW2 Sri Niwas Pandey was recorded vide Ex.PW2/A on the basis of which FIR was got registered. The co-convict was arrested on the spot and in pursuance of his disclosure statement and pointing out, the present Appellant Kaushlender was arrested from his house in Village Nawada. The Appellant got recovered a sum of Rs. 1,500/- from beneath the box in his room. After completion of investigation, the charge sheet was filed

3. Pursuant to the trial the learned Judge convicted the Appellant and the co-accused for the aforementioned offences. The Appellant Kaushlender has filed the present appeal. The appeal qua co-accused Abhay Raj Mishra being Cr. Appeal No. 531/1999 has been decided by this Court vide its judgment date 4th January, 2011.

4. Learned counsel for the Appellant states that there is material contradiction in the testimony of PW2, the Complainant Sri Niwas Pandey as in his complaint he states that the Appellant showed the knife whereas in the Court he alleges that co-convict Abhay Raj Mishra pushed him, showed the knife and removed Rs. 3,500/- from the right side of his pocket and handed over the same to the Appellant. Thus, no role in showing the knife has been attributed to the Appellant in the testimony of PW2 before the Court. There are material contradictions between the testimony of PW2, the Complainant, PW3 Constable Shyam Lal and PW6 Assistant Sub-Inspector Vijay Kumar, investigating officer as regards the time when they reached Nawada for arresting the Appellant. PW3 has stated that he came back to the spot after registering the FIR at 11:00 A.M. though the alleged incident is of 1:45 P.M. in the noon. He states

that he alongwith investigating officer and accused Abhay Raj Mishra reached Nawada at 6:30 P.M. and returned back to the police station at about 10:00 P.M. Thus, according to PW3, the Complainant had not accompanied the investigating officer PW6 and PW3 to the house of the Appellant. Whereas PW6 has stated that they reached Nawada at about 9:00 P.M. along with Subhash Pandey, Sri Niwas, co-accused Abhay Raj Mishra and Constable Shyam Lal. There is only one witness to the recovery at the instance of the Appellant i.e. PW3 who has not supported the prosecution case. There is discrepancy in the money recovered at the instance of the Appellant and produced in the Court. Neither the currency notes were sealed nor any specific mark given to them nor their numbers were noted. Learned counsel contends that the defence of the Appellant in his statement under Section 313 Cr.P.C. has not been considered. In view of the material discrepancies in the statements of the witnesses, the Appellant is entitled to the benefit of doubt. Though the co-convict Abhay Raj Mishra has been convicted for offence punishable under Section 394/34 IPC, the case of the Appellant stands on a different footing as he was not apprehended on the spot and he is entitled to be acquitted.

5. Learned APP for the State on the other hand contends that though the recovery of the money at the instance of the Appellant has been disbelieved by the learned trial court as the currency was not sealed, however, on the basis of identification by the Complainant that it was the Appellant along with Abhay Raj Mishra who robbed him by showing the knife , prosecution has proved the commission of offence under Section 392/34 IPC beyond reasonable doubt. Hence there is no merit in the present appeal and the same deserves to be dismissed.

6. I have heard learned counsel for the parties and perused the record. This Court in Criminal Appeal No. 531/1999 filed by the co-convict Abhay Raj Mishra has already held that in view of the discrepancy in the testimony of PW2 Sri Niwas Pandey as to who showed the knife to the Complainant, the learned trial court erred in convicting the Appellant and co-convict for offence punishable under Section 397 IPC. The learned trial court has disbelieved the recovery of currency notes at the instance of the present Appellant for the reason that they were neither sealed nor their numbers noted. Moreover, as per the seizure memo currency notes worth Rs. 1,500/- were recovered, however, when the same were produced in the Court, they were Rs. 1,515/-. In addition, PW6 has

clarified that he did not seal the currency notes nor noted the numbers because this was his first investigation for offences under Section 397/392 IPC. But the failure of prosecution to prove the recovery of Rs. 1,500/- at the instance of the Appellant cannot dent the otherwise trustworthy evidence of the Complainant. Thus, as regards the present Appellant, the only evidence which requires consideration is; whether the offence punishable under Section 392/34 IPC has been proved in view of the factum of his identification by the Complainant, PW2 Sri Niwas Pandey. This Court in Criminal Appeal No. 531/1999 has already held that the testimony of this victim PW2 is cogent and convincing. He has explained the entire incident. The testimony of PW2 is further corroborated from the fact that the co-convict Abhay Raj Mishra was apprehended at the spot and beaten by the public and was medically examined vide MLC Ex.PW4/A. The present Appellant was arrested on the pointing out of co-convict Abhay Raj Mishra and on the identification by PW2 the Complainant. PW2 had no reason to falsely implicate the Appellant herein. The testimony of PW2 is corroborated by the testimony of PW6, the investigating officer who has stated that after the arrest of Abhay Raj Mishra, he disclosed about the Appellant and took them to village Nawada along with Sri Niwas Pandey, Subhash Pandey, and Constable Shyam Lal. Merely because PW3 in his testimony had given different time of registration of FIR, leaving to Nawada and returning back to the police station, it would not discredit the otherwise cogent testimony of PW2 and PW6. As per the testimony of PW2 when he crossed the Vasant Kunj red light, two boys were going on the foot and one of them wanted to sit on his cycle but he told that there was a bundle of medicines on his carrier so they cannot sit on his cycle. On this, two boys again insisted and on his refusing, Abhay Raj Mishra gave a push to his cycle and he fell down along with his cycle. Accused Abhay Raj Mishra took out the knife and asked him to hand over the money and when he resisted, the same was taken out from right side pocket of his pant and handed over to the Appellant present in Court. The Appellant is the person who in furtherance of common intention with co-convict Abhay Raj Mishra committed the offence of robbery. I find that the prosecution has proved its case beyond reasonable doubt for commission of offence punishable under Section 392/34 IPC. The Appellant has undergone sentence of imprisonment for a period of nearly three years and three months. He has faced the ordeal of trial and the present appeal for the

last 14 years and thus it would be in the interest of justice that the sentence of the Appellant is modified to the period already undergone as was done by this Court in the case of co-convict Abhay Raj Mishra.

The Appeal is accordingly allowed modifying the conviction of the Appellant to one for offence punishable under Sections 392/34 IPC and the sentence to the period already undergone. The bail bond and the surety bond are discharged.

ILR (2011) IV DELHI 114
W.P.

COLONEL A.D. NARGOLKAR ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(PRADEEP NANDRAJOG & SURESH KAIT, JJ.)

W.P. NO. : 13360/2009 & 13367/09, 273/2010 **DATE OF DECISION: 26.04.2011**

Constitution of India, 1950—Article 226 & 227—Power of Superintedence over Armed Forces Tribunal (Tribunal)—Petitioner contended that power of judicial review vested in constitutional Courts is a basic feature of the Constitution and cannot be curtailed by legislation—Respondent contended that military jurisprudence has grown differently—Historically prerogative writs not issued to military Courts and Tribunals—Legislative intent to create Tribunal was to exclude the jurisdiction of High Court under Article 226 and 227.

Held—It is incorrect that historically civil Courts were

not exercising any supervisory control over military Courts and Tribunals proceedings under Article 226 are in exercise of original jurisdiction whereas under Article 227 are supervisory proceedings prerogative writs are not issued where errors are capable of being rectified at an appellate or revisional jurisdiction—Tribunal cannot be said to be a truly a judicial review forum as a substitute to High Courts—Power of judicial review-basic feature of the Constitution unaffected by constitution of Tribunal—Article 227(4) only takes away the administrative supervisory jurisdiction and does not impact the judicial supervisory jurisdiction—Thus decision of Tribunal amenable to judicial review under Article 226 and 227.

The aforenoted illuminating debate at the Constitution Assembly as afore extracted, should in our opinion, settle the controversy sought to be raised by Sh.Atul Nanda learned senior counsel. Two issues would probably be settled. First that the drafters of the Constitution clearly understood that historically, jurisprudence in civilized democracies recognized power of judicial review over decisions and sentences of Court Martials and notwithstanding insertion of Clause 4 in Article 227 of the Constitution of India, the Constituent Assembly recognized the power of judicial superintendence over Court Martials and this position, as would be noted by us hereinunder, came to be recognized by the Supreme Court, even without a reference to the aforenoted debate. **(Para 63)**

The decision in **Suryadev Rai's** case also brings out another interesting facet of the growth of Jurisprudence with respect to the power conferred by Article 226 of the Constitution vis-à-vis the power conferred under Article 227 of the Constitution of India; and notwithstanding the commonly perceived view that Article 226 of the Constitution of India preserves to the High Court the power to issue writs and thus vis-à-vis Tribunals, authorities and persons, with respect to writs of certiorari, the power would be limited, as held by

the Supreme Court in the decision reported as AIR 1955 SC 233 **Harivishnu Kamath Vs. Ahmad Ishaque,** to (a) correct errors of jurisdiction; (b) correct illegality in the exercise of its undoubted jurisdiction by the Tribunal; (c) correct such error which is a manifest error apparent e.g. when it is based on clear ignorance or disregard of the provision of law or is a patent error as against a wrong; (d) act not as in appellate jurisdiction but exercise supervisory jurisdiction, one consequence whereof being the Court will not review findings of facts even if erroneously reached by the Tribunals, power under Article 227 being supervisory power and in that sense has width and vigour unprecedented, the distinction between the two jurisdictions stands almost obliterated. In para 25 it was so observed and with the justification why it has become customary for the lawyers labeling their petitions as one common under Article 226 and Article 227 of the Constitution of India. **(Para 80)**

Whereas it can be safely said that proceedings under Article 226 are in the exercise of the original jurisdiction of the High Court, proceedings under Article 227 of the Constitution are not original but supervisory proceedings. **(Para 81)**

Even prior to the Constitution of India being promulgated, superior courts constituted by the Letters Patent Charter in India and other dominions of the Crown used to issue prerogative writs to courts and tribunals subordinate to the Chartered High Courts save and except where appellate or revisional remedies were created by statute. The writ of error, as called today by the name of certiorari used to be issued to courts and tribunals and the origin of the said power to issue prerogative writs could be traced to the theory that the king being the paramount judicial authority and the judges being only the king's deputies, any exercise of unauthorized jurisdiction by the Judges was considered as an usurpation of the royal prerogative. The August royal personage could not of course tolerate transgression of jurisdictional limits to the incumbents of the office of Judgeship and had therefore to exercise his controlling power over

them to keep them within the bounds of their authority. As it developed, the writ of certiorari was the process by which the King's Bench Division in the exercise of its superintending power over inferior jurisdictions, requires the Judges or officers of such jurisdiction to certify or send proceedings before them into the King's Bench Division, whether for the purposes of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below. **(Para 86)**

Recognizing efficacious alternative remedies available and on the principle of comity, prerogative writs were not issued where the error was capable of being rectified at an appellate or a revisional jurisdiction. **(Para 87)**

We have noted hereinabove that a limited contempt jurisdiction has been vested in the Tribunal which does not empower the Tribunal to enforce its decisions under contempt jurisdiction. We note that there is no Section in the Act empowering the Tribunal to execute its orders, though we find that under Rule 25 of the Armed Forces Tribunal (Procedure) Rules 2008 it is stipulated that nothing in the Rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders or give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. It would be debatable whether Rule 25 recognizes the sui generis power of contempt of the Tribunal. If not, it would be an anomaly to hold that the Armed Forces Tribunal is not a Tribunal subordinate to the High Court for the reason if held otherwise, a High Court would have no power under its contempt jurisdiction to enforce an order passed by the Armed Forces Tribunal, and if the Tribunal would have no power to enforce its order, it would be a strange situation where a party would be left without a remedy. But we refrain from expanding on this aspect of the matter for the reason learned counsel for the parties had not addressed any submissions on this point and thus we simply note a point which does arise for

consideration as it is relevant to the issue at hand and leave it at that. **(Para 88)**

To summarize, the position would be that the Armed Forces Tribunal, being manned by personnel appointed by the Executive, albeit in consultation with the Chief Justice of India cannot be said to be truly a judicial review forum as a substitute to High Courts which are constitutional courts and the power of judicial review, being a basic feature of the Constitution, under Article 226 and Article 227 of the Constitution of India is unaffected by the Constitution of the Armed Forces Tribunal. Further, Article 227(4) of the Constitution of India takes away only the administrative supervisory jurisdiction of High Court over the Armed Forces Tribunal and does not impact the judicial supervisory jurisdiction over the Armed Forces Tribunal. Thus, decisions by the Armed Forces Tribunal would be amenable to judicial review by High Court under Article 226 as also Article 227 of the Constitution of India. **(Para 89)**

Important Issue Involved: Article 227(4) of the Constitution of India takes away only the administrative supervisory jurisdiction of High Court over the Armed Forces Tribunal and does not impact the judicial supervisory jurisdiction over the Armed Forced Tribunal.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER	**:**	Mr. Vinay Kr. Garg, Advocate with Mr. Fazal Ahmad and Ms. Namrata Singh Advocates & Ors..
FOR THE RESPONDENTS	**:**	Mr. A.S. Chandhiok, ASG and Mr. Atul Nanda, Sr. Advocate with Mr. Ankur Chhibber and Mr. Anuj Aggarwal, Advocates for UOI with Major Rahul Soni & Ors..

CASES REFERRED TO:

1. *Ex.Hav.Maharam* vs.*UOI & Ors.*, W.P.(C) No.3441/2010.
2. *UOI* vs. *R.Gandhi* 2010 (5) SCALE 514.
3. *Joby Varghese* vs. *Armed Forces Tribunal.* 2010 (4) KLT 611.
4. *Col.Sanjay Kumar* vs. *UOI & Ors.*, W.P.(C) No.2667/2010.
5. *Hav.Reiji Kumar* vs. *UOI & Ors.*, W.P.(C) No.5794/2010.
6. *Ex.Sep.Inder Singh* vs. *UOI & Ors.*, W.P.(C) No.4926/2010.
7. *Lt.Col.Harpreet Singh* vs. *UOI & Ors.*, W.P.(C) No.654/2010.
8. *Risaldar Nabab Singh* vs. *UOI & Ors.*, W.P.(C) No.273/2010.
9. *Naik Prabhu Dayal Sharma* vs. *UOI & Ors.*, W.P.(C) No.5189/2010.
10. *Rameswar Prashad Sharma* vs. *UOI & Ors.*, W.P.(C) No.4699/2010.
11. *Smt.Surjeet Kaur* vs. *UOI & Ors.*, W.P.(C) No.4887/2010.
12. *Ex.Sigmn Ganga Ram Sharma* vs. *UOI & Ors.*, W.P.(C) No.4669/2010.
13. *Sub.Maj.Kiran Pal Singh* vs. *UOI & Ors.*, W.P.(C) No.4524/2010.
14. *Lt.Cdr.G.S.Beniwal* vs. *UOI & Ors.*, W.P.(C) No.4417/2010.
15. *Ex.Sep.Ram Swarup* vs. *UOI & Ors.*, W.P.(C) No.3841/2010.
16. *Indra Singh Solanki* vs. *UOI & Ors.* W.P.(C) No.3836/2010.
17. *Ex.Sep.Rai Singh* vs. *UOI & Ors.* W.P.(C) No.5206/2010.

18. *Ex.Maj.Bhagwan Singh* vs. *UOI & Ors.*, W.P.(C) No.6066/2010.
19. *Ex.Brig.R.P.Singh* vs. *UOI & Ors.*, W.P.(C) No.6183/2010.
20. *G.D.Banarasi Lal* vs. *UOI & Ors.*, W.P.(C) No.7018/2010.
21. *Ex.Capt.Sewa Ram Nigial* vs. *UOI & Anr.* W.P.(C) No.7040/2010.
22. *Ex.Maj.Gen.P.S.K.Chaudhary* vs. *UOI & Ors.* W.P.(C) No.6061/2010.
23. *GNR.B.N.Khente* vs. *UOI & Ors.*, W.P.(C) No.4652/2010.
24. *Ex.Col.Harvinder Singh Kohli* vs. *UOI & Ors.*, W.P.(C) No.5090/2010.
25. *Naib Sub.Vijay Bahadur Singh* vs. *UOI & Ors.*, W.P.(C) No.5156/2010.
26. *Ex.Gnr.Naresh Kumar* vs. *UOI & Ors.* W.P.(C) No.3828/2010.
27. *Brig.V.S.Sukhdial* vs. *UOI & Ors.* W.P.(C) No.3578/2010.
28. *Lt.Col.Rajeev Bhatt* vs. *Chief of Army Staff & Ors.*, W.P.(C) No.5764/2010.
29. *Om Prakash* vs. *UOI & Ors.*, W.P.(C) No.1918/2010.
30. *Lt.Cdr.Narvir Singh* vs. *Union of India & Ors.*, W.P.(C) No.3439/2010.
31. *Wing.Cdr.S.Yadav* vs. *Union of India & Ors.* W.P.(C) No.3086/2010.
32. *SqnLdr.Dr.Usha Atri* vs. *Union of India & Ors.* W.P.(C) No.3405/2010.
33. *Gunner Milkhi Ram* vs. *Union of India & Ors.*, W.P.(C) No.7039/2010.
34. *Gunner Sat Pal* vs. *Union of India & Ors.*, W.P.(C) No.7041/2010.
35. *Gunner Hari Singh* vs. *Union of India & Ors.* W.P.(C)

No.7042/2010.

36. *Ex.Sep.Bhagwan Singh* vs. *Union of India & Anr.* W.P.(C) No.8298/2010.

37. *Col.A.D.Nargolkar* vs. *Union of India & Ors.* W.P.(C) No.13360/2009.

38. *Col.A.D.Nargolkar* vs. *Union of India & Ors.* W.P.(C) No.13367/2009.

39. *I.R.Coelho* vs. *State of Tamilnadu,* AIR 2007 SC 861.

40. *Suryadev Rai* vs. *Ram Chandra Rai & Ors.* 2003 (6) SCC 675.

41. *L.Chandra Kumar* vs. *UOI* 1997 (3) SCC 261.

42. *Ex.Maj.R.S.Budhwar* vs. *UOI & Ors.,* 58 (1995) DLT 339.

43. *R.K.Jain* vs. *UOI* 1993 (4) SCC 119.

44. *Sakinala Hari Nath* vs. *State of A.P.* 1993 (3) ALT 471.

45. *Kihoto Hollohan* vs. *Zachillhu & Ors.,* 1992 Supp. (2) SCC 651.

46. *S.N.Mukherjee* vs. *UOI,* 1990 SC 1984.

47. *S.P.Sampath Kumar* vs. *UOI & Ors.* 1987 (1) SCC 124.

48. *Waman Rao & Ors.* vs. *UOI,* 1981 (2) SCC 362.

49. *Minerva Mills Ltd. & Ors.* vs. *UOI & Ors.* 1980 (3) SCC 625.

50. *Keshwananda Bharti* vs. *State of Kerala & Anr.* 1973 (4) SCC 225.

51. *Harinagar Sugar Mills* vs. *Shyam Sundar Jhunjhunwal* 1962 (2) SCR 339.

52. *Harivishnu Kamath* vs. *Ahmad Ishaque,* AIR 1955 SC 233.

53. *Whelchel* vs. *Mc-Donald* 340 U.S. 122 (1950).

54. *Gusik* vs. *Schilder 340 U.S. 128 (1950).*

55. *R.* vs. *Secretary of State Ex-Parte Martyn* 1949 (1) All. ER 242.

56. *R.* vs. *O.C.Depot Ex-Parte Elliot;* 1949 (1) All. ER 373.

57. *Burns* vs. *Wilson* 346 US 137 (1952-1953).

58. *King* vs. *Army Council Ex-Parte Ravenscorft* 1917 (2) KB 504.

59. *Evelyn Sutton* vs. *George Johnston* 1 Brown 427 (1787).

60. *Dawkins* vs. *Paulet* 1869 LR QV 888.

61. *Marks* vs. *Frogley* 1898 (1) QB 888.

62. *Dawkins* vs. *Lord Rokevy* 4 F&F 800.

RESULT: Preliminary question pertaining to maintainability answered in favour of the Petitioner.

PRADEEP NANDRAJOG, J.

1. For every real or imaginary problem, a law is enacted with the belief, that by this step the problem will be solved. But we find, for reasons which are fairly unexplainable, that problematic issues relating to the problem arise. The problem of delay in adjudication of disputes between members of an Armed Force and the Force in Civil Courts led to the establishment of the Armed Forces Tribunal with the pious hope that an exclusive Tribunal to decide disputes relating to Armed Forces would facilitate a speedy adjudication of disputes, but the establishment of the Tribunal has raised jurisdictional issues pertaining to the power of a High Court under Article 226 and Article 227 of the Constitution of India.

2. Much has been said about the delay in obtaining justice in Courts and one probable reason for the delay, apart from many others, is the multiple tiered adjudicatory forums available to the litigating parties. A simple revenue matter, pertaining to an entry in the record of rights, commences with a claim before the tehsildar whose decision is amenable to a challenge by way of an appeal either before the Revenue Assistant or an Additional Collector and a further forum of a Revision before the Financial Commissioner. Exhausting the channel of forums available before the Revenue Authorities, an aggrieved party can approach the High Court under its Writ or Supervisory Jurisdiction under Article 226 or Article 227 of the Constitution of India, which writ is heard by a learned Single Judge of the High Court. Further forum of a Writ Appeal or a Letters

Patent Appeal is available before a Division Bench and at the top of the pyramid would be a Petition for Special Leave to Appeal before the Supreme Court. The eviction of an unauthorized occupant from a public premises commences with a proceedings before the Estate Officer whose decision can be challenged by way of an Appeal before the District Judge and further remedies, one before a Single Judge and one before a Division Bench thereafter are available in the High Court before the destination is reached by way of a Petition for Special Leave to Appeal before the Supreme Court. An issue of levy and assessment of house tax commences with an adjudication before the Assessor and Collector against whose decision an Appeal would lie to either the District Judge or a Committee of Assessors and thereafter the water flows before a Single Judge and thereafter a Division Bench of the High Court before terminating by way of a Petition for Special Leave to Appeal before the Supreme Court. A licensing issue commences with a decision of the Licensing Inspector against which a departmental remedy by way of a representation to the Commissioner would lie before the water flows through a Single Judge and thereafter a Division Bench of the High Court before terminating by way of a Petition for Special Leave to Appeal before the Supreme Court. A simple recovery suit before a Judge, Junior Division, would result in an Appeal before a Judge Senior Division i.e. a Regular First Appeal with further remedy before the High Court by way of a Regular Second Appeal and the ultimate destination would be a Petition for Special Leave to Appeal before the Supreme Court. An ejectment petition before a Rent Controller leads to a First Appeal before the Rent Control Tribunal and if the remedy of Second Appeal against order is not provided by the statute a challenge would lie under the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India and mercifully no challenge would lie before a Division Bench and the journey would end a step earlier before the Supreme Court by way of a Special Leave to Appeal.

3. The multi tiered adjudicatory forums, having a pyramidical structure, are bound to result in congestion as we move upwards and the movement of the traffic (litigation) is bound to be slow; and if not result in making an exit from the reality of life, the slow pace certainly diminishes the value of a claim. Some believe that the existing adjudicatory mechanism, which functions in a multi-tiered pyramidically structured structure, has virtually reduced the whole system into a reductio ad

absurdum.

4. In spite of all these criticisms, it is also true to say that the system of administration of justice has withstood the test of time notwithstanding its inability to readjust itself to the changing time.

5. The concept of 'Rule of Law' is the outcome of the legal and political experience of people. The Rule of Law embodies the hard fought gains in the Common Law Traditions of England. It was the culmination of a long and bitter struggle of the common lawyers against Royal Tyranny. As far back as in the 13th Century, Bracton maintained that even Kings were subject to law. He exhorted: *'The King shall not be subject to man, but to God and the Law since law makes the King'*. James-I, who believed in the divine right of Kings, dictate that the King's will was supreme. He told the Judges not to interfere with his prerogative Courts, such as the Star Chamber. Chief Justice, Sir Edward Coke, repudiated the King's claim and declared that Judges would follow the Common Law and the King was under the Law. Indeed, the Judges won the struggle against the Royal claim to rule by prerogative.

6. The Parliament, with the aid of common lawyers, won the glorious bloodless revolution against the Kings. But, in the place of the King's supremacy, the supremacy of the Parliament came to be established. The supremacy of law, which Bracton and Coke had fought for and won, came to mean the supremacy of Parliament and its penchant for 'elective dictatorship'. Men realized that it would be a grave mistake to equate legitimacy with the sovereign will or majority rule alone to the exclusion of other constitutional values.

7. As Parliament legislated to control the rights of the citizens, the concern of the Rule of Law was to limit and discipline this sovereign power to legislate.

8. Three essential components of the concept of Rule of Law emerged. The first was that the law is supreme over the acts of both, the government and the citizens. The second was an independent judiciary to adjudicate claims between the government and the citizens and the third was the exercise of public power must find its ultimate source in some legal rule and the relationship between the State and the citizen must be regulated only by law.

9. Highlighting the second component of the concept of the Rule of Law, suffice would it be to state that laws, which ought to be equal, general and known, need to be administered by independent Judges and the three organs of the State i.e. the Legislature, the Executive and the Judiciary shall be separate.

10. The Indian Constitution rests on federalism, democracy, constitutionalism, respect for minority rights, fundamental rights of the individual and the Rule of Law. These defining principles function in symbiosis and no single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of the other.

11. The problem of judicial delays resulting from a pyramidical structure of adjudicatory forums has its roots in the concept of the Rule of Law having a feature of independent Judges, free from the control of the Executive, to decide disputes between the State and its citizens. The problem is the result of two conflicting values which society cherishes and has nurtured over the years. The first conflicting value is to secure, in the shortest possible time, the right conferred by law upon the citizen of the State and the second conflicting value is a say, in the adjudicatory process, by an independent Judge.

12. Whereas the State beckons us, in the instant writ petitions, to sacrifice the value of an independent Judge having a say in the adjudicatory process to resolve a conflict between a member of an Armed Force, subject to the Army Act, the Navy Act and the Air Force Act, and the Force and leave it to the Tribunal constituted under the Armed Forces Tribunal Act 2007 to do the needful; the result being a speedy adjudication of claims, stated to be necessary to maintain discipline in Armed Forces. The protagonists i.e. the writ petitioners state that it would be too heavy a price to pay i.e. speedy justice, if they have to sacrifice an independent Judge having a say in the adjudicatory process.

13. The cardinal question which arises for consideration in the above caption writ petitions, upon the answer whereof would depend whether the issues of merit raised in the writ petitions can be adjudicated on, is whether a writ of error/certiorari or any other writ of the like nature would lie under Article 226 of the Constitution of India against a decision of the Tribunal constituted under the Armed Forces Tribunal

Act 2007 and additionally whether a High Court can exercise the power of superintendence over said Tribunal, a power of the High Court under Article 227 of the Constitution of India.

14. The legislative competence in both, i.e. the Parliament and the State Legislatures, to effect changes in the Original Jurisdiction of the Supreme Court and the High Court can be traced not only to Article 323-A and 323-B of the Constitution of India inserted in the Constitution by the Constitution 42nd Amendment Act 1976, but even under entries 77, 78, 79 and 95 of List-I, pertaining to Parliament; and entry 65 of List-II, pertaining to the State Legislature; and entry 46 of List-III available to both. Thus, none has argued with respect to the lack of legislative competence in the Parliament to enact 'The Armed Forces Tribunal Act 2007' and we note that no section thereof is under challenge with respect to the constitutionality thereof. Pertaining to a Tribunal pertaining to an Armed Force, it may be highlighted that neither Article 323A nor Article 323B specifically refers to an Armed Force Tribunal, but entry 2 under List-I read with entry 97 of said list would be the safe source of the legislative power to create an Armed Force Tribunal.

15. Not that discipline is irrelevant in a civil society and that its relevance is only to an Armed Force, but surely everybody would agree that whereas some form of indiscipline may be accepted in the din of democracy, there is just no scope to brook even the slightest indiscipline in an Armed Force; for the reason it is recognized that in times of peace an Armed Force constitutes a grave threat to democracy. In the Indian context, by virtue of Article 33 of the Constitution of India, rights conferred by Part-III of the Constitution of India i.e. the precious fundamental rights available to persons and citizens of India can be curtailed in their application to the members of the Armed Forces and laws were enacted in India which gave the right to the Armed Forces to subject its members to punishment extending up to even the sentence of death at ˇtrials presided over by fellow members of the Armed Force, way back in the year 1982, in the decision reported as AIR 1982 SC 1414 Lt. Col. Prithi **Pal Singh Bedi vs. UOI & Ors.,** noting that military trials are subject to varying degrees of =command influence' and there was absence of even one appeal with an Appellate Forum (having power to review evidence, legal formulations, conclusions and adequacy or otherwise of punishment), and opining the same to be not in sync with democratic principles;

further noting the changes adopted in foreign jurisdictions, the Supreme Court expressed a pious hope that the legislature should earnestly consider creating an Appellate Forum, which should be free from the command influence, for members of Armed Forces; lest these brave sons and daughters of India feel being orphaned in a democratic society. The Supreme Court expressed itself, in para 45 of the decision, by highlighting that whereas a hierarchy of Courts with appellate powers has been found to be counter-productive, and suggested at least a single judicial review forum which must truly be a judicial review forum for the members of the Armed Forces to question the verdicts against them at a Court Martial. This was the clarion call which went unheeded and unnoticed till, in the year 1999, the Law Commission, in its 169th Report, titled as 'Amendment of Army, Navy and Air Force Acts – April 1999' opining that the requirement of justice and discipline for members of the Armed Forces had to march hand in hand and recommended setting up of an Adjudicatory Forum, to act as an Appellate Forum, against decisions of Military Courts and Military Tribunals. In para 1.1 and 1.2 of its report, the Law Commission highlighted that the existing mechanism of High Courts entertaining petitions under Article 226 of the Constitution of India against verdicts by Court Martials was unhealthy inasmuch as each High Court was adopting its own approach in the matter and thus there was a desirability of having a single Appellate Tribunal. In para 5.1.1 of its report, the Tribunal recommended that the Appellate Tribunal should not be a totally Civilian Appellate Tribunal as has been provided in the United Kingdom, opining that in the Indian context this may not be conducive to the discipline of the Armed Force. The Law Commission suggested a hybrid Tribunal, headed by a Civilian Judge whose other members could be drawn from retired members of the Armed Forces. In para 5.1.4 of the Report, the Commission recommended a direct Statutory Appeal to the Supreme Court against the decisions of the Tribunal and expressed a hope that if a legislation was enacted in harmony with its recommendations the Commission would expect that no High Court would entertain a writ petition under Article 226 of the Constitution of India against the orders of the Appellate Tribunal. In para 6.1 of its Report the Law Commission noted that each year thousands of writ petitions were filed by members of Armed Forces in several High Courts in India concerning their service matters and due to docket explosions in Courts these matters remain pending for years together resulting in a

sense of dissatisfaction creeping into the members of the Armed Forces; it was opined by the Law Commission that this creeping dissatisfaction was against the interest of discipline in an Armed Force. Thus, the Law Commission recommended that the Statutory Appellate Tribunal to be created should be all embracive i.e. should act as the Appellate Forum for merit review of Court Martials as also as the Forum where service disputes such as seniority, promotions and other conditions of service could be adjudicated upon. In para 6.2.4 of the report, the Law Commission opined that if an adequate remedy of appeal, on a question of law against the decision of the proposed Tribunal would be made available before the Supreme Court, in view of an adequate remedy of appeal, the High Courts would not exercise jurisdiction under Article 226 of the Constitution of India.

16. The setting up of Armed Forces Tribunal was then taken up by the 13th Lok Sabha Standing Committee on Defence, resulting in the committee recommending a Special Court of Appeal, headed by a retired Judge of the Supreme Court, independent of service headquarters, to be constituted for the redressal of grievances of service personnel, but restricted the same against decisions of Military Courts. The Parliament took up the matter further and we saw the birth of 'The Armed Forces Tribunal Act 2007' when having been passed by both the Houses of Parliament, The Armed Forces Tribunal Bill received the assent of the President of India on the 20th day of December 2007 and came on the Statute Book as THE ARMED FORCES TRIBUNAL ACT 2007 (ACT NO.55 OF 2007).

17. It was but necessary that in the Statement of Objects and Reasons, the necessity of the legislation was traced to the observations of the Supreme Court in **Prithi Pal Singh Bedi's** case (supra).

18. As per the Preamble, the Act aims to provide, for the adjudication or trial, by Armed Forces Tribunal, of disputes and complaints with respect to commission, appointment, enrollment and conditions of service in respect of persons subject to the Army, Navy and Air Force Act and additionally to provide for appeals arising out of orders, findings or sentences of Court Martial held under the said three acts. In other words, the Tribunal exercises an Appellate Jurisdiction with respect to orders, findings or sentences of Court Martials and exercises Original Jurisdiction with respect to service disputes.

19. As per Section 5 of the Act, the Tribunal is to consist of a Chairperson and such number of Judicial and Administrative Members as the Central Government may decide with the power and jurisdiction of the Tribunal to be exercised by Benches thereof. Vide sub-section 2 of Section 5, a Bench has to consist of 1 Judicial Member and 1 Administrative Member. As per Section 6, the qualification for being appointed as the Chairperson of the Tribunal is a person being a retired Judge of the Supreme Court or a retired Chief Justice of a High Court. The qualification for a Judicial Member is a person who is or has been a Judge of a High Court. To be qualified for appointment as an Administrative Member, a person must have held the rank of Major General or above for at least 3 years in the Army or equivalent rank in the Navy or the Air Force or is a Judge Advocate General for at least 1 year. Appointment of Chairperson and Members, as per Section 7 of the Act, is by the President of India; with consultation with the Chief Justice of India. As per sub-section 2 of Section 9 of the Act, the President has the power to remove the Chairperson or a Member upon ground of proof of misbehaviour or incapacity after an inquiry is made by a sitting Judge of the Supreme Court. The staff of the Tribunal is determined by the Central Government as per Section 13 of the Act.

20. Vide Section 14 of the Act, the Tribunal is vested with the jurisdiction relating to service matters pertaining to Members of the Armed Forces and vide Section 15 of the Act, the Tribunal is empowered to entertain appeals against Court Martials. Section 14 and 15 need to be noted and hence we reproduce the same as under:-

> **"14. Jurisdiction, powers and authority in service matters -** (1) Save as otherwise expressly provided in this Act, the Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority, exercisable immediately before that day by all courts (except the Supreme Court or a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to all service matters.
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> (2) Subject to the other provisions of this Act, a person aggrieved by an order pertaining to any service matter may make an application to the Tribunal in such form and accompanied by such documents or other evidence and on payment of such fee as may be prescribed.

> (3) On receipt of an application relating to service matters, the Tribunal shall, if satisfied after due inquiry, as it may deem necessary, that it is fit for adjudication by it, admit such application; but where the Tribunal is not so satisfied, it may dismiss the application after recording its reasons in writing.
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> (4) For the purpose of adjudicating an application, the Tribunal shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, (5 of 1908) while trying a suit in respect of the following matters, namely:-
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> (a) summoning and enforcing the attendance of any person and examining him on oath;
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> (b) requiring the discovery and production of documents;
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> (c) receiving evidence on affidavits;
>
> (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, (1 of 1872). requisitioning any public record or document or copy of such record or document from any office;
>
> (e) issuing commissions for the examination of witnesses or documents;
>
> (f) reviewing its decisions;
>
> (g) dismissing an application for default or deciding it ex parte;
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> (h) setting aside any order of dismissal of any application for default or any order passed by it ex parte; and
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> (i) any other matter which may be prescribed by the Central Government.
>
> (5) The Tribunal shall decide both questions of law and facts that may be raised before it.
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> **15. Jurisdiction, powers and authority in matters of appeal against court-martial.-** (1) Save as otherwise expressly provided in this Act, the Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable under this Act in relation to appeal against any order, decision, finding

or sentence passed by a court-martial or any matter connected therewith or incidental thereto.

(2) Any person aggrieved by an order, decision, finding or sentence passed by a court-martial may prefer an appeal in such form, manner and within such time as may be prescribed.

(3) The Tribunal shall have power to grant bail to any person accused of an offence and in military custody, with or without any conditions which it considers necessary:

Provided that no accused person shall be so released if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life.

(4) The Tribunal shall allow an appeal against conviction by a court-martial where-

(a) the finding of the court-martial is legally not sustainable due to any reason whatsoever; or

(b) the finding involves wrong decision on a question of law; or

(c) there was a material irregularity in the course of the trial resulting in miscarriage of justice,

but, in any other case, may dismiss the appeal where the Tribunal considers that no miscarriage of justice is likely to be caused or has actually resulted to the appellant:

Provided that no order dismissing the appeal by the Tribunal shall be passed unless such order is made after recording reasons therefore in writing.

(5) The Tribunal may allow an appeal against conviction, and pass appropriate order thereon.

(6) Notwithstanding anything contained in the foregoing provisions of this section, the Tribunal shall have the power to—

(a) substitute for the findings of the court-martial, a finding of guilty for any other offence for which the offender could have been lawfully found guilty by the court-martial and pass a sentence afresh for the offence specified or involved in such findings

under the provisions of the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950, (45 of 1950), as the case may be; or

(b) if sentence is found to be excessive, illegal or unjust, the Tribunal may—

(i) remit the whole or any part of the sentence, with or without conditions;

(ii) mitigate the punishment awarded;

(iii) commute such punishment to any lesser punishment or punishments mentioned in the Army Act, 1950, (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950), as the case may be;

(c) enhance the sentence awarded by a court-martial:

Provided that no such sentence shall be enhanced unless the appellant has been given an opportunity of being heard.

(d) release the appellant, if sentenced to imprisonment, on parole with or without conditions;

(e) suspend a sentence of imprisonment;

(f) pass any other order as it may think appropriate."

(7) Notwithstanding any other provisions in this Act, for the purposes of this section, the Tribunal shall be deemed to be a criminal court for the purposes of sections 175, 178, 179, 180, 193, 195, 196 or 228 of the Indian Penal Code (45 of 1860) and Chapter XXVI of the Code of Criminal Procedure, 1973. (2 of 1974)

21. Vide Section 19 of the Act, the Tribunal is clothed with the power to punish for contempt but only if the contempt arises out of using insulting or threatening language or by causing any interruption or disturbance in the proceedings of the Tribunal. Relevant would it be to note that the sui generis power of contempt vested in superior Courts i.e. the High Court and the Supreme Court to enforce their orders is not vested in the Armed Forces Tribunal.

22. Vide Section 23 of the Act, the Tribunal is not bound by the procedure prescribed by the Code of Civil Procedure 1908 and is free to be guided by its own procedures. Chapter-V, having 2 sections i.e. Section 30 and Section 31, deals with Appeals to the Supreme Court and being relevant for our discussion are noted hereunder:-

> **"30. Appeal to Supreme Court .-** (1) Subject to the provisions of section 31, an appeal shall lie to the Supreme Court against the final decision or order of the Tribunal (other than an order passed under section 19):
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> Provided that such appeal is preferred within a period of ninety days of the said decision or order:
>
> Provided further that there shall be no appeal against an interlocutory order of the Tribunal.
>
> (2) An appeal shall lie to the Supreme Court as of right from any order or decision of the Tribunal in the exercise of its jurisdiction to punish for contempt:
>
> Provided that an appeal under this sub-section shall be filed in the Supreme Court within sixty days from the date of the order appealed against.
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> (3) Pending any appeal under sub-section (2), the Supreme Court may order that—
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> (a) the execution of the punishment or the order appealed against be suspended; or
>
> (b) if the appellant is in confinement, he be released on bail:
>
> Provided that where an appellant satisfies the Tribunal that he intends to prefer an appeal, the Tribunal may also exercise any of the powers conferred under clause (a) or clause (b), as the case may be.
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> **31. Leave to appeal.-** (1) An appeal to the Supreme Court shall lie with the leave of the Tribunal; and such leave shall not be granted unless it is certified by the Tribunal that a point of law of general public importance is involved in the decision, or it appears to the Supreme Court that the point is one which ought to be considered by that Court.
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> (2) An application to the Tribunal for leave to appeal to the Supreme Court shall be made within a period of thirty days beginning with the date of the decision of the Tribunal and an application to the Supreme Court for leave shall be made within a period of thirty days beginning with the date on which the application for leave is refused by the Tribunal.
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> (3) An appeal shall be treated as pending until any application for leave to appeal is disposed of and if leave to appeal is granted, until the appeal is disposed of; and an application for leave to appeal shall be treated as disposed of at the expiration of the time within which it might have been made, but it is not made within that time."

23. Section 33 of the Act provides for exclusion of jurisdiction of civil courts and reads as under:-

> **"33. Exclusion of jurisdiction of civil courts.-** On and from the date from which any jurisdiction, powers and authority becomes exercisable by the Tribunal in relation-to service matters under this Act, no Civil Court shall have, or be entitled to exercise, such jurisdiction, power or authority in relation to those service matters."

24. A perusal of the statutory provisions of the Armed Forces Tribunal Act 2007 would reveal that relating to the jurisdiction of the Tribunal, vide Section 14, an original jurisdiction is created with respect to service matters between the members of an Armed Force and the Force and vide Section 15 the Tribunal has been vested with an appellate jurisdiction over decisions, findings and sentence passed by a Court Martial. It is also important to note that Sub-Section 1 of Section 14 preserves the jurisdiction of the Supreme Court and of the High Court and needless to state the jurisdiction of High Court preserved is under Article 226 and Article 227 of the Constitution of India. Vide Section 19, a limited power to punish for contempt is vested in the Tribunal and one find that the same is limited to using insulting or threatening language or by causing interruption or disturbance in the proceedings of the Tribunal. The contempt jurisdiction does not relate to willful disobedience to a judgment, direction or order passed by the Tribunal.

25. The right to file an appeal before the Supreme Court created vide Section 30 of the Act is subject to Section 31 of the Act and this means that the right to appeal to the Supreme Court is not a matter of right but is a matter of discretion to be exercised by the Tribunal upon an application to be filed seeking leave of the Tribunal to file an appeal to the Supreme Court. Further, the discretion of the Tribunal to grant leave is not with respect to every point of law which may have arisen for consideration before the Tribunal, but is limited to a point of law of general public importance. Of course, under Section 31 a power has been vested in the Supreme Court to grant leave to appeal if the Supreme Court would be satisfied that the point raised before it is one which ought to be considered by the Supreme Court. In other words the right to appeal conferred by the Act is a very narrow right and is not akin to a statutory right of appeal, as a matter of right, understood in ˇlaw.

26. It needs to be highlighted that the power to appoint the Chairperson and members of the Tribunal is vested in the executive.

27. It is time now to note the contentions urged by rival parties.

28. Sh.Vinay Garg learned counsel who argued, with his usual adroitness, the lead matter on behalf of the writ petitioners urged that with the decision of the Supreme Court reported as 1997 (3) SCC 261 **L.Chandra Kumar Vs. UOI** the debate with respect to alternative forums of judicial review and the power of the High Court under Article 226 and Article 227 of the Constitution of India has been set to rest. The law being that the power of judicial review vested in constitutional courts is not only an integral part but is a basic feature of the Constitution of India and cannot be curtailed by legislation. Learned counsel was at pains to take us through the growth of law on the subject and showed us the drifting currents in the stream of jurisprudence pertaining to judicial review. With respect to clause 4 of Article 227 of the Constitution of India, which apparently seeks to take away the jurisdiction of High Court under Article 227 of the Constitution of India pertaining to Tribunals constituted for Armed Forces, learned counsel drew our attention to the Constitution Assembly Debates and highlighted the distinction between the judicial power of superintendence and the administrative power of superintendence and urged that only administrative superintendence over Tribunals relating to Armed Forces was taken away from the High Courts and the power of judicial superintendence was retained. Learned counsel

urged that ˇSection 14 of the Act recognized the original power of the Tribunal to adjudicate service disputes relating to members of an Armed Force and the Force and thus urged that qua decisions of the Tribunal pertaining to service matters the power of the High Court under Article 226 and Article 227 of the Constitution of India remained intact. Qua Section 15 of the Act learned counsel submitted that the same recognized the appellate power of the Tribunal with respect to decisions and sentences by a Court Martial and submitted that qua said decision of the Tribunal the power of judicial review under Article 226 and 227 of the Constitution of India was retained but counsel conceded that exercise thereof would be on very narrow grounds, on the well-recognized principle evolved by Courts that in relation to dispute on facts, to be gathered or inferred from the evidence led, the judicial review would be limited to determine whether it is a case of no evidence and no further; and on other issues relating to jurisdiction, the judicial review would be limited to identification of proceedings suffering from a jurisdiction error or an error of law apparent on the face of the record. Counsel highlighted that findings in sentence at a Court Martial are incapable of execution unless confirmed by an Executive Authority and thus urged that these proceedings are akin to a domestic proceedings in civil service. Other learned counsel for the petitioners adopted aforenoted line of argument.

29. Per contra, Sh.Atul Nanda learned senior counsel, who argued with equal aplomb for the respondents urged that as against civil jurisprudence, military jurisprudence had grown differently and historically Courts in common law and non common law jurisdictions had not issued prerogative writs to military courts or tribunals. Conceding that power of judicial review under Article 226 of the Constitution was recognized to be a part of the basic structure of the Constitution, counsel urged that the legislative intent to create an Armed Force Tribunal which resulted in the legislative mandate under the Armed Forces Tribunal Act 2007 is to exclude the jurisdiction of the High Court under the Article 226 and Article 227 of the Constitution of India and for which submission learned senior counsel urged that vis-à-vis civil service, requirement of highest standard of discipline in an armed service was essential to a democratic society requiring speedy adjudication of disputes relating to members of an Armed Force and therefrom learned senior counsel urged that keeping in view said distinction between a civil service and a military service, on the principle of comity, speedy justice and the requirement of reducing

multiplicity of litigation, it has to be held that a High Court either does not have or if having, would refrain from exercising its power under Article 226 of the Constitution of India. With respect to the power of superintendence under Article 227 of the Constitution of India, with reference to clause 4 thereof, learned senior counsel urged that the complete power of superintendence created under Article 227 was non-applicable to Tribunals or Courts constituted by a law relating to the Armed Forces and thus counsel urged that even judicial superintendence was taken away with respect to the Armed Forces Tribunal. Learned counsel urged that the power under Article 226 of the Constitution of India to correct decisions passed by authorities and persons subordinate to the High Court did not extend to issue directions to exercise discretion in a particular manner, which power was a part of the jurisdiction under Article 227 of the Constitution, and thus learned senior counsel urged that de hors Article 227 of the Constitution of India, the High Court would be powerless to issue any direction to the Tribunal to exercise its jurisdiction in a particular manner.

30. The contention of Sh.Atul Nanda that the power of High Courts to issue writs under Article 226 of the Constitution of India must be tested on the touchstone of the well-settled principle of military jurisprudence that members of Armed Forces are a separate class; so treated in jurisdictions all over the world, and the consistent view taken by Courts in England, America and Canada is that issues of Military Law have to be treated as outside the scope and realm of ordinary civil jurisprudence requires us to briefly reflect upon the various decisions cited at the bar by Sh.Atul Nanda learned Senior Counsel. We shall link to this discussion the submission that the historical background under which the Armed Forces Tribunal was created reflects the legislative intent to take away the jurisdiction of High Court under Article 226 and Article 227 of the Constitution.

31. Learned senior counsel rightly pointed out, a submission which was not controverted by learned counsel for the petitioners, that in time of peace, a standing army was considered being a threat to the Rule of Law and this threat to a democratic nation by an undisciplined army was one of the foundation of military law i.e. Code of Discipline and secondly that issues of military discipline were different than those of disciplining the civil servant and indeed the exigencies of a military service were

qualitatively and quantitatively different than those of a civil service.

32. But, what was submitted by learned counsel for the petitioners was that the aforesaid foundation merely gave birth to the extent of judicial review power which a constitutional Court would exercise with respect to affairs of the military and affairs of civil services.

33. In the treatise *'Introduction to the Study of the Law of the Constitution'* 6th Edition, A.V.Dicey set out the historical element why it was considered necessary to have a separate set of Codes of Discipline as the foundation for military law. The learned author opined as under:-

> "As to the Standing Army - A permanent army of paid soldiers, whose main duty is one of absolute obedience to commands, appears at first sight to be an institution inconsistent with that rule of law or submission to the civil authorities, and especially to the judges, which is essential to popular or Parliamentary government; and in truth the existence of permanent paid forces has often in most countries and at times in England-notably under the Commonwealth been found inconsistent with the existence of what, by a lax though intelligible mode of speech, is called a free government. The belief indeed of our statesmen down to a time considerably later than the Revolution of 1689 was that a standing army must be fatal to English freedom, yet very soon after the Revolution it became apparent that the existence of a body of paid soldiers was necessary to the safety of the nation. Englishmen, therefore, at the end of the seventeenth and the beginning of the eighteenth century, found themselves placed in this dilemma. With a standing army the country could not, they feared, escape from despotism; without a standing army the country could not, they were sure, avert invasion; the maintenance of national liberty appeared to involve the sacrifice of national independence. Yet English statesmanship found almost by accident a practical escape from this theoretical dilemma, and the Mutiny Act, though an enactment passed in a hurry to meet an immediate peril, contains the solution of an apparently insolvable problem.
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> The position of the army in fact was determined by an adherence on the part of the authors of the first Mutiny Act to the fundamental principle of English law, that a soldier may, like a

clergyman, incur special obligations in his official character, but is not thereby exempted from the ordinary liabilities of citizenship.

The object and principles of the first Mutiny Act of 1689 are exactly the same as the object and principles of the Army Act, 1881, under which the English army is in substance now governed. A comparison of the two statutes shows at a glance what are the means by which the maintenance of military discipline has been reconciled with the maintenance of freedom, or, to use a more accurate expression, with the supremacy of the law of the land."

34. Similar ethos is to be found in the treatise *'The Federalist and Other Constitutional Papers'* by Hamilton, Jay, Madison.

35. Since at the heart of the matter at hand is the issue whether this Court can exercise jurisdiction under Article 226 and/or Article 227 of the Constitution of India with respect to decisions pronounced by the Armed Forces Tribunal constituted under the Armed Forces Tribunal Act 2007, we need to embark upon the journey to peep into the past precedents and see how this jurisprudential concept: of the different requirements of military discipline vis-à-vis civil discipline affected the remedies which could be availed of by members of Armed Forces before civil courts.

36. We deal with the various opinions and decisions cited by Sh.Atul Nanda, learned senior counsel.

37. At the forefront, learned senior counsel had referred to and had read out extracts from *'Halsbury's Laws of England'* 4th Edition, Vol.41.

38. We may only point out that the discussion on the subject in 'Halsbury's Laws of England' is very wide and exhaustive, but with reference to para 118 of the Commentary, it stands out that as per the treatise, the bar is not absolute. Pertaining to what could be called a writ of error or a writ of certiorari with which we are familiar with in India, it has been opined that the order of certiorari, to quote: *'will not, therefore, be directed to an ecclesiastical Court or to a Court which is not one of civil jurisdiction, for example a court-martial, unless it is shown that civil rights have been affected.'* (Underlined emphasized)

39. Learned senior counsel had relied upon observations in the decisions reported as 1 Brown 427 (1787) **Evelyn Sutton Vs. George**

Johnston. 4 F&F 800 **Dawkins Vs. Lord Rokevy.** 1869 LR QV 888 **Dawkins Vs. Paulet.** 1898 (1) QB 888 **Marks Vs. Frogley.** 1917 (2) KB 504 **King Vs. Army Council Ex-Parte Ravenscorft.** 1949 (1) All. ER 242 **R. Vs. Secretary of State Ex-Parte Martyn** and 1949 (1) All. ER 373 **R. Vs. O.C.Depot Ex-Parte Elliot;** all of which pertain to opinions rendered by the Judges in England. Two American decisions by judges in America, reported as 68 US 243 (1863) **Ex-Parte Valladingham** and 346 US 137 (1952-1953) **Burns Vs. Wilson** were also cited. One decision of the Supreme Court of Canada reported as 1956 SC Canada 154 Queen Vs. J.R.C.White was also cited.

40. Dealing with the two decisions of the U.S.Courts which were cited, it may be noted that in Ex-parte Vallandigham, the prisoner Vallandigham, a resident of the State of Ohio, and a citizen of the United States, was arrested at his residence and taken to Cincinnati on 5.5.1863 and imprisoned. On the following day, he was arraigned before a Military Commission on the charge of having expressed sympathies for those in Arms against the Government of the United States, and for having uttered, in a speech at a public meeting, disloyal sentiments and opinions with the purported object and purpose of weakening the power of the Government in its effort for the suppression of an unlawful rebellion.

41. The case before the Supreme Court of the United States arose on a petition for a certiorari. The Court was concerned with the 3rd Article of the U.S.Constitution which is the source of the foundation of the judicial power of the Supreme Court of the United States and the inferior Courts as the Congress may, from time to time, ordain and establish. Noting that appellate jurisdiction was vested in the U.S.Supreme Court as also the inferior Courts, it was observed that there was no analogy between the power given by the Constitution and Law of the United States to the Supreme Court and other inferior Courts of the United States, and to the Judges of them, to issue such process and the prerogative power available with the Courts in England. The Court refused to review or revise the proceedings of the Military Commission.

42. It is apparent that the decision was rendered at a very nascent stage of the growth of Jurisprudence in the United States of America. The decision relates to the year 1863. The observations in the said decision, do bring out a view which was sought to be propounded by Sh.Atul Nanda, learned senior counsel, but we must hasten to add that

a meaningful perusal of the decision would reveal that issues of fact, relatable to jurisdiction and on merits of the decision of the Military Commission, were sought to be raised in an action akin to a merit review and the Court declined to exercise such wide jurisdiction.

43. But, later decisions of the Courts in the United States throw more light as to how the Jurisprudence grew in the United States and since one such later decision was relied upon by Sh.Atul Nanda i.e. the one in **Burns's** case (supra), we note the same. The United States Court of Appeals for the District of Columbia Circuit relied upon the earlier decision reported as 137 U.S. SCR 147 **Re Grimley** where it was observed that the law which governs a civil court in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is sui generis; it must be so, because of the peculiar relationship between the civil and military law. But, relevant would it be to highlight that in the majority opinion, penned by Chief Justice Vinson, in which opinion Justice Reed, Justice Burton and Justice Clark joined, at page No.142 of the opinion, a caveat is to be found, wherein it was observed:-

> "We have held before that this does not displace the civil courts jurisdiction over an application for habeas corpus from the military prisoner. **Gusik Vs. Schilder** 340 U.S. 128 (1950). But these provisions do mean that when a military decision has dealt fully and fairly with an allegation raised in that application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. **Whelchel Vs. Mc-Donald** 340 U.S. 122 (1950)." (Underlined emphasized).

44. On facts, petitioners therein tried separately by Air Force Court Martial on the Island of Guam were found guilty of murder and rape and were sentenced to death. The petitioners had exhausted all remedies available to them under the Articles of War for review of their convictions by the Military Tribunals. They then filed petitions for writs of habeas corpus in the Unites States District Court for the District of Columbia alleging that they had been denied due process of law. They charged of being subjected to illegal detention; under coercion confessions being extorted and counsel of their choice denied tothem; they alleged that the

military authorities had suppressed evidence favourable to them and had procured perjured testimony against them and lastly urged that their trials were conducted in an atmosphere of terror and vengeance, conducive to mob violence instead of fair-play. The District Court dismissed the applications without hearing evidence, and without further review, after satisfying itself that the Court Martial, which tried petitioners had jurisdiction over their person. The Court of Appeals affirmed the District Courts Judgment, but after expanding the scope of review by giving petitioners' allegation full consideration on their merits, reviewing in detail the mass of evidence to be found in the transcripts of the trial and other proceedings before the Military Court. It was in this backdrop of the past litigation, observations made in the judgment cited have to be understood and needless to state the caveat lodged and as extracted by us in the preceding para has to be kept in mind, with further amplification that in the next but one page i.e. page No.144, Vinson CJ categorically held:-

> "These records make it plain that the military courts have heard petitioners out on every significant allegations which they now urge. Accordingly, it is not the duty of the civil courts simply to repeat that process – to re-examine and re-weigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the Military has given fair consideration to each one of these claims. Whelchel Vs.Mc-Donald (supra). We think they have.. (Underlined emphasized).

45. The action in **Evelyn Sutton's** case (supra), **Dawkins Vs. Lord Rokeby's** case (supra), **Dawkins Vs. Paulet's** case (supra) and **Marks's** (case) supra pertained to actions brought before a civil Court for damages. The action in **Evelyn Sutton's** case (supra) was by a Captain in the Navy who accused his Commander-in-Chief of acting in malice, under colour and pretence, of falsely, maliciously and wrongfully alleging offences committed by the plaintiff, after at the trial by a Court Martial, the plaintiff was honorarily acquitted. The action in **Dawkins Vs. Lord Rokeby's** case (supra) was against the Commander of the Army, on the allegation that on account of a malicious action initiated against the plaintiff he was falsely imprisoned and removed from service. Damages were sought. The action in **Dawkins Vs. Paulet's** case (supra) was also for damages on account of stated libel. The defendant had

addressed a communication to the Adjutant-General of the Army reflecting on the character and capacity of the plaintiff; a Captain in the Coldstream Guards with a request that the conduct be investigated by a Court of Inquiry in which the plaintiff lost his commission and was compelled to leave the regiment. The action in **Marks's** case (supra) was on the tort of assault and false imprisonment by the plaintiff, an Army Man and subjected to Military Law, at the hands of his superior officers.

46. Various observations in the decisions aforenoted which were relied upon which state that civil courts jurisdiction cannot be invoked to redress grievances arising between persons subject to military law and that the legislature excluded by interference of the civil courts must be read to confine all matter of complaint to the military authorities, have to be understood with reference to the nature of the actions brought before the common Courts in England. Suffice would it be to state that merely because an indictment by a superior officer failed to hold good at a trial before a military court or the nature of arrest was found to be wanting or force was used while arresting a person subject to military discipline, civil actions were held not maintainable. It may be noted that in each case active malice was not established at the trial before the military court, and it was held that it would be impermissible to have a trial before a common court on the issue of active malice. We may simply highlight further that these decisions have no concern and do not relate to the power of superintendence exercised by superior courts in England to issue various writs.

47. The decision in **Ex-Parte Ravenscroft's** case (supra) is an authority on the point that: (i) a civil court will not intervene in matters relating to military law prescribing rules for the guidance of officers when equally appropriate remedy was open to the officer concerned under the Army Act; (ii) the civil court will not entertain an action relatable to a discretionary power of the Army Council to assemble a Court of Inquiry; for the obvious reason no order can be issued to an authority to exercise a discretionary discretion in a particular way; and (iii) the remedy by mandamus would not be issued in circumstances which can make the mandamus in-effective at the hand of the authority to whom the mandamus is issued. But relevant would it be to note that Chief Justice Viscount, at page 511 of the opinion, clearly stated:-

> "I do not, however, wish to be taken as deciding that in no circumstances could this Court issue a writ of mandamus to the Army Council even on proof of a breach of duty which the applicant has a right to enforce. Upon so important and far reaching a proposition of law I desire to reserve my opinion."

48. In the concurring opinion, Ridley J. also observed:-

> "If there be a particular duty imposed by statute which must be obeyed implicitly and which allows no scope for discretion, matters assume a different aspect."

49. The aforesaid observations have to be read in the context of the view taken in the said decision when the Court refused to exercise its power of superintendence and refused to issue a writ of mandamus to the Army Council commanding them to cause a Court of Inquiry to re-assemble to hear the charge, but said that in an appropriate case, judicial review was permissible by a civil court.

50. The decision in **R. Vs. Secretary of State Ex-Parte Martyn** is a short and a cryptic decision, without much discussion, but relevant would it be to note that even in said decision it was observed: "……. But it is not a matter for this Court, *which can only interfere with military courts and matters of military law in so far as the civil rights of the soldier or other person with whom they deal may be affected."* The aforesaid observations make it clear that the Court did not lay down that proceedings or decisions before military courts or matters of military law were completely immune to a judicial review before a civil court.

51. In the decision of **R. Vs. O.C. Depot Ex. Parte Elliot** (supra), a deserter arrested abroad and subjected to a Court Martial was the subject matter of a writ of habeas corpus alleging that he was not a person subject to military law and thus his custody was wrongful. The issue in question had been gone into by the Divisional Court and on merit the detention was held to be lawful. The matter was thereafter considered by the King's Bench Division. The Division Bench found on merits that the person concerned was a deserter and on merit found that though released for two months, had received orders of recall which were disobeyed. Thus, observations in the said decision which were relied upon by learned counsel are of hardly any use for the reason the decision

shows that the King's Bench Division went into the merits and decided against the prisoner who claimed of not being subject to the military court by finding as a matter of fact and reasoning that he was a deserter.

52. The decision of the Supreme Court of Canada in **J.R.C. White's** case (supra) was on an action by J.R.C.White, a former member of the Royal Canadian Mounted Police, questioning his conviction by a Superintendent of the Force for the misdemeanour of condoning the consumption of intoxicating liquor by a female juvenile, and of associating with a female of questionable character and registering at a hotel under an assumed name. The Court of Appeal for British Columbia reversed an order by the Court of First Instance refusing certiorari. The Supreme Court of Canada allowed the appeal and set aside the judgment of the Court of Appeal and restored the order of the Court of First Instance. It may be noted that J.R.C.White was dismissed from the force and had questioned the verdict on 15 counts all of which related to what we may call a merit review.

53. No doubt, the Canadian Supreme Court observed that the Parliament had specified the punishable breaches of discipline and has equipped the Force with its own courts for dealing with them; and it needs no amplification to demonstrate the object of that investment; and that such a court is prima facie to be looked upon as being the exclusive means by which that particular purpose is to be attained, but hastened to add:-

> "Unless, therefore, the powers given are abused to such a degree as puts action taken beyond the purview of the statute or unless the action is itself unauthorized, that internal management is not to be interfered with by any superior court in exercise of its long established supervisory jurisdiction over inferior tribunals."

54. It is also important to note that the Canadian Supreme Court found that the Court of First Instance had found that the materials furnished by affidavits showed that it could not be inferred that the proceedings infringed were not supported by evidence or were outside the authority of the statute or the underlying principles of judicial process to be deemed annexed to the legislation concerned. It is apparent that even the Canadian Supreme Court was conscious of judicial review to be exercised on the known principles of writ of error or a writ of certiorari,

highlighted by the fact that the Canadian Supreme Court found that it was not shown that the proceedings infringed were not supported by any evidence nor was it shown that any underlying principle of judicial process which was a part of the legislation concerned was infringed.

55. It would thus be incorrect to urge that world over, the ordinary civil courts were historically not exercising any kind of supervisory control over military courts and tribunals.

56. It may be true that in **Col. Prithipal Singh Bedi's** case (supra), way back in the year 1982, the Supreme Court expressed an opinion that a single judicial review forum was desirable not only qua decisions and sentences at a Court Martial but even to adjudicate service disputes between members of an Armed Force and the Force, but it has to be kept in mind, as would be noticed hereinafter, that the law relating to judicial review by superior courts being a basic feature of the Constitution had yet to be developed. But that apart, it needs to be highlighted that in para 45 of its decision, while expressing the desirability to constitute a single judicial review forum for members of the Armed Forces, the Supreme Court hedged the words: 'which must truly be a judicial review forum'.

57. We shall be dealing with what has been interpreted to be a truly judicial review forum in the context of denuding High Court jurisdiction under Article 226 of the Constitution of India with reference to the decision of the Supreme Court reported as **UOI Vs. R. Gandhi** 2010 (5) SCALE 514 and would humbly request the read of our opinion to be patient with us. We assure that we shall so revert.

58. We have noted hereinabove, in para 15, the legislative intent which could be traced to the 169th report of the Law Commission titled: *'Amendment of Army, Navy and Air Force Acts – April 1999'* and would simply highlight that the Law Commission, vide para 5.1.1 of its report, recommended that the proposed tribunal should not be a totally Civil Appellate Tribunal (as has been provided in the United Kingdom) opining that, in the Indian context this may not be conducive to the discipline of the Armed Force and the Law Commission suggested a hybrid Tribunal consisting of Civilian Judges and other members drawn from the retired Armed Force Personnel. Indeed, as noted by us in para 19 above, the Armed Force Tribunal which has been constituted under the Act is a

hybrid Tribunal consisting of civilian Judges and retired Members drawn from the Armed Forces. We highlight that the appointment of Members of the Tribunal is by the Executive albeit with consultation with the Chief Justice of India. The legal consequence of this would be discussed by us a little later when we analyze the decision of the Supreme Court in **UOI Vs. R.Gandhi** (supra).

59. The discussion during the Constituent Assembly Debates on 16.10.1949 pertaining to draft Article 112 of the draft constitution which ultimately resulted in Article 136 of the Constitution of India as we find and Article 203 of the draft constitution which finds itself as Article 227 of the Constitution of India is of importance on the subject and thus we spend a little time on the subject.

60. Sh.T.T.Krishnamachari moved an amendment No364 and suggested Article 112 as proposed to be re-drafted and clause 4 to be inserted after clause 3 to Article 203 of the draft of the proposed constitution as under:-

> "112. (1) The Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India.
>
> (2) Nothing in clause (1) of this article shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."
>
> X X X
>
> "(4) Nothing in this Article shall be deemed to extend the powers of superintendence of a High Court over any Court or Tribunal constituted by or under any law relating to the Armed Forces."

61. Prof.Shibban Lal Saxena immediately rose to his feet stating that he wish to bring a charge of breach of faith against Dr.Ambedkar in this matter. He stated that sometime ago he had tabled an amendment to Article 112 in which he had specifically desired that provision should be made that persons sentence to death by Court Martial should be able to appeal to the Supreme Court and Dr.Ambedkar had assured that such

persons are covered by Article 112 and the Supreme Court could take notice of such persons under its said powers. He raised an issue of probably the discussion in the House being reported in the press and the Defence Department trying to strengthen itself and Mr.T.T.Krishnamachari extending a helping hand to the Defence Department. Stating that this was not fair as he had withdrawn his amendment on the assurance that the law protected members of an Armed Force against wrong decisions at a Court Martial. He highlighted that after the Second World War, in Britain a Commission was appointed to study the administration of Military Court Martials and recommended procedures to be made more civilized and that in the name of discipline people should not be butchered. He concluded his protest by stating that not only considered the provision unfair but against the promise given to the House by Dr.Ambedkar.

62. After Sh.R.K.Shidhava, Sh.B.Das and Pandit Thakur Das Bhargava made interjections, Dr.B.R.Ambedkar responded in the following words:-

> "Mr.President Sir, in view of the observations made by my hounorable Friend, Prof.Shibban Lal Saksena, it has become incumbent upon me to say something in relation to the proposed article moved by my honourable Friend, Mr.T.T.Krishnamachari. It is quite true that on the occasion when we considered article 112 and the amendment moved by my honourable Friend, Prof. Shibban Lal Saksena. I did say that under article 112 there would be jurisdiction in the Supreme Court to entertain an appeal against any order made by a Court-Martial. Theoretically that proposition is still correct and there is no doubt about it in my mind. But what I forgot to say is this: That according to the rulings of our High Courts as well as the rulings of the British courts including those of the Privy Council, it has been a well recognized principle that civil courts, although they have jurisdiction under the statute will not exercise that jurisdiction in order to disturb any finding or any decision given or order made by the Court-martial. I do not wish to go into the reason why the civil courts of superior authority, which notwithstanding the fact that they have this jurisdiction have said that they will not exercise that jurisdiction; but the fact is there and I should have thought that if our courts in India follow the same decision which has been given by

British courts – the House of Lords, the King's Bench Division as well as the Privy Council and if I may say so also the decision given by our Federal Court in two or three cases which were adjudicated upon by them – there would be no necessity for clause (2); but unfortunately the Defence Ministry feels that such an important matter ought not to be left in a condition of doubt and that there should be a statutory provision declaring that none of the superior civil courts whether it is a High Court or the Supreme Court shall exercise such jurisdiction as against a court or tribunal constituted under any law relating to the Armed Forces.

This question is not merely a theoretical question but is a question of great practical moment because it involves the discipline of the Armed Forces. If there is anything with regard to the armed forces, it is the necessity of maintaining discipline. The Defence Ministry feel that if a member of the armed forces can look up either to the Supreme Court or to the High Court for redress against any decision which has been taken by a court or tribunal constituted for the purpose of maintaining discipline in the armed forces, discipline would vanish. I must say that this is an argument against which there is no reply. That is why clause (2) has been added in article 112 by this particular amendment and a similar provision is made in the provisions relating to the powers of superintendence of the High Courts. That is my justification why it is now proposed to put in clause (2) of Article 112.

I should, however, like to say this that clause (2) does not altogether take away the powers of the Supreme Court or the High Court. The law does not leave a member of the armed forces entirely to the mercy of the tribunal constituted under the particular law. For, notwithstanding clause (2) of article 112, it would still be open to the Supreme Court or to the High Court to exercise jurisdiction, if the court martial has exceeded the jurisidiction which has been given to it or the power conferred upon it by the law relating to armed forces. It will be open to the Supreme Court as well as to the High Court to examine the question whether the exercise of jurisdiction is within the ambit of the law which creates and constitutes this court or tribunal.

Secondly, if the court-martial were to give a finding without any tribunal. Secondly, if the court martial were to give a finding without any evidence, then, again, it will be open to the Supreme Court as well as the High Court to entertain an appeal in order to find out whether there is evidence. Of course, it would not be open to the High Court or the Supreme Court to consider whether there has been enough evidence. That is a matter which is outside the jurisdiction of either of these Courts. Whether there is evidence or not, that is a matter which they could entertain. Similarly, if I may say so, it would be open for a member of the armed forces to appeal to the courts for the purpose of issuing prerogative writs in order to examine whether the proceedings of the court martial against him are carried on under any particular law made by Parliament or whether they were arbitrary in character. Therefore, in my opinion, this article, having regard to the difficulties raised by the Defence Ministry, is a necessary article. It really does not do anything more but give a statutory recognition to a rule that is already prevalent and which is recognized by all superior courts." (emphasis supplied)

63. The aforenoted illuminating debate at the Constitution Assembly as afore extracted, should in our opinion, settle the controversy sought to be raised by Sh.Atul Nanda learned senior counsel. Two issues would probably be settled. First that the drafters of the Constitution clearly understood that historically, jurisprudence in civilized democracies recognized power of judicial review over decisions and sentences of Court Martials and notwithstanding insertion of Clause 4 in Article 227 of the Constitution of India, the Constituent Assembly recognized the power of judicial superintendence over Court Martials and this position, as would be noted by us hereinunder, came to be recognized by the Supreme Court, even without a reference to the aforenoted debate.

64. Indeed, in the decision reported as AIR 1990 SC 1984 **S.N.Mukherjee Vs. UOI,** in para 41 the Supreme Court observed as under:-

"41. Before referring to the relevant provisions of the Act and the Rules it may be mentioned that the Constitution contains certain special provisions in regard to members of the Armed Forces. Article 33 empowers Parliament to make law determining

the extent to which any of the rights conferred by Part III shall, in their application to the members of the Armed Forces, be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline amongst them. By clause (2) of Article 136 the appellate jurisdiction of this Court under Article 136 of the Constitution has been excluded in relation to any judgment, determination, sentence or order passed or made by any Court or tribunal constituted by or under any law relating to the Armed Forces. Similarly clause (4) of Article 227 denies to the High Courts the power of superintendence over any Court or tribunal constituted by or under any law relating to the Armed Forces. This Court under Article 32 and the High Courts under Article 226 have, however, the power of judicial review in respect of proceedings of courts-martial and the proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings ˇsuffer from a jurisdictional error or any error of law apparent on the face of the record."

65. A Division Bench of this Court, in the decision reported as 58 (1995) DLT 339 **Ex. Maj. R.S. Budhwar Vs. UOI & Ors.,** surveying as many as 42 decisions on the subject and noting the decision in **S.N. Mukherjee's** case (supra) held in para 28 of the report as under:-

"28. The jurisdiction of this Court under Article 226 is, therefore, defined and is limited to the extent of finding it whether there is an error of jurisdiction and it is a case of total lack of evidence. This Court, as has been consistently held, does not sit as a Court of Appeal. In case legal evidence was available on which a finding could be given, the sufficiency or otherwise was for the Authority to decide and this Court cannot substitute its opinion for that of Court-Martial."

66. The Constitutional Bench decision of the Supreme Court reported as 1973 (4) SCC 225 **Keshwananda Bharti Vs. State of Kerala & Anr.** laid down the principle of the basic structure of the Constitution being inviolable and we may hasten to add that though the Bench did not specifically hold that judicial review is a part of basic structure of the Constitution but expressly held that Rule of Law is essentially a part of

the basic structure. Judicial review was however held to be an integral part of the Constitution. We may also note that Justice Y.V.Chandrachud (as His Lordship then was), in the decision reported as 1975 Supp. SCC 1 **Indira Nehru Gandhi Vs. Raj Narain & Anr.** held in the context of elections to elect representatives to the Lok Sabha, that judicial review cannot be considered to be a part of the basic structure of the Constitution. However, a meaningful reading of the opinion of Y.V.Chandrachud (CJ) in the decision reported as 1980 (3) SCC 625 **Minerva Mills Ltd. & Ors. Vs. UOI & Ors.** would reveal that His Lordship held judicial review with respect to legislative actions as a part of the basic structure of the Constitution. The separate opinion of P.N.Bhagwati, J. (as His Lordship then was), also upheld judicial review with respect to legislative actions as a part of the basic structure of the Constitution, but His Lordship hedged the opinion with a caveat in the following words:-

"Para 87……..I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for judicial review cannot be made by Parliament. (Underlined emphasized)."

67. In his separate opinion in the decision reported as 1981 (2) SCC 362 **Waman Rao & Ors. Vs. UOI,** Bhagwati, J. (as His Lordship then was) in para 64 of the opinion reiterated that para 77 and paras 80 to 102 of his opinion in **Minerva Mills'** case (supra) be read as part of his opinion and thereby reiterated the view that notwithstanding judicial review being a feature basic to the Constitution, nothing prevented Parliament to enact a law having arrangements for judicial review through alternative institutional mechanisms.

68. The aforesaid line of reasoning adopted by Bhagwati, J. was applied in full vigour in the decision reported as 1987 (1) SCC 124 **S.P. Sampath Kumar Vs. UOI & Ors.** in para 3 whereof it was observed that although power of judicial review is an integral part of our Constitutional system and without it there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality and thus judicial review cannot be altogether abrogated by Parliament, it can

certainly, without in any way violating the basic structure doctrine, set up alternative institutional mechanisms or arrangements for judicial review. But, to our mind, His Lordship made a very broad and a sweeping statement in said para 3 by observing that this view was the majority view of the Judges who decided **Minerva Mills'** case (supra). The observations in para 3: *It is undoubtedly true that my judgment in Minerva Mills Ltd. case was a minority judgment but so far as this aspect is concerned, the majority Judges also took the same view and held that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution and it is equally clear from the same decision that though judicial review cannot be altogether abrogated by Parliament it can certainly, without in any way violating the basic structure doctrine set up effective alternative institutional mechanisms or arrangements for judicial review.*

69. The majority opinion penned by Ranganatha Misra, J. (as his Lordship then was) held that effective alternative institutional mechanisms or arrangements for judicial review can be made by Parliament and as long as a Tribunal met the mandate of being a real substitute for the High Court, not only in form but even in content.

70. The concurring opinions of the Constitution Bench in S.P.Sampath Kumar's case laid the foundation that the basic feature of the Constitution of judicial review could be preserved through alternative dispute resolution mechanism as long as the same were a de jure and de facto substitute for High Courts.

71. Two decisions pronounced in the year 1993 incisively reviewed the legal position with reference to judicial review exercised by superior courts in the Indian context i.e. the High Courts exercising power under Article 226 and Article 227 of the Constitution of India. The first was a 3 Judge bench decision of the Supreme Court reported as 1993 (4) SCC 119 **R.K.Jain Vs. UOI** and the second being a full Bench decision of the Andhra Pradesh High Court reported as 1993 (3) ALT 471 **Sakinala Hari Nath Vs. State of A.P.** The main opinion in R.K.Jain's case, penned by K.Ramaswamy, J. with which Ahmadi, J. and Punchhi, J. concurred, in paras 66, 67 and 76 observed as under:-

"66. In **S.P.Sampath Kumar Vs. Union of India** this Court

held that the primary duty of the judiciary is to interpret the Constitution and the laws and this would predominantly be a matter fit to be decided by the judiciary, as judiciary alone would be possessed of expertise in this field and secondly the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. The Constitution has, therefore, created an independent machinery i.e. judiciary to resolve disputes, which is vested with the power of judicial review to determine the legality of the legislative and executive actions and to ensure compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercising the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the rule of law. The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. The judicial review, therefore, is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution and to provide alternative institutional mechanism or arrangement for judicial review, provided it is no less efficacious than the High Court. It must, therefore, be read as implicit in the constitutional scheme that the law excluding the jurisdiction of the High Court under Articles 226 and 227 permissible under it, must not leave a void but it must set up another effective institutional mechanism or authority and vest the power of judicial review in it which must be equally effective and efficacious in exercising the power of judicial review. The tribunal set up under the Administrative Tribunals Act, 1985 was required to interpret and apply Articles 14, 15 and 16 and 311 in quite a large number of cases. Therefore, the personnel manning the administrative tribunal in their determinations not only require judicial approach but also knowledge and expertise in that particular branch of constitutional and administrative law. The efficacy of the administrative tribunal and the legal input

would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage would definitely impair the efficacy and effectiveness of the Administrative Tribunal. Therefore, it was held that an appropriate rule should be made to recruit the members; and consult the Chief Justice of India in recommending appointment of the Chairman, Vice-Chairman and Members of the Tribunal and to constitute a committee presided over by Judge of the Supreme Court to recruit the members for appointment. In M.B. Majumdar Vs. Union of India when the members of CAT claimed parity of pay and superannuation as is available to the Judges of the High Court, this Court held that they are not on a par with the judges but a separate mechanism created for their appointment pursuant to Article 323-A of the Constitution. Therefore, what was meant by this Court in Sampath Kumar case ratio is that the tribunals when exercise the power and functions, the Act created institutional alternative mechanism or authority to adjudicate the service disputations. It must be effective and efficacious to exercise the power of judicial review. This Court did not appear to have meant that the tribunals are substitutes of the High Court under Articles 226 and 227 of the Constitution. **J.P.Chopra Vs. Union of India** merely followed the ratio of Sampath Kumar.

67. The tribunals set up under Articles 323-A and 323-B of the Constitution or under an Act of legislature are creatures of the Statute and in no case can claim the status as Judges of the High Court or parity or as substitutes. However, the personnel appointed to hold those offices under the State are called upon to discharge judicial or quasi-judicial powers. So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different and complex questions of law which baffle the minds of even trained judges in the High Court and Supreme Court would arise

for discussion and decision.

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76. Before parting with the case it is necessary to express our anguish over the ineffectivity of the alternative mechanism devised for judicial reviews. The Judicial review and remedy are fundamental rights of the citizens. The dispensation of justice by the tribunals is much to be desired. We are not doubting the ability of the members or Vice-Chairmen (non-Judges) who may be experts in their regular service. But judicial adjudication is a special process and would efficiently be administered by advocate Judges. The remedy of appeal by special leave under Article 136 to this Court also proves to be costly and probative and far-flung distance too is working as constant constraint to litigant public who could ill afford to reach this Court. An appeal to a ˇBench of two Judges of the respective High Courts over the orders of the tribunals within its territorial jurisdiction on questions of law would assuage a growing feeling of injustice of those who can ill afford to approach the Supreme Court. Equally the need for recruitment of members of the Bar to man the Tribunals as well as the working system by the tribunals need fresh look and regular monitoring is necessary. An expert body like the Law Commission of India would made an in-depth study in this behalf including the desirability to bring CEGAT under the control of Law and Justice Department in line with Income Tax Appellate Tribunal and to make appropriate urgent recommendations to the Government of India who should take remedial steps by an appropriate legislation to overcome the handicaps and difficulties and make the tribunals effective and efficient instruments for making Judicial review efficacious, inexpensive and satisfactory."

72. Suffice would it be to state that the observations of K.Ramaswamy, J. in **R.K.Jain's** case certainly struck a discordant note with respect to the view taken in **S.P.Sampath Kumar's** case (supra) and the observations in para 76 highlight judicial adjudication being a special process efficiency of which could be best maintained by advocate Judges as also remedy of appeal by Special Leave to the Supreme Court being cost prohibitive compelling citizens from far-flung areas to approach the Supreme Court and hence the desirability of a remedy before a Bench

at the respective High Courts.

73. In **Sakinala Hari Nath's** case the Full Bench of the Andhra Pradesh High Court declared Article 323A(2)(d) of the Constitution of India as unconstitutional to the extent it empowered Parliament, byelaw, to exclude the jurisdiction of the High Court under Article 226 of the Constitution of India as also declared Section 28 of the Administrative Tribunals Act 1985, to the extent it divested the High Court of its jurisdiction under Article 226 as unconstitutional. In so declaring as aforenoted the Full Bench of the Andhra Pradesh High Court referred to various decisions which held that Tribunals with trappings of a court are not courts in the strict sense of exercising judicial power and that Constitutional Courts are the only guardians to ensure and safeguard the enduring values which the Constitution seeks to preserve. It was held that Tribunals may have the authority of law to pronounce upon valuable rights and may act in a judicial manner, but they cannot be treated as equivalent to ordinary Courts of Civil judicature.

74. The 7 Judge Constitution Bench decision reported as 1997 (3) SCC 261 **L.Chandra Kumar Vs. UOI** completed the journey, root whereof could be traced to the Full Bench decision of the Andhra Pradesh High Court in Sakinala **Hari Nath's** case and the view taken in **R.K.Jain's** case. 3 broad issues, being: whether the power conferred upon Parliament or the State Legislatures by sub-clause (d) of Clause 2 of Article 323A or by sub-clause (d) of Clause 3 of Article 323B of the Constitution, totally exclude the jurisdiction of all Courts, except that of the Supreme Court under Article 136 run counter to the power of judicial review conferred on the High Courts under Article 226 and 227; whether the Tribunals constituted either under Article 323A or Article 323B of the Constitution possess the competence to test the constitutional validity of a statutory provision/rule; and whether the Tribunals, as they are functioning at present, can be said to be effective substitutes for the High Courts in discharging the power of judicial review. Considering 26 decisions, most of them penned and authored by Courts in India and a few abroad, the unanimous verdict was that under the Indian Constitutional Scheme the Supreme Court and the High Courts are the sole repositories of the power of judicial review and that notwithstanding judicial power being capable of being vested in a Tribunal, the power of judicial review of the High Court could not be excluded even by a Constitutional

amendment. The Supreme Court categorically upheld the underlying theme of the Full Bench decision of the Andhra Pradesh High Court that the power of judicial review is a basic feature of our Constitution and the aspect of the power of judicial review is vested exclusively in the constitutional courts i.e. the High Court and the Supreme Court. In paras 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 77, 78 and 80, the Constitution Bench discussed and analyzed the 5 majority opinions in **Keshwananda Bharti's** case and as subsequently applied in **Indira Nehru Gandhi's** case, **Minerva Mills'** case and **R.K.Jain's** case to bring home the point that the minority view i.e. P.N.Bhagwati, J.'s view in **Minerva Mills'** case as reflected by the 5 Judge Constitution Bench opinion in **S.P.Sampath Kumar's** case was not the correct view and that the correct legal position would be that whereas Tribunals can perform a supplemental as opposed to a substitutional role by empowering Tribunals with judicial power but the power of judicial review, which is a part of the basic structure of the Constitution, cannot be taken away from the High Courts which have the power to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdiction. In para 91 of the decision, the Constitution Bench affirmatively held that the decisions of Tribunals, whether created pursuant to Article 323A or Article 323B of the Constitution would be subject to the High Courts writ jurisdiction under Article 226 and Article 227 of the Constitution.

75. A words needs to be penned by us with reference to para 96 of the decision in **L.Chandra Kumar's** case, with reference whereto Sh.Atul Nanda learned senior counsel for the respondents urged that if not qua Article 226 of the Constitution of India, qua Article 227 of the Constitution of India, it would be permissible to denude High Court's jurisdiction under said Article. The observations relied upon read: *'96. It has been brought to our notice that one reason why these Tribunals have been functioning inefficiently is because there is not authority charge with supervising and fulfilling their administrative requirements. To this end, it is suggested that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall. We are, however, of the view that this may not be the best way of solving the problem.* We do not think that our constitutional scheme requires that all adjudicatory bodies which fall within the territorial jurisdiction of the High Courts should be subject to their supervisory

jurisdiction'.

76. Suffice would it be to state that the said observations pertain to administrative supervisory jurisdiction of a High Court over Courts and Tribunals functioning within the territory of the High Court and do not relate to judicial supervisory jurisdiction.

77. In the decision reported as AIR 2007 SC 861 **I.R.Coelho Vs. State of Tamilnadu,** a 9 Judge Bench of the Supreme Court, ˇin its unanimous opinion reiterated that the power of judicial review is a basic feature of the Constitution and being a constituent power cannot be abrogated by judicial process or interpretation (refer para 41).

78. The latest pronouncement of the Supreme Court reported as 2010 (5) SCALE 514 **UOI Vs. R.Gandhi** has very succinctly, in para 12 and 13 brought out the difference in the powers exercised by Courts and Tribunals and briefly stated reiterates the view that the sovereign power of the State to administer justice and in particular the power exercised by superior courts of that of judicial review can never be entrusted to Tribunals.

79. Another illuminating decision tracing the historical source of power of supervisory jurisdiction by superior courts in India is the decision reported as 2003 (6) SCC 675 **Suryadev Rai Vs. Ram Chandra Rai & Ors.** Dealing with the amendment to Section 115 CPC by Act No.46 of 1999 and its impact on the jurisdiction of the High Court under Article 226 and Article 227 of the Constitution of India, the Supreme Court held that the power of the superior court to issue a writ of error was historically treated as the inherent power of superior courts in common law countries. In para 29 of the decision it was held as under:-

> "29. The Constitution Bench in **L.Chandra Kumar v. Union of India** dealt with the nature of power of judicial review conferred by Article 226 of the Constitution and the power of superintendence conferred by Article 227. It was held that the jurisdiction conferred on the Supreme Court under Article 32 of the Constitution and on the High Courts under Articles 2226 and 227 of the Constitution is a part of the basic structure of the Constitution, forming its integral and essential feature, which cannot be tamperedwith much less taken away even by constitutional amendment, not to speak of a parliamentary

> legislation."

80. The decision in **Suryadev Rai's** case also brings out another interesting facet of the growth of Jurisprudence with respect to the power conferred by Article 226 of the Constitution vis-à-vis the power conferred under Article 227 of the Constitution of India; and notwithstanding the commonly perceived view that Article 226 of the Constitution of India preserves to the High Court the power to issue writs and thus vis-à-vis Tribunals, authorities and persons, with respect to writs of certiorari, the power would be limited, as held by the Supreme Court in the decision reported as AIR 1955 SC 233 **Harivishnu Kamath Vs. Ahmad Ishaque,** to (a) correct errors of jurisdiction; (b) correct illegality in the exercise of its undoubted jurisdiction by the Tribunal; (c) correct such error which is a manifest error apparent e.g. when it is based on clear ignorance or disregard of the provision of law or is a patent error as against a wrong; (d) act not as in appellate jurisdiction but exercise supervisory jurisdiction, one consequence whereof being the Court will not review findings of facts even if erroneously reached by the Tribunals, power under Article 227 being supervisory power and in that sense has width and vigour unprecedented, the distinction between the two jurisdictions stands almost obliterated. In para 25 it was so observed and with the justification why it has become customary for the lawyers labeling their petitions as one common under Article 226 and Article 227 of the Constitution of India.

81. Whereas it can be safely said that proceedings under Article 226 are in the exercise of the original jurisdiction of the High Court, proceedings under Article 227 of the Constitution are not original but supervisory proceedings.

82. The Jurisprudence on the subject would reveal that the expression *'administration of justice'* is always understood to mean the exercise of judicial power of the State to maintain and uphold rights. Judicial power means the power which every sovereign authority must of necessity have, to decide controversies between its subject, or between itself and its subjects. Though, with the growth of civilization and the problems of modern life, a large number of administrative Tribunals have come into existence and notwithstanding these Tribunals act in a judicial manner, but they are not part of the ordinary Courts of Civil Judicature. These Tribunals may share the exercise of the judicial power of the State, but

cannot exercise the power of judicial review. The decision of the Supreme Court reported as 1962 (2) SCR 339 **Harinagar Sugar Mills Vs. Shyam Sundar Jhunjhunwala** brings out the facet of Tribunals exercising judicial power but not being courts and hence capable of being entrusted with the judicial power of the State but not the sovereign power of the State of judicial review, which power is reserved for superior courts. The decision reported as 1992 Supp. (2) SCC 651 **Kihoto Hollohan Vs. Zachillhu & Ors.,** dealing with what is commonly known as the anti-defection law, categorically held that even where a statute gives finality to a decision, the same would not give immunity to the decision from a judicial review.

83. We had promised to discuss the decision of the Supreme Court in **UOI Vs. R.Gandhi** (supra).

84. The Constitution Bench of the Supreme Court was considering issues relating to 'The National Company Law Tribunal' and 'The National Company Law Appellate Tribunal'. In view of the decision in **L.Chandra Kumar's** case (supra), and recognizing that judicial review by Constitutional Courts was recognized as a basic feature of the Constitution, in para 12 onwards the Court discussed the difference between Courts and Tribunals followed by a discussion in para 17 onwards on the separation of executive and judicial powers of the State. Discussing in para 24 onwards, the question: *Whether the Government can transfer the judicial functions traditionally performed by Courts to Tribunals?* In para 32 it was noted that notwithstanding the Constitution contemplating judicial power being exercised both by Courts and Tribunals held that this must accept the powers and jurisdictions vested in superior courts by the Constitution.

85. Discussing the argument in favour of Tribunals the Supreme Court noted that since Court functions under archaic and elaborate procedural laws and highly technical evidence law and with a view to ensure fair play as also avoidance of judicial error, procedural laws provide for appeals, revision and reviews resulting in frivolous and vexatious preliminary objections, pushing into background the main issues resulting in the inevitable delays which lead to frustration and dissatisfaction and hence a user friendly Tribunal was welcomed, but noted that the dependence of Tribunals on the sponsoring or the parent department for infrastructural facilities and or personnel undermines the independence of

the Tribunals and this draw back substantially takes away the glitter from the positive features of tribunalization. It was noted that the Leggatt Committee chaired by Sir Andrew Laggatt had submitted a report to the Lord High Chancellor of Great Britain in March 2001 recommending that if Tribunals had to be a true successor of ordinary civil courts and not become *'Bureaucratic Boards'* it would be best served if there administrative support is provided by the *'Lord Chancellor's Department'*. This would be, in our opinion the signature tune of the ethos expressed by the Supreme Court in para 45 of the decision in **Lt.Col.Prithipal Singh Bedi's** case (supra) when the Supreme Court observed that the Tribunal it was suggesting should 'Truly be a Judicial Review Forum'.

86. Even prior to the Constitution of India being promulgated, superior courts constituted by the Letters Patent Charter in India and other dominions of the Crown used to issue prerogative writs to courts and tribunals subordinate to the Chartered High Courts save and except where appellate or revisional remedies were created by statute. The writ of error, as called today by the name of certiorari used to be issued to courts and tribunals and the origin of the said power to issue prerogative writs could be traced to the theory that the king being the paramount judicial authority and the judges being only the king's deputies, any exercise of unauthorized jurisdiction by the Judges was considered as an usurpation of the royal prerogative. The August royal personage could not of course tolerate transgression of jurisdictional limits to the incumbents of the office of Judgeship and had therefore to exercise his controlling power over them to keep them within the bounds of their authority. As it developed, the writ of certiorari was the process by which the King's Bench Division in the exercise of its superintending power over inferior jurisdictions, requires the Judges or officers of such jurisdiction to certify or send proceedings before them into the King's Bench Division, whether for the purposes of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below.

87. Recognizing efficacious alternative remedies available and on the principle of comity, prerogative writs were not issued where the error was capable of being rectified at an appellate or a revisional jurisdiction.

88. We have noted hereinabove that a limited contempt jurisdiction has been vested in the Tribunal which does not empower the Tribunal to enforce its decisions under contempt jurisdiction. We note that there is no Section in the Act empowering the Tribunal to execute its orders, though we find that under Rule 25 of the Armed Forces Tribunal (Procedure) Rules 2008 it is stipulated that nothing in the Rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders or give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. It would be debatable whether Rule 25 recognizes the sui generis power of contempt of the Tribunal. If not, it would be an anomaly to hold that the Armed Forces Tribunal is not a Tribunal subordinate to the High Court for the reason if held otherwise, a High Court would have no power under its contempt jurisdiction to enforce an order passed by the Armed Forces Tribunal, and if the Tribunal would have no power to enforce its order, it would be a strange situation where a party would be left without a remedy. But we refrain from expanding on this aspect of the matter for the reason learned counsel for the parties had not addressed any submissions on this point and thus we simply note a point which does arise for consideration as it is relevant to the issue at hand and leave it at that.

89. To summarize, the position would be that the Armed Forces Tribunal, being manned by personnel appointed by the Executive, albeit in consultation with the Chief Justice of India cannot be said to be truly a judicial review forum as a substitute to High Courts which are constitutional courts and the power of judicial review, being a basic feature of the Constitution, under Article 226 and Article 227 of the Constitution of India is unaffected by the Constitution of the Armed Forces Tribunal. Further, Article 227(4) of the Constitution of India takes away only the administrative supervisory jurisdiction of High Court over the Armed Forces Tribunal and does not impact the judicial supervisory jurisdiction over the Armed Forces Tribunal. Thus, decisions by the Armed Forces Tribunal would be amenable to judicial review by High Court under Article 226 as also Article 227 of the Constitution of India.

90. We may note that the view which we have taken finds a precedent in a Division Bench decision of the Kerala High Court reported as 2010 (4) KLT 611 **Joby Varghese Vs. Armed Forces Tribunal**.

91. The preliminary question pertaining to the maintainability of the writ petitions is accordingly answered in favour of the petitioners and it is held that the above captioned writ petitions against the decisions/orders passed by the Armed Forces Tribunal are maintainable.

92. W.P.(C) No.3441/2010 **Ex.Hav.Maharam Vs.UOI & Ors.,** W.P.(C) No.2667/2010 **Col.Sanjay Kumar Vs. UOI & Ors.,** W.P.(C) No.5794/2010 **Hav.Reiji Kumar Vs. UOI & Ors.,** W.P.(C) No.654/2010 **Lt.Col.Harpreet Singh Vs. UOI & Ors.,** W.P.(C) No.273/2010 **Risaldar Nabab Singh Vs. UOI & Ors.,** W.P.(C) No.5189/2010 **Naik Prabhu Dayal Sharma Vs. UOI & Ors.,** W.P.(C) No.4926/2010 **Ex.Sep.Inder Singh Vs. UOI & Ors.,** W.P.(C) No.4699/2010 **Rameswar Prashad Sharma Vs. UOI & Ors.,** W.P.(C) No.4887/2010 **Smt.Surjeet Kaur Vs. UOI & Ors.,** W.P.(C) No.4669/2010 **Ex.Sigmn Ganga Ram Sharma Vs. UOI & Ors.,** W.P.(C) No.4524/2010 **Sub.Maj.Kiran Pal Singh Vs. UOI & Ors.,** W.P.(C) No.4417/2010 **Lt.Cdr.G.S.Beniwal Vs. UOI & Ors.,** W.P.(C) No.3841/2010 **Ex.Sep.Ram Swarup Vs. UOI & Ors.,** W.P.(C) No.3836/2010 **Indra Singh Solanki Vs. UOI & Ors.** and W.P.(C) No.5206/2010 **Ex.Sep.Rai Singh Vs. UOI & Ors.** are directed to be listed for preliminary hearing on 29.4.2011.

93. W.P.(C) No.6066/2010 **Ex.Maj.Bhagwan Singh Vs.UOI & Ors.,** W.P.(C) No.6183/2010 **Ex.Brig.R.P.Singh Vs. UOI & Ors.,** W.P.(C) No.7018/2010 **G.D.Banarasi Lal Vs. UOI & Ors.,** W.P.(C) No.7040/2010 **Ex.Capt.Sewa Ram Nigial Vs. UOI & Anr.** and W.P.(C) No.6061/2010 **Ex.Maj.Gen.P.S.K.Chaudhary Vs. UOI & Ors.** shall be listed for preliminary hearing on 4.7.2011.

94. W.P.(C) No.4652/2010 **GNR.B.N.Khente Vs. UOI & Ors.,** W.P.(C) No.5090/2010 **Ex.Col.Harvinder Singh Kohli Vs. UOI & Ors.,** W.P.(C) No.5156/2010 **Naib Sub.Vijay Bahadur Singh Vs. UOI & Ors.,** W.P.(C) No.3828/2010 **Ex.Gnr.Naresh Kumar Vs. UOI & Ors.** and W.P.(C) No.3578/2010 **Brig.V.S.Sukhdial Vs. UOI & Ors.** shall be listed for preliminary hearing on 5.7.2011.

95. W.P.(C) No.5764/2010 **Lt.Col.Rajeev Bhatt Vs. Chief of Army Staff & Ors.,** W.P.(C) No.1918/2010 **Om Prakash Vs. UOI & Ors.,** W.P.(C) No.3439/2010 **Lt.Cdr.Narvir Singh Vs. Union of India & Ors.,** W.P.(C) No.3086/2010 **Wing.Cdr.S.Yadav Vs. Union of India & Ors.** and W.P.(C) No.3405/2010 **SqnLdr.Dr.Usha Atri Vs. Union of**

India & Ors. shall be listed for preliminary hearing on 6.7.2011.

96. W.P.(C) No.7039/2010 **Gunner Milkhi Ram Vs. Union of India & Ors.,** W.P.(C) No.7041/2010 **Gunner Sat Pal Vs. Union of India & Ors.,** W.P.(C) No.7042/2010 **Gunner Hari Singh Vs. Union of India & Ors.** and W.P.(C) No.8298/2010 **Ex.Sep.Bhagwan Singh Vs. Union of India & Anr.** shall be listed for preliminary hearing on 7.7.2011.

97. W.P.(C) No.13360/2009 **Col.A.D.Nargolkar Vs. Union of India & Ors.** and W.P.(C) No.13367/2009 **Col.A.D.Nargolkar Vs. Union of India & Ors.** shall be listed for preliminary hearing on 8.7.2011.

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W.P.

BALWINDER SINGH ....PETITIONER

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(DR. S. MURALIDHAR, J.)

W.P. NO. : 5685/2010 & CM APPL. NO. : 19825/2010 **DATE OF DECISION: 29.04.2011**

Constitution of India, 1950—Article 14 and 21—Compensation for arbitrary action of the Foreigner Regional Registration Office's (FRRO) seizure of a deportee's passport and institution of a criminal case without even inquiring into the authenticity of the work documents for over a year—Petitioner working in Spain-Embassy of Spain confirmed genuineness of work permit-came to India on vacations-while returning-confinded at Belgium-deported to India-all documents were seized—FRRO proceeded on the basis of the

action of Belgium Immigration Department (BID) which had refused the Petitioner entry into Belgium alleging him to be an imposter and lodging FIR—No enquiry was made—Petitioner suffered "irreversible hardship and mental agony"—Claimed exemplary costs.

Held—Had the inquiry been made soon after the deportation, criminal case would have been unnecessary—Petitioner may have had the enquiry been concluded promptly to be able to resume his job—Irreversible loss of employment and earnings besides mental trauma direct consequence of arbitrary action—Violation of fundamental rights under Article 14 and 21—Awarded compensation of Rs. 50,000/- along with litigation costs of Rs. 5,000/-.

The affidavits and documents placed on record in this petition by the FRRO shows that there was no basis for the above 'doubt' as to genuineness of the Petitioner's residence permit. No attempt was made to verify this from the Embassy of Spain. Instead, the FRRO straightway sent the papers to the police and an FIR was registered against the Petitioner under Sections 419/420/468/471 IPC. The present petition was filed on 17th August 2010. Notice was issued on 20th August 2010 and accepted by counsel for the Respondents on that date. Yet till 10th January 2011 no attempt was made by the FRRO to write to the Embassy of Spain to verify the genuineness of the Petitioner's residence permit. The Police on its part also made no effort to make inquiries with the Embassy of Spain till 22nd February 2011. Within ten days of such inquiry, Embassy of Spain confirmed the genuineness of the Petitioner's documents. This then led to the immediate closure of the criminal case. Had this inquiry been made soon after the deportation of the Petitioner, the criminal case would have been unnecessary. He may have been able to immediately return to Spain to resume his employment. On account of the utter negligence and callousness on the part of the Respondents, the Petitioner

had to needlessly undergo the trauma of a false criminal case against him for over one year and suffer the deprivation of his passport and travel documents. He was unable to return to Spain to resume his employment. The direct consequence of the arbitrary action of the Respondents has been irreversible loss of employment and earning of the Petitioner, apart from the mental trauma undergone as a result of the false criminal case. **(Para 17)**

This Court expresses its displeasure with the manner in which the Respondents have violated the life and liberty of the Petitioner. There has been an undoubted violation of the Petitioner's fundamental rights under Article 14 and Article 21 of the Constitution. The Petitioner has needlessly suffered hardship and trauma due to the arbitrary acts of the Respondents. In the circumstances, this Court considers it appropriate to direct that Respondents shall compensate the Petitioner in the sum of Rs. 50,000/- which will be paid by the Union of India in the Ministry of External Affairs to him within a period of four weeks from today. The Respondent Union of India will also pay to the Petitioner litigation expenses of Rs. 5,000/- within a period of four weeks from today. The Respondents will immediately return to the Petitioner, if not already done, all the documents seized from him. **(Para 18)**

Important Issue Involved: Arbitrary action in the form of seizure of passport and institution of a criminal case without undertaking an inquiry is a violation of fundamental rights guaranteed under Article 14 and 21 of the Constitution of India, aggrieved party held entitled to compensation in public law.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ajay Kumar Pipaniya, Advocate.

FOR THE RESPONDENTS : Mr. Virender Mehta, Advocate.

RESULT: Writ Petition disposed of with directions.

O R D E R

29.04.2011

1. The prayer in this writ petition filed on 17th August 2010 is for a direction to Respondent Nos. 2 and 3, i.e. Foreigner Regional Registration Offices ('FRRO') and the Regional Passport Officer ('RPO'), Jalandhar to release all the documents seized from the Petitioner on 22nd February 2010; to make arrangements for departure of the Petitioner to Spain and for a direction to the Respondents to pay compensation for the mental agony and torture suffered by the Petitioner.

2. The Petitioner holds an Indian passport issued by the Regional Passport Officer ('RPO'), Jalandhar (Respondent No. 13 herein) on 17th February 2006, valid upto 16th January 2016. The Petitioner was unemployed and had a desire to work abroad. He applied for a job at Jarona in Spain in 2007. The Petitioner was considered for the post of peon by a company at Jarona in Spain. He submitted necessary documents with the Embassy of Spain at New Delhi for issuance of work visa for Jarona in Spain. It is stated that the documents were verified by the officers of the Embassy at Spain. The Petitioner's credentials were also checked by the police and a certificate to that effect was issued on 6th July 2007. It was specifically stated in the said certificate as under:

> "There is no adverse information against Shri/Smt/Kum. BALWINDER SINGH S/o, D/o W/o Jit Singh SPOUCE NAME…..HOLDER OF Indian Passport No. F6537221 issued at Jalandhar on 17th Feb 06 which would render him/her ineligible for the grant of travel facilities including visa for SPAIN."

3. The Petitioner received a call from the Embassy of Spain in October 2007 confirming the genuineness of his work permit. He was asked to produce the medical certification. The Petitioner underwent the medical test. After completion of all formalities work Visa No. 200700/7041 INE was issued by the Embassy of Spain at New Delhi on 16th April 2008 for three months which was further extended to 2011. It is stated that the Petitioner went to Spain and worked as a peon in a shop at Jarona in Spain. The Petitioner states that the Petitioner was registered under the Social Security Scheme in Spain and was also given tax identity

number. The relevant documents in this regard have been enclosed with the petition. On 25th November 2009, the Petitioner returned to India to meet his family during the vacation. On 21st February 2010, he boarded a flight from Indira Gandhi International ('IGI') Airport at New Delhi to return to Spain, with one stoppage at Brussels Airport at Belgium. While in Brussels, when he was about to take the connecting flight to Spain, officials of the Jet Airways, (Respondent No. 4), began questioning the Petitioner in English and Belgium languages. It is stated that the Petitioner being illiterate could not answer the queries posed. Although he informed the officials that he had a valid work permit, he was kept in illegal confinement at Brussels Airport and was not allowed to fly at Spain. Finally, he was deported to India on 22nd February 2010.

4. The Petitioner states that on return to India his trauma increased. Instead of verifying the genuineness of his work permit from the Embassy at Spain the airport authority in Delhi kept the Petitioner in illegal confinement till the evening of 22nd February 2010. They took away all the personal documents of the Petitioner, including his passport, the residential permit, medical cards, driving licence and bank card etc. Thereafter, the Petitioner kept approaching the Respondents for return of his documents but in vain. Thereafter he filed the present petition.

5. This petition was first listed on 20th August 2010 when notice was issued to the Respondents. The FRRO, Delhi filed a status report dated 24th September 2010 in which it is stated that the deportation papers issued by the Belgium Immigration Department ('BID'), Brussels dated 21st February 2010 stated that the Petitioner had been refused entry into Belgium for the reason that he was an "imposter" who held a "fraudulent" visa and resident permit. The FRRO stated that on his arrival in India, the Petitioner's passport was seized along with the arrival card, the letter issued by the BID and these were sent to the Police Station ('PS'), IGI Airport. Thereafter, FIR No. 119 dated 7th March 2010 under Sections 419/420/468/471 IPC was registered against the Petitioner at PS IGI Airport. On 10th January 2011, the following order was passed by this Court:

> "1. Learned counsel for the Petitioner points out that he was deported on the basis of a report from the Belgian authorities that his Spanish travel document was fabricated. He submits that there was no verification got done by the Respondents of the genuineness of that document by the authorities in Spain.
>
> 2. Learned counsel for the Respondent states that he will seek instructions on whether any verification was sought from the authority in Spain on the genuineness of the travel document.
>
> 3. List on 9th March, 2011."

6. Thereafter, Respondent No. 2 filed an affidavit on 5th April 2011 enclosing the following letter dated 21st February 2011 from the Embassy of Spain:

> "New Delhi, 21st February 2011
>
> To,
> The Officer Incharge,
> Foreigners Regional Registration Office,
> New Delhi.
> Reference : No. X/25/2011/1123/For (F-3), dated 11/02/2011.
>
> Dear Madam/Sir,
>
> With reference to the above mentioned query, I inform you that the Spanish residence card X8340054-R corresponds to Balwinder Singh as per the archives of the competent Spanish authorities.
>
> Kind regards,
>
> Head of Consular Section
>
> -sd-
>
> Laura Oroz"

7. The affidavit of the FRRO also enclosed a copy of a letter dated 23rd February 2011 issued by the Embassy of Spain to the Station House Officer ('SHO'), PS IGI Airport to the following effect:

> "Nueva Delhi, 23rd February 2011
>
> To,
> The Officer Incharge,
> Office of the Station House,
> PS IGI Airport,

New Delhi.

Reference: 1360/R-SHO/PS IGI A, New Delhi, dated, the 22/2/2011.

Dear Madam/Sir,

With reference to the above mentioned query, I inform you that the Spanish residence card X8340054-R corresponds to Balwinder Singh as per archives of the competent Spanish authorites.

Kind regards,

Head of Consular Section

-sd-

Laura Oroz"

8. Meanwhile, on 8th March 2011, the following order was passed by the learned Additional Sessions Judge at Dwarka in the case arising out of the aforementioned FIR:

"08.3.2011

Present: Applicant in person.

APP for State with IO.

IO has stated that visa and resident permit connected with this case have been found genuine.

APP for State and IO, both have submitted that no case is made out against the applicant. They will make ˇimmediate attempts to get the case cancelled as against the applicant.

Under these circumstances, no merit in the application, and is, dismissed."

9. This was followed by an order of the Additional Chief Metropolitan Magistrate, Dwarka on 26th March 2011 accepting the cancellation report filed by the Police. The said order reads as under:

"FIR No. 119/2010

P.S. IGI Airport

26.3.2011

Present: Ld. APP for State.

S.I. Antriksh Alok present.

This is a cancellation report.

Briefly stated allegations are that in the intervening night of 22/23.2.2010, one pax Balwinder Singh arrived as deportee at IGI Airport on the allegation that pax has impersonated and was found in possession of forged residence permit of Spain. FIR was registered. The passport and the residence permit of Spain was got verified which was found to be genuine. Accordingly, no case is made out against the accused.

Heard and perused the record.

In view of the submission made, the present report is accepted as cancelled. Accused stands discharged. Surety of the accused also stands discharged. Documents, if any, be released after cancellation of endorsement.

File be consigned to record room."

10. On 8th April 2011, this Court passed the following order:

"1. The affidavit filed by Respondent No. 2 makes it clear now that there was no basis whatsoever to doubt the veracity of the Petitioner's Spanish residence card which led to his being detained in Brussels and thereafter being deported to India. This is clear from the letter dated 21st February 2011 written by the Spanish Embassy to the Officer Incharge, FRRO, New Delhi. A copy thereof has been enclosed with the affidavit.

2. The affidavit filed by Respondent No. 2 is however sketchy and does not explain the circumstances under which such a doubt came to be raised in the first place.

3. Counsel for Respondent No. 2 states that he will file a detailed affidavit giving para-wise reply along with all relevant documents within a period of three weeks and in any event not later than 28th April 2011.

4. List on 29th April 2011."

11. Pursuant to the above order, a further affidavit dated 5th April 2011 has been filed by the FRRO. This merely reiterates what has been stated earlier.

12. The affidavits of the FRRO and the documents placed on record show that an inquiry was made by the FRRO from the Spanish Embassy about the genuineness of the Petitioner's travel documents only on 10th January 2011 for the first time. Another reminder appears to have been sent on 11th February 2011, in response to which the Embassy of Spain, by the letter dated 21st February 2011 informed that the residence card of the Petitioner was a genuine document. It is also evident from the letter dated 23rd February 2011 of the Embassy of Spain addressed to the SHO, PS IGI Airport that the letter sent a query in that regard only on 22nd February 2011. In other words, only after notice as issued in the present petition, did the FRRO and the SHO made the first move to write to the Embassy of Spain . This was almost a year after the Petitioner was deported to India and the criminal case instituted against him.

13. Mr. Ajay Kumar Pipaniya, learned counsel appearing for the Petitioner submits that due to arbitrary action of the Respondents in seizing the Petitioner's passport, instituting a criminal case and not making any inquiries for over a year, the Petitioner has been subjected to irreversible hardship and mental agony. Since he was illegally deported to India from Brussels he could not report for work at Spain. The validity of the residence permit has also expired in the meanwhile. A false criminal case was lodged against the Petitioner and was kept pending for over a year. All this was on account of the failure of the Respondents to take prompt action to conduct a simple inquiry. It is prayed that the Petitioner should be awarded exemplary costs.

14. Appearing for the Respondents, Mr. Virender Mehta submits that since a criminal case had been instituted, no verification was done by the Respondents with the Embassy of Spain. He submitted that the Respondents went on the basis of the deportation papers sent by the BID.

15. The conduct of the Respondents in the present case displays utter callousness in dealing with the life and liberty of the citizen. The Petitioner had valid travel papers and work permit for employment in

Spain. He had already commenced his employment in Spain. He was returning to Spain to resume his employment after briefly visiting India during vacations. During the stop-over of his flight from New Delhi to Spain at Brussels, he was stopped and subsequently deported to New Delhi on 22nd February 2010. He was not permitted to travel by the BID, on the ground that he was an 'imposter' and that he held a "fraudulent" visa and fraudulent residence permit. It is now clear that this determination by the BID, which formed the basis of the Petitioner's deportation, was wholly erroneous.

16. What is unfortunate is that when the Petitioner arrived in New Delhi, pursuant to such deportation no effort was made by the airport immigration authorities in New Delhi to make any proper inquiry. A copy of the seizure report of the Indian Immigration Control at the IGI Airport, (which is at Annexure P-5 to the petition), gives the reasons for seizure of the Petitioner's passport and travel documents as under:

"The residential permit of Spain seems to be doubtful."

17. The affidavits and documents placed on record in this petition by the FRRO shows that there was no basis for the above "doubt" as to genuineness of the Petitioner's residence permit. No attempt was made to verify this from the Embassy of Spain. Instead, the FRRO straightway sent the papers to the police and an FIR was registered against the Petitioner under Sections 419/420/468/471 IPC. The present petition was filed on 17th August 2010. Notice was issued on 20th August 2010 and accepted by counsel for the Respondents on that date. Yet till 10th January 2011 no attempt was made by the FRRO to write to the Embassy of Spain to verify the genuineness of the Petitioner's residence permit. The Police on its part also made no effort to make inquiries with the Embassy of Spain till 22nd February 2011. Within ten days of such inquiry, Embassy of Spain confirmed the genuineness of the Petitioner's documents. This then led to the immediate closure of the criminal case. Had this inquiry been made soon after the deportation of the Petitioner, the criminal case would have been unnecessary. He may have been able to immediately return to Spain to resume his employment. On account of the utter negligence and callousness on the part of the Respondents, the Petitioner had to needlessly undergo the trauma of a false criminal case against him for over one year and suffer the deprivation of his passport and travel documents. He was unable to return to Spain

to resume his employment. The direct consequence of the arbitrary action of the Respondents has been irreversible loss of employment and earning of the Petitioner, apart from the mental trauma undergone as a result of the false criminal case.

18. This Court expresses its displeasure with the manner in which the Respondents have violated the life and liberty of the Petitioner. There has been an undoubted violation of the Petitioner's fundamental rights under Article 14 and Article 21 of the Constitution. The Petitioner has needlessly suffered hardship and trauma due to the arbitrary acts of the Respondents. In the circumstances, this Court considers it appropriate to direct that Respondents shall compensate the Petitioner in the sum of Rs. 50,000/- which will be paid by the Union of India in the Ministry of External Affairs to him within a period of four weeks from today. The Respondent Union of India will also pay to the Petitioner litigation expenses of Rs. 5,000/- within a period of four weeks from today. The Respondents will immediately return to the Petitioner, if not already done, all the documents seized from him.

19. It is clarified that it is open to the Petitioner to institute other appropriate proceedings in accordance with law for recovery of damages for the loss and hardship suffered by him. The passport of the Petitioner as stated by him is valid upto 16th January 2016. However, if the Petitioner requires any re-validation of the passport or new passport, upon his making application in that regard the needful be done by the RPO, Jalandhar, Respondent No. 3, expeditiously and in any event not later than four weeks from the date of making of such application.

20. The writ petition and the pending application are disposed of with the above directions. A certified copy of this order be sent forthwith to the Secretary, Ministry of External Affairs and the RPO, Jalandhar for immediate compliance.

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RFA (OS)

M/S. TEXEM ENGINEERING ....APPELLANT

VERSUS

M/S. TEXCOMASH EXPORT ....RESPONDENT

(VIKRAMAJIT SEN & SIDDHARTH MRIDUL, JJ.)

RFA (OS) NO. : 80/2009 DATE OF DECISION: 29.04.2011

Code of Civil Procedure, 1908—Order VII Rule 11—Defendant had agreed to pay a commission of Rs. 15/- per Kilogram of tea, which amounted to Rs. 1,76,26,500- Rs. 13,00,000/- paid by defendant to Plaintiff leaving Rs. 1,63,26,500 as balance—In liquidation of said outstanding amount a post dated cheque of Rs. 1.15 Crore made over by defendant—Proceedings under FERA were started against defendant—Defendant claimed the cheque of Rs. 1.15 crore unauthorizedly encashed by Plaintiff—Filed FIR against Plaintiff resulting in arrest of Plaintiff for 22 days—Sister of Plaintiff failed to get anticipatory bail—Settlement arrived at between parties—Application filed Under VII Rule 11—Allowed by Ld Single Judge, holding settlement to be not enforceable in view of section 23 and 28 of Contract Act—Appeal filed by Plaintiff—Held by Appellate Court—An application under Order VII Rule 11 to be decided entirely on perusal of plaint and documents filed with it—Plaintiff does not solely rely on "Settlement"—If there had been no commercial or other, dealing between the parties, a settlement to close the FERA proceeding by making favorable statement by Plaintiff and his sister would indubitably would have been hit by section 23 of Contract Act—No illegality found in transaction between

the parties—Section 23 of the Contract Act of no relevance—Ld Single erred in going threadbare into defence of Defendant—Proving or disproving cause of action can be considered after the parties have gone to trial—Oder under OVII Rule 11 set aside—Suit restored—Appeal allowed.

There can be no gainsaying that an application under Order VII Rule 11 of the CPC for rejection of the plaint has to be decided entirely on a perusal of the plaint and documents filed along with it. If authorities are required for this proposition, we need not travel beyond the latest exposition of the law contained in **Liverpool & London S.P.& I Association Ltd. -vs- M.V. Sea Success I,** (2004) 9 SCC 512. More recently, in **Mayar (H.K.) Ltd. v. Owners & Parties, Vessel M.V. Fortune Express,** (2006) 3 SCC 100 it has yet again been clarified that the Court cannot reject a plaint under Order VII Rule 11 of the CPC on the basis of the allegations made in the Written Statement. In other words, the defence to the Suit is not relevant for the purposes of Order VII Rule 11 of the CPC. **(Para 2)**

We say this for the reason that on a perusal of the Plaint, it is uncontrovertedly clear to us that the Plaintiff does not rely solely on the 'Settlement' which the learned Single Judge has viewed as being illegal and consequently hit by Section 23 of the Indian Contract Act. Had there been no commercial or other dealings between the parties, nonetheless a compact had been arrived at between them for payment by the Defendant to the Plaintiff of a sum of money in return for the Plaintiff and/or his sister making favourable statements to ensure the closure of FERA proceedings against the Defendant, such a contract would indubitably have been hit by Section 23. As we see it, the Plaintiff may succeed in proving his claim for the sum of Rs. 1,00,17,972/- by leading evidence of the transactions which allegedly earned and entitled the Plaintiff to commission at the rate of Rs. 15/- per kilogram, thereafter reduced to Rs. 9/- per kilogram. The learned Single Judge has found no

illegality in these transactions between the parties. It is for this reason that Section 23 of the Indian Contract Act is of little relevance. We also find it impossible not to conclude that the learned Single Judge has erred in going threadbare into the defences to the claim proffered by the Defendant. What has to be considered in the context of Order VII Rule 11 of the CPC, we may reiterate, as has been spelt out time and again in several judgments, is to understand and digest the cause of action that has been narrated in the Plaint. Proving or disproving that cause of action can only be considered after the parties have gone to Trial and have completed their evidence. **(Para 8)**

Important Issue Involved: A plaint can be rejected under order 7 Rule 11 Code of Civil Procedure, 1908 only in reference to the averments contained in the plaint. The defence taken in written statement can not be considered at this stage.

[La Ga]

APPEARANCES:

FOR THE APPELLANT : Mr. D.S. Narula, Sr. Advocate with Ms. Vandana & Mr. Angad S. Narula, Advocates.

FOR THE RESPONDENT : Mr. C. Mukund, Mr. Ashok Jain & Mr. Amit Kasana, Advocates.

CASES REFERRED TO:

1. *Mr. Narula to Vishnu Dutt Sharma* vs. *Daya Sapra (Smt.),* (2009) 13 SCC 729.
2. *Abdul Gafur* vs. *State of Uttarakhand,* (2008) 10 SCC 97.
3. *Rajiv Kumar* vs. *Kewal Cargo Carriers (P) Ltd.,* AIR 2007 Delhi 27.
4. *Hardesh Ores Pvt. Ltd.* vs. *M/s. Hede and Company,* (2007) 5 SCC 614.

5. *Popat and Kotecha Property* vs. *State Bank of India Staff Assn,* (2005) 7 SCC 510.

6. *Liverpool & London S.P. & I Assn. Ltd.* vs. *M.V. Sea Success I,* 2004(9) SCC 512.

7. *Inspiration Clothes & U* vs. *Colby International Limited,* 88(2000) DLT 769(DB).

8. *Steel Authority of India Ltd.* vs. *Rameshwar Dass Bishan Dayal,* 60(1995) DLT 271 (DB).

9. *Life Insurance Corporation of India, Madras* vs. *Devendrappa Bujjappa,* AIR 1987 Karnataka 129.

10. *T. Arivandandam* vs. *T.V. Satyapal,* (1977) 4 SCC 467.

11. *Sita Ram* vs. *Radha Bai,* AIR 1968 SC 534.

12. *Sudhindra Kumar, V. Narasimharaju* vs. *V. Gurumurthy Raju,* AIR 1963 SC 107.

13. *Sudhindra Kumar Rai Chaudhuri* vs. *Ganesh Chandra Ganguli,* AIR 1938 Calcutta 840.

RESULT: Appeal accepted.

VIKRAMAJIT SEN, J.

1. This Appeal assails the Order dated 13.8.2009 whereby the learned Single Judge had allowed the Application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC for short) filed by the Defendant/ Respondent and consequently had rejected the Plaint. It is apparent to us that the learned Single Judge was unshakably influenced by a document purporting to be a 'Settlement' between the parties which had been relied upon by the Plaintiff/Appellant and denied by the Defendant. The view of the learned Single Judge was that this document constituted an illegal contract inasmuch as the Plaintiff and his sister had agreed to give evidence favourable to the Defendant so that proceedings against the latter under the erstwhile Foreign Exchange Regulation Act (FERA), 1973 could be brought to an end. The learned Single Judge has pressed Sections 23 and 28 of the Indian Contract Act, 1872 to arrive at the conclusion that such a Settlement or "contract cannot form the basis of a legitimate claim by the plaintiff against the Defendant". Support has been taken for this conclusion from **Sudhindra Kumar Rai Chaudhuri –vs- Ganesh Chandra Ganguli,** AIR 1938 Calcutta 840 and **Sita Ram –vs- Radha Bai,** AIR 1968 SC 534.

2. There can be no gainsaying that an application under Order VII Rule 11 of the CPC for rejection of the plaint has to be decided entirely on a perusal of the plaint and documents filed along with it. If authorities are required for this proposition, we need not travel beyond the latest exposition of the law contained in **Liverpool & London S.P.& I Association Ltd. -vs- M.V. Sea Success I,** (2004) 9 SCC 512. More recently, in **Mayar (H.K.) Ltd. v. Owners & Parties, Vessel M.V. Fortune Express,** (2006) 3 SCC 100 it has yet again been clarified that the Court cannot reject a plaint under Order VII Rule 11 of the CPC on the basis of the allegations made in the Written Statement. In other words, the defence to the Suit is not relevant for the purposes of Order VII Rule 11 of the CPC. The summation of the law is available in the following paragraph thereof:

> 12. From the aforesaid, it is apparent that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application for rejection of the plaint. The court has to read the entire plaint as a whole to find out whether it discloses a cause of action and if it does, then the plaint cannot be rejected by the court exercising the power Order 7 Rule 11 of the Code. Essentially, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety taking those averments to be correct. A cause of action is a bundle of facts which are required to be proved for obtaining relief and for the said purpose, the material facts are required to be stated but not the evidence except in certain cases where the pleadings relied on are in regard to misrepresentation, fraud, wilful default, undue influence or of the same nature. So long as the plaint discloses some cause of action which requires determination by the court, the mere fact that in the opinion of the Judge the plaintiff may not succeed cannot be a ground for rejection of the plaint. In the present case, the averments made in the plaint, as has been noticed by us, do disclose the cause of action and, therefore, the High Court has rightly said that the powers under Order 7 Rule 11 of the Code cannot be exercised

for rejection of the suit filed by the plaintiff-appellants.

3. To similar effect is the pronouncement in **Hardesh Ores Pvt. Ltd. –vs- M/s. Hede and Company,** (2007) 5 SCC 614 where the suit had been rejected in response to the plea of the Defendant that the Suit was barred by limitation. The Hon'ble Supreme Court reversed the concurrent findings of the Trial Court as well as the High Court by observing that the language of Order VII Rule 11 of the CPC is quite clear and unambiguous; the plaint can be rejected on the ground of limitation only where a reading of the plaint unambiguously shows this to be so. The decision can be discerned from the following paragraph:-

> 25. The language of Order 7 Rule 11 CPC is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr Nariman did not dispute that "law" within the meaning of clause (d) of Order 7 Rule 11 must include the law of limitation as well. It is well settled that whether a plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is whether the averments made in the plaint, if taken to be correct in their entirety, a decree would be passed. The averments made in the plaint as a whole have to be seen to find out whether clause (d) of Rule 11 of Order 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. As observed earlier, the language of clause (d) is quite clear but if any authority is required, one may usefully refer to the judgments of this Court in **Liverpool & London S.P. & I Assn. Ltd. v. M.V. Sea Success I,** 2004(9) SCC 512 and **Popat and Kotecha Property v. State Bank of India Staff Assn,** (2005) 7 SCC 510.

4. Mr. Narula, learned Senior Counsel for the Appellant, relies on decisions of Division Bench of this Court in **Steel Authority of India Ltd. –vs- Rameshwar Dass Bishan Dayal,** 60(1995) DLT 271 (DB),

Inspiration Clothes & U –vs- Colby International Limited, 88(2000) DLT 769(DB) and on **Rajiv Kumar –vs- Kewal Cargo Carriers (P) Ltd.,** AIR 2007 Delhi 27. Our attention has also been drawn by **Mr. Narula to Vishnu Dutt Sharma –vs- Daya Sapra (Smt.),** (2009) 13 SCC 729 where the Court reiterated the established principle that every person has a right to have access to courts of justice, which right has been enshrined in Section 9 of the CPC. This very proposition has also been recognised by their Lordships in **Abdul Gafur –vs- State of Uttarakhand,** (2008) 10 SCC 97 where a writ petition was filed by one Tek Chand challenging the acquisition of land which came to be dismissed consequent upon the clarification by the Government that the road in question was not going to be used exclusively by the Hospital. This apparently did not assuage the fears of Tek Chand who thereafter filed two suits against the Hospital in which judgment was reserved. Undaunted, Tek Chand filed yet another writ petition in the course of hearing of which the High Court summoned the two pending suits to the file of the High Court. These two suits were thereupon dismissed by the High Court. It was in those circumstances that the Supreme Court observed that Section 9 bestowed on civil courts inherent jurisdiction, which could be whittled or watered down only by specific statue and, therefore, a suit could not be dismissed on the ground of it being frivolous. Their Lordships were, in no manner, desirous of diluting earlier observations made by the Supreme Court calculated to bring an expeditious and early conclusion of litigation, including civil suits. This is obvious from a reading of paragraph 20 of the Judgment which is reproduced below:-

> 20. Having considered the matter in the light of the aforestated legal position, we are of the opinion that the impugned order cannot be sustained. It is true that under Section 24 of the Code, the High Court has jurisdiction to suo motu withdraw a suit or appeal, pending in any court subordinate to it, to its file and adjudicate itself on the issues involved therein and dispose of the same. Unless the High Court decides to transfer the suit or the appeal, as the case may be, to some other court or the same court, it is obliged to try, adjudicate and dispose of the same. It needs little emphasis that the High Court is competent to dispose of the suit on preliminary issues, as contemplated in Order 14 Rules 1 and 2 of the Code, which may include the issues with regard to maintainability of the suit. If the High Court is convinced

that the plaint read as a whole does not disclose any cause of action, it may reject the plaint in terms of Order 7 Rule 11 of the Code. As a matter of fact, as observed by V.R. Krishna Iyer, J. in **T. Arivandandam –vs- T.V. Satyapal,** (1977) 4 SCC 467, if on a meaningful –not formal- reading of the plaint, it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the court should exercise its power under the said provision. And if clever drafting has created an illusion of a cause of action, it should be nipped in the bud at the first hearing by examining the party searchingly under Order 10 CPC. Nonetheless, the fact remains that the suit has to be disposed of either by the High Court or by the courts subordinate to it in a meaningful manner as per the procedure prescribed in the Code and not on one's own whims.

5. After this analysis of the law relating to the circumstances in which the plaint can be rejected, a reading thereof manifests that the Appellant/Plaintiffs' grievance was that the Defendant had initially agreed to pay to the former a commission of Rs. 15/- per kilogram of tea, which amounted to Rs. 1,76,26,500/-. The Plaint narrates that a sum of Rs. 13,00,000/- was paid by the Defendant to the Plaintiff leaving outstanding a sum of Rs. 1,63,26,500/-. According to the Plaint, in liquidation of this commission, a post-dated cheque for Rs. 1.15 crore had been made over by the Defendant to the Plaintiff.

6. It transpires that the proceedings under FERA were started against the Defendant. Contemporaneously, the Defendant claimed that the cheque for Rs. 1.15 crore was unauthorizedly encashed by the Plaintiff in conspiracy with his sister which compelled the Defendant to file a First Information Report resulting in the incarceration of the Plaintiff for twenty-two days. The Plaintiff's sister was unsuccessful in obtaining Anticipatory Bail. The Plaintiff's case is that the Settlement, referred to above, came to be arrived at between the parties acting through the Plaintiff's father. Needless to state, this version would have to be substantiated by the Defendant by leading requisite evidence.

7. Mr. Narula has relied on the Division Bench verdict in **Life Insurance Corporation of India, Madras –vs- Devendrappa Bujjappa,** AIR 1987 Karnataka 129 which clarifies that Section 23 of the Indian Contract Act does not prohibit enforcement of valid portion of the transfer

of property or debt if it is severable from the invalid portion. On the other hand, Mr.C. Mukund, learned counsel for the Respondent, has relied heavily on **Sudhindra Kumar, V. Narasimharaju –vs- V. Gurumurthy Raju,** AIR 1963 SC 107 and **Sita Ram –vs- Radha Bai,** AIR 1968 SC 534. We think that it is not necessary to rely on these Judgments.

8. We say this for the reason that on a perusal of the Plaint, it is uncontrovertedly clear to us that the Plaintiff does not rely solely on the 'Settlement' which the learned Single Judge has viewed as being illegal and consequently hit by Section 23 of the Indian Contract Act. Had there been no commercial or other dealings between the parties, nonetheless a compact had been arrived at between them for payment by the Defendant to the Plaintiff of a sum of money in return for the Plaintiff and/or his sister making favourable statements to ensure the closure of FERA proceedings against the Defendant, such a contract would indubitably have been hit by Section 23. As we see it, the Plaintiff may succeed in proving his claim for the sum of Rs. 1,00,17,972/- by leading evidence of the transactions which allegedly earned and entitled the Plaintiff to commission at the rate of Rs. 15/- per kilogram, thereafter reduced to Rs. 9/- per kilogram. The learned Single Judge has found no illegality in these transactions between the parties. It is for this reason that Section 23 of the Indian Contract Act is of little relevance. We also find it impossible not to conclude that the learned Single Judge has erred in going threadbare into the defences to the claim proffered by the Defendant. What has to be considered in the context of Order VII Rule 11 of the CPC, we may reiterate, as has been spelt out time and again in several judgments, is to understand and digest the cause of action that has been narrated in the Plaint. Proving or disproving that cause of action can only be considered after the parties have gone to Trial and have completed their evidence.

9. It is in these circumstances that the Appeal is accepted. The impugned Order is set aside. The application under Order VII Rule 11 of the CPC is dismissed. The Suit is restored to its original number. There shall be no order as to costs.

10. Parties to appear before the learned Single Judge on 5.5.2011.

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LPA

JASDEV SINGH & ORS. ....APPELLANTS

VERSUS

UNIT TRUST OF INDIA ....RESPONDENT

(DIPAK MISRA, CJ. & SANJIV KHANNA, J.)

LPA NO. : 10/2005 DATE OF DECISION: 02.05.2011

Constitution of India, 1950—Article 226—Judicial Review—Companies Act, 1956—Section 291, 292—Appellant No.3,a Corporate body purchased US 64 from Unit Trust of India (Respondent)—At the time of purchase Appellant complied with stipulation with regard to the submission of certificate of incorporation, memorandum and Article of Association, true copy of resolution passed by Managing body authorizing investment including Appellant no.2 making application for allotment of units—On 30th May 2001 Appellant No. 3 lodged Units for repurchase after duly discharging the same, signed by Appellant No.2—On 15th June Respondent returned the units with the objection "resolution for disinvestment letter is not there"—Indicating the same should be resubmitted after 30th June 2001—Appellant No.3 re-lodged it with resolution dated 12th May 2001—Unit Trust of India refused to accept the same in view of the decision to not to repurchase US 64 Units from 2nd July, 2001 onwards—Two question before Court—One, whether such resolution was required to be submitted as per terms of brochure—Other, whether there is any such statutory requirement—Held, the question whether the application was incomplete to be decided by examining terms of brochure and not by introducing

new terms and conditions, not mentioned in brochure—Not in dispute clauses relating to purchase had been complied with—No stipulation, at the time of repurchase the copies of Certificate of incorporation, Memorandum and Articles of Association, true copy of resolution of Managing Body for repurchase including the authority in favour of official were required to be submitted—Nothing prevented Respondent to stipulate, a certified copy of the resolution and the authority of the person submittng application should be submitted—Not the case, Application for purchase submitted by any person other than the one who submitted application for purchase—Reliance on section 291 and 292 of the Companies Act misplaced—Not the case that to repurchase UNITS any general meeting was required or Articles and Memorandum of Association restrict Board of directors from doing so, to attract section 291—As per Section 292(1) (d) it was not necessary to enclose Board Resolution with application for repurchase—In any case, violation of section 292 may have its impact and effect but a third person cannot reject application for repurchase on the ground of suspicion that there is non compliance of section 292—There is error in the decision making process—Respondent could not have taken irrelevant material into account—Decision is amenable to Judicial Review and can be corrected in Writ Proceedings.

[La Ga]

APPEARANCES:

FOR THE APPELLANTS : Mr. A.N. Haksar, Sr. Advocate with Mrs. Nisha Bagchi and Mr. Udayan Jain, Advocates.

FOR THE RESPONDENT : Mr. Parag P. Tripathi, ASG with Mr. Vibhu Bakhru, Mr. Shadan Earosat, Mr. Avnesh Arputham, Ms. Mahima Gupta, Mr. Gaurav Chauhan, Ms.

Ekta Kapil and Ms. Diksha Mehta, Advocates.

CASES REFERRED TO:

1. *MRF Ltd.* vs. *Manohar Parrikar*,(2010) 11 SCC 374.
2. *ABL International Ltd.* vs. *Export Credit Guarantee Corpn. of India Ltd.*,(2004) 3 SCC 553.
3. *Ferrom Electronics Private Limited* vs. *Vijaya Leasing Limited*, 2000 (1) CLC 1216.
4. *Shailesh Prabhudas Mehta* vs. *Calico Dyeing & Printing Mills Ltd.* 1994 13 CLA 371/ 1994 (3) SCC 339.
5. *The Commissioner of Income Tax, Nagpur* vs. *M/s Sutlej Cotton Mills Supply Agency Ltd.* (1975) 2 SCC 538.
6. *M/s Ashok Viniyoga Ltd.* vs. *The Commissioner of Income Tax (Central) Calcutta* (1972) 4 SCC 55.
7. *Gaya Sugar Mills Ltd.* vs. *Nand Kishore Bajoria & Anr.* AIR 1955 SC 441.
8. *Raja Bahadur Shivlal* vs. *Tircumdas Mills Company Ltd.*, (1912) 14 BomLR 45 (Bom)].

RESULT: Appeal allowed.

SANJIV KHANNA, J.

1. The appellants Jasdev Singh, Gurdev Singh and Richa Consultants Pvt. Limited, by this Intra Court appeal, have assailed the judgment dated 26th October, 2004 passed by the learned Single Judge dismissing their writ petition. Learned single Judge has held that the appellant No. 3 had furnished an incomplete application for re-purchase of units under the Unit Scheme 1964 (US64 or units, for short) on 30th May, 2001 and, therefore, the respondent Unit Trust of India had rightly refused to accept the units and make payment.

2. The question which arises for consideration in the present appeal is whether the application submitted by the appellant No. 3 on 30th May, 2001 was incomplete and liable to be rejected. The facts are almost undisputed and the principal issue pertains to the interpretation of the terms of the brochure and statutory requirements of the Companies Act,

1956 (Act, for short).

3. The appellant No. 3 is a corporate body and it is a limited company incorporated under the Act. It had purchased US 64 units as per the details given below:-

Date of Purchase	*No. Of Units*	*Rate of Purchase in (Rs.*	*Amount in (Rs.)*
29.07.1999	333500	13.50 Per Unit	45,02,250.00
29.08.2000	73500	13.65 Per Unit	10,03,275.00
29.09.2000	54347.826	13.80 Per Unit	7,50,000.00
Total	461347.826		62,55,525.00

4. At the time of purchase, the appellant No. 3 had complied with the following requirements stipulated in clause 20(6) for the purchase of US64 units.

> **"Documents to be submitted for Registered Societies and Companies :**
>
> Certified true copy of documents such as Certificate of Incorporation, Memorandum and Articles of Association, Bye Laws, certified true copy of the resolution of the Managing Body authorising investment in units including authority granted in favour of the officials signing the application for units together with their specimen signatures, etc. should be submitted. The officials should sign the application under their official designations."

5. There is no dispute that the appellant No. 3 at the time of purchase, had complied with the requirements of the abovementioned clause by enclosing Certificate of Incorporation, Memorandum and Articles of Association, certified true copy of the resolution passed by the Managing Body authorising the investment including the authority granted in favour of the appellant No. 2 Gurdev Singh for making the application for allotment with his specimen signatures.

6. On 30th May, 2001, appellant No. 3 lodged the original US64 units for repurchase along with a covering letter. The units were duly discharged as prescribed on the backside of the US64 certificates.

Photocopy of the discharged US64 certificates have been placed on record which show that the discharge was duly signed by the appellant No.2 Gurdev Singh i.e. the same person in whose favour authority letter had been issued by the company, appellant No. 3, at the time of investment. On the backside of the certificate stamp of the appellant No. 3 was also affixed. The discharge was witnessed.

7. On 15th June, 2001, the respondent returned the units with the objection "resolution for disinvestment letter is not there". The letter further indicated that the appellant No. 3 should resubmit the units after 30th June, 2001, as there was book closure till the said date.

8. Appellant No. 3 re-lodged the US 64 units for payment along with the copy of the resolution dated 12th May, 2001, but the respondent refused to accept the same in view of the decision not to repurchase US64 units from 2nd July, 2001 onwards. Correspondence followed but no positive response emanated therefrom.

9. The appellants filed writ petition 1887/2002 on or about 19th March, 2002. Notice on the writ petition was issued to the respondent. After filing of the writ petition, Unit Trust of India (Transfer of Undertaking and Repeal) Ordinance 2002, was promulgated dividing the respondent into 2 undertakings. US64 units came to be vested in the Administrator of the specified undertaking of the Unit Trust of India. The Ordinance was subsequently replaced by an Act. On 11th March, 2003, the Administrator offered an option to convert US 64 @ Rs.12/- for first 5000 US 64 units and @ Rs.10/- for the balance units. By letter dated 28th March, 2003, appellant No. 3 accepted the option without prejudice to its rights and contentions raised in the writ petition. The bonds issued have been now redeemed and the appellant No. 3 has been paid interest as stipulated therein.

10. The core issue pertains to the differential value in case the application for redemption/repurchase filed on 30th May, 2001 had been accepted and the face value of the bonds issued in 2003 of Rs.12 each for the first 5000 US64 units and Rs.10 each for the remaining units. The purchase value of the units as on 30th May, 2001, it is admitted was Rs.14.25. Thus, claim of the appellant No. 3 is for the difference between Rs.14.25 and Rs.12 for the first 5000 units and between Rs.14.25 and Rs.10 for the balance units. In monetary terms the claim is for refund

of Rs. 19,60,728/- with interest.

11. As noticed above, the respondent had rejected the repurchase application submitted by the appellant No. 3 for the reason that the repurchase application was not supported by the resolution of the Board of Directors of the respondent No. 3 for disinvestment. Question is whether any such resolution was required to be submitted as per the terms of the brochure or whether there is any such statutory requirement under the Act.

12. The relevant clauses of the brochure relating to repurchase of US64 Units read as under:-

"10. **Bank Account/ECS Particulars**

(i) Bank particulars of investors

It is mandatory for an investor to furnish full details of his/her bank account, such as nature of account, the account number and name of the bank and the branch, address with pin code etc. at the appropriate place in the application form, IDWs, if applicable, and repurchase cheque will then be made out in the name of the member with his bank particulars and sent to him for credit to his band (sic) account so specified.

(ii) Application without bank particulars will not be accepted/ processed."

11. **Repurchase**

The scheme provides instant liquidity throughout the year except during the period of book closure. Where a unit holder desires to offer his holding for repurchases, all he has to do is to submit at any UTI branch office, his membership advice/statement of account/unit certificate duly discharged. The units will be repurchased at the prevalent repurchase price. Partial repurchase is also allowed provided that no repurchase so made results in the unit holder having a balance of less than 200 units in a membership advice/statement of account/unit certificate. For repurchase of demated units, a unit holder has to approach the nearest UTI branch office through his Depository Participant (DP). The UTI branch office will dispatch the repurchase cheque

to the address of the unit holder.

19. **General**

(i) Units issued under the scheme are subject to the provisions of Unit Scheme 1964.

(ii) In case the application is found to the incomplete, the same will be liable for rejection and refund of such application money will be made by the Trust as soon as possible without any interest whatsoever. If any application is discovered to have been made under a false declaration/certificate, it will be rejected forthwith and the Trust shall have the right, in such an event, to repurchase the units at such price as may be decided by the Trust and recover the income distribution, if any, wrongly paid from out of the repurchase proceeds and return the balance.

(iii) All investments in the scheme are subject to market risks and the NAV of schemes/plans may go up or down depending upon the factors and forces affecting securities market. Past performance is not necessarily indicative of the future. There can be no assurance that the objective of the scheme will be achieved. "US-64" is only the name of the scheme and does not in any manner indicate either the quality of the scheme, its future prospects or returns."

13. A perusal of the aforesaid clauses would indicate that detailed instructions had been given in the brochure about the procedure for repurchase. The US64 units had to be duly discharged and could be submitted any time in the year except during the book closure. The US 64 units had been submitted on 30th May, 2001, before the book closure. They were accepted at the counter set up by the respondent for repurchase. It is not in dispute that clause 10 of the brochure was also duly complied with as the appellant No. 3 had given details of its bank account.

14. Clause 20(6) relates to the submission of documents by the companies or registered societies at the time of purchase. The said clause has been quoted above. It does not stipulate that at the time of repurchase, the copies of the same documents i.e. certificate of incorporation, Memorandum and Articles of Association, true certified copy of the resolution of the Managing Body for repurchase including authority granted

in favour of the official were required to be submitted. The brochure published by the respondent was detailed. A person who wanted to lodge units for repurchase was required to examine the brochure and comply with the terms and conditions mentioned therein. Nothing prevented the respondent from indicating and stating in the brochure that at the time of repurchase also, in the case of a registered society or a company, a certified copy of the resolution of the Managing Body and the authority of the person submitting the application should be submitted.

15. It may be noticed in the present case that the person who had submitted the application for repurchase and had discharged the certificate on behalf of the appellant No. 3 was the same person who had been authorised by the resolution of the Managing Body to purchase the units i.e. the appellant No. 2 Gurdev Singh. It is not the case wherein a different person had submitted the application for discharge and repurchase of the US64 Units.

16. Clause 19 of the brochure permitted and allowed the respondent to reject an application which was found to be incomplete. Whether or not the application was incomplete has to be decided by examining the terms of the brochure and not by introducing terms and conditions not mentioned in the brochure. Extraneous factors not mentioned in the brochure cannot be taken into consideration. The respondent, therefore, could have rejected the application submitted by the appellant No. 3 on 30th May, 2001, on the ground that application was incomplete in terms of the brochure and not for extraneous reasons and grounds. In addition, violation or non compliance with any other statutory requirement, if applicable, would also be a valid ground.

17. The respondent has contended that the term 'investment' used in clause 20(6) includes 'disinvestment' or 'repayment'. The argument is self-contradictory. It is accepted by the respondent that the appellant No. 3 had submitted a resolution dated 16th July, 1999, under which it was resolved as under:-

> "Resolved that the Company may invest an amount upto Rs.50.00 lacs into Unit Trust of India's US-64 securities as soon as possible."
>
> "Further resolved that the Managing Director Sh. Gurdev Singh be and is hereby authorised to take the necessary steps in this

regard."

18. If the term 'investment' includes 'disinvestment', then by the same resolution, the appellant No. 3 had resolved and permitted the Managing Director Gurdev Singh to take "necessary steps" for disinvestment or repurchase. The same resolution would be good and equally valid for repurchase.

19. The next question whether there was violation or non compliance of the Act. Reliance placed by the respondent on Section 292 of the Act is again misconceived. Sections 291 and 292 of the Act read as under:-

> **291. General powers of Board.**—(1) Subject to the provisions of this Act, the Board of directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do:
>
> Provided that the Board shall not exercise any power or do any act or thing which is directed or required, whether by this or any other Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting:
>
> Provided further that in exercising any such power or doing any such act or thing, the Board shall be subject to the provisions contained in that behalf in this or any other Act, or in the memorandum or articles of the company, or in any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting.
>
> (2) No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.
>
> **292. Certain powers to be exercised by Board only at meeting.**—(1) The Board of directors of a company shall exercise the following powers on behalf of the company, and it shall do so only by means of resolutions passed at meetings of the Board—
>
> (a) the power to make calls on shareholders in respect of money unpaid on their shares; 1[(aa) the power to authorise the buy-back referred to in the first proviso to clause (b) of sub-section

> (2) of Section 77-A;]
>
> (b) the power to issue debentures;
>
> (c) the power to borrow moneys otherwise than on debentures;
>
> (d) the power to invest the funds of the company; and
>
> (e) the power to make loans: Provided that the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, a principal officer of the branch office, the powers specified in clauses (c), (d) and (e) to the extent specified in sub-sections (2), (3) and (4) respectively, on such conditions as the Board may prescribe:
>
> Provided further that the acceptance by a banking company in the ordinary course of its business of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, or the placing of moneys on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be deemed to be a borrowing of moneys or, as the case may be, a making of loans by a banking company within the meaning of this section.
>
> Explanation I.—Nothing in clause (c) of sub-section (1) shall apply to borrowings by a banking company from other banking companies or from the Reserve Bank of India, the State Bank of India or any other banks established by or under any Act.
>
> Explanation II.—In respect of dealings between a company and its bankers, the exercise by the company of the power specified in clause (c) of sub-section (1) shall mean the arrangement made by the company with its bankers for the borrowing of money by way of overdraft or cash credit or otherwise and not the actual day-to-day operation on overdraft, cash credit or other accounts by means of which the arrangement so made is actually availed of.
>
> (2) Every resolution delegating the power referred to in clause

(c) of sub-section (1) shall specify the total amount outstanding at any one time up to which moneys may be borrowed by the delegate.

(3) Every resolution delegating the power referred to in clause (d) of sub-section (1) shall specify the total amount up to which the funds may be invested, and the nature of the investments which may be made, by the delegate.

(4) Every resolution delegating the power referred to in clause (e) of sub-section (1) shall specify the total amount up to which loans may be made by the delegate, the purposes for which the loans may be made, and the maximum amount of loans which may be made for each such purpose in individual cases.

(5) Nothing in this section shall be deemed to affect the right of the company in general meeting to impose restrictions and conditions on the exercise by the Board of any of the powers specified in sub-section (1).

20. Section 291 of the Act, 1956, postulates that the Board of Directors are entitled to exercise all powers, do such acts and things as the Company has authorised them to exercise and do, except a particular matter which is required by the Act or by the Memorandum and Articles of Association to be done in a general meeting.

21. It is not the case of the respondent that the Articles and Memorandum of Association put an embargo or a fetter on the Board of Directors or that under the Act, permission of the general meeting was required for submitting of an application for repayment of the US64 units. Section 292(1)(d), deals with power to make investment of the funds of the company. In broad sense, the term investment will include purchase of stock, shares, securities and application of money for purchase of property from which interest and profit is expected (Re, **Wragg** 1919 2 Ch 58). It means loss of the fluid character of money by a substituted asset possessing fixity or durable character while it lasts. The requirement under Section 292(1)(d) is that there should be a Board resolution and by a resolution the power may be delegated to a committee of Directors, Managing Director or any other principal officer of the company subject to the extent/value being specified and on such conditions as the Board may specify. Passing of a resolution is an internal requirement and has

to be satisfied by the company making the investment. It has been observed in **Ferrom Electronics Private Limited v Vijaya Leasing Limited,** 2000 (1) CLC 1216, that the company in whose shares money is invested cannot refuse to accept transfer of shares except for bona fide reasons and in the interest of the shareholders. The company should proceed with the assumption that provisions of Section 292 have been complied with by the investing company unless there is evidence to the contrary. It has been observed as under:-

"14. Shares of the company registered under the Act whose shares are quoted at the stock exchange are freely transferable. A shareholder has a right to transfer his shares. Correspondingly, in the absence of any impediment in this behalf, the transferee of shares in order to enable him to exercise the rights of a shareholder as against the company and third parties, is entitled to have the shares transferred in his name. In case a company refuses to transfer the shares it is entitled to have rectification of the register by registering therein as a registered shareholder of the shares transferred to him. The company whose shares have been purchased cannot refuse to register the shares arbitrarily or for any collateral purpose. It can be refused only for a bona fide reason in the interest of the company and the general interest of the shareholders. It is seen from the correspondence between the petitioner-company and the respondent-company that the respondent-company has very evasively resisted admitting and effecting the necessary changes in the register of members on the ground that the application for registration of the transfer was in violation of the Act. Despite specific query on the aspect of the violation of the provisions of the Act, except to state that there was violation of section 292 of the Act, no material particulars have been given regarding the violation. .....

[p. 400 of 2 CLA] Similarly, in **Shailesh Prabhudas Mehta v. Calico Dyeing & Printing Mills Ltd.** 1994 13 CLA 371/ 1994 (3) SCC 339, again Supreme Court held that the transferee has a right to have the rectification of the register of shares of the company. The company can refuse to register the shares only on specific grounds in exercise of its bona fide reason and

not arbitrary or for collateral purposes. Case set up by the respondent that it has refused to register the shares as the petitioner-company did not comply with the provisions of section 292 of the Act is wholly untenable and clearly an afterthought. Respondent in its objections regarding the transfer of shares as per letter dated 9th September, 1989 at Annexure G had specifically set out the various objections they had regarding the transfer of shares. In the said objections, the respondent-company did not at all set up that the provisions of section 292 had not been complied with. Moreover, section 292 does not at all relate to transfer of shares. Under section 292, the powers which can be exercised by the Board of directors by passing a resolution have been specified to be -

(a) the power to make calls on shareholders in respect of money unpaid on their shares;

(b) the power to issue debentures;

(c) the power to borrow moneys otherwise than on debentures;

(d) the power to invest the funds of the company; and

(e) the power to make loans

Section 292 being a matter of internal management of the company the respondent-company should have proceeded with the assumption that the petitioner-company had complied with the provisions of section 292 in the absence of any specific evidence to the contrary. Refusal of the respondent-company to register the transfer on this ground was unjustified. In spite of repeated queries raised by the petitioner-company asking the respondent-company to identify the aspect of section 292 which the petitioner-company failed to comply with, the respondent-company could not specifically say as to which clause of section 292 had not been complied with by the petitioner-company. Refusal to register the shares by the respondent-company under the circumstances cannot be held to be justified at all.

(emphasis supplied)

22. In the present case, appellant No. 3, a company, wanted its

investment in the said units liquidated and the investment converted into liquid money. It is extremely doubtful whether Section 292 (1)(d) would be applicable for making a repurchase i.e. encashment of the investment and conversion into cash, which is opposite and antithesis of investment. Further as noticed above, in case the word 'investment' includes 'disinvestment' then the earlier resolution passed by the Board of Directors dated 16th July, 1999 quoted above would be equally applicable, when the appellant No. 3 had made the application for repurchase. However this aspect need not be conclusively decided in the present case for the reasons stated below.

23. Submission of the Board resolution to a third person is not statutorily required even when Section 292 of the Act is attracted. Section 292 was not violated when Board resolution was not enclosed with the application for repurchase. There is no such requirement or condition stipulated in Section 292 of the Act. As per Section 292(1)(d) it was not necessary to enclose the Board resolution with the application for repurchase. Secondly, violation of Section 292 may have its own impact and effect but a third person cannot reject an application for repurchase on the ground of suspicion or assumption that there was non-compliance of Section 292 of the Act. As far as the third person is concerned, if the application was found to be in order and if the third person/party was not aware of any dispute, doubt or reason to believe that there was non-compliance of section 292, he was bound to comply with the request made for discharge of the investment and repay. The respondent could not have assumed that act of repurchase was irregular/illegal, there were disputes or the Board of Directors had not passed any resolution. There was no cause or reason for suspicion and doubt. The respondent has not pleaded and given any ground or reason for any doubt. Doctrine of indoor management applies unless there are grounds to apply rule of constructive notice. Formalities are normally assumed. The later rule applies when there are grounds or reasons to suspect that the person is acting beyond his authority. It has been observed in **MRF Ltd. v. Manohar Parrikar,**(2010) 11 SCC 374 :-

"**110.** The doctrine of indoor management is also known as the Turquand rule after **Royal British Bank v. Turquand**. In that case, the Directors of a company had issued a bond to Turquand. They had the power under the articles to issue such

bond provided they were authorised by a resolution passed by the shareholders at a general meeting of the company. But no such resolution was passed by the company. It was held that Turquand could recover the amount of the bond from the company on the ground that he was entitled to assume that the resolution was passed.

111. The doctrine of indoor management is in direct contrast to the doctrine or rule of constructive notice, which is essentially a presumption operating in favour of the company against the outsider. It prevents the outsider from alleging that he did not know that the constitution of the company rendered a particular act or a particular delegation of authority ultra vires. The doctrine of indoor management is an exception to the rule of constructive notice. It imposes an important limitation on the doctrine of constructive notice. According to this doctrine, persons dealing with the company are entitled to presume that internal requirements prescribed in the memorandum and articles have been properly observed. Therefore, doctrine of indoor management protects outsiders dealing or contracting with a company, whereas doctrine of constructive notice protects the insiders of a company or corporation against dealings with the outsiders. However, suspicion of irregularity has been widely recognised as an exception to the doctrine of indoor management. The protection of the doctrine is not available where the circumstances surrounding the contract are suspicious and therefore invite inquiry.

112. This exception was highlighted in the English case of **Houghton & Co. v. Nothard, Lowe & Wills Ltd.,** where the case involved an agreement between fruit brokers and fruit importing company. There was an allegation that the agreement was entered into by the company's directors without authority. It was held that the nature of transaction was found to have been such as to put the plaintiffs on inquiry. To this effect Sargant, L.J. held: (KB p. 267)

"Cases where the question has been as to the exact formalities observed when the seal of a company has been affixed, such as **Royal British Bank v. Turquand or County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery**

Co., are quite distinguishable from the present case. In Fireproof Doors Ltd., In re, tends rather against than in favour of the plaintiffs, since if a single director has as towards third parties the authority now contended for, the whole of the elaborate investigation of the facts in that case was entirely unnecessary. Perhaps the nearest approach to the present case is to be found in **Biggerstaff v. Rowatt's Wharf Ltd.** But there the agent whose authority was relied on had been acting to the knowledge of the company as a managing director, and the act done was one within the ordinary ambit of the powers of a managing director in the transaction of the company's affairs. It is, I think, clear that the transaction there would not have been supported had it not been in this ordinary course or had the agent been acting merely as one of the ordinary directors of the company. I know of no case in which an ordinary director, acting without authority in fact, has been held capable of binding a company by a contract with a third party, merely on the ground that that third party assumed that the director had been given authority by the Board to make the contract. A limitation of the right to make such an assumption is expressed in Buckley on the Companies Acts, 10th Edn., p. 175, in the following concise words: 'And the principle does not apply to the case where an agent of the company has done something beyond any authority which was given to him or which he was held out as having.' "

113. This exception to the doctrine of indoor management has been subsequently adopted in many Indian cases. They are **B. Anand Behari Lal v. Dinshaw and Co. (Bankers) Ltd. and Abdul Rahman Khan v. Mufassal Bank Ltd.** Applying the exception to the present scenario, there is sufficient doubt with regard to the conduct of the Power Minister in issuing the Notifications dated 15-5-1996 and 1-8-1996. Therefore, there is a definite suspicion of irregularity which renders the doctrine of indoor management inapplicable to the present case."

24. Neither want of resolution, nor the defect in the Board of Directors can adversely affect the rights of the third parties who have no knowledge of existence of infirmities when dealing with the company [See **Raja Bahadur Shivlal versus Tircumdas Mills Company Ltd.,**

(1912) 14 BomLR 45 (Bom)]. The respondent could not, on its own and without cause, presume that the repurchase application was an illegal/ irregular act, that they should be suspicious and clarify their doubts. There has to be a reason and justification to invoke the rule of constructive notice which requires some doubt or suspicion. There is no such allegation in the present case. In case there was any doubt, it was open to the respondent to write a letter and get it clarified. No such process was undertaken. On the other hand, the application for repurchase was rejected.

25. The respondent has relied upon **M/s Ashok Viniyoga Ltd. versus The Commissioner of Income Tax (Central) Calcutta** (1972) 4 SCC 55, **The Commissioner of Income Tax, Nagpur versus M/s Sutlej Cotton Mills Supply Agency Ltd.** (1975) 2 SCC 538 and **Gaya Sugar Mills Ltd. versus Nand Kishore Bajoria & Anr.** AIR 1955 SC 441. Decisions in these cases are not apposite and do not deal with the question/interpretation of Section 292 of the Act. In **M/s Ashok Viniyoga Ltd.** (supra) the question was whether the appellant-assessee's income was from business or realization of investments. In this context the resolution passed by the Board of Directors for purchase of shares was examined. In **M/s Sutlej Cotton Mills** (supra) again the question was whether the income earned was revenue or capital receipt. In **Gaya Sugar Mills** (supra) a scheme was framed to pay off the preference shareholders and thereby reduce capital of the company. But, neither meeting of creditors was held, nor sanction of the court was taken and the scheme never got implemented. However, the two persons appointed as trustees sold the shares and the sale proceeds were utilized for redemption of the preference shares. The company was subsequently wound up and the Official Liquidator made an application to recover the amount realized by the trustees. The Supreme Court held that till the scheme was sanctioned and the share capital was reduced, the preference shareholders had not acquired any right and the amount realized by the trustees was property of the company under liquidation. It is well settled that it is the ratio of the decision that is binding. The aforesaid decisions do not assist the pleas of the respondent.

26. By order dated 9th November, 2010, respondent was asked to file an affidavit about the practice and incidence of resolution adopted by it at the time of repurchase. Respondent has filed a vague affidavit stating, inter alia, that at least 8 companies had submitted specific

resolutions at the time of repurchase of units. The question is whether the respondent had accepted application for repurchase without any Board resolution in other cases. Merely because in some cases board resolutions were filed, it does not mean that no application was to be accepted without copy of a specific resolution. There can be variety of reasons why Board resolution was furnished e.g. change of the official who had signed the discharge certificate.

27. It is submitted on behalf of the respondent that it was entitled to reject the application for repurchase on the grounds and reasons not mentioned in the brochure or even when there was no statutory violation. The respondent was entitled to ask for the Board resolution and its conduct in rejecting the application for repayment was reasonable. The submission should be rejected. The relationship between the petitioner No.3 and the respondent was essentially contractual, and the parties were/are bound by the terms mutually accepted though the respondent being the State must adhere to and meet the standards prescribed as required by the Constitution from a State instrumentality. There was no requirement to furnish a copy of the Board resolution as per the agreed terms. Terms of a contract cannot be amended unilaterally and required mutual consent. Upholding power of unilateral imposition of conditions would give the respondent an infinite and unfettered right to accept or reject an application for reasons, which could be clarified or something which could be a mere surmise or conjecture. This would cause prejudice to the consumers or the unit holders. The sale and purchase of US64 units was on the basis of the price fixed by the respondent but the net asset value of the unit was known only to the respondent and was confidential. It is apparent that in the present case there was difference in the sale/purchase price and net asset value of the US64 unit. This information was not in public domain. Accepting the stand of the respondent would mean that even if the unit holder had submitted a proper and complete application as per the requirement of the brochure and as per law, the same could be rejected for any reasons, which the respondent perceived was reasonable. Any apprehension or doubt would be sufficient ground to reject the application though the apprehension was actually unfounded. This contention, if accepted, would cause prejudice and leave the unit holders at the mercy and discretion of the respondent, giving the respondent an unwarranted and unqualified upper hand to accept or reject the application. It may be noted that the problem has

arisen in the present case because of the difference between the buying/ selling price prior to 30th May, 2001 and the actual net asset value of the US64 units. This was in the internal knowledge of the respondent and there is substance in the allegation made by the appellants that the attempt has been to deny repayment by raking up issues and giving reasons, which were not stipulated in the brochure. If the respondent wanted the unit holders to comply with the further conditions, it could have informed or published the conditions by public notice or by other means. The respondent could not have unilaterally imposed fresh conditions on their own even without informing the public or the unit holders. Accepting the said contention would be unfair and unjust to unit holders, who have acted as per the brochure and while submitting the application for encashment have not violated any provision of law.

28. On the question whether a writ is maintainable, the issue is settled in favour of the appellant and is covered by the decision of the Supreme Court in the **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.,**(2004) 3 SCC 553. In this case it was held that if a state instrumentality acts in an arbitrary manner even in a matter of contract, then the aggrieved party may approach the court under Article 226 and the Court is within its powers to grant appropriate relief based on the facts of that particular case. The relevant paragraphs 10, 19,23, 25 and 27 are reproduced below:-

> **"10.** It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in **K.N. Guruswamy v. State of Mysore** was followed subsequently by this Court in the case of **D.F.O. v. Ram Sanehi Singh** wherein this Court held: (SCC p. 865, para 4)
>
> "By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on

> the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in **K.N. Guruswamy** case there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power." (emphasis supplied)
>
> **x x x x**
>
> **19.** Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Gunwant Kaur this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.
>
> **x x x x**
>
> **23.** It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent.....
>
> **x x x x**
>
> **25.** The learned counsel for the respondent then contended

that though the principal prayer in the writ petition is for quashing the letters of repudiation by the first respondent, in fact the writ petition is one for a "money claim" which cannot be granted in a writ petition under Article 226 of the Constitution of India. In our opinion, this argument of the learned counsel also cannot be accepted in its absolute terms. This Court in the case of **U.P. Pollution Control Board v. Kanoria Industrial Ltd.** while dealing with the question of refund of money in a writ petition after discussing the earlier case-law on this subject held: (SCC pp. 556-58, paras 12 & 16-17)

"12. In the para extracted above, in a similar situation as arising in the present cases relating to the very question of refund, while answering the said question affirmatively, this Court pointed out that the courts have made distinction between those cases where a claimant approached a High Court seeking relief of obtaining refund only and those where refund was sought as a consequential relief after striking down of the order of assessment etc. In these cases also the claims made for refund in the writ petitions were consequent upon declaration of law made by this Court. Hence, the High Court committed no error in entertaining the writ petitions.

* * *

16. In support of the submission that a writ petition seeking mandamus for mere refund of money was not maintainable, the decision in **Suganmal v. State of M.P.** was cited. In AIR para 6 of the said judgment, it is stated that

'we are of the opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax'.

17. Again in AIR para 9, the Court held:

'We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction.'

This judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax/cess is unconstitutional or without the authority of law. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case."

x x x x

27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State

or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable."

29. Learned single Judge has also not dismissed the writ petition on this ground. The writ petition was filed in 2002 and the present LPA was filed in 2005. We also do not think that it will be appropriate to non-suit the appellant on this ground after 8/9 years. As noticed above, we have proceeded on the principle whether there was any error in the decision making process i.e. whether the respondent could have introduced or imposed fresh conditions which were not mentioned in the brochure and when there was no violation of the statutory provisions. The respondent could not have taken into consideration irrelevant material and, therefore, an error has occurred in the decision making process. The aforesaid error in the decision making process is amiable to judicial review and can be corrected in the writ proceedings.

30. In view of the reasoning given above the appeal is allowed and writ of certiorari is issued quashing the letter of rejection dated 16th June, 2001 and mandamus is issued directing the respondent to pay Rs. 19,60,728/- with simple interest @ 8% per annum from 1st August, 2001 till payment is made. No costs.

ILR (2011) IV DELHI 208
W.P.(C)

DR. PREM LATA ....PETITIONER

VERSUS

GNCT OF DELHI AND ORS. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P. (C) NO. : 178/2011 DATE OF DECISION: .03.05.2011

Constitution of India, 1950—Article 226—Appointment of President of Consumer Disputes Redressal Forum (District Forum), Delhi—Selection Committee constituted under Section 10 (1A) of the Consumer Protection Act, 1986—Selection Committee made recommendations for filling up vacancies by preparing a panel valid for one year—Selected candidates were to join within 45 days of offer of appointment—In case failure to join, the appointment was to be offered to the second or third person as the case may be in preference—Petitioner did not figure in the name of first five selected candidates—The name of the petitioner however was mentioned as "second person" in the event of one Mr. M.C. Mehra not joining, whose name figured at Sr. no.4 in the list of selected candidates—According to the petitioner panel subsequently revised inspite of her being a candidate in waiting in the event of Mr. M.C. Mehra not joining, her name was placed at Sr. no.6—Thus she was entitled to join in the event of any of the first five candidates not joining within 45 days of offer of appointment—Candidates appearing at Sr. no.1, 2 and 5 did not join within 45 days—Their appointment lapsed and she being next on the panel became entitled to appointment—Submitted, mandate of the Selection

Committee binding on appointing authority—Held, Section 10(1A) merely provided mode of appointment—Word 'Recommendation' used in Section 10(1A) intended to mean what is ordinarily understood by the use of the word 'Recommendation'—If legislature intended to make recommendation of Selection Committee binding language of Section 10(1A) would have been different—State Government is not bound to accept the recommendations made by the Selection Committee—Act did not provide for preparation of a panel of candidates nor for the selected candidates to join within 45 days—Petitioner did not have any right to appointment—Record produced did not show that Selection Committee was only to make recommendation of names and not the conditions of appointment—It did not show that the Selection Committee had revised panel, it only showed that petitioner was to be appointed in the event of Sh. M.C. Mehra not joining within 45 days and infact Sh. Mehra had joined within 45 days—Petitioner had no right of appointment upon delay in the joining of candidates no.4 and 6—The appointment letter issued thus did not show that they were to join within 45 days—That Respondent no.4 to 6 were in service elsewhere was in contemplation of the appointing authority as well as Selection Committee that they, would not join till relieved by their employers—Appointing Authority was entitled to vary the recommendations of the Selection Committee—For reasons to be recorded—There were reasons on record for relaxing the period of 45 days as recommended by Selection Committee—No reason for the judicial review of this decision by appointing authority for relaxing the time of 45 days.

I am unable to agree and to read Section 10(1A) supra as contended. The legislature while making the State Government the appointing authority for the post of the

President of the District Forum has merely provided the mode of appointment. Had the intent been to appoint the candidates selected by the Selection Committee, the legislature would not have used the word "recommendation". The word "recommendation" as aforesaid has definite connotation in law and it can safely be presumed that the legislature when enacting Section 10(1A) intended what is ordinarily understood by use of the word "recommendation". Even if the appointments were to be necessarily made by the State Government, had the legislature intended the recommendations of the Selection Committee to be binding, language of Section 10(1A) would have been "every appointment under sub-section (1) shall be made by the State Government of the candidate selected by the Selection Committee consisting of the following……." **(Para 10)**

No answer was forthcoming from Mr. Saini. He rather suggested that it was for the Government to explain. He also contended that the appointing authority being the Lt. Governor having accepted the said recommendation of the Selection Committee, the said question did not arise. I may however notice that the advertisement inviting applications did provide that the appointing authority reserved the right to form a panel, "without any obligation of appointment to the wait listed candidates". In certain other matters, I have come across the Office Memorandum dated 30th July, 2007 of the Ministry of Personnel, Govt. of India providing for preparation of a panel, valid for a period of one year. I suspect that the panel in the present case was prepared as per the said Office Memorandum. I also find that the Supreme Court in **Dr. Uma Kant Vs. Dr. Bhikalal Jain** (1992) 1 SCC 105 observed that a reserve list is prepared to meet the contingency of anticipated or future vacancies caused on account of resignation, retirement, promotion or otherwise, because it takes a long time in constituting fresh Selection Committee and in order to avoid ad hoc appointment **(Para 18)**

It has thus to be necessarily held that the petitioner does not have any right of appointment. However, since it appears that the recommendation of the Selection Committee even though not as per the statute and without any mandate, was accepted by the appointing authority. This Court is to only satisfy itself whether the extension granted to the selected candidates to join was for reasons or arbitrary. **(Para 19)**

Neither the record produced nor the office notings therein show that any such mandate was issued to the Selection Committee. The advertisement inviting applications also did not contain any such condition that the selected candidate was required to join within 45 days. It was in contemplation at the time of inviting applications that those already in service may also apply and be selected and the advertisement required such persons to obtain the clearance/ sponsorship of their department/employer and route their applications through proper channel. At this stage, I may also notice that though it is the case of the petitioner that pursuant to the initial recommendation, a consolidated panel in which she was placed at serial no.6 was prepared but the record and/or the office notings do not support such case. The record and the office notings contain only the one recommendation of the Selection Committee and in which the petitioner had a right of appointment only in the event of Shri M.C. Mehra not joining within 45 days. It is not the case of the petitioner that Shri M.C. Mehra did not join within 45 days; Shri M.C. Mehra is not even impleaded as a party to this petition. Rather the record shows that Mr. M.C. Mehra joined within 45 days. Thus as per the recommendation on record, the petitioner had no right of appointment upon delay by the respondents no.4 to 6 in joining. **(Para 21)**

In accordance with the judgment of the Apex Court in **S. Chandramohan Nair** (supra) the Lt. Governor as the appointing authority was entitled to vary the recommendation of the Selection Committee for reasons to be recorded. The record contains the reasons aforesaid for the Lt. Governor

to have relaxed the period of 45 days recommended by the Selection Committee. **(Para 30)**

[La Ga]

APPEARANCES:

FOR THE PETITIONER : Mr. R.K. Saini & Mr. Sitab Ali Chaudhary, Advocates.

FOR THE RESPONDENTS : Mr. Najmi Waziri, Standing Counsel (Civil), GNCTD with Ms. Zeenat Masoodi, Advocate. Mr. Om Prakash, Advocate for R-4&5. Ms. Reeta Chaudhary, Advocate for R-6.

CASES REFERRED TO:

1. *D.K. Sharma* vs. *Union of India* W.P.(C) No.2231/2011.
2. *S. Chandramohan Nair* vs. *George Joseph* 2010 (10) SCALE 507.
3. *Basavaiah* vs. *Dr. H.L. Ramesh* (2010) 8 SCC 372.
4. *Acharya Gyan Ayurved College* vs. *Department of Ayush* MANU/DE/3346/2010.
5. *Shesh Mani Shukla* vs. *D.I.O.S. Deoria* 2009 (10) SCALE 457.
6. *Lakhwinder Singh* vs. *UOI* (2008) 7 SCC 648.
7. *Divisional Forest Officer* vs. *M. Ramalinga Reddy* (2007) 9 SCC 286.
8. *UOI* vs. *Kali Dass Batish* (2006) 1 SCC 779.
9. *State of U.P.* vs. *Rajkumar Sharma* (2006) 3 SCC 330.
10. *Sethi Auto Service Station* vs. *DDA* 129 (2006) DLT 139.
11. *M.P. Rural Agriculture Extension Officers Association* vs. *State of M.P.* (2004) 4 SCC 646.
12. *Ashwani Kumar Singh* vs. *U.P. Public Service Commission* (2003) 11 SCC 584.
13. *Sunil Kumar Goyal* vs. *Rajasthan Public Service*

Commission MANU/SC0405/2003.

14. *MTNL* vs. *TRAI 84* (2000) DLT 70.

15. *Union of India* vs. *Telecom Regulatory Authority of India* 74 (1998) DLT 282.

16. *Dr. Ashok K. Mittal* vs. *University of Delhi* ILR (1996) 2 Del 489.

17. *Union of India* vs. *N.P. Dhamania* AIR (1995) SC 568.

18. *R.S. Mittal* vs. *UOI* 1995 Supp (2) SCC 230.

19. *Dr. H. Mukherjee* vs. *UOI* AIR 1994 SC 495.

20. *Hoshiar Singh* vs. *State of Haryana* 1993 Supp. (4) SCC 377.

21. *S.M. Bose* vs. *AIIMS* 1993 (26) DRJ 544.

22. *Dr. Uma Kant* vs. *Dr. Bhikalal Jain* (1992) 1 SCC 105.

23. *Shankarsan Dash* vs. *Union of India* (1991) 3 SCC 47.

24. *Shainda Hasan* vs. *State of Uttar Pradesh* MANU/SC/0271/1990.

25. *District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram* vs. *M. Tripura Sundari Devi* MANU/SC/0478/1990.

26. *State of Kerala* vs. *A. Lakshmikutty* (1986) 4 SCC 632.

RESULT: Petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. The petition concerns appointment to the Office of the President of District Consumer Disputes Redressal Forum (District Forum), Delhi; advertisements inviting applications to the said post were published in the newspapers on 18th March, 2010 by the Food Supplies and Consumer Affairs Department of Government of NCT of Delhi. Seventy Two (72) applications including that of the petitioner were received. In accordance with Section 10(1A) of the Consumer Protection Act, 1986 (Consumer Act) a Selection Committee was constituted. The Selection Committee made its recommendation for filling up the vacancies in the Office of five District Fora in Delhi by preparing a panel, valid for one year. The said recommendation also provided:

> "In case the candidates selected fail to join within 45 days of offer of appointment, the appointment will lapse and the second or third person as the case may be in preference will be offered the appointment.
>
> During the course of interview on our query the candidates already serving had candidly expressed before us that in case they are selected and offered appointment, they will join immediately."

2. The name of the petitioner did not figure in the name of the five (5) selected candidates in the said recommendation. However the name of the petitioner was mentioned as the "second person" in the event of Mr. M.C. Mehra whose name figured at serial no.4 in the list of selected candidates, not joining.

3. The petitioner claims that the panel was subsequently revised and inspite of the petitioner, being a candidate in waiting in the event of Mr. M.C. Mehra not joining, the name of the petitioner was placed at serial no.6 i.e. entitled to join in the event of any of the first five selected candidates not joining within 45 days of offer of appointment.

4. It is further the case of the petitioner that the respondents no.4, 5 & 6 whose name appeared at number 1, 2 & 5 respectively of the selected candidates, did not join within 45 days of offer of appointment to them and thus as per the recommendation aforesaid of the Selection Committee, the offer to them of appointment, automatically lapsed and the petitioner being the next person on the panel became entitled to appointment. Upon the representation of the petitioner seeking such appointment meeting with no success, this writ petition was filed seeking quashing of the extension if any granted to the respondents no. 4 to 6 to join and mandamus declaring appointment of the respondents no. 4 to 6 to the said post as illegal and void and mandamus directing appointment of the petitioner to the said post w.e.f. 1st December, 2010 with all consequential benefits. The writ petition was filed in or about the beginning of January, 2011 and came up before this Court first on 12th January, 2011 when the petitioner appearing in person sought time to file the advertisement inviting applications and certain other documents.

5. The petition thereafter came up before this Court on 28th January,

2011 when the following order was passed.

"The petitioner, who is a sitting member of the District Consumer Disputes Redressal Forum, Janak Puri, West Delhi, appears in person. She states that she does not wish to engage an advocate. Her grievance is in relation to an advertisement stated to have been issued by the Department of Food, Civil Supplies and Consumer Forums on 18.03.2010 inviting applications for appointment to the post of President of Consumer Disputes Redressal Forum of Delhi.

I have suggested to her that perhaps it might be more appropriate for her to engage counsel so that the matter may be handled with professional, dispassionate objectivity and, at the same time permit her to attend to her duties at the consumer forum. She, however, wishes to exercise her right to appear in person.

After some preliminary hearing, I consider it appropriate to request Mr. R.K. Saini, Advocate, who happens to be ˇpresent in Court, to discuss the matter with the petitioner, and to thereafter assist the Court in this matter. In seeking an earlier date, the petitioner first said that public interest is suffering since the post of President in various forums in Delhi has been lying vacant since long, and the respondents are not taking any steps to fill them up. When it was pointed out that hers was not a public interest litigation, she then said that she apprehends that the respondents will appoint someone else in the meanwhile, thus defeating her claim.

Initially, keeping in mind the fact that the petitioner is appearing in person, and is also a member of a Consumer Disputes Redressal Forum, I had tried to take a very lenient view of her approach and manner in addressing this Court. But it appears that my indulgence is taken either as a sign of weakness, or a licence to the petitioner to address this Court in an intemperate manner saying that she has been denied justice and that her filing of the writ petition will be of no consequence whatsoever, in case other people are appointed by the respondents.

The petitioner appears to be under the impression that by

creating a spectacle and haranguing the Court, she would somehow be able to compel the Court to pass some favourble orders.

All efforts of other counsel present in Court to advise the petitioner to restrain herself; and even the efforts of Mr. R.K. Saini, Advocate, in this regard, made no impact on her. It is only when I have, thereafter, made it very clear that I intend to take a stern view of her conduct that she has tendered an apology. I, therefore, do not take this matter any further.

List on 4th March, 2011 for further preliminary consideration.

SUDERSHAN KUMAR MISRA, J."

6. The petitioner thereafter applied for amendment of the petition, which was allowed on 10th March, 2011 and notice of the amended petition was issued for 19th April, 2011 and the respondents no.1 to 3 (respondents no. 2 & 3 being the Secretary-cum-Commissioner, Department of Food Supplies & Consumer Affairs and the Lt. Governor, Delhi respectively) directed to produce the relevant record. On 19th April, 2011, Mr. Najmi Waziri counsel for the respondents no.1 to 3 produced the record relating to the appointment for the post of President, District Forum and Mr. R.K. Saini, Advocate appointed as a Amicus Curiae, Mr. Waziri and the counsel for the respondents no.4 & 5 were heard. The petitioner on that date chose not to address herself and expressed full confidence in Mr. Saini. Mr. Waziri on enquiry on the basis of the record brought has disclosed that while the respondents no. 5 & 6 joined the post on 25th February, 2011, the respondent no.4 joined on 28th February, 2011 i.e. before the date of issuance of the notice of this petition.

7. The contention of Mr. Saini is that, under Section 10(1A) of the Consumer Act which is as under:-

"(1A) Every appointment under sub-section (1) shall be made by the State Government on the recommendation of a selection committee consisting of the following, namely:-

(i) President of the State Commission -Chairman.

(ii) Secretary, Law Department of the State -Member.

(iii) Secretary, incharge of the Department -Member. dealing with consumer affairs in the State "

the appointment has to be made as per the recommendation of the Selection Committee; that the Selection Committee having recommended that the appointment of the five selected candidates would automatically lapse if do not join within 45 days of offer of appointment, the respondent no.1 as appointing authority was bound by the said recommendation and could not have extended the time for appointment and the petitioner in accordance with the recommendation of the Selection Committee became the "selected candidate" on the 46th day and has thus a right to appointment. He contends that the mandate of the Selection Committee is binding on the appointing authority.

8. Attention of the counsel for the petitioner was invited to the recent judgment of the undersigned in **Acharya Gyan Ayurved College v. Department of Ayush** MANU/DE/3346/2010 in para 10 whereof the following judgments on the value/nature of recommendations were noticed;-

(i) **Dr. Ashok K. Mittal v. University of Delhi** ILR (1996) 2 Del 489 where a Division Bench of this Court held that the Governing Body of the college was the appointing and the deciding authority and no error could be found in its decision while considering the report of the Selection Committee, to re-advertise the post;

(ii) **M.P. Rural Agriculture Extension Officers Association v. State of M.P.** (2004) 4 SCC 646 holding that even though Pay Commission is an expert body, it is still open to the State to accept or not to accept its recommendations;

(iii) **Union of India v. Telecom Regulatory Authority of India** 74 (1998) DLT 282 laying down that to hold the recommendations of the Regulatory Authority to be binding on the licensing authority i.e. the Government would amount to changing the basic structure of the Telegraph Act and to putting the Government under the control of the Regulatory Authority thereby curtaining, restricting and circumscribing the power of the Government;

(iv) **MTNL v. TRAI** 84 (2000) DLT 70 in which the Division Bench did not differ from the aforesaid dicta;

(v) **Dr. H. Mukherjee v. UOI** AIR 1994 SC 495 holding that Government as appointing authority has absolute power to approve or disapprove list of recommendations and that the Government can take into consideration the developments subsequent to the selection made by the UPSC and to hold otherwise would not be in public interest and may lead to serious complications if the Government is enjoined to act notwithstanding serious matters having come to its notice subsequent to the recommendation made by the UPSC.

(vi) **Sethi Auto Service Station v. DDA** 129 (2006) DLT 139 where also a Division Bench of this Court held that if the recommendatory body is not the final authority to take the decision, merely because some favourable recommendations are made at some level of decision making process, that will not bind the superior or higher authority;

(vii) **Lakhwinder Singh v. UOI** (2008) 7 SCC 648 where also the assessment of the Selection Board was held to be purely recommendatory in character and the power of the appointing authority to accept or vary the recommendation of the Selection Board was held to be implicit;

(viii) **State of Kerala v. A. Lakshmikutty** (1986) 4 SCC 632 where the recommendations of the High Court for appointment of District Judges were held to be not binding though the circumstances in which the State could differ were laid down;

9. Mr. Saini however contends that Section 10(1A) supra of the Consumer Act does not leave any such discretion in the State Government and mandates the appointment to be in accordance with the recommendations of the Selection Committee.

10. I am unable to agree and to read Section 10(1A) supra as contended. The legislature while making the State Government the

appointing authority for the post of the President of the District Forum has merely provided the mode of appointment. Had the intent been to appoint the candidates selected by the Selection Committee, the legislature would not have used the word "recommendation". The word "recommendation" as aforesaid has definite connotation in law and it can safely be presumed that the legislature when enacting Section 10(1A) intended what is ordinarily understood by use of the word "recommendation". Even if the appointments were to be necessarily made by the State Government, had the legislature intended the recommendations of the Selection Committee to be binding, language of Section 10(1A) would have been "every appointment under sub-section (1) shall be made by the State Government of the candidate selected by the Selection Committee consisting of the following……."

11. I may notice that Section 20 of the Consumer Act uses language identical to that of Section 10(1A) qua appointment of members of the National Consumer Disputes Redressal Forum (National Commission). However, Rule 12A(8) of the Consumer Protection Rules, 1987 provides for the Central Government, which is the appointing authority verifying credentials and antecedents of candidates selected by the Selection Committee and satisfying itself as to their suitability. The same is also indicative of the language used in Section 20 or Section 10(1A) meaning not what is attributed to it by Mr. Saini.

12. Mr. Saini after the close of hearing has submitted copies of the following judgments:-

(a) **S. Chandramohan Nair v. George Joseph** 2010 (10) SCALE 507 – this case concerned the appointment to the post of the Member of the Kerala State Consumer Disputes Redressal Commission Section 16(1A) of the Consumer Act relating to the said appointment similarly provides the appointment to be made by the State Government on the recommendation of the Selection Committee. The Supreme Court in para 16 of the said judgment also held:-

> "An analysis of these provisions shows that …… though, the State Government is not bound to accept the recommendations made by the Selection Committee, if it does not want to accept the recommendations, then

> reasons for doing so have to be recorded. The State Government cannot arbitrarily ignore or reject the recommendations of the Selection Committee. If the appointment made by the State Government is subjected to judicial scrutiny, then it is duty bound to produce the relevant records including recommendation of the Selection Committee before the Court to show that there were valid reasons for not accepting the recommendation."

I am unable to see as to how the said judgment can be of any assistance to the petitioner. In fact the Apex Court in relation to the same Act i.e. the Consumer Act has reiterated that notwithstanding the language of Section 16(1A) and which is identical to 10(1A), the State Government is not bound to accept the recommendations made by the Selection Committee. All that it lays down is that deviation from the recommendations has to be for valid reasons and which can be subject to judicial scrutiny.

(b) **Shesh Mani Shukla v. D.I.O.S. Deoria** 2009 (10) SCALE 457 which was however a case of appointment without complying with the prescribed procedure and thus has no application to the present case;

(c) **Basavaiah v. Dr. H.L. Ramesh** (2010) 8 SCC 372 which is a judgment on limits of judicial review and the Courts in exercise of power under Article 226 of the Constitution of India refraining from interference in Expert Committee's recommendations. Here this Court is not being called upon to interfere in the recommendations of candidates made by the Selection Committee but the question involved is of the powers of the appointing authority;

(d) Judgment dated 18th February, 2009 of the Kerala High Court in W.P.(C) No.16915/2005 (L) titled **James K. Joseph v. Government of India** relating to appointment of Administrative Member in Central Administrative Tribunal, Ernakulam Bench. In this case, the Selection Committee had withdrawn its earlier recommendation of the petitioner. It was held that in exercise of judicial review

the High Court cannot sit in appeal over report of Intelligence Bureau and as to the choice of candidates. I fail to see how this judgment either helps the petitioner.

13. The Supreme Court in **R.S. Mittal Vs. UOI** 1995 Supp (2) SCC 230held that though there is no vested right to be appointed to the post for which a candidate has been selected but the appointing authority cannot ignore the panel or decline to make the appointment and when a person has been selected then ordinarily there is no justification to ignore him for appointment unless there is a justifiable reason to decline to appoint a person who is on the selection panel. Similarly in **State of U.P. Vs. Rajkumar Sharma** (2006) 3 SCC 330 it was held that mere inclusion in the select list does not confer any right to be selected even if some of the vacancies remain unfilled.

14. The Constitution Bench in **Shankarsan Dash Vs. Union of India** (1991) 3 SCC 47 held that the notification merely amounts to an invitation to qualified candidates to apply for recruitment and or their selection they do not acquire any right to the post and that unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. It was however held that the same does not imply that the State has the license of acting arbitrarily and is bound to respect the comparative merit as reflected in the recruitment test.

15. The Supreme Court in **Ashwani Kumar Singh Vs. U.P. Public Service Commission** (2003) 11 SCC 584 also while holding that vacancies which exist on account of some selected candidates not joining need not perforce be filled up from the merit list and much would depend upon the statutory provisions governing the field. In the present case, as aforesaid, the statutory provision does not even provide for preparation of such a panel or of a list of candidates in waiting.

16. Reference may also be made to **Union of India v. N.P. Dhamania** AIR (1995) SC 568 laying down that the appointing authority can choose to differ from the recommendations but must give reasons for the same. To the same effect is the judgment in **S.M. Bose v. AIIMS** 1993 (26) DRJ 544.

17. Before referring to the records produced by the Government to

find whether any reasons existed for the appointing authority to relax the period of 45 days laid down in the recommendation of the Selection Committee, it is apposite to refer to another question put during the course of hearing to the Ld. Amicus Curiae. The Consumer Act does not provide for preparation of a panel of candidates or for the selected candidate being required to join within 45 days of offer of appointment and the appointment automatically lapsing upon not so joining and the candidate in waiting becoming the "selected candidate". No rules also in this regard were cited. It was as such enquired as to what was the power of the Selection Committee to, besides naming the selected candidates, provide a period of 45 days for joining or for automatic lapsing of appointment or to prepare a panel of others in waiting.

18. No answer was forthcoming from Mr. Saini. He rather suggested that it was for the Government to explain. He also contended that the appointing authority being the Lt. Governor having accepted the said recommendation of the Selection Committee, the said question did not arise. I may however notice that the advertisement inviting applications did provide that the appointing authority reserved the right to form a panel, "without any obligation of appointment to the wait listed candidates". In certain other matters, I have come across the Office Memorandum dated 30th July, 2007 of the Ministry of Personnel, Govt. of India providing for preparation of a panel, valid for a period of one year. I suspect that the panel in the present case was prepared as per the said Office Memorandum. I also find that the Supreme Court in **Dr. Uma Kant Vs. Dr. Bhikalal Jain** (1992) 1 SCC 105 observed that a reserve list is prepared to meet the contingency of anticipated or future vacancies caused on account of resignation, retirement, promotion or otherwise, because it takes a long time in constituting fresh Selection Committee and in order to avoid ad hoc appointment.

19. It has thus to be necessarily held that the petitioner does not have any right of appointment. However, since it appears that the recommendation of the Selection Committee even though not as per the statute and without any mandate, was accepted by the appointing authority. This Court is to only satisfy itself whether the extension granted to the selected candidates to join was for reasons or arbitrary.

20. I have perused the records produced by the Government to find

whether the Selection Committee had the mandate to besides recommending the name of the most suitable candidates for appointment, also lay down the terms of appointment. The language of Section 10(1A) requires the Selection Committee to only recommend the names of the selected candidates and not the conditions of appointment.

21. Neither the record produced nor the office notings therein show that any such mandate was issued to the Selection Committee. The advertisement inviting applications also did not contain any such condition that the selected candidate was required to join within 45 days. It was in contemplation at the time of inviting applications that those already in service may also apply and be selected and the advertisement required such persons to obtain the clearance/sponsorship of their department/ employer and route their applications through proper channel. At this stage, I may also notice that though it is the case of the petitioner that pursuant to the initial recommendation, a consolidated panel in which she was placed at serial no.6 was prepared but the record and/or the office notings do not support such case. The record and the office notings contain only the one recommendation of the Selection Committee and in which the petitioner had a right of appointment only in the event of Shri M.C. Mehra not joining within 45 days. It is not the case of the petitioner that Shri M.C. Mehra did not join within 45 days; Shri M.C. Mehra is not even impleaded as a party to this petition. Rather the record shows that Mr. M.C. Mehra joined within 45 days. Thus as per the recommendation on record, the petitioner had no right of appointment upon delay by the respondents no.4 to 6 in joining.

22. The record shows that offer of appointment was made to the respondents no.4 to 6 vide letters dated 13th October, 2010. The said letters also, though required acceptance to be intimated within 10 days and though containing other terms & conditions, did not provide that upon appointment the incumbents will have to join within 45 days. The record further shows that the respondents no.4 to 6 vide their letters dated 21st October, 2010, 20th October, 2010 & 21st October, 2010 respectively conveyed their acceptance thereto. The acceptance letter of only the respondent no.6 also states that he "shall join within the time framed by the department". The appointment orders dated 25th October, 2010 of the respondents no.4 to 6 were issued. The same also did not contain any term(s) of the appointees i.e. the respondents no.4 to 6 being

required to join within 45 days. However the office noting dated 8th November, 2010 shows a decision to inform the respondents no.4 to 6 of the recommendation of the Selection Committee of the selected candidates being required to join within 45 days and the appointment lapsing on failure to so join. In pursuance thereto letters dated 9th November, 2010 were issued to the respondents no.4 to 6 informing them that if they were unable to join by 27th November, 2010, the offer of appointment will automatically lapse and the next candidate on the panel will be considered for appointment to the post.

23. In this regard it may be stated that the respondent no.4 Shri Rakesh Kapoor was then the Principal District & Sessions Judge of Delhi and the respondent no.5 Shri C.K. Chaturvedi, District Judge-II, Delhi and the respondent no.6 Shri S.N.A. Zaidi, Addl. District Judge, Mathura. They had written to the High Court of Delhi and the High Court of Judicature at Allahabad respectively to be relieved.

24. In response letters dated 9th November, 2010 (supra), the respondent no.4 vide his letter dated 23rd November, 2010 informed that he had written to the High Court of Delhi requesting to be relieved at the earliest and shall join immediately on being relieved. Similar letters dated 19th November, 2010 and 20th November, 2010 were also sent by the respondents no.5&6 respectively.

25. Mr. Saini has argued that the date on which the respondents no.4 to 6 asked to be relieved would be relevant; that they were required to immediately after issuance of the appointment letter dated 25th October, 2010 take steps with their respective employers for being relieved and if are not shown to have so taken the steps, would be guilty of delay/laches and would forfeit their appointment. Upon the counsel for the respondents no.4 & 5 contending that the orders dated 25th October, 2010 do not even contain any such stipulation of 45 days, Mr. Saini contends that as per the recommendation aforesaid of the Selection Committee, the candidates at the time of interview had assured that they will join immediately and could not be permitted to, while continuing on their existing post, hold up other post. In fact he had sought affidavits to be filed by the respondents in this regard and a right to rejoin.

26. The record shows that though the respondent no.6 had applied to the High Court of Judicature at Allahabad for being relieved on 28th

October, 2010, the respondents no.4&5 applied for being relieved only after receipt of the letters dated 9th November, 2010. To my mind, however the said aspect is irrelevant for the reason that the record shows that each of the respondents no.4 to 6 joined immediately i.e. either the very next date or the same date of being relieved.

27. As aforesaid, applications were invited from those in service/ employment elsewhere also and it was thus in the contemplation of the appointing authority as well as the Selection Committee that the selected candidates would not be able to join till being relieved from their existing employers and which was not in their own hands. Mr. Saini has ofcourse argued that the respondents no.4 to 6 if not being relieved by their employer(s) should have gone to Court against their employer(s) but I am unable to accept such far-fetched argument.

28. Mr. Waziri from the record has also shown a letter dated 24th November, 2010 written by the High Court of Delhi to the Lt. Governor, Delhi informing that the Hon'ble Chief Justice of Delhi High Court had desired that three months more time be given to the respondents no.4 & 5 to join as they could be relieved by the Delhi High Court only after selection of their replacements in a Full Court meeting. The office notings show that the Lt. Governor on 4th February, 2011 considered the proposal for granting three months extension but sanctioned issuance of a final notice to the selected candidates then yet to join, to join within 15 days from the date of receipt of notice or three weeks from the date of issuance of notice failing which the offer of appointment will be given to the candidates kept on the panel. A request was also made to the Registrar, Delhi High Court to consider relieving the respondents no.4&5 immediately. In pursuance to the said decision of the Lt. Governor, letters dated 7th February, 2011 were issued to respondents no.4 to 6 asking them to join as aforesaid and informing them that on default, offer of appointment will be given to the candidates kept on panel.

29. As aforesaid, the respondents no.4 to 6 joined within the time aforesaid.

30. In accordance with the judgment of the Apex Court in **S. Chandramohan Nair** (supra) the Lt. Governor as the appointing authority was entitled to vary the recommendation of the Selection Committee for reasons to be recorded. The record contains the reasons aforesaid for the

Lt. Governor to have relaxed the period of 45 days recommended by the Selection Committee.

31. I find no reason for judicial review of the decision so taken by the appointing authority for relaxing the time of 45 days. Undoubtedly, the respondents no. 4 to 6 were the first choice for appointment and the petitioner only the second choice. I have repeatedly asked from Mr. Saini as to why should the appointing authority be not interested in taking the best candidate available and/or the first choice even if at the cost of some delay. No satisfactory answer has been forthcoming. The Supreme Court in **UOI Vs. Kali Dass Batish** (2006) 1 SCC 779 also reiterated the limits of judicial review in the matters of appointment.

32. There is another aspect of the matter. The order dated 28th January, 2011 in the present petition re-produced herein above reflects the conduct and behaviour of the petitioner before this Court. I have enquired from Mr. Saini as to whether in the light thereof, the petitioner can be said to be a fit person for occupying the post of the President and/or to be entitled to any equitable relief under Article 226 of the Constitution of India. Mr. Saini has contended that the petitioner, only committed the mistake of contrary to settled practice, appearing in person and was swayed owing to her personal involvement.

33. Philip Allen Lacovara, a distinguished practitioner in an article in the American Bar Association Journal observed that a perfect Judge is an abstraction…..he will never exist in fact…but then every cosmology has its ethics. There is no judicial discretion allowing a Judge to lose his sangfroid. Hot-button temperaments mar judgments and barbs demean the Courts. True, at times there may be judicial necessity to point to the right path. Even judicial pain may impel an appellate Court in some cases to provide proper direction, but, while dealing with peccadilloes suggesting the failings of individuals, the judges have to exhibit high intellectual, professional and literary skills. A Judge can neither afford to be unfair nor vituperative.

34. The petitioner is a long serving member of the District Forum and is expected to be conversant with the Court procedures and the behaviour of the petitioner recorded in the order aforesaid, in my opinion certainly disentitles the petitioner from the relief claimed in the present petition though with the clarification that the same is not intended to

come in the way of the petitioner seeking any appointment/post in future. The counsel for the respondent no.4&5 has in this regard after the close of hearing also handed over photocopy of **Hoshiar Singh v. State of Haryana** 1993 Supp. (4) SCC 377 laying down that non-selection on the ground of misbehaviour at the time of interview is justified.

35. Mr. Saini has also argued that even though the respondents no.4 to 6 have since joined but after the filing of this writ petition on 7th January, 2011 and thus the principle of lis pendens would apply and the petitioner upon succeeding would be entitled to an order for removal of the respondents no.4 to 6 and to an order of appointment. It is also contended that the procedure adopted is mala fide, intended to deprive the petitioner of appointment and to favour the respondents no.4 to 6. He also contends that the extension allowed of 90 days is disproportionate to the initial time granted of 45 days.

36. I am unable to accept any of the contentions aforesaid. The petition though filed on 7th January, 2011 remained deadwood till 4th March, 2011 when it was amended and before which date the respondents no.4 to 6 had already joined. No basis for the pleas of mala fide or favouritism have also been found on record.

37. Mr. Waziri has urged that the petitioner has no locus to maintain the present petition because she is not qualified for appointment. Strong objection was taken by Mr. Saini to the said argument contending that the petitioner having been selected and the recommendations of the Selection Committee having been accepted, no such ground can now be urged. He had also contended that if the respondents were to be permitted to urge the said ground, an opportunity ought to be also given to the petitioner to meet the same. Mr. Saini was assured at the close of hearing that this Court did not intend to return any finding on the said argument but the same would be recorded.

38. The contention of Mr. Waziri is that the eligibility provided under Section 10(1)(a) of the Consumer Act , for the post of the President of the District Forum is of a person who is, or has been, or is qualified to be a District Judge. He contends that admittedly the petitioner was not and has not been a District Judge. On the question of whether the petitioner is qualified to be a District Judge, attention is invited to Article 233 of the Constitution of India providing for a person to be eligible to

be appointed as a District Judge, if he is recommended by the High Court for appointment. It is urged that the petitioner having never been recommended by the High Court for appointment as the District Judge could not be eligible to be appointed as the President. Reliance in this regard is also placed on the recent dicta dated 8th April, 2011 of the Division Bench of this Court in W.P.(C) No.2231/2011 titled **D.K. Sharma v. Union of India** drawing a distinction between Article 233 and Article 217 relating to the appointment of a High Court Judge. It is contended that Article 217 while laying down eligibility for appointment as a Judge of the High Court, does not provide for recommendation of the High Court or the Supreme Court. On enquiry as to to what class of persons the eligibility prescribed in Section 10 (1)(a) of "qualified to be a District Judge" would apply, he states that it would apply to either serving judicial officers eligible to be District Judge or to Advocates recommended for appointment by the High Court but not appointed or not joining.

39. As assured at the close of hearing, this Court in this proceeding is not to adjudicate the aforesaid controversy.

40. The counsel for the respondents no.4&5 with reference to the CCS Rules applicable to the Subordinate Judiciary has contended that respondents no.4&5 could not have joined without being relieved and joined immediately upon being relieved by this Court. They have also denied that they were at the time of interview communicated that they would be required to join within 45 days. It is also contended that the Bio Data of the petitioner does not even show requisite experience of the petitioner as Advocate or a Pleader for eligibility for appointment as a District Judge. After close of hearing, copies of the following judgments were handed over:

A. **District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram v. M. Tripura Sundari Devi** MANU/SC/0478/1990 laying down that appointment in disregard of prescribed qualification is not a matter between appointing authority and appointee alone but amounts to fraud on public, to contend that respondents are entitled to raise the plea of eligibility of the petitioner.

B. **Shainda Hasan v. State of Uttar Pradesh** MANU/SC/0271/ 1990 to canvass that Selection Committee could not have relaxed

the qualifying criteria for the petitioner.

C. **Sunil Kumar Goyal v. Rajasthan Public Service Commission** MANU/SC0405/2003 laying down that those Advocates who had joined service, even though representing their Department before Tribunal, could not appear before the Court like lawyers, to contend that the petitioner did not have requisite experience as Advocate.

D. **Divisional Forest Officer v. M. Ramalinga Reddy** (2007) 9 SCC 286 laying down that a selected candidate has no legal right to be appointed automatically.

The Court must express appreciation for Mr. Saini who, at the request of the Court, has at short notice placed the case of the petitioner in the best possible perspective and rendered exemplary assistance to this Court.

The petition therefore fails and is dismissed. No order as to costs.

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CRL. A.

VINOD **....APPELLANT**

VERSUS

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

(BADAR DURREZ AHMED & VEENA BIRBAL, JJ.)

CRL. A. NO. : 789/2002 & 785/2002 **DATE OF DECISION: 10.05.2011**

Indian Penal Code, 1860—Section 300, 302, 323, 325 and 34—Aggrieved appellants filed appeals against judgment convicting and sentencing them for having committed offence under Section 302/34 IPC and under Section 323/34 IPC—Appellants admitted occurrence

but urged, occurrence took place in sudden fight in heat of passion upon quarrel and they did not take undue advantage or acted in a cruel or unusual manner—Thus, facts and circumstances only establish ingredients of exception 4 of Section 300 IPC, as such it was not case of murder but of culpable homicide not amounting to murder—Held:- To avail benefit of Exception 4, defence is required to probablise that offence was committed without premeditation in a sudden fight, in heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner—Exception is based upon principle that in absence of premeditation and on account of total deprivation of self-control but on account of heat of passion, offence was committed, which normally a man of sober urges would not resort to—Appellants committed an offence of culpable homicide without premeditation in a sudden fight in heat of passion upon a sudden quarrel and their case is covered by exception 4 of Section 300 which is punishable under Section 304 (part-I) IPC.

In the instant case, the evidence on record shows that there was no enmity between the deceased or his brother Jagdish (PW 1) and the appellants. The evidence on record shows that there was a sudden fight between the deceased and his brother Jagdish (PW1) and the appellants. The evidence on record shows that there was a sudden fight between Jeet (PW 4) and the accused persons and deceased Sanjay along with brother Jagdish (PW 1) standing near his house had intervened. Immediately thereafter accused persons had left the spot and came back within no time armed with cricket bat, wicket and lathi as is discussed in the evidence. It is not the case of the prosecution that they had given repeated blows on the head of the deceased. Evidence on record also shows that there was hardly any time gap when they had left the spot and returned armed with aforesaid weapons. It cannot be said that there was premeditation for

committing the occurrence. Evidence of all the eye witnesses shows that the accused persons had come back armed with bat and wicket within no time of leaving after the first occurrence. There is nothing on record to show that accused persons had taken undue advantage or acted in a cruel or unusual manner. There is nothing on record to show that repeated blows were given with Ex.P1 & Ex.P2 to the deceased Sanjay. It is not the case of prosecution that the pointed end of the wicket was used to cause the death of the deceased. The incident happened all of a sudden.

(Para 21)

Important Issue Involved: To avail benefit of Exception 4, defence is required to probablise that offence was committed without premeditation in a sudden fight, in heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner—Exception is based upon principle that in absence of premeditation and on account of total deprivation of self-control but on account of heat of passion, offence was committed, which normally a man of sober urges would not resort to.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Ajay Verma along with Mr. Gaurav Bhattacharya, Ms. Maria Riba and Mr. Anirudh Wadhwa, Advocates. Ms. Aasha Tiwari for appellant. Rakesh in Crl. A. 785/2002.

FOR THE RESPONDENT : Ms. Richa kapur, Addl. Standing Counsel.

CASES REFERRED TO:

1. *Sukhbir Singh* vs. *State of Haryana* reported in (2002) 3 SCC 327.
2. *Dariyao & Anr* vs. *State* reported in 1969 Criminal Law Journal 1237.

RESULT: Appeals partly allowed.

VEENA BIRBAL, J.

1. Both the appeals are directed against the judgment dated 14.08.2002 passed in Sessions Case No.40/1999 by the learned Additional Sessions Judge, New Delhi, arising out of FIR No.1/99 registered at Police Station Delhi Cantt. wherein both the appellants have been convicted under Section 302/34 IPC and u/s 323/34 IPC for having committed the murder of one Sanjay and having caused simple hurt to Jagdish. The appeals are also directed against the order of sentence dated 2.9.2002, whereby both the appellants are directed to undergo imprisonment for life and to pay a fine of Rs.100/- each and in default thereby to further undergo R.I for seven days.

2. Briefly the facts relevant for disposal of appeal are as under:-

A case was registered against aforesaid two appellants and the co-accused, namely, Raj Kumar & Rajinder @ Chutki vide FIR No.1/1999 (Ex. PW15/1) in Police Station Delhi Cantt on the statement Ex. PW1/1 of complainant Jagdish (PW.1) wherein he had alleged that on 31st December, 1998 at about 11.30 pm, appellants Vinod, Rakesh and their friends were quarreling with a boy, namely, Jeet PW-4 near the shop of Randhir. He and his brother Sanjay i.e deceased had intervened and the quarrel was brought to an end. In that process, some altercation and exchange of slaps had taken place. The appellants and their friends left by saying that they would be back within no time. After sometime when Jagdish (PW-1) and deceased Sanjay were standing near the shop of Randhir, four persons i.e both the appellants and co-accused persons Rakesh and Raj Kumar came again. Appellant Vinod was having a cricket bat in his hand, Raj Kumar was holding a wicket, Rakesh was having a wicket in his hand and another co-accused was having a lathi. They then assaulted him and when the deceased Sanjay tried to save him, appellant Vinod had hit the head of deceased Sanjay with a cricket bat and his associates had also started giving beatings to Sanjay. When he raised an alarm, they all ran away. Initially, this case was registered under section 307/34 IPC and when the injured Sanjay died on 1st January, 1999, an offence u/s 302 IPC was also added. Investigation was handed over to Inspector Anand Sagar (PW 18). On that day, I.O. PW-18 made search

for accused persons but could not locate them. A report u/s 174 Cr.P.C. was prepared and statements of father (PW 7) and Sh. Rati Ram (PW 3), uncle of deceased were recorded in the proceedings u/s 174 Cr.P.C. On 01.01.1999, statements of Raju (PW 2), Jeet Singh (PW 4) and Jagdish (PW 1) were recorded. Postmortem examination of deceased was got done. The co-accused Raj Kumar was arrested on 03.01.1999, whereas both the appellants had surrendered on 04.01.1999. The appellants and the co-accused had made their respective disclosure statements to I.O. (PW-18) i.e. Ex. PW2/2, Ex. PW18/4 and Ex. PW18/5 respectively. Appellant Vinod got recovered a cricket bat (Ex P1) from his house which was lying under the cot inside the room. Appellant Rakesh got recovered a wicket (Ex.P2) from the roof of first floor of his house. The same were seized by preparing necessary memos. After completion of necessary investigation, a challan was filed against the accused persons i.e Vinod, Rakesh and Raj Kumar. In the said challan, accused Rajinder @ Chutki was shown as a proclaimed offender.

3. The charges were framed against the appellants and co-accused Raj Kumar vide orders dated 13th August, 1999, for having committed the offence punishable u/s 302/34 IPC and u/s 307/34 IPC to which they pleaded not guilty and claimed trial.

4. The prosecution, in all, had examined 20 witnesses before the Ld. Addl. Sessions Judge, Delhi, out of which, Jagdish PW 1, Raju PW 2 and Jeet PW 4, are the alleged eye witnesses to the occurrence. Rati Ram PW 3, uncle of the deceased Sanjay, had identified the dead body of Sanjay. Daya Chand, PW.7, father of deceased Sanjay had handed over the blood stained jacket Ex.P3 of deceased Sanjay which he was wearing at the time of the incident to the police and the same was seized vide memo Ex.PW.7/1. He had also identified the dead body of Sanjay. Remaining witnesses relate to police and medical evidence.

5. In the statement under section 313 Cr.P.C, the appellants had denied the incriminating evidence against them. The appellant Vinod had stated that he was friendly with a girl Seema, daughter of Jai Om and had eloped with her. Jai Om belonged to the family of Jagdish PW 1. The family of Jai Om had falsely implicated him in a case of rape wherein he was ultimately acquitted. Thereafter, Jai Om and his family became inimical to him and had falsely implicated him in the case. The appellant Rakesh had stated that he had helped Vinod in fighting the aforesaid rape

case and due to that reason he was also falsely implicated in the present case. No evidence in defence was led by the appellants.

6. After considering the evidence on record, the learned ASJ had convicted both the appellants, that is, Vinod and Rakesh under Sections 302/34 IPC and 323/34 IPC and sentenced them to undergo imprisonment for life whereas co-accused Raj Kumar was acquitted in respect of both the charges as it was held that there was no evidence on record to connect him with the alleged occurrence.

7. Appellants have challenged the impugned judgment of conviction as well as order of sentence by filing the separate appeals, which are being taken up together for disposal.

8. At the outset, learned counsel for the appellant Vinod has submitted that he has instructions from the appellant to submit that appellant is admitting the alleged occurrence. It is contended that in any event, appellant could not have been held guilty for the offence punishable u/s 302/34 IPC. Learned counsel has submitted that occurrence took place in a sudden fight in the heat of passion upon a sudden quarrel. It is contended that accused persons had not taken undue advantage or acted in a cruel or unusual manner. It is contended that as per evidence on record, the role assigned to the appellant-Vinod was that he had given one cricket bat blow on the head of the deceased. Learned counsel has further contended that the facts and circumstances of the case only establishes the ingredients of exception 4 of section 300 IPC, as such it is not a case of murder but a case of culpable homicide not amounting to murder. It is further contended that there is no previous enmity between the appellant-Vinod and deceased. In support of his case, learned counsel for the appellant has relied upon **Sukhbir Singh Vs. State of Haryana** reported in (2002) 3 SCC 327.

9. Learned counsel for the appellant Rakesh has contended that the role assigned to the appellant Rakesh is that he had given a single blow of wicket to deceased Sanjay. There is no evidence on record to show that the Rakesh had common intention with the remaining the accused persons to commit the occurrence. It is contended that there is nothing on record to show that which of the accused had caused fatal blow to deceased Sanjay which resulted in his death. It is contended that at the most, appellant Rakesh can be convicted only for the offence u/s 325

IPC. Learned counsel has relied upon **Dariyao & Anr vs State** reported in 1969 Criminal Law Journal 1237.

10. On the other hand, learned counsel for the State has contended that the present case does not fall under exception 4 of section 300 IPC as is contended by counsel for appellant-Vinod. The evidence on record clearly establishes that appellants have committed the offence of murder. It is contended that there were two separate incidents on the day of occurrence. In the first incident, as per evidence on record, appellants Vinod and Rakesh and one more person were quarrelling with Jeet (PW.2) and deceased Sanjay had intervened and separated them. At that time, they had some altercation and appellants and the associates had left the place by saying that they would be back soon. Immediately they hadcome back armed with weapons in their hands. It is contended that Vinod was armed with a cricket bat, Rakesh was having a wicket in his hand while their associate was having a lathi. It is contended that they had come to the spot again with premeditation. It is contended that second fight was not a sudden fight, as such the occurrence does not fall under exception 4 to section 300 IPC and appellant has been rightly convicted under section 302/34 IPC.

11. We have considered the submissions made and perused the entire material on record.

12. There are three eye witnesses to the alleged occurrence i.e Jagdish PW 1, Raju, PW 2 and Jeet PW 4. As per prosecution, Jagdish PW 1 is the brother of deceased Sanjay and he had also sustained injuries at the time of alleged incident. Jagdish (PW 1) has categorically deposed that on 31st December, 1998 at about 11.30 pm, he along with his three brothers namely Sanjay, Rakesh and Shyam were standing in front of his house no.T-101, Old Nangal Village, Delhi Cantt. A scuffle was going on in front of shop of Randhir between Jeet (PW 4) and accused persons i.e Rakesh, Vinod and Chutki wherein they were beating Jeet PW 4. The complainant Jagdish (PW 1) along with his brothers went to the shop of Randhir and had intervened. Thereafter, accused persons went ˇtowards their houses by saying that they would be back within no time. Thereafter, when deceased Sanjay was taking Jeet (PW 4) towards his house, he saw the appellants and Chutki coming back and started beating the deceased Sanjay. Appellant-Vinod had a cricket bat (Ex. P1) in his hand, Appellant-Rakesh had a wicket (Ex. P2) in his hand while Chutki had a lathi in his

hand. He had also identified appellants before the court. He has also deposed that they had attacked Sanjay with the respective weapons they had in their hands. They had also caused injuries to him and he fell down. After beating them, they ran away and PCR Van came and removed Sanjay to hospital. Later on he was also taken to hospital. He had been cross-examined at length but his material deposition as regards presence of Vinod and Rakesh at the spot and having caused injuries to him and deceased Sanjay was not shaken in cross-examination. His material deposition is in consonance with statement Ex.PW 1/1 on the basis of which FIR No.561/98 (Ex.PW.15/DB) was registered. The other eye witnesses, i.e., Raju (PW 2) and Jeet (PW 4) have also supported the case of prosecution as regards the presence of appellants Vinod and Rakesh at the spot and having caused injuries to deceased Sanjay and complainant Jagdish (PW.1) at the incident. These material witnesses were cross-examined at length and their material deposition as regards presence of Vinod and Rakesh having caused injuries to Sanjay and Jagdish (PW 1) was not shaken in cross-examination.

13. Reading the entire evidence, it cannot be said that the appellants were not present at the spot and that they did not cause injuries to deceased Sanjay and Jagdish (PW 1).

14. The evidence of material witnesses of the prosecution also stand corroborated by the MLC Ex PW 6/1 of the deceased Sanjay which shows Contused Lacerated Wound (CLW) on left parietal region and left frontal region. The MLC Ex.PW 6/1 of deceased Sanjay is proved on record by Dr. Rajiv Sharma (PW 6). The said doctor has also opined that the said injuries can be caused by a blunt object. The MLC of Jagdish (PW 1) shows that injuries are simple in nature having been caused by blunt object.

15. The evidence of eye witnesses also finds corroboration from postmortem report (Ex. PW5/1). The aforesaid report is proved by Dr. Alexander F. Khakha (PW 5) and the same shows the following external injuries:-

(i) Black eye-left side with swelling.

(ii) Laceration on the left side forehead 2 cms. Above the eye brow size 2.5 cms x 0.5 cms.

(iii) Abrasion on the left side forehead two cms. Above injury

no.2. Size 2 cms x .9 cms.

(iv) Laceration on the left side top front of head. Size 4.2 cms. X 0.5 cms x 0.5 cms.

Internal examination of Head revealed that "there was extra vassation of blood under the scalp on the left fronto-tempero-parietal region of the head. Skull vault showed a fissure fracture of the left tempo-parietal occipital bones extending to the base of skull at middle craneal fossa bilaterally. Sub-dural and sub-arachnoid haemorrhage present on the left fronto tempero parietal lobes of cerebrum. Brain was grossly sedamatous. Intra-ventricular bleeding was present.

16. The post mortem report Ex. PW 5/1 shows that death was due to cranio cerebral injuries caused by blunt force impact with hard and blunt object/weapon. The said doctor has also opined that injury no.2, 3 & 4 could be caused by cricket bat Ex.P1 as well as wicket ExP2. Dr.Alexander PW.5 has also opined that injury no.4 and its corresponding internal injuries were sufficient to cause death.

17. The appellants had not led any evidence in defence to substantiate the alleged inimical relations. Not even copy of alleged FIR was placed by them on record. Under these circumstances, the stand taken by them was disbelieved by the learned ASJ.

18. Considering the evidence on record, we find no illegality in the finding of the learned ASJ that the accused persons are responsible for the alleged occurrence.

19. The contention of appellant-Vinod is that the present is not a case of culpable homicide amounting to murder but the evidence on record establishes that it is a case which would fall within exception 4 to Section 300 IPC.

Exception 4 to Section 300 of the IPC reads as under:-

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

20. In **Sukhbir Singh Vs. State of Haryana** (supra), wherein

after altercation over the splashing of mud on the person of appellant, who was also slapped by the complainant party, appellant left the spot by declaring that a lesson would be taught to them. After some time, appellant with his associates came to the spot carrying weapons. Appellant gave two thrust blows with his bhala on the upper right portion of the chest. As per allegations, his associates had also attacked. The appellant was convicted under section 302 IPC by the trial court. The conviction was also upheld by the High Court. The Supreme Court had set aside the conviction of the appellant u/s 302 IPC and held him guilty for the commission of offence of culpable homicide not amounting to murder punishable under section 304 (part I) of the IPC and was sentenced to undergo RI for 10 years. The relevant portion of the judgment is as under:-

"18. To avail the benefit of Exception 4, the defence is required to probabilise that the offence was committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel and the offender had not taken any undue advantage and the offender had not acted in a cruel or unusual manner. The exception is based upon the principle that in the absence of premeditation and on account of total deprivation of self-control but on account of heat of passion, the offence was committed which, normally a man of sober urges would not resort to. Sudden fight, though not defined under the Act, implies mutual provocation. It has been held by the courts that a fight is not per se palliating circumstance and only unpremeditated fight is such. The time gap between quarrel and the fight is an important consideration to decide the applicability of the incident. If there intervenes a sufficient time for passion to subside, giving the accused time to come to normalcy and the fight takes place thereafter, the killing would be murder but if the time gap is not sufficient, the accused may be held entitled to the benefit of this exception."

19. In the instant case, concededly, there was no enmity between the parties and there is no allegation of the prosecution that before the occurrence, the appellant and others had premeditated. As noticed earlier, the occurrence took place when Sukhbir Singh got mud splashes on account of sweeping of the street by Ram

Niwas and a quarrel ensued. The deceased gave slaps to the appellant for no fault of his. The quarrel appeared to be sudden, on account of heat of passion. The accused went home and came armed in the company of others though without telling them his intention to commit the ultimate crime of murder. The time gap between the quarrel and the fight is stated to be a few minutes only. According to Gulab Singh (PW 10) when Sukhbir Singh was passing in the street and some mud got splashed on his clothes, he abused Ram Niwas. They both grappled with each other whereupon Lachhman (deceased) intervened and separated them. Accused Sukhbir had abused Lachhman who gave him two slaps. The said accused thereafter went to his home after stating that he would teach him a lesson for the slaps which had been given to him. After some time he, along with other accused persons, came at the spot and the fight took place. His own house is at a different place. There is a street in between his house and the house of Lachhman (deceased). On the northern side of his house, the house of the appellant is situated. Similarly Ram Niwas (PW 11) has stated that after the quarrel the accused went towards his house and within a few minutes he came back with other accused persons. It is, therefore, probable that there was no sufficient lapse of time between the quarrel and the fight which means that the occurrence was "sudden" within the meaning of Exception 4 of Section 300 IPC."

21. In the instant case, the evidence on record shows that there was no enmity between the deceased or his brother Jagdish (PW 1) and the appellants. The evidence on record shows that there was a sudden fight between Jeet (PW 4) and the accused persons and deceased Sanjay along with brother Jagdish (PW 1) standing near his house had intervened. Immediately thereafter accused persons had left the spot and came back within no time armed with cricket bat, wicket and lathi as is discussed in the evidence. It is not the case of the prosecution that they had given repeated blows on the head of the deceased. Evidence on record also shows that there was hardly any time gap when they had left the spot and returned armed with aforesaid weapons. It cannot be said that there was premeditation for committing the occurrence. Evidence of all the eye witnesses shows that the accused persons had come back armed with

bat and wicket within no time of leaving after the first occurrence. There is nothing on record to show that accused persons had taken undue advantage or acted in a cruel or unusual manner. There is nothing on record to show that repeated blows were given with Ex.P1 & Ex.P2 to the deceased Sanjay. It is not the case of prosecution that the pointed end of the wicket was used to cause the death of the deceased. The incident happened all of a sudden.

22. We have also examined the contention of learned counsel for the appellant Rakesh that the said appellant had no common intention with the other accused person to commit the occurrence and no fatal blow was given by him and at the most he can be convicted under Section 325 IPC. The evidence of eye witnesses shows that he was present at the time of initial incident. Thereafter the said appellant had left the spot with others and within no time he had come again to the spot armed with wicket Ex.P2 with other co-accused and had given a beating to deceased Sanjay and Jagdish (PW1) along with appellant Vinod. The same establishes that appellant shared the common intention with others. It is well settled that common intention to commit the crime can be framed at the spur of moment. It has also come in the evidence of Dr Alexandar F. Khakha (PW 5) who has conducted the post mortem of deceased Sanjay vide report Ex. PW5/1 that injury No. 2, 3 and 4 could be caused by cricket bat Ex. P1 as well as wicket Ex. P2 and injury No.4 and its corresponding internal injuries were sufficient to cause death. Under these circumstances, it cannot be said that blow given by him was not the fatal blow. The contention raised by learned counsel for appellant Rakesh is rejected.

23. Keeping in view the facts and circumstances of the case, we are of the opinion that on the basis of evidence on record it is proved that appellants have committed the offence of culpable homicide without premeditation in a sudden fight in the heat of passion upon sudden quarrel and did not act in a cruel or unusual manner and their case is covered by Exception 4 of Section 300 which is punishable under Section 304 (Part I) IPC.

24. Both the appeals stand disposed of by partly allowing the same. The conviction of the appellants for the offence of murder is converted to a conviction under Section 304 (Part I)/34 IPC and their sentences of life imprisonment are reduced to 7 years of rigorous imprisonment. The

sentence of fine of Rs. 100 and in default of payment of fine to undergo rigorous imprisonment of 7 days as imposed by the Ld. ASJ, is maintained. We also make it clear that if appellant Vinod has already undergone the sentence now imposed, then he shall be released forthwith, if not required in any other case. Appellant Rakesh is on bail. If he has not undergone 7 years of rigorous imprisonment, he shall surrender forthwith and shall undergo the remaining sentence. On his surrender, the bail bond furnished by him will stand cancelled and the surety will also be discharged. Benefit of Section 428 Cr.P.C. be given to both the appellants.

The appeals are partly allowed, as above.

ILR (2011) IV DELHI 241
W.P. (C)

MASTER SHIKHAR GUPTA ....PETITIONER

VERSUS

GOVT. OF NCT OF DELHI & ORS. ....RESPONDENTS

(KAILASH GAMBHIR, J.)

W.P. (C) NO. : 2140/2011 DATE OF DECISION: 11.05.2011

Recognized Schools (Admission Procedure for Pre-primary Class) Order, 2007-2008—Rule 19—Essentiality of draw of lots in the presence of parents of candidate—Petitioner was not selected for admission Alleged arbitrary conduct of school-holding draw of lots not in the presence of the parents of the Petitioner—Admitted that draw of lots was held in the presence of Admission Committee consisting of two representatives of the parents of the candidates.

Held—Petitioner did not contend that no draw of lots

was held or there has been any bias or prejudice against him—Admission committee consisted of representatives of parents—Process of draw of lots-transparent and fair.

It is undoubtedly true that the petitioner applied for two consecutive sessions in the alumni category hoping to get admission in the same school as his father studied. It is understandable that the parents want their children to get the same quality education and value system that they got from the same established educational institution, besides the emotional attachment that they have with their alma mater and consequently the schools also have a moral responsibility for the wards of their old students, for which this special category of alumni has been created. But to expect that the children of every alumni would get admission in the school is a far fetched proposition and the petitioner cannot be allowed to seek relief alleging the whole process to be arbitrary and not in consonance with the guidelines issued in this regard. The right to education is undoubtedly a fundamental right of every citizen of the country today and no authority can deprive any child of the same, but at the same time it cannot also be used as a weapon to allege capriciousness or arbitrariness on the part of the school or other authorities. **(Para 11)**

Important Issue Involved: In the absence bias or prejudice, draw of lots for the purpose of admission held in front of representatives of parents was fair and transparent, even if all parents were not present.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Aditya Aggarwal , Advocate.

FOR THE RESPONDENTS : Ms. Sonia Arora, for respondent No. 1 Mr. Kamal Mehta, for the respondent No.2.

CASE REFERRED TO:

1. *Vikas Jandial and Ors* vs. *State of J & K*, 2004(3) JKJ 66.

RESULT: Writ Petition dismissed.

KAILASH GAMBHIR, J. Oral

1. By this petition filed under Articles 226 & 227 of the Constitution of India, the petitioner seeks direction to direct respondent No.1 to forthwith provide admission to the petitioner in the pre-school for the academic year 2011-12. Petitioner also seeks directions to direct the Directorate of Education to take action against respondent No.1 in accordance with law on account of failure on their part for not holding the draw of lots in accordance with the laid down rules of the Directorate of Education.

2. The short point involved for adjudication in the present petition is that the petitioner applied to the respondent no.2 school for admission for the academic year 2011-2012 in the category of "alumni", but was not selected. The grievance of the petitioner is that the draw of lots by which selection was made was not conducted in the presence of the parents of the applicants and thus alleging that there has not been any transparency in the selection process. Feeling aggrieved by the act of the respondent no.2 school the petitioner has preferred the present petition.

3. Mr.Aditya Aggarwal, counsel appearing for the petitioner submits that respondent-school clearly violated Rule No.19 of The Recognized Schools (Admission Procedure For Pre-Primary Class) Order, 2007 which clearly provides draw of lots to be held in a transparent manner in front of parents or guardian and all the members of admission committee. Counsel has also placed reliance on the subsequent order dated 27th October, 2008 passed by the GNCTD which reiterated the same rule. Counsel has further placed reliance on the guidelines issued by Directorate of Education to contend that the same process has been adopted by Sarvodya Vidyalaya School i.e holding the draw of lots in the presence of the parents and guardians. Counsel for the petitioner further submits that the petitioner had applied to seek admission in the nursery as well as pre-primary under the alumni category and so far the pre-nursery class was concerned, for 36 seats there were total 112 applicants and for

14 seats for pre-primary there were 56 applicants and, therefore, if the draw of lots was fairly conducted by the school then the petitioner stood a fair chance of being selected. Counsel also states that the petitioner had applied for the last academic session 20102011 also but was not selected by the school. The contention of the counsel for the petitioner is that in the face of the policy guidelines issued by the respondent/Directorate of Education, the petitioner has a legitimate expectation that the draw of lots would be held in the presence of the parents/guardians. In support of his arguments, counsel for the petitioner placed reliance on the judgment of the Jammu and Kashmir High Court in **Vikas Jandial and Ors vs. State of J & K,** 2004(3) JKJ 66.

4. Opposing the present petition, Mr.Mehta, learned counsel appearing for respondents 2-school submits that it is not the case of the petitioner that he was not considered for admission in the said nursery and pre-primary school. Counsel also submits that the draw of lots was held in the presence of the members of the admission committee consisting of two parents, one nominee of the Directorate of Education NDMC and the Head Mistress of the School. Counsel further states that the draw of lots was conducted by the respondent-school strictly in terms of the policy guidelines issued by the Directorate of Education. The learned counsel has also produced order dated 15.12.2010 issued by the Directorate of Education and the last para of the same, as per the counsel, would clearly show that the previous admission guidelines issued were superseded. Mr. Mehta has also invited attention of this Court to Clause 8 of the Recognized Schools (Admission Procedure for Pre-Primary Class) Order, 2007 wherein it is clearly stated that that there shall be no overall lottery system to select/short list a child for admission and limited use of lottery may however be adopted in case there is a tie amongst applicants. Counsel thus submits that under the said policy also it was not that the selection of all the students was to be made through a draw of lots but only in a case where there was a tie amongst students. Counsel thus states that this Clause 19(b) has to be read with clause 8 and the same would be applicable only where there is a tie between two candidates. Counsel thus states that clause 19 does not provide the holding of draw of lots for the entire selection and that too in the presence of parents or guardians. Counsel further reiterates that the earlier orders of 2007 and 2008 also stand superseded as fresh guidelines were issued by the Directorate of Education through order dated 15.12.2010, and now the school has the

liberty to frame its own criteria in compliance with the guidelines laid down in the said order dated 15.12.2010.

5. Ms. Sonia Arora, counsel appearing for the Directorate of Education, respondent No.1 states that the latest guidelines were issued by the Directorate of Education, by the order dated 15.12.2010 and the same is applicable to the case of the petitioner. Counsel also submits that in the said order there is no requirement to issue any notice to the parents before holding draw of lots.

6. I have heard learned counsel for the parties.

7. The grievance raised by the petitioner in the present petition is that he had applied for admission in respondent no.2 school at the entry level/ pre school for the academic year 2011-2012, but he was not selected for admission in the category of „children of alumni. for the academic year 2011-2012 and even his non-selection in the previous academic year 2010-2011 has been attributed by the petitioner to the alleged arbitrary conduct of the respondent school. The conduct complained of by the petitioner is that the school did not send any intimation to the parents and guardians including that of the petitioner to hold a draw of lots in their presence. Such an act on the part of the respondent school has been dubbed as illegal, arbitrary and in violation of Rule 19 of the Recognized Schools (Admission Procedure for Pre-primary Class) Order, 2007-2008 and also the guidelines issued by the Directorate of Education. Counsel for the petitioner has taken a stand that the petitioner had a very fair chance of getting admission in the category of alumni either in the nursery class or pre-primary class as in the said category there were limited applicants.

8. During the course of arguments, the counsel has not denied the fact that the draw of lots for admission in the nursery and pre-primary level was held by the school and the same was held in the presence of members of the Admission Committee. Counsel has also not disputed the fact that in the Admission Committee there was due representation of the parents as there were two members representing the parents of the students in the said committee. The counsel also has not disputed the fact that no other parents had raised any dispute so as to challenge the draw of lots held by the school to grant admission in the nursery and pre-primary level for the academic year 2011-12.

9. It is also not in dispute that the Order dated 15.12.2010 issued by the GNCT of Delhi, Directorate of Education would be applicable to govern the admission in the school for nursery and pre primary level for the academic year 2011-12. A perusal of the order dated 15.12.2010 issued by the Directorate of Education clearly reveals that the said order on admission guidelines supersedes the previous orders issued by the Directorate of Education on the same subject. In the face of this latest order dated 15.12.2010, the reliance placed by the counsel for the petitioner on the previous orders issued by the Directorate of Education in the year 2007-2008 will be of no relevance. Under this latest order for admission to 75% of the seats in the General Category each school was required to formulate its own policy and the criteria to be formulated by the school should be in terms of the objectives of the school and the same can include sibling, transfer case, single parents and alumni. As per the said order dated 15.12.2010, each school was required to submit its own admission policy to the Directorate of Education which should be in conformity with the various guidelines as issued by the Directorate ofEducation vide their order dated 15.12.2010, which guidelines in fact are based on the guidelines issued by the Ministry of Human Resource Development, Government of India through their Circular dated 23.11.2010.

10. Based on the abovesaid order dated 15.12.2010, the respondent no.2 school formulated a policy where 20 percent of the seats were reserved for the children of the alumni, giving due consideration to double alumni and more than one generation alumni. It is however not the case of the petitioner that the respondent school has not conducted the draw of lots to grant admission in the nursery and pre-school level for the academic year 2011-2012. It is also not the case of the petitioner that the said draw of lots was not held in presence of members of the Admission Committee which comprised of two representatives from the parents of the students. It is also not the stand of the petitioner that there has been any bias or prejudice against the petitioner of the respondent school due to which the petitioner was not granted admission. Thus, in the face of all these admitted facts it is difficult to accede to the contention of the counsel for the petitioner that the respondent school did not undertake the process of draw of lots in a transparent and fair manner.

11. It is undoubtedly true that the petitioner applied for two

consecutive sessions in the alumni category hoping to get admission in the same school as his father studied. It is understandable that the parents want their children to get the same quality education and value system that they got from the same established educational institution, besides the emotional attachment that they have with their alma mater and consequently the schools also have a moral responsibility for the wards of their old students, for which this special category of alumni has been created. But to expect that the children of every alumni would get admission in the school is a far fetched proposition and the petitioner cannot be allowed to seek relief alleging the whole process to be arbitrary and not in consonance with the guidelines issued in this regard. The right to education is undoubtedly a fundamental right of every citizen of the country today and no authority can deprive any child of the same, but at the same time it cannot also be used as a weapon to allege capriciousness or arbitrariness on the part of the school or other authorities.

12. In the light of the aforesaid, this court does not find any merit in the present petition and the same is accordingly dismissed.

ILR (2011) IV DELHI 247
R.S.A.

MUNICIPAL CORPORATION OF DELHI ....APPELLANT

VERSUS

RAMJAS FOUNDATION CHARITABLE TRUST ....RESPONDENT

(INDERMEET KAUR, J.)

R.S.A. NO. : 97/2008 DATE OF DECISION: 11.05.2011

Delhi Municipal Corporation Act, 1957—Section 115—This appeal has impugned the judgment and decree dated 23.10.2007 which had endorsed the finding of the trial judge dated 06.08.1985 whereby the suit filed by the plaintiff Ramjas Foundation Charitable Trust

with a prayer that the defendant be restrained from seeking recovery of the property tax with respect to the building of Ramjas School, Pusa Road New Delhi be declared null and void had been decreed in favour of the plaintiff. Three suits had been filed by the plaintiff in respect of different periods, seeking restraint against the defendant from recovery of property tax demands—In the written statement, the defense was that the suit was barred by time—Seven issues were framed—Suit of the plaintiff was decreed—In appeal, this finding was endorsed—This is a second appeal—The present suits related for subsequent years; the matter in issue in the earlier suits and matter in issue in the subsequent suits was not the same; applicability of the doctrine of res-judicata was an illegality. The finding returned in the impugned judgment applying this doctrine is thus a perversity; hence, set aside—There was no other evidence to substantiate the stand of the plaintiff that he was running the trust for a charitable purpose. No record had been produced by the plaintiff society i.e. his balance-sheet, statement of account or any other document to substantiate his submission that the school was being running for charitable purpose. The onus is always upon a party to the case to prove his case before he is entitled to the grant of relief. The Supreme Court has noted in the case of Children Book Trust that running of a school is per se not charitable; imparting education sans an element of public benefit or philanthropy is not per se charitable; secondly the society must be supported wholly or in part by voluntary contribution; lastly, the society must utilize its income in promoting its objects and must not pay any dividend or bonus to its members. Tax liability of a registered society running a recognized private unaided school be considered in the light of the above conditions as well as the relevant provisions of Delhi School Education Act and the Rules framed

thereunder; transfer of funds by the school to the society even in the name of contribution would amount to transfer by the society to itself and therefore cannot be considered for the purposes of exemption. Applying these guiding principles to the case of the appellant, it is clear that the plaintiff had not fulfilled this test entitling him to exemption. The finding in the impugned judgment holding that the plaintiff was working for a charitable purpose is a perversity—Plaintiff not entitled to exemption under Section 115(4) of the Act.

Admittedly there was no documentary evidence with the plaintiff. Except his bald statement which has been noted hereinabove and which had been refuted by the defendant; there was no other evidence to substantiate the stand of the plaintiff that he was running the trust for a charitable purpose. No record had been produced by the plaintiff society i.e. his balance-sheet, statement of account or any other document to substantiate his submission that the school was being running for charitable purpose. The onus is always upon a party to the case to prove his case before he is entitled to the grant of relief. The Supreme Court has noted in the case of **Children Book Trust** that running of a school is per se not charitable; imparting education sans an element of public benefit or philanthropy is not per se charitable; secondly the society must be supported wholly or in part by voluntary contribution; lastly, the society must utilize its income in promoting its objects and must not pay any dividend or bonus to its members. Tax liability of a registered society running a recognized private unaided school should be considered in the light of the above conditions as well as the relevant provisions of Delhi School Education Act and the Rules framed thereunder; transfer of funds by the school to the society even in the name of contribution would amount to transfer by the society to itself and therefore cannot be considered for the purposes of exemption. Applying these guiding principles to the case of the appellant, it is clear that the plaintiff had not fulfilled this

test entitling him to exemption. The finding in the impugned judgment holding that the plaintiff was working for a charitable purpose is a perversity. **(Para 19)**

Important Issue Involved: The present suits related for subsequent years; the matter in issue in the earlier suits and matter in issue in the subsequent suits was not the same; applicability of the doctrine of res-judicata was an illegality. Running of a school is per se not charitable; imparting education sans an element of public benefit or philanthropy is not per se charitable; secondly the society must be supported wholly or in part by voluntary contribution; lastly, the society must utilize its income in promoting its objects and must not pay any dividend or bonus to its members.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mrs. Amita Gupta and Mr. Parveen Kumar, Advocates.

FOR THE RESPONDENT : Mr. Atul Nigam, Advocate.

CASES REFERRED TO:

1. *Municipal Corporation of City of Thane* vs. *Vidyut Metallies Ltd. & Anr.* JT 2007 (11) SC 131.
2. *Municipal Corporation of Delhi* vs. *Children Book Trust* (1992) 3 SCC 390.

RESULT: Allowed.

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 23.10.2007 which had endorsed the finding of the trial judge dated 06.08.1985 whereby the suit filed by the plaintiff Ramjas Foundation Charitable Trust with a prayer that the defendant be restrained from seeking recovery of the property tax with respect to the building of Ramjas School, Pusa Road, New Delhi be declared null and void had been decreed in favour of the plaintiff.

2. Three suits had been filed by the plaintiff seeking restraint against the defendant from recovery of property tax demands.

(i) The first suit was suit no. 370/82 for the recovery of Rs. 33117/- and for a period up to 31.03.1983.

(ii) The second suit was suit no. 501/81; in this case, demand was Rs. 31117/- for the period up to 31.03.1981.

(iii) The third suit was suit no. 92/80 for the recovery of Rs. 34749/- for the assessment year 1979-80.

3. In the written statement, the defense was that the suit was barred by time as the order fixing the ratable value at Rs. 1,08,750/- p.a. w.e.f 01.01.1975 was passed on 10.01.1977; intimation was given to the assessee on 15.01.1977; it was duly acknowledged by him vide letter dated 09.02.1977. The plaintiff was even otherwise not the recorded owner of the property; the bar of Section 169-170 of the Delhi Municipal Corporation Act, 1957 (hereinafter read as Delhi Municipal Corporation Act) and Section 477-478(1) were operational. On merits, it was stated that the plaintiff society had been constructed in the year 1971 after the possession of the plot had been granted in their favour in 1964. Construction of this building had come to the knowledge of the defendant only in 1975-76 i.e. on 26.03.1976; plaintiff had not informed the defendant. Notice under Section 126 proposing to determine the rateable value of the plaintiff society at the rate of Rs. 2,81,830/- per annum w.e.f 01.04.1975 had been served upon the principal of the society. Objections had been invited on or before 05.05.1976. Objections had been filed on 08.04.1976 without disclosing the locus standi of the objector. Call letter dated 14.12.1976 was given to the Principal of the plaintiff for appearing before the Assessing Officer; authorized representative of the plaintiff had appeared on 27.12.1976; the case had been adjourned to 30.12.1976. Vide assessment order dated 10.01.1977, the rateable value at Rs. 1,08,850/- p.a. w.e.f. 01.04.1975 was determined after considering all the objections of the objector. This was communicated to the plaintiff vide letter dated 15.01.1977 duly received by the plaintiff vide his letter dated 09.02.1977. No exemption was permissible as plaintiff's property did not qualify for exemption under Section 115 (4) of the DMC Act; premises being used for a school were not per se exempted from the levy of general tax; merely because the trust was running an educational institution; did not make it a charitable purpose; no relief to the poor,

either financially, educationally or medically was provided by the plaintiff qua the suit property. In fact, the plaintiff was charging heavy fee from the students; school was running a business. Exemption was not permissible.

4. On the pleadings of the parties, the following 7 issues were framed:-

1. Whether the plaintiff has locus standi to file the present suit? OPP

2. Whether the plaintiff is exempted from payment of property tax? OPP

3. If the answer of issue No. 2 is affirmative, whether the demand of Rs. 34749/- towards property tax is legal and within jurisdiction. If not its effect? Onus on parties.

4. Whether the suit is barred by time under Section 478/(2) of the DMC Act as alleged in para 1 of the preliminary objections of HS? OPD

5. Whether the suit is not maintainable under Section 471/478 of the DMC Act ? OPD

6. Whether the suit is not maintainable under Section 169/170 of the DMC Act read with Section 41 (h) of the S.R. Act? OPD

7. Relief.

5. Court was of the view that Section 128 of the DMC Act which relates to the change of title is not attracted. The contention of the plaintiff and the testimony of PW-1 coupled with the decision rendered in the two suits i.e. suit no. 9/84 and 580/78 (previous suits) between the same parties wherein the defendant had been restrained from levying property tax on the plaintiff's society, had been relied upon by the trial court to decree the suit of the plaintiff. Court was of the view that the plaintiff's society is entitled to exemption under Section 115 (4) of the DMC Act. It was noted that the judgment Ex. PA (delivered in the aforenoted two suits was on 10.07.1974) which had recorded the finding that the plaintiff's society is entitled to exemption has attained a finality; it would operate as res judicata; even otherwise exemption was permissible

in view of the evidence led by the plaintiff. Applicability of Section 169-70 of the DMC Act was also adverted to. It was held that it had no application. Suit of the plaintiff was accordingly decreed.

6. In appeal, this finding was endorsed.

7. This is a second appeal. It had been admitted and on 28.07.2010, the following substantial questions of law had been formulated:-

(1) Whether the courts below had illegally allowed a "general tax" exemption to Ramjas Foundation Charitable Trust under Section 115 of Delhi Municipal Corporation Act, 1957?

(2) Whether the judgment dated 10.07.1984 in Suit Nos. 9/84 and 580/78 will not operate as res judicata?

8. On behalf of the appellant, it has been urged that the two courts below have committed a perversity; suit of the plaintiff had been decreed firstly on the ground of res-judicata by relying upon the earlier judgment delivered in suit No. 9/1984 and 580/1978 by Justice O.P. Dwivedi (the then learned District & Sessions Judge) delivered on 10.07.1984. It is pointed out that the impugned judgment relying upon this judgment to apply the doctrine of res-judicata is an illegality as this judgment had returned a finding only upto the assessment years 1978 whereas the present suits had been filed for subsequent years. It is further submitted that there was no evidence before the court below to grant an exemption to the plaintiff under Section 115(4) of the DMC Act (which deals with a charitable purpose); not a single document had been produced by the plaintiff to substantiate his case. It is submitted that each fiscal year has to be treated as an independent year and even presuming that the Court in the judgment delivered on 10.07.1984 had returned a finding that Ramjas Foundation Charitable Trust was performing a charitable purpose, it was for the assessment years upto 1978 and for subsequent years, the plaintiff had to establish his case that it was running a charitable trust. For the submission that each fiscal year has to be treated as an independent assessment year, learned counsel for the appellant has placed reliance upon the judgment reported in JT 2007 (11) SC 131 **Municipal Corporation of City of Thane Vs. Vidyut Metallies Ltd. & Anr.** It is pointed out that the finding returned in the impugned judgment granting exemption from general tax to the plaintiff on the ground that Ramjas

Foundation Charitable Trust was running a school for a charitable purpose is a perversity and is liable to be set aside.

9. Arguments have been countered. It is pointed that the impugned judgment suffers from no perversity. The impugned judgment had rightly relied upon the judgment delivered on 10.07.1984 in suit No.9/1985 and suit No.580/1978; this judgment has not been challenged; it has since attained a finality. This judgment has recited that the plaintiff society is running a school for a charitable purpose; this finding could not have been assailed again; even evidence adduced by the plaintiff remained unrebutted. The defendant had not produced any evidence in defence. The impugned judgment calls for no interference.

10. There are two findings against the appellant. Both the courts below were the last fact finding courts. In a second appeal, findings of fact can be interfered only if there is a perversity. The averments in the plaint have been perused. There were three suits which had been filed by the plaintiff namely

(i) suit No. 92/1980

(ii) suit No.504/1981 and

(iii) suit No. 370/1982.

The first suit sought restraint against the defendant corporation for recovery of Rs.34,749/- for the assessment year 1979-80 which was an illegal demand raised by the department upon the plaintiff.

The second suit was sought a restraint to the illegal demand of Rs.33,117/-raised upon the plaintiff for the year up to 31.03.1981.

The last suit was sought a restraint against the illegal demand of Rs.33,177/- raised on the plaintiff up to the period 31.03.1983.

The three suits as is evident from the plaint have been filed for three different periods.

Suit No.9/1985 and suit No.580/1978 had been decided by a common judgment delivered on 10.07.1984. The first suit i.e. suit No. 9/1985 had been filed for the recovery of Rs.60,000/- which the defendant had alleged illegally collected towards the payment of property tax and for which the plaintiff had sought refund. It was coupled with a prayer that the levy of tax on the plaintiff on the ground that education is a charitable

purpose and is exempt from general tax. The second suit i.e. suit No. 580/1978 had been filed by the plaintiff seeking a permanent injunction restraining the defendant from recovering the balance amount i.e. the amount raised upon the plaintiff. This suit was of the year 1978. In the present suit plaintiff has averred that he had been exempted from general tax; on 27.03.1976, an illegal demand had been raised upon him by the defendant; the plaintiff had been coerced to pay sum of Rs.60,000/- which he had paid on 16.02.1978; this amount of Rs.60,000/- which has been paid by the plaintiff was for the property tax up to the period ending 31.03.1978; this has been specifically averred in para 5 of the plaints of the three suits.

11. The judgment of 10.07.1984 while disposing of the two suits i.e. suit No.9/1985 and suit No.580/1978 had dealt with exemption from general tax only up to 31.03.1978; this is evident not only from the averments in the present suits but also the averments made in the earlier suits as also recorded in the judgment of 10.07.1984. The notice which had been impugned before the Court of Justice O.P. Dwivedi was a notice dated 27.03.1976. In that case issues No. 4 & 5 had been framed which are relevant for the purpose of this appeal and read as under:-

> "(iv) Whether the suit is barred by time under Section 478 (2) of the DMC Act as alleged in para 1 of the preliminary objections of HS? OPD
>
> (v) Whether the suit is not maintainable under Section 471/478 of the DMC Act? OPD"

12. Evidence had been led by the respective parties. The court had noted that the audit reports (Ex.P-1 to Ex. P-9) for the years 1974 to 1978 had been produced by the plaintiff company as also donations made by the plaintiff for the year 1973-74 totaling a sum of Rs.61,300/- were sufficient evidence led by the plaintiff to prove his case. The evidence adduced was for the period 1973-78.

13. It is a settled proposition that every fiscal year has to be treated as an independent assessment year; this is also not been disputed by learned counsel for the respondent. The Supreme Court in the judgment of **Municipal Corporation of City of Thane** (Supra) had noted:-

"In tax matter, strict rule of res-judicata as envisaged by Section

11 of the Code has no application; as a general rule, each year's assessment is final only for that year and goes not govern later years, because it determines the tax for a particular period. It is open to the Revenue/ Taxing Authority to consider the position of the assessee every year for the purpose of determining and computing the liability to pay tax or octroi on that basis is subsequent years. A decision taken by the authorities in the previous year would not estop or operate as res-judicata for subsequent year."

14. The fact finding arrived at in the judgment of 10.07.1984 (Ex.PA) related only up to the year 31.03.1978. The present suits related for subsequent years; the matter in issue in the earlier suits and matter in issue in the subsequent suits was not the same; applicability of the doctrine of res-judicata was an illegality. The finding returned in the impugned judgment applying this doctrine is thus a perversity; it is set aside.

15. The second ground on which the suit of the plaintiff was decreed was the evidence which has been led by the plaintiff to establish his submission that the plaintiff society had been running a charitable trust; it was for a charitable purpose. One witness has been examined on behalf of the plaintiff. Admittedly no documentary evidence had been led. Oral version of PW-1 had been adverted to. Testimony of PW-1 has been perused. Part of his testimony relates to the resolution authorizing him to depose on behalf of the society. Relevant extract related to the submission that the society was running the school for a charitable purpose. Relevant extract of his version reads as under:-

"The main purpose of the society is to promote and provide of the education in Delhi and New Delhi. There are 15 schools in Delhi and one college in Delhi. All the members of the society are honourary members and do not get any honarium or profits of any kind and all the funds of society are spend for the purpose of education. The tuition fee collected from the student is similarly employed for its promotion and education. Any other benefits received from any sources i.e. donation is also used for the purpose of providing education."

16. Cross-examination of PW-1 has also been perused. Specific suggestion has been given to him that he was not running the school on charitable lines but on commercial lines. PW-1 had ˇadmitted that he not

produced the balance-sheet; he denied that admission in the school is allowed only to children of affluent class of persons. This was the sum total evidence which have been led to return a finding that the plaintiff has been able to prove his that it was running an education society for charitable purpose which entitled him to grant of exemption from general tax.

17. A 'charitable purpose' has been defined under Section 115 (4) of the DMC Act. It reads as under:-

> "115. Premises in respect of which property taxes are to be levied-: (4) Save as otherwise provided in this Act, the general tax shall be levied in respect of all lands and building in Delhi except:-
>
> (a) xxxxxxxxxxxxxxxx
>
> Explanation:- .Charitable purpose. includes relief of the poor, education and medical relief but does not include a purpose which relates exclusively to religious teaching."

18. The Supreme Court in the case of **Municipal Corporation of Delhi Vs. Children Book Trust** (1992) 3 SCC 390 has held that education per se is not charitable. It had noted as under:

> "We have already seen that merely because education is imparted in the school, that by itself, cannot be regarded as a charitable object. Today, education has acquired a wider meaning. If education is imparted with a profit motive, to hold, in such a case, as charitable purpose, will not be correct. We are inclined to agree with Mr. B. Sen, learned counsel for the Delhi Municipal Corporation in this regard. Therefore, it would necessarily involved public benefit."

19. Admittedly there was no documentary evidence with the plaintiff. Except his bald statement which has been noted hereinabove and which had been refuted by the defendant; there was no other evidence to substantiate the stand of the plaintiff that he was running the trust for a charitable purpose. No record had been produced by the plaintiff society i.e. his balance-sheet, statement of account or any other document to substantiate his submission that the school was being running for charitable

purpose. The onus is always upon a party to the case to prove his case before he is entitled to the grant of relief. The Supreme Court has noted in the case of **Children Book Trust** that running of a school is per se not charitable; imparting education sans an element of public benefit or philanthropy is not per se charitable; secondly the society must be supported wholly or in part by voluntary contribution; lastly, the society must utilize its income in promoting its objects and must not pay any dividend or bonus to its members. Tax liability of a registered society running a recognized private unaided school should be considered in the light of the above conditions as well as the relevant provisions of Delhi School Education Act and the Rules framed thereunder; transfer of funds by the school to the society even in the name of contribution would amount to transfer by the society to itself and therefore cannot be considered for the purposes of exemption. Applying these guiding principles to the case of the appellant, it is clear that the plaintiff had not fulfilled this test entitling him to exemption. The finding in the impugned judgment holding that the plaintiff was working for a charitable purpose is a perversity.

20. Substantial questions of law are answered in favour of the appellant and against the respondent. Appeal is allowed. Suit is dismissed.

ILR (2011) IV DELHI 259
CS (OS)

M/S. HERBICIDES (INDIA) LTD. ....PLAINTIFF

VERSUS

M/S. SHASHANK PESTICIDES P. LTD. AND ORS. ....DEFENDANTS

(V.K. JAIN, J.)

CS (OS) NO. : 1362/1997 DATE OF DECISION: 13.05.2011

Contract Act, 1872—Section 73 & 74—Code of Civil Procedure, 1908—Sale of Goods Act, 1930—Section 61 (2)—Suit filed for recovery of Rs. 24,90,665—Defendant Company entered contract for supply of One Lakh liters of weedicide @ Rs.96.98 per liters plus tax in staggered lots commencing October 2005—Contract stipulated in the event of non-supply or non-lifting pre-determined compensation @ Rs. 20/- per liters—Plaintiff supplied 7000 liters of goods on 1st of October, 1995—Defendant informed by letters in November, 1995, it was not in a position to commit the lifting of supplies because of failure of season and market crash or making financial arrangement for further quantities—Plaintiff in reply informed that it has made necessary arrangement for supplies, refusal to lift would result in loss to Plaintiff—Defendant failed to act—Plaintiff sued for unlifted quantity as well as towards the balance payment of 7000 liters—Defendant No1 is a Company controlled by Defendant No.4 and his family—Defendant No.3 wife running business in the name and style of defendant no.2—Held, Suit not maintainable against No. 2 to 4—No privity of contract between the Defendant No. 3 & 4—Contract only with Defendant No.1 company—Defendant No 3 & 4 not

personally liable—Defendant No. 2 only a Trade name not a legal entity—Names of Defendant No.2 to 4 Struck off from array of Parties. A party suffering loss as a result of breach of contract which provides for liquidated damages, can claim reasonable damages unless shown no damages suffered, though not more than damages stipulated—In case in hand, no damages shown to have been suffered but it cannot be disputed that some damages were suffered by Plaintiff on account of breach—Damages to the tune of Rs. 9,30,000/- granted to plaintiff—Though no agreement between the parties to pay interest, however, granted under section 61(2) of Sales of Goods Act as the contract was for sale & purchase of goods.

This is not in dispute that only the plaintiff-company and defendant No.1-company were parties to the agreement for supply of goods. Defendant No. 1 is a legal entity and defendant No. 4 is one of its Directors. There is, however, no privity of contract between the plaintiff and ˇdefendant Nos. 3 and 4. If there is a breach of contract on the part of defendant No. 1 or defendant No. 1-company has failed to pay the price of the goods received by it from the plaintiff-company, the remedy of the plaintiff-company lies only against defendant No. 1 and neither defendant No. 3 nor defendant No. 4 is personally liable to discharge the liability of defendant No. 1. Defendant No. 2 is not a legal entity and is only a trade name adopted by defendant No. 3. The issues are accordingly decided in favour of the defendants and against the plaintiff. The names of defendant No. 2 to 4 are struck off from the array of defendants.

Issue No. 2

Ex.PW-1/1 is the copy of the Resolution passed by the Board of Directors of the plaintiff-company, authorizing Mr Ahok Dugar, Mr V.P. Singal, Mr R.K. Gupta and Mr Paras Parakh and to commence & institute suits, etc. on behalf of the plaintiff-company and to sign and verify the pleadings

etc. The suit having been instituted and the plaint having been signed and verified by Mr Ashok Dugar, the issue is decided in favour of the plaintiff and against the defendants. **(Para 4)**

The propositions of law which emerge from the statutory provisions contained in Section 73 & 74 of the Indian Contract Act when examined in the light of a cumulative reading of aforesaid decisions of Supreme Court can be summarized as under:

(a) If a party to the contract commits breach of the contract, the party who suffers loss/damage on account of such breach is entitled to receive such compensation from the party in breach of the contract which naturally arose in usual course of business, on account of such breach or which the parties to the contract knew, at the time of making the contract, to be likely to result on account of its breach. However, the party suffering on account of the breach is entitled to recover only such loss or damage which arose directly and is not entitled to damages which can be said to be remote.

(b)In case the agreement between the parties provides for payment of liquidated damages, the party suffering on account of breach of the contract even if it does not prove the actual loss/damage suffered by it, is entitled to reasonable damages unless it is proved that no loss or damage was caused on account of breach of the contract. In such a case, the amount of reasonable damages cannot exceed the amount of liquidated damages stipulated in the contract.

Any other interpretation would render the words "whether or not actual damage or loss is proved to have been caused thereby" appearing in Section 74 of the Indian Contract Act absolutely redundant and therefore the Court needs to eschew such an

interpretation.

(c)If the amount stipulated in the contract, for payment by party in breach of the contract, to the party suffering on account of breach of the contract is shown to be by way of penalty, the party suffering on account of the breach is entitled only to a reasonable compensation and not the amount stipulated in the contract. If it is shown by the party in breach of the contract that no loss or damage was suffered by the other party on account of breach of the contract, the party in breach of the contract is not liable to pay any amount as compensation to the other party.

(d)If the nature of the contract between the parties is such that it is not reasonably possibly to assess the damages suffered on account of breach of the contract, the amount stipulated in the contract, for payment by the party in breach should normally be accepted as a fair and reasonable pre-estimate of damages likely to be suffered on account of breach of the contract and should be awarded. **(Para 20)**

The plaintiff has claimed interest @ 18% p.a. on the price of 7000 litres of the finished product which it had supplied to defendant No.1 company. No agreement between the parties for payment of interest has either been pleaded or proved by the plaintiff. However, since this is a suit for price of goods sold and delivered, interest can be awarded to the plaintiff under Section 61(2) of the Sales of Goods Act. Considering the nature of transaction between the parties, I am of the view that interest should be awarded to the plaintiff company @ 12% p.a. Calculated on the aforesaid rate, the amount of interest comes to Rs.93,008/-. ˇThe plaintiff is entitled to recover the aforesaid amount from defendant No.1 as interest. The issue is decided accordingly. **(Para 24)**

Important Issue Involved: (A) A party suffering loss as a result of breach of contract which provides for liquidated damages, can claim reasonable damages unless shown no damages suffered, though not more than damages stipulated.

(B) Even if there is no agreement between the parties for payment of interest in a contract for sale & purchase of goods interest can be granted under Section 61(2) of Sales of Goods Act.

[La Ga]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Rajat Arora.

FOR THE DEFENDANT : Mr. K.R. Gupta, Mr. S.K. Gupta, Mr. Nitin Gupta and Mr. Manish Gupta, Advocates.

CASES REFERRED TO:

1. *BSNL* vs. *Reliance Communication Ltd.* (2011) 1 SCC 394.
2. *ONGC* vs. *Saw Pipes Ltd* AIR 2003 SC 2629.
3. *Narbada Devi Gupta* vs. *Birendra Kumar Jaiswal And Anr.* AIR 2004 SC 175.
4. *Iswar Bhai C. Patel @ Bachu Bhai Patel* vs. *Harihar Behera & Anr.* 1999 (3) SCC 457.
5. *Enuga Lakshmamma* vs. *Vennapuse Chinna Malla Reddy (Dead) by Lrs.*, 1985 (2) SCC 100.
6. *Sait Tarajee Khimchand And Ors.* vs. *Yelamarti Satyam Alias Satteyya And Ors.*, AIR 1971 SC 1865.
7. *Maula Bux* vs. *UOI* AIR 1970 SC 1955.
8. *Gopal Krishnaji* vs. *Mohamed. Haji*, AIR 1968 SC 1413.
9. *Firm Bhagwandas Shobhala Jain, a Registered Fir, and Anr.* vs. *State fo Madhya Pradesh* AIR 1966 MP 95.

10. *Pannalal Jugatmal* vs. *State of Madhya Pradesh* AIR 1963 MP 242.
11. *Fateh Chand* vs. *Balkishan Dass*, AIR 1963 SC 1405.
12. *Shiva Jute Baling Ltd* vs. *Hindley and Company Ltd*, AIR 1959 SC 1357.

RESULT: Decree passed in favour of plaintiff.

V.K. JAIN, J.

1. This is a suit for recovery of Rs 24,90,665/-. Defendant No. 1 is a company alleged to be owned and controlled by defendant No. 4 and his family members. Defendant No. 3 is the wife of defendant No. 4 and is running business in the name and style of defendant No. 2 ˇfrom the same premises, where defendant No. 1 is functioning. Defendant No. 1-company entered into an agreement to purchase one lakh litres of weedicide, namely 2, 4-D Ethyl Ester 38% EC in 200 litres packaging, at the price of Rs 96.80 per litre plus local tax in staggered lots commencing from October, 1995 and ending in December, 1995. In the event of non-supply or non-lifting of goods, the party, in default, was to pay pre-determined compensation at the rate of Rs 20/- per litre. The plaintiff claims to have supplied 7000 litres of the aforesaid goods to defendant No. 1 in October, 1995. On the request of the defendant, invoice in respect of these 7000 litre of goods were raised on one M/s Paramount Pesticides Pvt. Ltd., nominee of the defendant.

Vide letters dated 14th November, 1995 and 17th November, 1995, defendant Nos.1 and 4 informed the plaintiff that due to failure of season, the market had crashed and they were not in a position to make any commitment for lifting or for making financial arrangement for further quantities. The plaintiff, thereupon, informed the defendant that it had made all the necessary arrangements for supply of contracted goods and its refusal to lift the goods would cause immense loss to the plaintiff. The plaintiff asked defendant No. 1 to make arrangements to take delivery of the entire quantity during November and December. Since the defendants have failed to act upon the request and have also paid the price of 7000 litre of goods supplied to it, the plaintiff is now seeking a sum of Rs 18,60,000/- towards pre-determined compensation at the rate of Rs 20/- per litre of unlifted quantity of the goods, Rs 1,97,472/-+ 2,93,680/- toward balance price of 7000 litre of goods after adjusting the payment

of Rs 2 lakhs made by the defendant and Rs 1,39,513/- (56,093 + 83,420) towards interest at the rate of 18% per annum on the principal amount due from the defendant.

2. The defendants have contested the suit and have taken a preliminary objection that the suit is bad for mis-joinder of parties since there is no privity of contract between the plaintiff and defendant Nos. 2 and 3 and there was no personal contract between the plaintiff and defendant No. 4. They have also taken a preliminary objection that suit against defendant No. 2, which is not a legal entity, is not maintainable. On merits, it has been alleged that the plaintiff was to deliver 10,000 litre of goods by the eve of Diwali 1995 and the balance quantity was to be delivered in regular intervals commencing from 1st November, 1995 and was to be completed by 15th December, 1995, but, the plaintiff failed to effect the delivery of any part of the goods, despite receiving Rs 4 lakhs from them. It is further alleged that after expiry of season, the plaintiff tried to foist goods on defendant No. 1, but, at that time the goods were of no use to them. The defendants have denied having received 7000 litre of goods from the plaintiff and having asked the plaintiff to raise invoice in the name of Paramount Pesticides Pvt. Ltd. The defendant Nos. 1 and 4 have filed a counter-claim of Rs 5,45,000/- against the plaintiff on the ground that it had not refunded the amount of Rs 4 lakhs, received from them and, therefore was liable to refund that amount along with interest amounting to Rs 1,44,000/- and Rs 1,100/- towards Advocate fee for service of notice. In its replication, the plaintiff-company has admitted receipt of total payment of Rs 4 lakhs from defendant No. 1

3. The following issues were framed on the pleadings of the parties:

1. Whether the suit is bad for mis-joinder of defendant Nos. 2, 3 and 4 as parties, as alleged by defendants? OPP
2. Whether the suit has been filed by a duly authorized person on behalf of the plaintiff? OPP
3. Whether any quantity of 2, 4-D, Ethyl Ester 38% EC supplied by the plaintiff to defendant No. 1? OPP
4. Whether the defendant Nos. 1 and 4 are liable jointly and severally to pay pre-determined compensation of Rs 18,60,000/- to the plaintiff, as claimed? OPP
5. Whether the defendant Nos. 1 to 4 are liable jointly and severally to pay the sum of Rs 6,30,665/- for the goods supplied by the plaintiff to defendant? OPP
6. Whether the counter-claim has been instituted, signed and verified by a duly authorized person on behalf of defendant Nos. 1 and 4? OPD
7. Whether the defendant No. 1 is entitled to receive from the plaintiff the sum of Rs 5,45,000/- as claimed in its counter-claim? OPD
8. Whether the defendant No. 1 is entitled to receive any interest, if so, at what rate and on what amount? OPD
9. Whether the plaintiff is entitled to receive any interest, if so at what rate? OPP
10. Whether there exist any privity of contract between the plaintiff and defendants 2&3? OPP
11. Whether the suit against defendant No. 2, non-juristic person is maintainable? OPD
12. Whether any contract was entered into between the plaintiff and defendant Nos.2 and 3 for the supply of goods set out in the plaint and whether any goods were supplied by the plaintiff to the defendants 2 and 3, if so of what value? OPP
13. Relief.

Issues No. 10, 11 & 12

4. This is not in dispute that only the plaintiff-company and defendant No.1-company were parties to the agreement for supply of goods. Defendant No. 1 is a legal entity and defendant No. 4 is one of its Directors. There is, however, no privity of contract between the plaintiff and defendant Nos. 3 and 4. If there is a breach of contract on the part of defendant No. 1 or defendant No. 1-company has failed to pay the price of the goods received by it from the plaintiff-company, the remedy of the plaintiff-company lies only against defendant No. 1 and neither defendant No. 3 nor defendant No. 4 is personally liable to discharge the liability of defendant No. 1. Defendant No. 2 is not a legal entity and is only a trade name adopted by defendant No. 3. The issues are accordingly decided in favour of the defendants and against the plaintiff. The names

of defendant No. 2 to 4 are struck off from the array of defendants.

Issue No. 2

Ex.PW-1/1 is the copy of the Resolution passed by the Board of Directors of the plaintiff-company, authorizing Mr Ahok Dugar, Mr V.P. Singal, Mr R.K. Gupta and Mr Paras Parakh and to commence & institute suits, etc. on behalf of the plaintiff-company and to sign and verify the pleadings etc. The suit having been instituted and the plaint having been signed and verified by Mr Ashok Dugar, the issue is decided in favour of the plaintiff and against the defendants.

Issues No.3 & 5

5. PW-1/A, Mr. Ashok Dugar, Director of the plaintiff-company, has stated that 7000 litre of goods in 35 drums were dispatched vide GR dated 21st October, 1995 (Ex.PW1/5) and the delivery of the consignment was taken by defendant Nos. 1 and 4, making endorsement in this record on the back side of GR. It has come in the deposition of PW-1 that the goods were moved by the plaintiff-company from Jaipur to Delhi on Stock Transfer basis and the truck, containing 7,000 litre of stock, was unloaded at the godown of defendant No. 1. It has also come in his deposition that defendant No. 4 Mr R.K. Gupta, who is the Director of defendant No. 1-company, was in touch with the officials of the plaintiff-company so that delivery could be taken at the godown of defendant No.1.

In rebuttal, DW-1, Mr R.K. Gupta, has stated that no goods were supplied by the plaintiff to defendant No. 1. A perusal of the Goods Receipt Ex.PW-1/5 shows that it bears an endorsement of receipt of 35 drums on the back of the document. It is also noted in the endorsement that one drum had leakage from it. The GR pertains to 35 drums of pesticides, the consignor as well as consignee is Harbicides India Ltd. and the goods were sent from Jaipur to Delhi on 21st October, 1995. According to Mr Ashok Dugar, these goods were received by Mr Vishesh Jain of the defendant, who made the endorsement on the back of this document. It has been admitted by Mr R.K. Gupta that Mr Vishesh Jain is also a Director of defendant No. 1. Since Mr Ashok Dugar had, in his deposition, claimed that these goods were received by Mr Vishesh Jain, it was incumbent on defendant No. 1 to produce Mr Vishesh Jain in the witness box to controvert the deposition of Mr Ashok Dugar in this

regard and to prove that neither the goods were received by him nor does the GR Ex.PW-1/5 bear an endorsement by him.

6. In **Enuga Lakshmamma Vs. Vennapuse Chinna Malla Reddy (Dead) by Lrs.,** 1985 (2) SCC 100, there was dispute with respect to the date of birth of the plaintiff/appellant. It was noticed that the father of the plaintiff/appellant was not produced as a witness. Supreme Court was of the view that non-examination of the father of the plaintiff/appellant on the most material issue, namely, the birth date of the plaintiff will have to be regarded as fatal to the plaintiff's case and the High Court was right in drawing adverse inference against the plaintiff on this aspect.

In **Iswar Bhai C. Patel @ Bachu Bhai Patel Vs. Harihar Behera & Anr.** 1999 (3) SCC 457, the appellant did not enter the witness-box to deny on oath. The statement of defendant/respondent No.2 that it was at the instance of the appellant that he had advanced a amount of Rs 7,000/- to the appellant by issuing a cheque on the account of respondent No.1. The Court was of the view that the appellant having not entered the witness box and having not presented himself for cross-examination, an adverse presumption has to be drawn against him on the basis of the principles contained in Illustration (g) of Section 114 of Evidence Act.

No explanation has been given by defendant No. 1 for not producing Mr Vishesh Jain in the witness box. It can, therefore, be presumed that had Mr Vishesh Jain been produced in the witness box he would not have supported the case of defendant No. 1 in this regard.

7. Ex.PW1/18 is the copy of the letters dated 20th November, 1995, sent by the plaintiff-company to defendant No. 1. It is subsequently stated in this letter that the plaintiff had supplied only 7000 litre of goods to the defendant No. 1 against its assurance to lift 60,000 litre of goods during November, 1995, thereby leaving a shortfall of 56,000 litres. This letter was sent vide Courier Receipt Ex.PW-1/19. Ex.PW-1/20 is the letter dated 29th November, 1995 from the plaintiff-company to defendant No. 1 which purports to have been delivered by hand on 29th November, 1995 and bears the stamp of defendant No. 1. Vide this letter, the plaintiff sought billing instructions for the balance 5,000 liters supplied to defendant No. 1 and also sought dispatch instructions for the balance 53,000 litres to be supplied, during November and 40,000 litre to be supplied during December. This is not the case of the defendant that

Ex.PW-1/20 does not bear stamp of defendant No. 1. In his affidavit, Mr R.K. Gupta did not claim that the signature and stamp on this letter have been forged by the plaintiff-company. Ex.P-1/21 is the letter dated 23rd December, 1995 sent by the plaintiff-company to defendant No. 1, referring to the telephonic discussion, wherein the plaintiff had requested defendant No. 1 to place further order for 93,000 litre, enclosing therewith invoice No. 655 for supply of 5,000 litre of goods and informing that 2000 litre of goods had already been billed on Paramount Pesticide Pvt. Ltd., Meerut as per the advice of the plaintiff. This letter was sent by registered post vide postal receipt Ex.PW-1/22 and the AD card bearing the stamp of defendant No. 1 is Ex. PW.1/23. Section 27 of General Clauses Act gives rise to presumption that service of notice has been effected when it is sent to the correct address by registered post. Similar presumption can be raised under Section 114 (e) of Evidence Act, once it is proved that a letter by registered post was sent at the correct address of the addressee and the registered envelope is not received back unserved, a statutory presumption of service on the addressee arises. Therefore, even if the AD card filed by the plaintiff is excluded from consideration, the service of this letter stands proved on account of the letter having been sent by registered post at the correct address of defendant No. 1-company.

8. Moreover, no evidence has been led by defendant No.1 to prove that the stamp on the AD Ex.PW-1/23 is not of defendant No. 1-company and/or the signature and stamp on this document have been forged by the plaintiff-company. No such claim was made by Mr R.K. Gupta in his affidavit by way of evidence and no other witness has been produced by the defendant. Had the plaintiff not supplied 7000 litres of goods, defendant No. 1 would not have remained silent to the averments made in this regard in the letters Ex.PW-1/19 PW-1/20 and PW-1/21 and would have definitely controverted the same by writing to the plaintiff-company, immediately of receipt of these letters, that no material at all had been supplied to it. Failure of defendant No. 1 to controvert the averment made in the letters in this regard indicates that these goods were actually supplied to defendant No. 1 and the plea taken by the defendants in this regard are false. The plaintiff-company, therefore, is entitled to recover the balance price of that 7000 litre goods, but only from defendant No.1. The balance amount, payable towards price of 7000 litre of goods, after deducting Rs 4 lakhs paid to the plaintiff-company, comes to Rs 91152/-. The issue is decided against accordingly.

Issues No. 4, 6 & 7

9. A perusal of Ex.PW-1/3 which is the letter of the plaintiff-company dated 19th October, 1995, Ex.P-1/D1 & D-4, which is the letter of defendant No. 1 dated 20th October, 1995, Ex.PW-1/4, which is the letter of the plaintiff-company dated 21st October, 1995, Ex.P-2/D1 & D4, which is the letter of defendant No. 1 dated 26th October, 1995, discloses the following terms agreed between the parties:

(a) The total quantity agreed to be purchased by defendant No. 1 was 1 lakh litres;

(b) The agreed price as per letter Ex.PW-1/3 was Rs 96.80 per litre + 2% local tax/CST Form in lieu of the sale. The rate given in the letter of defendant No. 1 is Rs 88 per litre + excise, which I am informed comes to Rs 96.80 per litre only;

(c) 10,000 litres of the material was to be supplied by the eve of Diwali, 1995;

(d) The supplies were to be completed by 15th December, 1995; 60,000 litres were to be supplied up to 30th November and the balance quantity in December, 1995, and were to be made at regular intervals, maintaining proper ratio.

(e) In case of either non-supply on the part of the plaintiff or non-lifting of goods on the part of ˇdefendant No. 1, a sum of Rs 20 per litre was agreed to be paid as compensation by the party in default.

10. Ex.P-4/D1&D4 is the letter dated 14th November, 1995, written by defendant No. 1 to the plaintiff-company, enclosing therewith a circular issued by M/s Parijat Agencies Pvt. Ltd and seeking review of the matter on account of market conditions being bad and season having been miserably failed. Ex.P-5/D1&D4 is the letter dated 17th November, 1995 written by defendant No. 1 to the plaintiff-company, referring to the earlier letter dated 14th November, 1995 (Ex.P-4/D1&D4) and regretting that the season had miserably failed and therefore, the market had crashed. It was stated in this letter that since there was no lifting and no finances

in the market, defendant No. 1 was not in a position to make any commitment for lifting or to make financial arrangements. Defendant No. 1-company expressed its inability to pursue the matter in the circumstances and requested the plaintiff-company to make some alternative arrangement. In view of these letters, it cannot be disputed that defendant No.1-company had refused to accept any further delivery from the plaintiff-company and, thereby committed breach of contract to purchase one lakh litre of goods from the plaintiff-company.

In its letter dated 20th November, 1995 (Ex.PW-1/18), the plaintiff-company informed defendant No. 1 that on account of firm written confirmation from it they had already procured 40 M.T. of 2, 4-D Ethyl Ester technical Remix/Acromax and also liquid Emulsifiers costing approximately Rs 83 lakhs and defendant No. 1's failure to lift the material would put them to a great loss. Vide letter dated 21st November, 1995 (Ex.PW-1/20), the plaintiff again sought instructions for dispatch of remaining 93 litre of goods. These letters indicate that the plaintiff-company had obtained the necessary raw material and was in a position to supply the remaining 93,000 litre of goods to defendant No. 1.

11. In his affidavit by way of evidence, Mr Ashok Dugar, Director of the plaintiff–company, has specifically stated that the plaintiff duly made all arrangements and procured all the raw-material, consisting mainly of 2,4-D Ethyl Ester Technical and required stabilizers, solvents and drums etc. at a considerable cost. According to him, the plaintiff purchased a total quantity of 60 MT of 2,4-D Ethyl Ester Technical at the relevant time which also included 39 MT of 2,4-D Ethyl Ester Technical required for formulation of one lakh litres of the said goods. The said 39 Mt was procured at a landed cost of Rs 73,61,250/-. He has further stated that the plaintiff had also procured other emulsifiers, drums, solvents, etc. at an approximate value of Rs 15,00,000/- in order to fulfil its obligations in supplying one lakh litres of the said goods to the defendants 1 and 4. He has also referred in his evidence to Ex.PW-1/6 to 15, which are the invoices by the Atul Products Ltd. on the plaintiff, during August, 1995 to November, 1995 towards supply of 2,4-D, Ethyl Ester Technical.

12. The learned counsel for the defendant has objected to the invoices being read in evidence on the ground that they have not been proved in accordance with law as the person, who procured the invoices, has not been produced in the witness-box. In support of his contention

that mere putting exhibit marks on the document does not by ipso facto amount to proof of the document. The learned counsel for the defendant has referred to decisions of **Sait Tarajee Khimchand And Ors. vs Yelamarti Satyam Alias Satteyya And Ors.,** AIR 1971 SC 1865 and **Narbada Devi Gupta vs Birendra Kumar Jaiswal And Anr.** AIR 2004 SC 175.

13. Even if these invoices are excluded from consideration, the deposition of PW-1, read along with letters sent by the plaintiff-company to defendant No. 1-company, clearly shows that the plaintiff-company had procured the requisite raw-material for supply of one lakh litre of the material to defendant No. 1-company. Vide letter dated 20th November, 1995 (Ex.PW-1/18) in response to defendant No.1's letter dated 17th November, 1995, the plaintiff-company informed it that on their firm written confirmation, it had already procured 40 M.T. of 2, 4-D Ethyl Ester technical Remix/Acromax and also liquid Emulsifiers costing approximately Rs 83 lakhs and their declining to lift the material when the goods were ready for dispatch was not only against business ethics, but will also put the plaintiff to a great loss. Defendant No. 1-company was requested to make balance payment so as to enable the plaintiff-company to deliver the balance quantity of 53,000 litres which was to be delivered in November, 1995 and to make necessary arrangement for further 40,000 litres which was to be supplied during December 1995. There was no response from defendant No. 1 to this letter. Vide letter dated 29th November, 1995 (Ex.PW-1/20), the plaintiff again requested defendant No. 1 to send dispatch instructions for the balance 53000 litres to be supplied during November and 40,000 litres to be supplied during December so as to enable it to arrange immediate supply from Jaipur plant. Again, there was no response from defendant No.1. These letters, coupled with the deposition of PW-1 Ashok Dugar, are sufficient to prove that the plaintiff-company had either produced the remaining 93000 litres of the finished product or at least 53000 litre which was the balance quantity to be supplied in November, 1995 or it had at least procured the necessary raw material and was ready to supply those goods to defendant No. 1-company immediately on receiving dispatch instructions and requisite payment from it. Even otherwise, it is difficult to say that the plaintiff-company would not have procured raw material even up to 17th November, 1995, when it had to supply 600 litres of material during November, 1995 and 40,000 of material during December, 1995. The

plaintiff-company had agreed to pay liquidated damages at the rate of Rs 20 per litre in case of its failure to supply the goods, within the agreed time. Therefore, it would not have taken the risk of paying those damages to defendant No.1-company and, therefore, must have procured the necessary raw material for this purpose.

14. It was contended by the learned counsel for the defendants that even if there was breach of contract on behalf of defendant No.1 and despite the contract between the parties providing for payment of liquidated damages in case of breach of contract on the part of either party, the plaintiff-company is not entitled to damages since there was no proof of any damages having been actually suffered by it. In support of his contention, he has relied upon the decision of Supreme Court in **Fateh Chand vs. Balkishan Dass,** AIR 1963 SC 1405, **Maula Bux vs. UOI** AIR 1970 SC 1955 and **Gopal Krishnaji vs. Mohamed. Haji,** AIR 1968 SC 1413. The learned Counsel for the plaintiff on the other hand contended that since the contract between the parties stipulated payment of liquidated damages which was a bona fide and genuine pre-estimate of the loss which the plaintiff company was likely to suffer because of breach of contract on the part of the defendant, it was not necessary for the plaintiff company to prove the actual damages and it is entitled to recover the liquidated damages at the rate stipulated in the contract. In support of his contention that the plaintiff-company is entitled to damages at the agreed rate of Rs 20 per litre, the learned Counsel for the plaintiff has relied upon **BSNL vs. Reliance Communication Ltd.** (2011) 1 SCC 394 and **ONGC vs. Saw Pipes Ltd** AIR 2003 SC 2629.

15. In the case of **Fateh Chand** (supra), the agreement for sale of the suit property provided that if the vendee fails to get the sale deed registered by 1st June, 1949, a sum of Rs 25,000/- which he had paid to the vendor, shall be deemed to be forfeited and the agreement cancelled. Alleging that the agreement was rescinded, on account of default on the part of the defendant and the amount of Rs 25,000/- paid by him had been forfeited, the plaintiff filed a suit for recovery of possession of the suit property which he had delivered to the vendee. Referring to Section 74 of Indian Contract Act, Supreme Court, inter alia, observed as under:

> "The measure of damages in the case of breach of a stipulation by way of penalty is by s. 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the

> Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach." (emphasis supplied)

16. In the case of **Maula Bux** (supra), the contract between the plaintiff and defendant-Union of India provided for forfeiture of the security deposit in case of rescission of the contract. Government of India rescinded the contracts and forfeited the amount which the plaintiff had deposited with it. A suit for recovery of Rs 20,000/- was the filed by the plaintiff against Union of India. The suit was dismissed by the Trial Court, holding that though the Government of India was justified in rescinding the contract, they could not have forfeited the amount of deposit as they had not suffered any loss in consequence of the default committed by the plaintiff. The High Court, however, awarded a sum of Rs 416.25 to the plaintiff along with interest. The High Court, in awarding the aforesaid sum to the plaintiff, took into consideration the decision of Supreme Court in the case of **Fateh Chand** (supra), but felt that the aforesaid judgment did not purport to overrule the previous trend of authorities to the effect that earnest money deposited by way of security for due performance of a contract does not constitute penalty contemplated under Section 74 of Indian Contract Act and even if it was held otherwise, the Government was entitled to receive from the plaintiff reasonable compensation not exceeding that amount, whether or not actual damage

was proved to have been caused.

17. Setting aside the order of High Court and restoring that of the Trial Court, the Supreme Court, inter alia, observed as under:

> "Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty……
>
> …..It is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree, and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him…….
>
> ……In the present case, it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver "regularly and fully" the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made."

In **Saw Pipes Ltd** (supra), the respondent offered to supply casing pipes to the appellant, who accepted the offer and issued a detailed order containing terms and conditions of which the goods were to be supplied on or before 14th November, 1996. The contract provided for payment of liquidity damages to the appellant. After referring to Sections 73 and 74 of the Contract Act, Supreme Court, inter alia, observed as under:

> "Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This Section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia [relevant for the present case] provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. Question which would arise for consideration is--whether by such breach

party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different

(emphasis supplied)

….Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within stipulated time, then it would be difficult to prove how much loss is suffered by the Society/State. Similarly in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident-II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Section 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable."

In para 69 of the judgment, the Court, inter alia, concluded as under:

"(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same;

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is

required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the Court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, Court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

In **BSNL** (supra), the contract between the parties provided for payment of liquidity damages to the appellant. On the question as to whether a sum named in the contract is a pre-estimate of reasonable compensation for the loss or by way of penalty, Supreme Court referred to the following extract from Law of Contract (10th Edn.):

"a payment stipulated as in terrorem of the offending party to force him to perform the contract. If, on the other hand, the clause is an attempt to estimate in advance the loss which will result from the breach, it is a liquidated damages clause. The question whether a clause is penal or pre-estimate of damages depends on its construction and on the surrounding circumstances at the time of entering into the contract".

As regards the liquidity damages, the Court observed as under:

"Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorize as penalties the clauses described as liquidated damages. This principle is relevant to regulatory regimes. It is important to bear in mind that while categorizing damages as "penal" or "liquidated 68 damages", one must keep in mind the concept of pricing of these

contracts and the level playing field provided to the operators because it is on costing and pricing that the loss to BSNL is measured and, therefore, all calls during the relevant period have to be seen."

18. It would be appropriate to notice here that in the case of **Maula Bux vs. UOI** (supra) the contract between the parties was for supply of goods to the government and therefore loss of the government on account of non-supply of the goods could have been easily proved by the government as was also noted by Supreme Court. In **ONGC vs. Saw Pipes Ltd** (supra) the contract pertained to supply of pipes required for deployment of rigs which were to be used for production of gas and the plan for redeployment and a revised plan had to be made for deployment of rigs on account of various constraints including shortage of casing pipes which were to be supplied by Saw Pipes Ltd. and shortage of casing pipes being only one of the several reasons leading to delay in deployment of rigs, the actual damages on account of delay in supply of casing pipes could not have been ascertained by the Court. In **BSNL vs. Reliance Communication Ltd.** (supra), there was an interconnection agreement between the parties which provided for payment of liquidated damages and considering that the telecom services in India are operating under regulatory regime where all service providers are to be afforded level playing field. The Court was of the view that the compensation claimed by BSNL was pre-estimate of damages and was not penal in nature.

19. In **Shiva Jute Baling Ltd vs. Hindley and Company Ltd,** AIR 1959 SC 1357, the appellant company entered into a contract with the respondent company for supply of 500 bales of jute. The contract proved that in the event of default of tender or delivery, the seller shall pay to the buyer as and for liquidated damages, Rs 10 per ton plus the excess (if any) of the market value over the contract price, the market value being that of jute contracted for on the day following the date of default. On the appellant taking the stand that the contract had stood cancelled, the respondent claimed default on the part of the appellant and the matter was referred for arbitration. Upholding the compensation awarded by the Arbitrator in terms of the contract between the parties, Supreme Court, inter alia, observed as under:-

"The argument under this head is that the liquidated damages

provided under clause (12) of the contract include not only the difference between the contract price and the market price on the date of default but also a further sum of 10s. per ton. Reference in this connection is made to Sections 73 and 74 of the Indian Contract Act, and it is said that the extra amount of 10s. per ton included in the sum of liquidated damages is against the provision of these section and therefore the award being against the law of India is bad on the face of it and should not be enforced in India. Section 73 provides for compensation for loss or damage caused by breach of contract. It lays down that when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Section 74 provides for breach of contract where penalty is stipulated for or a sum is named and lays down that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for. What clause (12) of the contract provides in this case is the measure of liquidated damages and that consists of two things, namely, (i) the difference between the contract price and the market price on the date default and (ii) an addition of 10s. per ton above that. There is nothing in s. 73 or s. 74 of the contract Act, which makes the award of such liquidated damages illegal. Assuming that the case is covered by s. 74, it is provided therein that reasonable compensation may be awarded for breach of contract subject to the maximum amount named in the contract. What the arbitrators have done is to award the maximum amount named in the contract. If the appellant wanted to challenge the reasonableness of that provision in clause (12) it should have appeared before the arbitrators and represented its case. It cannot

now be heard to say that simply because clause (12) provided for a further sum of 10s. per ton over and above the difference between the contract price and the market price on the date of the default, this was per se unreasonable and was therefore bad accordingly to the law of India as laid down in Sections 73 and 74 of the Contract Act. Both these sections provide for reasonable compensation and s. 74 contemplates that the maximum reasonable compensation may be the amount which may be named in the contract. In this case the arbitrators have awarded the maximum amount so named and nothing more. Their award in the circumstances cannot be said to be bad on the face of it, nor can it be said to be against the law of India as contained in these sections of the Contract Act."

20. The propositions of law which emerge from the statutory provisions contained in Section 73 & 74 of the Indian Contract Act when examined in the light of a cumulative reading of aforesaid decisions of Supreme Court can be summarized as under:

(a) If a party to the contract commits breach of the contract, the party who suffers loss/damage on account of such breach is entitled to receive such compensation from the party in breach of the contract which naturally arose in usual course of business, on account of such breach or which the parties to the contract knew, at the time of making the contract, to be likely to result on account of its breach. However, the party suffering on account of the breach is entitled to recover only such loss or damage which arose directly and is not entitled to damages which can be said to be remote.

(b) In case the agreement between the parties provides for payment of liquidated damages, the party suffering on account of breach of the contract even if it does not prove the actual loss/damage suffered by it, is entitled to reasonable damages unless it is proved that no loss ˇor damage was caused on account of breach of the contract. In such a case, the amount of reasonable damages cannot exceed the amount of liquidated damages stipulated in the contract.

Any other interpretation would render the words "whether or not actual damage or loss is proved to have been caused thereby" appearing in Section 74 of the Indian Contract Act absolutely redundant and therefore the Court needs to eschew such an interpretation.

(c) If the amount stipulated in the contract, for payment by party in breach of the contract, to the party suffering on account of breach of the contract is shown to be by way of penalty, the party suffering on account of the breach is entitled only to a reasonable compensation and not the amount stipulated in the contract. If it is shown by the party in breach of the contract that no loss or damage was suffered by the other party on account of breach of the contract, the party in breach of the contract is not liable to pay any amount as compensation to the other party.

(d) If the nature of the contract between the parties is such that it is not reasonably possibly to assess the damages suffered on account of breach of the contract, the amount stipulated in the contract, for payment by the party in breach should normally be accepted as a fair and reasonable pre-estimate of damages likely to be suffered on account of breach of the contract and should be awarded.

21. In the case before this Court, though the plaintiff company has not proved the actual damages suffered by it on account of breach of contract by defendant No.1 company it cannot be disputed that some loss or damage was definitely suffered by the plaintiff company on account of the breach. No evidence has been led by defendant No.1 to prove that either on account of increase in price of raw material/finished goods or for some other reason the plaintiff company did not suffer any loss on account of the failure of defendant No.1 to lift the balance quantity of 93,000 litres. As noted earlier, the facts and the circumstances of the case including the letters written by the plaintiff company to defendant No.1 from time to time, coupled with the deposition of PW-1 Shri Ashok Dugar, clearly show that the plaintiff company had either procured the requisite raw material or had produced the finished product, may be to the extent of 53,000 litres if not 93,000 litres. Vide its letter

dated 21st October, 1995 (Exh. PW-1/4) plaintiff company had written to defendant No.1 that since the product agreed to be supplied to it was required for application in wheat crop in north India and if it is not disposed then, it will have to be stocked for next year and therefore, there should not be any doubt left about their lifting the entire quantity. The plaintiff company went to the extent of requesting defendant No.1 company to re-assess and let it know if defendant wished them to reduce any quantity. In its reply dated 26.10.1995 Exh. (P-2 D1 and D4) defendant No.1 did not dispute that if the contract goods were not lifted by it, the plaintiff company would have to carry the same for one year. In its letter dated 17.11.1995 (Exh. P-5 D1 & D4) which is an admitted document, defendant No.1 company itself informed the plaintiff company that the season had miserably failed, the market had crashed and therefore they were not in a position to make any commitment for lifting or making financial arrangement. Therefore it cannot be disputed that the goods agreed to be sold by the plaintiff to defendant No.1 were seasonal in nature and if they were not sold by December, 1995 the plaintiff company had necessarily to carry the inventory upto next season. If the plaintiff company did not manufacture any goods other than 7000 litres supplied by it to defendant No.1, it would have stored the raw material procured by it till next season when it would have utilized it for manufacturing the finished product. The plaintiff company in such a case, suffered damages on account of interest which it paid or it could have earned on the amount paid for procurement of raw material and would also have incurred cost in storing that raw material for about one year. If the plaintiff company had manufactured the remaining 93,000 litres of finished product, it was deprived of use of the money which defendant No.1 company would have paid to it in case it had not committed breach of the contract and thereby it incurred loss of interest on the amount which it would have received from defendant No.1 company besides incurring expenditure on storage of finished products. If the plaintiff company partly manufactured the finished product and had to store them upto the next year along with the raw material required for production of the remaining quantity of the finished product, the plaintiff company suffered a loss on account of expenditure incurred in storage of the finished product and raw material besides loss of interest on the amount paid by it for the raw material. Even if I take a conservative interest @ 12% p.a. the plaintiff company would have suffered loss of about Rs.10 per litre besides the

expenditure incurred on storage of raw material/finished product for about one year. In these circumstances, it can hardly be disputed that the plaintiff company is entitled to recover at least Rs.10 per litre from defendant No.1 company by way of damages for the loss suffered by it due to breach of contract on the part of defendant No.1 company.

22. It was contended by the learned Counsel for the defendants that it was incumbent upon the plaintiff company to make efforts to mitigate the losses and no evidence has been produced to prove any such effort. In support of his contention he has relied upon **Pannalal Jugatmal vs. State of Madhya Pradesh** AIR 1963 MP 242 and **Firm Bhagwandas Shobhala Jain, a Registered Fir, and Anr. vs. State fo Madhya Pradesh** AIR 1966 MP 95. In the case of **Pannalal** (supra) the Court was concerned with a case attracting Section 73 of the Indian Contract Act and not a case to which the provisions of Section 74 of the Indian Contract Act applied. During the course of the judgment the Court referring to Section 73 of the Indian Contract Act observed as under:

> 14. Now, the rule is that damages are compensatory and no penal and that one who has suffered loss fro breach of contract must take every reasonable step that is available to him to mitigate the extent of damages caused by the breach. He cannot claim tobe compensated by the party in default for loss which is really due not to the breach but to his own failure to behave reasonably after the breach. This rule is incorporated in the explanation to Section 73 of the Contract Act.

In case of **Bhagwandas** (Supra) which again was a case attracting applicability of Section 73 of the Indian Contract Act, the Court interalia observed as under:

> 33. It has also to be remembered that the law imposes a duty upon the plaintiffs to take all reasonable steps to mitigate the loss caused by a breach of contract and debars him from claiming compensation for any part of the damages which is due to his neglect to do so;……..

However, in the case before this Court since admittedly the goods were seasonal in nature and therefore could not have been disposed of till next year, it cannot be said that the plaintiff company could have disposed them of soon after there was breach of contract on the part of

defendant No.1. Moreover, since the market had crashed and there were no buyers in the marked for the product as is evident from the letter written by defendant No.1 to the plaintiff on 17.11.1995, the plaintiff company would not have been in a position to sell the goods manufactured by it on the instructions of defendant No.1 company at a remunerative price. Even if the plaintiff company had not manufactured the finished goods, it would not have been possible for it to sell the raw material procured by it, at the same price at which it was procured. The raw material meant for manufacture of seasonal goods could not have fetched a ready buyer at the cost price of the plaintiff company, in case it could not have been consumed for about a year.

Since there was no breach of contract on the part of the plaintiff, defendant no.1 is not entitled to recover any amount from it and the counter claim is therefore liable to be dismissed. The plaintiff company on the other hand is entitled to recover a sum of Rs.9,30,000/- though only from defendant No.1 company as damages @ Rs.10 per litre. The issues are decided accordingly.

Issue No. 8

23. In view of my findings above, I hold that defendant No.1 is not entitled to any interest from the plaintiff.

Issue No. 9

24. The plaintiff has claimed interest @ 18% p.a. on the price of 7000 litres of the finished product which it had supplied to defendant No.1 company. No agreement between the parties for payment of interest has either been pleaded or proved by the plaintiff. However, since this is a suit for price of goods sold and delivered, interest can be awarded to the plaintiff under Section 61(2) of the Sales of Goods Act. Considering the nature of transaction between the parties, I am of the view that interest should be awarded to the plaintiff company @ 12% p.a. Calculated on the aforesaid rate, the amount of interest comes to Rs.93,008/-. The plaintiff is entitled to recover the aforesaid amount from defendant No.1 as interest. The issue is decided accordingly.

Relief

25. In view of my findings on other issues defendant No.1 is not

entitled to recover any amount from the plaintiff. The plaintiff however, is entitled to recover a total sum of Rs.11,14,160/-from defendant No.1 company alone.

ORDER

For the reasons given in the preceding paragraphs a decree of Rs.11,14,160/- with proportionate costs and pendent lite and future interest @ 12% p.a. is hereby passed in favour of plaintiff and against defendant No.1. The suit against the other defendants is dismissed without any order as to costs.

Decree sheet be prepared accordingly.

ILR (2011) IV DELHI 286
OMP

PROGRESSIVE CAREER ACADEMY PVT. LTD. ....PETITIONER

VERSUS

FIIT JEE LTD. ....RESPONDENT

(VIKRAMAJIT SEN AND SIDDHARTH MRIDUL, JJ.)

OMP NO. : 297/2006, DATE OF DECISION: 16.05.2011
FAO (OS) NO. : 128/2008,
FAO (OS) NO. : 129/2009,
FAO (OS) NO. : 334/2009 AND
FAO (OS) NO. : 525/2010

(A) Arbitration and Conciliation Act, 1996—Section 9, 34, 37—Constitution of India, 1950—Article 226—Legal propriety of judicial directions for removal of Arbitrators even before publishing of Award challenged in appeals before Division Bench—Objection lodged to maintainability of appeals on ground that such remedy of appeal provided only against granting or

refusing to grant interim measures or setting aside or refusing to set aside arbitral award—Per contra plea taken where order is passed de hors The Act, appeal assailing such order be entertained—Held—Aggrieved party could, in deserving cases, approach Supreme Court under plenary powers contained in Article 136 of Constitution of India—Present appeals are incompetent.

(B) Arbitration and Conciliation Act, 1996—5, 8, 9, 12, 13, 14, 15, 23, 24, 25, 26, 27, 34, 36, 37 and 50—Arbitration Act, 1940—Section 39—Constitution of India, 1950—Article 136—International Arbitration Act, 1974—Section 16(1), 18A—Uniform Arbitration Act, 1989—Section 12, 13, 14, 15—UNCITRAL Model Law on International Commercial Arbitration—Article 13(3)—Ld. Single Judge referred petition to Division Bench because of existence of two divergent conceptions—One view is assertions as to de jure or de facto incompetence of Arbitral Tribunal must immediately be addressed by Court—Other view is statutorily provided procedure postulates immediate remonstration but a deferred assailment of Award by invocation of Section 34 of The Act—Held—Parliament did not want to clothe Courts with power to annul Arbitral Tribunal on ground of bias at intermediate stage—Act enjoins immediate articulation of challenge to authority of arbitrator on ground of bias before Tribunal itself and ordains adjudication of this challenge as objection under Section 34 of A & C Act—Curial interference is not possible at Pre-Award stage on allegations of bias or impartiality of Arbitral Tribunal—Referral order answered.

In this analysis, we must immediately observe that the approach taken by one of us (Vikramajit Sen, J.) in **Interstate Constructions** is not correct as it transgresses and infracts the provisions of the A&C Act. Learned Single Benches

have interfered and removed arbitrators obviously on pragmatic considerations, viz. the futility and idleness of pursuing arbitral proceedings despite lack of faith therein because of justifiable doubts as to the independence or impartiality of the arbitrators. Clearly, Parliament has also proceeded on the compelling expediency and advisability of expeditious conclusion of these proceedings. Relief against possible mischief has been provided by making clarification in Section 13(5) that apart from the challenges enumerated in Section 13(4), an assault on the independence or impartiality of the Arbitral Tribunal is permissible by way of filing Objections on this aspect after the publishing of the Award. We, therefore, affirm the approach in **Pinaki Das Gupta, Neeru Walia, Ahluwalia Contracts (India) Ltd.** and **Newton Engineering and Chemicals Ltd.**. We are of the opinion that the Single Benches who interfered with the progress of the proceedings of the Arbitral Tribunal in the pre-Award stage fell in error. Humans often fall prey to suspicions which may be proved to be ill-founded on the publication of an Award. There is compelling wisdom in Parliament's decision to allow adjudication on grounds of bias, lack of independence or impartiality of the Tribunal only on the culmination of the arbitral proceedings.

(Para 21)

Having arrived at the conclusion that curial interference is not possible at the pre-Award stage on the allegations of bias or impartiality of the Arbitral Tribunal on the one hand, and our understanding that the Appeals are not maintainable on the other hand, is any further relief to be granted? We think it expedient to abjure from passing any further orders for several reasons including – firstly, the reality that arbitration proceedings would inevitably have already come to an end in those instances where the arbitrator had been removed by orders of the Court, and secondly the availability of redress under Article 136 of the Constitution of India. All pending applications stand disposed of. The Referral Order is answered by reiterating that the statute does not postulate judicial interference in arbitral proceedings till the Award is

published, whereupon Objections can be raised also on the platform of the alleged bias of the Tribunal. This challenge is possible provided the grievance is articulated in consonance with Section 13 of the A&C Act. **(Para 22)**

Important Issue Involved: (A) Appeals challenging the legal propriety of judicial directions for the removal of an arbitrator even before the publishing of an award are incompetent. An aggrieved party could, in deserving cases, approach the Hon'ble Supreme Court under the plenary powers contained in Article 136 of the Constitution of India.

(B) A & C Act statute does not postulate judicial interference in arbitral proceedings till the Award is published, whereupon objections can be raised also on the plarform of the alleged bias of the Tribunal. This challenge is possible provided the grievance is articulated in consonance with Section 13 of the A & C Act.

(C) Courts have to give full expression and efficacy to the words of the parliament especially where they are unambiguous and unequivocal. The golden rule of interpretation requires Courts to impart a literal interpretation and not to deviate therefrom unless such exercise would result in absurdity.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. S.K. Maniktala & Mr. V.M. Chauhan, Mr. P.V. Kapur, Sr. Advocate with Anil Airi, Ms. Ekta Kalra Sikri & Ms. Sadhana Sharma, Advocates, Mr. Deepak Bhattacharya, Mr. Rajesh Kumar & Mr. Mithlesh Kumar, Advocates Mr. Vikas Mahajan Advocate.

FOR THE RESPONDENT : Mr. T.K. Pradhan, Mr. Anil Sapra, Sr. Advocate with Mr. Rajendra Singvi & Mr. Sanjay Abbot, Advocates, Vijay K. Mehta & Mr. S.S. Parashar, Advocate.

CASES REFERRED TO:

1. *Tandav Films Entertainment Pvt. Ltd.* vs. *Four Frames Pictures*, 2010(1) Arb. LR 79(Delhi) DB).
2. *Shivnath Rai Harnarain India Co.* vs. *Glencore Grain Rotterdam*, 164 (2009) DLT 197(DB).
3. *National Highways Authority of India* vs. *K.K.Sarin*, 159 (2009) DLT 314.
4. *S.N.Dhingra, J. in Neeru Walia* vs. *Inderbir Singh Uppal*, 160(2009) DLT 55.
5. *RITES Limited* vs. *JMC Projects (India) Ltd.*, 2009(2) Arb. LR 64 (Del.) (DB).
6. *Canbank Financial Services Ltd.* vs. *Haryana Petrochemicals Ltd.*, 2008(2)Arb.LR 365 Delhi (DB).
7. *Bharat Salt Refineries Ltd.* vs. *M/s. Compania*, OSA No.52/2008.
8. *Ahluwalia Contracts (India) Ltd.* vs. *Housing and Urban Development Corporation*, 2008 (100) DRJ 461.
9. *O.P.B.K.Construction Pvt. Ltd.* vs. *Punjab Small Industries & Export Corporation Ltd.*, 2008 (3) Arb.LR 189 (P&H).
10. *State of Arunachal Pradesh* vs. *Subhash Projects and Marketing Ltd.*, 2007(1) Arb. LR 564 (Gau).
11. *Raghunath Rai Bareja* vs. *Punjab National Bank*, (2007) 2 SCC 230.
12. *Dharam Prakash* vs. *Union of India*, 138 (2007) DLT 118 (DB), 2007(1) Arb. LR 308(Del.) (DB).
13. *Surinder Pal Singh* vs. *HPCL*, 2006(4) Arb. LR 109.
14. *Midnapore Peoples' Co-op. Bank Ltd.* vs. *Chunilal Nanda*, AIR 2006 SC 2190.

15. *ITE India (P) Ltd.* vs. *Mukesh Sharma,* RFA (OS) No. 9/2006.
16. *Indira Rai* vs. *Vatika Plantations (P) Ltd.*, 127 (2006) DLT 646.
17. *E. Logistics* vs. *Financial Technologies India Ltd.,* MANU/TN/7554/2006.
18. *Groupe Chimique SA* vs. *Southern Petrochemicals Industries Corpn. Ltd.,* (2006) 5 SCC 275.
19. *SBP & Company* vs. *Patel Engineering,* (2005) 8 SCC 618.
20. *Sushil Kumar Raut* vs. *Hotel Marina,* 121(2005) DLT 433.
21. *SBP & Co.* vs. *Patel Engineering Limited,* (2005) 8 SCC 618.
22. *Great Eastern Shipping Co. Ltd.* vs. *Board of Trustees for the Port of Calcutta,* 2005(1) Ar. LR 389 (Cal) (DB).
23. *State of Jharkhand* vs. *Govind Singh* (2005) 10 SCC 437 : 2005 SCC (Cri) 1570 : JT (2004) 10 SC 349.
24. *Vilas* vs. *Ganesh Builders,* 2005(2) AllMR 634.
25. *P.S. Sathappan* vs. *Andhra Bank Ltd.,* (2004) 11 SCC 672 : AIR 2004 SC 5152.
26. *P.S. Sathappan* vs. *Andhra Bank Ltd.,* AIR 2004 SC 5152.
27. *Pinaki Das Gupta* vs. *Publicis (India) Communications,* 115 (2004) DLT 345.
28. *Shyam Telecom Ltd.* vs. *Arm Ltd.,* 113 (2004) DLT 778.
29. *Prakash Nath Khanna* vs. *CIT* (2004) 9 SCC 686.
30. *Delhi Financial Corpn.* vs. *Rajiv Anand,* (2004) 11 SCC 625.
31. *Swedish Match AB* vs. *Securities and Exchange Board of India* (2004) 11 SCC 641 : AIR 2004 SC 4219.
32. *Govt. of A.P.* vs. *Road Rollers Owners Welfare Assn.* (2004) 6 SCC 210.

33. *Prasar Bharati* vs. *Stracon (India) Limited,* 114(2004) DLT 562.
34. *Interstate Constructions* vs. *NPCC Limited,* 2004(3) R.A.J. 672.
35. *V.M. Manohar Prasad* vs. *N. Ratnam Raju,* (2004) 13 SCC 610.
36. *Bhaiji* vs. *Sub-Divisional Officer* (2003) 1 SCC 692.
37. *Nasiruddin* vs. *Sita Ram Agarwal* (2003) 2 SCC 577 : AIR 2003 SC 1543.
38. *Bhaiji* vs. *Sub-Divisional Officer* (2003) 1 SCC 692.
39. *J.P. Bansal* vs. *State of Rajasthan* (2003) 5 SCC 134 : 2003 SCC (L&S) 605 : AIR 2003 SC 1405.
40. *State of Jharkhand* vs. *Indian Builders,* 2003(3) JCR 718.
41. *Jinia Keotin* vs. *Kumar Sitaram Manjhi* (2003) 1 SCC 730.
42. *Konkan Railway Corporation Ltd.* vs. *Rani Construction,* (2002) 2 SCC 388.
43. *Fuerst Day Lawson* vs. *Jindal Exports Ltd.,* AIR 2001 SC 2293).
44. *Cref Finance Ltd.* vs. *Puri Construction Ltd.,* AIR 2001 Delhi 414.
45. *Hasmukhlal H.Doshi* vs. *Justice M.L.Pendse,* 2001(1) Arb.LR 87 (Bombay).
46. *G.Vijayaraghavan* vs. *M.D.Central Warehousing Corporation,* 86 (2000) DLT 844.
47. *Modi Korea Telecommunication Ltd.* vs. *Appcon Consultants Pvt. Ltd.,* 2000 (Suppl.) R.LR 618(Cal) (DB).
48. *Bharat Heavy Electricals Ltd.* vs. *C.N. Garg,* 88 (2000) DLT 242(DB).
49. *Jindal Exports Ltd.* vs. *Fuerst Day Lawson Ltd.,* 1999(51) DRJ 170 (DB).
50. *Vanita M. Khanolkar* vs. *Pragna M. Rai,* AIR 1998 SC

424.

51. *Jas Enterprises* vs. *The Karanpara Dev. Co. Ltd.*, (1997) 2 CalLT 277.

52. *Union of India* vs. *Harnam Singh*, (1993) 2 SCC 162.

53. *State of West Bengal* vs. *Gourangalal Chatterjee*, (1993) 3 SCC 1.

54. *Kishore Paliwal* vs. *Sat Jit Singh*, (1984) 1 SCC 358.

55. *Shah Babulal Khimji* vs. *Jayaben*, AIR 1981 SC 1786.

56. *Union of India* vs. *A.S. Dhupia*, AIR 1972 Delhi 108.

57. *Union of India* vs. *Mohindra Supply Co.*, [1962] 3 SCR 497.

58. *CIT* vs. *Keshab Chandra Mandal* AIR 1950 SC 265 : (AIR p. 270, para 20).

59. *King Emperor* vs. *Benoari Lal Sarma* (1944-45) 72 IA 57 : AIR 1945 PC 48, AIR at p. 53.).

60. *Eastman Photographic Materials Co.* vs. *Comptroller General of Patents*, (1898) AC 571.

RESULT: Referred order answered.

VIKRAMAJIT SEN, J.

1. The question in this bunch of Appeals concerns the legal proprietary of judicial directions for the removal of an arbitrator even before the publishing of an Award. Several judgments of our esteemed Single Benches have been cited before us, a perusal of which manifests the existence of a polarity of opinion. On one side of the watershed is the view that assertions as to the de jure or de facto incompetence of the Arbitral Tribunal must immediately be addressed by the Court, and in deserving cases remedied, whilst on the other side is the contrary view that the statutorily provided procedure postulates an immediate remonstration but a deferred assailment of the Award, inter alia on this ground, by way of an invocation of Section 34 of the Arbitration & Conciliation Act, 1996 (A&C Act for short).

2. At the threshold, an objection has been lodged to the maintainability of the Appeals on the ground that Section 37 of the A&C Act provides

for such remedy only against orders (a) granting or refusing to grant any measure under Section 9 or (b) setting aside or refusing to set aside an arbitral award under Section 34 of the A&C Act. In **Cref Finance Ltd. –vs- Puri Construction Ltd.,** AIR 2001 Delhi 414 the controversy which had arisen before this Court concerned the competency of a Second Appeal; and the Division Bench held that it was forbidden in terms of Section 37(3) of the A&C Act. We are mindful that this aspect of law does not directly arise before us. However, it is a worthy preface to our analysis inasmuch as it records the non-availability of Letters Patent even in these circumstances. The Division Bench, inter alia, took note of the Five-Judge Bench decision in **Union of India –vs- A.S. Dhupia,** AIR 1972 Delhi 108 which pithily provides a perspicuous perusal of the annals of the establishment of the Delhi High Court. The Division Bench also observed that **Shah Babulal Khimji –vs- Jayaben,** AIR 1981 SC 1786 was distinguishable for the simple reason that their Lordships were not concerned with the maintainability of an Appeal against the Order/Judgment of a Single Bench of the Delhi High Court exercising original jurisdiction.

3. In **Dharam Prakash –vs- Union of India,** 138 (2007) DLT 118 (DB), 2007(1) Arb. LR 308(Del.) (DB), the challenge was laid to the vires of Section 13 of the A&C Act which was repelled because of the existence of a remedy via filing of Objections under Section 34 of the A&C Act. The said Bench applied the previous enunciation of the law in **Bharat Heavy Electricals Ltd. –vs- C.N. Garg,** 88 (2000) DLT 242(DB). Yet another Division Bench of this Court in **Canbank Financial Services Ltd. –vs- Haryana Petrochemicals Ltd.,** 2008(2)Arb.LR 365 Delhi (DB) had concluded that a challenge concerning controversies raised in a plaint/suit was not maintainable in view of Section 37 of the A&C Act. This decision was applied in **Tandav Films Entertainment Pvt. Ltd. –vs- Four Frames Pictures,** 2010(1) Arb. LR 79(Delhi) DB), albeit in that case, it was Section 8 of the A&C Act which was at the fulcrum of the controversy. The abiding bedrock of these decisions remains **Union of India –vs- Mohindra Supply Co.,** [1962] 3 SCR 497 which reiterates that the right of appeal is essentially a creature of a statute; ergo a litigant does not possess an inherent right to appeal. Accordingly, Section 39 of the repealed Arbitration Act, 1940 which had provided for a limited scope of appeal before the appellate Court, superseded the

provisions of Letters Patent. This opinion is evident from a perusal of the following paragraphs:-

> 16. There is in the Arbitration Act no provision similar to Section 4 of the Code of Civil Procedure which preserves powers reserved to courts under special statutes. There is also nothing in the expression .authorised by law to hear appeals from original decrees of the Court. contained in Section 39(1) of the Arbitration Act which by implication reserves the jurisdiction under the Letters Patent to entertain an appeal against the order passed in arbitration proceedings. Therefore, in so far as Letters Patent deal with appeals against orders passed in arbitration proceedings, they must be read subject to the provisions of Section 39(1) and (2) of the Arbitration Act.
>
> 17. Under the Code of 1908, the right to appeal under the Letters Patent was saved both by Section 4 and the clause contained in Section 104(1), but by the Arbitration Act of 1940, the jurisdiction of the Court under any other law for the time being in force is not saved; the right of appeal can therefore be exercised against orders in arbitration proceedings only under Section 39, and no appeal (except an appeal to this Court) will lie from an appellate order.
>
> 18. There is no warrant for assuming that the reservation clause in Section 104 of the Code of 1908 was as contended by counsel for the respondents, 'superfluous' or that its 'deletion from Section 39(1) has not made any substantial difference': the clause was enacted with a view to do away with the unsettled state of the law and the cleavage of opinion between the Allahabad High Court on the one hand and Calcutta, Bombay and Madras High Courts on the other on the true effect of Section 588 of the Code of Civil Procedure upon the power conferred by the Letters Patent. If the legislature being cognizant of this difference of opinion prior to the Code of 1908 and the unanimity of opinion which resulted after the amendment, chose not to include the reservation clause in the provisions relating to appeals in the Arbitration Act of 1940, the conclusion is inevitable that it was so done with a view to restrict the right of appeal within the strict limits defined by Section 39 and to take away the right

> conferred by other statutes. The Arbitration Act which is a consolidating and amending Act, being substantially in the form of a code relating to arbitration must be construed without any assumption that it was not intended to alter the law relating to appeals. The words of the statue are plain and explicit and they must be given their full effect and must be interpreted in their natural meaning, uninfluenced by any assumptions derived from the previous state of the law and without any assumption that the legislature must have intended to leave the existing law unaltered. In our view the legislature has made a deliberate departure from the law prevailing before the enactment of Act 10 of 1940 by codifying the law relating to appeals in Section 39.

4. This decision was followed by their Lordships in **State of West Bengal –vs- Gourangalal Chatterjee,** (1993) 3 SCC 1. The argument that the ratio of Mohindra Supply Co. would not apply where the order of the learned Single Judge was passed not in exercise of Appellate jurisdiction but of Original jurisdiction was roundly rejected. The Supreme Court went on to hold in Gourangalal Chatterjee that – 'the order passed by learned Single Judge revoking the authority of the Chief Engineer on his failure to act as an arbitrator was not covered under any of the six clauses mentioned in Section 39. It is obvious that no appeal could be filed against the order of the learned Single Judge". This decision definitively sounds the death knell for the Appeals before us since it directly deals with the removal of an arbitrator. To avoid prolixity, we shall go no further than to mention that our research has encompassed Jugal **Kishore Paliwal –vs- Sat Jit Singh,** (1984) 1 SCC 358, **Vanita M. Khanolkar -vs- Pragna M. Rai,** AIR 1998 SC 424, **P.S. Sathappan –vs- Andhra Bank Ltd.,** AIR 2004 SC 5152, **Groupe Chimique SA –vs- Southern Petrochemicals Industries Corpn. Ltd.,** (2006) 5 SCC 275 and **RITES Limited –vs- JMC Projects (India) Ltd.,** 2009(2) Arb. LR 64 (Del.) (DB). It appears that keeping in perspective the views of the Hon'ble Supreme Court and of this High Court, the only conclusion possible is that the present Appeals are incompetent.

5. Faced with this predicament, Mr. P.V. Kapur, learned Senior Advocate appearing for the Appellants, has contended that where an order has palpably been passed de hors the A&C Act, an Appeal assailing

such an order should nevertheless be entertained. He has sought support from a decision of the Division Bench of this Court in **Jindal Exports Ltd. –vs- Fuerst Day Lawson Ltd.,** 1999(51) DRJ 170 (DB). In that case, an objection to the maintainability of execution proceedings had been canvassed on the premise that the learned Single Judge had erred in converting the execution proceedings into a petition seeking enforcement of a foreign award. Our learned Brothers had noted that an Appeal against such an order would not lie under Section 50 of the A&C Act. However, the impugned Order was "treated as one having been passed by learned Single Judge not under any of the provisions of the A&C Act, but in exercise of his inherent jurisdiction on Original Side of this Court. Thus, the impugned order is such, which would be deemed to have been passed de hors the provisions of the Act". It was opined that such an order could be scrutinized for its proprietary under Clause 10 of the Letters Patent and would constitute a judgment in the mould of Shah Babulal Khimji. Our learned Brother duly discussed Gourangalal Chatterjee but distinguished it on the dialectic that execution proceedings, unlike the removal of an arbitrator, were not envisaged under the A&C Act. It is debatable whether this approach has been approved by the Supreme Court inasmuch as in the Appeal their Lordships have not specifically affirmed the view of the Division Bench on the jurisdictional aspect (See **Fuerst Day Lawson –vs- Jindal Exports Ltd.,** AIR 2001 SC 2293).

6. It is topical to advert to the opinion of the Division Bench in **Shivnath Rai Harnarain India Co. –vs- Glencore Grain Rotterdam,** 164 (2009) DLT 197(DB) which is in these words:-

> 8. Very recently, in RFA (OS) No. 9/2006 titled **ITE India (P) Ltd. –vs- Mukesh Sharma,** another Division Bench of this Court has categorically held that Section 10 of the DHC Act does not confer a right of appeal. Drawing support from a detailed judgment of a Division Bench of Madras High Court in OSA No.52/2008 titled **Bharat Salt Refineries Ltd. –vs- M/s. Compania,** our learned Brothers categorically concluded that an Appeal under Section 50(1) (a) of the Arbitration and Conciliation Act lies only in cases where the Court below refuses to refer the parties to arbitration. These observations were made because the question before our learned Brothers was restricted to that conundrum alone. The present dispute would, however,

encompass Section 50 (1)(b), but the reasoning of our esteemed Brothers nevertheless is applicable on all fours. The Appeal was dismissed as not maintainable. Apart from the pronouncements of the Supreme Court on the Arbitration Act, 1940, it is obvious that several Division Benches of this Court, as well as of the Madras High Court, have not entertained appeals at least pertaining to arbitration disputes under Section 10 of the Letters Patent.

9. In **P.S. Sathappan –vs- Andhra Bank Ltd.,** (2004) 11 SCC 672 : AIR 2004 SC 5152 the Constitution Bench, by a majority of 3 to 2, held that the application of Letters Patent enabling appeals from certain orders continued unabated despite later legislation, yet clarified that where "a statue does not permit an appeal, it will not lie. Thus, for example, in cases under the Land Acquisition Act, the Guardians and Wards Act and the Succession Act, a further appeal is permitted whilst under the Arbitration Act a further appeal is barred" (emphasis added by us). This would apply a fortiori to the Delhi High Court which came into existence as a distinct entity by virtue of parliamentary enactment and not by Letters Patent, a distinguishing feature which is not always recognized. This is extremely significant keeping in perspective the fact that the avowed purpose of Letters Patent was to establish High Courts in India, restrict appeals to the House of Lords/Privy Council, and to provide intra court appeals within the High Courts so established. So far as the Delhi High Court is concerned this is the very objective of the enactment of Parliament and therefore reverting to a previous document such as Letters Patent could well be seen as superfluous or futile. It seems to us that the Delhi High Courts Act, 1976 completely substitutes or subsumes the Letters Patent.

7. Section 36 of the A&C Act covers execution or rather enforcement of an Award. If a picturisation is permitted, we can visualize the curtain coming down, so far as arbitral proceedings are concerned, to be followed by quite another Act/scene of the play, in which the Civil Procedure Code becomes the focal dialogue. Application for adjournments or for amendment of pleadings etc. would fall in this genre; on any consideration, the A&C Act neither attempted nor intended to cover these projects. It would be apposite to draw attention once again to Cref Finance Ltd. in

which another Division Bench has categorically concluded that the Letters Patent are inapplicable to proceedings under the arbitration legislation. Similar is the tenor of two Division Bench Judgments of Calcutta High Court, namely, **Modi Korea Telecommunication Ltd. –vs- Appcon Consultants Pvt. Ltd.,** 2000 (Suppl.) R.LR 618(Cal) (DB) which came to be applied in **Great Eastern Shipping Co. Ltd. –vs- Board of Trustees for the Port of Calcutta,** 2005(1) Ar. LR 389 (Cal) (DB). The Division Bench of the Calcutta High Court had come to the conclusion that the orders assailed before them did not partake of the character of orders passed under the A&C Act. It would be virtually impossible to inventories all instances of orders passed de hors the A&C Act. We are not called upon to cogitate upon this issue since the controversy is covered on all fours by Gourangalal Chatterjee. For this very reason, it appears to us that **V.M. Manohar Prasad –vs- N. Ratnam Raju,** (2004) 13 SCC 610 does not further the argument that the present batch of cases are amenable to correction under Clause 10 of the Letters Patent. Their Lordships had repelled the view taken by the High Court that an appeal was prohibited under the Contempt of Courts Act, 1971 since the Contempt Judge had not imposed any punishment. The learned Single Judge had directed that all those employees who had not completed five years of regular service would not be considered for regularization in the contempt proceedings. An appeal was held to be maintainable against this part of the Order. A similar conclusion was reached in **Midnapore Peoples' Co-op. Bank Ltd. –vs- Chunilal Nanda,** AIR 2006 SC 2190 where their Lordships held that if orders of a civil nature or having civil ramifications came to be passed in contempt proceedings, they would be appealable.

8. Returning to the facts of the Appeals before us, all of them directly deal with the removal of an arbitrator and/or with terminating the mandate of the Arbitral Tribunal. These questions have been dealt with under the fasciculus of Sections 12 to 15 of the A&C Act. We find that there can be no conceivable considerations for concluding that such orders can be perceived as being unconnected with any of the provisions of the A&C Act. We are not dealing with an order directing a lower Court to conclude proceedings under Section 8 of the A&C Act expeditiously. We make no observations regarding maintainability of an Appeal against them since they would essentially be in the nature of obiter dicta. In any event, it would be relevant to recall the enunciation of the law in **SBP & Co. –vs- Patel Engineering Limited,** (2005) 8

SCC 618 to the effect that an aggrieved party could, in deserving cases, approach the Hon'ble Supreme Court under the plenary powers contained in Article 136 of the Constitution of India to correct a grievous error. In fact, Section 37 of the A&C Act explicitly explains this position.

9. In **Progressive Career Academy Pvt. Ltd. –vs- FIIT JEE Ltd.** (OMP No.297/2006), a learned Single Judge has referred the Petition to the Division Bench because of the existence of the two divergent and diametrically different conceptions and persuasions which have already been dissected by us above. Hence, even though it is our opinion that the Appeals are not maintainable, we must answer the queries raised by the Referral Order. We are mindful of the fact that our decision shall put to rest the controversial and conflicting verdicts of Single Benches of this Court.

10. In the present analysis of the law, we cannot concur with the ratio of **Interstate Constructions –vs- NPCC Limited,** 2004(3) R.A.J. 672 (Del) in which one of us (Vikramajit Sen, J.) had terminated the authority of the Arbitrator keeping in mind the directions of the latter requiring the claimants to travel from New Delhi to Andhra Pradesh solely to carry out inspection of documents. Bias was found to pervade the arbitral proceedings in that the Arbitrator was manifestly functioning to the detriment of the Claimant and to the advantage of the party who had appointed him. This dialectic appears to have found favour with another learned Single Judge in **Indira Rai –vs- Vatika Plantations (P) Ltd.,** 127 (2006) DLT 646. The mandate of the Arbitrator was accordingly terminated and another Arbitrator was appointed in his stead. Our Learned Brother had also drawn support from the decision of the Division Bench in **Sushil Kumar Raut –vs- Hotel Marina,** 121(2005) DLT 433. While doing so, the Bench was cautious to record that its action .may not be technically or strictly in tune with the provisions of the Act.. The Division Bench considered it necessary to 'break the impasse' and accordingly removed the existing arbitrator and appointed a third person as the Arbitrator. In **National Highways Authority of India –vs- K.K.Sarin,** 159 (2009) DLT 314, a Single Bench of this Court (Rajiv Sahai Endlaw, J.) has concluded that the 'party alleging bias is required to first follow the procedure in Sections 12 and 13 and if unsuccessful has choice of either waiting till the stage of Section 34 or if he feels that bias can be summarily established or shown to the Court, approach the Court

immediately under Section 14, after the challenge being unsuccessful, for the Court to render a decision'. In **Shyam Telecom Ltd. –vs- Arm Ltd.,** 113 (2004) DLT 778 a Single Bench (R.C.Jain, J.) has concluded that Section 14(2) of the Act empowers the Court to decide the question of termination of the mandate if a controversy arises concerning the termination of the Arbitrator's mandate on one or the other grounds.

11. Our research reveals that another Single Bench, while declining to interfere in **Pinaki Das Gupta –vs- Publicis (India) Communications,** 115 (2004) DLT 345, has favoured the view that interference under Section 14 is not warranted even in the face of allegations of the bias of the Arbitrator. A reference was made by the learned Single Judge to his previous decision in **Prasar Bharati –vs- Stracon (India) Limited,** 114(2004) DLT 562 which interpreted the powers vested in the Court under Section 11 of the A&C Act. Both the decisions were predicated on the earlier view of the Supreme Court in **Konkan Railway Corporation Ltd. –vs- Rani Construction,** (2002) 2 SCC 388, which no longer holds the field because of subsequent enunciation of law in **SBP & Company –vs- Patel Engineering,** (2005) 8 SCC 618.

12. In **G.Vijayaraghavan –vs- M.D.Central Warehousing Corporation,** 86 (2000) DLT 844, the Court had been approached under Sections 12 and 13 of the Act with the prayer to set aside the appointment of the Arbitrator on the premise that his name was on the panel of the Arbitrators drawn up by the opposite party. The prayer was declined without going into the legal nodus whether the Court possessed the power of interference in the proceedings of the Arbitral Tribunal even at the pre Award stage. Our attention has also been drawn to a Single Bench decision of the Punjab and Haryana High Court reported as **O.P.B.K.Construction Pvt. Ltd. –vs- Punjab Small Industries & Export Corporation Ltd.,** 2008 (3) Arb.LR 189 (P&H) wherein the Court found it fit to terminate the mandate of the Arbitrator without addressing the question whether this power had been bestowed upon it by the Act. As in all other cases, the verdict proceeds on the presumption that the Court possesses power to terminate the mandate of the Arbitrator prior even to the publication of the Award. In **Jas Enterprises –vs- The Karanpara Dev. Co. Ltd.,** (1997) 2 CalLT 277, a Single Bench of the Calcutta High Court rejected a challenge to the impartiality of the Arbitrator without rendering asunder the guardian knot whether such a challenge

had been made available under the A&C Act. This is also what transpired in **State of Jharkhand –vs- Indian Builders,** 2003(3) JCR 718 (Jhar.) where the learned Single Judge directed the Arbitrator to refund fees drawn from the Government even though he was in its employment; the learned Single Judge assumed he had powers to direct so. In **E. Logistics –vs- Financial Technologies India Ltd.,** MANU/TN/7554/2006, interference was declined on merits without questioning the power to do so under the statute.

13. In **Surinder Pal Singh –vs- HPCL,** 2006(4) Arb. LR 109, the question for determination, inter alia, was the maintainability of suit for declaration and injunction to the effect that the mandate of the Arbitrator had come to an end since the Award had not been published within the agreed period of ten months. The Division Bench of this Court concluded that the Suit was incompetent and the legal proceedings ought to have been initiated under Section 14 of the A&C Act. A Division Bench of the Gauhati High Court has ,in **State of Arunachal Pradesh –vs- Subhash Projects and Marketing Ltd.,** 2007(1) Arb. LR 564 (Gau), returned a categorical finding to the effect that if grounds of challenge to the independence and impartiality of the Arbitrator have been articulated, an application under Section 14(1)(a) of the Act is maintainable. The opinion of the Division Bench becomes evident in that it distinguished the decision of the Bombay High Court in **Hasmukhlal H.Doshi –vs- Justice M.L.Pendse,** 2001(1) Arb.LR 87 (Bombay) in which the learned Single Judge was of the persuasion that "when a specific challenge is provided and the forum which has to decide the challenges is also provided, it would not be open to this Court to decide and consider that the mandate of the Arbitrator has been terminated under Section 14. That challenge in a case where Arbitrator decides the objection will have to be taken as a ground in a challenge to the Award under Section 34. The object seems to be to allow the Arbitral proceedings to be concluded at the earliest. If the challenge is successful finally, the remedy is not lost as time is saved by virtue of Section 43(4) of the Act." This conclusion was also adopted in **Vilas –vs- Ganesh Builders,** 2005(2) AllMR 634, following Doshi.

14. There are a few judgments which clearly and unequivocally hold that the Applications filed in a Court of Law assailing arbitral proceedings on the grounds of bias, thus making out a case of de jure and de facto failure to perform arbitral functions, are not maintainable at

the pre Award stage. The decisions brought to our notice laid before us emanating from the High Court of Delhi are those of **S.N.Dhingra, J. in Neeru Walia –vs- Inderbir Singh Uppal,** 160(2009) DLT 55 and of Aruna Suresh J. in **Ahluwalia Contracts (India) Ltd. –vs- Housing and Urban Development Corporation,** 2008 (100) DRJ 461. We have already noted Pinaki Das Gupta where Mukul Mudgal, J. has concluded that "*de jure and de facto*, the authority of the Arbitrator cannot be questioned under Section 14". This is also the position in **Newton Engineering and Chemicals Ltd. –vs- Indian Oil Corporation Ltd.,** where Reva Khetrapal, J. expressed the view that where the Arbitrator does not recuse from the proceedings, the Award must be published and the challenge under Section 34 would thereafter provide complete remedy.

15. We think it relevant to revert to **C.N. Garg,** which deserves to be dealt with in some detail. The challenge before the Division Bench of this Court was to the vires of Section 13 of the A&C Act, principally on the contention that remedial recourse has not been provided by the statute. Our learned Brothers had laid emphasis on Section 5 which bars interference by a judicial authority except where so provided by the Act. We are in respectful agreement with their opinion that – .if there is no provision to deal with a particular situation, Courts cannot assume jurisdiction and interfere. Comparing this legislation with the earlier legislation on the subject namely the Arbitration Act, 1940, the message is loud and clear. The legislature found mischief in various provisions contained in the Arbitration Act, 1940 which would enable a party to approach the Court time and again during the pendency of arbitration proceedings resulting into delays in the proceedings. … A statute is an edict of the legislature and the conventional way of interpreting or construing a statute is to seek the intention of its maker. …. The function of the Courts is only to expound and not to legislate.. After a detailed discussion, the verdict was that Section 34 of the A&C Act provided sufficient remedy even in those instances where the grievance of a party was that the arbitrator was inimical or biased towards it. In **Dharam Prakash,** the Division Bench pointedly relied on **C.N. Garg** in addition to the dictum in **Union of India –vs- Harnam Singh,** (1993) 2 SCC 162 to the effect that it is the duty of the Courts to promote the intention of the legislature by an intelligible and harmonious interpretation. The Division Bench, in **Hotel Marina,** had also expressed the doubts as to whether an arbitrator could be removed during the currency of the arbitration,

followed by a fresh appointment.

16. On a reading of Section 13(5), the legislative intent becomes amply clear that Parliament did not want to clothe the Courts with the power to annul an Arbitral Tribunal on the ground of bias at an intermediate stage. The Act enjoins the immediate articulation of a challenge to the authority of an arbitrator on the ground of bias before the Tribunal itself, and thereafter ordains that the adjudication of this challenge must be raised as an objection under Section 34 of the Act. Courts have to give full expression and efficacy to the words of the Parliament especially where they are unambiguous and unequivocal. The golden rule of interpretation requires Courts to impart a literal interpretation and not to deviate therefrom unless such exercise would result in absurdity. In **Raghunath Rai Bareja –vs- Punjab National Bank,** (2007) 2 SCC 230, the Hon'ble Supreme Court, while emphasizing on the rule of literal interpretation, held as under:

> 40. It may be mentioned in this connection that the first and the foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation. The other rules of interpretation e.g. the mischief rule, purposive interpretation, etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute. Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide **Swedish Match AB v. Securities and Exchange Board of India** (2004) 11 SCC 641 : AIR 2004 SC 4219. As held in **Prakash Nath Khanna v. CIT** (2004) 9 SCC 686, the language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Assuming there is a defect or an omission in the words used by the legislature, the court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result, vide **Delhi Financial Corpn. v. Rajiv Anand,** (2004) 11 SCC 625. Where the legislative intent is clear from the language, the court should give effect to it, vide **Govt. of A.P. v. Road Rollers Owners Welfare Assn.** (2004)

6 SCC 210 and the court should not seek to amend the law in the garb of interpretation.

41. As stated by Justice Frankfurter of the US Supreme Court (see *"Of Law & Men : Papers and Addresses of Felix Frankfurter"*):

"Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction."

42. As observed by Lord Cranworth in *Gundry v. Pinniger* (1852) 21 LJ Ch 405 : 42 ER 647

"To adhere as closely as possible to the literal meaning of the words used', is a cardinal rule from which if we depart we launch into a sea of difficulties which it is not easy to fathom."

43. In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see *G.P. Singh's Principles of Statutory Interpretations*, 9th Edn., pp. 45-49). Hence departure from the literal rule should only be done in very rare cases, and

ordinarily there should be judicial restraint in this connection.

44. As the Privy Council observed (per Viscount Simonds, L.C.): (IA p. 71)

"Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used." (See **King Emperor v. Benoari Lal Sarma** (1944-45) 72 IA 57 : AIR 1945 PC 48, AIR at p. 53.)

45. As observed by this Court in **CIT v. Keshab Chandra Mandal** AIR 1950 SC 265 : (AIR p. 270, para 20)

"Hardship or inconvenience cannot alter the meaning of the language employed by the legislature if such meaning is clear on the face of the statute…."

46. The rules of interpretation other than the literal rule would come into play only if there is any doubt with regard to the express language used or if the plain meaning would lead to an absurdity. Where the words are unequivocal, there is no scope for importing any rule of interpretation vide Pandian Chemicals Ltd. v. CIT (2003) 5 SCC 590.

47. It is only where the provisions of a statute are ambiguous that the court can depart from a literal or strict construction vide **Nasiruddin v. Sita Ram Agarwal** (2003) 2 SCC 577 : AIR 2003 SC 1543. Where the words of a statute are plain and unambiguous effect must be given to them vide **Bhaiji v. Sub-Divisional Officer** (2003) 1 SCC 692.

48. No doubt in some exceptional cases departure can be made from the literal rule of the interpretation e.g. by adopting a purposive construction, Heydon's mischief rule, etc. but that should only be done in very exceptional cases. Ordinarily, it is not proper for the court to depart from the literal rule as that would really be amending the law in the garb of interpretation, which is not permissible vide **J.P. Bansal v. State of Rajasthan** (2003) 5 SCC 134 : 2003 SCC (L&S) 605 : AIR 2003 SC 1405, **State of Jharkhand v. Govind Singh** (2005) 10 SCC 437 :

2005 SCC (Cri) 1570 : JT (2004) 10 SC 349. It is for the legislature to amend the law and not the court vide **State of Jharkhand v. Govind Singh**(supra). In **Jinia Keotin v. Kumar Sitaram Manjhi** (2003) 1 SCC 730 this Court observed (SCC p.733, para 5) that the court cannot legislate under the garb of interpretation. Hence there should be judicial restraint in this connection, and the temptation to do judicial legislation should be eschewed by the courts. In fact, judicial legislation is an oxymoron.

17. In the context of the A&C Act, especially keeping in mind the alternations, modifications or deviations with regard to the UNCITRAL Model Law, the following speech of the Earl of Halsbury in **Eastman Photographic Materials Co. –vs- Comptroller General of Patents,** (1898) AC 571 readily comes to mind – "My lords, it appears to me that to construe the Statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provides the remedy".

18. For facility of reference, Sections 12 to 15 are reproduced:-

"12. Grounds for challenge.—(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.

(2) An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him.

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality; or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

13. Challenge procedure.—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with Section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate if—

(a) he becomes *de jure or de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.

(3) If, under this section or sub-section (3) of Section 13, an

arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of Section 12.

15. Termination of mandate and substitution of arbitrator.— (1) In addition to the circumstances referred to in Section 13 or Section 14, the mandate of an arbitrator shall terminate—

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

19. The Preamble to the A&C Act refers to the UNCITRAL Model Law on International Commercial Arbitration adopted by the General Assembly of the United Nations in 1985. The Preamble further recites that the General Assembly has recommended that all countries give due consideration to the said UNCITRAL Model Law and Rules. The Preamble further recognizes the expediency of making laws with regard to arbitration, keeping in perspective the said UNCITRAL Model Law and Rules. The English Arbitration Act, 1996 is also predicated on the UNCITRAL Model Law and Rules. The Sections corresponding to the Indian statute are to be found in Sections 23 to 27 thereof. The Uniform Arbitration Act, 1989 passed by the Canadian Parliament, at its very commencement, mentions the UNCITRAL Model Laws and Rules. Section 12 prescribes the revocation of the appointment of an arbitrator. Section 13, containing provisions pertaining to the challenge of an arbitrator's authority, broadly corresponds to the same Section in the Indian statute. Thereafter, Section 14 postulates situations in which the arbitrator's mandate would terminate.

The Canadian Act, however, in its Section 15, provides for an approach to the Court for the removal of the arbitrator. So far as Australia is concerned, its International Arbitration Act, 1974 prescribes in Section 16(1) that the UNCITRAL Model Law shall have the force of law in that country. Furthermore, Section 18A clarifies that it is necessary to locate .a real danger of bias. and that justifiable doubts as to the impartiality or independence of the arbitrator may be insufficient for the Courts to interfere. We think it would be advantageous, for ease of reference, to reproduce the provisions of the UNCITRAL Model Law for the reason that a departure therefrom cannot but be read as our Parliament's resolve to ordain its own and distinct arbitral regime:-

Article 12 - Grounds for challenge

1. When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

2. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13 - Challenge procedure

1. The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

2. Failing such agreement, a party which intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal.

Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

3. If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14 - Failure or impossibility to act

1. If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

2. If, under this article or article 13 (2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12 (2).

20. A comparison of the provisions dealing with the challenge to the arbitrator's authority in the A&C Act and the UNCITRAL Model Law discloses that there are unnecessary and cosmetic differences in these provisions, except for one significant and far-reaching difference. The UNCITRAL Model Law, in Article 13(3), explicitly enables the party challenging the decision of the Arbitral Tribunal to approach the Court on the subject of bias or impartiality of the Arbitral Tribunal. However, after making provisions for a challenge to the verdict of Arbitral Tribunal on the aspect of bias, the UNCITRAL Model Law prohibits any further Appeal. It seems to us, therefore, that there is no room for debate that

the Indian Parliament did not want curial interference at an interlocutory stage of the arbitral proceedings on perceived grounds of alleged bias. In fact, Section 13(5) of the A&C Act indicates that if a challenge has been made within fifteen days of the concerned party becoming aware of the constitution of the Arbitral Tribunal or within fifteen days from such party becoming aware of any circumstances pointing towards impartiality or independence of the Arbitral Tribunal, a challenge on this score is possible in the form of Objections to the Final Award under Section 34 of the A&C Act. Indeed, this is a significant and sufficient indicator of Parliament's resolve not to brook any interference by the Court till after the publication of the Award. Indian Law is palpably different also to the English, Australia and Canadian Arbitration Law. This difference makes the words of Lord Halsbury in **Eastman Photographic Materials Co.** all the more pithy and poignant.

21. In this analysis, we must immediately observe that the approach taken by one of us (Vikramajit Sen, J.) in **Interstate Constructions** is not correct as it transgresses and infracts the provisions of the A&C Act. Learned Single Benches have interfered and removed arbitrators obviously on pragmatic considerations, viz. the futility and idleness of pursuing arbitral proceedings despite lack of faith therein because of justifiable doubts as to the independence or impartiality of the arbitrators. Clearly, Parliament has also proceeded on the compelling expediency and advisability of expeditious conclusion of these proceedings. Relief against possible mischief has been provided by making clarification in Section 13(5) that apart from the challenges enumerated in Section 13(4), an assault on the independence or impartiality of the Arbitral Tribunal is permissible by way of filing Objections on this aspect after the publishing of the Award. We, therefore, affirm the approach in **Pinaki Das Gupta, Neeru Walia, Ahluwalia Contracts (India) Ltd.** and **Newton Engineering and Chemicals Ltd.**. We are of the opinion that the Single Benches who interfered with the progress of the proceedings of the Arbitral Tribunal in the pre-Award stage fell in error. Humans often fall prey to suspicions which may be proved to be ill-founded on the publication of an Award. There is compelling wisdom in Parliament's decision to allow adjudication on grounds of bias, lack of independence or impartiality of the Tribunal only on the culmination of the arbitral proceedings.

22. Having arrived at the conclusion that curial interference is not

possible at the pre-Award stage on the allegations of bias or impartiality of the Arbitral Tribunal on the one hand, and our understanding that the Appeals are not maintainable on the other hand, is any further relief to be granted? We think it expedient to abjure from passing any further orders for several reasons including – firstly, the reality that arbitration proceedings would inevitably have already come to an end in those instances where the arbitrator had been removed by orders of the Court, and secondly the availability of redress under Article 136 of the Constitution of India. All pending applications stand disposed of. The Referral Order is answered by reiterating that the statute does not postulate judicial interference in arbitral proceedings till the Award is published, whereupon Objections can be raised also on the platform of the alleged bias of the Tribunal. This challenge is possible provided the grievance is articulated in consonance with Section 13 of the A&C Act.

23. We refrain from imposing costs.

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ANUPAM RANJAN **....PETITIONER**

VERSUS

STATE (C.B.I.) **....RESPONDENT**

(VIPIN SANGHI, J.)

CRL. REV. P. NO. : 270/1999 **DATE OF DECISION: 18.05.2011**

Indian Penal Code, 1860—Section 420, 460, 471, 120B, Criminal Procedure Code, 1973—Sections 397, 407, 482—Aggrieved by order of learned trial court directing framing of charge for offences punishable under Section 420/468/470 read with Section 120-B, petitioner preferred revision—Petitioner urged, order on charge based upon baseless conjectures and uncertainty and vagueness of charge itself sufficient ground for quashing the same—As per Respondent, at initial stage of framing of charges, truth, veracity and necessary effect of evidence which prosecution proposes to prove not required to be maticulously judged by trial Court—Also, charges can be framed even on basis of strong suspicion found on material collected by investigating agency during course of investigation—Held:- At time of framing of charge, probative value of material on record cannot be gone into and material brought on record by prosecution has to be accepted as true at that stage—Before framing charge, Court must apply its judicial mind to material placed on record and must be satisfied that commission of offence by accused was possible—Whether, in fact, accused committed offence, can only be decided at trial.

The scope of these proceedings, wherein the petitioner assails the order directing framing of charges against the petitioner, and the charges as framed, and the approach to be adopted by the Court while dealing with a petition like the present, is settled by a catena of decisions of the Supreme Court. I had occasion to deal with the same in **Sajjan Kumar v. C.B.I.,** 171 (2010) DLT 120. Paragraphs 15 to 17 of this decision may be referred to, which reads as follows:

> "15. The scope of the enquiry that the Court is required to undertake at the stage of consideration of the aspect of framing of charge and the approach that the Court should adopt is well settled by a catena of decisions of the Supreme Court. At the stage of framing the charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence for arriving at a conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for

proceeding further, then the charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by the cross examination or rebutted by defence evidence, if any, cannot show that the accused committed a particular offence. In such a case, there would be no sufficient ground for proceeding with the trial. At the stage of framing of charge, the enquiry must necessarily be limited to decide if the facts emerging from the materials on record constitute the offence with which the accused could be charged. The Court may peruse the record for that limited purpose, but it is not required to martial it with a view to decide the reliability thereof. The Court is required to evaluate the material and documents on record with a view to find out the if the facts emerging therefrom taken at their face value disclosed the existence of all the ingredients constituting the alleged offence. For this limited purpose, the Court may sift the evidence as it cannot be expected even at the initial stage to accept all that the prosecution states as the gospel truth, even if it is opposed to common sense or the broad probabilities of the case.

16. Consequently, if on the basis of the material on record, the Court could form an opinion that the accused might have committed the offence, it can frame the charge. Though for conviction, the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. **(Para 57)**

On prima facie evaluation of the case and on sifting and weighing the evidence for that limited purpose, it cannot be said that a case against the accused has not been made out. **(Para 66)**

Important Issue Involved: At time of framing of charge, probative value of material on record cannot be gone into and material brought on record by prosecution has to be accepted as true at that stage—Before framing charge, Court must apply its judicial mind to material placed on record and must be satisfied that commitment of offence by accused was possible—Whether, in fact, accused committed offence, can only be decided at trial.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. D.C. Mathur, Senior Advocate with Mr. Mohit Mathur, Advocate.

FOR THE RESPONDENT : Mr. Vikas Pahwa, Addl. P.P. with Mr. Saurabh Soni, Advocate.

CASES REFERRED TO:

1. *Sajjan Kumar* vs. *C.B.I.,* 171 (2010) DLT 120.
2. *Mohd. Ibrahim* vs. *State of Bihar,* (2009) 3 SCC (CRI) 929.
3. *Parminder Kaur* vs. *State of U.P,* JT 2009 (13) SC507.
4. *Rukmini Narvekar* vs. *Vijaya Satardekar & Ors.* IV (2008) CCR 426 (SC).
5. *Soma Chakravarty* vs. *State Through CBI* (2007) 5 SCC 403.
6. *Devander Kumar Singla* vs. *Baldev Krishan Singla* 2005 (9) SCC 15.
7. *Sarbans Singh & Ors.* vs. *State of NCT of Delhi* 116 (2005) DLT 698.
8. *Paul George* vs. *State,* AIR 2002 SC 657.
9. *Dilawar Balu Kurane* vs. *State of Maharashtra* (2002) 2 SCC 135.
10. *State of Madhya Pradesh* vs. *S.B. Johari,* (2000) 2 SCC 57.

11. *State of Maharashtra* vs. *Priya Sharma Maharaj & Ors.*, (1997) 4 SCC 393.
12. *L.K.Advani* vs. *Central Bureau of Investigation* 1997 CRI.L.J 2559.
13. *Jibrial Diwan* vs. *State of Maharashtra* 1997 SC 3424.
14. *Sukhvinder Singh and Ors* vs. *State of Punjab* (1994) 5 SCC 152.
15. *State of Maharashtra* vs. *Sukhdeo Singh and Anr.* AIR 1992 SC 2100.
16. *Union of India* vs. *Prafulla Kumar Samal,* (1979) 3 SCC 4.
17. *Nrisingha Murari Chakraborty and Ors.* vs. *State of West Bengal* (1977) 3 SCC 7.
18. *Smt. Bhagwan Kaur* vs. *Shri Maharaj Krishan Sharma and Ors.* 1973 SCC (cri) 687.
19. *Dr. Vimla* vs. *Delhi Administration,* AIR1963SC1572.
20. *Abhayanand Mishra* vs. *State of Bihar,* 1961 CriLJ 822.
21. *Queen Empress* vs. *Appasami,* ILR (1889) 12 Mad 151.
22. *Queen Empress* vs. *Soshi Bhushan,* ILR (1893) 15 All 210.

RESULT: Petition dismissed.

VIPIN SANGHI, J.

1. This Criminal Revision Petition has been preferred under Sections 397,401 read with 482 of the Code of Criminal Procedure to seek the setting aside of the orders dated 10.05.1999 and 06.07.1999 passed by the Ld. MM in FIR No.RC 4(S) / 93-SIU-(II)-CBI, whereby he directed framing of charges against the petitioner and the co-accused ˇShri Ashraf Jamal-the petitioner in connected Crl. R.P. No.399/2009, for substantive offences under sections 420, 468 and 471 IPC and also for conspiracy under sections 120B read with sections 420, 468 and 471 IPC; and further framed the charges too.

2. Arguments had been heard and judgment reserved in this petition and Crl. Rev. Pet. No. 399/1999, initially on 21.05.2010. However, the

judgment could not be pronounced within a reasonable period of time due to the heavy work load. Consequently , these cases were listed again and the counsels were heard again.

3. Case of the prosecution as disclosed in the charge sheet is that Sh Anupam Rajan appeared in the Civil Services (Preliminary) Examination, 1993 held on 13th June 1993, even though he, on the basis of the result of 1992 examination announced on 3.6.93, had been selected for appointment to the IAS, securing 52nd position in the merit list, in order to help his friend and co-accused Shri Ashraf Jamal, who also appeared in the said examination. According to the charge sheet, on scrutiny of the examination documents, the UPSC found a clear nexus between Sh Anuam Rajan (Roll No.169758) and Sh. Ashraf Jamal (Roll No.169757) to the extent that both swapped their answer sheets and Shri Anupam Rajan wrote the examination for Shri Ashrat Jamal in sociology paper, who ultimately passed the examination, whereas Shri Anupam Rajan did not even qualify. UPSC also found obliteration in Roll No. in the answer sheets of both of them.

4. According to the prosecution, during investigation it was ascertained that both Shri Anupam Rajan and Shri Ashraf Jamal belong to Daltonganj, Bihar and were friends of long standing. Both were studying in JNU as Boarders during 1993. Both of them were aspirants for Civil Services and appeared in C.S. examination conducted by the UPSC in 1992 as well as in 1993.

5. According to the prosecution, Shri Anupam Rajan sent an application form on 3.2.93 to UPSC duly filled in for appearing in CS (Preliminary) Examination, 1993 from Daltonganj, Bihar, offering Patna as the Centre for the examination. The application was received at UPSC on 8.2.93 and was allotted Roll No.041998. Thereafter, Shri Anupam Rajan, while living in Satluj Hostel, JNU, New Delhi, again filled up the application, for the same examination. Both offered Sociology as optional subject and Delhi as Examination Centre. On 22.2.93, both Shri Rajan and Shri Jamal handed over their applications to their friend and co-boarder Shri Manoj Kumar, who was going to UPSC to deposit applications of many JNU boarders for CS(P) Exam, 1993. Shri Manoj Kumar deposited in UPSC the applications of many boarders including those of Shri Rajan and Shri Jamal. Shri Anupam Rajan and Shri Jamal were allotted consecutive Roll Nos.169758 and 169757 respectively, and the

same sub-centre, i.e. Govt. Girls Sr. Sec. School No.1, Sarojini Nagar, New Delhi. On 13.6.93, both Shri Rajan and Shri Jamal appeared in the examination in Room No.13 of the said School, occupying adjacent seats as they had been allotted consecutive roll numbers.

6. Shri Ashraf Jamal had also appeared in CS(P) Examination, 1992 but could not qualify. His optional subject was Sociology with compulsory subject as General Studies, although, Sociology was never his subject during academic career.

7. The Civil Services (P) Examination was slated on 13.6.1993 in sub-centre No.082 at Govt. Girls Senior Secondary School No.1, Sarojini Nagar, New Delhi where 15 rooms were earmarked, including Room No.13 for conducting the said examination. In Room No.13 of the Centre, the seating arrangement for 24 candidates was arranged in four rows with 6 candidates in each row. The examination was to be held in two sessions of the day, i.e. from 9:30 a.m. to 11:30 a.m. being the first session meant for option subjects, and from 2:30 p.m. to 4:30 p.m., being the second session meant for compulsory subject, i.e. General Study. The candidates, namely, Anupam Rajan and Ashraf Jamal were allotted seats in Room No.13 along with other candidates. Most of them hailed from the State of Bihar. Mrs. Neera Sharma, Section Officer, Min. of Agriculture and Mrs. T. Bannerjee, a school teacher were deputed as invigilator and co-invigilator respectively in Room No.13. Shri P. Parmeshwaran was the Superintendent of the examination in the said Centre.

8. According to the prosecution, during CS(P) Examination, 1993, Shri Anupam Rajan got question booklet of C-series whereas Shri Ashraf Jamal got of B-series in optional subject (Sociology). After completion of the examination, the candidates were allowed to take the question booklets with them. During searches from the premises of Ahraf Jamal, his question booklet has been recovered. The Sociology answer sheet submitted under roll number of Anupam Rajan bears printed serial number 3789408 and the serial number of Ashraf Jamal's answer sheet was 3789409.

9. UPSC has confirmed that Anupam Rajan secured 79 marks in General Studies out of 150 marks and 230 marks out of 300 marks in Sociology (Optional subject) during CS(P) Examination of 1992, whereas Ashraf Jamal had secured 27 marks in General Studies and 147 marks

in Sociology, i.e., Anupam Rajan was way ahead in 1992, but in 1993, the scores have undergone a diametric change and Anupam Rajan got only 160 marks in total, against Ashraf Jamal's total of 271. This, according to the prosecution, suggests exchange of answer sheets.

10. As mentioned earlier, according to the prosecution, there were four rows for the candidates taking the examination in Room No.13 of Sub-centre No.082 and in each row there was sitting arrangements for six candidates. In one of the rows, seats were occupied by Hema Rajora, R.N. Acharaya, Ashraf Jamal, Anupam Rajan, Manoj Kumar and P.C. Mahapatra. In ordinary course, the answer sheets should have been distributed according to serial number. However, this is not found in the case of Shri Ashraf Jamal and Anupam Rajan. The candidate Hema Rajora was absent in Sociology paper, whereas R.N. Acharaya got answer sheet No.3789407, who was sitting ahead of Ashraf Jamal. Ashraf Jamal should have got answer sheet No.3789408 and Shri Rajan (who was seated behind Sh. Ashraf Jamal) should have got answer sheet No.3789409, whereas Ashraf Jamal has received answer sheet No.3789409 and Anupam Rajan received 3789408. According to the prosecution, this shows that serial nos. of the answer sheets in respect of the two accused persons were exchanged.

11. The questioned writings existing in the title entries of the answer sheets of both Anupam Rajan and Ashraf Jamal, i.e. 'Delhi', 'Sociology', Roll No.169758 & 169757 alongwith the admitted writings were sent to CFSL for comparison and opinion. The handwriting expert has opined that the writings in the title entries on the answer sheet No.3789409 (belonging to Shri Ashraf Jamal) have been written by Shri Anupam Rajan and the title entries on the answer sheet No.3789408 (belonging to Shri Anupam Rajan) have been written by Shri Ashraf Jamal, meaning thereby that Shri Anupam Rajan solved the question paper of Sociology for Shri Ashraf Jamal in the CS(P) Examination, 1993 and Shri Ashraf Jamal solved the questions for Shri Anupam Rajan. As a result, Ashraf Jamal could qualify for CS(Main) Examination, 1993 whereas Anupam Rajan did not. Expert has also confirmed overwriting in the roll nos. of these two persons on the concerned answer sheets and use of erasure in encoding the booklet series by invigilator of the answer sheet of Shri Anupam Rajan.

12. According to the prosecution, the aforesaid facts and circumstances disclose that both Anupam Rajan and Ashraf Jamal entered into a criminal conspiracy to cheat the authorities of Union Public Service Commission and pursuant to it both cheated UPSC by forging the answer sheets of C.S. (P) Exam., 1993 and using the same as genuine and thereby they committed offences punishable under Sections 120-B r/w 420, 468 & 471 IPC and substantive offences under Sections 420, 468 & 471 IPC.

13. The Learned Magistrate heard the arguments of the prosecution and the defense on the point of charge, and vide the impugned order dated 10.05.1999 directing the framing of charges against the petitioner and the co-accused Shri Ashraf Jamal, which he eventually framed on 06.07.1999. The present revision petition impugnes the aforesaid two orders and seeks the quashing of the same.

Petitioner's submission

14. The petitioner Shri Anupam Rajan submits that he did not appear in 1993 to collude with the other candidate, namely Ashraf Jamal and to help him in his paper. His only purpose was to improve his own rank in the IAS cadre. It is a common practice amongst the candidates aspiring for Civil Services, to repeat the exam in order to improve their position in the merit, which is only possible in the immediate next year's examination, without any gap. Therefore no inference of a criminal conspiracy can be made out in his case.

15. Petitioner further submits that there exists no independent evidence or circumstance to come to the conclusion that: reasonable grounds exist to believe the commission of the offences of which the petitioner is accused. Mere association of persons is not culpable enough for making out an offence as grave as criminal conspiracy.

16. The petitioner submits that the Ld. Trial Court has relied heavily on the fact that the petitioner was allotted a Roll Number immediately after that allotted to the co-accused Ashraf Jamal. It is clearly borne out from D-27 (I) and D-27 (II) that the application forms of the petitioner and the co-accused were not submitted in seriatim. Roll numbers are allocated to candidates by the UPSC and there is a procedure, which ensures that there is no scope for securing any predetermined roll number to any candidate. Further, the seating plan for the examination is only

known once the candidates enter the examination hall.

17. Petitioner submits that the petitioner could not have entered into any sort of a conspiracy on 22.2.1993, as the results of Civil Services (Main) Examination of 1992 were not even out by then. Further, interviews were still pending and the sifting of the candidates at these two stages, results in only about 5-7% of the candidates who appear for the preliminary examinations reaching the final list of selected candidates. By reference to D-10, the press note dated 02.06.1993 issued by PIB, he submits that the number of vacancies notified for the Civil Services (Main) Examination, 1992 were subject to revision. Therefore, even after securing the 52nd position, the petitioner Anupam Rajan could not be sure of ultimately being allocated a service of his choice in the Indian Administrative Service. After this, is stage of service allocation, which took place only on 14.08.1993 (D-18), i.e. after the conduct of the 1993 preliminary examination on 13.06.1993. It is argued that unsure of his own result and future career, how could the petitioner enter into a conspiracy for benefiting someone else?

18. Petitioner further submits that the prosecution has relied heavily on the fact that there has been a considerable improvement in the performance of the co accused Ashraf Jamal in the Sociology paper in 1993 vis-à-vis his performance in the 1992 examination. It is pointed out that while the performance of the co accused Ashraf Jamal in the Sociology paper improved by only 35% in 1993, there was an improvement of 166% in the General studies paper. Both these paper need to be cleared to clear the preliminary examination, and there is no suggestion from the prosecution that there was any kind of assistance rendered by the petitioner to the co accused in the General Studies paper. He further submits that in the scheme of subjects for the UPSC preliminary examinations, literature subjects cannot be opted. Hence, it would be incorrect on the part of the prosecution to allege that the co-accused Ashraf Jamal, who was a student of Urdu Literature, chose to appear in Sociology, because of a conspiracy between him and the petitioner. The co accused had, in fact, chosen sociology as his subject in the 1992 examination as well, and secured 147 marks out of 300 in 1992.

19. The petitioner also relies on statement of Shri Karan Singh (PW-11), Section Officer (confidential) UPSC dated 18.01.1994 to assail the observations made in the impugned order as not being accurate. It

is argued that the trial Court has proceeded on a wrong premise that Ashraf Jamal had scored 271 out of 300 in the Sociology paper. The fact is, (as disclosed from Document D-6) that the score of 271 was the aggregate of both the Sociology and General Studies papers out of 450. According to the petitioner, this shows non-application of mind by the learned Metropolitan Magistrate.

20. Mr. Mathur has also referred to the sitting plan (D-35) of Room No.13, where the petitioner and Shri Ashraj Jamal were seated. He submits that the answer booklets were distributed randomly as stated by Ruchita Sahai in her statement recorded on 02.02.1994 and also seen from D-35. He submits that there is no basis to proceed on the assumption that the petitioner Anupam Rajan should have got answer sheet no.378409 and that Ashraf Jamal should have got answer sheet no.378408, as the answer sheets were not distributed in seriatim. He refers to the answer sheet numbers of various other candidates sitting in the same room to show that they were not given in seriatim.

21. Mr. Mathur further submits that it is not even the allegation of the prosecution that the petitioner Anupam Rajan and Ashraf Jamal also swapped their respective question papers. Both these candidates were having different set of question papers. Shri Ashraf Jamal was given Series-B question paper, whereas Shri Anupam Rajan was given Series-C question paper. Without the swapping of the question papers, and by merely swapping the answer sheets, the petitioner could not have possibly solved the question paper given to Ashraf Jamal. He further submits that Ruchita Sahai on whose alleged complaint the case was started, has not supported the case of the prosecution.

22. Mr. Mathur submits that the entire case of the prosecution is founded upon the opinion of the handwriting expert and the said opinion is of no avail without positive corroboration. Even if it is assumed that the answer sheets were indeed exchanged, that by itself, does not tantamount to forgery or cheating. There is no basis to conclude that the petitioner had answered the question paper of Ashraf Jamal and vice versa. He submits that the swapping of the answer sheets could have taken place only before 9.30 a.m and not thereafter.

23. Mr. Mathur submits that the right of the petitioner to appear in the Preliminary Examination in 1993 is admitted by PW 19. Petitioner

submits that the learned Trial Court also presumes that the petitioner was not serious in his attempt in the 1993 Civil Services (Preliminary) Examination, else he would have improved his result and secured better marks as compared to the previous year. This circumstance, according to the petitioner, cannot be construed to be indicative of culpability. It is common knowledge that several students who try improving their position in the subsequent year fail to do so. This can never be an incriminating circumstance.

24. Petitioner submits that the order on charge is based upon baseless conjectures, and the Ld. Trial Court is unjustified in forming the opinion that the answer sheets may have been exchanged even after the attendance sheets were filed. The uncertainty and vagueness of the charge itself is sufficient ground for quashing the same. Reliance is placed on **Sarbans Singh & Ors. v. State of NCT of Delhi** 116 (2005) DLT 698; **L.K.Advani v. Central Bureau of Investigation** 1997 CRI.L.J 2559; and on **Rukmini Narvekar v. Vijaya Satardekar & Ors.** IV (2008) CCR 426 (SC).

25. The petitioner submits that the opinion of the Handwriting Expert in his report further requires positive corroboration, without which, it is of no avail. Ruchita Sahai, on whose alleged complaint the investigation was started, had stated in her statement dated 02.02.1994 that she did not notice any act of swapping of answer sheets or question booklets, and therefore, she has not supported the case of the prosecution. She also disowned the anonymous complaint against the petitioner. Reliance is placed on **Smt. Bhagwan Kaur v. Shri Maharaj Krishan Sharma and Ors.** 1973 SCC (cri) 687; **State of Maharashtra v. Sukhdeo Singh and Anr.** AIR 1992 SC 2100, and **Sukhvinder Singh and Ors v. State of Punjab** (1994) 5 SCC 152.

26. It is argued that the FIR in the present case was filed on the basis of an anonymous letter received by the Chairman of UPSC stating that the petitioner herein had appeared for the IAS Preliminary Exam, 1993 just to help his friend, since the petitioner had already secured 52nd rank in the 1992 IAS Mains Exam. Petitioner submits that there was no mens rea on part of the petitioner to commit any forgery or conspiracy. Mens rea being an important ingredient to establish the culpability, which is absent in the present case, it can be said that no such alleged offence was committed. Deriving force from the decision **Jibrial Diwan v. State**

of Maharashtra 1997 SC 3424, where the Supreme Court was of the opinion that where nobody was put in any disadvantageous position or no wrongful gain was caused to anybody nor wrongful loss was caused by appellant's action the appellant should be acquitted, Mr. D.C. Mathur submits that similarly in the present case, no offence under Sections 417, 471 and 465 of the IPC can be made out and therefore, the petition be allowed. Reliance is also placed on **Parminder Kaur v. State of U.P,** JT 2009 (13) SC507.

27. Mr. Mathur also refers to the decision in **Dr. Vimla Vs. Delhi Administration,** AIR1963SC1572 wherein the court examined the ingredients of the offence of fraud under section 468 of the IPC and had held that deceit forms an important part of that offence. To justify a charge for the offence under section 468 IPC, intention to defraud under section 25 IPC needs to be present. He submits that in this case, there is no evidence of any deceit on part of the petitioner, and so no culpability for the offence, as alleged, lies herein. Similarly in **Devander Kumar Singla v. Baldev Krishan Singla** 2005 (9) SCC 15, the court while deciding a case of section 420 of the IPC concluded that the alleged offence was not made out as there was no property delivered. Therefore, there was no material to say that there was deceit, and the accused was acquitted. Mr. Mathur also places reliance on **Mohd. Ibrahim v. State of Bihar,** (2009) 3 SCC (CRI) 929 to submit that there is no false document created and there is no forgery even if it is assumed that the petitioner and Ashraf Jamal had exchanged their answer sheets, as, according to the petitioner, the petitioner had solved the question booklet Series-C and Sh. Ahsraf Jamal had solved the question booklet Series-B.

28. Mr. Mathur submits that this Court should examine the pleas raised by the petitioner in light of the judgment of the Supreme Court in **Paul George v. State,** AIR 2002 SC 657, wherein the Supreme Court has held that the order disposing of the criminal revision preferred by the appellant must indicate application of mind to the case, and some reasons should be assigned for negating or accepting the pleas. Mere ritual of repeating words or language used in the provision, that there is no illegality, impropriety or jurisidictional error in the judgment under challenge, without even a whisper on the merits of the matter or nature of pleas raised does not meet the requirement of a decision being judicious.

29. Concluding his submissions, Mr. Mathur submits that the High Court (as a Revisonal Court) is not handicapped or powerless from examining the material placed by the Respondent along with the charge sheet. The alleged writings may give rise to some suspicion, but definitely not "strong suspicion", so as to invite framing of the said criminal charges. He urges that this court should use its inherent / supervisory powers to quash the charges and discharge the petitioner, who has suffered since 1993, i.e. for 6 years before the charges were framed, and thereafter again for over 10 years while this revision has remained pending. The petitioner has submitted his written submissions and synopsis of written arguments on the aforesaid lines.

Respondent's submissions

30. Mr. Vikas Pahwa, the learned Additional Public Prosecutor submits that the fact that both the accused, namely Anupam Rajan and Ashraf Jamal belong to Daltonganj (Bihar) and are old friends; both were studying at JNU as boarders in the same Sutlej Hostel during 1993; both of them were also Civil Services aspirants and appeared for the said examination in 1992 as well as 1993, establishes a nexus between the two people.

31. He submits that in 1992 C.S. (P) Exam, Ashraf Jamal's performance was very poor as he scored 147 marks in his Sociology paper. But in 1993, he secured 199 marks as against the petitioner who had scored 239 marks in Sociology in the year 1992, but scored 160 in the 1993 exam. As expected, Ashraf jamal qualified in the 1993 exam, but the petitioner could not. This suggests that the answer sheets were exchanged between the two of them. He submits that, in the charge that the petitioner exchanged the answer sheet and solved the question paper for Ashraf Jamal, is implicit the charge that he also exchanged the question paper with Ashraf Jamal by taking the 'B' series question paper from Ashraf Jamal and giving him his own 'C' series question paper.

32. It is also contended that the petitioner had previously appeared in the 1991 exam too where he had secured 565 rank. So he appeared again in 1992 to improve his rank, which he did do by securing 52nd rank in his 1992 exam. Therefore, there existed no reason for appearing again for improvement of rank, as alleged by the petitioner. For the 1992 examination, the vacancies advertised for the general category were 61,

and the petitioner having secured 52nd rank had a very bright chance of getting the Indian Administrative Service. He again appeared for the said exam in 1993, and the only inference that can be drawn is that this was done to collude with his friend, Ashraf Jamal to help him qualify the said exam in 1993. Else, he would have taken the said examination seriously and would have attempted the question papers fully, which he failed to do. He submits that the petitioner's contention that he sat in the 1993 exam to improve his rank, is not borne out by his performance, as compared to that of his friend, Ashraf Jamal. He attempted only 73 questions out of 150 in his General Studies paper, whereas Ashraf Jamal attempted 150 out of 150 questions. Hence, it will not be correct to say that the petitioner sat in 1993 exam just to improve his rank. His conduct does not support his plea and rather belies the same.

33. It is further submitted that Anupam Rajan had applied for the 1993 exam from Bihar on 29.01.1993. This form was received in the UPSC office on 08.02.1993 and he was allotted a roll number 041998. But he again applied on 22.02.1993 with his friend Ashraf Jamal from Delhi and managed to get consecutive roll numbers in the same center.

34. It is argued that though Anupam Rajan had done his Masters in Sociology and, therefore, his opting for Sociology in the IAS Exam made sense, Ashraf Jamal had never studied Sociology, but still opted for it in his attempts both in 1991 and 1992.

35. Mr. Pahwa draws the attention of the court to the statement of the first invigilator, that is, PW 4, wherein she stated that she did not go back to check whether candidates filled in the correct details in the answer sheet. So, it is probable that the petitioner and his friend Ashraf Jamal filled the details for each other so as to make the swapping of answer sheets go unnoticed.

36. Mr. Pahwa submits that a conspiracy is an inference drawn from the circumstances. There cannot always be much direct evidence about it. The conspiracy can be inferred even from the circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence. Since conspiracy is often hatched in utmost secrecy, it is almost impossible to prove conspiracy by direct evidence. It has to be inferred from the acts, statements and conduct of parties to the conspiracy. Thus if it is proved that the accused

pursued, by their acts, the same object, by the same means, one performing one part of the act and the other another part of the same act so as to complete it with a view to attainment of the object which they were pursuing, the court is at liberty to draw the inference that they conspired together to achieve that object. Conspiracy has to be treated as a continuing offence and whosoever is a party to the conspiracy, during the period for which he is charged, is liable under this section. Motive and economic loss are not a sine qua non for proving an offence of criminal conspiracy. If the evidence as to the actual commission of crime is believed, then no question of motive remains to be established.

37. It is submitted that the petitioner and Ashraf Jamal have cheated UPSC by swapping the answer sheets of Sociology Exam, between 9.30 a.m to 11.30 a.m in Room No.13 which ultimately enabled Ashraf Jamal, to qualify CSE (Preliminary) and making him eligible for Civil Services (Main) examination. Thus the act of swapping the answer sheets deceived and induced UPSC to grant him higher marks, which Ashraf Jamal would not have secured had there been no swapping of answer sheets.

38. Cheating is deception of any person by fraudulently or dishonestly inducing that person to deliver any property to any person or to consent that any person shall retain any property. Cheating is intentionally inducing a person to do or omit to do anything which he would not do or omit if he was not so deceived.

39. The petitioner and Ashraf Jamal have deceived the UPSC/ Invigilator by misrepresenting that the answer sheets have been written/ marked by them, as contemplated by the UPSC Civil services (P) Examination 1993, and have dishonestly and fraudulently induced the UPSC to give Admission Certificate of passing the CSE (P) 1993 to Mr. Ashraf Jamal, although the answer sheets were swapped and were forged, by writing exams for each other. The Property as contemplated in section 415 and 420 IPC is the Admission Certificate of Passing CSE Preliminary 1993 issued by UPSC.

40. Deceiving means causing to believe what is false or misleading as to a matter of fact, or leading into error. Whenever a person fraudulently represents as an existing fact, that, which is not an existing fact, he commits this offence. A willful misrepresentation of a definite fact with intent to defraud is cheating. Intention is the gist of the offence. The

intentions at the time of offence and the consequences of the act or omission itself have to be considered. The damage may be the direct, natural or probable consequences of the induced act.

41. The essential ingredients of the offence under Sections 420/ 467/471 of the IPC necessarily entail mens rea; the intention has to be gathered from the circumstances built up of the case; the offence of cheating consists of a dishonest inducement as contained in the definition of Section 415 of the IPC; to constitute the offence of cheating it has to be established that the Accused deceived the complainant dishonestly inducing him to part with any property in his favour which he would not have parted but for the deception played on him.

42. The petitioner and Ashraf Jamal while cheating the UPSC and the Invigilator have committed the offence of Forgery, by swapping the Answer sheets, and writing (Roll number, Delhi, Sociology) in the answer sheets for each other and in also solving the question paper for each other, with an objective of helping Ashraf Jamal in CSE (P) 1993 in the paper of Sociology and thus inducing the invigilator to believe that both of them have solved their own respective answer sheets.

43. Forgery is making of a false document or part of it. Such making should be with intent to support any claim or title or to cause any person to part with property, or to enter into any express or implied contract or with intent to commit fraud or that fraud may be committed. To constitute forgery, simple making of a false document is sufficient. The offence of forgery is complete if a false document is made with intent to commit a fraud. Where there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud and if a document is fabricated with such intent, it is a forgery. An actual intention to convert an illegal or doubtful claim into an apparent legal one is dishonesty and will amount to forgery. The term "claim" is not limited in its application to a claim to property. It may be a claim to anything. The damage or injury must be intended to be caused by the false document to the public or any individual.

44. The petitioner has made a false document, by dishonest and fraudulent intention, to make the UPSC believe that the document (Answer Sheet) has been made by Ashraf Jamal although he knew that the response in the Answer sheet has not been made by him.

45. The opinion of the hand writing expert D-36, D-39 and D-43 were given on 29.3.1994, 21.12.1994, 23.12.1994 bearing No.94/D-146, wherein it was opined by the hand writing expert that the title entries in the answer sheets of Ashraf Jamal were written by Anupam Rajan and vice versa. The Roll No's which were given to both the petitioners were consecutive i.e. 169757 and 169758. It was further opined by the hand writing expert that the last digit of the roll no's in both the cases were initially erased and later on the same were rewritten. The answer sheets which were given to both the petitioners were bearing no.3789408 and 3789409. Thus from the opinion of the hand writing expert it is crystal clear that both-the petitioner and Ashraf Jamal indulged in cheating during the examination.

46. The handwriting expert opinion sought by the CBI is not only on the basis of the Specimen Handwriting, but also the admitted handwriting of the accused persons. The trial court, however, in terms of section 73 Evidence Act can satisfy itself about the handwriting of the accused either by telling the accused to write the words in the court, or to obtain a fresh opinion of the expert.

47. He relies on **Nrisingha Murari Chakraborty and Ors. Vs. State of West Bengal** (1977) 3 SCC 7, where the question was ˇwhether passports were 'property' within meaning of Section 420. The Apex Court observed that passport being a tangible thing was a useful document and could be subject of ownership or exclusive possession and therefore it is 'property' within meaning of Sections 415 and 420 IPC.

48. He relies on the definition of the word "property", as defined in the Century Dictionary- "the right to the use or enjoyment or the beneficial right of disposal of anything that can be the subject of ownership; ownership; estate; especially, ownership of tangible things…; anything that may be exclusively possessed and enjoyed;...possessions."

49. He also relies on the decision in **Abhayanand Mishra v. State of Bihar,** 1961 CriLJ 822. The appellant there applied to the Patna University for permission to appear at the M. A. examination as a private candidate, representing that he was a graduate having obtained the B. A. degree in 1951 and had been teaching in a school. On that basis, an admission card was despatched for him to the Headmaster of the school. It was however found that he was neither a graduate nor a teacher. He

was prosecuted for the offence under Section 420 read with Section 511 of the Penal Code. He contended that his conviction was unsustainable because the admission card had no pecuniary value and was not property. The Court repelled the contention, and held that although the admission card as such had no pecuniary value, it had immense value to the candidate appearing in the examination for he could not have appeared at the examination without it, and that it was therefore property within the meaning of Section 415 of the Penal Code. While reaching that conclusion, the Court relied on **Queen Empress v. Appasami,** ILR (1889) 12 Mad 151 and **Queen Empress v. Soshi Bhushan,** ILR (1893) 15 All 210. In Appasami's case it was held that the ticket entitling the accused to enter the examination room was "property", and in **Soshi Bhushan's** case it was held that the term "property" included a written certificate to the effect that the accused had attended a course of lectures and had paid up his fees. On a parity of reasoning, the Court observed that it had no doubt that looking to the importance and characteristics of a passport, the High Court rightly held that it was property within the meaning of Sections 415 and 420 of the Penal Code.

50. Deriving force from the above authorities, Mr. Pahwa submits that the admission card of the petitioner is "property", which he did utilize with an intention to defraud. According to the respondent, culpability under section 415 and 420 is established.

51. Mr. Pawha lastly submits that at the initial stage of framing of charges under section 227 and 228 of CrPC, the truth, veracity, and the necessary effect of the evidence, which the prosecution proposes to prove, is not required to be meticulously judged by the Ld. Trial Court. The charges against the accused persons can be framed even on the basis of strong suspicion found on the material collected by the investigating agency during the course of investigation. The trial court can form a presumptive opinion regarding the existence of factual ingredients constituting the offence alleged, and would be justified in framing the charges against the accused in respect of the offences alleged to have been committed by them. Reliance is placed on **Soma Chakravarty v. State Through CBI** (2007) 5 SCC 403.

Rejoinder

52. Petitioner, in its rejoinder submits that it has consistently been

the case of the prosecution that the accused persons swapped their answer sheets and wrote for each other. It has never been their case, as is borne out from the chargesheet, as well as the order on charge, that the question booklets (which were of different series, thereby having questions in different sequential order), were swapped by them at any point, during the course of the examination. Exchange of answer sheets without the exchange of question booklets would serve no purpose, if such an act were intended to benefit the co-accused.

53. Petitioner submits that as per attendance sheet for the said examination, the co-accused Ashraf Jamal had with him, answer sheet bearing serial no. 3789409, and question booklet bearing serial no. 013498, whereas the petitioner had answer sheet bearing serial no. 3789408 and question booklet bearing serial no. 013499 at the time when attendance was recorded around 10:00 a.m. The chargesheet as well as the order on charge, make no mention of the fact that the question booklets were ever exchanged. It goes on to show that it was never the case of the prosecution that the question booklets were ever exchanged.

54. Mr. D.C. Mathur, the Ld. Senior advocate for the petitioner relies on **L.K. Advani** 1997 CrLJ 2559, wherein in para 102 the court had observed "there can only be one presumption and that is of the innocence of the accused." A different presumption cannot be raised. The charges have to be based on evidence which is legally convertible at the stage of trial. In the present case, there is no legally admissible material on record to indicate exchange of answer sheets or question papers during the course of the examination.

55. Reliance is also placed on the decision in **Dilawar Balu Kurane v. State of Maharashtra** (2002) 2 SCC 135, wherein it is held that, "….by and large, if two views are equally possible and the Judge is satisfied that the evidence produced before him gave rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused…".

56. In the present case, while a suspicion might arise because of the alleged swapping of answer sheets, it is not grave enough to conjure up a conspiracy or allege forgery on behalf of the accused petitioner. He reiterates that merely because the answer sheets of the petitioner and the co accused were not in sequential order, it does not imply that the two

accused persons had swapped their answer sheets and solved the question papers for each other. This presumption by the Ld. MM is not only baseless, but even contrary to the record, as per the statement of PW4 (Neera Sharma) who states that the distribution of answer sheet was on random basis. Even the seating plan of the room in which the candidates were sitting, amply demonstrates the lack of sequence in the distribution of answer sheet.

Discussion & Decision

57. The scope of these proceedings, wherein the petitioner assails the order directing framing of charges against the petitioner, and the charges as framed, and the approach to be adopted by the Court while dealing with a petition like the present, is settled by a catena of decisions of the Supreme Court. I had occasion to deal with the same in **Sajjan Kumar v. C.B.I.,** 171 (2010) DLT 120. Paragraphs 15 to 17 of this decision may be referred to, which reads as follows:

> "15. The scope of the enquiry that the Court is required to undertake at the stage of consideration of the aspect of framing of charge and the approach that the Court should adopt is well settled by a catena of decisions of the Supreme Court. At the stage of framing the charge, the Court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence for arriving at a conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for proceeding further, then the charge has to be framed. The charge can be quashed if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by the cross examination or rebutted by defence evidence, if any, cannot show that the accused committed a particular offence. In such a case, there would be no sufficient ground for proceeding with the trial. At the stage of framing of charge, the enquiry must necessarily be limited to decide if the facts emerging from the materials on record constitute the offence with which the accused could be charged. The Court may peruse the record for that limited purpose, but it is not required to martial it with a view to decide the reliability thereof. The Court is required to

> evaluate the material and documents on record with a view to find out the if the facts emerging therefrom taken at their face value disclosed the existence of all the ingredients constituting the alleged offence. For this limited purpose, the Court may sift the evidence as it cannot be expected even at the initial stage to accept all that the prosecution states as the gospel truth, even if it is opposed to common sense or the broad probabilities of the case.
>
> 16. Consequently, if on the basis of the material on record, the Court could form an opinion that the accused might have committed the offence, it can frame the charge. Though for conviction, the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.
>
> 17. At the time of framing of the charge, the probative value of the material on record cannot be gone into and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing the charge, the Court must apply its judicial mind to the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided at the trial. (See **State of Madhya Pradesh v. S.B. Johari,** (2000) 2 SCC 57; **State of Maharashtra v. Priya Sharma Maharaj & Ors.,** (1997) 4 SCC 393; and **Soma Chakravarty v. State,** (2007) 5 SCC 403)."

58. It will not be advisable for me to go into the merits of the case of the prosecution or the defences that the petitioner has sought to urge in support of this petition, as it may prejudice the trial which is yet to take place. Suffice to say, that it can be said at this stage that the prosecution has a prima facie case, which discloses sufficient ground for proceeding against the petitioner/accused.

59. The past acquaintance between the petitioner and the co-accused, Shri Ashraf Jamal from their home town; the fact that they were studying at JNU as boarders in the same hostel during 1993; the fact that Shri Ashraf Jamal performed poorly and scored 147 marks in his Sociology paper in CS (P) Examination, 1992, and made an improvement by scoring 199 marks in the year 1993, in contrast to the petitioner's own

performance of scoring 239 marks in the year 1992, and only 160 marks in the year 1993 examination; the fact that at the time of his making the application for CS (P) Examination, 1993, he was aware of his having secured 52nd rank in the CS (Main) Examination, 1992 - when there were 61 advertised vacancies in the general category for the year 1992; the fact that the petitioner not only did not improve in his performance in the CS (P) Examination, 1993 but also did not attempt the full general studies paper (only 73 questions out of 150 questions were attempted) in the CS (P) Examination 1993, coupled with the fact that the handwriting expert opinion suggests that the answer sheet provided to Ahsraf Jamal was written upon by the petitioner and vice versa, do raise grave suspicion and warrant the framing of charge against the petitioner and the co-accused Ashraf Jamal.

60. The various explanations/defences raised by the petitioner to explain his conduct would be a matter to be considered by the trial court at the stage of trial. Even if the circumstance that the answer sheets were not distributed in seriatim is taken into account, that by itself cannot be said to shake the foundation of the case of the prosecution. It is only during the trial that it would be established whether or not there was a conspiracy between the petitioner and Shri Ashraf Jamal as alleged by the prosecution, and if so, at what stage that the conspiracy was hatched, and given effect to. Pertinently, the prosecution has not fixed any point of time or place where the alleged conspiracy was allegedly hatched.

61. I do not find merit in the submission of Mr. Mathur that the prosecution does not even allege that the petitioner and Shri Asraf Jamal exchanged/swapped their question papers. The whole case of the prosecution is that the petitioner has answered the question paper for Shri Ashraf Jamal and vice versa. As the petitioner and Shri Ashraf Jamal had different series of question papers (the petitioner had Series-C and Shri Ashraf Jamal had Series-B), it would be obvious that if there is truth in the said allegation, the same could not have been achieved without the exchange of the question papers between the petitioner and the co-accused Ashraf Jamal. I agree with the submission of Mr. Pahwa that the said accusation is implicit in the fundamental accusation that the petitioner has solved the question paper for Ashraf Jamal by exchanging the answer sheet, and the fact that the same is not expressly articulated in the charge sheet makes no difference.

62. The submission of Mr. Mathur that the opinion of the handwriting expert, even if believed, merely establishes that the petitioner had filled up the details of Ashraf Jamal and vice-versa in the answer sheets, which, by itself, does not lead to the conclusion that even the answers to the questions were marked by the two accused for each other, cannot be accepted at this stage because of the pattern of scoring of the two accused in the two papers of Sociology and General Studies, in comparison to the scoring pattern in the previous year and in light of the stand of the petitioner that he had appeared in the Preliminary Examination in 1993 with a view to improve his ranking from 52, which he scored in the overall assessment for the year 1992.

63. The anonymous complaint attributed to Ruchita Sahai may have the set the ball rolling to kick start the investigation, but it cannot be said that the entire case of the prosecution is founded upon that complaint alone. Therefore, merely because Ruchita Sahai may have disowned the anonymous complaint against the petitioner, does not appear to take away from the case of the prosecution in any manner. Pertinently, according to the prosecution, the hand writing expert has, on comparison, found the complaint to have been written by Ruchita Sahai, though she has disowned the same.

64. I find no merit in the submission of Mr. Mathur that no mens rea can be attributed to the petitioner at this stage. It would be highly premature to conclude as to whether or not the petitioner has committed the acts of forgery and conspiracy as alleged against him, and consequently, it cannot be said with certainty that the petitioner did not have the mens rea to commit the offence of which he is accused. The submission that there is inaccuracy in the impugned order because the learned M.M. has proceeded on the basis that the marks obtained by Ashraf Jamal in Sociology paper were 271, whereas the same were only 199, also, in my view make no difference, as the fundamental premise remains the same. The charge does not get diluted because the marks obtained by Ashraf Jamal in Sociology paper were 199, and not 271.

65. I now proceed to consider the various decisions relied upon by the petitioner and Ashraf Jamal. **Sarbans Singh** (supra) is merely an instance of a case where this Court applied the Supreme Court decision in **Union of India V. Prafulla Kumar Samal,** (1979) 3 SCC 4, wherein the Supreme Court had, inter alia, held that the Court has the power to

sift and weigh the evidence- although for the limited purpose of finding out whether a prima facie case against the accused has been made out. In **Prafulla** (supra), it had also been held that where materials placed before the Court disclosed grave suspicion against the accused which has not been properly explained, the Court would be fully justified in framing a charge and proceeding with the trial. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to some suspicion, but not grave suspicion against the accused, he will be fully within his right to discharge the accused. In the facts of the case before it, this Court in **Sarbans Singh** (supra) came to the conclusion that, prima facie, the case had emerged in favour of the accused rather than in favour of the prosecution and, consequently, quashed the order framing charges and discharged the petitioner.

66. In the present case, on prima facie evaluation of the case and on sifting and weighing the evidence for that limited purpose, it cannot be said that a case against the accused has not been made out. It also cannot be said at this stage that the materials placed before the Court do not disclose grave suspicion against the accused, or that, at this stage, the petitioner has been able to properly explain his conduct. In my view, it cannot be said that the two views, namely, that the petitioner and the co-accused, Ashraf Jamal are guilty of the offences alleged against them, and the other view that they are not so guilty, are equally possible. Consequently in my view, neither **Sarbans Singh** (supra) nor **Prafulla** (supra) are of any avail to the petitioner's case.

67. In **L.K.Advani** (supra), this Court observed as follows:-

> "57……..the prosecution must show a prima facie case against the accused in order to enable the Court to frame a charge against him. If the evidence before the Court is of such type which if un-rebutted and un-challenged by way of cross-examination would not be sufficient enough to convict the accused ultimately then the Court would not be justified in framing the charge against the accused. The Court at that stage is under no obligation to make an elaborate enquiry by sifting and weighing the material to find out a case against the accused beyond a reasonable doubt which it is required to do at the time of the final hearing. The Judge at that preliminary stage is simply required

> to find out that there was material which may lead to the inference that the accused has committed an offence. Thus the charge can be framed by the Court against an accused if the material placed before it raises a strong suspicion that the accused has committed an offence. In other words, the Court would be justified in framing the charges against an accused if the prosecution has sown the seed in the form of the incriminating material which has got the potential to develop itself into a full-fledged tree of conviction later on."

68. On the basis of the prosecution's case, the observation of the learned Metropolitan Magistrate that a prima facie case exists against the accused cannot be faulted. It cannot be said that the evidence before the Court is of such a type that if unrebutted and unchallenged by way of cross examination, the same would not be sufficient enough to convict the petitioner and the co-accused Ashraf Jamal. At this stage, the Court is not expected to make an elaborate enquiry by sifting and weighing material to find out whether or not a case against the accused beyond reasonable doubt is made out. That enquiry is required to be done at the time of final hearing. Certainly, there is material which may lead to the inference that the petitioner-accused has committed the offences he is accused of.

69. Rukmini Narwekar (supra), in my view, has no application in the facts of this case. The Supreme Court held that in some very rare and exceptional cases, where some defence material when shown to the trial court would convincingly demonstrate that the prosecution version is totally absurd and preposterous, the defence material can be looked into by the Court at the time of framing of the charges or taking cognizance.

70. In the present case, the petitioner has failed to make out that rare and exceptional case and, even more importantly, the petitioner has not produced any defence material which could have convincingly demonstrated that the prosecution version is totally absurd or preposterous. The petitioner has sought to place before the Court various facets which may or may not eventually be accepted by the trial Court after conducting the trial.

71. Smt. Bhagwan Kaur (supra), in my view is not relevant to the

petitioner's case at this stage. This is because the case of the prosecution is not entirely founded upon the evidence of the hand writing expert. The evidence of the hand writing expert is being relied upon by the prosecution to provide support to its case of conspiracy, cheating and forgery. In **Sukhdeo Singh** (supra), the Supreme held that a hand writing expert is a competent witness whose opinion evidence is recognized as relevant under the provisions of the Evidence Act. The Court held that it would not be fair to approach the opinion evidence with suspicion but the correct approach would be to weigh the reasons on which it is based. The science of identification of hand writing is an imperfect and frail one as compared to the science of identification of finger prints. Courts have, therefore, been wary in placing implicit reliance on such opinion evidence and have looked for corroboration depending upon the circumstances of the case and the quality of expert evidence. No hard and fast rule can be laid down in this behalf but the Court has to decide in each case on its own merit what weight it should attach to the opinion of the expert.

72. In the present case it would be premature at this stage to assess the weight to be attached to the hand writing experts opinion evidence as that would be a matter to be considered by the trial court. As aforesaid, it cannot be said that prima facie there is no other evidence against the petitioner accused and the co-accused Ashraf Jamal. **Sukhdeo** (supra), therefore, does not advance the petitioner's case.

73. The decision of the Supreme Court in **Sukhvinder Singh** (supra) relied upon by the petitioner has no relevance to the facts of this case. As submitted by Mr. Pahwa, the hand writing expert opinion sought by the CBI is not only on the basis of the specimen hand writing, but also the admitted hand writing of the accused persons. The trial court in terms of Section 73 of the Evidence Act can satisfy itself about the hand writing of the accused either by requiring the accused to writ the words in the Court, or to obtain a fresh opinion of an expert.

74. Jibrial Diwan (supra) is a case entirely on its own facts. In that case the accused had prepared the invitation letters for a cultural show on the letter heads of the Minister. The letters did not bear the signature of the Minister. It was found as a matter of fact that neither any wrongful gain to anyone nor any wrongful loss to another was caused by delivery of the forged letters. The Court concluded that the

act of the accused could not have been termed to have been done dishonestly. The Court held that the act of the accused did not cause or was not likely to cause harm to any person in body or mind. It was in those circumstances that the Supreme Court allowed the appeal and set aside the conviction of the petitioner. However, the same cannot be said from the accusations made against the petitioner and the co-accused Ashraf Jamal. The charge against the petitioner and Ashraf Jamal is that they have exchanged their answer sheets for the Sociology paper and the petitioner has answered the question paper for Ashraf Jamal and vice versa. The said acts, it is alleged, have been done with a view to benefit Ashraf Jamal in passing the Civil Services (Preliminary Practical) Examination, 1993. Therefore, **Jibrail Diwan** (supra) has not application to the facts of the present case.

75. Similarly, **Parminder Kaur** (supra) also has no relevance to the facts of the present case. In that case, the accused was alleged to have added the figure '1' before the date 6.05.2002 and 7.05.2002 and also the figure '2' before the date 7.05.2002 so as to save her Suit from the bar of limitation. The Court found, as a matter of fact, that the Civil Suit had been filed on 27.05.2002 i.e just after ten or twenty days after the changed date or the original date. The change brought about by adding the figure '1' would not cause any damage or injury to public or anybody, nor could it support the claim or title nor could it cause any person to part with property. There could not be also any intention to commit fraud. The Court found that the Suit as filed was well within the period of limitation. It was on this basis, and also on the basis that the FIR was lodged by the brother-in-law of the accused as an act of vengeance, that the Supreme Court quashed the FIR against the accused.

76. From the charges leveled against the petitioner and the co-accused, Ashraf Jamal, it cannot be said that their alleged conduct if established, could not cause any damage or injury to public or anybody, nor could it support the claim or title nor could it cause any person to part with property. The analysis of Mr. Pahwa, recorded in paras 37 to 44 above, appeals to this court. Reliance placed on **Parminder Kaur** (supra) is, therefore, rejected.

77. Dr. Vimla (supra) is also a case which turned on its own facts. The Supreme Court held that no injury had been caused to the person deceived. The Supreme Court held that the expression 'defraud' involves

two elements- deceit and injury to the person deceived. "Injury" is something other than economic loss i.e deprivation of property, whether movable or immovable or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. Therefore, the injury could be non-economic or non-pecuniary loss. A benefit or advantage to the deceiver will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or an advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. In this case, the accused had purchased a motor car in the name of her minor daughter. She obtained the insurance policy which was transferred in the name of her minor daughter. She claimed compensation against genuine claims for two accidents. She signed claim forms and receipts in the name of her minor daughter. The Supreme Court took the view that even though the accused was guilty of deceit, as she signed in all the relevant papers as her daughter and made the insurance company believe that her name was that of her daughter, but the said deceit did not either secure to her any advantage, or cause any non economic loss or injury to the insurance company. The insurance company would have paid the claim even if the claim had been made by disclosing that the daughter was minor. The Supreme Court held that on the evidence as disclosed, neither was the accused benefited nor the insurance company incurred any loss, in any sense of the term. The charges against the petitioner and the co-accused in the present case are entirely of a different nature as already discussed hereinabove. **Dr. Vimla** (supra) has no application to the present case.

78. Devender Kumar (supra) is a case dealing with Section 420 IPC. The Supreme Court observed that the essential ingredients to attract Section 420 IPC are:- (i) cheating; (ii) dishonest inducement to deliver property or to make alter or destroy any valuable security or anything which is sealed or signed or is capable of being converted into a valuable security and (iii) the mens rea of the accused at the time of making the inducement. The making of a false representation is one of the ingredients for the offence of cheating under Section 420 IPC. The Supreme Court observed that it is not necessary that a false pretext should be made in express words by the accused. It may be inferred from all the circumstances including the conduct of the accused in obtaining the property. In the true nature of things, it is not always possible to prove dishonest intention by any direct evidence. It can be proved by a number

of circumstances from which a reasonable inference can be drawn.

79. I find no merit in the submission of Mr. Mathur that the ingredients of Section 420 IPC are not made out in the charge sheet. I am inclined to accept the analysis placed before the Court by Mr. Pahwa in paragraphs 36 to 46 above.

80. Mohammed Ibrahim (supra) is again a case which has no relevance to the petitioner's submissions. That was a case where the accused no.1 had executed a sale deed in favour of accused No.2 claiming that the property sold belonged to accused No.1. A criminal complaint was filed against the accused by the complainant, claiming that the said property belonged to him and, therefore, accused No.1 had committed offences under Section 461 and 471 IPC. The Supreme Court held:

> "When a sale deed is executed conveying a property claiming ownership thereto, it may be possible for the purchaser under such sale deed to allege that the vendor has cheated him by making a false representation of ownership and fraudulently induced him to part with sale consideration. But in this case the complaint is not by the purchaser. On the other hand, the purchaser is made a co-accused. It is also not the case of the complainant that any of the accused tried to deceived him. Nor did the complainant allege that first appellant pretended to be complainant while executing the sale deeds. Therefore, it cannot be said that the first accused by the act of executing sale deeds in favour of second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner. As the ingredients of cheating as stated in Section 415 are not found, it cannot be said that there was an offence punishable under Sections 417, 418, 419 or 420 IPC."

81. The same certainly cannot be said to be the case in hand. If the charge against the petitioner and the co-accused Ashraf Jamal is believed to be true, the two answer sheets prepared by each one of them would, prima facie, constitute false documents as in that case, the answer sheet claimed to be that of Ashraf Jamal would not be his, and that claimed

to be of the petitioner would not be his. **Mohammed Ibrahim** (supra) does not advance the petitioner's case.

82. In the light of the decisions in **Nrisingha Murari Chakraborty** (supra) and **Abhayanand Mishra** (supra), it cannot be said that the ingredients of the various offences of which the petitioner is accused are not disclosed in the charge sheet.

83. Consequently, I find no merit in this petition. The impugned orders dated 10.05.1999 and 06.07.1999 passed by the learned Metropolitan Magistrate in FIR No. RC 4(S) / 93-SIU-(II)-CBI are upheld. The petition is dismissed. 84. No observation made by me in this order shall prejudice the case of either party in the course of trial and the trial court shall not be influenced by anything stated in this order.

84. Considering the fact that the case has been hanging fire since the year 1999, and the trial has been stayed, I direct that the trial should now proceed without any delay whatsoever and conclude it at the earliest, preferable within the next six months.

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BAJAJ ELECTRICAL LTD. ....APPELLANT

VERSUS

DHRUV DEVANSH INVESTMENT & FINANCE PVT. LTD. ....RESPONDENT

(G.S. SISTANI, J.)

RFA NO. : 235/2009 DATE OF DECISION: 19.05.2011

Transfer of Property Act, 1882—Section 106—Requirement of notice to sub tenant to quit—Decree passed in favour of respondent under Order XII Rule 6 CPC—Appellant inducted as tenants by previous owners for five years—Respondent acquired title from erstwhile owners by sale deed—Not in dispute, appellant sub-let property to one M/s Bajaj Auto Ltd.—Respondent terminated tenancy by a legal notice—In the suit for possession M/s Bajaj Auto Ltd. inter-alia took the plea, no notice under Section 106 served upon it—Suit decreed in favour of respondent under Order XII Rule 6 CPC—Before the Appellate Court inter-alia plea taken, no notice to quit served on sub tenant who was lawful sub-tenant and admittedly in possession—Held, notice to a tenant is sufficient to terminate the tenancy—No notice is required to be served on sub-tenant—Appeal dismissed.

Applying the settled law, I concur with the view of the Single Judge of this Court and do not find any infirmity with the view of the trial court that notice to a tenant is sufficient to terminate the tenancy and no notice is required to served upon the sub-tenant. Further, a perusal of the letters dated 4.07.2007 and 05.07.2007, exhibited as Ex. P-1 and Ex. P-2 respectively, make it clear that the same persons exercise influence over the appellant and the subtenant. The said letters are also admitted documents. In any case no appeal has been preferred by sub-tenant M/s Bajaj Auto Ltd. against the judgment and decree of eviction nor any inter-pleader suit has been filed. **(Para 29)**

Important Issue Involved: A notice to vacate served on a tenant is sufficient to terminate the tenancy and recover possession. A separate notice is not required to be served on lawful sub-tenant.

[La Ga]

APPEARANCES:

FOR THE APPELLANT : Mr. J.P. Sengh, Sr. Advocate with Mr. P.K. Dham, Mr. Anil Sharma, Mr. Tarun Arora, Ms. Deepika Madan, Advocates.

FOR THE RESPONDENT : Mr. Deepak Gupta, Mr. B.B. Gupta, Mr. Mohit Nagar, Mr. Gaurav Shankar, Advocates.

CASES REFERRED TO:

1. *Ms. Rohini* vs. *RB Singh* reported at 155(2008) DLT 440.
2. *Puran Chand Packaging Industrial (P) Ltd* vs. *Sona Devi & Anthr* reported at 154 (2008) DLT 113.
3. *Balvant N. Viswamitra* vs. *Yadav Sadashiv Mule* reported at (2004)8 SCC 706.
4. *Rajiv Sharma And Another* vs. *Rajiv Gupta*, reported at (2004) 72 DRJ 540.
5. *Mr. JC Mehra* vs. *Smt. Kusum Gupta* [CR 470/2008 & CM 1010/2003].
6. *Atma Ram Properties (P) Ltd* vs. *Pal Properties (India) Pvt. Ltd & Others* reported at (2002) 62 DRJ 623.
7. *Manisha Commercial Ltd.* vs. *N.R. Dongre and Anthr*, 85 (2000) DLT 211 AIR 2000 Del. 176.
8. *Uttam Singh Duggal & Co. Ltd.* vs. *United Bank of India* reported at (2000) 7 SCC 120.
9. *P.S. Jain Company Ltd.* vs. *Atma Ram Properties (P) Ltd. & Ors.*, reported in 65 (1997) DLT 308 (DB).
10. *State Bank of India* vs. *M/s. Midland Industries and Others*, AIR 1988 Delhi 153.
11. *Rupchand Gupta* vs. *Raghuvanshi (P) Ltd* [1964]7SCR760.
12. *Importers and Manufacturers Ltd.* vs. *Pheroze Framroze Taraporewala* [1953]4SCR226.
13. *S. Rajdev Singh & Others* vs. *Punchip Associates Pvt. Ltd.* reported at AIR 2008 Delhi 56 was 4 AIR 1953 SC 73 : 1953 SCR 226 5 AIR 1964 SC 1889 : (1964)7 SCR 760.

RESULT: Appeal dismissed.

G.S. SISTANI, J. (ORAL)

1. The present appeal is directed against the judgement and decree dated 17.04.2009 passed by the learned additional district judge decreeing the suit of the respondent under Order XII Rule 6 CPC.

2. The brief facts necessary to be noticed for disposal of the present appeal are that the appellant was inducted as a tenant at the ground floor of the property bearing municipal no. 2537, Ward No. X, now commonly known as 4/11, Asaf Ali Road, Near Delhi Gate, New Delhi (hereinafter referred to as 'suit property') by its erstwhile owners, Sh. Muni Lal Vohra and Sh. Hira Lal Vohra vide registered lease deed dated 09.10.1964 for a period of five years. The respondent has acquired the suit property from its erstwhile owners, Sh. Muni Lal Vohra and Sh. Hira Lal Vohra, vide registered sale deed dated 15.06.2007 and therefore, by operation of law, the appellant has become a tenant under the respondent. As per the information given by the erstwhile owners to the respondent, the appellant was stated to be in arrears of rent for several years and under the indenture of sale deed dated 15.06.2007, the erstwhile owners of the suit property had assigned their right to recover the arrears of rent in favour of the respondent. It is also not in dispute that the appellant has further sub-let the suit property to M/s Bajaj Auto Ltd. on a monthly rent of Rs. 8000/-. Since despite repeated requests the appellant has failed to pay the arrears of rent, the respondent, vide legal notice dated 08.08.2007, terminated the tenancy of the appellant. Despite the termination of tenancy, the appellants have failed to vacate the suit premises and thus, the respondent was compelled to file a suit for recovery of possession and mesne profits.

3. Summons was served upon the appellant and the written statement was filed on 21.01.2008. Amended written statement was filed on 11.09.2008. Pursuant to an application under Order I, Rule 10 of CPC filed by M/s Bajaj Auto Ltd., Bajaj Auto Ltd was impleaded as defendant no. 2 before the trial court. Defendant no. 2 filed its written statement alleging that since the suit property is in the possession of the defendant no. 2, the suit of the respondent is not maintainable since admittedly, no notice under section 106 of the Transfer of Property Act has been served upon the subtenant.

4. Subsequent to the filing of the written statement, the respondent

filed an application under order XII Rule 6 CPC stating that parties are not in dispute with regard to questions of fact but are at issue only with regard to questions of law which are no longer res integra. The said application has been allowed by the learned trial court decreeing the suit of the respondent which has led to the filing of the present appeal.

5. It is contended by counsel for appellant that the impugned judgment is bad in law and is contrary to the factual position on record. The counsel states that the trial court has failed to appreciate the pleadings of the parties and the documents placed on record.

6. The counsel for appellant submits that the trial court has failed to appreciate the fact that the appellant has denied the title of the respondent over the suit property and there is no admission of the landlord-tenant relationship. The counsel questions the locus standi of the plaintiff/ respondent in the absence of his knowledge of the alleged sale of the suit property by the erstwhile owners to the respondent. It is the case of the appellant that the appellant has become a tenant of the suit premises by virtue of its amalgamation with M/s Matchwel Electricals (India) Ltd., the original tenant at the suit premises, and have lawfully sub-let the suit property to M/s Bajaj Auto Ltd. The counsel further submits that the question of lawful sub-letting has already been decided by the Rent Control Tribunal, Delhi and the appeal before the High Court against the order of the Tribunal stands abated.

7. Mr. JP Sengh, learned senior counsel for appellants contends that in order to pass a decree under Order XII Rule 6 CPC, the admissions made must be unequivocal, unqualified and unambiguous. Reliance is placed upon **Puran Chand Packaging Industrial (P) Ltd v. Sona Devi & Anthr** reported at 154 (2008) DLT 113 and more particularly at paras 8 and 9 which reads as under:

> "8. The only short question which arises for consideration in the instant case is as to whether a decree for possession on the basis of the admission purported to have been made by the appellant/ defendant could be passed. Before adverting to the same it will be worthwhile to reproduce the language of Order 12 Rule 6:
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> > "Order 12 Rule 6. Judgment on admissions.—(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.
> >
> > (2) Whenever a judgment is pronounced under Sub-rule (1), a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."

9. A perusal of the aforesaid provision would show that before a decree on the basis of admission in the pleadings can be passed, the admission must be made by the defendant or a party to the proceedings in an unequivocal, unambiguous manner. In other words the admission should not be vague or equivocal. Converse of it would mean that if there is an admission made by a party which is conditional wherein certain objections which go to the root of the matter have been raised then it could not be treated as an admission. Reliance in this regard can be placed in **State Bank of India v. M/s. Midland Industries and Others,** AIR 1988 Delhi 153. Though this is a judgment of the learned Single Judge of this Court but as this judgment lays down the correct proposition of law we have no hesitation in approving the same. Another point which has to be borne in mind while passing a judgment on the basis of an admission is that the document is to be read as a whole and the Court is not to take out one or two sentences so as to treat it as an admission. Moreover, passing of a judgment on this basis by the Court is a matter of discretion and not a matter of course. Reliance in this regard is placed on **Manisha Commercial Ltd. v. N.R. Dongre and Anthr,** 85 (2000) DLT 211=AIR 2000 Del. 176."

8. The counsel for appellant next submits that admittedly, the rent of the premises is Rs. 1600 per month and therefore, the appellant is entitled to protection under the Delhi Rent Control Act. The counsel submits that M/s Matchwel Electricals (India) Ltd were inducted as tenants of the entire ground floor of the suit premises for a period of five years from 01.10.1964 with an option of renewal for a further period of five years at a monthly rent of Rs. 1600/-payable to two landlords in

equal proportions. As no further lease deed was executed, the said M/s Matchwel Electricals (India) Limited became a statutory tenant under the Delhi Rent Control Act, 1958 paying a monthly rent of Rs. 1600 per month. The counsel further submits that after the amalgamation of the appellant with M/s Matchwel Electricals (India) Ltd., the appellant is a statutory tenant at the suit property and is entitled to protection under the Delhi Rent Control Act.

9. It is further contended by counsel for appellant that the respondent, knowing fully well that the suit premises is in the possession of M/s Bajaj Auto Ltd (defendant no.2 before the trial court) and that they are lawful sub-tenants, has neither alleged any cause of action nor claimed any relief against them. The counsel also contends that the notice of termination of tenancy was admittedly not served upon the sub-tenant M/s Bajaj Auto Ltd and thus, the trial court has erred in decreeing the suit of the respondent.

10. Lastly, the counsel for appellant contends that Sh. OP Gupta is not authorised to sign and verify the plaint on behalf of the respondent and that the trial court has ignored the fact that the respondent has not proved the resolution dated 01.0.2007 passed by its Board of Directors authorising Sh. O.P. Gupta to sign and verify the plaint on its behalf.

11. Per contra, counsel for respondent submits that there is no infirmity in the impugned judgement as the appellant has no defence and has duly admitted the receipt of notice to quit and the rate of rent is also not disputed. Further, in view of the registered sale deed dated 15.06.2007 executed between the erstwhile owners and the respondent, the respondent is the owner of the suit property and appellant was a tenant of the respondent.

12. The counsel for respondent next submits that in view of the registered sale deed dated 15.06.2007 placed on record, it leaves no room for doubt that the respondent is the owner of the suit property and therefore, the appellant is the tenant of the respondent. Refuting the contention of the counsel for appellant that respondent has no cause of action since the appellant has no knowledge of the alleged sale of the suit property; the counsel for respondent contends that a landlord does not require a tenant's consent or attornment before the delivery of possession or for assigning the right to recover rent. Substantiating his argument,

the counsel for respondent has placed reliance upon a decision of this Court in **Mr. JC Mehra v. Smt. Kusum Gupta** [CR 470/2008 & CM 1010/2003] wherein a Single Judge of this Court has held as under:

> "It is not right to say that it needs a tenant's consent to attornment before delivery of possession takes place. Once possession-or right to recover rent-has been handed over, it is sufficient delivery of possession. Delivery of possession does not have to be physical. In these circumstances, that is for power of attorney sales, so long as the right to recover rent has been handed over, it is sufficient. The question is transfer of that right. Whether consequent to such transfer the transferee exercises these rights or not is not germane because it is transfer of that right and not the exercise of it that is relevant or matters. Provisions of Order 21 Rule 35 have been so worded because of court proceedings and third parties; but when two persons enter into an agreement they may decide upon whatever mode of delivery they deem proper.

The Law Lexicon by P. Ramanatha Aiyer 2nd edition 1997 (page 1848) defines symbolical delivery as under:

> "Symbolical delivery is a substitute for actual delivery, when the latter is impracticable, and leaves the real delivery to be made afterwards. As between the parties, the whole title passes by such delivery, when that is their intention."

If the decision in **Sushil Kanta Chakravorty's case**[1] (Supra) is read in its entirety, this was the precise question which was answered by the court. The only attempt to distinguishing it is made by the fact that in that case the property was vacant and in the present case, it was tenanted. If a property is tenanted, the sale thereof by any accepted mode does not have to be dependent or await attornment by the tenant. It depends on the agreement to sell, full payment and transfer of right to recover the rent as distinct from sending a letter of attornment to the tenant. The contention of the petitioner that asking the tenant to attorn is imperative may now be tested. If attornemnt letter is not sent by

1. Sushil Kanta Chakravorty v. Rajeshwar Kumar; 2000 (85) DLT 187

the purchaser would it mean that only on giving the information the power of attorney sale would be complete, or that the statutory authorities would assess the previous owner and not the purchaser as the owner. The answer to each is in the negative. To my mind omission to ask the tenant to attorn cannot be fatal or postpone the actual sale till that is done. The petitioner in his written submissions filed in this court conceded that in 1993 in the petition no. 9/96 titled JC Mehra v. Pushpawati filed by the petitioner, he was informed that property in question had been bought by the respondent herein. The date of proceedings is more than 5 years prior to filing of the eviction petition. I am fortified in this regard by a judgment of this court in **Jagdish Chander Gulati** (Supra)[2] which has been dealt with above."

13. Counsel for respondent next submits that since the premises have been sub-let by the appellant to M/s Bajaj Auto Ltd at a monthly rent of Rs 8000 per month, the provisions of Delhi Rent Control Act have ceased to apply and the tenancy is governed by the provisions of the Transfer of Property Act simpliciter. Reliance is placed on **PS Jain Company Ltd. v. Atma Ram Properties (P) Ltd & others** reported at 65 (1997) DLT 308(DB) and more particularly at paras 5,6,7, 12 and 13 which read as under:

"5. The point for consideration in the appeal is: Whether a tenant who is paying a rent of Rs. 900 p.m. (less than Rs. 3,500 as specified in Section 3(c) of the Delhi Rent Control Act, 1958) can be evicted by a simple notice under Section 106 Transfer of Property Act, through the Civil Court if he has lawfully sub-let the premises to two tenants, one for Rs. 40,000 p.m. and another for Rs. 4,500 p.m. (in each case for more than Rs. 3,500 p.m.)

6. Section 3 of the Act deals with 'premises' to which the Delhi Rent Control Act, 1958 is not to apply. One of the clauses is Clause (c) as introduced in 1988. It reads as follows:

"Section3. Act not to apply to certain premises:— Nothing in this Act shall apply

2. Jagdish Chander Gulati v. Ram Chand Lakram; 45 (1991) DLT 660

(a) .....

(b) .....

(c) to any premises, whether residential or not, whose monthly rent exceeded three thousand and five hundred."

7. It will be noticed, that the Sub-clause (c) refers to the *"premises"* which is fetching a rent in excess of Rs. 3,500 p.m. and not to a tenant who is paying rent in excess of Rs. 3,500. In fact, the emphasis in all the clauses in Section 3 is on the "premises" which are exempt. Different classes of "premises" which are exempt are enumerated in Section 3(c).

12. In our view, the intention behind Section 3(c) is that a premises which fetches a rent of Rs. 3,500 p.m. should be exempt and that protection should be restricted to buildings fetching a rent less than Rs. 3,500 p.m. In case a tenant paying less than Rs. 3,500 p.m. to his landlord has sub let the very same premises—may be lawfully— for a rent above Rs. 3,500 p.m., then the question naturally arises whether such a tenant can be said to belong to weaker sections of society requiring protection. By sub-letting for a rent above Rs. 3,500 p.m., the tenant has parted with his physical possession. He is receiving from his tenant (i.e. the sub-tenant) more than Rs. 3,500 p.m. though he is paying less than Rs. 3,500 p.m. to his landlord. The above contrast is well illustrated by the facts of the case before us. The appellant tenant is paying only Rs. 900 p.m. to the plaintiff, while he has sublet the premises in two units, one for Rs. 40,000 p.m. and another for Rs. 4,500 p.m. In regard to each of these units, the sub-tenants have no protection of the Rent Act. In our view, the purpose of Section 3(c) is not to give any protection to such a tenant.

13. Indeed there will be a serious anomaly if such a tenant is to be allowed the benefit of the rent control legislation. If he should get protection, the strange situation will be that when he cannot be evicted except on limited grounds specified in the Act and that too only before the Rent Controller, he could, in his turn, evict his tenants i.e. the sub-tenants, by giving a simple notice

under Section 106 of Transfer of Property Act, and then move the Civil Court. Further, he could after such eviction of his tenants (i.e. sub-tenants) induct fresh subtenants at still higher rents. In our view, an interpretation which places him in such an advantageous position is to be avoided."

14. Further reliance is sought on **Atma Ram Properties (P) Ltd v. Pal Properties (India) Pvt. Ltd & Others** reported at (2002) 62 DRJ 623 at paras 15 and 16 which read as under:

"15. Issue No. 3: The rent of the premises in question is more than Rs. 3,500/-PM and, therefore, there is no protection of the provisions of Delhi Rent Control Act available to the tenants.

16. The last question which calls for determination is as to whether the tenancy of the defendants is protected under the provisions of Delhi Rent Control Act and the suit is not maintainable in view of Section 50 of the said Act. On this aspect facts are not in dispute. Defendants 1 to 3 are paying the rent of Rs. 1,540/-. However, they have sub-let a part of the tenanted premises to defendant No. 4 and defendant No. 4 is paying the rent of Rs. 24,701.25 paise to defendants 1 to 3. Therefore, no evidence is required and legal question which calls for determination is as to whether it is a rent of Rs. 1,540/-paid by tenants to the landlord or it is a rent of Rs. 24,701.75 paise paid by sub-tenant to tenants which would be a determinative factor in such proceedings. This issue is no more *res integra*. Identical question came up for consideration before the Division Bench of this Court in the case of **P.S. Jain Company Ltd. v. Atma Ram Properties (P) Ltd. & Ors.,** reported in 65 (1997) DLT 308 (DB). In para-5, the question which fell for consideration was posed. It reads as under:

"The point for consideration in the appeal is : Whether a tenant who is paying a rent of Rs. 900/-p.m. (less than Rs. 3,500/-as specified in Section 3(c) of the Delhi Rent Control Act, 1958) can be evicted by a simple notice under Section 106, Transfer of Property Act, through the Civil Court if he has lawfully sub-let the premises to two tenants, one for Rs. 40,000/-p.m. and another for Rs.

4,500/-p.m. (in each case for more than Rs. 3,500/-p.m.) ?"

The answer to this question is found in paras 8, 9 and 12 of that judgment. After relying upon four Supreme Court judgments dealing with purposeful construction of a statute rather than adopting mechanical approach, in para-12 the Court observed as under :

"12. In our view, the intention behind Section 3(c) is that a premises which fetches a rent of Rs. 3,500/-p.m. should be exempt and that protection should be restricted to buildings fetching a rent less than Rs. 3,500/-p.m. In case a tenant paying less than Rs. 3,500/-p.m. to his landlord has sublet the very same premises may be lawfully for a rent above Rs. 3,500/-p.m., then the question naturally arises whether such a tenant can be said to belong to weaker sections of society requiring protection. By sub-letting for a rent above Rs. 3,500/-p.m., the tenant has parted with his physical possession. He is receiving from his tenant (i.e. the sub-tenant) more than Rs. 3,500/-p.m. though he is paying less than Rs. 3,500/-p.m. to his landlord. The above contrast is well-illustrated by the facts of the case before us. The appellant-tenant is paying only Rs. 900/-p.m. to the plaintiff, while he has sublet the premises in two units, one for Rs. 40,000/-p.m. and another for Rs. 4,500/-p.m. In regard to each of these units, the sub-tenants have no protection of the Rent Act. In our view, the purpose of Section 3(c) is not to give any protection to such a tenant."

15. It is contended by counsel for respondent that the appellant has not denied the sale of the suit premises but has only pleaded that the alleged sale is not within his knowledge. Further contending that a general denial is of no consequence and in fact no denial in the eyes of law , the counsel has drawn the attention of the court to para 1 of the plaint and its reply in the writtenstatement. Para 1 of the plaint reads as under;

"1. That the Plaintiff, M/s Dhruv Devansh Investment and Finance Pvt. Ltd. named above, is the (new) owner and consequently the landlord in respect of the immovable property earlier known as

Ramjas Building , bearing municipal No. 2537, Ward No. X, now commonly known as 4/11, Asaf Ali road, Near Delhi Gate, New Delhi-110002 having acquired the same in terms of a sale deed dated 15th June, 2007 (duly registered in accordance with law) executed by the erstwhile owners (namely Shri Jagdish Prasad Vohra S/o late Shri Hira Lal R/o 14, The Mall, Amritsar and his other co-sharers/co-owners)."

Para 1 of the amended written statement reads as under;

"1. The contents of paragraph no. 1 of the plaint are not to the knowledge of the defendant and are denied. The Plaintiff is put to strict proof of the same."

16. The counsel has further drawn the attention of the court to the reply dated 12.09.2007 sent by the appellant to the notice dated 08.08.2007 wherein the appellant has not denied the factum of sale of the suit property but only required the respondent to furnish details and supply a copy of the registered sale deed. The counsel contends that lack of knowledge of a fact pleaded by the plaintiff does not tantamount to denial of existence of a fact and reliance is placed on **Jahuri Sah v. DP Jhunjhunwala** reported at AIR 1967 SC 109 and more particularly at para 10 which reads as under:

"10. In our opinion the High Court was right in holding that the Act is inapplicable to this case. The plaintiffs and defendants were admittedly co-owners of the property. As the property had not been partitioned it was open to either or both the parties to occupy it. The defendants occupied the property except a small portion which was in possession of the tenants. The plaintiffs acquiesced in it because of an agreement between the parties that the defendants would pay Rs 200 p.m. as compensation to them. The defendants did not dispute that there was an agreement about payment of compensation between the parties but their plea was that the amount agreed to was Rs 50 p.m. and not Rs 200 p.m. Their contention in this behalf was rejected by the High Court which accepted the plaintiffs' contention that the amount was Rs 200 p.m. This part of the High Court's judgment is not challenged before us by Mr Sarjoo Prasad. He, however, challenged the finding of the High Court that the claim to

compensation was enforceable. But before we deal with this matter it would be appropriate to deal with the reasons given by him in support of the contention that the suit was not maintainable. He reiterated the argument urged before the trial court based upon the non-joinder of Shankarlal as a party to the suit. According to him, as Shankarlal's adoption has not been established by the plaintiffs he was also a co-owner of the property and his non-joinder as a party to the suit rendered the suit incompetent. The High Court has pointed out that the plaintiffs have clearly stated in para 1 of the plaint that Shankarlal had been given in adoption to Sreelal. In neither of the two written statements filed on behalf of the defendants has this assertion of fact by the plaintiffs been specifically denied. Instead, what is stated in both these written statements is that the defendants have no knowledge of the allegations made in para 1 of the plaint. Bearing in mind that Order 8 Rule 5, CPC provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted, to say that a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of the existence of that fact, not even an implied denial. No specific issue on the question of adoption was, therefore, raised. In the circumstances the High Court was right in saying that there was no occasion for the parties to lead any evidence on the point. However, Sreelal who was examined as a witness on behalf of the plaintiffs has spoken about the fact of adoption and his statement can at least be regarded as prima facie evidence of adoption. It is true that he admits the existence of a deed of adoption and of its non-production in the court. This admission, however, would not render oral evidence inadmissible because it is not by virtue of a deed of adoption that a change of status of a person can be effected. A deed of adoption merely records the fact that an adoption had taken place and nothing more. Such a deed cannot be likened to a document which by its sheer force brings a transaction into existence. It is no more than a piece of evidence and the failure of a party to produce such a document in a suit does not render oral evidence in proof of adoption inadmissible. We, therefore, agree with the High Court that the

plaintiffs' suit for partition of their half share in the property was not incompetent because Shankarlal was not made a party thereto."

17. I have heard the counsel for the parties and have carefully perused the entire material on record. The contention of the counsel for appellant may be summarised as under:

- The appellant is entitled to protection under the Delhi Rent Control Act since the rent of the suit premises is less than Rs.3500 per month
- For a decree under Order XII Rule 6 CPC, the admissions must be unequivocal, absolute and unambiguous. The appellant has not made any such admission so to entitle the respondent to a decree under Order XII Rule 6 CPC.
- Suit not maintainable since no notice to quit has been served upon the sub-tenant M/s Bajaj Auto Ltd who is in lawful possession of the premises and no relief has been pressed against it.
- Sh. OP Gupta is not authorised to sign and verify the plaint on behalf of the respondent company.

18. The arguments of the counsel for respondent may be summarised as under

- Since property has been sublet at a monthly rent exceeding Rs 3500/-, the appellant is not entitled to the protection under the Delhi Rent Control Act and the tenancy is governed by the provisions of the Transfer of Property Act and there is no requirement of service of notice to the sub-tenant.
- Respondent is entitled to a decree under Order XII Rule 6 CPC since the appellant has admitted the rate of rent and the receipt of notice dated 08.08.2007. The appellant has not denied the sale of the suit property but has only pleaded lack of knowledge of the alleged sale.

19. The law with regard to Order XII Rule 6 CPC is fairly well settled. The principle behind Order XII Rule 6 is to give the plaintiff a right to speedy judgement as regard so much of the rival claim about which there is no controversy. In **Uttam Singh Duggal & Co. Ltd. v.**

United Bank of India reported at (2000) 7 SCC 120, the Apex Court observed as under:

> **"12.** As to the object of Order 12 Rule 6, we need not say anything more than what the legislature itself has said when the said provision came to be amended. In the Objects and Reasons set out while amending the said Rule, it is stated that .where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the plaintiff is entitled.. We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where the other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed."

20. It was observed in the case of **Rajiv Sharma And Another v. Rajiv Gupta,** reported at (2004) 72 DRJ 540, that the purpose of Order XII Rule 6 of CPC is to enable the party to obtain speedy justice to the extent of relevant admission, which according to the admission, if the other party is entitled for. Admission on which judgment can be claimed must be clear and unequivocal. In the case of **Ms. Rohini v. RB Singh** reported at 155(2008) DLT 440 it has been held as under: "it is trite to say that in order to obtain judgment on admission, the admissions must be clear and unequivocal. In the matter of landlord and tenant there are only three aspects which are required to be examined – (i) relationship of landlord and tenant; (ii) expiry of tenancy by efflux of time or determination of valid notice to quit; and (iii) the rent of the premises being more than Rs. 3500/-per month , in view of the Act."

21. It is not in dispute that the appellant is a tenant at the suit property at a monthly rent of Rs.1600. It is an admitted fact that the suit property has been further sublet by the appellant to M/s Bajaj Auto Ltd at a monthly rent of Rs 8000/-. Applying the law laid down in **Atma Ram Properties** (supra), it is clear that the tenancy of the appellant is governed by the Transfer of Property Act and that the appellant is not entitled to the protection under the Delhi Rent Control Act. Therefore, the

submission made by counsel for appellant is without any force.

22. I find that it is the appellant's own case that the appellant was inducted as a tenant in the suit property in as far back as 1964 for a period of five years and after the lease expired by efflux of time in 1969, no fresh lease deed has been executed. Thus, as per section 106 of the Transfer of Property Act, the tenancy of the appellant is a month-to-month tenancy that can be validly terminated by a fifteen days' notice to the appellant. The respondent alleges that vide legal notice dated 08.08.2007, the respondent terminated the tenancy of the appellant and called upon the appellant to handover the vacant physical possession of the suit property. The receipt of said notice has also not been denied by the appellant. In fact, the appellant had duly replied to the said notice vide communication dated 12.09.2007.

23. I further find that the appellant has admitted its landlord and tenant relationship with the erstwhile owners, but has disputed the title of the respondent over the suit property on the ground of lack of knowledge of the alleged sale of the suit property vide sale deed dated 15.06.2007. The respondent has placed on record a certified copy of the registered sale deed dated 15.06.2007. It is not the case of the appellant that respondent is not the owner of the suit property neither has the appellant pleaded that the said sale deed is forged and fabricated nor the sale of the suit property has been denied by the appellant. A perusal of the reply dated 12.09.2007 makes it evident that the appellant has not denied the sale of the suit property but has only asked the respondent to furnish the details of the sale and a copy of the sale deed. A certified copy of the sale deed has also been filed during the pendency of the appeal. During the course of hearing, no such objection has been raised by the counsel for the appellant.

24. A reading of the amended written statement makes it clear that the erstwhile landlords have not accepted the rent of the suit property since August 2002. It is the appellant's own contention that after the death of the erstwhile landlords, it was agreed that the share of lease rental of Sh. Muni Lal Vohra would be paid to Smt. Asha Rani Sajdeh while there being no legal heir to Sh. Hira Lal Vohra, his share was to be deposited in a separate account. However, since August, 2002, the cheques forwarded to Smt. Asha Rani Sajdeh are being received back unaccepted and her share is also being deposited in a separate account

by the appellant till date. In the amended written statement, the appellant has conceded that the appellant would release the arrears of rent in favour of the respondent once the respondent establishes its credential before the Rent Controller and an order to that effect is passed by the Rent Controller.

25. Applying the law laid down in **Jahuri Sah v. D.P. Jhunjhunwala** (supra), I find the denial with regard to ownership of the respondent is only a general denial. Nowhere has the appellant specifically denied the sale of the tenanted premises but instead has only pleaded no knowledge of the alleged sale. Pleading that the appellant has now knowledge of a fact asserted by the respondent does not tantamount to even an implied denial. Further a certified copy of the sale deed dated 15.6.2007 has also been placed on record.

26. It has also been argued by the counsel for appellant that the suit is not maintainable on the ground that no notice under section 106 of the Transfer of Property Act has been served upon M/s Bajaj Auto Ltd who is the lawful sub-tenant and the suit property is admittedly its possession.

27. In **Balvant N. Viswamitra v. Yadav Sadashiv Mule** reported at (2004)8 SCC 706, the Apex Court observed as under:

> "26. As held by this Court in **Udit Narain Singh Malpaharia v. Addl. Member, Board of Revenue, Bihar**[3] there is a distinction between .necessary party 'and' proper party.. In that case, the Court said: (SCR p. 681)
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> > "The law on the subject is well settled: it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be 3 1963 Supp(1) SCR 676 : AIR 1963 SC 786 made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. (emphasis supplied)

27. In **Importers and Manufacturers Ltd. v. Pheroz Framroze Taraporewala**[4] this Court held that in a suit for possession by a landlord against a tenant, the sub-tenant is merely a proper

3. 1963 Supp(1) SCR 676 : AIR 1963 SC 786

4. AIR 1953 SC 73 : 1953 SCR 226

party and not a necessary party.

28. In **Rupchand Gupta v. Raghuvanshi (P) Ltd**[5] an ex parte decree was passed in favour of the landlord and against the tenant. An application for setting aside the decree was made by the subtenant by invoking the provisions of Order 9 Rule 13 of the Code of Civil Procedure, 1908, inter alia contending that the decree was collusive inasmuch as the sub-tenant was not joined as the party defendant. The decree was, therefore, liable to be set aside. Repelling the contention, this Court observed: (SCR p.764)

> "[I]t is quite clear that the law does not require that the sub-lessee need be made a party. It has been rightly pointed out by the High Court that in all cases where the landlord institutes a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee and does not implead the sub-lessee as a party to the suit, the object of the landlord is to eject the sub-lessee from the land in execution of the decree and such an object is quite legitimate. The decree in such a suit would bind the sub-lessee. This may act harshly on the sub-lessee; but this is a position well understood by him when he took the sub-lease. The law allows this and so the omission cannot be said to be an improper act."(emphasis supplied)

28. A single judge of this Court in **S. Rajdev Singh & Others v. Punchip Associates Pvt. Ltd.** reported at AIR 2008 Delhi 56 was 4 AIR 1953 SC 73 : 1953 SCR 226 5 AIR 1964 SC 1889 : (1964)7 SCR 760 faced with the same question whether notice of termination of tenancy was required to be served upon the sub-tenant. Answering the above question in the negative, it was observed:

> "Whether any notice of termination of tenancy was required to be served on the sub-tenants' If so, its effect? OPD-2 to 4.
>
> 23. The aforesaid issue arises from the plea that the subtenants had an independent right to be served with a notice of termination

5. AIR 1964 SC 1889 : (1964)7 SCR 760

prior to the eviction proceedings being initiated. Admittedly, no such notice was issued to the sub-tenants, defendants 2 to 5.

24. It is the case of the plaintiffs that such sub-tenants had no independent right and their rights would not arise as claimed by defendant No. 1, as a tenant. The termination of the tenancy of the tenant (defendant No. 1) would result in the termination of the sub-tenancy. It has been urged that the sub-tenants are not even necessary parties to the present proceedings and have been so impleaded in order to ensure that in case of decree for possession being passed no difficulty is created in the way of the plaintiffs.

25. Learned Counsel for the plaintiffs has referred to the judgment of the Apex Court in **Importers and Manufacturers Ltd. v. Pheroze Framroze Taraporewala** [1953]4SCR226 where in paragraph 4, it has been observed that under the ordinary law a decree for possession passed against a tenant in a suit for ejectment is binding on a person under or through that tenant and is executable against such person whether or not he was or was not a party to the suit. Thus, non-joinder of such a person does not render the decree any the less binding on him and such a person was held not to be a necessary party to the ejectment suit against the tenant. Simultaneously it was recognised that such a person would nevertheless be a proper party to the suit in order that the question where the lease has been properly determined and the landlord/plaintiff is entitled to recover possession of the premises may be decided in his presence so that he may have the opportunity to see that there is no collusion between the landlord and the tenant under or through whom he claims and to seek protection under the TP Act, if he is entitled to any.

26. A reference has also been made to the judgment in **Rupchand Gupta v. Raghuvanshi (P) Ltd** [1964] 7 SCR 760 to the effect that the law does not require the sub-lessee to be made a party where the landlord institutes a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee. The decree in the suit would bind the sub-lessee and even though it may sound harsh on the sub-lessee, this is the position well understood by him when he took the sub-lease.

27. On consideration of the aforesaid judgments and the submissions of the parties to show that the notice of termination is required only to be given to the tenant, the sub-tenants are at best, proper parties to the proceedings. In the present case, the sub-tenants have been imp leaded as defendants. Even in the eviction proceedings filed before the Rent Controller, the subtenants were impleaded as parties.

28. Learned Counsel for the defendants did not even contend that they were statutory tenants, especially in view of their objections raised in the proceedings before the Rent Controller, which had resulted in the order dated 4.10.1995. It was on consideration of the said objection that the Rent Controller found that the provisions of the Rent Act would not apply in view of the legal position enunciated therein as once the sub-tenant was paying a rent of over Rs. 3,500 per month, the Rent Controller would have no jurisdiction. The said judgment would, thus, be binding on the defendants insofar as the plea of lack of jurisdiction of the Rent Controller and the conformant of the judgment in the civil court is concerned.

29. Learned Counsel for defendant No. 2 does not seek to contend that the notice is defective on account of the fact that the lease commenced on the 18th day of the month and thus the monthly tenancy would expire on the end of the 18th day and not at the end of the month. However, it would be seen that the lease had already expired and the defendants were holding over as tenants. Such holding over on a month to month basis would be by the end of the month. The termination notice dated 9.4.1995, in fact, directed the defendants to vacate the premises on or before 31.5.1995, thus giving a little less than two months to vacate the premises and thus either way, there was sufficient time given as per Section 106 of the TP Act to the defendants to hand over vacant and peaceful possession of the suit property. This is, of course, apart from the fact that there is not even an issue framed in this behalf.

30. In my considered view, the legal position set forth makes it abundantly clear that there was no requirement of any notice to be served personally on the said subtenants for the plaintiff to

seek eviction of the defendants from the tenanted premises and, thus, the issue is answered in favor of the plaintiffs."

29. Applying the settled law, I concur with the view of the Single Judge of this Court and do not find any infirmity with the view of the trial court that notice to a tenant is sufficient to terminate the tenancy and no notice is required to served upon the sub-tenant. Further, a perusal of the letters dated 4.07.2007 and 05.07.2007, exhibited as Ex. P-1 and Ex. P-2 respectively, make it clear that the same persons exercise influence over the appellant and the subtenant. The said letters are also admitted documents. In any case no appeal has been preferred by sub-tenant M/s Bajaj Auto Ltd. against the judgment and decree of eviction nor any inter-pleader suit has been filed.

30. A faint argument has been advanced by counsel for appellant that Sh. OP Gupta is not authorised to sign and verify the plaint on behalf of the respondent company. As regards the aforesaid contention, I find that Sh. OP Gupta is stated to be one of the Directors of the respondent company duly authorised by the Board of Directors vide resolution dated 01.08.2007 to sign, verify, institute and pursue the suit of the respondent. Even otherwise, Sh. O P Gupta is stated to fully conversant with the facts and circumstances of the present case and as per Order XXIX Rule 1 of CPC, any director who is able to depose to the facts of the case can verify and sign a pleading on behalf of the corporation. Para 2 of the affidavit filed with the plaint states that Sh. OP Gupta is fully conversant with the facts and circumstances of this case and is competent to sign and verify the plaint.

31. In view of the above the appeal filed by the appellant is without any merit and the same is dismissed with costs of Rs. 15,000/-.

ILR (2011) IV DELHI 365
WP (C)

YUDHVIR SINGH ....PETITIONER

VERSUS

LAND ACQUISITION COLLECTOR ....RESPONDENT

(SANJAY KISHAN KAUL AND RAJIV SHAKDHER, JJ.)

WP (C) NO. : 3595/2011 DATE OF DECISION: 24.05.2011
C.M. NO. : 7523/11

Land Acquisition Act, 1894—Section 4, 6, 18, 28 and 28A—Constitution of India, 1950—Article 226—Land of petitioner was acquired vide award passed in 1963—Petitioner never preferred a reference for enhancement of compensation—Other aggrieved land owners from same village and in respect of same award succeeded in a reference vide decision rendered by High Court in RFA in 1987—Petitioner applied for certified copy and filed application under Section 28A for enhanced compensation in 2008—Application dismissed by LAC for limitation—Order challenged in High Court Plea taken, it is date of knowledge of petitioner which is material for purposes of filing application to claim parity in respect of compensation qua persons who had sought and obtained enhanced compensation—Per contra plea taken, provisions cannot go beyond what the legislature has stipulated—Proviso to Section 28 A of Act itself makes it clear how period of limitation is to be calculated for purposes of making application—No other period is to be excluded from time stipulated of three months than what is specifically stated in proviso—Petitioner seeks to rely upon judgment of HC for making application for enhanced compensation while benefit is to be made available only on basis of award rendered—Held—It is not open to this Court to extend contours of beneficial legislation any further specifically in view of mode and manner in which legislature in its wisdom has enacted said provision—Relevant date would be date of decision of reference Court and not date of decision of High Court—Petitioner only steps into shoes of his father and original land owner never took steps in accordance with law to seek parity of compensation and petitioner cannot be better off than original land owner—Date of knowledge is immaterial and limitation would begin to run from date of award on basis of which re-determination of compensation is sought—No merit in writ petition.

Important Issue Involved: (A) The relevant date for seeking enhancement of compensation under Section 28A of the Land Acquisition Act, 1894 would be the date of decision of the reference Court and not the decision of the High Court.

(B) In view of the mode and manner in which the legislature in its wisdom has enacted Section 28A of Land Acquisition Act, 1894 it is not open to this Court to extend the contours of the beneficial legislation.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. N.S. Dalal, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Poddar, Advocate.

CASES REFERRED TO:

1. *V. Ramakrishna Rao* vs. *Singareni Collieries Company Limited and Anr.;* (2010) 10 SCC 650
2. *Ram Sharma* vs. *State of Haryana;* (1997) 4 SCC 473

3. *Babua Ram* vs. *State of UP;* (1995) 2 SCC 689.

4. *UOI & Anr.* vs. *Pradeep Kumari & Ors.;* (1995) 2 SCC 736.

RESULT: Dismissed.

SANJAY KISHAN KAUL, J. (ORAL)

CM No.7523/2011

Allowed subject to just exceptions.

+ WP (C) No.3595/2011

1. The petitioner seeks to raise a legal plea that he is entitled to maintain an application for enhanced compensation under Section 28-A of the Land Acquisition Act, 1894 ('the said Act' for short) even though filed admittedly beyond three (3) months of the date of the award on the ground that it was filed within three months of the date of the knowledge of the award. In substance the plea is that it is the date of knowledge of the petitioner which is material for purposes of filing an application under Section 28-A of the said Act to claim parity in respect of compensation qua persons who had sought and obtained enhanced compensation.

2. The factual matrix is limited. The petitioner was owner of the land in question, which was situated in Village Dhaka. The land was sought to be acquired by issuance of a notification u/Section 4 of the said Act on 13.11.1959, which was followed by a declaration dated 22.11.1962 issued under Section 6 of the said Act. An award no.1557, in this regard, was passed on 30.03.1963. The petitioner never preferred a reference for enhancement of compensation. Other aggrieved land owners from the same village and in respect of the same award, sought a reference. These persons are stated to have succeeded ultimately in a decision rendered by this Court in RFA No.23/1970 vide order dated 24.04.1987. This fact is stated not to be within the knowledge of the petitioner till 26.06.2008, when he applied for a certified copy and obtained the same on 04.07.2008. The petitioner thereafter filed applications under Section 28-A of the said Act on 10.07.2008 and 12.08.2008. The aforesaid applications were not entertained. The last communication in this behalf (which is the impugned communication) is dated 13.01.2010. The impugned communication/order

reads as under:

> " With reference to your applications dated 10.07.2008 and 12.08.2008 on the subject mentioned above. In this regard, I am to inform you that your applications have been dismissed on the ground that the judgment of ADJ and Hon'ble High Court on the basis of which you have sought the compensation u/s 28-A of LA Act were passed on 15.02.08, 24.07.87 and 14.02.02 respectively and you have filed applications on 10.07.08 and 12.08.08 after a considerable gap of time as prescribed in LA Act."

3. The petitioner being aggrieved has filed the present writ petition under Article 226 of the Constitution of India.

4. An aggrieved party is entitled to seek a reference inter alia in respect of the quantum of compensation under Section 18 of the said Act.

5. Section 28-A of the said Act was introduced with effect from 24.09.1984 to give benefit of an award which may have been made in respect of a decision made in a reference where other land owners from the same village and in respect of the same award had sought such a reference and succeeded. The objective was to give parity. The said Section reads as under:

> **"28-A. Re-determination of the amount of compensation on the basis of the award of the Court.-** (1) where in an award under this part, the court allows to the applicant any amount of compensation in excess of the amount awarded by the collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the court:

Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded. (2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.

(3) Any person who has not accepted ˇthe award under sub-section (2) may, by written application to the Collector, required that the matter be referred by the Collector for the determination of the Court and the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18."

6. A reading of the aforesaid Section thus provides that in order to avail of the benefit of Section 28-A of the said Act, an application has to be made within three months of the date of the award. The proviso stipulates that the time to be excluded for making such an application is only the time spent in obtaining a copy of the award.

7. The aforesaid provision was interpreted even more beneficially in a judgment of the Supreme Court in **UOI & Anr. v. Pradeep Kumari & Ors.;** (1995) 2 SCC 736. The legal position propounded is that where more than one award is made by the Court, an applicant under Section 28-A of the said Act can avail of the benefit by taking last award into consideration and moving an application within the time stipulated from such last award. In arriving at this conclusion, the beneficial nature of legislation has been taken into consideration as set out in para 8 of the said judgment, which reads as under:

"8. We may, at the outset, state that having regard to the Statement of Objects and Reasons, referred to earlier, the object underlying the enactment of Section 28-A is to remove inequality in the payment of compensation for same or similar quality of land arising on account of inarticulate and poor people not being able to take advantage of the right of reference to the civil court under Section 18 of the Act. This is sought to be achieved by

providing an opportunity to all aggrieved parties whose land is covered by the same notification to seek redetermination once any of them has obtained orders for payment of higher compensation from the reference court under Section 18 of the Act. Section 28-A is, therefore, in the nature of a beneficent provision intended to remove inequality and to give relief to the inarticulate and poor people who are not able to take advantage of right of reference to the civil court under Section 18 of the Act. In relation to beneficent legislation, the law is well-settled that while construing the provisions of such a legislation the court should adopt a construction which advances the policy of the legislation to extend the benefit rather than a construction which has the effect of curtailing the benefit conferred by it. The provisions of Section 28-A should, therefore, be construed keeping in view the object underlying the said provision."

8. Learned counsel for the petitioner submits that the aforesaid observations should result in even more beneficial interpretation and thus the date of knowledge should be taken into account as is often done in respect of different provisions while calculating limitation. Learned counsel has also relied upon the observations made by the Supreme Court in a more recent judgment in **V. Ramakrishna Rao v. Singareni Collieries Company Limited and Anr.;** (2010) 10 SCC 650 where mere pendency of the application was held not to deny the legitimate rights to seek enhancement of compensation.

9. Learned counsel for the LAC, on the other hand, submits that the effect of the provisions cannot go beyond what the legislature has stipulated, and that the proviso to Section 28-A of the said Act itself makes it clear how the period of limitation is to be calculated for purposes of making an application under Section 28-A of the said Act. Thus, no other period is to be excluded from the time stipulated of three months than what is specifically stated in the proviso.

10. Another aspect which has been raised by learned counsel for LAC is that the petitioner seeks to rely upon the judgment of the High Court for making the application under Section 28-A of the said Act while the benefit is to be made available only on the basis of an award rendered. Learned counsel states that in case a reference court gives

enhanced compensation and the beneficiaries are aggrieved further, they may prefer an appeal, but the application to be filed by other land owners seeking to avail of benefit of Section 28-A of the said Act has to be within a period of three months from the date of the award passed by the civil court and such an application is to be kept pending till the final conclusion of the matter. This is so in view of the judgment of the Supreme Court in **Babua Ram v. State of UP;** (1995) 2 SCC 689.

11. Learned counsel has also drawn our attention to a subsequent judgment of the Supreme Court in Bhagti (Smt.) (deceased) through her LR Jagdish **Ram Sharma v. State of Haryana;** (1997) 4 SCC 473 which has referred to the judgment in **Babua Ram v. State of UP's** case (supra). It has been held that Section 28-A of the said Act does not apply in case of an order made by the High Court and the claimant can seek re-determination of compensation only on the basis of an award of the reference court and not the judgment of the High Court.

12. We find that in view of the aforesaid legal principles set out, the Supreme Court itself has answered all the issues which are now sought to be raised by the petitioner. No doubt, Section 28-A of the said Act has been construed as a beneficial legislation, but to what extent such a benefit has to be granted, has been discussed in **UOI & Anr. v. Pradeep Kumari & Ors.'s case** (supra). The Supreme Court has gone thus far and not further. In view of the relevant provision having been fully interpreted, in our considered view, it is not open to this Court to extend the contours of the beneficial legislation any further specifically in view of the mode and manner in which the legislature in its wisdom has enacted the said provision. The decision in Bhagti (Smt.) (deceased) through her **LR Jagdish Ram Sharma v. State of Haryana's** case (supra) also stands in the way of the petitioner as the very premise on which the petitioner seeks to contend his case, is that, the relevant date is the date of decision of the High Court, which is not so, as the relevant date would be the date of decision of the reference court. Since the appeal is of the year 1970, the reference court's decision would be at least of 1970 or earlier.

13. Learned counsel for the petitioner at this stage has also sought to raise the issue of the petitioner being the only son of the original land owner and thus pleads that the date of knowledge would be, according

to him, when he acquired knowledge of the decision of the High Court.

14. In our considered view, this is a self-defeating argument for the reason that the petitioner only steps into the shoes of his father, who is stated to be the original land owner and the original land owner never took steps in accordance with law to seek parity of compensation and thus the petitioner cannot be better off than the original land owner. The judgment in **UOI & Anr. v. Pradeep Kumari & Ors.'s** case (supra) makes it absolutely clear that the limitation for moving an application under Section 28-A of the said Act will begin to run only from the date of the award on the basis of which re-determination of compensation is sought which in turn would imply that the date of knowledge is immaterial. Para 11 of the said judgment reads as under:

> "11. Since the cause of action for moving the application for redetermination of compensation under Section 28-A arises from the award on the basis of which redetermination of compensation is sought, the principle that "once the limitation begins to run, it runs in its full course until its running is interdicted by an order of the court" can have no application because the limitation for moving the application under Section 28-A will begin to run only form the date of the award on the basis of which ˇredetermination of compensation is sought."
>
> (emphasis is ours)

15. We may note that the judgment in **UOI & Anr. v. Pradeep Kumari & Ors.'s** case (supra) over-ruled the judgment in **Babua Ram v. State of UP's** case (supra) only to the limited aspect of conferring the benefit of limitation to the claimant on the basis of the first award as against the last award.

16. In the writ petition, the petitioner has also made a reference to one of the orders passed on 15.02.2008 and claims that the application filed in July, 2008 is just after 8 months {ground (v) of the writ petition}. However, no copy of this order dated 15.02.2008 has been annexed to the writ petition nor there is a reference of such an order in the application filed under Section 28-A of the said Act annexed as Annexure P-1 to the writ petition. We are thus unawareas to what is the nature of this order. Be that as it may, even if this order is taken into account, the application is way beyond the period of three months.

17. In view of the aforesaid settled legal position, we find no merit in the writ petition.

18. Dismissed.

ILR (2011) IV DELHI 373
CRL. REV. P.

CHANDNI SHARMA ....PETITIONER

VERSUS

GOPAL DUTT SHARMA ....RESPONDENT

(HIMA KOHLI, J.)

CRL. REV. P. NO. : 767/2010 DATE OF DECISION: 26.05.2011

Code of Criminal Procedure, 1973—Section 125, 397, 401 and 482—Petitioner's mother married with respondent on 03.12.1988—Petitioner was born on 22.08.1989—Respondent denied the marriage and paternity—He married with another lady—Petitioner being minor filed petition for maintenance through her mother, natural guardian—Magistrate directed the respondent to pay her a sum of Rs. 1,000/- p.m from 24.09.2011 to 31.03.2005 and a sum of Rs. 1,500/- p.m from 01.04.2005 to 22.08.2007, as maintenance—Petition—Held—No set formula can be laid down for fixing the amount of maintenance payable and the calculation of the same would always depend upon the facts and circumstances of each case—In the facts of the present case, the methodology adopted in the cases of *Annurita Vohra v. Sandeep Vohra* report as 110 (2004) DLT 546 and *S.S. Bindra v. Tarvinder Kaur* reported as 112 (2004) DLT 813 has been found to be a useful tool to determine the monthly salary of the

respondent, in order to calculate maintenance payable to the petitioner—In the aforesaid cases, after taking into account the compulsory deductions from the salary, the remaining income was divided equally by the Court between all the family members entitled to maintenance, with one extra portion/share being allotted to the earning spouse solely for the extra expenses that would necessarily occur—In the present case, other than the petitioner and the respondent himself, there are three dependents entitled to maintenance, i.e. petitioner's wife and two children—Therefore, no extra portion needs to be allotted to the respondent as all extra expenses can be accommodated in the separate allotments made to the three dependents and the respondent himself—As a result, the net monthly salary of the respondent for the relevant years, would be liable to be divided in five equal portions, with one-fifth part of the salary going to the share of the petitioner towards maintenance.

As observed in the decision of the Supreme Court in the case of **Jasbir Kaur Sehgal v. District Judge, Dehradun & Ors.** reported as (1997)7 SCC 7, it is settled law that no set formula can be laid down for fixing the amount of maintenance payable and the calculation of the same would always depend upon the facts and circumstances of each case. In the facts of the present case, the methodology adopted in the cases of **Annurita Vohra v. Sandeep Vohra** reported as 110(2004) DLT 546 and **S.S. Bindra v. Tarvinder Kaur** reported as 112(2004) DLT 813 has been found to be a useful tool to determine the monthly salary of the respondent, in order to calculate maintenance payable to the petitioner. In the aforesaid cases, after taking into account the compulsory deductions from the salary, the remaining income was divided equally by the court between all the family members entitled to maintenance, with one extra portion/share being allotted to the earning spouse

solely for the extra expenses that would necessarily occur. In the present case, other than the petitioner and the respondent himself, there are three dependants entitled to maintenance, i.e. petitioner's wife and two children. Therefore, no extra portion needs to be allotted to the respondent as all extra expenses can be accommodated in the separate allotments made to the three dependants and the respondent himself. As a result, the net monthly salary of the respondent for the relevant years, would be liable to be divided in five equal portions, with one-fifth part of the salary going to the share of the petitioner towards maintenance. **(Para 17)**

Important Issue Involved: For calculating maintenance, after taking into consideration the compulsory reduction from the salary, remaining income be divided equally between all the family members entitled to maintenance and one extra share be alloted to the earning spouse.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Ms. G.A. Arife, mother of the petitioner in person.

FOR THE RESPONDENT : Ms. Gita Dhingra and Mr. M.G. Dhingra, Advocates.

CASES REFERRED TO:

1. *Southern Sales & Services* vs. *Sauermilch Design & Handels GMBH* reported as (2008) 14 SCC 457.
2. *Ashish Aggarwal* vs. *BSES Rajdhani Power Ltd.* in Crl. Rev. P No. 513/2007.
3. *Annurita Vohra* vs. *Sandeep Vohra* reported as 110(2004) DLT 546.
4. *S.S. Bindra* vs. *Tarvinder Kaur* reported as 112(2004) DLT 813.
5. *T.N. Dhakkal* vs. *James Basnett* reported as (2001) 10 SCC 419.

6. *Jasbir Kaur Sehgal* vs. *District Judge, Dehradun & Ors.* reported as (1997)7 SCC 7.
7. *Kirtikant D. Vadodaria* vs. *State of Gujarat* reported as (1996) 4 SCC 479.
8. *Harish Cander & Anr.* vs. *Santosh Kumari & Ors.* reported as 1(1985) DMC 355.

RESULT: Petition allowed.

HIMA KOHLI, J.

1. The present revision petition is filed by the petitioner, through her mother who is her natural guardian, under Sections 397/401 read with Section 482 of the Cr.PC praying inter alia for revising the order dated 13.02.2009, passed by the learned Metropolitan Magistrate directing the respondent herein, father of the petitioner, to pay her a sum of Rs.1,000/- p.m. from 24.9.2001 to 31.3.2005 and a sum of Rs.1,500/- p.m. from 1.4.2005 to 22.8.2007, as maintenance.

2. The brief relevant facts of this case are that the petitioner's mother had alleged that she had got married to the respondent on 3.12.1988, and from this union, the petitioner was born 22.8.1989. However, the fact of the marriage was denied by the respondent, who subsequently got married to another lady. The respondent further denied being the father of the petitioner. Since the petitioner was a minor, hence a petition for maintenance under Section 125 Cr.PC was filed on her behalf by her mother and natural guardian, Ms. G.A. Arife. By the impugned order dated 13.2.2009, the said petition was disposed of by the learned MM, in the aforementioned manner.

3. It is mentioned in the impugned order that by an earlier order dated 5.5.1993 passed by the learned MM, the petitioner was awarded interim maintenance at the rate of Rs.300/- p.m. Later on, the matter came up before the High Court and as the respondent disputed being the father of the petitioner, he was directed to undergo a DNA test, to determine the paternity of the petitioner, which test confirmed the fact that the respondent was the father of the petitioner. In the aforesaid case registered as Crl.MM no. 3029/1993, the High Court vide order dated 29.4.2003 awarded to the petitioner, interim maintenance at the rate of Rs.500/- p.m. The difference of Rs.200/- per month was paid by the

respondent in three installments. Till 24.9.2001, the highest amount of maintenance that could have been awarded under the statute was Rs.500/-. The said provision came to be amended w.e.f 24.9.2001, as a result of which, the monetary limit placed on the amount of maintenance that could be awarded, was removed. The petitioner filed an application for enhancement of maintenance on 8.12.2003. In the impugned order, the learned MM observed that since the petitioner had attained majority on 22.8.2007, hence the period for which maintenance was required to be determined in the petition was for the period from 24.9.2001 till 22.8.2007. The same period concerns this court for determination of maintenance, in the event an enhanced sum is found to be due and payable to the petitioner. The learned MM also observed that the respondent had not disputed the report of the DNA test for the purposes of the petition by the petitioner filed seeking maintenance. On the basis of the materials placed on record and the testimonies of the petitioner's mother and the respondent, maintenance was granted to the petitioner at the rate of Rs.1,000/- p.m. from 24.9.2001 to 31.3.2005 and at the rate of Rs.1,500/- p.m. from 1.4.2005 to 22.8.2007, while directing that the interim maintenance already paid to her be deducted from the amount so awarded.

4. The petitioner, appearing through her mother, Mrs. G.A. Arife has challenged the impugned order on the limited point of quantum of maintenance granted to her and has sought an enhancement thereof. In the course of arguments, the mother of the petitioner further expressed that she did not wish to press the relief, with regard to the non-disposal of an application filed by the petitioner before the court below, for action to be taken against the respondent under Sections 174 and 193 IPC, which submission was duly recorded in the order of this court dated 15.2.2011. Ms. Arife had also brought to the notice of this court the order of the Supreme Court dated 13.12.2010, requesting that the present revision petition be disposed of on or before 31.01.2011. As the petition came to be listed before this court only two days before 31.1.2011, i.e. on 28.1.2011, that date could not be met. However, the matter has been heard and disposed of with reasonable despatch.

5. The argument advanced on behalf of the petitioner was that the respondent had failed to disclose his correct income before the learned MM and consequently, the maintenance that was granted under the impugned order was erroneous and inadequate. It was further urged that

the maintenance granted was not proportionate to the actual monthly income earned by the respondent during the relevant time period. It was also stated that the income that was disclosed by the respondent was after deductions had been made from it towards income tax, home and car loans, provident fund, etc., which was not permissible. It was contended that since these did not qualify as statutory deductions, they should not have been permitted to be deducted from the income of the respondent, for the purposes of calculating the maintenance payable to the petitioner.

6. On the other hand, the counsel for the respondent refuted the arguments advanced on behalf of the petitioner, and laid much stress on the fact that the respondent had, on his part, disclosed his correct income before the learned MM, who had taken into consideration the deductions and granted maintenance accordingly, hence the amount awarded should not be enhanced. Counsel for the respondent further challenged the maintainability of the revision petition on the grounds inter alia that the scope of a revision petition is limited and also that the revision petition was filed with a delay of 425 days, with no explanation for the same forthcoming from the petitioner. She relied upon a decision in the case of **Ashish Aggarwal v. BSES Rajdhani Power Ltd.** in Crl. Rev. P No. 513/2007 decided on 20.8.2007, to urge that where the petition is filed with a delay, each day's delay would have to be explained, for the same to be condoned. The locus standi of the mother of the petitioner to file the revision petition on behalf of the petitioner was also questioned and it was asserted that as the petitioner has attained majority, it was for her to file such a petition in her own right.

7. This court has heard both the petitioner's mother and the counsel for the respondent. At the outset, the question of maintainability of the revision petition is required to be dealt with. The argument urged on behalf of the respondent that the mother of the petitioner could not have appeared on behalf of the petitioner, who is now a major, in the absence of a power of attorney executed in her favour, does not find favour with this court as it is to be noticed that the interests of Ms. Arife, the mother and natural guardian of the petitioner, are not antithetical to her interests. In fact the mother has not sought any maintenance from the respondent for herself and her sole interest lies in getting maintenance for the wellbeing of the petitioner. Further, records reveal that the maintenance petition

was being contested by the mother of the petitioner in the court below, even after the petitioner had attained majority and a perusal of the order dated 13.12.2010 passed by the Supreme Court, shows that in the said proceedings also the petitioner was being represented by her mother, and she was permitted to do so. In light of the facts and circumstances of this case, the argument advanced, on behalf of the respondent regarding locus standi of the mother of the petitioner, cannot be accepted and is turned down.

8. Insofar as the maintainability of the present petition, filed with a delay of 425 days, without any specific explanation offered in the application for condonation of delay is concerned, a pointed query was directed towards the petitioner's mother regarding the explanation for the delay in filing of the petition. Ms. Arife explained that delay occurred in filing due to the protracted litigation between her and the respondent in the divorce proceedings initiated by her, under the Hindu Marriage Act. She stated that the petitions filed by her, for seeking divorce and permanent alimony respectively, were rejected by the learned ADJ vide order dated 9.4.2010. The two matrimonial appeals filed by her in the High Court also came to be dismissed, vide a common order dated 13.08.2010. She submitted that the SLP preferred by her to the Supreme Court, was dismissed on 13.12.2010. Ms. Arife further stated that she had been personally pursuing the aforesaid cases, as she could not afford to engage a counsel, therefore she was able to file the present petition only on 8.12.2010. Keeping in mind the fact that the mother of petitioner has been appearing in all proceedings in person, without engaging the services of a counsel, this court considers the explanation, offered for the delay, just and sufficient and in exercise of its inherent powers, deems it appropriate to condone the delay of 425 days, as prayed for, thus deciding the question of maintainability of the petition, on the ground of limitation, in favour of the petitioner.

9. Counsel for the respondent also challenged the very basis of the maintenance being granted to the petitioner, by stating that the purpose of granting maintenance is to prevent vagrancy and destitution of the dependant. She canvassed that at the present time, the petitioner, who is now a major and has pursued her studies in engineering, is quite capable of supporting herself and is no longer in a state of vagrancy or destitution to claim any maintenance . This argument of the counsel for the respondent

is found to be untenable and cannot be accepted as the respondent being the father of the petitioner cannot be permitted to shirk his responsibility towards her, merely because her mother somehow managed to eke out the resources to support the petitioner's education. Further, the decision of the Supreme Court in the case of **Kirtikant D. Vadodaria v. State of Gujarat** reported as (1996) 4 SCC 479 and of this court in the case **Harish Cander & Anr. v. Santosh Kumari & Ors.** reported as 1(1985) DMC 355, relied on by the counsel for the respondent, cannot come to the aid of the respondent as these judgments do not lay down a mandatory negative prescription, i.e., where destitution or vagrancy is not shown, maintenance cannot be granted. Rather, based on the facts and circumstances of a case, where existence of destitution or vagrancy would be a dominant factor for consideration, maintenance can be granted.

10. Furthermore, the fact that the petitioner attained majority, while maintenance proceedings were pending, cannot prejudice her rights qua the respondent, as the application for enhancement of maintenance was filed by her mother as early as on 8.12.2003 when the petitioner was still a minor, and the order of the learned MM dated 13.02.2009 was subsequent to the petitioner attaining majority on 22.08.2007. It is also significant to note that there are decisions of the Supreme Court, where maintenance has been awarded to unmarried daughters till the date of their marriage, even after their having attained majority. Without going into the question of entitlement of the petitioner to any future maintenance subsequent to the attainment of majority, the scope of the present petition is confined to the period, before the petitioner attained majority. This court is, therefore, firmly of the opinion that nothing would turn on the factum of the petitioner attaining majority during the pendency of the present proceedings, so as to ˇdisentitle her from claiming an enhanced maintenance from the respondent.

11. Counsel for the respondent also contended that the learned MM had erroneously directed the respondent to pay maintenance to the petitioner from the date of the amendment made in Section 125 of the Criminal Procedure Code, 1973 i.e. from 24.9.2001, by taking into consideration the fact that the original application for maintenance was filed prior to the amendment, and hence maintenance beyond the statutory limit of Rs.500/- would be paid from the date of the amendment. She urged that such a view would be incorrect as the relevant date was 8.12.2003, on which

date an application for enhancement of maintenance was filed by the petitioner, and it would be this date from which the respondent would be required to pay maintenance, and not prior thereto, as awarded in the impugned order. At the outset, it may be noted that such an argument would not lie in the mouth of the respondent, as it is not he who has come in revision to this court against the impugned order, but the petitioner, who has filed the present petition. If the respondent was aggrieved by the impugned order, he had a legal remedy available to him, which he has failed to avail of, and furthermore, he has complied with the impugned order by paying to the petitioner, the maintenance for the periods as fixed by the learned MM, thus clearly accepting the said order, and waiving his right to contest the same.

12. Furthermore, not only on the point of lack of locus of the respondent, but also on merits, the aforesaid argument is found to be devoid of merits. A perusal of Section 125(2) of Cr.PC shows that the provision envisages that maintenance would be paid either from the date of application or from the date of the order, if so ordered. It has to be seen that the date of institution of the maintenance proceedings before the learned MM was 28.9.1990, and the said matter was still pending and had yet not been finally adjudicated upon, when the provision was amended. Had the application for enhancement been filed subsequent to the final order on the maintenance petition but before the amendment had taken place, then the argument of the counsel for the respondent could perhaps have cut some ice. But in the facts of the present case, no benefit can be claimed on this count by the respondent.

13. The final argument advanced by the counsel for the respondent was that the scope of a revision petition preferred under the Cr.PC is very limited and unless a palpable illegality or irregularity or perversity can be demonstrated on the face of the record, this court should not interfere with the order of the court below. It was vehemently argued that that no such illegality or irregularity or perversity has been shown by the petitioner in the impugned judgment to deserve interference. In support of her submission, learned counsel for the respondent relied on a decision of the Supreme Court in the case of **Southern Sales & Services v. Sauermilch Design & Handels GMBH** reported as (2008) 14 SCC 457.

14. There is no gainsaying the fact that the scope of revisionary

power of this court is indeed limited and should be exercised with restraint. However, it has also been held by the Supreme Court in the case of **T.N. Dhakkal v. James Basnett** reported as (2001) 10 SCC 419, that such a power is discretionary in nature and is to be exercised to correct miscarriage of justice and further, whether or not, there is justification for the exercising such power, would depend upon the facts and circumstances of each case. In the present case, it is quite clear that the calculation of the income of the respondent, for the purposes of determination of maintenance payable to the petitioner, was done erroneously by excluding all deductions, both statutory and voluntary in nature. It is to correct this material irregularity that this court proposes to exercise its powers of revision to enhance the maintenance granted to the petitioner, on the basis of the correct income of the respondent, for the relevant period.

15. Coming to the merits of the case, the mother of the petitioner has sought interference in the impugned order, for enhancement of the quantum of maintenance, on the ground that the respondent misled the learned MM into excluding all deductions, both voluntary and statutory, from his income, and due to this error, the maintenance granted in the impugned order was not proportionate to the real income of the respondent. She argued that only those deductions that are statutory in nature could have been excluded from the income of the respondent such as income tax, and not the voluntary deductions such as monthly installments towards the house and car loans or the provident fund, as the respondent would eventually benefit from such deductions. This court is inclined to accept the petitioner's argument that in calculating the net income of the respondent, while the deductions towards income tax being statutory deductions can be excluded, however voluntary deductions such as house building allowance cannot be excluded. Furthermore, it has to be seen that the voluntary deductions are of such a nature which would eventually benefit the respondent and his family. There is no good reason as to why the petitioner should be prejudiced in this regard, at the stage of determination of maintenance, just because she does not happen to be a part of the respondent's family. Based on such reasoning, vide order dated 21.2.2011, this court had calculated the net income of the respondent for the month of December 2002 to be Rs.13,300/- (as the gross monthly income of the respondent was admittedly Rs.24,470/- excluding income tax of Rs.7,869/- while retaining the component of house building

allowance), and not Rs.5,614 as erroneously calculated in the impugned order. In the light of the above, the submission made on behalf of the petitioner for enhancement of the maintenance fixed in the impugned order, is accepted and it is held that the same is liable to be revised.

16. For the purposes of calculating the maintenance payable to the petitioner, accurate figures of the respondent's monthly income and deductions were required. In the month of February 2011, the respondent retired from his service as the Principal Director, Integrated Headquarters, Ministry of Defence (Navy). As the figures of his monthly income furnished by the respondent himself for the relevant period were found to be somewhat ambiguous and incoherent, the Deputy Director (Claims), Naval Headquarters, Ministry of Defence, the former employer of the respondent, was summoned and called upon to furnish a summary of the pay and allowances of the respondent for the relevant period. The statement so furnished, with an advance copy to both sides, was taken on record on 4.4.2011.

17. As observed in the decision of the Supreme Court in the case of **Jasbir Kaur Sehgal v. District Judge, Dehradun & Ors.** reported as (1997)7 SCC 7, it is settled law that no set formula can be laid down for fixing the amount of maintenance payable and the calculation of the same would always depend upon the facts and circumstances of each case. In the facts of the present case, the methodology adopted in the cases of **Annurita Vohra v. Sandeep Vohra** reported as 110(2004) DLT 546 and **S.S. Bindra v. Tarvinder Kaur** reported as 112(2004) DLT 813 has been found to be a useful tool to determine the monthly salary of the respondent, in order to calculate maintenance payable to the petitioner. In the aforesaid cases, after taking into account the compulsory deductions from the salary, the remaining income was divided equally by the court between all the family members entitled to maintenance, with one extra portion/share being allotted to the earning spouse solely for the extra expenses that would necessarily occur. In the present case, other than the petitioner and the respondent himself, there are three dependants entitled to maintenance, i.e. petitioner's wife and two children. Therefore, no extra portion needs to be allotted to the respondent as all extra expenses can be accommodated in the separate allotments made to the three dependants and the respondent himself. As a result, the net monthly salary of the respondent for the relevant years, would be liable to be

divided in five equal portions, with one-fifth part of the salary going to the share of the petitioner towards maintenance.

18. As per the salary statement of the respondent furnished by his employer, the following amounts are found to be payable to the petitioner towards maintenance for the relevant blocks of time period, arrived at on the basis of the upward revision of the emoluments received by the respondent from time to time:-

S. No.	Blocks of time period		No. of Months in the block (a)	Monthly Salary less Income Tax deducted (b) (Rs.)	Salary for the block less income tax deducted (c) = a X b (Rs)	Maintenance to petitioner for the block (d) = 1/5th of c (Rs.)
1.	24.9.2001	31.12.2002	15	19,560	2,93,400	58,680
2.	1.1.2003	28.2.2003	2	19,560	39,120	7,824
3.	1.3.2003	29.2.2004	12	22,461	2,69,536	53,907
4.	1.3.2004	28.2.2005	12	24,106	2,89,266	57,853
5.	1.3.2005	28.2.2006	12	30,116	3,61,389	72,278
6.	1.3.2006	28.2.2007	12	37,973	4,55,673	91,135
7.	1.3.2007	22.8.2007	6	40,615	2,43,688	48,738
	TOTAL					3,90,415

19. The aforesaid revised amount as calculated would be payable by the respondent to the petitioner as maintenance, after deducting the maintenance amount already received by the petitioner from the respondent in compliance with the impugned order. The said amount shall be paid by the respondent to the petitioner within six weeks from today. Failure to pay the maintenance, as calculated above, shall attract simple interest at the rate of 10% p.a. The revision petition is allowed and the impugned order is modified as indicated above, with costs quantified at Rs.5,000/-.

ILR (2011) IV DELHI 385
ITR

SHANTI BHUSHAN ....APPELLANT

VERSUS

COMMISSIONER OF INCOME TAX ....RESPONDENT

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

ITR NO. : 230/1994 DATE OF DECISION: 31.05.2011

Income Tax Act, 1961—Section 31 Section 37—Reference under Section 256(2) of the Act—Whether the expenses incurred by assessee on coronary bypass surgery should be allowed as allowable deduction either under Section 31 or under Section 37 of the Act—Assessee/Petitioner claimed deduction of Rs. 1,74,000/- incurred by him on coronary bypass, carried out in USA as expenditure incurred on current repair of plant—Assessing Officer rejected claim of petitioner—In appeal, Commissioner, Income Tax affirmed the view of Assessing Officer—In further appeal, the Tribunal also upheld the order of CIT(A)—Held, petitioner's claim for allowing deduction of the expenses incurred on his coronary surgery is not tenable.

In our view, deduction under section 31 of the IT Act would not be available for two reasons: firstly, if the heart of a human being, as in the case of the assessee, were to be considered a plant, it would necessarily mean that it is an asset which should have found a mention in the assessee's balance sheet of the previous year in issue, as also, in the earlier years. Apart from the fact that this is admittedly not so, the difficulty that the assessee would face in showing the same in his books of accounts would be of arriving at the cost of acquisition of such an asset. Therefore, in our view

before expenses on repair of plant are admitted as a deduction, the plant would necessarily have to be reflected as an asset in the books of accounts. **(Para 21.1)**

As observed hereinabove, an impaired heart would handicap functionality of a human being irrespective of his position, status or vocation in life. Expenses incurred to repair an impaired heart would thus add perhaps to the longevity and efficiency of a human being per se. The improvement in the efficiency of the human being would be in every activity undertaken by a person. There is thus no direct or immediate nexus between the expenses incurred by the assessee on the coronary surgery and his efficiency in the professional field per se. Therefore, to claim a deduction on account of expenses incurred by the assessee on his coronary surgery under section 37(1) of the IT Act would have to be rejected. There is, as a matter of fact, no evidence brought on record, which would suggest that the assessee could have continued in the same state without the medical procedure undertaken by him. On this aspect, the best example which comes to mind, which perhaps, in a given case could be considered as an expense amenable under section 37 of the IT Act would be that of an actor undertaking plastic surgery to prevent age being reflected on screen. It could be argued in the case of an actor that he could have existed in the state he was without having gone under the knife of a plastic surgeon. Such are not the facts in the instant case. **(Para 22.2)**

Important Issue Involved: The expenses incurred by assessee on coronary bypass surgery cannot be allowed as allowable deduction either under Section 31 of under Section 37 of the Income Tax Act.

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. S.K. Pathak.

FOR THE RESPONDENT : Ms. Rashmi Chopra.

CASES REFERRED TO:

1. *Scientific Engineering House Pvt. Ltd.* vs. *CIT* (1987) 166 ITR 66.
2. *Commissioner of Income Tax Gujarat* vs. *Elecon Engineering Co. Ltd.* 1987 166 ITR page 66.
3. *Scientific Engineering House P Ltd.* vs. *CIT* (1986) 157 ITR 86.
4. *Waterfall Estates Ltd.* vs. *CIT,467/468,* (1981) 131 ITR 223 Madras (at page 227).
5. *Mehboob Productions Pvt. Ltd.* vs. *CIT,* (1977) 106 ITR 758 Bombay (at page 766/767).
6. *CIT* vs. *Elecon Engineering Co. Ltd.* (1974) 96 ITR 672 (Guj.).
7. *CIT* vs. *Elecon Engineering* at 652 and 658, (1974) 96 ITR 672 (Gujrat).
8. *C.I.T.* vs. *Taj Mahal Hotel :* [1971] 82 ITR 44(SC).
9. *Hinton* vs. *Maden & Ireland Ltd.,* (1960) 39 I.T.R. 357 (HL).
10. *TATA Sons Ltd.* vs. *CIT* (1950) 18 ITR 460.
11. *Norman* vs. *Golder (Inspector of Taxes)* (1945)13 ITR 21.
12. *Knives and Hinton* vs. *Maden and Iyerland Ltd.* 39 ITR 357.
13. *Mehboob Production Pvt. Ltd.* vs. *Commissioner of Income-Tax* 106 ITR 78.
14. *Yarmouth* vs. *France* XIX QB 647.

RESULT: Reference answered in Negative.

RAJIV SHAKDHER, J.

1. This is a reference made to this court under Section 256(2) of the Income Tax Act, 1961 (hereinafter referred to as 'I.T. Act') against the judgment dated 19.05.1994 passed by the Income Tax Appellate

Tribunal (hereinafter referred to as 'Tribunal'). Accordingly, a statement of case was drawn up and the following ˇquestion of law was referred, pursuant to order dated 08.09.1994 passed by this court :-

> "whether, on all facts and circumstances of the case, the expenses incurred by the assessee on coronary by-pass operation should have been allowed as a allowable deduction either under Section 31 or Section 37 of the I. T. Act, 1961?"

2. As is apparent from the questions of law extracted hereinabove by us, the issue raised in the captioned reference is both ingenious and novel. The question raised is the product of experience, deftness and obvious artfulness of the petitioner who is a seasoned, experienced and an eminent Advocate of the country.

3. What is at the heart of the matter, as a matter of fact, is the heart itself. When one speaks of heart it brings forth imagery of myriad emotions. Emotions which encompass, often varied passions, of soulful love, abominable deceit, unremitting treachery and revenge. No two individuals deal with matters of heart similarly; often confounded, as to how to deal with it – which is why a famous lyricists expounds on this very peculiar quandary thus: *DIL-E-NADAN TUJHE HUA KYA HAI AKHIR ESS DARD KE DAWA KYA HAI.* (Here heart is personified. It is asked of it what ails it? What is the remedy for the malady).

3.1 But then here we are concerned with the nuts and bolts of what most would consider straight forward application of the provisions of the IT Act. Therefore, before one gets into the legal nitty gritty, a brief mention of the facts would be useful :

4. In the year in issue i.e., assessment 1983-84, the assessee had filed a return declaring a total income of Rs 2,15,520/-. This return was filed on 25.06.1983. The assessee, however, revised his return on 04.09.1985. In the revised return, the assessee scaled down his income to Rs.2,14,050/-.

5. During the course of the assessment, the revenue noticed that the assessee had claimed as expense a sum of Rs. 1,74,000/- incurred evidently by him, on coronary surgery performed on him, in Houston in USA. He claimed waiver under Section 31 of the I.T. Act which, inter-alia permits deduction of expenditure incurred on current repairs of plant.

5.1 In other words, the assessee's stand was that the expenditure incurred by him on coronary surgery conducted on him, was akin to expenses incurred on current repairs of a plant. The assessee's stand thus is that a human heart is in the nature of a plant.

6. The Assessing Officer, however, was of the view that the expenditure in issue, was in the nature of a personal expense and hence, not allowable as deduction either under Section 31, or even, under Section 37 of the I.T. Act. He, therefore, referred the case to Inspecting Assistant Commissioner (in short 'IAC') for directions under Section 144-A of the I.T. Act.

6.1 Before the IAC, the assessee was given an opportunity to present his case. The assessee put forth his submissions both orally as well as in writing.

6.2 In short, the assessee argued that the he suffered a heart attack in December, 1978, because of which he was advised against, undertaking strenuous physical activity, which included any hectic professional work requiring him to travel out of station. The assessee submitted that he agreed to undergo a bypass surgery on the advice of his doctors. It was thus argued that the repair of this vital organ i.e., the heart had directly impacted his professional competence. The assessee demonstrated this, by adverting to the rapid increase in his professional income in the period ensuing the surgery. Therefore, while in the assessment year 1982-83 his gross receipts were only to the tune of Rs 3.55 lakhs, after the bypass surgery, his gross receipts for the assessment years i.e., 1983-84, 1984-85 and 1985-86 increased to a figure of Rs. 5.1 lakhs, Rs 10.8 lakhs and Rs 12.15 lakhs respectively. According to the assessee such was the impact of this surgery that in the assessment year 1986-87, his gross professional receipts jumped substantially, to a figure of over Rs 20 lakhs.

7. The assessee submitted that the word "plant" defined under Section 43(3) of the I.T. Act, was wide and varied. According to the assessee, the definition being inclusive, took within its fold, things like ships, vehicles, books, scientific apparatus and surgical equipments used for the purposes of business or profession.

7.1 Therefore, on a parity of reasoning, the assessee argued, that

just like, for a professional musician, plant, would include musical instruments used by him in connection with his profession, and thus have a case to claim deduction in respect of expenses incurred on its repair or, even expenses incurred by a vocalist on repair of his vocal cords; a lawyer ought be allowed deduction of expenses incurred on repair of his heart under Section 31 of the I.T. Act. Similar examples were given of other situations such as a cricketer and a guitarist making use of their fingers and having to incur expenses in case they required repair.

7.2 Plethora of case law was also cited in this regard. Since almost identical case law has been cited before us, they are dealt with by us, in the later part of the judgment.

7.3 As indicated above, arguments in the alternative were also raised, to effect that: in case the expense incurred by the assessee was not allowable under Section 31, it surely fell within the domain of Section 37 of the IT Act.

7.4 Suffice it to say that the Assessing Officer rejected the claim made by the assessee under Section 31 as well as under Section 37(1) of the IT Act. The Assessing Officer was of the view that for the expenditure to be allowed as deduction under Section 37(1) of the IT Act it ought to fulfill three conditions: Firstly, the incurred expenditure could not be on capital account. Secondly, the expenditure should not be of a personal nature. And lastly, it should have been expended wholly and exclusively for the purposes of business or profession and was of a personal nature.

7.5 The Assessing Officer was of the view that expenditure did not fulfill the last two conditions, inasmuch as, it was not incurred wholly and exclusively for the purpose of business or profession and was of a personal nature.

7.6. According to the Assessing Officer it was the moral obligation of the assessee to keep himself physically and mentally fit, therefore, expenditure of such nature could only be categorized as personal in nature.

7.7 The assessee's reliance on the judgment of the Bombay High Court in the case of **Mehboob Production Pvt. Ltd. Vs. Commissioner**

of Income-Tax 106 ITR 78 was distinguished by the Assessing Officer, on the ground that in that particular case, the Director, who was the "driving force" in the company had travelled abroad. While he was abroad he suffered a heart attack. Therefore, the expenses incurred in providing him medical facilities had been allowed as an expense. The Assessing Officer was of the view that assessee's case was not pari materia with the facts obtaining in **Mehboob Production** (supra). The assessee being neither his own employee nor had he gone abroad for professional activity. The assessee, in the instant case had travelled abroad specifically for treatment. Therefore, on these two grounds, the Assessing Officer came to the conclusion that the expense was not allowable under Section 37(1) of the IT Act.

7.8 Insofar as the assessee's claim under Section 31 was concerned, the Assessing Officer came to the following conclusion:-

(i) to claim deduction on account of expenses incurred on repair of plant under Section 31, it should be relatable to an asset of the business or that of the profession. Therefore, if expenses on repair of plant had been incurred it would necessarily have to be disclosed in the books, before expenses incurred on it, could be claimed as a deduction under Section 31 of the I.T. Act. The plant, which is undoubtedly an asset would necessarily have to be shown on the asset side of the balance sheet, and if it is so shown in the balance sheet it would have to carry an acquisition cost. The Assessing Officer was of the view that such was not the case where a human body was involved. The Assessing Officer came to the conclusion based on the judgment in the case of **Norman Vs. Golder (Inspector of Taxes)** (1945)13 ITR 21 that a human body was not a plant. In this regard the judgments in the case of **Yarmouth Vs. France** 1887 **Knives and Hinton Vs. Maden and Iyerland Ltd.** 39 ITR 357, electrical fittings and other office applicances 71 ITR 587 etc. were distinguished.

7.9 The Assessing Officer thus, rejected the claim of the petitioner even under Section 31 of the IT Act.

8. Accordingly, expenses in issue were added to the assessee's income.

9. Aggrieved by the decision of the Assessing Officer, the matter was carried in appeal to the Commissioner of Income Tax (Appeals)

[hereinafter referred to as 'CIT(A)']. The CIT(A) while affirming the view of the Assessing Officer looked at it from another point of view, which is that if, the assessee's argument was to accepted that his heart should be treated as plant in terms of Section 31 of the I.T. Act, because his heart was used for the purposes of his professional work, it could logically be construed that a retired lawyer or a person who is not actively engaged in earning any income is not interested in the efficacious functioning of his heart. The CIT(A) was of the opinion that regardless of the earning capacity. Since, every individual was interested in the efficient working of his heart then, could it be said that a lawyer's heart was used, only, for the purpose of his profession. Based on this he sustained the Assessing Officer's opinion under Section 31 of the IT Act. Similarly, he also agreed with the Assessing Officer's the view taken by him as regards non-availability of deduction even under Section 37 of the IT Act.

10. Not being satisfied, the assessee carried the matter in appeal to the Tribunal. The Tribunal by virtue of the impugned judgment rejected the contention of allowability of expenses made by the assessee both under Section 31 and 37 of the IT Act. Insofar as Section 31 is concerned, the Tribunal relying upon the test as laid down by the Gujarat High Court in the case of **CIT Vs. Elecon Engineering Co. Ltd.** (1974) 96 ITR 672 (Guj.) came to the conclusion that for the expenses incurred on the repair of the plant to be allowed, the assessee would have to demonstrably show that the plant was used as a "tool" with which he carried out his business or professional activity. Applying the said test, the Tribunal came to the conclusion that the assessee could not have demonstrated that heart was used as a **"tool of his trade"** since the heart was even otherwise an organ, essential, for normal and healthy functioning of ˇa human body, and not necessarily for a professional, such as a lawyer.

10.1 The Tribunal, contrasted in this regard, the example cited by the assessee of a cricketer, guitarist and a vocalist. A cricketer or a guitarist may be able to claim, according to the Tribunal, expenses incurred on the repair of their fingers since they are used as a tool of their trade for furthering their professional activities. Similarly, a vocalist may be able to claim such like expenses incurred in repair of his vocal cord. This, however, was not the case of a lawyer claiming expenses incurred on repair of his heart.

10.2 The Tribunal applied the dicta laid down by the Court of Appeal in Norman Vs. Golder (Inspector of Taxes) that a tax payer's body could not be regarded as a plant. Like the authorities below, even the judgment in **Mehboob Productions** was distinguished on the ground that the expenses in that case were incurred by the company qua its Director. The expenses of the company, which was the assessee in that case, were allowed on the principles of commercial expediency; having been incurred wholly for the purpose of the business of the company. Insofar as the company was concerned, the expenses could not be regarded as personal in nature. The assessee, therefore, could not claim parity, as the facts in **Mehboob Production**s were distinguishable from those obtaining in the instant case. Therefore, Tribunal came to the conclusion that not only were the expenses in issue, not expended wholly and exclusively for the purpose of assessee's business, but being personal in nature, were not allowable under Section 37(1) of the IT Act.

11. Before we proceed further, it may be important to note that the matter had come up for hearing on 19.04.2011 when an adjournment was sought. Since several adjournments had been granted in the case, parties were asked to file short synopsis in support of their respective stands. The matter was fixed for directions/clarifications on 10th May, 2011. On the said date, the learned counsel for the assessee relied upon the arguments put forth in the written submissions. A perusal of the submissions would show that once again the deduction has been claimed under Section 31, and in the alternative, under Section 37 of the I.T. Act, by treating the expenditure incurred as one, expended wholly and exclusively for the purposes of profession of the assessee. The assessee's contention, in short, runs as follows:-

11.1 Coronary surgery was not a life saving operation but was undertaken due to professional and commercial expediency in order to enable assessee to carry out his profession efficiently. It was stressed that the medical procedure had enabled the assessee to ˇtravel extensively all over the country in connection with his professional duty of putting in appearances in various High Courts of the country. In support of his contention, as already noticed, a reference was made to the fact that his gross receipts had increased from Rs 3.55 lakhs in the assessment year 1982-83 to 106.87 lakhs in 1992-93. It may be noted that figures of assessment year 1992-93 could not have been on the record of the

assessing officer since the order of the Assessing Officer was passed on 12.03.1986. Nevertheless, the point made is that there has been a substantial increase in the assessee's income, post the surgery conducted on him. In support of the submissions made, reliance has been placed once again on the following judgments:-

(1950) 18 ITR 460 Bombay, **TATA Sons Ltd. Vs. CIT** at pages 467/468, (1981) 131 ITR 223 Madras (at page 227) **Waterfall Estates Ltd. Vs. CIT,** (1977) 106 ITR 758 Bombay (at page 766/767) **Mehboob Productions Pvt. Ltd. Vs. CIT,** XIX QB 647 **Yarmouth Vs. France** at 652 and 658, (1974) 96 ITR 672 (Gujrat) **CIT Vs. Elecon Engineering** and (1987) 166 ITR 66 **Scientific Engineering House Pvt. Ltd. Vs. CIT** at page 95/97.

11.2 Apart from the submissions made on behalf of assessee, that the expenditure incurred was not to undertake a life saving medical procedure, but to enhance professional efficacy of the assesee, it was also contended once again before us, based on the judgment in the case of **Mehboob Productions** that if expenditure incurred by the company qua its Director (who was the driving force in the company and had travelled abroad for its work) was allowable as expenditure, there was no reason to deny a lawyer deduction on account of repair of his heart against his professional income.

11.3 The Tribunal having observed that a lawyer sharpens his professional skill not by using his heart, but using his brain, could it then be said that a lawyer would be allowed deductions for expenses incurred on brain surgery as against those incurred on medical procedure involving the human heart;

11.4 Lastly, Tribunal having accepted that the assessee had incidently benefitted by this medical procedure in undertaking his professional activities, the claim ought to be allowed as a deduction.

12. As against this, in rebuttal, learned counsel for the Revenue Ms.Rashmi Chopra relied largely upon the reasoning and the findings of the authorities below. Based on which Ms.Chopra pleaded for the rejection of the claim made on behalf of the counsel for the assessee.

13. Before we proceed further, let me advert to judgments cited by

the assessee in support of his case.

13.1 The first, in the line of cases cited by the learned counsel for the assessee is the judgment in the case of Royal Calcutta Turf Club. The brief facts in this case were as follows :-

13.2. The Royal Calcutta Turf Club (in short, the club) was an association of persons whose business was to hold race meetings in Calcutta (now known as Kolkata) on a commercial basis. The Club did not own any horse and thus did not employ jockeys. The jockeys were employed by the owners and the trainers of horses which ran in the races organised by the club. Since the club was of the opinion that there was a possibility of the jockeys becoming unavailable due to injury, etc., and this could, not only seriously affect its business, but could also lead to closing down of the business; the club considered it appropriate to remedy this by establishing a training school of Indian boys as jockeys. The purpose being to make available a pool of trained jockeys for the purposes of races organised by it. Somehow, the training school did not prove successful and it had to be closed down within a period of three years. In the relevant accounting year ending on 31st March, 1949, the Club had spent certain sums of money on running this school, which was claimed by it, as deduction under section 10(2)(xv) of the provisions of the Income Tax Act then prevailing. The claim of the club was disallowed by the Income Tax Officer (in short, ITO). In a further appeal, both the first appellate authority as well as the Tribunal confirmed the decision of the ITO. The club, however, succeeded before the High Court. The revenue came up in appeal to the Supreme Court.

13.3. The Supreme Court dismissed the revenue's appeal by holding that the amount was expended wholly and exclusively for the clubs business as the supply of efficient and skilled jockeys was crucial for the business of the club. The money having been spent for preservation of the club business, the deduction had to be allowed. In this case the Supreme Court after noticing several precedents, broadly provided the contours of the kind of expenses which could be considered commercially expedient. One such expense being that which was incurred was for preventing extinction of business. The point to be noted is that, in this case, the expense was directly and immediately beneficial to the trade in which the club was engaged.

14. The second case cited by the petitioner is the judgment of the Bombay High Court in **Tata Sons** (supra). In this case, the assessee, which was a limited company, held a managing agency of another company i.e., Tata Iron and Steel Company Ltd. (in short, TISCO). The terms of the managing agency were incorporated in the agreement dated 02.05.1948. By virtue of this agreement, the assessee company was to be paid commission at different rates, which were to be computed based on the net profits of TISCO. In the assessment year in issue, the assessee company had paid half share of the bonus which the managed company paid to its officers. The question which arose was, whether it could claim deduction in respect of a portion of the said sum. From the record, the following facts emerged :-

14.1. The assessee company was entirely dependent in respect of its earning on the profits earned by the managing company, thus the assessee company was directly and vitally interested in the earnings of the managing company.

14.2 The Tribunal disallowed the deduction claimed by the assessee company. The reason being that the Tribunal was of the view that profits for the accounting year in issue, had already been earned and that bonuses had been paid subsequent to the earning of such profits and therefore, there was, according to the Tribunal, no connection between the two. The High Court, however, agreed with the assessee. In coming to the conclusion whether the expense was incurred wholly and exclusively for the purposes of the assessee's business it applied the following test :-

> "if the expenditure helps or assists the assessee in making or increasing the profits, then undoubtedly that expenditure would be expended wholly and exclusively for the purposes of business."

14.3 The court agreed with the assessee that even voluntary payment, if necessitated on the grounds of commercial expediency, would be amenable for deduction, provided it was intended for the purpose of making or increasing the profits of the assessee company. The court in allowing the deduction held that the nexus between the managing company and the assessee company could not be seriously disputed. If the managing company intended to increase its profits, it would automatically tend to increase the income and profits of the assessee company. In that case, the court came to the conclusion "...the only motive by which the

expenditure was actuated was a purely commercial and pecuniary one and that was to see that more profits were made by the managed company so that their own commission should thereby increased.". This again was a case where the court came to the conclusion that there was a direct nexus in the sums expended and the motive of the assessee which was to enhance its profitability.

15. The third case cited by the petitioner is a judgment of the Madras High Court passed in the case of Waterfall Estates Ltd. In this case, the facts briefly were as follows :-

15.1 The assessee carried on business of running tea and coffee estates in addition to being in the business of coffee curing. For both these businesses, it had a common head office. Under the Central Income Tax Act, the business of tea was liable to be taxed to the extent of 40%, whereas income from coffee was wholly exempted. However, income from coffee curing works was wholly taxable. The finding of the Tribunal was that these businesses were separate. In the background of these facts, the issue which arose was whether the entire depreciation in respect of asset in the head office would be deductible from the taxable income and that in this regard there was no justification, as far as depreciation was concerned, to bifurcate and disallow any portion thereof.

15.2 The ITO allowed only a proportionate part of the depreciation. The Appellate Assistant Commissioner (in short, AAC) sustained the order of the ITO. The matter was carried in appeal to the Tribunal. The Tribunal came to the conclusion that the assessee had to maintain a head office, and that merely because the head office also supervised the coffee estates, the income from which was not taxable, a bifurcation could not be made between the user of the assets towards taxable sources of income and non-taxable sources of income. The Tribunal further observed that as the assets had been utilized for earning taxable income, there was no justification for bifurcation and thus disallowing a portion of the depreciation as was done by the ITO. Consequently, the Tribunal reversed the view of the authorities below. The matter was carried to the High Court by way of a reference under section 256(1) of the then prevailing provisions of the I.T. Act. The Tribunal was thus concerned with reconciling the provisions of sub-sections (1) and (2) of section 38 of the Income Tax Act. The expression which finds mention in section 38(1) of the Act is : used for the purposes of business or profession. The

Madras High Court in coming to the conclusion which it did, looked to the principles set forth by the courts in deciding cases under section 37 of the I.T. Act. The court held that so long as the expenditure was incurred for the purposes of business, and merely because some other person or some other activity was also benefitted by such an expenditure, it would not come in the way of the assessee being allowed a deduction. In that case, the court came to the conclusion that since the head office had been used for the purposes of the business whose income was being taxed, the assessee ought to be entitled to depreciation. The judgment noticed the principles, inter alia, set forth by the Supreme Court in Royal Calcutta Turf Club case. As noticed above, one cannot but agree with the principle, it is its applicability of the principle to the assessee's case which is in doubt.

16. The fourth case on which great stress has been laid by the petitioner is once again the judgment of the Bombay High Court in the case of **Mehboob Productions** (supra). The facts of the case were as follows :-

16.1 The assessee company was in the business of film production. Sometime in 1957, the assessee company produced a film titled 'Mother India'. Before the court, two questions arose for adjudication. The first question related to taxability of certain sums of money which the assessee company had received from its exhibitors and theatres, on the Government exempting the picture produced from entertainment duty. We are not concerned with the facts obtaining in respect of this question.

16.2 The second question which pertained to the claim of deduction of medical expenses incurred by the assessee company for treatment of its Managing Director, while in USA in connection with the assessee company's business, is the question we are concerned with. The facts of this case briefly are as follows :

16.3 One Mehboob Khan, Director of the assessee company, while on tour of USA suffered a serious heart attack. Mr. Mehboob Khan had to be hospitalized. In that connection, a sum of Rs.33,667/- was incurred on his illness. It is pertinent to note that Mr. Mehboob Khan had visited USA as 'Mother India' was one such foreign film which had been nominated for an award by the Academy of Arts and Sciences, Hollywood. On his return from the USA, the Board of Directors passed a resolution

to the effect that the entire expenditure on the treatment of Mr. Mehboob Khan would be borne by the assessee company. The expenditure incurred was debited to the assessee company's account. The ITO rejected the assessee company's claim. The ITO was of the view that the expenditure incurred had directly benefitted Mr. Mehboob Khan, who had a substantial interest in the assessee company. The AAC confirmed the order of the ITO with regard to the claim for deduction of medical expenses.

16.4 In a further appeal, the Tribunal, however, in respect of medical expenses accepted the contention of the assessee company. The Tribunal came to the conclusion that since Mr. Mehboob Khan suffered a heart attack while he was in the USA for the purposes of the assessee company's work, therefore, expenses to the extent they were in excess of the expenses which would normally have been incurred in India ought to be allowed as deduction to the assessee company. On a rough and ready basis, 2/3rd expenses incurred in the USA were allowed as deduction. The matter was carried to the High Court in respect of the balance 1/3rd expenses (which were incurred for treatment of Mr. Mehboob Khan in USA), which were disallowed. The High Court was of the view that the Tribunal having returned findings of fact: that Mr. Mehboob Khan had visited USA in connection with the business of the assessee as he was a "driving force" in the assessee company; that the expenses had been incurred on account of special contingency; and that, "*there was nothing unbusiness like or abnormal in the assessee company bearing the expenses of medical treatment of a person who meant so much to the company.*" – the revenue not having challenged the conclusion of the Tribunal that the decision of the Board of Directors, which was based on the principles of commercial expediency, was improper or perverse; the deduction with regard to the balance 1/3rd expenses had also to be allowed.

16.5 Importantly, in this case, the High Court was only concerned with, as noticed above, as to whether the balance 1/3rd amount incurred by the assessee company for treatment of Mr. Mehboob Khan had to be allowed as deduction. The revenue had not challenged the findings of the Tribunal. The assessee company's reimbursement of the expenses had been allowed on a principle of commercial expediency as, Mr. Mehboob Khan was found to be a 'driving force' in running the affairs of the assessee company.

16.6 On the other hand, in the instant case, the assessee admits that his travel to the USA was for a specific purpose of undergoing a coronary surgery.

17. The fifth case cited before us is the judgment of the Queen's Bench Division in the case of **Yarmouth Vs. France**. This was a case where an action was brought under the Employers. Liability Act, 1880. The plaintiff brought the action under the said Act against his employer, the defendant in the action, on account of injury suffered by him while being in his employment. The defendant was a wharfinger and a warehouseman in London. The plaintiff was given a horse and a trolley for the purpose of delivering goods to the designated consignees. After the job was done, the plaintiff was required to return the trolley to the employer's premises and stable the horse thereafter. The plaintiff had been in the defendant service prior to the institution of the action for a period of four years. In one particular year, the defendant had bought a new horse. The horse was under the control and supervision of the defendant's stable foreman. The plaintiff found the horse to be a vicious animal who was a "kicker" and a "jibber" and hence dangerous and unfit to be driven. This fact was brought by the defendant to the notice of the stable foreman. The stable foreman persisted with the plaintiff to keep driving the trolley with the said horse and, is stated to have said, that if he met with an accident, they would stand responsible for it. On one unfortunate day, the plaintiff while driving the horse, met with an accident, in as much as, the horse kicked the plaintiff, in which, he broke one of his begs. The question which arose for consideration was: as to whether the plaintiff was entitled to compensation under the Employers. Liability Act. The action was defended on the ground that: the plaintiff was not a workman; the horse was not a plant within the meaning of the Act; and lastly, the plaintiff was guilty of contributory negligence as he continued to drive the horse even after he became aware of the vicious character of the horse.

17.1 The Judge of the First Court found in favour of the plaintiff in respect of the first two objections i.e., he was a workman and horse was a plant within the meaning of the Act. With regard to the third objection, the Judge found in favour of the defendant.

17.2 The Appeal Court was thus called upon to decide as to whether the plaintiff having continued to drive the horse even after knowing the

vicious character of the horse had assented to incur the risk which was an incident of his employment. While answering this question, the majority in the Appeal Court considered the effect of the provisions of the Employers Liability Act. In this connection, the following observations were made with regard to whether a horse ˇcould be considered a plant within the meaning of section 1 sub-section(1) of the Employers. Liability Act. The observations being as follows :-

> "...Then comes the question which is somewhat more difficult, - can a horse be considered 'plant' within s.1, sub-s. 1, of the Employers. Liability Act? It is suggested that nothing that is animate can be plant; that is, that living creatures can in no sense be considered plant. Why not? In many businesses horses and carts, wagons, or drays, seem to me to form the most material part of the plant : they are the materials or instruments which the employer must use for the purpose of carrying on his business and without which he could not carry it on at all. The principal part of the business of a wharfinger is conveying goods from the wharf to the houses or shops or warehouses of the consignees and for this purpose he must use horses and carts or wagons. They are all necessary for the carrying on of the business. It cannot for a moment be contended that the carts and wagons are not 'plant'. Can it be said that the horses, without which the carts and wagons would be useless, are not? If, then, this horse was part of the plant, it had a defect, that is, it had the constant habit, whether in a stable or harnessed to a trolley, of kicking whatever was near it, whether a human being or a brick wall. In short, it was a vicious beast that could not be managed or controlled by the most careful driver. The plant, therefore, was defective."

18. As would be noticed, the majority in coming to the conclusion that the horse was a plant, took into account the nature of the business. As noticed above, the nature of the business of the defendant was of a wharfinger which involved goods being carried from the wharf to the houses and the shops or, the warehouses of the consignees. For this purpose, the defendant had to use horses and carts, or wagons. These were necessary for carrying on the business. Since carts and wagons could not but be considered as plants, the court held that horses had to

be held as plants as, carts and wagons would be useless without it. As is evident, the case did not involve the provisions of the Income Tax Act. The decision was rendered in the facts and circumstances obtaining in that case and in the background of the provisions of the Employers. Liability Act.

19. The next judgment which is referred to by the petitioner is the judgment of the Gujarat High Court in the case of **Elecon Engineering Company Ltd.** (supra). This judgement required the court to determine whether drawings and patterns received by the assessee from a foreign company under a collaboration agreement can be said to be plant on which depreciation could be claimed under section 32 of the IT Act. In determining as to whether drawings and patterns fell within the definition of a plant, the court examined section 43(3) of the IT Act. The court noted that the definition of a plant under section 43(3) of the IT Act was an inclusive definition. The Division Bench after examining a number of decisions observed that the word 'plant' is not necessarily confined to apparatus which is used for mechanical operations or is employed in mechanical or industrial businesses. It would according to the court not include stock-in-trade or even articles which are merely part of the premises in which business is carried on. According to the court, for an article to qualify as plant it must have a degree of durability, and that which is quickly consumed or worn out in the course of its operation, within a short span of time, cannot properly be called a plant. The test, which the court suggested could be applied was, the operation that the apparatus / article involved, performed in the performance of the assessee's business i.e., did it fulfil the function of a plant in assessee's trading activity. In other words, was it a tool of tax payers trade? The court thus held that the word 'plant' in its ordinary sense was a word of wide import and it had to be construed broadly having regard to the fact that articles like books and surgical instruments were expressly included in the definition of plant under section 43(3) of the IT Act. Since the issue pertained to interpretation of section 32 of the IT Act, the court ultimately came to the conclusion that the word 'plant' in section 32 would include not only such articles which were capable of diminution in value year after year by reason of wear and tear in the course of their application for the business of assessee's profession but also those which diminished in value on account of other known factors such as obsolescence. The important aspect to be noted is that the court laid stress that plant would

include such an article whether animate or inanimate which is used as a tool of the assessee's trade.

19.1 This matter was carried in appeal to the Supreme Court by the Revenue. The Supreme Court in **Commissioner of Income Tax Gujarat Vs. Elecon Engineering Co.** Ltd. 1987 166 ITR page 66 dismissed the appeal of the revenue in limine by relying on its own judgment in the case of **Scientific Engineering House P Ltd. vs CIT** (1986) 157 ITR 86.

20. This brings me to the principles enunciated by the Supreme Court in the case of **Scientific Engineering** (supra). Briefly in this case, amongst others, one of the issues which the court was called upon to decide was whether technical know-how supplied by a foreign collaborator of the assessee company by way of what was termed as 'documentation services' could be construed as a capital asset of a depreciable nature.

20.1 The assessee company was in the business of manufacturing scientific instruments and apparatus. For the purposes of its business it entered into two separate collaboration agreements with a Hungarian company. The Hungarian company in consideration of a lump sum amount in respect each of the two agreements, agreed to supply to the assessee technical know-how required for manufacturing, such like, scientific instruments. The object of the agreement was to enable the assessee to manufacture the said instruments in India, under its own trade mark though under the licence of the Hungarian collaborator. It was for this purpose that the Hungarian collaborator supplied manufacturing drawings, processing documents, design charts, plans and other literature which was, as indicated above, termed as "documentation services".

20.2 In the assessment year in issue, the assessee showed the aforementioned documentation received from the Hungarian collaborator as a *"library"* and claimed a depreciation on the same. The ITO disallowed the claim of the assessee for depreciation allowance on the ground that the lump sum price paid for the documents did not represent value of books but represented the price paid for acquiring technical know-how. Thus ITO was of the view that even though the assessee had incurred expenses on capital account no tangible or depreciable asset have been brought into existence. Accordingly, he had disallowed, as indicated above, claim for depreciation allowance.

20.3 In an appeal preferred by the assessee the Appellant Assistant

Commissioner agreed with the assessee that the documents purchased by the assessee constituted a book, on which depreciation was allowable as in the case of plant and machinery. Appropriate directions were issued by the AAC to the ITO.

20.4 The Tribunal, however, in a further appeal by the revenue came to the conclusion that the lump sum amounts paid by the assessee were not solely for purchase of documents. According to the Tribunal assessee had paid the said amount for acquiring other services of the foreign collaborator; the supply of documents being only incidental to those services. Therefore, the Tribunal came to the conclusion that the amounts paid did not represent the purchase price of the documents and hence deemed it unnecessary to determine as to whether documents fell within the meaning of the word 'books'. Consequently it did not find it necessary to adjudicate upon the issue, as to whether depreciation was available to the assessee. The Tribunal, however, held that since some of the services rendered by the foreign collaborator to the assessee were on revenue account, therefore, the lump sum payment made by the assessee to the foreign collaborator was partly on capital account and, therefore, the remaining part which was expended on revenue account had to be allowed as deduction. Accordingly, the Tribunal confirmed the deduction claimed by the assessee before the ITO though not on the ground of it being a depreciation allowance, but on the ground that it was in the nature of revenue expenditure.

20.5 Aggrieved, both the revenue and the assessee preferred references before the High Court. The High Court took the view that even though the entire amount expended by the assessee represented an expenditure on the capital account, since no depreciable asset was brought into existence the assessee was not entitled to the relief claimed.

20.6 Aggrieved by the judgment of the High Court, the assessee carried the matter to the Supreme Court. The Supreme Court allowed the appeal of the assessee. What is important for our purpose is that the Supreme Court observed that definition of word 'plant' in Section 43(3) of the I.T. Act was wide. It would include broadly both animate and inanimate things. The court made the following apposite observations:

> "In other words, plant would include any article or object fixed or movable, live or dead, used by businessman for carrying on

his business and it is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business. In order to qualify as plant, the article must have some degree of durability, as for instance, in **Hinton v. Maden & Ireland Ltd.,** (1960) 39 I.T.R. 357 (HL), knives and lasts having an average life of three years used in manufacturing shoes were held to be plant. In **C.I.T. v. Taj Mahal Hotel** : [1971] 82 ITR 44(SC), the respondent, which ran a hotel, installed sanitary and pipeline fittings in one of its branches in respect whereof it claimed development rebate and the question was whether the sanitary and pipe-line fittings installed fell within the definition of plant given in Section 10(5) of the 1922 Act which was similar to the definition given in Section 43(3) of the 1961 Act and this Court after approving the definition of plant given by Lindley L.J. in Yarmouth v. France as expounded in Jarrold v. John Good and sons limited 1962, 40 T.C. 681(CA), held that sanitary and pipe-line fittings fell within the definition of plant…. ….In other words the test would be: Does the article fulfil the function of a plant in the assessee's trading activity? Is it a tool of his trade with which he carries on his business? If the answer is in the affirmative, it will be a plant.

14. If the aforesaid test is applied to the drawings, designs, charts, plans, processing data and other literature comprised in the 'documentation service' as specified in Clause 3 of the agreement it will be difficult to resist the conclusion that these documents as constituting a book would fall within the definition of 'plant'. It cannot be disputed that these documents regarded collectively will have to be treated as a 'book', for, the dictionary meaning of that word is nothing but a "a number of sheets of paper, parchment, etc., with writing or printing on them, fastened 'together along one edge, usually between protective covers; literary or scientific work, anthology, etc., distinguished by length and form from a magazine, tract etc." (vide Webster's New World Dictionary). But part from its physical form, the question is whether these documents satisfy the functional test indicated above. Obviously, the purpose of rendering such documentation service by supplying these documents to the assessee was to enable it to undertake its trading activity of manufacturing

theodolites and microscopes and there can be no doubt that these documents had a vital function to perform in the manufacture of these instruments; in fact it is with the aid of these complete and upto date sets of documents that the assessee was able to commence its manufacturing activity and these documents really formed the basis of the business of manufacturing the instruments in question. True, by themselves these documents did not perform any mechanical operations or processes but that cannot militate against their being a plant since they *were in a sense the basic tools of the assessee's trade having a fairly enduring utility, though owing to technological advances they might or would in coarse of time become obsolete.* We are, therefore, clearly of the view that the capital asset acquired by the assessee, namely, the technical know-how in the shape of drawings, designs charts, plans, processing data and other literature falls within the definition of 'plant' and is, therefore, a depreciable asset." (emphasis is ours)

21. Having heard the learned counsels for the parties and having regard to the submissions made both on behalf of the assessee and the revenue, what emerges from the record is as follows :-

(i) The assessee had claimed a sum of Rs.1,74,000/- as deductible expenditure towards expenses incurred by him on getting a coronary by-pass surgery conducted on himself in Huston, USA.

(ii) The assessee's gross receipts over the years have increased from Rs.3.55 Lakhs returned in assessment year 1982-1983 to Rs.106 Lakhs in assessment year 1992-1993.

(iii) Based on these facts the assessee has made a claim for deduction under section 31 of the IT Act and in the alternative under section 37 of the IT Act.

21.1 In our view, deduction under section 31 of the IT Act would not be available for two reasons: firstly, if the heart of a human being, as in the case of the assessee, were to be considered a plant, it would necessarily mean that it is an asset which should have found a mention in the assessee's balance sheet of the previous year in issue, as also, in the earlier years. Apart from the fact that this is admittedly not so, the difficulty that the assessee would face in showing the same in his books

of accounts would be of arriving at the cost of acquisition of such an asset. Therefore, in our view before expenses on repair of plant are admitted as a deduction, the plant would necessarily have to be reflected as an asset in the books of accounts.

21.2 The second ground on which, we are persuaded by the counsel for the revenue not to accept the assessee's claim is that, even if one were to give the widest meaning to the word "plant" in section 31 of the IT Act, it would still not fall within the definition of the word plant. The test of functionality laid down by the Gujarat High Court in **Elecon Engineering Co. Ltd.** (supra) which is affirmed by the Supreme Court in its judgement rendered in **Scientific Engineering** (Supra) is not fulfilled in this case. It cannot be said that the assessee who is a lawyer would have used his heart as a tool for his professional activity. The fact that a healthy and a functional human heart is necessary for a human being irrespective of his vocation or social strata is stating the obvious. But this would not necessarily lead to the conclusion that the heart is used by, a human being, as a tool of his trade or professional activity. General well being of the heart and its functionality cannot be equated with using the heart as a tool for engaging in trade or professional activity. Atleast the facts in this case do not demonstrate the same. Hence, the petitioner's claim for allowing deduction of the expenses incurred by him on his coronary surgery under section 31 of the IT Act, is rejected.

22. This brings us to the alternate claim made by the assessee under section 37 of the IT Act. It is trite law that the claim for deduction under section 37 of the IT Act should satisfy three conditions: firstly, it should be an expense which is incurred wholly and exclusively for the purpose of the assessee's business or profession; secondly, it should not be an expense incurred to bring into existence a capital asset; and lastly, it should not be an expense of a personal nature.

22.1 In our view, the assessee's claim under section 37 of the IT Act does not fulfil the first condition which is that the expense in issue have been incurred wholly and exclusively for the purposes of the assessee's profession.

22.2 As observed hereinabove, an impaired heart would handicap functionality of a human being irrespective of his position, status or vocation in life. Expenses incurred to repair an impaired heart would thus

add perhaps to the longevity and efficiency of a human being per se. The improvement in the efficiency of the human being would be in every activity undertaken by a person. There is thus no direct or immediate nexus between the expenses incurred by the assessee on the coronary surgery and his efficiency in the professional field per se. Therefore, to claim a deduction on account of expenses incurred by the assessee on his coronary surgery under section 37(1) of the IT Act would have to be rejected. There is, as a matter of fact, no evidence brought on record, which would suggest that the assessee could have continued in the same state without the medical procedure undertaken by him. On this aspect, the best example which comes to mind, which perhaps, in a given case could be considered as an expense amenable under section 37 of the IT Act would be that of an actor undertaking plastic surgery to prevent age being reflected on screen. It could be argued in the case of an actor that he could have existed in the state he was without having gone under the knife of a plastic surgeon. Such are not the facts in the instant case.

22.3 In this regard, even the judgment of the Bombay High Court in **Mehboob Productions** (supra), which was cited before us, is distinguishable. As indicated above, only the assessee had come up before it with regard to the Tribunal's decision disallowing 1/3rd of the expenses reimbursed by the assessee company to its Director who had suddenly suffered a serious heart attack while running an errand for the assessee company in USA. Based on the findings returned by the Tribunal, that the Director was the 'driving force' of the company and that he had gone to USA in connection with nomination of the film produced by the assessee company for an award – the Division Bench of the Bombay High Court, concluded that there was no good reason to disallow the remaining expenses as the revenue had not challenged the findings on the ground of perversity.

23. In view of the foregoing reasons, we are of the opinion that the concurring judgments and orders of the authorities below ought not to be disturbed. It is ordered accordingly. The question of law is thus answered in the negative and against the assessee.

24. Resultantly, the reference stands disposed of; cost shall follow the result.

ILR (2011) IV DELHI 409
W.P. (C)

AIRPORT AUTHORITY OF INDIA ....PETITIONER

VERSUS

DELHI CANTONMENT BOARD ....RESPONDENT

(S. MURALIDHAR, J.)

W.P. (C) NO. : 3615/2003 DATE OF DECISION: 31.05.2011

Cantonments Act, 1924—Section 71 Section 84—House Tax—Petitioner challenged assessment order passed by Delhi Cantonment Board, finalizing annual property tax assessments for the years 1998 to 2001 and bill dated 24.02.2003—Objection of respondents about availability of alternate remedy of an appeal under Section 84 Cantonments Act rejected, observing that the said appeal provision is harsh in the sense that till the entire amount of the disputed tax is deposited, appeal cannot be heard and therefore Section 84 cannot be treated as alternate efficacious remedy, writ is maintainable—Further held, the impugned demand being on the basis of revision, admittedly prior to the impugned demand there was no assessment of tax by Cantonment Board under the provisions of Cantonment Act, accordingly no legal basis for revision of the annual value has been shown by the Cantonment Board—Further held, in terms of proviso to Section 71 of the Cantonment Act, no person can be liable to pay tax in respect of any period prior to the commencement of the year in which the assessment is made, so in the present case tax cannot be claimed for a period prior to 01.04.2003.

The first issue that arises is whether AAI ought to have exhausted an alternate remedy of an appeal under Section

84 of the CA, 1924. In terms of the said provision, in order that the appeal is entertained the entire amount of tax in dispute has to be deposited in the office of the DCB. While analyzing a similarly worded S.169 DMC Act, the Supreme Court in **Shyam Kishore v. Municipal Corporation of Delhi** 48 (1992) DLT 277 (SC) held that "such an appeal can be admitted or entertained but only cannot be heard or disposed of without pre-˘deposit of the disputed tax." Although it means that an appeal which was filed can be admitted, it cannot be heard till the entire amount of disputed tax is deposited. Apart from the fact that Section 84 CA, 1924 is harsh and therefore, the alternate remedy of appeal will not be efficacious, there are two other reasons for rejecting the preliminary objection as to non-exhaustion of the alternate remedy. One is that the earlier writ petition had been entertained by this Court and the matter had been remanded to the AC for making a fresh assessment of the property tax in accordance with law. Secondly, even in the present writ petition one of the grounds is that neither the show cause notice nor the impugned order gives the reasons for determining the annual values which are proposed to be adopted for the purposes of property tax. This Court would, in the circumstances, be justified in exercising its jurisdiction under Article 226 of the Constitution and entertaining the present writ petition. **(Para 10)**

The next issue is whether the impugned demand for period of three years from 1998-99 to 2000-2001 on the basis of "revision" is sustainable in law. It is an admitted position that prior to the impugned demand there was no assessment of tax by the DCB. The order dated 24th February 2003 only refers to the previous correspondence with the AAI and to the letter dated 27th March 2001 whereby the AAI is supposed to have given "its willingness for payment of property tax with effect from 1st April 1992". Irrespective of any such "willingness" by AAI, no levy of property tax has been assessed in accordance with provisions of the CA, 1924. No legal basis for "revision" of the annual value and consequently, the property tax for the period 1st April 1998

to 31st March 2001 has been shown by DCB. A perusal of the notice dated 26th March 2001 shows that the previous assessment is shown as Rs. 1,19,07,000/- and the proposed assessment at Rs. 4,50,00,000/-. The basis of such assessment has not been indicated. This is contrary to the law explained in **DCM Ltd. v. MCD** 73 (1998) DLT 227 (DB). **(Para 11)**

In terms of the proviso to Section 71 of the CA 1924 no person can be made liable to pay tax "in respect of any period prior to the commencement of the year in which the assessment is made". In other words, tax cannot be claimed in the instant case for a period prior to 1st April 2003. While interpreting a similar provision (Section 126 of the DMC Act) this Court in **Lucky Star Estate (I) P. Ltd. v. MCD** 144 (2007) DLT, following an earlier decision in **Tin Can Manufacturing Co. v. MCD** 19 (1981) DLT 23 held that the disposal of objections against notices of assessment under Section 126 DMC Act cannot be kept pending beyond the date of the assessment of the authentication list for the following year. On this ground too, therefore, the impugned notice dated 26th March 2001 and the consequential assessment order dated 26th February 2003 cannot be sustained in law. **(Para 12)**

Important Issue Involved: No person can be liable to pay tax in respect of any period prior to the commencement of the year in which the assessment is made.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. B.B. Jain with Ms. Anjana Gosain, Advocate.

FOR THE RESPONDENT : Mr. R. Nanavaty, Advocate.

CASES REFERRED TO:

1. *Lucky Star Estate (I) P. Ltd.* vs. *MCD* 144 (2007) DLT.

2. *Telco* vs. *Municipal Corporation of Delhi* 108 (2003) DLT 217.
3. *Municipal Board, Saharanpur* vs. *Shahdara (Delhi) Saharanpur Light Rail Company Limited* AIR 1999 SC 277.
4. *DCM Ltd.* vs. *MCD* 73 (1998) DLT 227 (DB).
5. *Prem Prashad Juneja* vs. *Municipal Corporation of Delhi* 1996 (37) DRJ 63 (DB).
6. *Hindustan Lever Limited* vs. *Municipal Corporation of Greater Bombay* (1995) 3 SCC 716.
7. *Shyam Kishore* vs. *Municipal Corporation of Delhi* 48 (1992) DLT 277 (SC).
8. *Municipal Corporation of Delhi* vs. *K.P. Gupta* 1990 (2) DL 337.
9. *Tin Can Manufacturing Co.* vs. *MCD* 19 (1981) DLT 23.
10. *Godhra Borough Municipality* vs. *Godhra Electricity Company* AIR 1968 SC 1504.

RESULT: Writ petition allowed.

JUDGMENT

31.05.2011

1. The challenge by the Petitioner, Airports Authority of India ("AAI"), is to an assessment order dated 24th February 2003 passed by the Respondent Delhi Cantonment Board ("DCB") finalizing the annual property tax assessments for the years 1998-99 at Rs. 12,10,40,791/-, for 1999-2000 at Rs. 13,87,01,935/- and for 2000-2001 at Rs. 16,64,71,391/-. The petition also challenges a bill dated 24th February 2003 raised by the DCB calling upon AAI to pay Rs. 20,12,06,539/- as house tax under the Cantonments Act, 1924 ('CA, 1924') for the period 1st April 1998 to 31st May 2002.

2. On 26th May 2003, this Court directed that subject to AAI depositing a sum of Rs. 51,00,000/-, the impugned demand for property tax would remain stayed.

3. AAI states that in the year 1940, 718.85 acres of land within the

jurisdiction of the DCB comprising Terminal I-B and the domestic arrival buildings consisting of ground floor and mezzanine floor was purchased from the DCB for a sum of Rs. 4,61,95,600/-. This comprised capital cost of the original Terminal I building at Rs. 2,86,54,506/-, electrical installations costing Rs. 1,73,16,144/- which included additions and alterations and cost of land at Rs. 313/- per acre for 718.85 acres at Rs. 2,25,000/-. Terminal I-A was reconstructed in 1998 and the cost of reconstruction as on 31st March 2001 was Rs. 14,32,12,000/-. Additions and alterations were periodically carried out to Terminal I-B which was originally constructed in the year 1939-41. The cost of construction of Terminal I-B if reconstructed as on 31st March 2001 would, according to the Valuation Report obtained by AAI, would be Rs. 13,96,94,000/-. In 2000-2001 a domestic arrival hall was reconstructed and as on 31st March 2001 the cost of reconstruction as per the said Valuation Report was Rs. 6,62,50,600/-. It is stated that the total cost of reconstruction of all three terminals as on 31st March 2001 excluding the cost of machinery, air-conditioning and other equipments was Rs. 34,91,56,000/-. The area under self-occupation of the AAI is stated to be 12136.65 sq. m., the common area 15178 sq. m and the area given to airlines etc. 7757.65 sq.m. thus totaling 35072.30 sq. m. It is stated that the land appurtenant to the superstructure of 26388 sq. m. (comprising Terminals I-A and I-B and the domestic arrival hall) has also to be valued at Rs. 313/- per acre which works out to Rs. 14,250. On the basis of the judgment in **Municipal Board, Saharanpur v. Shahdara (Delhi) Saharanpur Light Rail Company Limited** AIR 1999 SC 277 depreciation at 10% on the value of the land and terminal buildings is claimed as it is used by lakhs of people.

4. AAI states that since the above property on which the airport stood belonged to the Government of India till 1994, only service charges were payable. AAI was constituted as a separate entity by the Airport Authority of India Act, 1994 and became liable to pay property tax to the DCB. It is stated that the AAI gave on licence to the various airlines spaces for counters in the centrally air-conditioned halls with watch and ward, electricity, water and other facilities but without any rights therein.

5. It is stated that a notice dated 26th March 2001 was issued under Section 68 (1) of the CA Act, 1924 by the DCB to AAI proposing to 'increase' the rateable value from Rs. 1,19,07,000/- per annum to Rs.

4,50,00,000/- per annum for the period from 1st April 1998 to 31st March 2001. By its letter dated 27th March 2001 AAI requested DCB that the service charges paid till that date by the AAI should be adjusted against the 'revised rateable value' based on the cost of land. It was requested that a revised/payable statement be drawn up for adjustment of service charges paid up to 31st March 1992 and property tax from 1st April 1992 onwards. The lump sum payment made by AAI amounting to Rs. 3 crores was also requested to be reflected in the said statement. Further details were furnished to the DCB by AAI on 24th January 2002, 23rd/24th April 2002, 24th May 2002 and 26th July 2002.

6. AAI filed Writ Petition (Civil) No. 6799 of 2001 in this Court challenging the Notice dated 26th March 2001 The said writ petition was disposed of by this Court by an order dated 27th November 2001 with a direction to the Assessment Committee ('AC') of the DCB to assess the property tax payable by AAI in accordance with law. It is stated that thereafter a hearing was granted to the AAI. On 24th December 2001, information was provided by the DCB to AAI with the details of the assessments year-wise from 1998-91 to 2000-01. The objections of AAI were disposed of by the impugned assessment order dated 24th February 2003. It was held by the AC as under:

(i) As regards the cost of construction, the DCB had taken the actual cost of the buildings as provided by AAI by its letter dated 6th June 1983 in response to the notice under Section 103 of the CA, 1924 and the valuation as on 1st April 1982 i.e. Rs. 4,61,95,650/-. Since the actual cost of the building had been taken, there was no need to give 10% rebate as that was to be given for an old building in terms of the judgment of the Supreme Court in **Municipal Board, Saharanpur**.

(ii) The value of the land had been taken as per the information provided by AAI by its letter dated 6th June 1983 and there was no reason to adopt any different value.

(iii) The use of word 'let' or 'rent' in Section 64 (b) of the CA, 1924 did not limit the scope of the DCB to levy tax only on those portions which technically fell within the meaning of term 'let out'. The intention behind the provision to as that if an assessee was making some money by providing the space to someone

else, then a certain percentage of that amount must be paid as tax to the municipal body.

(iv) Section 64 (b) applied not only to the building but also to open land, and therefore, tax was leviable even for charges received for the use of open area and such car parking.

7. By a separate communication dated 16th April 2003, the DCB informed AAI that the AC had finalized the assessment for the years 1998-2001 to 2000-2001 and for the annual amounts mentioned earlier in para 2 of the assessment order and that "the above mentioned assessment is authenticated" under Section 69 of the CA, 1924.

8. Mr. B.B. Jain, learned counsel appearing for the Petitioner, submitted that if one was to take the value of the land as on the date of purchase at Rs. 2,25,000/- and the depreciated cost of construction, then the tax per annum worked out to Rs. 16,91,183/- and for the three years to Rs. 50,73,549/-. AAI had already deposited a sum of Rs. 3,53,89,051/- as admitted by Respondent and another sum of Rs. 51 lakhs in compliance with the interim order dated 26th May 2003 passed by this Court. It is next submitted that whether the case of AAI fell under Section 64 (a) or 64 (b) of the CA, 1924, the present cost of the building had to be considered and if it was a new building then the depreciated value of the building had to be considered. Relying on the observations of the Supreme Court in **Municipal Board, Saharanpur,** it is submitted that in case of a railway station or such like structures in terms of extensive use by large number of visitors, 10% depreciation should be allowed. It is further submitted that in terms of Section 71 of the CA, 1924 which is identically worded with the amended Section 126 of the Delhi Municipal Corporation Act, 1957 ('DMC Act'), the liability to pay tax would at best be for the year in which the assessment order was passed and not prior thereto. It is further submitted that the giving of certain portions on licence to different airlines did not amount to parting with the rights in the property and the property had to be assessed on self-occupation basis. It is submitted that a taxing statute has to be strictly construed and the benefit of doubt has to go to the assessee. Lastly, it is submitted that the land rates under the Cantonment Administration Rules, 1937 ('CA Rules') cannot be applied in view of the provisions of Section 64 (a) of the CA, 1924. Reliance is placed on the judgment of this Court in **Municipal Corporation of Delhi v. K.P. Gupta** 1990 (2) DL 337 to urge that

annual sale transactions can alone be taken into account and pre-determined rates have to be discarded. It is submitted that the Supreme Court, in **Godhra Borough Municipality v. Godhra Electricity Company** AIR 1968 SC 1504, has held that balance-sheet values cannot be used for purposes of property tax assessment. This has been followed by a learned Single Judge of this Court in **Telco v. Municipal Corporation of Delhi** 108 (2003) DLT 217. Lastly, it is submitted that in a notice to revise the assessment, grounds of revision must be indicated and that an order revising the assessment must contain the reasons for the assessment. Reliance is placed on the judgment in **Prem Prashad Juneja v. Municipal Corporation of Delhi** 1996 (37) DRJ 63 (DB). It is submitted that the impugned notice as well as the assessment order do not contain any reasons for revising the assessment.

9. Appearing for the DCB, Mr. R. Nanavaty, learned counsel submitted that AAI had not exhausted the alternative remedy of an appeal before the learned District Judge under Section 84 of the CA, 1924. It is submitted that whether AAI is receiving licence fee or rent in respect of the spaces given by it to other airlines and whether AAI is spending huge amounts to maintain the infrastructure and therefore, whether it should not be assessed under Section 64 (b) of the CA, 1924, are all mixed questions of facts and law which cannot be examined by this Court in a writ petition under Article 226 of the Constitution.

10. The first issue that arises is whether AAI ought to have exhausted an alternate remedy of an appeal under Section 84 of the CA, 1924. In terms of the said provision, in order that the appeal is entertained the entire amount of tax in dispute has to be deposited in the office of the DCB. While analyzing a similarly worded S.169 DMC Act, the Supreme Court in **Shyam Kishore v. Municipal Corporation of Delhi** 48 (1992) DLT 277 (SC) held that "such an appeal can be admitted or entertained but only cannot be heard or disposed of without pre-deposit of the disputed tax." Although it means that an appeal which was filed can be admitted, it cannot be heard till the entire amount of disputed tax is deposited. Apart from the fact that Section 84 CA, 1924 is harsh and therefore, the alternate remedy of appeal will not be efficacious, there are two other reasons for rejecting the preliminary objection as to non-exhaustion of the alternate remedy. One is that the earlier writ petition had been entertained by this Court and the matter had been remanded to

the AC for making a fresh assessment of the property tax in accordance with law. Secondly, even in the present writ petition one of the grounds is that neither the show cause notice nor the impugned order gives the reasons for determining the annual values which are proposed to be adopted for the purposes of property tax. This Court would, in the circumstances, be justified in exercising its jurisdiction under Article 226 of the Constitution and entertaining the present writ petition.

11. The next issue is whether the impugned demand for period of three years from 1998-99 to 2000-2001 on the basis of "revision" is sustainable in law. It is an admitted position that prior to the impugned demand there was no assessment of tax by the DCB. The order dated 24th February 2003 only refers to the previous correspondence with the AAI and to the letter dated 27th March 2001 whereby the AAI is supposed to have given "its willingness for payment of property tax with effect from 1st April 1992". Irrespective of any such "willingness" by AAI, no levy of property tax has been assessed in accordance with provisions of the CA, 1924. No legal basis for "revision" of the annual value and consequently, the property tax for the period 1st April 1998 to 31st March 2001 has been shown by DCB. A perusal of the notice dated 26th March 2001 shows that the previous assessment is shown as Rs. 1,19,07,000/- and the proposed assessment at Rs. 4,50,00,000/-. The basis of such assessment has not been indicated. This is contrary to the law explained in **DCM Ltd. v. MCD** 73 (1998) DLT 227 (DB).

12. In terms of the proviso to Section 71 of the CA 1924 no person can be made liable to pay tax "in respect of any period prior to the commencement of the year in which the assessment is made". In other words, tax cannot be claimed in the instant case for a period prior to 1st April 2003. While interpreting a similar provision (Section 126 of the DMC Act) this Court in **Lucky Star Estate (I) P. Ltd. v. MCD** 144 (2007) DLT, following an earlier decision in **Tin Can Manufacturing Co. v. MCD** 19 (1981) DLT 23 held that the disposal of objections against notices of assessment under Section 126 DMC Act cannot be kept pending beyond the date of the assessment of the authentication list for the following year. On this ground too, therefore, the impugned notice dated 26th March 2001 and the consequential assessment order dated 26th February 2003 cannot be sustained in law.

13. Although the Petition is entitled to succeed on the above grounds,

the other points are also being considered on their merits. Section 64 of the CA, 1924 reads as under:

> **"64. Definition of 'annual value'** – For the purposes of this Chapter, „annual value. means –
>
> (a) in the case of railway stations, hotels, colleges, schools, hospitals, factories and any other buildings which a Board decides to assess under this clause, one twentieth of the sum obtained by adding the estimated present cost of erecting the building to the estimated value of the land appurtenant thereto.
>
> (b) In the case of building or land not assessed under the clause (a), the gross annual rent for which such building (exclusive of furniture or machinery therein) or such land is actually let or, where the building or land is not let or in the opinion of the Board is let for a sum less than its fair letting value, might reasonably be expected to let from year to year. Provided that there the annual value of any buildings is by reason of exceptional circumstances, in the opinion of the Board, excessive if calculated in the aforesaid manner, the Board may fix the annual value at any less amount which appears to it to be just."

14. Section 64 (a) defines 'annual value' to be 1/20th of the sum obtained "by adding the estimated present cost of erecting the building to the estimated value of the land appertaining thereto". Section 64 (b) implies that the building in question is a self-occupied one. The expression "the estimated present cost of erecting the building" is a notional value in relation to any old building. By the letter dated 6th June 1983 AAI indicated the value of land at the time of purchase of the property in 1940 and the cost of the structures. AAI has also provided to ˘the DCB cost of additions/alterations/ restrictions of terminals I-A and I-B and the domestic arrival hall by enclosing the valuation report in relation thereto. The total cost with regard to these three buildings worked out at Rs. 34,91,56,000/- and 10% depreciation works out to Rs. 23,60,29,727/- in respect of the three buildings. However, neither in the notice dated 26th March 2001 or the letter dated 16th April 2003 has the DCB explained the basis for the determination of the annual values.

15. The impugned order dated 24th February 2003 seeks to distinguish the decision in **Municipal Board, Saharanpur** on the ground that AAI's

letter dated 6th June 1983 at best gives the cost of the building as of that date and not as of the dates of the assessment orders for the period i.e. 1998-1999 to 2000-01. Learned counsel for the Respondent referred to para 9 of the decision in **Municipal Board, Saharanpur** (supra), the relevant portion of which reads as under:

> "9….. Consequently, it becomes obvious that while estimating the present cost of erecting the building concerned, the assessing authority has to keep in view the life of the building and also the fact as to when it was earlier constructed and in what present state the building is and what will be the cost of erecting a new building so as to result into erection of such an old building keeping in view its life and wear and tear from which it has suffered since it was put up. It is obvious that if the building is an old one, the present cost of erecting such a building would necessarily require further consideration to what would be the depreciated value of such buildings; if a new building is erected at the time of assessment. Such cost, obviously, has to be sliced down by giving due weight to the depreciation so as to make estimation of present cost of the new building to ultimately become equal to the erection cost of the building concerned in its depreciated state. Consequently, it cannot be said that 10 percent depreciation allowed by the District Magistrate and as confirmed by the High Court on the total estimated cost of the building for bringing it within the assessable tax net of house tax was an exercise which was ultra vires provisions of the Act or beyond the jurisdiction of the assessing authority. On the facts governing the case, it is seen that the railway station belonging to the respondent, was as old as 1905, there may be other buildings within the complex which might have seen the light of the day years before the time of assessment. Naturally, they would not be new buildings which could have said to have been put up only at the time of assessment proceedings. They were obviously old buildings. It is not the case of the appellant or any of them that these buildings were new buildings recently constructed when assessment proceedings were initiated. Consequently, a flat rate of 10 percent depreciation as granted by the District Magistrate while computing the annual value for house tax purposes, in the present case, cannot said to be an unauthorised exercise. The third point for determination, therefore, has to be answered in the affirmative against the appellant and in favour of the respondent."

16. This Court fails to appreciate how the observations advance the case of the DCB. On the other hand they support the claim of AAI for 10% depreciation on the cost of the building as calculated by it. The impugned orders do not deal with any of the contentions raised by AAI in response to the notice dated 26th March 2001. There is merit in the contention of AAI that the impugned assessment by the AC and the determination of the annual values is based on arbitrary figures.

17. The impugned order dated 24th February 2003 simply states that even if the spaces have been given to the airlines by the AAI on licence basis, the charges collected thereby would be amenable to tax in terms of Section 64 (b) CA, 1924. It overlooks the settled proposition that taxing statutes have to be strictly construed. The wording in Section 64 (b) applies only where 'gross annual rent' received for such building or such land is actually let or, where the building or land is not let or in the opinion of the Board is let for a sum less than its fair letting value. This provision does not apply to a situation where spaces are given out on licence basis. In **Hindustan Lever Limited v. Municipal Corporation of Greater Bombay** (1995) 3 SCC 716 it was held in para 11 that "in any case as we are concerned with a taxing provision, an interpretation beneficial to the assessee, in case two interpretations be reasonably possible, has to be given. This is a well settled position in law."

18. For all the aforesaid reasons the writ petition is allowed and the impugned assessment order dated 24th February 2003 and the bill raised on the same date are hereby quashed. The Respondent will pay to AAI costs of this petition which are quantified at Rs. 10,000/- within a period of four weeks. The amounts already deposited by AAI with the DCB, including the amount deposited pursuant to the interim order dated 26th May 2003 of this Court, will be either refunded by the DCB within a period of eight weeks or adjusted against any future assessment in accordance with law.

ILR (2011) IV DELHI 421
W.P.

M/S. RAKESH KUMAR SHARMA & SONS ....PETITIONER

VERSUS

BSES RAJDHANI POWER LTD. & ANR. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P.(C) NO. : 5208/2010 & CM NO. : 10270/2010 (FOR INTERIM RELIEF) **DATE OF DECISION: 01.06.2011**

Delhi Electricity Supply Code and Performance Standards Regulations, 2007—Regulation 15, 46 and 49—Petitioner filed writ petition seeking a direction to BSES to take appropriate steps to recover upto date dues with respect to premises from tenant to ensure that petitioner upon being put back into possession of premises is not saddled with liability for dues of electricity consumed by tenant—Plea taken by BSES, relief sought by petitioner is contrary to regulations whereunder BSES is entitled to refuse electricity supply to premises after tenant has vacated premises if any arrears of electricity dues remain—Petitioner ought to have incorporated in lease deed, obligation of tenant to pay electricity dues upto date of vacation of premises—Per contra plea taken, electricity charges are always responsibility of tenant more so when connection itself is in name of tenant—Held—Consumer of electricity is liable to get special reading done at time of change of occupancy or on premises falling vacant and to obtain No Dues Certificate from Distribution Company who is obliged to arrange for such special reading and to deliver final bill including

all arrears till date of billing at least three days before vacation of premises—Thereafter, Distribution Company is left with no right to recover any amounts other than those subject matter of bill and is also required to disconnect electricity on its vacancy—Distribution Company cannot be negligent in complying with its obligations and which non compliance may be to prejudice of petitioner—Distribution Companies cannot afford to be complacent in relief that its dues are secure and will be recovered if not from tenant then in any case from petitioner—If Distribution Companies are permitted to so allow arrears of electricity charges to accumulate and not take timely prompt action for recovery thereof from person liable therefore and then coerce subsequent occupant to pay same, it would be serious clog on transferability of immovable properties—Distribution Companies when warned of likely date of vacation of property by consumer liable for electricity dues, are obliged to ensure that electricity charges do not accumulate and are recovered before consumer vacates property so that electricity dues do not fall on subsequent consumer—Supplier of electricity is required to enforce all its Rules and cannot be selective in same and if found to be negligent in enforcement of Rules against previous occupant and to detriment of subsequent occupant, subsequent occupant would be entitled to resist such claims of supplier of electricity—Writ allowed directing BSES to ensure that claims against electricity meter in name of tenant in premises are paid before date of vacation of premises otherwise it shall not be entitled to deny electricity connection to petitioner or any subsequent transferee/ occupant thereof for reason of said dues.

Important Issue Involved: (A) The Distribution Companies, when warned of the likely date of vacation of the property by the consumer liable for electricity dues, are obliged to ensure that the electricity charges do not accumulate and are recovered before the consumer vacates the property so that the electricity dues do not fall on the subsequent occupant.

(B) The supplier of electricity is required to enforce all its rules and cannot be selective in the same and if found to be negligent in enforcement of rules against the previous occupant and to the detriment of the subsequent occupant, the subsequent occupant would be entitled to resist such claims of the supplier of electricity.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Laliet Kumar with Mr. Deepak Vohra, Advocates.

FOR THE RESPONDENTS : Mr. Sunil Fernandes, Standing Counsel with Mr. Vipin Pillai, Advocates.

CASES REFERRED TO:

1. *BSES Rajdhani Power Ltd.* vs. *Saurashtra Color Tones Pvt. Ltd.* AIR 2010 Delhi 14.
2. *Haryana State Electricity Board* vs. *Hanuman Rice Mills* (2010) 9 SCC 145.
3. *Paschimanchal Vidyut Vitran Nigam Limited* vs. *DVS Steels and Alloys Private Limited* (2009) 1 SCC 210.
4. *Madhu Garg* vs. *North Delhi Power Ltd.* 129 (2006) DLT 213.

RESULT: Allowed.

RAJIV SAHAI ENDLAW, J.

1. The present writ petition is a sequel to the Full Bench judgment of this Court in **BSES Rajdhani Power Ltd. Vs. Saurashtra Color Tones Pvt. Ltd.** AIR 2010 Delhi 14 and as per which, if a tenant leaves arrears of electricity charges, the landlord can be denied electricity in the premises if does not clear the said arrears.

2. The petitioner is the owner of the first floor of property bearing No.E-5, South Extension Part-II (Market), New Delhi. The said property has been let out to the respondent no.2 M/s Saraf Projects Pvt. Ltd. The respondent no.2 tenant has obtained an electricity connection in the said tenanted premises in its own name from the respondent no.1. Disputes and differences arose between the petitioner and the respondent no.2 resulting in the filing of CS(OS) No.842/2009 by the petitioner in this Court for eviction of the respondent no.2. In the said suit, a settlement was arrived at between the petitioner and the respondent no.2 and under which settlement, the respondent no.2 has inter alia agreed to vacate the premises on or before 7th January, 2013.

3. The petitioner has filed this writ petition averring that to the knowledge of the petitioner, the respondent no.2 has outstanding arrears of over Rs.55,00,000/- to the respondent no.1 towards electricity charges and expressing apprehension that unless the respondent no.1 recovers the said amount from the respondent no.2 immediately or disconnects electricity supply to the respondent no.2 in the tenanted premises immediately, so as to compel the respondent no.2 to make payment, the petitioner may be ˇsaddled with the said liability upon the respondent no.2 vacating the premises.

4. The petitioner thus seeks a direction to the respondent no.1 to take appropriate steps to recover upto date dues with respect to the premises from the respondent no.2 only, to ensure that the petitioner upon being put back into possession of the premises is not saddled with liability for dues of electricity consumed by the respondent no.2.

5. Considering the nature of the controversy, need was not felt to call for the counter affidavit or to issue notice to the respondent no.2 tenant and the counsel for the petitioner and the counsel for the respondent

no.1 have been heard finally on the petition.

6. The counsel for the respondent no.1 has contended that the petitioner has concealed from this Court that there is a dispute pending between the respondent no.2 tenant and the respondent no.1 with respect to the electricity dues aforesaid. It is stated that the respondent no.2 tenant had filed a complaint against the respondent no.1 before the State Consumer Disputes Redressal Forum and which was decided in favour of the respondent no.2 tenant on 16th December, 2008; the respondent no.1 preferred an appeal to the National Consumer Disputes Redressal Commission which was decided in favour of the respondent no.1 on 7th August, 2009; the respondent no.2 tenant has now preferred a Special Leave Petition No.25343/2009 which is pending consideration before the Supreme Court. It is contended that the relief sought in this writ petition of directing the respondent no.1 to recover the dues of over Rs.55,00,000/- from the respondent no.2 tenant is contrary to the aforesaid dispute which is pending. The counsel for the respondent no.1 however on enquiry informs that there is no stay by the Supreme Court of any action by the respondent no.1 to recover the dues from the respondent no.2 tenant.

7. It is further the contention of the counsel for the respondent no.1 that the relief sought by the petitioner is contrary to Regulation 15 of the Delhi Electricity Supply Code & Performance Standards Regulations, 2007 whereunder the respondent no.1 is entitled to refuse electricity supply to the premises aforesaid after the respondent no.2 tenant has vacated the premises if any arrears of electricity dues remain. The counsel for the respondent no.1 has also taken me through paragraphs 10 to 14 of the judgment in **Paschimanchal Vidyut Vitran Nigam Limited Vs. DVS Steels and Alloys Private Limited** (2009) 1 SCC 210 in this regard.

8. The counsel for the respondent no.1 has further contended that as per paragraph 14 of the judgment of the Full Bench in **Saurashtra Color Tones Pvt. Ltd.** (supra), the petitioner ought to have incorporated in the Lease Deed, the obligation of the respondent no.2 tenant to pay the electricity dues up to the date of vacation of the premises. It is urged that the Lease Deed has intentionally not been filed.

9. The counsel for the petitioner states that the petitioner is not a party to the proceedings between respondent no.1 and respondent no.2 and thus no question of concealment arises. It is further stated that the electricity charges are always the responsibility of tenant and more so when the connection itself is in the name of the tenant. It is further stated that Lease Deed if required, can be filed.

10. The Full Bench of this Court in the judgment aforesaid has held that the question of mala fides does not arise in the enforcement of Regulation 15 aforesaid and the said Regulation is to be enforced even if the owner or subsequent transferee or purchaser of the property was unaware of the electricity dues and has no truck with the person leaving the arrears.

11. The petitioner, atleast by way of the present petition has made the respondent no.1 aware of the last date when the respondent no.2 is to vacate the premises. The counsel for the petitioner also relies upon Regulation 49 whereunder the respondent no.1 is required to immediately disconnect the electricity supply for non-payment of the arrears. It is contended that notwithstanding there being no stay against the respondent no.1 from the Supreme Court, the respondent no.1 is not taking any steps for recovery of huge dues and which may ultimately fall on the petitioner. Both petitioner as well as respondent no.1 allege collusion of the respondent no.2 with other.

12. The counsel for the respondent no.1 states that the respondent no.1 as a matter of policy does not take coercive steps during the pendency of a litigation, even if there be no stay order.

13. It has at the outset to be examined whether the relief sought is in the face of Regulation 15 supra. The same is as under:

> "**15. General**—(i) The Licensee shall prominently display at all offices where application for new connection is accepted, the detailed procedure for new connection and the complete list of documents required to be furnished along with the application. No other document, which has not been listed, shall be asked to be submitted by the applicant. Rate/amount of security and cost

of service line to be deposited by the applicant in accordance with the stipulation in the regulations shall also be displayed.

(ii) Where applicant has purchased existing property and connection is lying disconnected, it shall be the duty of the ˇapplicant to verify that the previous owner has paid all dues to the Licensee and has obtained "no-dues certificate" from the Licensee. In case "no-dues certificate" is not obtained by the previous owner, the applicant before purchase of property may approach the Business Manager of the Licensee for a "no-dues certificate". The Business Manager shall acknowledge receipt of such request and shall either intimate in writing outstanding dues, if any, on the premises or issue "no-dues certificate" within one month from the date of application. In case the Licensee does not intimate outstanding dues or issues "no-dues certificate" within specified time, new connection on the premises shall not be denied on ground of outstanding dues of previous consumer.

(iii) Where a property/premises has been sub-divided, the outstanding dues for the consumption of energy on such premises, if any, shall be divided on prorata basis based on area of sub-division.

(iv) A new connection to such sub-divided premises shall be given only after the share of outstanding dues attributed to such sub-divided premises is duly paid by the applicant. A Licensee shall not refuse connection to an applicant only on the ground that dues on the other portion(s) of such premises have not been paid, nor shall the Licensee demand record of last paid bills of other portion(s) from such applicants.

(v) In case of complete demolition and reconstruction of the premises or the building, the existing installation shall be surrendered and agreement terminated. Meter and service line will be removed, and only fresh connection shall be arranged for the reconstructed premises or building, treating it as a new premises after clearing the old dues on the premises by the consumer(s)."

14. It would thus be seen that Regulation 15 imposes an obligation on a purchaser of existing property electricity connection wherein is lying disconnected. The present is not a case of sale-purchase of property. The petitioner is the owner having inducted respondent no.2 as the tenant and the dues subject matter of this writ petition are the dues of electricity connection obtained by the respondent no.2 tenant himself in its own name in the premises.

15. Both **Saurashtra Color Tones Pvt. Ltd. and Paschimanchal Vidyut Vitran Nigam Limited** also were concerned with sale-purchase of property and not with a case of tenancy as the present case is, though I must record that in the order of reference to Full Bench in **Saurashtra Color Tones Pvt. Ltd.,** there indeed is a reference to "previous tenant". **Saurashtra Color Tones Pvt. Ltd.** however does not refer to Regulation 15 (supra) but bases the entitlement to recover outstanding dues against the premises and/or disconnected connection on General Conditions of Supply of electricity which were held to be binding and statutory in nature. It was held since as a condition of supply in Delhi the consumer is bound to pay / deposit outstanding dues, the consumer could not be heard to contend otherwise. The Division Bench of this Court in **Madhu Garg Vs. North Delhi Power Ltd.** 129 (2006) DLT 213 approved by the Full Bench in **Saurashtra Color Tones Pvt. Ltd.** had also held that whenever a person purchases a property, it is his duty to find out whether there are outstanding electricity dues in relation to the premises and he cannot be allowed to say later that he was unaware that there were dues of the previous occupant.

16. I may also notice that Regulation 46 makes a consumer of electricity liable to get a special reading done at the time of change of occupancy or on the premises falling vacant and to obtain No Dues Certificate from the Distribution Company such as the respondent no.1 herein is. The respondent no.1 is also obliged to arrange for such special reading and to deliver the final bill including all arrears till the date of billing at least three days before the vacation of the premises. Upon such final bill being raised, the Distribution Company as respondent no.1, is left with no right to recover any amounts other than those subject matter of the bill and is also required to disconnect the supply on its vacancy.

17. In my view, the right aforesaid of the respondent no.1 under General Conditions of Supply has to be harmonized with its obligations under Regulations 15, 49 & 46 supra. The respondent no.1 especially after being warned cannot be negligent in complying with its obligations and which non-compliance may be to the prejudice of the petitioner. Even if it be the policy of the respondent no.1 to not disconnect electricity supply during the pendency of legal proceedings, the respondent no.1 can certainly in the said legal proceedings seek a direction for securing its claims. The respondent no.1 cannot afford to be complacent in the belief that its dues are secure and will be recovered if not from the respondent no.2 then in any case from the petitioner. The provisions of Regulations 15, 46 & 49 have been made in public interest and the respondent no.1 cannot use it to the detriment of the public. If the Distribution Companies such as the respondent no.1 are permitted to so allow the arrears of electricity charges to accumulate and not take timely prompt action for recovery thereof from the person liable therefor and then coerce the subsequent occupant to pay the same, it would be a serious clog on transferability of immovable properties. People would then hesitate in acquiring properties for the fear of the unknown liability of electricity dues. Cases are not unknown where the Distribution Companies have on enquiry disclosed a certain amount of dues and subsequently demanded manifold amounts. The Distribution Companies, when warned of the likely date of vacation of the property by the consumer liable for electricity dues, are obliged to ensure that the electricity charges do not accumulate and are recovered before the consumer vacates the property so ˇthat the electricity dues do not fall on the subsequent occupant. Just like under Conditions of Supply the respondent no.1 is entitled to recover the outstanding of previous occupant from the subsequent occupant, the respondent no.1 is also entitled to (a) insist on the respondent no.2 obtaining a No Dues Certificate from the respondent no.1 under Regulation 15(ii) as well as Regulation 46(i) before leaving the premises, (b) take a special reading under Regulation 46(ii) seven days in advance of the respondent no.2 vacating the premises, (c) deliver the final bill under Regulation 46(iii) to the respondent no.2 at least three days before it vacates the property and (d) under Regulation 46(iv) disconnect the electricity supply immediately on the respondent no.2 vacating the

premises. All this can be ensured by the respondent no.1 calling upon the respondent no.2 to furnish an affidavit or undertaking to comply with the aforesaid Regulations and if the respondent no.2 fails to furnish such affidavit/undertaking, to proceed to disconnect electricity supply forthwith.

18. Mention may also be made of the recent dicta in **Haryana State Electricity Board Vs. Hanuman Rice Mills** (2010) 9 SCC 145 laying down that electricity arrears do not constitute a charge over the property and because in general law a transferee of premises cannot be made liable for the dues of the previous owner/occupier and further holding that only where the statutory rules and terms and conditions of supply which are statutory in character, authorize the supplier of electricity to demand from the purchaser of a property claiming reconnection or fresh connection of electricity, the arrears due from the previous owner/ occupier in regard to supply of electricity to such premises, can the supplier recover the arrears from the purchaser. I am of the opinion that the supplier of electricity is required to enforce all its rules and cannot be selective in the same and if found to be negligent in enforcement of rules against the previous occupant and to the detriment of the subsequent occupant, the subsequent occupant would be entitled to resist such claims of the supplier of electricity.

19. The writ petition is therefore disposed of with the following directions:-

(i) the petitioner shall immediately serve notice on the respondent no.1 of any change in terms with the respondent no.2 than as contained in the compromise/application in the suit, copy of which is annexed to the writ petition. The petitioner to, in the event of learning of the intent of the respondent no.2 to vacate the premises prior to 7th January, 2013, immediately serve the respondent no.1 with notice of the same.

(ii) the respondent no.1 is directed to secure itself in the manner aforesaid and otherwise, qua the dues, if any from the respondent no.2 and to ensure that all its claims against the electricity meter in the name of the respondent no.2 in the premises aforesaid are paid before the stipulated date of vacation of the premises. If the

respondent no.1 is found to be wanting in the same, it shall not be entitled to deny the electricity connection to the petitioner or any subsequent transferee/occupant thereof for the reason of the said dues.

No order as to costs.

ILR (2011) IV DELHI 431
FAO (OS)

BABLI BRAR ....APPELLANT

VERSUS

ADESH KANWARJIT SINGH BRAR ....RESPONDENT

(VIKRAMAJIT SEN & SIDDHARTH MRIDUL, JJ.)

FAO (OS) NO. : 279-80/2011 & CM NO. : 10404/2011 **DATE OF DECISION: 03.06.2011**

Code of Civil Procedure, 1908—Order VII Rule 11—Rejection of the Plaint—Suit for Declaration, Partition and Permanent injunction in respect of Plot acquired through a Perpetual Lease by father of the Plaintiff—Construction on the said Plot was carried on the double storey residential building in 1955—The contribution of funds for the purchase and construction of the building is said to have come from his father, mother and the Plaintiff himself in the proportion of 1/4, 1/4 and 1/2 respectively, though admittedly the Plaintiff was 3-5 years of age at that point in time—It has further been averred that in the Perpetual Lease whereby his father had acquired the

said property, had only lent in his name for the purpose of completing the formalities of executing the Lease Deed—Father of the plaintiff was the Karta of the Brar HUF having ancestral property from the proceeds of which the present property was purchased—The said property is said to have been let-out on lease from time to time and the rental income was shared by his parents and the Plaintiff in the ratio of 1/4, 1/4 and 1/2—The shared ownership of the property is said to be duly reflected by the father of the plaintiff by his conduct as well as admissions before Income Tax Authorities, Wealth Tax Authorities and Revenue Authorities—The Plaintiff has filed the present Suit claiming half together with his proportional share in the 1/4 interest/title of his father—The defendant sought the rejection of the suit by means of an application under Order VII Rule 11 of the CPC on the ground that the claim of the plaintiff was that the property was the Benami property in the name of his father and the Benami Transaction Prohibition Act, 1988 specifically barred any suit, claim and action to enforce any right in respect of any property held benami by a person who claims to be the real owner of the property—Learned Single Judge dismissed the application holding that the Plaintiff's case may fall in the exception of Section 4 on the dialectic that the father stood in a fiduciary capacity as the Plaintiff was 3-5 years old when the property was purchased and he acted as a Trustee for the purposes of Section 88 of Indian Trusts Act, 1882—Hence the instant Appeal.

Held—Order VI of the CPC only requires the parties to state the material facts and not the evidence—Pleadings are to contain facts and facts alone and a party is not required to state the law or substantial legal pleas in their respective pleadings—In a case of

clever drafting where an illusion of a cause of action is sought to be created, the Court has to nip in the bud such a frivolous suit—Similarly, in the case of shoddy or deficient drafting, the Court should not abort a valid claim that requires Trial—It is the duty of the Court to make a holistic and meaningful reading of the Plaint and only when it is manifestly and uncontrovertibly evident that the requirements of Order VII Rule 11 are met, and that it is plain that the Plaint does not deserve to go to Trial, should it order a rejection of the Plaint—In the instant case since the father is the nominal owner, and it stands clearly pleaded that he used his sons (Plaintiffs) finances for the purchase, Order VII Rule 12 would not be attracted, at the stage of determination of the plea under Order VII Rule 11—Not disputed that the Plaintiff was a minor at the time of acquisition of the property—Section 6 of Hindu Minority and Guardianship Act, 1956 enjoins that in respect of a minor person and property, the natural guardian in case of a minor boy is the father—The property was purchased from the funds that came from an ancestral property belonging to the Brar HUF for the purposes of Income Tax and Wealth Tax—The father had been showing the Plaintiff to be 1/2 owner of the suit property, the rental income was also shared in that proportion by the Plaintiff, his father and the mother—All these averments conjointly prima facie raise a presumption of a fiduciary relationship existing between the father and the Plaintiff with respect to the ownership of the property—These pleadings have to be traversed by the Defendant in a Trial and cannot be adjudicated at Order VII Rule 11 stage—There is no comparison between the relationship of a father/parent and his infant child on the one hand, and of siblings on the other. Appeal is entirely devoid of merit and is dismissed.

After a holistic reading to the Plaint and cogitating upon the contentions of the Appellant, we are not convinced that the subject matter suit is liable to be dismissed under Order VII Rule 11 of the CPC at the incipient stage. It is an established principle that the pleadings are to contain facts and facts alone. A party is not required to state the law or substantial legal pleas in their respective pleadings. Order VI of the CPC only requires the parties to state the material facts and not the evidence. In the circumstances of this case, since the father is the nominal owner, and it stands clearly pleaded that he used his sons (Plaintiffs) finances for the purchase, Order VII Rule 12 of the CPC would not be attracted, at least at the stage of determination of a plea under Order VII Rule 11. It cannot be disputed that the Plaintiff was a minor nay an infant at the time of the acquisition of the property. Section 6 of Hindu Minority and Guardianship Act, 1956 enjoins that in respect of a minor person and property, the natural guardian in case of a minor boy or an unmarried girl is the father. It has been stated in the Plaint that the Plaintiff at the time of the conveyance was 3-5 ˇyears old, that the property was purchased from the funds that came from an ancestral property belonging to the Brar HUF for the purposes of Income Tax and Wealth Tax. The father had been showing the Plaintiff to be ½ owner of the suit property, the rental income was also shared in that proportion by the Plaintiff, his father and the mother. All these averments conjointly prima facie raise a presumption of a fiduciary relationship existing between the father and the Plaintiff with respect to the owner of the property. These pleadings have to be traversed by the Defendant in a Trial and cannot be adjudicated at Order VII Rule 11 stage. In a case of clever drafting where an illusion of a cause of action is sought to be created, the Court has to nip in the bud such a frivolous suit. Similarly, in the case of shoddy or deficient drafting, the Court should not abort a valid claim that requires Trial. It is

the duty of the Court to make a holistic and meaningful reading of the Plaint and only when it is manifestly and uncontrovertedly evident that the requirements of Order VII Rule 11 are met, and that it is plain that the Plaint does not deserve to go to Trial, should it order a rejection of the Plaint. There is no comparison between the relationship of a father/parent and his infant child on the one hand, and of siblings on the other. **(Para 4)**

Important Issue Involved: It is the duty of the Court to make a holistic and meaningful reading of the Plaint and only when it is manifestly and uncontrovertibly evident that the requirements of Order VII Rule 11 are met, and that it is plain that the Plaint does not deserve to go to Trial, should it order a rejection of the Plaint.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Dr. A.M. Singhvi, Sr. Advocate with Mr. Amit Sibal Ms. Jyoti Mendiratta, Ms. Gurkirat Kaur & Ms. Deeksha Kakkar, Advocates.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Abdul Gafur* vs. *State of Uttarakhand*, (2008) 10 SCC 97.
2. *R. Rajgopal Reddy* vs. *Padmini Chandrashekharan*, AIR 1996 SC 238.
3. *Wander Ltd.* vs. *Antox India P. Ltd.*, (1990) Supp SCC 727.

RESULT: Appeal dismissed.

VIKRAMAJIT SEN, J.

1. The present Appeal assails the Order of the learned Single Judge dated 8.4.2011 dismissing the Application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC for short) for rejection of the Plaint.

2. The Suit is one for Declaration, Partition and Permanent Injunction in respect of property situated at Plot No.6 in Block No.172, Jorbagh, New Delhi. The case set-out in the Plaint is that on 29.5.1952, the said Plot was acquired through a Perpetual Lease by Shri Harcharan Singh Brar, father of the Plaintiff. Construction on the said Plot was carried on the double storey residential building in 1955. The contribution of funds for the purchase and construction of this building is said to have come from the father, Late Shri Harcharan Singh Brar, the mother Mrs. Gurbinder Singh Brar and the Plaintiff himself in the proportion of ¼, ¼ and ½ respectively, though admittedly the Plaintiff was 3-5 years of age at that point in time. It has further been averred that in the Perpetual Lease whereby Late Shri Harcharan Singh Brar had acquired the said property, he had only lent in his name for the purpose of completing the formalities of executing the Lease Deed. It is stated in the Plaint that Late Shri Harcharan Singh Brar was the Karta of the Brar HUF and by an Order of Sikh Gurdwara Tribunal, Brar HUF was declared to be the owner of agricultural property which was ancestral in nature. Late Shri Harcharan Singh Brar got the said property partitioned in the year 1951 in three equal parts – one each to himself, Gurvinder Kaur, his wife and the Plaintiff, Shri Kanwarjit Singh. It is alleged in the Plaint that the Jorbagh property was purchased from these funds. The said property is said to have been let-out on lease from time to time and the rental income was shared by Late Shri Harcharan Singh Brar, Gurvinder Kaur and the Plaintiff in the ratio of ¼, ¼ and ½ and the said position regarding the shared ownership of the Jorbagh property is said to be duly reflected by Late Shri Harcharan Singh Brar by his conduct as well as admissions before Income Tax Authorities, Wealth Tax Authorities and Revenue Authorities. It is also averred by the Defendant, Mrs. Babli Brar, sister of the Plaintiff, that Shri Harcharan Singh Brar had gifted the entire property to her predicated on a registered Gift Deed dated 28.1.1999.

The Plaintiff has filed the present Suit claiming half together with his proportional share in the ¼ interest/title of his father.

3. The Appellant before us sought the rejection of this Suit by means of an application under Order VII Rule 11 of the CPC on the ground that the claim of the Plaintiff was essentially that the said property was benami property in the name of the deceased father. It is contended that the Benami Transaction Prohibition Act, 1988 specifically barred any suit, claim and action to enforce any right in respect of any property held benami by a person who claims to be the real owner of the property. Learned Senior Counsel for the Appellant, Dr. A.M. Singhvi, has laid great store on Section 4 of the Benami Transaction Act to contend that the Parliament had consciously put a specific bar not only on benami transactions but had even against claiming any right with respect to a property purported to be held benami; and has proscribed a defence of this nature against the person in whose name the property is held. Dr. Singhvi contends that on a bare perusal of the Plaint, it is clear that since the Plaintiff admits that the property was held in the name of his father, the Suit was not maintainable after the coming into effect of Benami Transaction Act. It is argued that the father's Title even as a benamidar is impervious to any challenge. It is further contended that the learned Single Judge erred in returning the finding that the Plaintiff's case may fall in the exception of Section 4 on the dialectic that the father stood in a fiduciary capacity as the Plaintiff was 3-5 years old when the property was purchased; alternatively, that he acted as a Trustee for the purposes of Section 88 of Indian Trusts Act, 1882. Dr. Singhvi has argued that these factors have not been pleaded and to overcome this lacuna, has applied for leave to amend the Plaint and introduce the ground of fiduciary relationship. Dr. Singhvi has relied on **R. Rajgopal Reddy –vs- Padmini Chandrashekharan,** AIR 1996 SC 238 which holds that Section 4(1) and Section 4(2) of the Benami Transactions Act prohibits any suit or action or claim being filed after the commencement of the Act; and that the date of the benami transaction would be inconsequential for the purposes of said statutory bar as the operation of the Act is retrospective. ˇDr. Singhvi also relies on various Single Judge decisions wherein similar suit has been rejected under Order VII Rule 11 of the CPC on the ground of bar of Section 3 and Section 4 of Benami Transactions Act.

4. After a holistic reading to the Plaint and cogitating upon the contentions of the Appellant, we are not convinced that the subject matter suit is liable to be dismissed under Order VII Rule 11 of the CPC at the incipient stage. It is an established principle that the pleadings are to contain facts and facts alone. A party is not required to state the law or substantial legal pleas in their respective pleadings. Order VI of the CPC only requires the parties to state the material facts and not the evidence. In the circumstances of this case, since the father is the nominal owner, and it stands clearly pleaded that he used his sons (Plaintiffs) finances for the purchase, Order VII Rule 12 of the CPC would not be attracted, at least at the stage of determination of a plea under Order VII Rule 11. It cannot be disputed that the Plaintiff was a minor nay an infant at the time of the acquisition of the property. Section 6 of Hindu Minority and Guardianship Act, 1956 enjoins that in respect of a minor person and property, the natural guardian in case of a minor boy or an unmarried girl is the father. It has been stated in the Plaint that the Plaintiff at the time of the conveyance was 3-5 years old, that the property was purchased from the funds that came from an ancestral property belonging to the Brar HUF for the purposes of Income Tax and Wealth Tax. The father had been showing the Plaintiff to be ½ owner of the suit property, the rental income was also shared in that proportion by the Plaintiff, his father and the mother. All these averments conjointly prima facie raise a presumption of a fiduciary relationship existing between the father and the Plaintiff with respect to the owner of the property. These pleadings have to be traversed by the Defendant in a Trial and cannot be adjudicated at Order VII Rule 11 stage. In a case of clever drafting where an illusion of a cause of action is sought to be created, the Court has to nip in the bud such a frivolous suit. Similarly, in the case of shoddy or deficient drafting, the Court should not abort a valid claim that requires Trial. It is the duty of the Court to make a holistic and meaningful reading of the Plaint and only when it is manifestly and uncontrovertedly evident that the requirements of Order VII Rule 11 are met, and that it is plain that the Plaint does not deserve to go to Trial, should it order a rejection of the Plaint. There is no comparison between the relationship of a father/parent and his infant child on the one hand, and of siblings on the other.

5. In these circumstances, we are of the opinion that the Appeal is entirely devoid of merit and is dismissed. CM No.10404/2011 is also dismissed. Order VII Rule 11 of the CPC has assumed exponential proportion. Courts are already bursting at the seams from an exponential explosion of dockets and this burden is being exacerbated by filing of appeals from orders rejecting such applications. None of the cases cited before us are of a parent investing money allegedly belonging to a child of tender years. The principle of **Wander Ltd. –vs- Antox India P. Ltd.,** (1990) Supp SCC 727 rightly comes to mind and if a Judge is of the view that a case needs to go to Trial, it would be almost impossible for the Appellate Court to arrive at a contrary conclusion. In **Abdul Gafur –vs- State of Uttarakhand,** (2008) 10 SCC 97, their Lordships have enunciated the law to the effect that the party has right to a patient hearing by a civil court, regardless of the preponderance of merit or demerit. However, we desist from imposing costs.

ILR (2011) IV DELHI 439
W.P. (C)

S.K. TYAGI **....PETITIONER**

VERSUS

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

(DIPAK MISRA, CJ AND SANJIV KHANNA, J.)

W.P. (C) NO. : 4421/2000 **DATE OF DECISION: 04.07.2011**

Constitution of India, 1950—Article 32, 226 and 227—Penalty of dismissal imposed upon petitioner as he was found guilty of charge levelled against him—Tribunal refused to interfere in order of punishment—Order challenged before High Court—Plea taken,

allegation of interpolation not proved since only witness in this regard is expert witness who had not taken admitted signatures or writings of petitioner and opinion of said expert does not deserve acceptation—Held—Handwriting expert was cross-examined at length by defence and private handwriting expert was permitted to be cited as a defence witness—It can be said with certitude that there has been substantial compliance of principles of natural justice—Tribunal does not sit in appeal on the findings recorded by enquiry officer in departmental proceeding but under certain circumstances a judicial review of fact is permissible—No merit in writ petition.

Though, the learned senior counsel for the petitioner has raised with immense vehemence that principles of natural justice have been violated by not examining Mr. Wagh but, the same leaves us unimpressed as, we have indicated hereinbefore, that Mr. Gajjar, the handwriting expert was cross-examined at length by the defence and Mr. Vij, the private handwriting expert was permitted to be cited as a defence witness. Thus, it can be said with certitude that there has been substantial compliance of principles of natural justice. That apart, the tribunal has also ascribed cogent reasons that the petitioner had really not sought permission to examine Mr. Wagh. In any case, no prejudice has been caused to the petitioner. **(Para 23)**

Important Issue Involved: The Tribunal does not sit in appeal on the findings recorded by an enquiry officer in a departmental proceeding but under certain circumstances a judicial review of fact is permissible.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER **:** Mr. P.P. Khurana, Sr. Advocte with

Ms. Sunita Tiwari, Advocate.

FOR THE RESPONDENTS : Mr. Ravinder Agarwal with Mr. Nitish Gupta, Advocates for Respondent No. 1 & 2.

CASES REFERRED TO:

1. *Moni Shankar* vs. *Union of India and another,* (2008) 3 SCC 484.
2. *State of U.P.* vs. *Sheo Shanker Lal Srivastava,* (2006) 3 SCC 276.
3. *Noble Resources Ltd.* vs. *State of Orissa & Anr.,* AIR 2007 SC 119.
4. *Coimbatore District Central Coop. Bank* vs. *Employees Assn.* (2007) 4 SCC 669].
5. *State of U.P. and Another* vs. *Johri Mal,* (2004) 4 SCC 714.
6. *B.C. Chaturvedi* vs. *Union of India and others,* (1996) 1 LLJ 1231 SC. 19.
7. *State Bank of India and others* vs. *D.C. Aggarwal and another,* (1993) 1 SCC 13.
8. *H.B. Gandhi* vs. *Gopi Nath & Sons,* 1992 Supp (2) SCC 312.

RESULT: Dismissed.

DIPAK MISRA, CJ.

1. In this writ petition preferred under Articles 226 and 227 of the Constitution of India, the petitioner has called in question the legal substantiality of the order dated 18.2.2000 passed by the Central Administrative Tribunal, Principal Bench (for short 'the tribunal') in OA No.1265/1995.

2. The petitioner entered Indian Revenue Service (IRS) as a direct Class-I Officer in 1968. He was promoted as Inspecting Assistant

Commissioner of Income Tax in 1979. A disciplinary proceeding was initiated against him and he was served with a chargesheet on 29.11.1988 for imposition of major penalty. A raid was also conducted by the CBI on 9.12.1988 at his office and the residential premises. The CBI did not think it appropriate to file the chargesheet and accordingly the seized documents were returned to him on 20.3.1992. As set forth in the petition in April 1988, the Departmental Promotion Committee (DPC) recommended his name for the post of Commissioner of Income Tax (CIT) but eventually he was not extended the benefit of promotion.

3. The disciplinary proceeding that was initiated vide charge memo dated 29.11.1988 continued. An additional charge memo was served on him on 26.7.1989. The petitioner was found guilty in respect of the additional charge levelled against him and eventually the penalty of dismissal was imposed vide order dated 11.7.1994. Being dissatisfied with ˇthe order of penalty of dismissal, the petitioner addressed a memorial dated 30.8.1994 to the President of India but there was no response to the same. The order of dismissal was assailed before the tribunal in the original application. It was contended before the tribunal that the petitioner was not afforded adequate opportunity during the enquiry as a consequence of which the disciplinary proceeding is vitiated; that he was not allowed reasonable opportunity to examine the material defence witnesses; that the enquiry officer rejected the testimony of the defence witnesses in a most cryptic manner and further the enquiry officer did not consider the stand and stance put forth during his defence and, hence, the enquiry report did not deserve to be accepted; that the order passed by the disciplinary authority was based on conjectures and it was basically a case of no evidence; and that the expert evidence was accepted without following the due procedure of law.

4. The respondents before the tribunal in support of the order of dismissal submitted that the charge had been properly proven and the findings recorded by the disciplinary authority do not suffer from any perversity of approach and the tribunal should not appreciate the material brought on record as an appellate authority. The tribunal referred to the chargesheet, the material brought on record and certain authorities in the

field and analyzed the evidentiary value of the material and came to hold that there was no justification for interference in the order of punishment.

5. Mr. P.P. Khurana, learned senior counsel appearing for the petitioner has submitted that the punishment has been imposed on the basis of the report given by the Union Public Service Commission (UPSC), the copy of which was not supplied to the petitioner and, hence, the punishment is unsustainable in law. That apart, the authorities could not have pressed into service the report of the UPSC which is only a recommendatory one in view of the decision of the Apex Court in **State Bank of India and others v. D.C. Aggarwal and another,** (1993) 1 SCC 13. It is his further submission that the allegation of interpolation has not been proven since the only witness in this regard is the expert witness who had not taken the admitted signatures or the writings of the petitioner and, therefore, the opinion of the said expert does not deserve acceptation and, hence, the charge in entirety falls to the ground. Learned senior counsel would contend that the disciplinary authority had passed the order without considering the explanation / show cause submitted by the petitioner in proper perspective and further the order being laconic is indefensible. It is urged that if the evidence of SW-1, SW-2 and SW3 are properly scrutinized nothing is reflected that the petitioner had any role in the interpolation, as alleged in the chargesheet but the disciplinary authority has not taken pains to scrutinize the same and passed a very routine order. To buttress the said submission he has drawn inspiration from the decision in **Anil Kumar v. Presiding Officer and others,** AIR 1985 SC 1121. It is the further submission of learned senior counsel for the petitioner that it is a case of no evidence and the findings are based on such material which cannot be conferred the status of evidence in law.

6. Mr. Ravinder Agarwal and Mr. Nitish Gupta, learned counsel for respondent nos. 1 and 2 supporting the order passed by the tribunal contended that the same is absolutely impeccable and does not suffer from any infirmity since the charges levelled against him have been proven. It is urged by them that the nature of proof in a disciplinary proceeding and in a criminal trial are different and, therefore, the submission as regards the appreciation of evidence is totally sans substance.

7. To appreciate the submissions raised at the Bar, it is appropriate to mention that in the charge memo dated 29.11.1988 four articles of charge were mentioned. The first three articles of charges were held not proven and in respect of the fourth one a finding was returned that no malafides were established against him.

8. Be it noted, during the pendency of the first enquiry an additional charge memo dated 26.7.1989 containing one Article of charge was served on the petitioner. It is as follows:

> "Major penalty proceedings were initiated against Shri S.K. Tyagi, D.C.I.T., now under suspension, by service of a Memorandum dated 29th November, 1988. Shri Tyagi was granted inspection of documents listed in the said chargesheet for enabling him to furnish his written statement of defence. On 14.2.1989 when Shri S.K. Tyagi was taking inspection of a folder marked "Angel Office File Super-de-Luxe" which was a part of assessment records for Asstt. Years 1981-82 and 1982-83 in the case of Kishore Kumar documents contained in the folder and inserted fresh document therein with an intention to get undue advantage in the disciplinary proceedings already instigated against him vide memorandum dated 29.11.1988. Thereby he failed to maintain absolute integrity and exhibited a conduct unbecoming of a Govt. Servant and accordingly he violated the provisions of rules 3(1)(i) & 3(1)(iii) of the C.C.S. (Conduct) Rules, 1964."

9. At this stage, it is pertinent to refer to Article III of the original chargesheet as the additional charge memo pertains to it. The said Article of charge reads as follows:

> "Shri S.K. Tyagi while posted as Inspecting Assistant Commissioner of Income Tax, C-II, Range, Bombay during the year 1984-85, approved the assessment orders for the assessment years 1981-82 and 1982-83 in the case of Shri Kishor Kumar Bhimji Zaveri in an improper manner, ignoring the directions of the Commissioner of Income Tax directing full and proper investigation in this case and overlooking the material available

on record. Shri Tyagi thereby failed to maintain absolute integrity and devotion to duty and exhibited a conduct, unbecoming of a Govt. servant. He, thus violated provisions of Rules 3(1)(i), 3(1)(ii) and 3(1)(iii) of CCS (Conduct) Rules, 1964."

10. After the said chargesheet was served on the petitioner, an enquiry proceeding was initiated and the enquiry officer submitted the report dated 4.5.1992 holding that the charge leveled against him had been proved and on the basis of the said report the disciplinary authority vide order dated 11.7.1994 imposed the punishment of dismissal. At that stage the petitioner preferred a petition before the Apex Court under Article 32 of the Constitution of India but the same was disposed of with the observation that the petitioner may move the tribunal for redressal of his grievances.

11. To appreciate the submissions of learned counsel for the petitioner, it is essential to refer to the enquiry report. The enquiry officer has referred to the charge which dealt with the issue that the delinquent officer had tampered with the documents contained in the folder Ex.S.3(ii) and inserted fresh documents therein with an intention to get undue advantage in the disciplinary proceedings already instituted against him vide Memorandum dated 29.11.1988. The enquiry officer has taken note of the fact that on 14.2.1989 the petitioner was allowed inspection of certain records in the office of SW-4. On a perusal of the enquiry report, it is demonstrable that the enquiry officer has referred to the evidence SW-1 to SW-4 and the insertion of the letters and in the enquiry report he has stated thus:

"(III) From the depositions of witnesses it is seen that Shri S.D. Sabnis was produced and examined as SW-1 during the enquiry..

From the deposition of SW-1 it is seen that SW-1 has confirmed the contents of Ex.S.2 and has also clarified that numbering of pages of the files in Ex.S.2 was done by is staff and he had checked them before signing Ex.S.2.

(IV) From Ex.S.4 it is seen that the documents suspected to have been inserted by the CO i.e. the disputed documents were

given to the Examiner of Questioned Documents (SW-2) for his "Expert Opinion".

It is also seen from Ex.S.4 read with the deposition of SW-2 (who prepared Ex.S.4) that SW-2 has given the following "expert opinions":

(a) The writers of the Standard encircled figures representing the page numbers 1 to 10 and the standard encircled figure in the page number "104" on the blank piece of paper of Ex.S.3(ii) have not written the disputed eight encircled figures in the page numbers 104 to 111 of Ex.S.3(ii).

It is seen that SW-2 has given 15 reasons for coming to the conclusion mentioned above.

(b) The CO has written the eight disputed encircled figures representing the page numbers 104 to 111 of Ex.S.3(ii).

It is seen that SW-2 has given 15 reasons for arriving at the conclusion mentioned above.

(c) The eight disputed statements of Account bearing hand written encircled page numbers 104 to 111 are subsequently filed / inserted after a very long gap or interval of time after the filing of the documents bearing hand written encircled page numbers 1 to 103 and the blank paper showing hand written encircled page number "104" (having a long downward straight stroke going towards right edge of the said blank paper).

It is seen that SW-2 has given six reasons for arriving at the above conclusion.

In view of above, the allegation against the CO is held to be proved."

12. The learned senior counsel for the petitioner has referred to the depositions of SW-1 to SW-3 but the enquiry officer has found them as self-contradictory on material points and, hence, not relied upon. He has

held that the veracity of SW-4's letter dated 15.2.1989 to SW-5 in Ex.S.1 cannot be questioned on the basis of such statement which is self-contradictory. The enquiry officer has given adequate reasons to place reliance on the testimony of SW-4 and SW-5. He has also ascribed cogent reasons to discard the testimony of the defence witnesses as they were self-contradictory and further the testimony of one witness, namely, Kishore Kumar Bhimji Zaveri was totally inconsistent and contradictory. The disciplinary authority has taken note of the submissions of the petitioner against the findings returned by the enquiry officer. The grounds that were raised before the disciplinary authority were that the enquiry proceedings were vitiated as the principles of natural justice had been violated; that the report was totally perverse as there had been no discussion of evidence; that the enquiry officer had not applied his mind to the charges leveled against the concerned officer; and that he had blindly relied on the expert evidence.

13. The principal ground that was raised in the explanation / show cause to the enquiry report before the disciplinary authority is as follows:

> "(ii) that he placed before the I.O. two reports of the private hand writing experts against the opinion of Sh. Gajjar, hand writing expert relied upon by the Department. As per the opinion of these two hand writing experts, the opinion of Shri Gajjar was based on grossly insufficient sample of disputed and standard writing and that the opinion was false and erroneous, but the I.O. totally ignored the opinion of these two experts."

14. The disciplinary authority has dealt with the same as follows:

> "(ii) It has been alleged by Shri Tyagi that the I.O. had not considered the admitted evidence in the form of two private hand writing experts opinion. From the enquiry records, it is evident that the I.O. admitted the opinion of the private hand-writing expert Mrs. R.K. Vij as exhibit D-2, while second opinion of Shri Mahesh Wagh was enclosed as Annexure "E" to C.O's brief submitted before the I.O.
>
> (iv) It is alleged by the C.O. that the opinion of Shri Gajjar,

> departmental handwriting expert was wrong and based on insufficient sample and even this fact was accepted by Shri Gajjar in his cross-examination. A perusal of the enquiry records show that Shri Gajjar was a witness as SW-II and a detailed examination was conducted. During examination, Shri Gajjar admitted that Sl. No.1 to 103 could have been written by more than one person as against one person mentioned in his report but he was definite that the marking on the 8 pages from 104 to 111 was in the hand writing of the C.O."

15. The tribunal took note of the fact that there was no reason to discard the evidence of Mr. Gajjar, the handwriting expert and further Mr. R.K. Vij, the private handwriting expert, who was examined as a defence witness. Learned senior counsel for the petitioner would submit that the enquiry officer did not allow the second hand writing expert Shri Wagh to adduce defence evidence and further his admitted signatures were not taken. The tribunal has analyzed the material on record to return a finding that there was no specific prayer to examine Mr.Wagh. A part of the letter that was written by the petitioner seeking permission to examine Mr. Wagh, reads as follows:

> "I would also request you to permit either Mr.Mahesh Wagh if he is being permitted as a Defence Witness or Mrs. R.K. Vij B.A.L.L.B., Examiner of Questioned Documents, New Delhi (who has already been admitted as Defence Witness) to cross-examine the handwriting expert engaged by the Disciplinary Authority namely Shri H.T. Gajjar. This request is being made because neither I nor my Defence Assistant would be in a position to cross-examine a hand writing expert effectively."

16. Relying on the same, the tribunal has opined that no specific request was made. That apart, Mr. Wagh was also not included in the list of defence witnesses. Had he been examined as a defence witness, the department could have cross-examined him. Be that as it may, it cannot be regarded as a violation of principles of natural justice as the petitioner had cross-examined Mr.Gajjar at length and Mr.Vij was permitted to be cited as a defence witness.

17. It is well settled in law that the tribunal does not sit in appeal on the findings recorded by an enquiry officer in a departmental proceeding but under certain circumstances a judicial review of fact is permissible.

18. In **H.B. Gandhi v. Gopi Nath & Sons,** 1992 Supp (2) SCC 312, wherein it has been held as follows:

> "Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It will be erroneous to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself."

Similar view has been reiterated by their Lordships in **B.C. Chaturvedi v. Union of India and others,** (1996) 1 LLJ 1231 SC. 19. In **Moni Shankar v. Union of India and another,** (2008) 3 SCC 484, it has been held thus:

> "17. The departmental proceeding is a quasi-judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The courts exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the Department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely, preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality. [See **State of U.P. v. Sheo Shanker Lal Srivastava,** (2006) 3 SCC 276 and **Coimbatore District Central Coop. Bank v. Employees Assn.** (2007) 4 SCC 669].
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> 18. We must also place on record that on certain, aspects even judicial review of fact is permissible. (E v. Secy. of State for the Home Deptt., 2004 QB 1044)"

20. In **State of U.P. and Another v. Johri Mal,** (2004) 4 SCC 714, it has been held as follows:

> "It is well settled that while exercising the power of judicial review the court is more concerned with the decision-making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the court is not competent to exercise its power when there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact-finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision-maker's opinion on facts is final. But while examining and scrutinizing the decision-making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be well-nigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touchstone of the tests laid down by the court with special reference to a given case. This position is well settled in the Indian administrative law. Therefore, to a limited extent of scrutinizing the decision-making process, it is always open to the court to review the evaluation of facts by the decision-maker."

21. Similar principle has been reiterated in **Noble Resources Ltd. v. State of Orissa & Anr.,** AIR 2007 SC 119.

22. On a perusal of the report of the enquiry officer and the order passed by the disciplinary authority, it cannot be treated as perverse or unreasonable.

23. Though, the learned senior counsel for the petitioner has raised with immense vehemence that principles of natural justice have been violated by not examining Mr. Wagh but, the same leaves us unimpressed as, we have indicated hereinbefore, that Mr. Gajjar, the handwriting expert was cross-examined at length by the defence and Mr. Vij, the private handwriting expert was permitted to be cited as a defence witness. Thus, it can be said with certitude that there has been substantial compliance of principles of natural justice. That apart, the tribunal has also ascribed cogent reasons that the petitioner had really not sought permission to examine Mr. Wagh. In any case, no prejudice has been caused to the petitioner.

24. The learned senior counsel would further submit that the report of the enquiry officer should be a reasoned one and to buttress the said submission he has commended us to the decision rendered in **Anil Kumar** (supra). In the said case the Apex court has held thus:

> "It is well-settled that a disciplinary enquiry has to be a quasi-judicial enquiry held according to the principles of natural justice and the Enquiry Officer has a duty to act judicially. The Enquiry Officer did not apply his mind to the evidence. Save setting out the names of the witnesses, he did not discuss the evidence. He merely recorded his ipse dixit that the charges are proved. He did not assign a single reason why the evidence produced by the appellant did not appeal to him or was considered not credit-worthy. He did not permit a peep into his mind as to why the evidence produced by the management appealed to him in preference to the evidence produced by the appellant. An enquiry report in a quasi-judicial enquiry must show the reasons for the conclusion. It cannot be an ipse dixit of the Enquiry Officer. It has to be a speaking order in the sense that the conclusion is supported by reasons."

25. On a studied scrutiny of the enquiry report, we are of the considered view that the ratio of the aforesaid decision is not applicable inasmuch as the enquiry officer at hand has given cogent and germane reasons and, in fact, scrutinized in detail the depositions of the witnesses and appreciated them. Thus, the said contention is without any substance and is hereby repelled.

26. In view of the aforesaid analysis, we do not perceive any merit in this writ petition and accordingly the same is dismissed without any order as to costs.