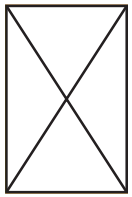

INDIAN LAW REPORTS
DELHI SERIES
2012

(Containing cases determined by the High Court of Delhi)

VOLUME-6, PART-II

(CONTAINS GENERAL INDEX)

**PUBLISHED UNDER THE AUTHORITY OF HIGH COURT OF DELHI,
BY THE CONTROLLER OF PUBLICATIONS, DELHI-110054.**

Annual Subscription rate of I.L.R.(D.S.) 2012
(for 6 volumes each volume consisting of 2 Parts)

In Indian Rupees : 2500/-
Single Part : 250/-

for Subscription Please Contact :

Controller of Publications
Department of Publication, Govt. of India,
Civil Lines, Delhi-110054.
Website: www.deptpub.nic.in
Email:acop-dep@nic.in (&) pub.dep@nic.in
Tel.: 23817823/9689/3761/3762/3764/3765
Fax.: 23817876

PRINTED BY : **J.R. COMPUTERS, 477/7, MOONGA NAGAR,
KARAWAL NAGAR ROAD DELHI-110094.
AND PUBLISHED UNDER THE AUTHORITY OF HIGH COURT OF DELHI,
BY THE CONTROLLER OF PUBLICATIONS, DELHI-110054—2012.**

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VII, Rule 11 for rejection of plaint. Held—It is settled preposition of law that while considering an application under Order VII Rule 11 CPC, the Court can take into consideration only the averments made in the plaint and the documents filed by plaintiff. Neither the written statement nor the documents filed by the defendant can be considered at this stage. It is also settled preposition of law that the truthfulness or otherwise of the averments made in the plaint cannot be gone into at this stage and the averments have to be taken at their face value and as correct. It is difficult to say at this stage that the plaint does not disclose any cause of action to file the present suit for specific performance of the agreement set up by the plaintiff or for grant of declaration claimed by him. The plaintiff claims an Agreement to Sell in his favour and he says that he was all along ready and willing to perform his part of contract and it is the defendants 1 & 2 who avoided completion of the transition. The entire averments essential in a suit for specific performance of an Agreement to sell have, thus, been made.

Malkiat Singh Johal v. Pran Chopra & Ors. 700

— Intra Court appeal impugns order passed by the learned single Judge in Execution Petition, which allowed the execution and directed the appellants herein to execute a conveyance deed in favour of the Respondents in respect of property in question—Present dispute is between two brothers resulting in multifarious litigation—With the intervention of family members, both brothers agreed for arbitration—Thereafter; application for making said awards the rule of the court were pending in the High Court bearing Suit Nos. 1983-A/1995 to 1986-A/1995—During the pendency of suit, parties agreed to compromise and terms of compromise were recorded—It was decided, that both brothers shall bid for immovable properties in three separate lots. i.e. properties at Mumbai, Delhi and Hathras—The higher bidder will take property by paying 50%

of the bid amount to the other side within three months—In case of failure to pay the bid amount, the other side would be entitled to the properties in the lot on payment of 50% of the lower bidder's bid—Present respondent was highest bidder and made payment of the bid amount for Delhi and Mumbai lots. But did not make payment for the immovable properties included in Hathras lot—Present appeal only concerned with one of the properties at Delhi wherein the partnership firm Lalji Mal Tika Ram had tenancy rights in the property—In the two civil suits filed for partition and rendition of accounts, the disputed property was shown as one of the partnership properties but the partnership firm had interest in the property not as the owner, but as the tenant—By a sale deed dated 25th May. 1998. Prem Lata and Ram Kishan, wife and son of Ram Gopal purchased the property from the erstwhile owner-In 1999 Ram Charan had filed a civil suit for prohibitory injunction against Ram Gopal, Prem Lata and Ram Kishan praying, inter alia, that the said persons should be restrained from making additions/alterations or structural changes to the ground floor. Held—Ownership of the property was not a subject matter of dispute in any of the proceedings or the suits, which were pending before the Court. In these circumstances. In case the ownership of the property was to be transferred to Ram Charan if he was to be the highest bidder, a specific noting to this effect was required and necessary. Also the two brothers were to give bids to acquire the same right i.e. the tenancy right Family settlements are governed by special equity and are to be enforced if honestly made, though sometimes the terms agreed may have their origin in a mistake or founded on ignorance of fact as to what the rights of parties actually are—Held, the compromise decree has to be executed and implemented even if it is alleged and contended that the respondent did not fully appreciate the consequence and implication of acquiring tenancy rights and had not visualized that the Supreme Court by a judicial decision would permit

bar payment of money by the company or its director to any person for satisfaction of their legally enforceable dues.

R.P.G. Transmissions Ltd. (Now Known As Kec International Limited) v. State & Anr. *545*

COMPANIES ACT, 1956—Section 610—By way of impugned orders, the appeals preferred by the respondent/querist were allowed, rejecting the defence of the petitioners founded on Section 610 of the Companies Act and it was directed that the complete information sought by the respondent/querist be supplied—Despite earlier orders of two Central Information Commissioners taking a view that information placed by the petitioner ROC in public domain and accessible under Section 610 Companies Act, are out of purview of RTI Act, being specifically brought to his notice, the CIC Sh. Shailesh Gandhi in the present case, simply brushed aside those decisions, observing that he differs—Held, there is nothing inconsistent between the scheme provided under Section 610 of the Companies Act and provisions of the RTI Act and merely because a different charge is collected for providing information under Section 610 of the companies Act than the prescribed fee for providing information under RTI Act, does not lead to an inconsistency in the provisions of these two enactments—Further held, the RTI Act, being a general law dealing with right of a citizen to access information cannot be read to have abrogated the earlier special law of Section 610 of the Companies Act.

Registrar of Companies & Ors. v. *Dharmendra Kumar Garg & Anr.* *499*

CONSTITUTION OF INDIA, 1950—Article 226—Code of Criminal Procedure, 1973—Section 321—Petitioner sought quashing of communication issued by Director of Prosecution to the Principal Secretary (Home), seeking instructions as to

whether the concerned APP has to press the application under Section 321 before the Court of learned ACMM for withdrawal of prosecution in case FIR Nos. 90/2000, 99/2002 and 148/2002 registered at P.S. Connaught Place and Defence Colony—Petitioners also assailed the order passed by the Hon'ble Lt. Governor agreeing with the proposal not to press the application for withdrawal so that trial may proceed on merits—Petitioners claimed that revocation of previous decision to withdraw prosecution was un-constitutional on the ground that sanction had not been obtained from all the Department—Observed, as per the impugned communication, the charge-sheet was not expressly considered by members of the Screening Committee when they recommended withdrawal of prosecution—Perusal of charge-sheets reflected that there is sufficient evidence against the accused persons in view taken by the Director of Prosecution to which a Principal Secretary (Home) agreed-Held—the Screening Committee is not a statutory creation but formed only to aid and assist the Hon'ble Lt. Governor and the latter is not bound by the recommendation of Screening Committee—Also held, Director of Prosecution was not precluded from moving the impugned proposal, merely because he was a part of Screening Committee that had earlier recommended withdrawal of prosecution—Further held, the High Court while exercising jurisdiction under Article 226 and 227 is not obliged, in every case involving irregularity or illegality of procedure, to interfere if it appears to the Court that the said irregularity or illegality has not resulted in failure of justice—Petitioners had first approached under Section 482 Cr PC for quashing of the said FIRs but withdrew the petition reserving their right to raise all the issues at the time of hearing of the arguments on charge which hearing is yet to take place—Held, court not inclined to exercise jurisdiction.

Vipul Gupta v. State & Ors. *528*

Appellant produced secondary evidence within the meaning of Section 63 of the Indian Evidence Act, 1872 (the Evidence Act) so as to rely on the copy of the insurance policy Ex. Rw-1/C produced by the Appellant—The document produced is only a photocopy of the renewal notice. The same does not fall under any of the five clauses of section 63 of the Evidence Act and therefore, it cannot be looked into. In the absence of proof of the insurance policy, the Appellant has failed to prove that its liability was limited to Rs. 50000/-. It is therefore, held that the Appellant's liability was unlimited. The claims Tribunal's findings that the Appellant's liability was unlimited, cannot be faulted.

New India Assurance Co. Ltd. v. Geeta & Ors. 582

INDUSTRIAL DISPUTES ACT, 1947—Section 33(2)(b), 33A—Whether non compliance of the provisions of S. 33(2)(b) would ipso facto mean that an order of dismissal passed by the employer, would be ineffective—Whether the employee in such a circumstance be required to file an application u/s 33A for having the said order of dismissal being declared as void ab-initio Held—if mandatory conditions of S. 33(2)(b) are contravened, the order of dismissal would have no effect in law—If this happens it is not at all necessary for an employee to file a complaint u/s 33A to have the order of dismissal/termination set aside—Employee may file complaint u/s 33A seeking relief of reinstatement and back wages—Only thing that needs to be done by the Tribunal in such a case is to direct that the employee be given a appropriate relief by way of reinstatement and back wages—The Tribunal is not required to go into the question of whether the dismissal was good or bad, on merits.

Tops Security Ltd. v. Subhash Chander Jha 617

— Respondent employed as Aya in Petitioner School for 2 years

on compassionate ground-Respondent stopped coming and raised industrial dispute of illegal termination—Industrial Adjudicator ordered reinstatement with 75% back wages—Held—When no post existed, the Respondent could not be reinstated with 75% back wages—Respondent not appointed through a regular selection procedure against a vacancy—Relief granted modified—Petitioner directed to pay Rs. 1 lac compensation to the Respondent.

Delhi Public School v. Manju 738

— Section 2(oo), 2(s), 25F—CCS (Temporary Service) Rules, 1965—Rule 5—Punjab Municipal Act, 1911—Section 45—Respondent initially appointed on adhoc basis, on consolidated salary—His services were regularised and he was placed on probation for two years—Thereafter, workman remained absent on several dated and stopped coming to office, without intimation—A show cause notice was issued to him and was also given a call back notice, pursuant to which he rejoined duties—Thereafter, service of Respondent was terminated—Workman raised a dispute—Trial Court held that termination of workman was illegal and injustified and directed reinstatement with full back wages and continuity of service—Order challenged before High Court—Plea taken, since Respondent was no probation and probation had not been confirmed, discharge simpliciter of Respondent is not illegal and award is liable to be set aside—Per contra plea taken, Respondent is a workman and even if he was on probation, provisions of Section 25F are duly attracted, if his services are terminated without following due process—Held—Sub Section (bb) of Section 2 (00) of Act permits termination simpliciter, in terms of contract—Petitioner was on probation for a period of two years which could be terminated by school at any time by giving one month notice or payment in lieu of such notice, without furnishing any reason thereto—

Respondent had not been confirmed and was repeatedly absenting and thus, vide termination order, Board of Governors terminated his services and gave him a cheque for one month's salary in lieu of notice period—This being position, it cannot be held that termination of Respondent was illegal—Impugned order set aside—Directions also given to petitioner to reconsider case of Respondent for regular appointment, if he has been found working satisfactorily.

NDMC & Anr. v. Ram Prasad 791

LABOUR LAW—Industrial Disputes Act, 1947—Section 2(oo), 2(s), 25F—CCS (Temporary Service) Rules, 1965—Rule 5—Punjab Municipal Act, 1911—Section 45—Respondent initially appointed on adhoc basis, on consolidated salary—His services were regularised and he was placed on probation for two years—Thereafter, workman remained absent on several dated and stopped coming to office, without intimation—A show cause notice was issued to him and was also given a call back notice, pursuant to which he rejoined duties—Thereafter, service of Respondent was terminated—Workman raised a dispute—Trial Court held that termination of workman was illegal and injustified and directed reinstatement with full back wages and continuity of service—Order challenged before High Court—Plea taken, since Respondent was no probation and probation had not been confirmed, discharge simpliciter of Respondent is not illegal and award is liable to be set aside—Per contra plea taken, Respondent is a workman and even if he was on probation, provisions of Section 25F are duly attracted, if his services are terminated without following due process—Held—Sub Section (bb) of Section 2 (00) of Act permits termination simpliciter, in terms of contract—Petitioner was on probation for a period of two years which could be terminated by school at any time by giving one month notice or payment in lieu of such notice, without furnishing

any reason thereto—Respondent had not been confirmed and was repeatedly absenting and thus, vide termination order, Board of Governors terminated his services and gave him a cheque for one month's salary in lieu of notice period—This being position, it cannot be held that termination of Respondent was illegal—Impugned order set aside—Directions also given to petitioner to reconsider case of Respondent for regular appointment, if he has been found working satisfactorily.

NDMC & Anr. v. Ram Prasad 791

LIMITATION ACT, 1963—Section 21, 22—Original suit for recovery against husband as proprietor of a Defendant 1, within limitation—After coming to know that actually wife is the proprietor and not the husband, Plaintiff moved application for amendment of plaint by impleading wife—Plaintiff contends that the husband though his conduct all along represented and held himself out to be the Proprietor of Defendant 1. Held—Husband and wife have acted in concert with one another to avoid any liability being fastened upon them for the transactions with the plaintiff. Plaintiff bona fide believed husband to be the proprietor—Omission to implead wife bona fide mistake and Proviso to Section 21 squarely applicable. Suit not barred by limitation.

Birla Textile Mills v. Ashoka Enterprises & Ors. 593

MOTOR VEHICLES ACT, 1988—Parents of deceased filed claim petition before Claims Tribunal for compensation for deceased's death in a motor accident—Tribunal deducted conveyance allowance from salary of deceased, added 50% towards future prospects, deducted 50% towards personal living expenses and after adding notional sums under conventional heads, awarded overall compensation of Rs. 6,13,500/- —Appeal filed before High Court for enhancement of compensation—Plea taken, multiplier as per age of mother was applied, multiplier should have been applied as per age

Accident took place on 25.3.2006—Death of a male, aged 24 years who was a bachelor—TSR driven by a person, other than the registered owner—Tribunal Held, accident caused on account of use of TSR and compensation of Rs. 1,83,000/- awarded—Recovery rights granted against the owner of TSR—Aggrieved owner/respondent preferred appeal—Contended that vehicle not involved in accident—No breach of the term of policy as vehicle was not used for the purpose not allowed by permit—Driving of vehicle by a person other than registered owner cannot be said to the use of the vehicle for a purpose not allowed by the permit—Recovery rights should not have been granted—Held—Unchallenged testimony as to involvement of TSR in accident—Each and every breach would not be a contravention of condition of permit—driving of a TSR by a person other than the permit holder would not be use of vehicle for purpose not allowed by the permit—No violation of clause (c) of S. 149 (2) (a) (i)—recovery rights—Grant of recovery rights set aside—Appeal allowed.

Mahender Singh v. Oriental Insurance Co. Ltd. & Ors. *477*

— Section 163-A—Two vehicles involved in the accident a TSR and a stationary bus—death of a male graduate who was engaged in teaching—Compensations claimed from the owner of both the vehicles—Tribunal awarded compensation taking the income to be Rs. 15,000/- p.m.—Multilplier of 16 applied—Appellant/insurer directed to pay the compensation—Determination of liability postponed—Aggrieved appellant preferred the appeal—Contended that TSR rammed in the stationary bus—Drivers of TSR solely liable—Entire liability cannot be fastened on the appellant/insurer—Tribunal not empowered to ask the appellant to pay compensation first and then decide the liability—in the absence of evidence income should not have been taken to be Rs. 15000/- --Multiplier of

16 is on higher side—Held, bus abandoned on a public way—Neither any indicator nor any signal indicating the presence of the bus—Bus was in a drivable condition—Cannot be said to be no negligence on the part of bus driver—Case of composite negligence—Both the owners are jointly and severally liable to pay the compensation in equal proportion—Quantum of compensation awarded not faulty—Appellant Insurance Company liable to pay compensation—Has right to recover 50% from owner of TSR—Appeal partly allowed.

New India Assurance Co. Ltd. v. Vivek Thakur & Ors. *486*

— Indian Evidence Act, 1872—Section 63—Limited liability The sole ground of challenge is that the Appellant having successfully proved that there was limited liability of Rs. 50,000/- as a premium of Rs. 240/- only was charged for covering third party risk, the Claims Tribunal erred in fastening the entire liability on the Insurance Company—The Claims Tribunal rejected the plea of limited liability—Admittedly, no evidence was led by the owner (the fifth Respondent) that the notice was not received by him. Rather, he preferred himself to be proceeded ex-parte. The notice and the postal receipt were duly proved. In the circumstances, the Claim Tribunal's finding that the notice under Order XII Rule 8 CPC was not proved to have been served upon the owner, cannot be sustained—Similarly, the Claims Tribunal's rejection of the service of notice on the ground that notice ought to have been sent to Bank of India, to whom the policy was sent, is also misconceived. There is nothing to indicate on the copy of the policy Ex. RW-1/D that the original policy was sent to the Bank of India. In the circumstances the Appellant's right to lead secondary evidence on the ground that no notice was sent to the Bank of India cannot be defeated—The Claims Tribunal's observation that the word "unlimited" finds mention

in the printed form of Ex. Rw-1/C at one place, is also of not much consequence, as the Court is concerned with the payment of premium under various clauses. Similarly, a copy of the proposal form 'Mark B' (the same has not been proved) was placed on record, in the course of his cross-examination recorded on 19.9.2002. The Claims Tribunal opined that in para 11 there was mention of payment of premium towards the unlimited liability. This finding was without any material, in as much as a premium of Rs. 440/- and Rs. 1700/- was towards own damage and Rs. 60/- was towards terrorist risk. Thus, it cannot be said that there was unlimited coverage in respect of third party risk vide proposal form Mark B—The vital question for consideration, however, is whether the Appellant produced secondary evidence within the meaning of Section 63 of the Indian Evidence Act, 1872 (the Evidence Act) so as to rely on the copy of the insurance policy Ex. Rw-1/C produced by the Appellant—The document produced is only a photocopy of the renewal notice. The same does not fall under any of the five clauses of section 63 of the Evidence Act and therefore, it cannot be looked into. In the absence of proof of the insurance policy, the Appellant has failed to prove that its liability was limited to Rs. 50000/-. It is therefore, held that the Appellant's liability was unlimited. The claims Tribunal's findings that the Appellant's liability was unlimited, cannot be faulted.

New India Assurance Co. Ltd. v. Geeta & Ors. 582

— Section 168—Award challenged by the Insurance Company on the ground that deceased's (a government employee) widow given employment by the deceased's employer; therefore, pecuniary advantage on account of the death of her husband received by her should have been deducted while awarding loss of decendency—Held, only those amounts which are payable to the claimant only by reason of death of injury

in an accident are liable to be deducted—Widow got employment not on account of accidental death, but on the basis of a circular of the Government providing for employment on compassionate ground to the dependents on the family members of a Government servant, dying in harness—Appointment did not have any relation with the accidental death—Widow was to be paid not because of the death of her husband but because of the work performed by her as an employee—Thus, salary or any portion thereof being paid to the widow, would not be deductible from the loss of dependency granted to the dependents.

National Insurance Co. Ltd. v. Charanjeet Kaur @ Simmi & Ors. 631

— Claims Tribunals awarded compensation in favour of claimants taking deceased's income as per minimum wages of a matriculate, on date of accident—Appeal filed before High Court by claimants for enhancement of compensation—Plea taken, Claims tribunal should have considered vocation of deceased while assessing damages to claimant—Claims tribunals ought to have granted compensation on basis of minimum wages, future prospects of deceased and increase in salary on account of inflation should also have been considered—Salary of a person in private employment is also bound to increase with passage of time—Per Contra plea taken, *Santosh Devi* did not deal with case of minimum wages—Salary certificate proved deceased's income to be Rs. 4,000/- per month—Claims Tribunal fell into error in awarding compensation on basis of minimum wages which were Rs. 4,081/- per month—Judgment in *Santosh Devi* must be taken per incuram—Held—In *Dhaneshwari,* this court considered various Single Bench decisions of this court and Division Bench decisions of this Court in case of *Kumari Lalita* and *Rattan Lal Mehta* and held that Division Bench decision of

this Court which laid down that future inflation was built in 'in multiplier method' was a binding precedent as there was no contrary judgment of Supreme Court—Although inflation was built in 'in multiplier method, but in Indian context where inflation was very high, multiplier method did not take care of inflation completely—Granting of increase in income on account of inflation is distinguishable from future prospects—Question of granting increase on account of inflation to income of a person getting a fixed salary or a self employed, i.e. skilled and unskilled worker like barber, blacksmith, cobbler, mason, carpenter etc. at time of his death was not before Supreme Court Observations *Sarla Verma* were explained and distinguished by Supreme Court in case of Santosh Devi and it was said persons getting fixed salary and self employed persons would also increase their wages with passage of time on account of inflation—There is no conflict between earlier judgments of SC in *Susamma Thomas, Sarla Dixit, Bijoy Kumar Dugar* and *Sarla Verma* which dealt with increase in income on account of future prospects and Santosh Devi which dealt with inflation—Persons who are getting fixed salary or who are self employed as menial, skilled and unskilled workers like barber, blacksmith, cobbler, mason, carpenter etc. would be entitled to increase in income to extent of 30% on account of inflation when deceased or victim is aged upto 50 years—In instant case, there was no evidence of bright future prospects of the deceased—Claimants are entitled to increase of 30% in salary on account of inflation—Compensation increased.

Rakhi v. Satish Kumar & Ors. *643*

— Sections 166 and 163-A—Claim for compensation—Sections 168 and 169 conducting enquiry—Section 172 award of costs—Section 176 framing of rules—Delhi Motor Vehicles Rules 1993—Chapter IX Rules 118 and 119—Delhi Motor

Accident Claim Tribunal Rules 2008 Rule 32 vesting of powers of Civil Court—Code of Civil Procedure, 1908—Section 35 Order XXA Award of Costs Delhi High Court Rules Vol. Chapter 16 Part-B Rules 1, 1A and 9 Counsel's Fee out of pocket expenses whether can be awarded by the Claims Tribunal.

MAC. APP. 645/2012

— Compensation of Rs. 7,90,000/- awarded on the basis of settlement between the parties Rs. 21,000/- awarded as counsel's fee—Aggrieved Insurance Co. preferred appeal—Held dispute amicably settled no agreement to pay counsel's fee, no certificate of fee filed, award of counsel's fee not in consonance with Delhi High Court Rules—Order set aside.

CM (M) 651/2012

— Settlement reached between parties Compensation Rs. 60,000/- awarded Rs. 5000/- awarded towards counsel's fee paid after deducting TDS—Show cause notice issued to the Managing Director of Insurance Company towards counsel's fee paid after deducting TDS. Held—No agreement regarding payment of counsel's fee- no ground for issuance of show cause notice award of counsel's fee illegal—Order set aside.

MAC. APP. 655/2012

— Settlement reached between the parties. Compensation of Rs. 4,50,000/- awarded Rs. 25,000/- awarded as counsel's fee—Aggrieved Insurance Co. preferred appeal. Held, award of counsel's fee beyond the terms of settlement, no certificate of counsel's fee placed on record, not in consonance with law—Order set aside.

MAC. APP. 594/2012

— Settlement arrived at between the parties compensation of Rs. 9,00,000/- awarded towards full and final settlement Rs.

be set aside—Per contra plea taken, Respondent is a workman and even if he was on probation, provisions of Section 25F are duly attracted, if his services are terminated without following due process—Held—Sub Section (bb) of Section 2 (00) of Act permits termination simpliciter, in terms of contract—Petitioner was on probation for a period of two years which could be terminated by school at any time by giving one month notice or payment in lieu of such notice, without furnishing any reason thereto—Respondent had not been confirmed and was repeatedly absenting and thus, vide termination order, Board of Governors terminated his services and gave him a cheque for one month's salary in lieu of notice period—This being position, it cannot be held that termination of Respondent was illegal—Impugned order set aside—Directions also given to petitioner to reconsider case of Respondent for regular appointment, if he has been found working satisfactorily.

RIGHT TO INFORMATION ACT, 2005—Section 3 section 22 Companies Act, 1956 Section 610—By way of impugned orders, the appeals preferred by the respondent/querist were allowed, rejecting the defence of the petitioners founded on Section 610 of the Companies Act and it was directed that the complete information sought by the respondent/querist be supplied—Despite earlier orders of two Central Information Commissioners taking a view that information placed by the petitioner ROC in public domain and accessible under Section 610 Companies Act, are out of purview of RTI Act, being specifically brought to his notice, the CIC Sh. Shailesh Gandhi in the present case, simply brushed aside those decisions, observing that he differs—Held, there is nothing inconsistent between the scheme provided under Section 610 of the Companies Act and provisions of the RTI Act and merely

because a different charge is collected for providing information under Section 610 of the companies Act than the prescribed fee for providing information under RTI Act, does not lead to an inconsistency in the provisions of these two enactments—Further held, the RTI Act, being a general law dealing with right of a citizen to access information cannot be read to have abrogated the earlier special law of Section 610 of the Companies Act.

— Judicial propriety—Held, Central Information Commission is a quasi judicial authority as it determines the inter-se rights and obligations of the parties in relation to the grant of information, which may entail civil and other consequences and it is a well settled canon of judicial discipline that a bench dealing with a matter respects an earlier decision rendered by a coordinate bench and is bound by to a larger bench Breach of such discipline would lead chaos—As such, if CIC differs with the earlier decisions taken by two other Central Information Commissioners, the judicial discipline demanded that after recording his disagreement, CIC should have required constitution of a larger bench to re-examine the issue.

SERVICE LAW—Promotion—Petitioner sought directions to the respondents No. 1-4 to appoint him as PGT Persian in the school respondent No. 3, in preference to respondent No. 5—Post in question found to be merit-cum-selection post—Petitioner as well as respondent no. 5 had applied for the post—Though petitioner was senior to the respondent No. 5, the fact was that respondent No. 5 had been regularly taking classes and teaching Persian in the school, respondent No.

SPECIFIC RELIEF ACT, 1963—Suit filed for specific performance of a memorandum of understanding ("MoU") dated 28th August /11th September 2001. Parties to the suit were family members carrying on various businesses and owned different properties—disputes arose about a property situated at Faridabad, which was subsequently resolved through intervention of an arbitrator and an MOU was entered into—It is alleged that plaintiff executed release/relinquishment deed, but the defendant failed to transfer their right, title and interest of plot at Faridabad and also failed to pay a loan of Rs. 1 crore—Earlier the plaintiff filed the suit CS (OS) 1048/ 2004 for declaring the said MOU cancelled/revoked/incapable of being performance/null and void and not legally enforceable—However, the defendants were willing to perform their part of obligation. Learned Single Judge while dismissing interlocutory applications observed that the suit was barred by limitation—The Division Bench while disposing of the appeal, observed that it was open to the appellants/plaintiffs to withdraw the suit and file a fresh suit and it would be equally open to the respondents/defendants to take whatever legal plea were available to them including the plea of limitation- In the present suit the defendants filed IA No. 3042/2009 under Order VII Rule 11 for rejection of the plaint on the ground that it does not disclose any cause of action is barred by law, specifically barred by limitation and also barred by principles of res judicata. It is also alleged in the plaint that CS (OS) 1048/2004 which the plaintiff had earlier filed against the defendants was in Contradiction to the instant suit since the allegations in that suit were to the effect that MOU had been obtained by fraud and without consent of the plaintiff whereas in the present suit they were seeking specific performance of that very MOU. Held—In the present suit, the plaintiffs are seeking specific performance of the very same MOU, which they had in the previous suit claimed to be tainted

with fraud and misrepresentation and, therefore, not enforceable in law—The plaintiffs, therefore, want to take a plea which is absolutely contrary to the plea taken in the previous suit; are mutually destructive. Having made an election by seeking to challenge the validity of the MoU and seeking its annulment. The plaintiffs are now stopped in law, from seeking specific performance of that very agreement between the parties. Section 16(c)—The specific Relief Act, 1963—Held that the plaintiff had nowhere in the petition mentioned that they had always been ready and willing to perform their part of the obligation. Though such an averment can be pleaded by way of amendment, the previous suit, repudiating the MOU and seeking its annulment leaves no doubt that at the time of filing the previous suit, they were not ready and willing to perform all their obligations under the MOU.

ILR (2012) VI DELHI 447
MAC

VIJAY LAXMI & ANR. ….APPELLANTS

VERSUS

BINOD KUMAR YADAV & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 1148/2011 DATE OF DECISION: 03.01.2012

Motor Vehicles Act, 1988—Parents of deceased filed claim petition before Claims Tribunal for compensation for deceased's death in a motor accident—Tribunal deducted conveyance allowance from salary of deceased, added 50% towards future prospects, deducted 50% towards personal living expenses and after adding notional sums under conventional heads, awarded overall compensation of Rs. 6,13,500/- — Appeal filed before High Court for enhancement of compensation—Plea taken, multiplier as per age of mother was applied, multiplier should have been applied as per age of deceased—Deduction towards his personal expenses, should have been one third—Held—As far as selection of multiplier is concerned, law is settled that choice of multiplier is determined by age of deceased or that of claimants whichever is higher—Multiplier of 11 was applied according to age of deceased's mother, who was 52 years—Tribunal's finding in this regard cannot be faulted—Turning to contention that one third of deceased's income ought to have been deducted towards his personal and living expenses, though it was laid down in case of *Sarla Verma* as a general principle that normally in case of death of a bachelor 50% would be treated as his personal and living expenses, however, where

family of bachelor is large and dependent on income of deceased as in a case where he has a widowed mother and a large number of younger non earning brothers and sisters, his personal living expenses should be restricted to one-third—Deceased has left behind his parents—There were no younger brothers and sisters dependent on deceased—Tribunal rightly made deduction of 50% of deceased's income towards his personal and living expenses—Compensation awarded by Tribunal is just and reasonable.

It may be seen that though it was laid down as a general principle that normally in the case of death of a bachelor 50% would be treated as his personal and living expenses, however, where the family of the bachelor is large and dependant on the income of the deceased as in a case where he has a widowed mother and a large number of younger non-earning brothers and sisters, his personal living expenses should be restricted to one-third. Thus, as per **Sarla Verma** (supra 1) the deduction of personal living expenses in case of death of a bachelor dying in an accident would vary from case to case. **(Para 13)**

Important Issue Involved: (A) The multiplier has to be selected as per the age of the deceased or that of the claimants whichever is higher.

(B) The deduction of personal living expenses in case of a death of a bachelor dying in an accident would vary from case to case. Where the deceased left behind his parents, deduction of 50% of the deceased's income towards his personal and living expenses would be justified.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Anuj Jain, Advocates.

FOR THE RESPONDENTS : Nemo.

CASES REFERRED TO:

1. *National Insurance Company Ltd.* vs. *Shyam Singh & Ors.,* (2011) 7 SCC 65.
2. *P.S. Somanathan* vs. *District Insurance Officer,* I (2011) ACC 659.
3. *Manam Saraswathi Sampoorna Kalavathi & Ors.,* vs. *The Manager, APSRTC, Tadepalligudem A.P. & Anr.,* (2010) 5 SCC 785.
4. *Arun Kumar Agrawal & Anr.* vs. *National Insurance Company Ltd. & Ors.,* (2010) 9 SCC 218.
5. *Shakti Devi* vs. *New India Insurance Company Ltd. & Anr.,* (2010) 11 SCALE 571.
6. *Mohd. Ameeruddin* vs. *United India Insurance Co. Ltd.,* 2010 (12) SCALE 155.
7. *Divisional Manager, New India Assurance Co. Ltd.* vs. *T. Chelladurai & Ors.,* 2010 ACJ 382.
8. *National Insurance Co. Ltd.* vs. *Azad Singh & Ors.,* 2010 ACJ 2384.
9. *Smt. Sarla Verma & Ors.* vs. *Delhi Transport Corporation & Anr.,* 2009 (6) SCC 121.
10. *Oriental Insurance Co. Ltd.* vs. *Deo Patodi & Ors.,* 2009 ACJ 2359.
11. *Ramesh Singh & Anr.* vs. *Satbir Singh & Anr.,* (2008) 2 SCC 667.
12. *Bilkish* vs. *United India Insurance Co. Ltd. & Anr.,* 2008 (4) SCALE 25.
13. *New India Assurance Company Ltd.* vs. *Shanti Pathak (Smt.) & Ors.,* (2007) 10 SCC 1.
14. *New India Assurance Co. Ltd.* vs. *Charlie,* (2005) 10 SCC 720.
15. *Fakeerappa* vs. *Karnataka Cement Pipe Factory* (2004) 2 SCC473.

16. *U.P. State Road Transport Corporation & Ors.* vs. *Trilok Chandra & Ors.,* (1996) 4 SCC 362.
17. *U.P. SRTC* vs. *Trilok Chandara,* (1996) 4 SCC 362.
18. *G.M., Kerala SRTC* vs. *Susamma Thomas,* (1994) 2 SCC 176.
19. *General Manager, Kerala State Road Transport,* vs. *Susamma Thomas:* (1994) 2 SCC 176.

RESULT: Appeal dismissed in limini.

G.P. MITTAL, J.

1. The Appellants who are the parents of the deceased Nitant Lakhanpal seek enhancement of compensation for the deceased's death in a motor accident which took place on 13.02.2007. By the impugned judgment, the Motor Accident Claims Tribunal (the Tribunal) took the deceased salary as given in the Salary Certificate Ex.PW-1/10 to be Rs. 6123/- per month, deducted Rs. 800/- which was being paid as conveyance allowance, added 50% towards future prospects and on deducting 50% towards the personal living expenses (in the case of a bachelor) computed the loss of dependency as Rs. 5,43,500/-. After adding notional sums under conventional heads of funeral expenses, loss of estate, loss of love and affection an overall compensation of Rs. 6,13,500/- was awarded. It is not in dispute that at the time of the accident the deceased was working as a Team Member with M/s. Omnia BPO Service Ltd. for a salary of Rs. 6123/- per month and was pursuing B.Com from School of Open Learning, University of Delhi.

2. The award is challenged on the two grounds:-

(i) The Tribunal applied the multiplier of 11 as per the age of the mother which was 52 years. Since the deceased was about 25 years, the multiplier of 18 should have been applied; and

(ii) The Tribunal deducted 50% of the deceased's income towards his personal living expenses, which should have been one-third.

3. In support of his contention, learned counsel for the Appellants relied on the following judgments:-

(1) **Smt. Sarla Verma & Ors. v. Delhi Transport Corporation & Anr.,** 2009 (6) SCC 121,

(2) **Mohd. Ameeruddin v. United India Insurance Co. Ltd.,** 2010 (12) SCALE 155,

(3) **P.S. Somanathan v. District Insurance Officer,** I (2011) ACC 659,

(4) **Bilkish v. United India Insurance Co. Ltd. & Anr.,** 2008 (4) SCALE 25,

(5) **National Insurance Co. Ltd. v. Azad Singh & Ors.,** 2010 ACJ 2384,

(6) **Oriental Insurance Co. Ltd. v. Deo Patodi & Ors.,** 2009 ACJ 2359, and

(7) **Divisional Manager, New India Assurance Co. Ltd. v. T. Chelladurai & Ors.,** 2010 ACJ 382.

4. As far as the selection of multiplier is concerned, the law is settled that the choice of multiplier is determined by the age of the deceased or that of the claimants whichever is higher. There is a three Judges Bench judgment of the Supreme Court in **U.P. State Road Transport Corporation & Ors. v. Trilok Chandra & Ors.,** (1996) 4 SCC 362, where the Supreme Court relied on **G.M., Kerala SRTC v. Susamma Thomas,** (1994) 2 SCC 176 and reiterated that the choice of the multiplier is determined by the age of the deceased or that of the claimants whichever is more. Para 12 of the report is extracted hereunder:-

> "12. For concluding the analysis it is necessary now to refer to the judgment of this Court in the case of **General Manager, Kerala State Road Transport, v. Susamma Thomas:** (1994) 2 SCC 176. In that case this Court culled out the basic principles governing the assessment of compensation emerging from the legal authorities cited above and reiterated that the multiplier method is the sound method of assessing compensation. The Court observed:
>
> > "The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of

> > the multiplier is determined by the age of the deceased (or that of the claimants, whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed-up over the period for which the dependency is expected to last.
>
> The principle was explained and illustrated by a mathematical example:
>
> > "The multiplier represents the number of Years' purchase on which the loss of dependency is capitalised. Take for instance a case where annual loss of dependency is Rs. 10,000. If a sum of Rs.1,00,000 is invested at 10% annual interest, the interest will take care of the dependency, perpetually. The multiplier in this case works out to 10. If the rate of interest is 5% per annum and not 10% then the multiplier needed to capitalise the loss of the annual dependency at Rs.10,000 would be 20. Then the multiplier i.e., the number of Years' purchase of 20 will yield the annual dependency perpetually. Then allowance to scale down the multiplier would have to be made taking into account the uncertainties of the future, the allowances for immediate lump sum payment, the period over which the dependency is to last being shorter and the capital feed also to be spent away over the period of dependency is to last etc. Usually in English Courts the operative multiplier rarely exceeds 16 as maximum. This will come down accordingly as the age of the deceased person (or that of the dependents, whichever is higher) goes up."

5. There is another three Judges' decision of the Supreme Court in **New India Assurance Company Ltd. v. Shanti Pathak (Smt.) & Ors.,** (2007) 10 SCC 1, where in the case of the death of a bachelor, who was aged only 25 years, the multiplier of 5 was applied according to the age of the mother of the deceased, who was about 65 years at the time of the accident. Para 6 of the report is extracted hereunder:-

> "6. Considering the income that was taken, the foundation for

working out the compensation cannot be faulted. The monthly contribution was fixed at Rs.3,500/-. In the normal course we would have remitted the matter to the High Court for consideration on the materials placed before it. But considering the fact that the matter is pending since long, it would be appropriate to take the multiplier of 5 considering the fact that the mother of the deceased is about 65 years at the time of the accident and age of the father is more than 65 years. Taking into account the monthly contribution at Rs.3,500/- as held by the Tribunal and the High Court, the entitlement of the claim would be Rs.2,10,000/-. The same shall bear interest @ 7.5% p.a. from the date of the application for compensation. Payment already made shall be adjusted from the amount due."

6. Learned counsel for the Appellant referred to **Sarla Verma** (supra 1) in support of the proposition that age of the deceased is to be taken into consideration for selection of the multiplier. As an example the multiplier taken in various cases such as in **Susamma Thomas** (supra), **U.P. SRTC v. Trilok Chandara,** (1996) 4 SCC 362 as clarified in **New India Assurance Co. Ltd. v. Charlie,** (2005) 10 SCC 720 and the multiplier as mentioned in Second Schedule to the Motor Vehicles Act were compared and it was held that the multiplier as per Column No.4 in the said table was appropriate for application. Sarla Verma (supra) related to the death of one Rajinder Prakash who had left behind his widow, three minor children apart from his parents and the grandfather. Obviously, the age of the deceased was taken into consideration for the purpose of selection of the multiplier as the deceased left behind a widow younger to him, apart from three minor children. It was not laid down as a proposition of law that irrespective of the age of the claimants, the age of the deceased is to be taken into consideration for selection of the multiplier for calculation of the loss of dependency. It is true that in **Mohd. Ameeruddin** (supra 2) and **P.S. Somanathan** (supra 3) and **National Insurance Company Ltd. v. Azad Singh** (supra 5), the Hon'ble Supreme Court applied the multiplier according to the age of the deceased, yet in view of **Trilok Chandra** (supra) and Shanti Pathak (supra) decided by the three Judges of the Supreme Court, the judgment in Mohd. Ameeruddin (supra 2), P.S. Somanathan (supra 3) and Azad Singh (supra 5) cannot be taken as a precedent for selection of the multiplier.

7. In the latest judgment of the Supreme Court in **National Insurance Company Ltd. v. Shyam Singh & Ors.,** (2011) 7 SCC 65, decided on 04.07.2011, the Supreme Court referred to **Ramesh Singh & Anr. v. Satbir Singh & Anr.,** (2008) 2 SCC 667 and held that the multiplier as per the age of the deceased or the claimant whichever is higher would be applicable. Para 9 and 10 of the report are apposite:-

"9. This Court in the case of **Ramesh Singh & Anr. v. Satbir Singh & Anr.,** (2008) 2 SCC 667, after referring to the earlier judgments of this Court, in detail, dealt with the law with regard to determination of the multiplier in a similar situation as in the present case. The said findings of this Court are as under:-

"6. We have given anxious consideration to these contentions and are of the opinion that the same are devoid of any merits. Considering the law laid down in **New India Assurance Co. Ltd. v. Charlie,** AIR 2005 SC 2157, it is clear that the choice of multiplier is determined by the age of the deceased or claimants whichever is higher. Admittedly, the age of the father was 55 years. The question of mother's age never cropped up because that was not the contention raised even before the Trial Court or before us. Taking the age to be 55 years, in our opinion, the courts below have not committed any illegality in applying the multiplier of 8 since the father was running 56th year of his life." 10. In our view, the dictum laid down in **Ramesh Singh** (supra) is applicable to the present case on all fours. Accordingly, we hold that the Tribunal had rightfully applied the multiplier of 8 by taking the average of the parents of the deceased who were 55 and 56 years."

8. Similarly in **Manam Saraswathi Sampoorna Kalavathi & Ors., v. The Manager, APSRTC, Tadepalligudem A.P. & Anr.,** (2010) 5 SCC 785, decided on 26.03.2010, the multiplier of 13 was applied in case of death of a young bachelor where the mother was 47 years of age.

9. Thus, there is no escape from the conclusion that the multiplier has to be selected as per the age of the deceased or that of the claimants whichever is higher.

10. Turning to the facts of the case, the multiplier of 11 was applied according to the age of the deceased's mother who was 52 years. The Tribunal's finding in this regard cannot be faulted.

11. Turning to the contention that one-third of the deceased's income ought to have been deducted towards his personal and living expenses, the Supreme Court in Mohd. Ameeruddin (supra 2) held that the deduction of one-third should have been made towards the personal living expenses as the deceased was bachelor.

12. In **Sarla Verma** (supra 1), relied upon by the learned counsel for the Appellant, the Hon'ble Supreme Court considered **Susamma Thomas** (supra), **Trilok Chandra** (supra), **Fakeerappa v. Karnataka Cement Pipe Factory,** (2004) 2 SCC 473 and examined the questions of deduction of the personal living expenses of the deceased in detail in various circumstances. Para 27 to 32 of the report are extracted hereunder:-

> "27. In Susamma Thomas, it was observed that in the absence of evidence, it is not unusual to deduct one-third of the gross income towards the personal living expenses of the deceased and treat the balance as the amount likely to have been spent on the members of the family/dependants.
>
> 28. In **UPSRTC v. Trilok Chandra** (1996) 4 SCC 362, this Court held that if the number of dependents in the family of the deceased was large, in the absence of specific evidence in regard to contribution to the family, the Court may adopt the unit method for arriving at the contribution of the deceased to his family. By this method, two units is allotted to each adult and one unit is allotted to each minor, and total number of units are determined. Then the income is divided by the total number of units. The quotient is multiplied by two to arrive at the personal living expenses of the deceased. This Court gave the following illustration:-
>
> > "15....X, male, aged about 35 years, dies in an accident. He leaves behind his widow and 3 minor children. His monthly income was Rs. 3500. First, deduct the amount spent on X every month. The rough and ready method hitherto adopted where no definite evidence was

> > forthcoming, was to break up the family into units, taking two units for and adult and one unit for a minor. Thus X and his wire make 2+2=4 units and each minor one unit i.e. 3 units in all, totaling 7 units. Thus the share per unit works out to Rs. 3500/7=Rs. 500 per month. It can thus be assumed that Rs. 1000 was spent on X. Since he was a working member some provision for his transport and out-of-pocket expenses has to be estimated. In the present case we estimate the out-of-pocket expense at Rs. 250. Thus the amount spent on the deceased X works out to Rs.1250 per month per month leaving a balance of Rs.3500-1250=Rs.2250 per month. This amount can be taken as the monthly loss of X's dependents."

29. In **Fakeerappa v. Karnataka Cement Pipe Factory** (2004) 2 SCC 473, while considering the appropriateness of 50% deduction towards personal and living expenses of the deceased made by the High Court, this Court observed:-

> "7. What would be the percentage of deduction for personal expenditure cannot be governed by any rigid rule or formula of universal application. It would depend upon circumstances of each case. The deceased undisputedly was a bachelor. Stand of the insurer is that after marriage, the contribution to the parents would have been lesser and, therefore, taking an overall view the Tribunal and the High Court were justified in fixing the deduction."

In view of the special features of the case, this Court however restricted the deduction towards personal and living expenses to one-third of the income.

30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/

4th) where the number of dependant family members is 4 to 6, and one-fifth (1/5th) where the number of dependant family members exceed six.

31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent/s and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependant and the mother alone will be considered as a dependent. In the absence of evidence to the contrary, brothers and sisters will not be considered as dependents, because they will either be independent and earning, or married, or be dependant on the father.

32. Thus even if the deceased is survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where family of the bachelor is large and dependant on the income of the deceased, as in a case where he has a widowed mother and large number of younger non-earning sisters or brothers, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

13. It may be seen that though it was laid down as a general principle that normally in the case of death of a bachelor 50% would be treated as his personal and living expenses, however, where the family of the bachelor is large and dependant on the income of the deceased as in a case where he has a widowed mother and a large number of younger non-earning brothers and sisters, his personal living expenses should be restricted to one-third. Thus, as per **Sarla Verma** (supra 1) the deduction of personal living expenses in case of death of a bachelor dying in an accident would vary from case to case.

14. The line of approach in **Sarla Verma** (supra 1) was followed in **Arun Kumar Agrawal & Anr. v. National Insurance Company Ltd. & Ors.,** (2010) 9 SCC 218 and **Shakti Devi v. New India Insurance Company Ltd. & Anr.,** (2010) 11 SCALE 571.

15. In **Shakti Devi** (supra), the Supreme Court referred to **Sarla Verma** (supra 1), **Susamma Thomas** (supra), **Trilok Chandra** (supra) and **Fakeerappa** (supra) and it was held that "if the deceased was survived by parents and siblings, only the mother would be considered to be a dependant, and 50% would be treated as the personal and living expenses of the bachelor and 50% as the contribution to the family. However, where the family of the bachelor is large and dependent on the income of the deceased, as in a case where he had a widowed mother and large number of younger non-earning sisters or brother, his personal and living expenses may be restricted to one-third and contribution to the family will be taken as two-third."

16. In the instant case, the deceased left behind his parents. It was not the Appellants' case that there were younger brothers and sisters dependant on the deceased. In the circumstances, the Tribunal rightly made deduction of 50% of the deceased's income towards his personal and living expenses.

17. The overall compensation of Rs. 6,13,500/- awarded by the Tribunal is just and reasonable.

18. The Appeal is devoid of any merit; the same is accordingly dismissed in limini.

19. A copy of this judgment shall be circulated to all the Officers of Delhi Higher Judicial Services for information.

ILR (2012) VI DELHI 459
MAC. APP.

UNITED INDIAN INSURANCE CO. LTD. ....APPELLANT

VERSUS

RAMVATI UPADHYAY & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 199/2011 & 383/2011 **DATE OF DECISION: 21.02.2012**

Motor Vehicles Act, 1988—Claim for compensation—Death of a male, aged 57 years in road accident—He was mechanical engineer, working as AGM with a PSU—Tribunal held, accident caused due to rash and negligent driving of bus—Applied multiplier of 9, deducted 1/3rd towards personal and living expenses—Liability of Income Tax deducted—Awarded compensation of Rs. 41,53,800/- Aggrieved respondent (Insurer) preferred appeal—Sought reduction of compensation—Contended that deceased was to retire in 2 years and 8 months, a lower multiplier is to be applied—Cross objections filed—Stated compensation to be meagre and contended that number of dependents were five, deduction should have been of 1/4th instead of 1/3rd—A higher multiplier should have been applied; sought enhancement—Held, daughter already married, other one gainfully employed and son not dependent on deceased—Deduction of 1/3rd income towards personal and living expenses, proper—Multiplier of 11 is applied for the age between 51 to 55 years—No fault can be found with selection of multiplier of 9, at the age of 57 years 4 months—Compensation awarded is just and reasonable—Appeals dismissed.

Important Issue Involved: Concept of spilt multiplier cannot be introduced. The multiplier of 11 is acceptable for the age between 51 to 55 years, the selection of multiplier of 9 at the age of 57 years 4 months is right.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Mr. Pankaj Seth, Advocate, Mr. Nitinyajen with Ms. Sushma, Advocates.

FOR THE RESPONDENTS : Mr. Nitinyajen with Ms. Sushma Advocates for the Respondent No. 1 to 5.

CASES REFERRED TO:

1. *K.R. Madhusudhan & Ors.* vs. *Administrative Officer & Anr,* (2011) 4 SCC 689.
2. *United India Insurance Co. Ltd. etc.* vs. *Patricia Jean Mahajan & Ors,* (2002) 6 SCC 281.

RESULT: Appeals dismissed.

G.P. MITTAL, J. (ORAL)

1. These are two Cross-Appeals. MAC APP No.199/2011 has been filed by the Appellant United India Insurance Co. Ltd. for reduction of compensation of Rs. 41,53,800/- awarded for the death of Sh. R.K. Upadhyay who was aged 57 years and 04 months at the time of his death in an accident which occurred on 24.03.2006.

2. The Cross-Objections which were registered as MAC APP. No.383/2011 have been preferred by the Respondents 1 to 5 on the ground that the compensation awarded is meager. For the sake of convenience, the Appellant United India Insurance Co. Ltd. shall be referred to as the Insurer and the Cross-Objectionists shall be referred to as the Claimants.

3. During inquiry before the Claims Tribunal, it was established that the deceased R.K. Upadhyay was a Mechanical Engineer and was working

as an Assistant General Manager with Engineers India Ltd., a public sector undertaking of the Government of India. The Claims Tribunal found that the accident was caused on account of rash and negligent driving of bus No.DL-1PB-5979 insured by the Appellant; deducted an amount of Rs. 1,35,219/- towards the liability of Income Tax; deducted 1/3rd towards personal and living expenses as the number of dependents were two i.e. the deceased's wife and the deceased's mother; applied multiplier of 9 suitable to the deceased's age to compute the loss of dependency as Rs. 41,18,814/-.

4. It is urged by the learned counsel for the Appellant that the deceased was to retire from his service with Engineers India Ltd. just in a period of 02 years and 08 months. The Claims Tribunal acted illegally in applying the multiplier of 9. It is contended that whenever multiplicand is high, a lower multiplier can be applied. Reliance is placed in **United India Insurance Co. Ltd. etc. v. Patricia Jean Mahajan & Ors,** (2002) 6 SCC 281.

5. On the other hand, it is submitted by the learned counsel for the Claimants that since the number of dependents were five, the Claims Tribunal ought to have deducted 1/4th of the deceased's income towards his personal and living expenses instead of 1/3rd. It is urged that as far as choice of multiplier in case of a salaried employee is concerned, the case is covered by **K.R. Madhusudhan & Ors. v. Administrative Officer & Anr,** (2011) 4 SCC 689.

6. I have carefully gone through the impugned judgment and have perused the record. In **United India Insurance Co. Ltd. etc. v. Patricia Jean Mahajan & Ors. (supra)** related to an accident which occurred in the year 1995, the multiplier of 7 was applied to arrive at the compensation of Rs. 1.19 Crores and interest @ 12% per annum was awarded by the Tribunal. The learned Single Judge of this Court enhanced the multiplier to 10 and held that at current exchange rate for dollar, the compensation would be Rs. 10.38 Crores. The multiplier was further increased to 13 by the Division Bench, raising the amount of compensation to Rs. 16.12 Crores. It was in those circumstances that the multiplier as applied by the learned Single Judge was approved by the Supreme Court in the SLP. Herein an accident has occurred 11 years after the accident in **United India Insurance Co. Ltd. etc. v. Patricia Jean Mahajan & Ors.** (supra), and a compensation of Rs. 41,53,800/- has been awarded.

The case is squarely covered by the judgment of the Supreme Court in **K.R. Madhusudhan & Ors. v. Administrative Officer & Anr.** (supra) wherein it was held that the High Court was wrong in introducing the concept of split multiplier. The multiplier of 11 for the age between 51 to 55 years was accepted. Thus, no fault can be found in the selection of multiplier of 9 at the age of 57 years 04 months.

7. As far as deduction towards the personal and living expenses is concerned, it was proved on record that one of the deceased's daughter was already married. The other one was M.Sc. in Biotech and was gainfully employed. Similarly, the son was a Computer Engineer and was getting a salary of Rs. 85,000/- per month. He admitted that he was an Engineer since the year 2000 and was not dependent on his father. In the circumstances, the Claims Tribunal rightly deducted 1/3rd of the deceased's income towards the personal and living expenses.

8. The compensation of Rs. 41,53,800/- awarded by the Claims Tribunal is just and reasonable.

9. The Appeals are devoid of any merit; the same are accordingly dismissed.

10. The amount deposited shall be released to the Claimants in terms of the Tribunal's order.

ILR (2012) VI DELHI 463
MAC. APP.

D.T.C. ….APPELLANT

VERSUS

JAGDISH KATARIA & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 565/2008, 609/2008, 610/2008, 75/2009, 97/2009, 258/2009, 378/2009, 609/2008, 474/2009

DATE OF DECISION: 05.03.2012

Motor Vehicles Act, 1988—Sections 3, 14 and 15—Sections 146 and 149—Claim for compensation—Drivers of the appellant did not posses a valid and effective driving license on the date of accident—Driving license not renewed within 30 days of its expiry—Compensation awarded in favour of claimants—Insurer permitted to recover from the appellant—Aggrieved appellant preferred the appeals—Plea license renewed within 5 years—The drivers shall be considered as 'duly licenced' within section 149 (2) of the Act—Recovery rights should not have been granted—Held—Appellant a public sector company, expected to see the driving license at the time the driver is employed or engaged to drive its bus—Was aware that the driving licences of the drivers had expired—Driving licence renewed beyond 30 days of their validity—Driving license not valid and effective on the respective dates of accidents—Guilty of willful breach of the condition of policy—Insurance Company entitled to defend the action—Rightly granted option to recover compensation—Appeals dismissed.

Section 15 of the Act provides different fees for an application

for renewal of driving licence if made previous to or within 30 days of the expiry of the licence or when the same is made after the expiry of the earlier said period of 30 days. Second proviso appended to sub-Section (4) to Section 15 provides that if the application is made after a period of five years after the driving licence is ceased to be effective, the licencing authority may refuse to renew the driving licence, unless the applicant undergoes and passes the test of competence to drive. In other words, the Licencing Authority is under obligation to renew the licence, if an applicant makes an application for its renewal within a period of five years from the date when it ceased to be effective.

(Para 12)

Important Issues Involved: (A) If the driving license is renewed after a period of 30 days of the expiry of the driving license, it would be effective only from the date of its renewal and the driver of the vehicle shall be deemed to be without a driving license in the interregnum and the insured would be guilty of breach of the condition of policy as envisaged under section 149 (2) of the Act.

(B) If the driver does not have an effective and valid driving license on the date of accident, the Insurance Company could avoid liability to pay the compensation.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Mr. S.P. Gupta, Advocates.

FOR THE RESPONDENTS : Mr. Pradeep Gaur with Mr. Amit Gaur and Mr. Shashank Sharma, Advocate, for R-2.

CASES REFERRED TO:

1. *Ami Chand & Anr.* vs. *Jai Prakash & Ors.*, FAO 488/1999 decided on 12.10.2011.

2. *New India Assurance Company Ltd.* vs. *Suresh Chandra Aggarwal,* (2009) 15 SCC 761.

3. *National Insurance Company Limited* vs. *Jarnail Singh & Ors.,* (2007) 15 SCC 28.

4. *K.G.Srinivasamurthy* vs. *Habib Khathun & Ors.,* II (2002) ACC 510 (DB).

5. *Oriental Insurance Co. Ltd.* vs. *Mohammed Sab Ali Sab Kaladagi,* II (1999) ACC 70.

6. *Oriental Insurance Company Ltd.* vs. *Indirani & Ors.,* 1995 ACJ 703.

7. *National Insurance Company Ltd.* vs. *Thulasi,* (1994) 1 LW 567.

RESULT: Appeals dismissed.

G.P. MITTAL, J.

1. In these eight Appeals common question of law is involved; "Whether the insured shall be guilty of breach of condition of policy read with section 149(2)(a)(ii) of the Motor Vehicles Act, if the driving licence of the driver had expired more than thirty days before the accident and it could not be renewed from the date of expiry under Section 15 of the Act".

2. The Motor Accident Claims Tribunal (the Claims Tribunal) while awarding compensation in favour of the Claimants permitted the Insurer to recover the compensation from the Appellant Delhi Transport Corporation, a Public Sector Transport Undertaking (hereinafter referred to as 'DTC') as its drivers did not possess a valid and effective driving licence on the date of the accident.

3. It is an admitted case of the parties that the driving licence was not renewed within a period of 30 days of its expiry so as to relate back to the date of expiry.

4. It is urged on behalf of the DTC that as per provision of Section 149 (2) (a) (ii) of the Motor Vehicle Act, 1988 (the Act), the requirement is that the driver should have held a valid driving licence and should not be disqualified from holding such a driving licence. Thus, it is contended that if the driving licence has expired on the date of the accident and is

renewed within a period of five years from the date of its expiry, the driver holding such driving licence shall be considered "duly licensed" unless he is disqualified from holding such a driving licence.

5. It is argued that under Section 146 of the Act, a person except as a passenger is debarred from using a motor vehicle in any public place, unless there is in force in relation to the use of the vehicle, by that person or any other person, a policy of insurance complying with the requirement of Chapter XI.

6. It is contended that the Insurer cannot include any condition in an Insurance Policy denying the benefit provided under the Act, but the policy can grant more benefits than the ones provided under the Act.

7. Learned counsel for the Appellant DTC places reliance on a Division Bench judgment of the Karnataka High Court in **K.G.Srinivasamurthy v. Habib Khathun & Ors.,** II (2002) ACC 510 (DB) and a judgment of this Court in **Ami Chand & Anr. v. Jai Prakash & Ors.,** FAO 488/1999 decided on 12.10.2011.

8. Before adverting to the case law cited by the Appellant, I would extract the provisions of Section 149 (2) (a) (ii) of the Act and the relevant Clause in the Insurance Policies placed and proved on record before the Claims Tribunal. I may mention that the condition entitling person/persons to drive is same in all the said Appeals; the relevant Clause therefore shall be extracted from MAC APP.565/2008.

9. Section 149 (2) (a) (ii) 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) .....
>
> (2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment of award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer

to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle-

(a) .....

(b) .....

(c) .....

(d) .....

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or.."

10. Condition in the Insurance Policies reads as under:-

"Persons or Classes of Persons entitled to drive:-

Any person including insured Provided that a person driving hold an effective driving licence at the time of the accident and is not disqualified from holding or obtaining such a licence."

11. It would appropriate to notice the provisions contained in Section 14 and 15 of the Act. Section 14 talks about the currency of driving licence to drive motor vehicles. Its proviso says that every driving licence notwithstanding its expiry under Sub-section (2) would continue to be effective for a period of 30 days from the date of expiry.

12. Section 15 of the Act provides different fees for an application for renewal of driving licence if made previous to or within 30 days of the expiry of the licence or when the same is made after the expiry of the earlier said period of 30 days. Second proviso appended to sub-Section (4) to Section 15 provides that if the application is made after a period of five years after the driving licence is ceased to be effective, the licencing authority may refuse to renew the driving licence, unless the applicant undergoes and passes the test of competence to drive. In

other words, the Licencing Authority is under obligation to renew the licence, if an applicant makes an application for its renewal within a period of five years from the date when it ceased to be effective.

13. It is the contention of the learned counsel for the Appellant DTC that renewal of a driving licence within a period of five years and 30 days after its expiry is automatic, once the application for renewal is made by the applicant. Thus, the learned counsel argues that any person who has got his licence renewed within a period of five years from the time when the driving licence ceased to be effective, it shall be presumed that the person was duly licensed within the meaning of Section 149 (2) (a) (ii) of the Act.

14. First of all, I would advert to the judgments relied upon by the leaned counsel for the Appellant DTC.

15. In **K.G.Srinivasamurthy v. Habib Khathun & Ors.,** II (2002) ACC 510 (DB), the Division Bench of Karnataka High Court referred to Division Bench judgment of Madras High Court in **Oriental Insurance Company Ltd. v. Indirani & Ors.,** 1995 ACJ 703; **National Insurance Company Ltd. v. Thulasi,** (1994) 1 LW 567 and **Oriental Insurance Co. Ltd. v. Mohammed Sab Ali Sab Kaladagi,** II (1999) ACC 70 and held as under:-

> "54..... The only contention raised by learned Counsel for the appellant is that the Insurance Company is not liable in this case to pay the compensation inasmuch as the driver of the vehicle, involved in the accident, did not have an effective licence on the date of accident. Accident had occurred on 28.9.1992. The licence which had expired on 26.6.1992. That was renewed only on 26.10.1992. In between the two dates, the accident had occurred. Hence, it is contended by the learned Counsel for the appellant that the exclusion clause in the policy will come into play.
>
> In that case the relevant clause in the insurance policy read as follows:
>
> "Provided that a person driving holds an effective driving licence at the time of the accident and is not disqualified from holding or obtaining such a licence."

x x x x x x x x x x x

The clause can be divided into three parts. The first part refers to a person holding an effective driving licence at the time of the accident. The second part refers to the disqualification of such person from holding it. Even after obtaining a licence, a person may get disqualified under the provisions of the Act from holding it and such a person will be governed by the second part. The third part refers to persons who are disqualified from obtaining such a licence. The first part cannot go together with the third part. In other words, if a person is having an effective driving licence he cannot be said to be disqualified from obtaining such a licence. It means if there is an effective valid licence, it could be contended by the insurance company that he is subsequently disqualified from holding it, but it is not open to the company to contend that he was disqualified from obtaining that licence.

x x x x x x x x x x x

(3) A similar question arose in case of **National Insurance Co. Ltd. v. Thulasi** (1994) 1 LW 567. The clause in the insurance policy in that case was worded exactly in similar language. While considering that clause the Bench to which one of us (Srinivasan, J.) was a party referred to Section 96(2) (b) (ii) of the Motor Vehicles Act and said:

"There are two limbs to the section and the disjunctive 'or' is used. The first part deals with a case where the driver is not duly licensed. If a person had no licence at all prior to and at the time of the accident he will be covered by the first part. If the first part applies to a case, the second part will not apply. The second part will necessarily apply only to cases in which the driver had a licence sometime or other and at the time of the accident it is not subsisting. The latter part of the section cannot be interpreted as meaning that even if the driver had no licence at any time, he must be shown to be disqualified to hold or obtain a licence for the purpose of excluding the liability of the insurer."

x x x x x x x x x x x

56. In **Oriental Insurance Co. Ltd. v. Mohammed Sab Ali Sab Kaladagi,** II (1999) ACC 70, the period of driving licence had expired on 9.6.1988 and it was renewed on 3.11.1992 and in the meanwhile the accident had occurred on 13.10.1992 and the question was as to whether the insurer will be liable if the driving licence of the driver of the offending vehicle had not been renewed on the date of the accident, learned single Judge of this Court held as follows:

(5) The wording used as 'or' assumes much importance in this case. According to the construction of this section, the Insurance Company can succeed only if the person was not duly licensed or he was disqualified from holding or obtaining the driving licence during the period of disqualification. According to the construction of the language either of the conditions has to be duly fulfilled. But in the policy issued the word 'and' is used as conjunction. By the use of word 'and' it goes to show that the Insurance Company has to prove that the driver was not only not duly licensed but was also disqualified for holding the licence. The word 'or' and the word 'and' used in the policy assumes much importance. There cannot be compromise between the word 'or' and 'and'. The plain language as it is read has to be understood. In this direction, Mr. B.S. Patil, learned Counsel for the respondents relied upon the observation as how the construction of the statute be understood. On page 96 of the Interpretation of Statutes by Maxwell it is stated as follows:

"To suppress the mischief and advance the remedy.- It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy."

x x x x x x x x

x x x

60. We are in respectful agreement with the above said decisions. It is clear that mere fact that the driver of the offending vehicle had not got his driving licence renewed on the date of the accident and got it renewed subsequently would not amount to breach of condition of the policy as it cannot be said that there was violation

of the condition of the exclusion clause."

16. Thus, the Karnataka High Court took the view that where the driver of an offending vehicle had got renewed his driving licence subsequently even beyond the period of 30 days, it could not be said that there was violation of condition of the exclusion Clause.

17. This Court in **Ami Chand & Anr. v. Jai Prakash & Ors.,** FAO 488/1999 decided on 12.10.2011 took the similar view as was taken by the Karnataka High Court.

18. At this juncture, I would like to refer to the use of different terminology for a valid driving licence in Section 3 and Section 149 (2) (a) (ii) of the Act.

19. Section 3 prohibits a person to drive a motor vehicle in any public place unless he holds *"an effective driving licence issued to him authorizing him to drive the vehicle."* On the other hand, Section 149 (2) (a) (ii) lays down that the Insurance Company is permitted to defend an award given by the Claims Tribunal if there has been a breach to satisfy condition of policy and one of such condition is "a condition excluding driving by a named person or persons or by any person who is not duly licensed".

20. The use of the words 'duly licensed' used in Section 149, in my view would mean to convey that the driver of the offending vehicle should not only have a licence which is valid on the date of accident, but also should be for the class of vehicle which the driver was driving. The counsel for the Appellants relied on **Swaran Singh's** case (supra) to point out that the word 'duly licensed' has been used in the past tense, and therefore the driving licence, even though had expired the driver would still be duly licenced, until a period of 5 years from the date of expiry, this argument is liable to be rejected. The Supreme Court in **Swaran Singh's** case (supra), meant that the word 'duly licensed' would also include the period of one month after the expiry of driving licence of a driver, which has been unequivocally specified under Section 14 of the Act. Therefore, it was in that context did the Supreme Court conclude that the word 'duly licensed' is used in the past tense.

21. A similar condition in the Insurance Policy was analyzed by the Supreme Court in **National Insurance Company Limited v. Jarnail Singh & Ors.,** (2007) 15 SCC 28, and in **New India Assurance Company Ltd. v. Suresh Chandra Aggarwal,** (2009) 15 SCC 761. In both these reports of the Supreme Court, it was held that, if the driving licence is renewed after a period of 30 days of the expiry of the driving licence, it would be effective only from the date of its renewal and the driver of the vehicle shall be deemed to be without a driving licence in the interregnum and the Insured would be guilty of breach of the condition of policy as envisaged under Section 149 (2) (a) (ii) of the Act.

22. In **Jarnail Singh & Ors.** (supra) the accident took place on 20.10.1994. The driving licence had expired on 18.05.1994 and it was renewed w.e.f. 28.10.1996. After referring to Section 15 (1) of the Act that since the Insurance Policy stipulated the condition that the vehicle would not be driven by a person without a valid driving licence, the Insured would be guilty of the violation of the condition of the policy.

23. In **Suresh Chandra Aggarwal** (supra) it was held that since the driver did not have an effective and valid driving licence on the date of the accident, the Insurance Company could avoid the liability to pay the compensation. Para 15 to 23 of the report are extracted hereunder:-

> "15. Having noted the relevant Statutory provisions, we may now advert to the facts at hand. As noticed above, the stand of the appellant is that the claim preferred by the claimant could not be processed and had to be repudiated because special condition No. 5 of the insurance policy had been violated inasmuch as the driver of the insured vehicle did not have an effective driving licence at the time of the accident.
>
> 16. Special condition No. 5 reads as follows:
>
> "5. Persons or classes of persons entitled to drive-
>
> (a) The insured,
>
> (b) Any other person who is driving on the insured's order or with his permission:
>
> Provided that the person driving holds or had held and has not been disqualified from holding an effective driving licence with all the required endorsements thereon as per the Motor Vehicles Act and the Rules made thereunder for the time being in force to drive the category of Motor

Vehicle insured hereunder." (emphasis supplied)

It is manifest that the said condition contemplates that apart from the insured, any other person, authorised by the insured, could also drive the vehicle provided the person driving the vehicle "holds or had held and has not been disqualified" from holding an effective driving licence.

17. In the instant case, as noted above, as per the certificate issued by the licensing authority, the driving licence of the deceased driver had expired on 25.10. 1991 i.e. four months prior to the date of accident on 29.02.1992 and it was renewed with effect from 23.03.1992. It is not the case of the claimant that the driver had applied for renewal of the licence within 30 days of the date of its expiry. On the contrary, it is the specific case of the appellant that the driving licence was renewed only with effect from 23.03.1992.

18. From a plain reading of Section 15 of the Act, it is clear that if an application for renewal of licence is made within 30 days of the date of its expiry, the licence continues to be effective and valid without a break as the renewal dates back to the date of its expiry. Whereas, when an application for renewal is filed after more than 30 days after the date of its expiry, the proviso to Sub-section (1) of Section 15 of the Act gets attracted and the licence is renewed only with effect from the date of its renewal, meaning thereby that in the interregnum between the date of expiry of the licence and the date of its renewal, there is no effective licence in existence. The provision is clear and admits of no ambiguity.

19. However, the stand of the claimant before the District and State Fora as also before us was that since the deceased driver was holding a valid licence and had not been disqualified from holding an effective licence, the stipulation in the afore-extracted condition was not infringed. In our view, the argument is stated to be rejected.

20. Admittedly, having failed to apply for renewal of the driving licence within 30 days from the date of its expiry in terms of Section 15 of the Act, the licence could not be renewed with

effect from the date of its expiry and therefore, between the period from 26.10.1991 to 22.03.1992, the deceased driver had no valid and effective driving licence as contemplated under Section 3 of the Act. We are convinced that during this period, he did not hold at all an effective driving licence, as required in the terms and conditions governing the policy on the date of accident i.e. 29.02.1992.

21. As a matter of fact, in view of the clear mandate of Section 3 of the Act, the deceased driver was not even permitted to drive the insured vehicle in a public place. Furthermore, the claimant not only committed breach of the terms of the policy, he also violated the provisions of Section 5 of the Act by entrusting the vehicle to a person who did not hold a valid licence on the date of the accident.

22. Although it was not pleaded by learned Counsel for the appellant, but we fail to understand as to how the licence was and could be renewed w.e.f. 23.03.1992 after the death of the licence-holder on 29.02.1992. In our opinion, therefore, the appellant was not liable to indemnify the claimant for the loss suffered by him in the accident of the insured vehicle.

23. We are fortified in our view by the decision of this Court in **Jarnail Singh** (supra). In that case also, the driving licence of the driver, who drove the vehicle which got involved in the accident, had expired on 16.05.1994. The accident took place more than five months thereafter i.e. on 20.10.1994 and the driving licence was renewed only with effect from 28.10.1996. On these facts, it was held that proviso to Sub-section (1) of Section 15 applied; the driver had no licence to drive the vehicle on the date of accident; the condition in the policy identical to the one in the present case was violated and therefore, the Insurance Company was not liable to pay any amount to the insured."

24. Thus the Supreme Court held that the person holding an expired licence would be guilty for the offence of driving the vehicle without licence and the insurer for committing the breach of the policy. It was held that the Insurance Company would not be liable to pay any amount.

25. In view of the authoritative pronouncement of the Supreme Court in **Suresh Chandra Aggarwal** (supra), where the terms of the policy as extracted in Para 16 of the report were much wider, still the driver was held to be not holding a valid driving licence as the licence had expired and had not been renewed within a period of 30 days of its expiry; it was held to be breach of a condition of policy, entitling Insurance Company to avoid the policy. The report in **K.G. Srinivasamuthy** (Supra) of Karantaka High Court and a judgment of this Court in **Ami Chand** (Supra) and the argument that the driving licence could be renewed without taking any test within a period of five years of the time it has ceased to be effective, are of no help to the DTC.

26. Since these Appeals relate to the Claim in respect of injury to third party, the Insurance Company was asked to pay the compensation on account of its statutory liability with a right to recover the same from the Insured i.e. DTC.

27. It goes without saying that the onus is on the Insurer to establish that there is willful breach of the terms of policy. I would refer to each of the eight cases except the condition of policy which has been extracted earlier in Para 8 of the judgment.

MAC APP.565/2008

1.	Date of Accident	29.07.2005
2.	Date of Expiry of the driving Licence	03.11.1999
3.	Date of renewal of the driving licence	17.08.2005

MAC.APP. 609/2008

1.	Date of Accident	20.11.2003
2.	Date of Expiry of the driving Licence	11.02.2002
3.	Date of renewal of the driving licence	28.11.2003

MAC.APP. 610/2008

1.	Date of Accident	20.01.2005
2.	Date of Expiry of the driving Licence	04.11.2004
3.	Date of renewal of the driving licence	06.02.2005

MAC.APP. 75/2009

1.	Date of Accident	03.03.2004
2.	Date of Expiry of the driving Licence	19.09.2002
3.	Date of renewal of the driving licence	22.03.2004

MAC.APP. 97/2009

1.	Date of Accident	30.08.2001
2.	Date of Expiry of the driving Licence	30.04.2001
3.	Date of renewal of the driving licence	01.07.2002

MAC.APP. 258/2009

1.	Date of Accident	02.02.2003
2.	Date of Expiry of the driving Licence	24.05.2002
3.	Date of renewal of the driving licence	17.03.2003

MAC.APP. 378/2009

1.	Date of Accident	31.05.2002
2.	Date of issue of driving Licence	14.09.2004*
3.	Date of Expiry of the driving licence	13.09.2007

* The driver Randhir Singh (R2W1) in his examination-in-chief admitted that on the date of the accident his licence had expired and he got it renewed on 14.09.2004. MAC.APP. 474/2009

1.	Date of Accident	02.07.2005
2.	Date of Expiry of the driving Licence	14.04.2005
3.	Date of renewal of the driving licence	13.07.2005

28. The DTC does not dispute that it was aware that the driving licence of its driver had expired. The DTC is a Public Sector Transport Company and is expected to take a test and see the driving licence of the driver at the time he is employed or is engaged to drive its bus. The case of expired driving licence is different from a case of fake driving licence because owner of the vehicle may not be able to distinguish between a fake and a genuine driving licence. Once, it was established that the driver held an expired driving licence it was for the Appellant DTC to

explain the circumstances under which it permitted the driver to drive the vehicle, which has not been done. Therefore, the DTC shall be presumed to be guilty of the willful breach of the condition of the policy read with Section 149 (2) (a) (ii) of the Act.

29. The Claims Tribunal by impugned judgment directed the Insurance Company to satisfy the claim of the third party with a right to recover the same from the DTC.

30. Since the Insurance Company was entitled to defend the action in case of the driver of the vehicle was not duly licensed, the Insurance Company was rightly granted an option to recover the compensation paid from the DTC, the insured of the vehicle in the respective Appeals by the impugned order.

31. The conclusion reached by the Claims Tribunal cannot be faulted.

32. No other contention has been raised by the Appellant.

33. The Appeals are devoid of any merit. The same are accordingly dismissed. No costs.

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MAHENDER SINGH ….APPELLANT

VERSUS

ORIENTAL INSURANCE CO. LTD. & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 430/2010 DATE OF DECISION: 10.5.2012

Motor Vehicles Act, 1988—Section 147—Section 149(2)—Section 66—Section 163-A—Accident took place on 25.3.2006—Death of a male, aged 24 years who was a bachelor—TSR driven by a person, other than the registered owner—Tribunal Held, accident caused on account of use of TSR and compensation of Rs. 1,83,000/- awarded—Recovery rights granted against the owner of TSR—Aggrieved owner/respondent preferred appeal—Contended that vehicle not involved in accident—No breach of the term of policy as vehicle was not used for the purpose not allowed by permit—Driving of vehicle by a person other than registered owner cannot the said to the use of the vehicle for a purpose not allowed by the permit—Recovery rights should not have been granted—Held—Unchallenged testimony as to involvement of TSR in accident—Each and every breach would not be a contravention of condition of permit—driving of a TSR by a person other than the permit holder would not be use of vehicle for purpose not allowed by the permit—No violation of clause (c) of S. 149 (2) (a) (i)—recovery rights—Grant of recovery rights set aside—Appeal allowed.

Thus, the user of a transport vehicle for the purpose not allowed by the permit would be using a goods vehicle as a passenger vehicle, a passenger vehicle as a goods vehicle, etc. and not each and every contravention of the condition of permit issued by the concerned Transport Authority. Thus, simply because the vehicle was driven by a person other than the permit holder cannot be said to be a user of the transport vehicle for the purpose not allowed by the permit under which the vehicle was used. **(Para 10)**

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Ms. Brijender Khurana, Advocate

FOR THE RESPONDENTS : Mr. D.K. Sharma, Advocate for the Respondents no. 1 insurance company.

CASES REFERRED TO:

1. *State of Maharashtra and Ors.* vs. *Nanded-Parebhani Z.L.B.M.V. Operator Sangh* (2000) 2 SCC 69.

2. *Kanailal Sur* vs. *Paramnidhi Sadhu Khan* (1958) 1 SCR 360.

RESULT: Appeal allowed.

G.P. MITTAL, J. (ORAL)

1. An interesting question as to the interpretation of Section 149(2)(a)(i)(c) of the Motor Vehicles Act, 1988 arises in this case as while awarding a compensation of Rs. 1,83,000/- in favour of the Second Respondent, recovery rights were granted against the Appellant owner of the TSR No.DL-1W-0025. It is alleged that the TSR was involved in the accident which occurred on 25.03.2006 resulting in the death of Naushad, a bachelor aged 24 years.

2. A Claim Petition under Section 163-A of the Motor Vehicles Act was preferred by the Second Respondent claiming a compensation of Rs. 10,00,000/- for the death of her son. The Respondent No.2 examined ASI Krishan Kumar, P.S. Sultanpuri, IO of the case in FIR No.444/2006 registered in respect of the accident. His testimony regarding involvement of the vehicle (DL-1W-0025) was not challenged in the cross-examination by the Appellant. The Claims Tribunal returned a finding that the accident was caused on account of use of vehicle No.DL-1W-0025 and awarded the compensation as stated above.

3. A feeble attempt was made by the learned counsel for the Appellant to challenge this finding of fact. However, I do not find any reason to take a view other than the one reached by the Claims Tribunal in view of the IO's unchallenged testimony.

4. It is urged by the learned counsel for the Appellant that there was no breach of the terms of the policy as envisaged under Section 149(2) of the Act and thus the Claims Tribunal erred in granting recovery rights against the Appellant. It is argued that Section 149(2)(a)(i)(c) entitles the insurer to defend the action for payment of compensation if the vehicle was used for a purpose not allowed by the permit under which the vehicle was being used. The learned counsel urges that the user/driving of the vehicle by a person other than the registered owner

cannot be said to be use of the vehicle for a purpose not allowed by the permit. To appreciate the contention raised, it would be appropriate to extract Section 149(2) hereunder:-

> **"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks-**
>
> (1).....
>
> (2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment of award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-
>
> (a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-
>
> (i) a condition excluding the use of the vehicle-
>
> (a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or
>
> (b) for organized racing and speed testing, or
>
> (c) <u>for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or</u> (emphasis supplied)"

5. I obtained the conditions for grant of a permit for a TSR plying in NCT of Delhi from the transport department, which are also available on the website of the Transport Department, Govt. of National Capital Territory of Delhi. The same are extracted hereunder:-

> "1. The vehicles shall ply as per the rate/tariff approved by the Govt./State Transport Authority from time to time and exhibited in the meter.
>
> 2. The fare distance chart as per the notified fares duly approved

by the State Transport Authority shall be displayed prominently available at the back of the seat of the driver inside the vehicle as prescribed by the State Transport Authority.

3. Only electronic fare meter duly approved and duly calibrated by the Competent Authority or any other metering device duly approved by the competent Authority shall be installed. The Electronic Fare Meter shall be kept in proper working condition.

4. The number of passengers shall not exceed 3 adults excluding driver. A child of not more than 12 years of age shall be reckoned as a half and a child of not more than three years of age shall not be reckoned.

5. The driver shall not refuse to ply any place within the NCT of Delhi or the area specified from time to time.

6. The driver shall not misbehave with the passenger/intending passenger.

7. The driver shall extend help and assistance to all senior citizens and disabled while boarding and alighting the vehicles.

8. The driver shall wear the uniform in grey colour with his/her smart card based Public Service Vehicle (PSV) badge prominently displayed on uniform.

9. The driver shall undergo training as may be prescribed by the Commissioner (Transport) from time to time and in the manner prescribed.

10. The vehicle shall display the Helpline No. of the Transport Department on the rear side of the vehicle also name and address of the permit holder.

11. The vehicle shall affix registration number plate in Braille as per design approved by the Department at the space prescribed by Transport Department.

12. The permit holder shall inform any change in his/her residential address in form 33 of CMVR, 1989 within the stipulated period i.e. within 30 days to the Registering Authority.

13. Hire purchase, lease, hypothecation deed shall be allowed for

Nationalized Banks. Scheduled Banks and Non-Banking Financial companies duly approved by RBI or any other competent authority notified by Central Govt. in this regard.

14. The permit holder shall exercise such supervision as is necessary to ensure that the vehicle is operated in conformity with the Motor Vehicle Act and the rules made there-under and shall be liable for action for violation of permit condition without prejudice to the action that may be legally permissible to be taken against the driver.

15. The permit holder shall be liable for the suspension/ cancellation of the permit for any violation of the permit condition.

16. The vehicle shall be kept neat and clean at all time during the operation.

17. The vehicle must be equipped with the First Aid Box containing material as specified in DMV Rules, 1993.

18. The vehicle must be equipped with the Fire Fighting equipment as specified in DMV Rules, 1993.

19. The drivers identity/particulars along with his/her photograph to be displayed at prominent place inside the wind screen.

20. A complaint book shall be maintained with serial numbers printed and issued by the Transport Department, will be available at the Complaint Box installed at prominent place.

21. The driver must be of good character without any criminal record.

22. The permit holder shall be responsible for the behavior, reliability of the Auto Drivers and to ensure the proper police verification is done."

6. Thus, a perusal of the condition for issuance of permit, inter alia, are that the vehicle shall be kept neat and clean at the time of operation (condition No.16); that the vehicle must be equipped with the First Aid Box; that the driver must display the particulars of his identity and photograph at a prominent place inside the windscreen (Condition No.19); that the driver must be of good character and without any criminal

record; the driver shall wear uniform in gray colour with his/her smart card based Public Service Vehicle (PSV) badge prominently displaying on the uniform (Condition No.8).

7. Can it be said that the Insurance Company would be able to avoid liability if the vehicle is not kept clean or the driver is not wearing the uniform? It is not each and every condition of permit contravention of which would allow the Insurance Company to avoid the liability. On the other hand, a close reading of the Clause (c) to Section 149 (2) (i) (a) would show that it is only the user of the transport vehicle for the purpose not allowed by the permit would enable the Insurance Company to defend the action to satisfy an award in a motor accident where the risk is covered by a policy obtained under Section 147 of the Act.

8. The interpretation of contravention of condition of permit envisaged under Section 66 of the Act and the contravention of condition of permit with respect to the purpose for which the vehicle may be used came up for consideration before the Supreme Court in **State of Maharastra and Ors. v. Nanded-Parebhani Z.L.B.M.V. Operator Sangh** (2000) 2 SCC 69 albeit in a different context. In the said case, the police had seized certain vehicles for carrying passengers in excess of the numbers permitted by the condition of permit issued by the Transport Authority. The action was challenged by the Association of Transporters by virtue of a writ petition before the Aurangabad Bench of Bombay High Court. The High Court analyzed the different provisions of the Motor Vehicles Act, 1988 and the Rules framed thereunder and on consideration of the same came to the conclusion that it is not each and every violation of the condition of the permit which would authorize the seizure and detention of the vehicle under Section 207 (1) of the Act. It was held that it was only when the condition of permit relating to the route on which or the area in which or the purpose for which the vehicle was used, is violated, the vehicle could be seized by the Authorities. The Appeal filed by the State of Maharastra was dismissed by the Supreme Court. The contention raised on behalf of the State of Maharastra that carrying passengers more than prescribed by the permit could be construed to be violation, was rejected. The Supreme Court relied upon the report in **Kanailal Sur v. Paramnidhi Sadhu Khan** (1958) 1 SCR 360 and held as under:-

"If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act". The intention of the legislature is required to be gathered from the language used and, therefore, a construction, which requires for its support with additional substitution of words or which results in rejection of words as meaningless has to be avoided. Bearing in mind, the aforesaid principles of construction of statute and on examining the provisions of Section 207 of the Act, which has been quoted earlier, we have no doubt in our mind that the police officer would be authorised to detain a vehicle, if he has reason to believe that the vehicle has been or is being used in contravention of Section 3 or Section 4 or Section 39 or without the permit required under Sub-section (1) of Section 66 or in contravention of any condition of such permit relating to the route on which or the area in which or the purpose for which the vehicle may be used. In the case in hand, we are not concerned with the contravention of Section 3 or Section 4 or Section 39 or Sub-section (1) of Section 66 and we are only concerned with the question of contravention of the condition of permit. Reading the provisions as it is, the conclusion is irresistible that the condition of permit relating to the route on which or the area in which or the purpose for which the vehicle could be used if contravened, would only authorise the police officer to detain the vehicle and not each and every condition of permit on being violated or contravened, the police officer would be entitled to detain the vehicle. According to the learned Counsel, appearing for the State of Maharashtra, the expression "purpose for which the vehicle may be used" could be construed to mean that when the vehicle Is found to be carrying passengers more than the number prescribed in the permit, the purpose of user is otherwise. We are unable to accede to this contention as in our opinion, the purpose would only refer to a contingency when a vehicle having a permit of stage carriage is used as a contract carriage or vice versa or where a vehicle having a permit for stage carriage or contract carriage is used as a goods vehicle and vice versa. But carrying passengers more than the number specified in the permit

will not be a violation of the purpose for which the permit is granted. If the legislature really wanted to confer power of detention on the police officer for violation of any condition of the permit, then there would not have been the necessity of adding the expression "relating to the route on which or the area In which or the purpose for which the vehicle may be used". The user of the aforesaid expression cannot be ignored nor can it be said to be a tautology. We have also seen the Form of permit (From P.Co. T.), meant in respect of a tourist vehicle, which is issued under Rule 72(1)(ix) and Rule 74(6) of the Maharashtra Motor Vehicles Rules, 1989. On seeing the different columns, we are unable to accede to the contention of the learned Counsel appearing for the State of Maharashtra, that carrying passengers beyond the number mentioned in Column 5, indicating the seating capacity, would be a violation of the conditions of permit relating to either the route or the area or the purpose for which the permit is granted. In this view of the matter, we see no infirmity with the conclusion arrived at by the High Court in the impugned judgment and the detention of the vehicles has rightly been held to be unauthorised and consequently, the compensation awarded cannot be said to be without jurisdiction....."

9. Although, the interpretation of Section 207 was done by the Supreme Court in a different context, yet, the same would apply to Clause (c) to Section 149 (2) (a) (i) of the Act.

10. Thus, the user of a transport vehicle for the purpose not allowed by the permit would be using a goods vehicle as a passenger vehicle, a passenger vehicle as a goods vehicle, etc. and not each and every contravention of the condition of permit issued by the concerned Transport Authority. Thus, simply because the vehicle was driven by a person other than the permit holder cannot be said to be a user of the transport vehicle for the purpose not allowed by the permit under which the vehicle was used.

11. The Claims Tribunal erred in holding that there was violation of Clause (c) of Section 149(2)(a)(i) of the Act.

12. The impugned order cannot be sustained. The Appeal is accordingly allowed. The impugned order to the extent it grants recovery rights against the Appellant is set aside.

13. The Appeal is allowed in above terms.

ILR (2012) VI DELHI 486
MAC. APP.

NEW INDIA ASSURANCE CO. LTD. ....APPELLANT

VERSUS

VIVEK THAKUR & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 692/2007 DATE OF DECISION: 11.5.2012

Motor Vehicles Act, 1988—Section 163-A—Two vehicles involved in the accident a TSR and a stationary bus—death of a male graduate who was engaged in teaching—Compensations claimed from the owner of both the vehicles—Tribunal awarded compensation taking the income to be Rs. 15,000/- p.m.—Multilplier of 16 applied—Appellant/insurer directed to pay the compensation—Determination of liability postponed—Aggrieved appellant preferred the appeal—Contended that TSR rammed in the stationary bus—Drivers of TSR solely liable—Entire liability cannot be fastened on the appellant/insurer—Tribunal not empowered to ask the appellant to pay compensation first and then decide the liability—in the absence of evidence income should not have been taken to be Rs. 15000/- --Multiplier of 16 is on higher side—Held, bus abandoned on a public way—Neither any indicator nor any signal indicating the presence of the bus—Bus was in a

drivable condition—Cannot be said to be no negligence on the part of bus driver—Case of composite negligence—Both the owners are jointly and severally liable to pay the compensation in equal proportion—Quantum of compensation awarded not faulty—Appellant Insurance Company liable to pay compensation—Has right to recover 50% from owner of TSR—Appeal partly allowed.

Section 163-A enables a Claimant to claim compensation without proving any negligence on the part of the owner of the vehicle involved in the accident and there is no indication in the provision as to from which owner/insurer the Claimants would claim the compensation, if more than one vehicle is involved in the accident. Since in the case of composite negligence, the Claimants can elect to sue and recover compensation from all or any of the tortfeasor. Thus under Section 163-A of the Act also it would be the option of the Claimant to claim compensation from all or any of the owner/ insurer of the vehicle involved in the accident. I am fortified in this view by a Division Bench Judgment of Kerala High Court in **United India Insurance Company Ltd. v. Ratheesh,** MANU/KE/1687/2011, wherein while relying on **United India Insurance Company Ltd. v. Madhavan,** 2011 (3) KLT 452 and after analyzing the provisions of Section 140 and 163-A of the Motor Vehicles Act, the Division Bench held as under:

> "13. The legislature in 1994 introduced S.163A into the Statute book. While under S.140 even without proving any fault only a specific amount alone could be claimed, under S. 163A comprehensive claim can be staked for compensation by the victims who have suffered permanent disablement or legal heirs of a deceased victim.
>
> 14. Provisions of S.40 of the M.V. Act make it clear that payment under S.140 is only ad hoc and interim. The claimants are entitled, even after claiming the

amount under S.140 of the M.V. Act, to claim the entire amount of compensation which would otherwise be payable by resort to S.166 of the M.V. Act. The only stipulation is that the amount paid under S.140 must be adjusted towards the amount that would be payable under S.166 of the M.V. Act.

15. The legislature, with long experience of working S.140, and its predecessor provisions had introduced 163A into the Motor Vehicles Act in 1994 and in S.163A of the M.V. Act significantly there is no reference at all to the nature of liability of owners/ insurers if there is plurality of vehicles involved in the accident. The difference is significant. It would not be an inadvertent omission. S.140 speaks of the arrangement when plurality of vehicles are involved. The liability is declared to be joint and several. But when it came to S.163A of the M.V. Act the legislature did not incorporate such a stipulation.

16. Why? The query is pored. We have already noted that it could not be an inadvertent omission and this is eminently clear from S.163A(2) of the M.V. Act which eloquently conveys to the court that the legislature was cognizant and seized of the possibility of plurality of vehicles being involved in the accident wrongful act, neglect or default of the owner of the vehicle or vehicles concerned or of any other person need not be proved in a claim under S.163A of the M.V. Act, it is declared in S.163A(2). This definitely reveals to the court that it was a conscious deviation from the scheme that was stipulated under S.140 of the M.V. Act.

17. So far as S.140 of the M.V. Act is concerned, it is now trite that claim can be raised against either or both owners/insurers of the vehicles. The decision in **Oriental Insurance Co. Ltd. v Lakshmikutty Amma & Ors.,** 1999 ACJ 597 (D.B.) makes the position clear

that the Tribunal need not identify at the stage of award of compensation under S.140 of the M.V. Act all the vehicles (persons) liable to pay compensation. It is therefore evident that a claim under S.140 can be staked against the owner of either vehicle. The insurer consequently will be liable to indemnify the owner of the vehicle liable.

18. We requested the learned counsel to advance arguments at the Bar as to why totally different semantics and dynamics have been employed by the legislature while enacting S.163A of the M.V. Act. Significantly it is not even mentioned in S.163A that the liability is joint and several. Even under S.140 of the M.V. Act claim can be staked against either or both the owner/owners of the vehicle. It therefore appears to us to be evident that in a claim under S.163A also the choice/option must be for the claimant to stake claim against either or both owner/insurer of the vehicles involved in the accident.

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22. We are unable to find any other reason as to why a different language is used under Ss.140 and 163A of the M.V. Act by the legislature so far as the nature of the liability of the owner/insurer is concerned, when plurality of vehicles are involved. Consequently, therefore, it appears to us, that the option is entirely on the claimant to stake his claim against either or both owners/insurers of the vehicles involved in a claim under S.163A of the M.V. Act. That right/option of his got to be protected." **(Para 5)**

Important Issue Involved: (A) Section 163-A-enables a claimant to claim compensation without proving any negligence on the part of the owner of the vehicle involved in the accident and there is no indication in the provision as to from which owner/insurer the claimant would claim the compensation, if more than one vehicle involved in the accident.

(B) In the case of composite negligence, the claimants can elect to sue and recover compensation from all or any of the tortfeasor. Under Section 163-A of the Act also, it would be the option of the claimant to claim compensation from all or any of the owner/insurer of the vehicle involved in the accident.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Mr. K.L. Nandwani, Advocate.

FOR THE RESPONDENTS : None.

CASES REFERRED TO:

1. *United India Insurance Company Ltd.* vs. *Ratheesh*, MANU/KE/1687/2011.
2. United India Insurance Company Ltd. vs. Madhavan, 2011 (3) KLT 452.
3. *Ningamma* vs. *United India Insurance Co. Ltd.*, 2009 ACJ 2020.
4. *Oriental Insurance Co. Ltd.* vs. *Lakshmikutty Amma & Ors.*, 1999 ACJ 597 (D.B.).

RESULT: Appeal Allowed.

G.P. MITTAL, J.

1. The Appellant impugns a judgment dated 07.09.2007 whereby in a Petition under Section 163-A of the M.V. Act preferred by the Respondents No.1 to 3, a compensation of Rs. 4,31,900/- was awarded in their favour.

2. The Appellant's (Insurance Company's) grievance is that there were two vehicles involved in the accident i.e. a TSR bearing No.DL-1RE-3360 in which the deceased was travelling and a stationary bus bearing No.DL-1PB-1906 which was owned by Sukhchain Singh (the Respondent No.7) and was insured with the Appellant New India Assurance Co. Ltd. It is stated that although there was no negligence on the part of the driver of the bus and the TSR driver being solely liable,

having rammed the TSR in the stationary bus, the Claims Tribunal erred in fastening the entire liability on the Appellant. It is further the contention of the Appellant Insurance Company that the Claims Tribunal had no power to ask the Insurance Company to satisfy the award in the first instance and then decide on the liability. It is urged that in the absence of any evidence, the deceased's income should have been taken as Rs. 15,000/- per annum. The multiplier of 16 adopted by the Claims Tribunal, argues the learned counsel is also on the higher side.

3. There is no appearance on behalf of the Respondents No.1 to 3 or the owner & the driver of the TSR.

4. It has to be borne in mind that in a Claim Petition under Section 163-A of the Motor Vehicles Act, the Claimants are not required to raise a plea that the death or permanent disablement in respect of which the claim had been made was due to any wrongful act, neglect or default of the owner or of the vehicle or the vehicles concerned or of any person. In the circumstances, the contention raised on behalf of the Appellant that there was no negligence on the part of the bus driver and thus the Appellant was not liable to indemnify the owner and pay the compensation is without any substance. Moreover, a perusal of the testimony of PW2 SI V.K. Sharma shows that the bus was abandoned on a public way which was not an authorized parking space. There was neither any indicator nor any signal indicating the presence of the bus. He further deposed that the bus was in a drivable condition and there was no problem as to its motorability.

5. Section 163-A enables a Claimant to claim compensation without proving any negligence on the part of the owner of the vehicle involved in the accident and there is no indication in the provision as to from which owner/insurer the Claimants would claim the compensation, if more than one vehicle is involved in the accident. Since in the case of composite negligence, the Claimants can elect to sue and recover compensation from all or any of the tortfeasor. Thus under Section 163-A of the Act also it would be the option of the Claimant to claim compensation from all or any of the owner/insurer of the vehicle involved in the accident. I am fortified in this view by a Division Bench Judgment of Kerala High Court in **United India Insurance Company Ltd. v. Ratheesh,** MANU/KE/1687/2011, wherein while relying on **United India Insurance Company Ltd. v. Madhavan,** 2011 (3) KLT 452 and after

analyzing the provisions of Section 140 and 163-A of the Motor Vehicles Act, the Division Bench held as under:

> "13. The legislature in 1994 introduced S.163A into the Statute book. While under S.140 even without proving any fault only a specific amount alone could be claimed, under S. 163A comprehensive claim can be staked for compensation by the victims who have suffered permanent disablement or legal heirs of a deceased victim.
>
> 14. Provisions of S.40 of the M.V. Act make it clear that payment under S.140 is only ad hoc and interim. The claimants are entitled, even after claiming the amount under S.140 of the M.V. Act, to claim the entire amount of compensation which would otherwise be payable by resort to S.166 of the M.V. Act. The only stipulation is that the amount paid under S.140 must be adjusted towards the amount that would be payable under S.166 of the M.V. Act.
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> 15. The legislature, with long experience of working S.140, and its predecessor provisions had introduced 163A into the Motor Vehicles Act in 1994 and in S.163A of the M.V. Act significantly there is no reference at all to the nature of liability of owners/ insurers if there is plurality of vehicles involved in the accident. The difference is significant. It would not be an inadvertent omission. S.140 speaks of the arrangement when plurality of vehicles are involved. The liability is declared to be joint and several. But when it came to S.163A of the M.V. Act the legislature did not incorporate such a stipulation.
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> 16. Why? The query is pored. We have already noted that it could not be an inadvertent omission and this is eminently clear from S.163A(2) of the M.V. Act which eloquently conveys to the court that the legislature was cognizant and seized of the possibility of plurality of vehicles being involved in the accident wrongful act, neglect or default of the owner of the vehicle or vehicles concerned or of any other person need not be proved in a claim under S.163A of the M.V. Act, it is declared in S.163A(2). This definitely reveals to the court that it was a conscious deviation from the scheme that was stipulated under S.140 of the M.V. Act.

17. So far as S.140 of the M.V. Act is concerned, it is now trite that claim can be raised against either or both owners/insurers of the vehicles. The decision in **Oriental Insurance Co. Ltd. v Lakshmikutty Amma & Ors.,** 1999 ACJ 597 (D.B.) makes the position clear that the Tribunal need not identify at the stage of award of compensation under S.140 of the M.V. Act all the vehicles (persons) liable to pay compensation. It is therefore evident that a claim under S.140 can be staked against the owner of either vehicle. The insurer consequently will be liable to indemnify the owner of the vehicle liable.

18. We requested the learned counsel to advance arguments at the Bar as to why totally different semantics and dynamics have been employed by the legislature while enacting S.163A of the M.V. Act. Significantly it is not even mentioned in S.163A that the liability is joint and several. Even under S.140 of the M.V. Act claim can be staked against either or both the owner/owners of the vehicle. It therefore appears to us to be evident that in a claim under S.163A also the choice/option must be for the claimant to stake claim against either or both owner/insurer of the vehicles involved in the accident.

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22. We are unable to find any other reason as to why a different language is used under Ss.140 and 163A of the M.V. Act by the legislature so far as the nature of the liability of the owner/insurer is concerned, when plurality of vehicles are involved. Consequently, therefore, it appears to us, that the option is entirely on the claimant to stake his claim against either or both owners/insurers of the vehicles involved in a claim under S.163A of the M.V. Act. That right/option of his got to be protected."

6. The Division Bench posed before it a question whether this will lead to innocent owners or insurers being compelled to pay the compensation and the guilty/offending owners/insurers to go scot free. It was held that since Section 163-A was introduced as a social measure, the use of the terminology betrays a want of commitment. Paras 26 to 31 of the report are extracted hereunder:

"26. Will not this lead to the innocent owners/insurers being

compelled to pay compensation while the guilty/offending owners/insurers go scot free? Where is justice in such an event? Will not the law offend the primary constitutional mandate under Article 21 that any law has to be fair, just and reasonable? A flurry of questions are thrown at the Court. We are in the least impressed by these queries. In the scheme of S.163A there is no place for words like 'innocent' and 'offending'. Even the use of the terminology betrays a want of commitment to the laudable goals of the statutory provisions under S.163A and its very scheme. The statutory concern is only that the victims must be compensated. To ensure that, the option must be and has been conceded to the claimant. He is the best judge to decide what would ensure payment to him. He can and has hence been conceded the option.

27. Going by the purpose that S.163A has to achieve, the argument that the singular expressions in a statute take in the plural also and hence all the owners/insurers are together covered by the expression "the owner of the vehicle or authorized insurer" in S.163A cannot be accepted. The further argument that the liability hence rests on all the owner/insurers equally cannot be accepted. The language of S.163A and the purpose that it has to serve does not persuade or permit us to accept such an interpretation.

28. If the primary accent under S.163A is to provide a social security scheme, we are satisfied that the option must be given to the target group of the beneficent provision to stake the claim against any of the owners/insurers who is made liable under S.163A. The liability under S.163A appears to be a joint and separable liability. Either or both (or any or all) who have been saddled with the liability under S.163A can be proceeded against by a claimant at his option under S.163A of the M.V.Act.

29. It is not as though the concept is alien to the law. In the case of joint and several liability in tort option is given to the claimant to proceed against either or both the tort feasors. Reference to page 171 in the Law of Tort by Ratanlal and Dhirjalal, 21st Edition may in this context be relevant. We extract the relevant portion below:

> Joint tort feasors are jointly and severally, liable for the damages caused from the tort. They may be sued jointly or separately. If sued jointly damages may be levied from all or either. Each is responsible for the injury sustained by his common act.

It is a suit for composite negligence plaintiff is not entitled to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules of remoteness of damages, he is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons, though in any case he cannot recover or the whole more than his whole damage. He has a right to recover full amount of damages from any of the defendants. (emphasis supplied)

30. If that can be the case of tortuous liability, we find it absolutely safe to come to the conclusion that the same principle must apply in a claim under S.163A of the M.V.Act. The legislature has advisedly and very cautiously not limited the option of the claimant when he stakes a claim under S.163A of the M.V. Act. He is not obliged to claim against both (or all) the insurers/ owners. It is open to the claimant to choose the person from whom he should stake and recover the claim. M

31. There can be many a reason which can prompt the claimant to choose to proceed against one of the many persons liable under S.163A of the M.V. Act. Where two vehicles are involved in the accident and one of them is not covered by a valid policy of insurance that is an eminently acceptable reason as to why the claimant should choose to stake the claim against the owner/ insurer of one vehicle and not the other. There may also be instances like the one that presented itself in **Ningamma v. United India Insurance Co. Ltd.,** 2009 ACJ 2020 where the insurer of one of the vehicles may be entitled to claim absolution from liability under S.163A of the M.V. Act. If the purpose to be achieved by the statutory provision is a social security scheme, the accent must be to ensure that the claimant gets the amount under such social security scheme without dispute and at the earliest. If that be so, certainly our conclusion that the claim can

> be staked against either or both at the option of the claimant must be held to be sound."

7. Thus, there is no escape from the conclusion that a Claimant choosing a remedy under Section 163-A of the Motor Vehicles Act is entitled to sue and recover compensation as per the structured formula from the owner/insurer of any or all the vehicles involved in the accident. Turning to the instant case, the Respondents No.1 to 3 chose to implead and claim compensation from the owners of the both vehicles involved in the incident. Since the bus was insured, the Appellant was also impleaded as insurer of bus No.DL-1PB-1906. The Claims Tribunal instead of making both the owners and the insurer (of the vehicle which was insured) liable to pay the compensation jointly or severally or in a specific proportion, made the Appellant liable to pay the compensation holding that determination of liability will be done later on in this very Claim Petition after the compensation is paid by the Appellant. The Claims Tribunal held as under:

> "26. Lot of arguments were advanced under this head. Ld. counsel for the petitioner Sh. Jitender Kamra categorically argued that no apportionment of liability can take place in this case for the reasons that rashness and negligence is not required to be determined in a U/s 163-A. Counsel Sh. D.N. Sharma for the Insurance Company, Sh. Om Parkash and Sh. Yogender on the other hand requested for apportionment of the liability on the ground that they shall have to enter into another round of litigation for determination of the same. It is no more res integra that in a case U/s 163-A, apportionment of liabilities cannot be done as doing of the same will amount to entering into the realm of deciding rashness and negligence which is not within the scope of Section 163-A and therefore, I deem it expedient to allow the argument of Sh. Jitender Kamra and prefer to leave the question open for its decision after payment of compensation to the claimants in order to achieve the object of providing the earliest possible help to the victims of the accident. As the liabilities of the vehicles involved in the accident is joint and several in a case U/s 163-A, all the respondents are liable jointly and severally as far as claimants are concerned. In view of the submissions made coupled with the fact that evidence has been led on the point of

ownership as well as on the point of negligence by parties, I deem it expedient to observe that after payment of compensation to the claimants respondents will be at liberty to move this Tribunal for determination of the remaining contentions vis-a-vis who is the owner and what is the respective proportion of liability interse between the driver, owner and insurer of the vehicles involved in the accident. In order to provide the earliest and easy payment, insurance company i.e. respondent no.5 New India Assurance Company is directed to make the payment in the first instance. It is given the liberty to move this court after making of the payment about decision of respective liabilities and other questions connected with the same. It is hereby observed that the same shall be determined on the basis of the records of this petition and there will be no need of filing of separate petition and of leading of evidence. The reason weighting heavily in my mind for leaving the question to be decided at a later stage is that if question of apportionment is decided at this stage, it is definitely going to delay the payment to the victims of accident."

8. Since the question of negligence in a Claim Petition under Section 163-A of the Motor Vehicles Act is not to be determined irrespective of the fact whether one or more than one vehicle is involved in the incident, the question of actual liability ought not to have been postponed by the Claims Tribunal. Since the Respondents No.1 to 3 claimed compensation from the owner of both the vehicles and the insurer of bus No.DL-1PB-1906, they all could have been made liable to pay the compensation jointly or severally or in equal proportion. Thus, instead of remanding back the case to the Claims Tribunal on this issue, I would hold that both the owners of the vehicles involved in the incident were equally liable to pay the compensation in equal proportion. The liability was joint and several, the Respondents No.1 to 3 could recover the compensation from any of them. The Appellant Insurance Company was, therefore, liable to pay the compensation held payable to the Respondents No.1 to 3.

9. Adverting to the contention that in the absence of any evidence as to the deceased's income a notional income of Rs.15,000/- should have been taken into consideration, to say the least, is without any substance. It is true that a Claims Tribunal and the Court would have jurisdiction to entertain the Claim Petition under Section 163-A where the

income of the deceased was upto Rs.40,000/-. In the absence of any proof of income, the Court can take the minimum wages. The deceased in this case was a graduate engaged in teaching. This part of PW1's testimony was not challenged in the cross-examination. The minimum wages of a graduate on the date of the accident was more than Rs.3,300/- per month. The Claims Tribunal was, therefore, justified in accepting PW1's testimony that the deceased was earning Rs.3,300/- per month. Thus, there is no fault in the quantum of compensation of Rs.4,31,900/- awarded by the Claims Tribunal.

10. In view of the discussion above, the liability being joint and several, the Appellant would be under obligation to satisfy the award with a right to recover 50% from the owner of the TSR No.DL-1RE-3360. The Appellant Insurance Company shall deposit the balance amount of compensation along with the interest as awarded by the Claims Tribunal within six weeks with the Registrar General of this Court.

11. The Appellant and the Respondents No.4 to 8 are directed to appear before the Claims Tribunal for determination of the ownership of TSR No. DL-1RE-3360 and for recovery of 50% of the compensation from the owner/insurer, if any, of the TSR.

12. The Appeal is allowed in above terms.

13. A copy of the judgment be sent to the concerned Claims Tribunal for necessary action in the matter.

ILR (2012) VI DELHI 499
W.P. (C)

REGISTRAR OF COMPANIES & ORS. ….PETITIONERS

VERSUS

DHARMENDRA KUMAR GARG & ANR. ….RESPONDENTS

(VIPIN SANGHI, J.)

W.P. (C) NO. : 11271/2009 DATE OF DECISION: 01.06.2012

(A) Right to Information Act, 2005—Section 3 section 22 Companies Act, 1956 Section 610—By way of impugned orders, the appeals preferred by the respondent/ querist were allowed, rejecting the defence of the petitioners founded on Section 610 of the Companies Act and it was directed that the complete information sought by the respondent/querist be supplied—Despite earlier orders of two Central Information Commissioners taking a view that information placed by the petitioner ROC in public domain and accessible under Section 610 Companies Act, are out of purview of RTI Act, being specifically brought to his notice, the CIC Sh. Shailesh Gandhi in the present case, simply brushed aside those decisions, observing that he differs—Held, there is nothing inconsistent between the scheme provided under Section 610 of the Companies Act and provisions of the RTI Act and merely because a different charge is collected for providing information under Section 610 of the companies Act than the prescribed fee for providing information under RTI Act, does not lead to an inconsistency in the provisions of these two enactments—Further held, the RTI Act, being a general law dealing with right of a citizen to access information cannot be read to have abrogated the earlier special

law of Section 610 of the Companies Act.

(B) Judicial propriety—Held, Central Information Commission is a quasi judicial authority as it determines the inter-se rights and obligations of the parties in relation to the grant of information, which may entail civil and other consequences and it is a well settled canon of judicial discipline that a bench dealing with a matter respects an earlier decision rendered by a coordinate bench and is bound by to a larger bench—Breach of such discipline would lead to chaos. As such, if CIC differs with the earlier decisions taken by two other Central Information Commissioners, the judicial discipline demanded that after recording his disagreement, CIC should have required constitution of a larger bench to re-examine the issue.

This principle has been applied in **Maharaja Pratap Singh Bahadur Vs. Thakur Manmohan Dey & Others,** AIR 1996 SC 1931 as well. Therefore, Section 22 of the RTI Act, in any event, does not come in the way of application of Section 610 of the Companies Act, 1956. **(Para 46)**

It is, therefore, a well-recognised position that the CIC discharges quasi-judicial functions while deciding complaints/ appeals preferred by one or the other party before it. **(Para 53)**

It is a well-settled canon of judicial discipline that a bench dealing with a matter respects an earlier decision rendered by a coordinate bench (i.e., a bench of same strength), and is bound by the decision of a larger bench. If this discipline is breached, the same would lead to complete chaos and confusion in the minds of the litigating public, as well as in the minds of others such as lawyers, other members/judges of quasi-judicial/judicial bodies, and the like. Breach of such discipline would result in discrimination and would shake the confidence of the consumers of justice. There can be no greater source of discomfiture to a litigant and his counsel,

than to have to deal with diametrically opposite views of coordinate benches of the same judicial /quasi-judicial body. If the emergence of contradictory views is innocent i.e. due to ignorance of an earlier view, it is pardonable, but when such a situation is created consciously, with open eyes, and after having been put to notice, the judge/authority responsible for the later view should take the blame for creating confusion and for breaching judicial discipline.

(Para 54)

[Gi Ka]

APPEARANCES:

FOR THE PETITIONERS : Mr. Pankaj Batra, Advocates.

FOR THE RESPONDENTS : Mr. Rajeshwar Kumar Gupta and Ms. Shikha Soni, Advocates.

CASES REFERRED TO:

1. *The Institute of Chartered Accountants of India* vs. *Shaunak H. Satya & Others*, Civil Appeal No. 7571/2011 decided on 02.09.2011.
2. *Smt. Dayawati* vs. *Office of Registrar of Companies*, in CIC/SS/C/2011/000607.
3. *Sh. K. Lall* vs. *Sh. M.K. Bagri, Assistant Registrar of Companies & CPIO*, F. No. CIC/AT/A/2007/00112.
4. *State Bank of India* vs. *Mohd. Shahjahan*, W.P.(C.) No. 9810/2009.
5. *Union Public Service Commission* vs. *Shiv Shambhu & Others*, L.P.A. No. 313/2007 decided on 03.09.2008.
6. *Sh. Sonal Amit Shah* vs. *Registrar of Companies*, Decision No. 2146/IC(A)/2008 dated 31.03.2008.
7. *Union Public Service Commission* vs. *Shiv Shambu* 2008 IX (Del) 289.
8. *K. Lall* vs. *Ministry of Company Affairs*, Appeal No. CIC/AT/A/2007/00112 dated 14.04.2007.
9. *Arun Verma* vs. *Department of Company Affairs*, Appeal No. 21/IC(A)/2006.
10. *Dr. Vijay Laxmi Sadho* vs. *Jagdish*, (2001) 2 SCC 247.
11. *Maharaja Pratap Singh Bahadur* vs. *Thakur Manmohan Dey & Others*, AIR 1996 SC 1931.
12. *R.S. Raghunath* vs. *State of Karnataka & Another*, (1992) 3 SCC 335.
13. *Ashoka Marketing Limited and Another* vs. *Punjab National Bank and Others*, (1990) 4 SCC 406.
14. *U.P. State Electricity Board* vs. *Hari Shankar Jain*, [1979] 1 SCR 355.
15. *J.K. Cotton Spinning & Weaving Mills Co. Ltd.* vs. *The State of Uttar Pradesh & Others*, [1961] 3 SCR 185.
16. *Nicolle* vs. *Nicolle*, (1922) 1 AC 284.

RESULT: Petition allowed.

VIPIN SANGHI, J.

1. The present writ petition has been preferred by the Registrar of Companies, NCT of Delhi & Haryana (ROC) and its CPIOs Sh. Raj Kumar Shah and Sh. Atma Shah to assail two similar orders dated 14.07.2009 passed by the Central Information Commission (CIC) in complaint case Nos. CIC/SG/C/2009/000702 and CIC/SG/C/2009/000753. By these similar orders, the appeals preferred by the same respondent-querist were allowed, rejecting the defence of the petitioners founded upon Section 610 of the Companies Act, 1956, and it was directed that the complete information sought by the respondent-querist in his two applications under the Right to Information Act (RTI Act) be provided to him before 25.07.2009. The CIC has also directed issuance of show-cause notice to the petitioner-PIOs under Section 20(1) of the RTI Act asking them to show-cause as to why penalty should not be imposed upon them for not furnishing information as sought by the querist within thirty days.

2. The querist-Shri Dharmendra Kumar Garg filed an application under the RTI Act on 28.05.2009 requiring the PIO of the ROC to provide the following information in relation to company No. 056045 M/s Bloom Financial Services Limited:

"1. Who are the directors of this company? Please provide their name, address, date of appointment and copies of consent filed at ROC alongwith F-32 filed.

2. After incorporation of above company, how many times directors were changed? Please provide the details of documents files and copies of Form 32 filed at ROC.

3. Please provide the copies of Annual Returns filed at ROC since incorporation to 1998

4. On what ground prosecution has been filed. Please provide the details of prosecution and persons included for prosecution. Please provide the copies of Order Sheets and related documents.

5. On what ground the name of Dharmender Kumar Garg has been included for prosecution?

6. Please provide the copies of Form No 5 and other documents filed for increase of capital?

7. How much fee was paid for increase of Capital of above company? Please provide the details of payment of fee at ROC.

8. Please provide the copies of Statutory Report and Special Leave Petition (Statement in lieu of prospectus) filed at ROC."

3. The PIO-Sh. Atma Shah responded to the said queries on 29.05.2009. In respect of queries No. 1, 2, 3, 6, 7 & 8, the stand taken by the PIO was as follows:

"that in view of the provisions of Section 610 of the Companies Act, 1956 read with Companies (Central Government's) General Rules and Forms, 1956 framed in exercise of powers conferred by clauses (a) & (b) of sub-section (1) of Section 642 of the Companies Act, 1956, the documents filed by companies pursuant to various provisions of the Companies Act, 1956 with the ROCs are to be treated as 'information in public domain' and such information is accessible by public pursuant to the provisions of Section 610 of the Companies Act, 1956. There is an in built mechanism under the provisions of the Companies Act, 1956 for accessing information relating to documents filed which are in the public domain on payment of fees prescribed under the

provisions of the Companies Act, 1956 and the Rules made there under. Hence you can obtain the desired information by inspecting the documents filed by the company in this office before filing of documents online i.e. prior to 8/03/2006 at O/o Registrar of Companies, NCT of Delhi & Haryana, 131, Sector-5, IMT Manesar, Haryana and after 18/3/06 on the Ministry's website www.mca.gov.in. Further certified copies of the desired documents can also be obtained on payment of fees prescribed thereof. In view of this, the information already available in the public domain would not be treated as 'information held by or under the control of public authority' pursuant to Section 2(j) of the Right to Information Act, 2005. Therefore, the provisions of RTI Act, 2005 would not be applicable for providing inspection/ copies of such documents/information to the public."

4. The queries at serial Nos. 4 & 5, as aforesaid, were also responded to by the PIO. However, I am not concerned with the answers given in response to the said queries, as the legal issue raised in the present petition by the petitioners relates to the interplay between Section 610 of the Companies Act on the one hand, and the provisions of the RTI Act on the other hand. Not satisfied with the response given by the PIO Sh. Atma Shah, as aforesaid, the respondent-querist, without preferring a first appeal, straightway preferred an appeal before the CIC, which has been disposed of vide impugned order dated 14.07.2009 in complaint case No. CIC/SG/C/2009/000702.

5. The respondent-querist raised further queries in respect of the same company vide an RTI application dated 06.06.2009. This application was also responded to by the PIO Sh. Atma Shah on 23.06.2009. In this reply as well, in respect of certain queries, the PIO responded by placing reliance on Section 610 of the Companies Act and gave more or less the same reply, as extracted above. Since the respondent-querist was not satisfied with the said response, he preferred a petition before the CIC, once again by-passing the statutory first appeal provided under the RTI Act. This appeal was registered as complaint case No. CIC/SG/C/2009/ 000753.

6. Before the CIC, the petitioners contended that the information which could be accessed by any person by resort to Section 610 of the Companies Act is information which is already placed in the public

domain, and it cannot be said that the said information is 'held by' or is 'under the control' of the public authority. It was contended that such information, as has already been placed in the public domain, does not fall within the scope of the RTI Act and a citizen cannot by-pass the procedure, and avoid paying the charges prescribed for accessing the information placed in the public domain, by resort to provisions of the RTI Act.

7. In support of their submissions, before the CIC the petitioners placed reliance on a departmental circular No. 1/2006 issued by the Ministry of Company Affairs, wherein the view taken by the Director, Inspection & Investigation was that in the light of the provisions of Section 610 of the Companies Act read with Companies (Central Government's) General Rules & Forms, 1956 (Rules), framed in exercise of powers conferred under clauses (a) & (b) of sub-Section 1 of Section 642 of the Companies Act, the documents filed by the Companies pursuant to various provisions of the Companies Act with the ROC are to be treated as information in the public domain. It was also his view that there being a complete mechanism provided under the provisions of the Companies Act for accessing information relating to documents filed, which are in public domain, on payment of fees prescribed under the Companies Act and the Rules made thereunder, such information could not be treated as information held by, or under the control of, the public authority. His view was that the provisions of RTI Act could not be invoked for seeking copies of such information by the public.

8. The petitioners also placed reliance on various earlier orders passed by the different CICs, upholding the aforesaid stand of the ROC and, in particular, reliance was placed on the decision of Sh. A.N. Tiwari, Central Information Commissioner in F.No. CIC/80/A/2007/000112 decided on 12.04.2007. Reference was also made to various orders of Prof. M.M. Ansari, Central Information Commissioner taking the same view. The petitioner has placed all these orders before this Court as well, as Annexure A-7(Colly.)

9. The first submission of learned counsel for the petitioners is that, while passing the impugned orders, the Central Information Commissioner Sh. Shailesh Gandhi has acted with impropriety. Despite the earlier orders of two Central Information Commissioners – taking the view that the information placed by the petitioner-ROC in the public domain and

accessible under Section 610 of the Companies Act are out of the purview of the RTI Act, being specifically brought to his notice, he has simply brushed them aside after noticing them by observing that he differs with these decisions. It is submitted that even if Sh. Shailesh Gandhi, Central Information Commissioner, was of the opinion that the earlier views taken by two other learned CICs were not correct, the proper course of action for him to adopt would have been to record his reasons for not agreeing with the earlier views of the Central Information Commissioners, and to refer the said issue for determination by a larger bench of the Central Information Commission. Sitting singly, Sh. Shailesh Gandhi, Central Information Commissioner, could not have taken a contrary view by merely observing that he disagrees with the earlier views.

10. The further submission of learned counsel for the petitioners is that, even on merits, the view taken by the CIC in the impugned orders is illegal and not correct. It is argued that Clause (a) of Section 610 (1) of the Companies Act, inter alia, entitles 'any person' to inspect any document kept by the Registrar, which may have been filed or registered by him in pursuance of the Companies Act, or may inspect any document, wherein the Registrar has made a record of any fact required or authorized to be recorded to be registered in pursuance of the Companies Act, on payment for each inspection of such fee, as may be prescribed.

11. Further, by virtue of Clause (b) of Section 610 (1) any person can require the Registrar to provide certified copies of the Certificate of Registration of any company, or a copy or extract of any other document, or any part of any other document, on payment in advance of such fee, as may be prescribed. It is submitted that the Registrar of Companies has placed all its records pertaining to, and in relation to the companies registered with it in the public domain. They have either been placed on the website of the ROC, or are available for inspection at the facility of the ROC. Any person can inspect such records either on-line, or at the facility of the petitioner-ROC and if the person so desires, can also obtain copies of all or any of such documents on payment of charges, as prescribed under the Rules.

12. Learned counsel for the petitioners submits that the Companies (Central Government's) General Rules & Forms, 1956, which have been framed in exercise of the power conferred upon the Central Government by clauses (a) & (b) of sub-Section (1) of Section 642 of the Companies

Act, prescribe the fees for inspection of document and for obtaining certified copies thereof in Rule 21 A, which reads as follows:

"21A. Fees for inspection of documents etc. - The fee payable in pursuance of the following provisions of the Act, shall be -

(1) Clause (a) of sub-section (1) of section 118	rupees ten.
(2) Clause (b) of sub-section (1) of section 118	rupee one.
(3) Sub-section (2) of section 144	rupees ten.
(4) Clause (b) of sub-section (2) of section 163	rupees ten.
(5) Clause (b) of sub-section (3) of section 163	rupee one.
(6) Sub-section (2) of section 196	rupee one.
(7) Clause (a) of sub-section (1) of section 610	rupees fifty.

(8) Clause (b) of sub-section (1) of section 610—

(i) For copy of certificate of incorporation rupees fifty.

(ii) For copy of extracts of other documents including hard copy of such documents on computer readable media rupees twenty five per page."

13. Learned counsel submits that there are two kinds of information available with the ROC. The first is the information/ documents, which the ROC is obliged to receive, record and maintain under the provisions of the Companies Act, and the second kind of information relates to the administration and functioning of the office of the ROC. The first kind of information, i.e., the returns, forms, statements, etc. received, recorded and maintained by the ROC in relation to the companies registered with it, is all available for inspection, and the certified copies thereof can be obtained by resort to Section 610 of the Companies Act and the aforesaid Rules. He submits that since this information is already in the public domain, same cannot be said to be information held by, or in the control of the public authority, i.e., ROC. He submits that it is the second kind of information, as aforesaid, which a citizen can seek by invoking provisions of the RTI Act from the ROC, and not the first kind of information which, in any event, is already available in the public domain, and accessible to one and all, including non-citizens.

14. He submits that the right to information vested by Section 3 of the RTI Act is available only to citizens. However, the right vested by virtue of Section 610 of the Companies Act can be exercised by any person, whether, or not, he is a citizen of India. Therefore, the right vested by Section 610 of the Companies Act is much wider in its scope than the right vested by Section 3 of the RTI Act. It is argued that the object of the RTI Act is to enable the citizens to access information so as to bring about transparency in the functioning of public authorities, which is considered vital to the functioning of democracy and is also essential to contain corruption and to hold governments and their instrumentalities accountable to those who are governed, i.e., the citizens. The information accessible under Section 610 is, in any event, freely available and all that the person desirous of accessing such information is required to do, is to make the application in terms of the said provision and the Rules, to become entitled to receive the information.

15. Learned counsel submits that the fees prescribed for provision of information under the RTI Act is nominal and much less compared to the fees prescribed under Rule 21 A. Learned counsel for the petitioners submits that the petitioners have consciously prescribed the fees under the RTI Act as a nominal amount of Rs.10/- per application since the petitioner-ROC does not wish to make it inconvenient or difficult for the citizens to obtain information held by or under the control of the ROC under the said Act. However, the said provision cannot be exploited or misused by a citizen for the purpose of seeking information, which is available in the public domain and is accessible under Section 610 of the Companies Act by payment of prescribed fee under Rule 21 A of the aforesaid Rules.

16. On the other hand, the submission of learned counsel for the respondent-querist is that the provisions of the RTI Act have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923 and any other law for the time being in force or in any instrument having effect by virtue of any law other than the RTI Act itself. In this respect reference is made to Section 22 of the RTI Act. It is, therefore, argued that a citizen has an option to seek information from the ROC, either by resort to Section 610 of the Companies Act or by resort to the provisions of the RTI Act. Merely because Section 610 exists on the Statute Book, it does not mean that the right available under

the RTI Act to seek information can be curtailed or denied.

17. Learned counsel for the respondent further submits that under Section 610 of the Companies Act, a person can access only such information which has been filed or registered by him (i.e., the person seeking the information), in pursuance of the Companies Act. He submits that the expression "being documents filed or registered by him in pursuance of this Act" used in Section 610(1)(a) of the Companies Act connect with the words "any person" and not with the words "inspect any documents kept by the Registrar".

18. Section 610 of the Companies Act, 1956 reads as follows:

"610. Inspection, production and evidence of documents kept by Registrar.

(1) [Save as otherwise provided elsewhere in this Act, any person may]-

(a) inspect any documents kept by the Registrar [in accordance with the rules made under the Destruction of Records Act, 1917] being documents filed or registered by him in pursuance of this Act, or making a record of any fact required or authorised to be recorded or registered in pursuance of this Act, on payment for each inspection, of [such fees as may be prescribed];

(b) require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document to be certified by the Registrar, [on payment in advance of [such fees as may be prescribed:]

Provided that the rights conferred by this sub-section shall be exercisable-

(i) in relation to documents delivered to the Registrar with a prospectus in pursuance of sub-clause (i) of clause (b) of sub-section (1) of section 60, only during the fourteen days beginning with the date of publication of the prospectus; and at other times, only with the permission of the Central Government; and

(ii) in relation to documents so delivered in pursuance of clause (b) of sub-section (1) of section 605, only during the fourteen days beginning with the date of the prospectus; and at other

times, only with the permission of the Central Government.

(2) No process for compelling the production of any document kept by the Registrar shall issue from any Court [or the [Tribunal]] except with the leave of that Court [or the [Tribunal]] and any such process, if issued, shall bear thereon a statement that it is issued with the leave of the Court [or the [Tribunal]].

(3) A copy of, or extract from, any document kept and registered at any of the officers for the registration of companies under this Act, certified to be a true copy under the hand of the Registrar (whose official position it shall not be necessary to prove), shall, in all legal proceedings, be admissible in evidence as of equal validity with the original document..

19. The submission of learned counsel for the respondent that only the person who has filed documents with the Registrar of Companies is entitled to inspect the same is wholly fallacious and deserves to be outrightly rejected. This interpretation is clearly not borne out either from the plain language of section 610 or upon a scrutiny of the object and purpose of the said provision. Section 610 enables "any person" to inspect any documents kept by the registrar, being documents "filed or registered by him in pursuance of this Act". The obligation to file and register the documents, which may be submitted by a company registered, or seeking registration with the Registrar of Companies, is that of the Registrar of Companies. It is the Registrar, who makes a record of any fact required or authorized to be recorded or registered in pursuance of the Companies Act, and not .any person..

20. If the submission of learned counsel for the respondent were to be accepted, it would mean that it is the applicant under section 610, who is obliged to make a record of any fact required, or authorized to be recorded or registered in pursuance of the Companies Act, which is not the case. It is also not the obligation of 'any person' either to file, or to receive and put on record, or to register, the documents lodged by him in the office of the ROC. That is the obligation of the Registrar of Companies. The whole purpose of section 610 is to bring about full and complete transparency in the matter of registration of companies and in the matter of their accounts and directorship, so that any person can obtain all the relevant information in relation to any registered company.

21. Pertinently, the language used in clause (b) does not support the submission of the respondent at all. If the submission of learned counsel for the respondent were to be accepted, it would mean that while a person can inspect only those documents which he has lodged in the office of the Registrar of Companies (by virtue of clause (a)), at the same time, under clause (b) of section 610(1), he can obtain the certificate of incorporation of any company, or a copy or extract of any other document or any part of any other document duly certified by the Registrar.

22. Section 610(2) puts a check on issuance of a process for compelling the production of any document by the Registrar, by any Court or Tribunal. It requires that such process would not be issued except with the leave of the Court or the Tribunal. This check has been placed, since any person can obtain information either through inspection, or by obtaining certified copies of documents filed by any company, by following the procedure prescribed, and a certified true copies of any such documents or extracts is admissible in evidence in all legal proceedings, and has the same efficacy and validity as the original documents filed and registered by the Registrar of Companies (see section 610(3)).

23. There can be no doubt that the documents kept by the Registrar, which are filed or registered by him, as well as the record of any fact required or authorized to be recorded by the Registrar or registered in pursuance of the Companies Act qualifies as 'information' within the meaning of that expression as used in Section 2(f) of the RTI Act. However, the question is - whether the mere fact that the said documents/ record constitutes .information., is sufficient to entitle a citizen to invoke the provisions of the RTI Act to access the same?

24. The Parliament has defined the expression 'right to information' under Section 2(j). The same reads as follows:

> "2. (j) "right to information" means the right to information accessible under this Act which is held by or under the control of any public authority and includes the right to -
>
> (i) Inspection of work, documents, records;
>
> (ii) Taking notes, extracts, or certified copies of documents or records;

> (iii) Taking certified samples of material;
>
> (iv) Obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device;"

25. The right to information is conferred by section 3 of the RTI Act, which reads as follows:

> "3. Right to information. - Subject to the provisions of this Act, all citizens shall have the right to information."

26. Pertinently, the Parliament did not use the language in Section 3: *"Subject to the provisions of this Act, citizens shall have a right to access all information"*, or the like. Therefore, the right conferred by Section 3 of the RTI Act, which is the substantive provision, means the right to information "*accessible under the Act which is held by or under the control of any public authority and includes ...."*.

27. It is not without any purpose that the Parliament took the trouble of defining .right to information.. Parliament does not undertake a casual or purposeless legislative exercise. The definition of 'right to information' specifically qualifies the said right with the words:

(1) "accessible under this Act", and;

(2) "which is held by or under the control of any public authority".

28. The information should, firstly, be accessible under this Act. This means that if there is information which is not accessible under this Act, there is no 'right to information' in respect thereof. Consequently, there is no right to information in respect of information, which is exempted from disclosure under Section 8 or Section 9 of the RTI Act.

29. A particular information may not be held by, or may not be under the control of the public authority concerned. There would be no right in a citizen to seek such information from that particular public authority, though he may have the right to seek the same information from another public authority who holds or under whose control the desired information resides. That is why Section 6(3) provides that an application to seek information:

(i) Which is held by another public authority; or

(ii) The subject matter of which is more closely connected with the functions of another public authority, shall be transferred to that other public authority.

30. But is that all to the expression 'held by or under the control of any public authority' used in the definition of 'Right to information' in Section 2(j) of the RTI Act?

31. In the context of the object of the RTI Act, and the various provisions thereof, in my view, the said expression *"held by or under the control of any public authority"* used in section 2(j) of the RTI Act deserves a wider and a more meaningful interpretation. The expression "Hold" is defined in the Black's Law dictionary, 6th Edition, inter alia, in the same way as 'to keep' i.e. to retain, to maintain possession of, or authority over.

32. The expression *"held"* is also defined in the Shorter Oxford Dictionary, inter alia, as *"prevent from getting away; keep fast, grasp, have a grip on"*. It is also defined, inter alia, as *"not let go; keep, retain"*.

33. The expression "control" is defined in the Advanced Law Lexicon by P.N. Ramanatha Aiyar 3rd Edition Reprint 2009 and it reads as follows:

> "(As a verb) To restrain; to check; to regulate; to govern; to keep under check; to hold in restraint; to dominate; to rule and direct; to counteract; to exercise a directing, restraining or governing influence over; to govern with reference thereto; to subject to authority; to have under command, and authority over, to have authority over the particular matter. (Ame. Cyc)"

34. From the above, it appears that the expression 'held by' or 'under the control of any public authority., in relation to "information", means that information which is held by the public authority under its control to the exclusion of others. It cannot mean that information which the public authority has already "let go", i.e. shared generally with the citizens, and also that information, in respect of which there is a statutory mechanism evolved, (independent of the RTI Act) which obliges the public authority to share the same with the citizenry by following the prescribed procedure, and upon fulfillment of the prescribed conditions. This is so, because in respect of such information, which the public

authority is statutorily obliged to disseminate, it cannot be said that the public authority 'holds' or 'controls' the same. There is no exclusivity in such holding or control. In fact, the control vests in the seeker of the information who has only to operate the statutorily prescribed mechanism to access the information. It is not this kind of information, which appears to fall within the meaning of the expression .right to information., as the information in relation to which the 'right to information' is specifically conferred by the RTI Act is that information which *"is held by or under the control of any public authority"*.

35. The mere prescription of a higher charge in the other statutory mechanism (in this case Section 610 of the Companies Act), than that prescribed under the RTI Act does not make any difference whatsoever. The right available to any person to seek inspection/copies of documents under Section 610 of the Companies Act is governed by the Companies (Central Government's) General Rules & Forms, 1956, which are statutory rules and prescribe the fees for inspection of documents, etc. in Rule 21A. The said rules being statutory in nature and specific in their application, do not get overridden by the rules framed under the RTI Act with regard to prescription of fee for supply of information, which is general in nature, and apply to all kinds of applications made under the RTI Act to seek information. It would also be complete waste of public funds to require the creation and maintenance of two parallel machineries by the ROC - one under Section 610 of the Companies Act, and the other under the RTI Act to provide the same information to an applicant. It would lead to unnecessary and avoidable duplication of work and consequent expenditure.

36. The right to information is required to be balanced with the need to optimize use of limited fiscal resources. In this context I may refer to the relevant extract of the Preamble to the RTI Act which, inter alia, provides:-

> "AND WHEREAS revelation of information in actual practice is likely to conflict with other public interests including **efficient operations of the Governments, optimum use of limited fiscal resources** and the preservation of confidentially of sensitive information;
>
> AND WHEREAS **it is necessary to harmonise these conflicting**

interests while preserving the paramountancy of the democratic ideal;" (emphasis supplied).

37. Section 4(1)(a) also lays emphasis on availability of recourses, when it talks about computerization of the records. Therefore, in the exploitation and implementation of the RTI Act, a delicate and reasonable balance is required to be maintained. Nobody can go overboard or loose ones equilibrium and sway in one direction or assume an extreme position either in favour of upholding the right to information granted by the RTI Act, or to deny the said right.

38. The Supreme Court in **The Institute of Chartered Accountants of India Vs. Shaunak H. Satya & Others,** Civil Appeal No. 7571/2011 decided on 02.09.2011, observed that:

> "it is necessary to make a distinction in regard to information intended to bring transparency, to improve accountability and to reduce corruption, falling under section 4(1)(b) and (c) and other information which may not have a bearing on accountability or reducing corruption. **The competent authorities under the RTI Act will have to maintain a proper balance so that while achieving transparency, the demand for information does not reach unmanageable proportions affecting other public interests, which include efficient operation of public authorities and government, preservation of confidentiality of sensitive information and optimum use of limited fiscal resources." (**emphasis supplied).

39. Therefore, if another statutory provision, created under any other law, vests the right to seek information and provides the mechanism for invoking the said right (which is also statutory, as in this case) that mechanism should be preserved and operated, and not destroyed merely because another general law created to empower the citizens to access information has subsequently been framed.

40. Section 4 of the RTI Act obliges every public authority, inter alia, to publish on its own, information described in clause (b) of sub-Section (1) of Section 4. Sub-clause (xv) of clause (b) obliges the public authority to publish "the particulars of facilities available to citizens for obtaining information ....". In the present case, the facility is made available - not just to citizens but to any person, for obtaining

information from the ROC, under Section 610 of the Companies Act, and the Rules framed thereunder above referred to. Section 4(2) of the RTI Act itself postulates that in respect of information provided by the public authority suo moto, there should be minimum resort to use of the RTI Act to obtain information.

41. The submission of learned counsel for the respondent founded upon Section 22 of the RTI Act also has no merit. Section 22 of the RTI Act reads as follows:

> "22. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."

42. Firstly, I may notice that I do not find anything inconsistent between the scheme provided under Section 610 of the Companies Act and the provisions of the RTI Act. Merely because a different charge is collected for providing information under Section 610 of the Companies Act than that prescribed as the fee for providing information under the RTI Act does not lead to an inconsistency in the provisions of these two enactments. Even otherwise, the provisions of the RTI Act would not override the provision contained in Section 610 of the Companies Act. Section 610 of the Companies Act is an earlier piece of legislation. The said provision was introduced in the Companies Act, 1956 at the time of its enactment in the year 1956 itself. On the other hand, the RTI Act is a much later enactment, enacted in the year 2005. The RTI Act is a general law/enactment which deals with the right of a citizen to access information available with a public authority, subject to the conditions and limitations prescribed in the said Act. On the other hand, Section 610 of the Companies Act is a piece of special legislation, which deals specifically with the right of any person to inspect and obtain records i.e. information from the ROC. Therefore, the later general law cannot be read or understood to have abrogated the earlier special law.

43. The Supreme Court in **Ashoka Marketing Limited and Another Vs. Punjab National Bank and Others,** (1990) 4 SCC 406, applied and explained the legal maxim: leges posteriors priores conterarias abrogant, (later laws abrogate earlier contrary laws). This principle is

subject to the exception embodied in the maxim: generalia specialibus non derogant, (a general provision does not derogate from a special one). This means that where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one (Benion: Statutory Interpretation p. 433-34). One of the principles of statutory interpretation is that the later law abrogates earlier contrary laws. This principle is subject to the exception embodied in the second latin maxim mentioned above. The Supreme Court in paragraphs 50-52 of this decision held as follows:

> "50. One such principle of statutory interpretation which is applied is contained in the latin maxim: leges posteriors priores conterarias abrogant, (later laws abrogate earlier contrary laws). This principle is subject to the exception embodied in the maxim: generalia specialibus non derogant, (a general provision does not derogate from a special one). This means that where the literal meaning of the general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to continue to be dealt with by the specific provision rather than the later general one (Benion: Statutory Interpretation p. 433-34).
>
> 51. The rationale of this rule is thus explained by this Court in the **J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. The State of Uttar Pradesh & Others,** [1961] 3 SCR 185:
>
> > "The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier directions should have effect."
>
> 52. In **U.P. State Electricity Board v. Hari Shankar Jain,** [1979] 1 SCR 355 this Court has observed:

> > "In passing a special Act, Parliament devotes its entire consideration to a particular subject. When a general Act is subsequently passed, it is logical to presume that Parliament has not repealed or modified the former special Act unless it appears that the special Act again received consideration from Parliament." "

44. Justice G.P. Singh in his well-known work "Principles of Statutory Interpretation 12th Edition 2010" has dealt with the principles of interpretation applicable while examining the interplay between a prior special law and a later general law. While doing so, he quotes Lord Philimore from **Nicolle Vs. Nicolle,** (1922) 1 AC 284, where he observed:

> "it is a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases, of which the particular law is but one. This, as a matter of jurisprudence, as understood in England, has been laid down in a great number of cases, whether the prior law be an express statute, or be the underlying common or customary law of the country. Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so."

45. The Supreme Court in **R.S. Raghunath Vs. State of Karnataka & Another,** (1992) 3 SCC 335, quotes from Maxwell on The Interpretation of Statutes, the following passage:

> "A general later law does not abrogate an earlier special one by mere implication. Generalia specialibus non derogant, or, in other words, where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. In such

cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act."

46. This principle has been applied in **Maharaja Pratap Singh Bahadur Vs. Thakur Manmohan Dey & Others,** AIR 1996 SC 1931 as well. Therefore, Section 22 of the RTI Act, in any event, does not come in the way of application of Section 610 of the Companies Act, 1956.

47. Now, I turn to consider the submission of learned counsel for the petitioner that the Central Information Commissioner Sh. Shailesh Gandhi has acted with impropriety while passing the impugned order, by disregarding the earlier orders of the other Central Information Commissioners and by taking a decision contrary to them without even referring the matter to a larger bench.

48. In **Sh. K. Lall Vs. Sh. M.K. Bagri, Assistant Registrar of Companies & CPIO,** F. No. CIC/AT/A/2007/00112, the Central Information Commissioner Sh. A.N. Tiwari squarely considered the very same issue with regard to the interplay between Section 610 of the Companies Act and the rights of a citizen to obtain information under the RTI Act. Sh. A.N. Tiwari by a detailed and considered decision held that information which can be accessed by resort to Section 610 of the Companies Act cannot be accessed by resort to the provisions of the RTI Act. The discussion found in his aforesaid order on this legal issue reads as follows:

"9. It shall be interesting to examine this proposition. Section 2(j) of the RTI Act speaks of "the right to information accessible under this Act which is held by or under the control of any public authority.....". The use of the words "accessible under this Act"; "held by" and "under the control of" are crucial in this regard. The inference from the text of this sub-section and, especially the three expressions quoted above, is that an information to which a citizen will have a right should be shown to be a) an information which is accessible under the RTI Act and b) that it is held or is under the control of a certain public authority. This should mean that unless an information is exclusively held and controlled by a public authority, that

information cannot be said to be an information accessible under the RTI Act. Inferentially it would mean that once a certain information is placed in the public domain accessible to the citizens either freely, or on payment of a pre-determined price, that information cannot be said to be 'held' or 'under the control of' the public authority and, thus would cease to be an information accessible under the RTI Act. This interpretation is further strengthened by the provisions of the RTI Act in Sections 4(2), 4(3) and 4(4), which oblige the public authority to constantly endeavour "to take steps in accordance with the requirement of clause b of subsection 1 of the Section 4 to provide as much information suo-motu to the public at regular intervals through various means of communication including internet, so that the public have minimum resort to the use of this Act to obtain information." (Section 4 sub-section 2). This Section further elaborates the position. It states that "All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed." The explanation to the subsection 4 section 4 goes on to further clarify that the word "disseminated" used in this Section would mean the medium of communicating the information to the public which include, among others, the internet or any other means including inspection of office of any public authority.

10. It is significant that the direction regarding dissemination of information through free or priced documents, or free or priced access to information stored on internet, electronic means, or held manually; free or on payment of predetermined cost for inspection of such documents or records held by public authorities, appear in a chapter on 'obligations of public authorities'. The inference from these sections is a) it is the obligation of the public authorities to voluntarily disseminate information so that "the public have minimum resort to the use of this Act to obtain information", b) once an information is voluntarily disseminated

it is excluded from the purview of the RTI Act and, to that extant, contributes to minimizing the resort to the use of this Act, c) there is no obligation cast on the public authority to disseminate all such information free of cost. The Act authorizes the public authorities to disclose such information suo-motu "at such cost of a medium or the print cost price as may be prescribed", d) the RTI Act authorizes the public authority to price access to the information which it places in the public domain suo-motu.

11. These provisions are in consonance with the wording of the Section 2(j) which clearly demarcates the boundary between an information held or under the control of the public authority and, an information not so held, or under the control of that public authority who suo-motu places that information in public domain. It is only the former which shall be "accessible under this Act" . viz. the RTI Act and, not the latter. This latter category of information forms the burden of sub-section 2, 3 and 4 of Section 4 of this Act.

12. The RTI Act very clearly sets the course for the evolution of the RTI regime, which is that less and less information should be progressively held by public authorities, which would be accessed under the RTI Act and more and more of such held information should be brought into the public domain suo-motu by such public authority. Once the information is brought into the public domain it is excluded from the purview of the RTI Act and, the right to access this category of information shall be on the basis of whether the public authority discloses it free, or at such cost of the medium or the print cost price "as may be prescribed". The Act therefore vests in the public authority the power and the right to prescribe the mode of access to voluntarily disclosed information, i.e. either free or at a prescribed cost / price.

13. The respondents are right therefore in arguing that since they had placed in the public domain a large part of the information requested by the appellant and prescribed the price of accessing that information either on the internet or through inspection of documents, the ground rules of accessing this information shall

be determined by the decision of the public authority and not the RTI Act and the Rules. That is to say, such information shall not be covered by the provisions about fee and cost of supply of information as laid down in Section 7 of the RTI Act and the Rules thereof.

14. It is, therefore, my view that it should not only be the endeavour of every public authority, but its sacred duty, to suo-motu bring into public domain information held in its control. The public authority will have the power and the right to decide the price at which all such voluntarily disclosed information shall be allowed to be accessed.

15. There is one additional point which also needs to be considered in this matter. The appellant had brought up the issue of the overarching power of the RTI Act under Section 22. This Section of the Act states that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in the Official Secrets Act, 1923, and any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act. In his view, the pricing of the access to the records and information by the public authority at a scale different from the rates / fees for accessing the information prescribed under the Act amounts to inconsistency. A closer look at the provision shows that this is not so. As has been explained in the preceding paragraphs, the fees prescribed for access to information under the RTI Act applies only to information 'held' or 'under the control of' the public authority. It does not apply inferentially to the information not held or not under the control of the public authority having been brought into the public domain suo-motu in terms of sub-section 3 of Section 4. The price and the cost of access of information determined by the public authority applies to the latter category. As such, there is no inconsistency between the two provisions which are actually parallel and independent of each other. I therefore hold that no ground to annul the provision of pricing the information which the public authority in this case has done, exists.

16. In my considered view, therefore, the CPIO and the AA were acting in consonance with the provision of this Act when

they called upon the appellant to access the information requested and not otherwise supplied to him by the CPIO, by paying the price / cost as determined by the public authority."

49. This view was followed by Sh. A.N. Tiwari in a subsequent order dated 29.08.2007 in **"Shri Shriram (Dada) Tichkule Vs. Shri P.K. Galchor, Assistant Registrar of Companies & PIO"**. The same view was taken by another Central Information Commissioner namely, Prof. M.M. Ansari in his orders dated 29.03.2006 in **Arun Verma Vs. Department of Company Affairs,** Appeal No. 21/IC(A)/2006, and in the case of **Sh. Sonal Amit Shah Vs. Registrar of Companies,** Decision No. 2146/IC(A)/2008 dated 31.03.2008, and various others, copies of which have been placed on record. It appears that all these decisions were cited before learned Central Information Commissioner Sh. Shailesh Gandhi. In fact, in the impugned order, he also refers to these decisions and states that "I would respectfully beg to differ from this decision".

50. The Central Information Commission while functioning under the provisions of the RTI Act, no doubt, do not constitute a Court. However, there can be no doubt about the fact that Central Information Commission functions as a quasi-judicial authority, as he determines inter se rights and obligations of the parties in relation to the grant of information, which may entail civil and other consequences for the parties.

51. This Court in **Union Public Service Commission Vs. Shiv Shambhu & Others,** L.P.A. No. 313/2007 decided on 03.09.2008, while dealing with the issue whether the Central Information Commissioner should be impleaded as a party respondent in proceedings challenging its order and whether the Central Information Commission has a right of audience to defend its order before this Court in writ proceedings, observed as follows:

"2. At the outset this Court directs the deletion of the CIC which has been arrayed as Respondent No. 1 to this appeal, consequent upon it being arrayed as such in the writ petition. This Court has repeatedly issued practice directions stressing that a judicial or quasi-judicial body or Tribunal whose order is challenged in a writ petition (and thereafter possibly in appeal) ought not to itself be impleaded as a party respondent. The only exception would be if malafides are alleged against any individual member of such

authority or Tribunal in which case again it would be such member, and not the authority/Tribunal, who may be impleaded as a respondent. Accordingly the cause title of the present appeal will read as **Union Public Service Commission v. Shiv Shambhu & Ors.**"

52. This decision has subsequently been followed in **State Bank of India Vs. Mohd. Shahjahan,** W.P.(C.) No. 9810/2009, wherein the Court held as follows:

"12. This Court is unable to accept the above submission. There is no question of making the CIC, whose order is under challenge in this writ petition, a party to this petition. Like any other quasi-judicial authority, the CIC is not expected to defend its own orders. Likewise, the CIC cannot be called upon to explain why it did not follow any of its earlier orders. That the CIC should not be made a party in such proceedings is settled by the judgment of the Division Bench in this Court in **Union Public Service Commission v. Shiv Shambu** 2008 IX (Del) 289."

53. It is, therefore, a well-recognised position that the CIC discharges quasi-judicial functions while deciding complaints/appeals preferred by one or the other party before it.

54. It is a well-settled canon of judicial discipline that a bench dealing with a matter respects an earlier decision rendered by a coordinate bench (i.e., a bench of same strength), and is bound by the decision of a larger bench. If this discipline is breached, the same would lead to complete chaos and confusion in the minds of the litigating public, as well as in the minds of others such as lawyers, other members/judges of quasi-judicial/judicial bodies, and the like. Breach of such discipline would result in discrimination and would shake the confidence of the consumers of justice. There can be no greater source of discomfiture to a litigant and his counsel, than to have to deal with diametrically opposite views of coordinate benches of the same judicial /quasi-judicial body. If the emergence of contradictory views is innocent i.e. due to ignorance of an earlier view, it is pardonable, but when such a situation is created consciously, with open eyes, and after having been put to notice, the judge/authority responsible for the later view should take the blame for creating confusion and for breaching judicial discipline.

55. The Supreme Court in **Dr. Vijay Laxmi Sadho Vs. Jagdish,** (2001) 2 SCC 247, deprecated such lack of judicial discipline by observing as follows:

> "33. As the learned Single Judge was not in agreement with the view expressed in Devilal's case, Election Petition No. 9 of 1980, it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distress that the said course was not followed. **It is well-settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of "different arguments" or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs."** (emphasis supplied)

56. In the present case, the Central Information Commissioner Mr.Shailesh Gandhi has also demonstrated complete lack of judicial discipline while rendering the impugned decisions. By no stretch of imagination, it cannot be said that the earlier decisions were not on the point. Particularly, the decision rendered by Sh. A.N. Tiwari in F. CIC/T/A/2007/0012 dated 12.04.2007 directly deals with the very same issue, and is an exhaustive, and detailed and considered decision. If the Central Information Commissioner Sh. Shailesh Gandhi had a different view in the matter – which he was entitled to hold, judicial discipline demanded that he should have recorded his disagreement with the view of Sh. A.N. Tiwari, Central Information Commissioner, and, for reasons to be recorded by him, required the constitution of a larger bench to re-examine the issue. He could not have ridden rough shot over the earlier decisions of Sh. A.N. Tiwari and Prof. M.M. Ansari, particularly when he was sitting singly to consider the same issue of law.

57. The consequence of the improper conduct of Sh. Shailesh Gandhi, Central Information Commissioner, is that there are now two sets of conflicting orders- taking diametrically opposite views, on the issue aforesaid. Therefore, unless the said legal issue is settled one way

or the other by a higher judicial forum, it would be open to any other Information Commissioner to choose to follow one or the other view. This would certainly lead to confusion and chaos. It would also lead to discrimination between the querists/public authority, who are either seeking information or are defending the action under the RTI Act. One such instance, cited by learned counsel for the petitioner is in the case of **Smt. Dayawati Vs. Office of Registrar of Companies,** in CIC/SS/C/2011/000607 decided on 23.03.2012. In this case, once again the same issue had been raised. The Central Information Commissioner Smt. Sushma Singh has preferred to follow the view of Sh. A.N. Tiwari in the case of **K. Lall Vs. Ministry of Company Affairs,** Appeal No. CIC/AT/A/2007/00112 dated 14.04.2007.

58. On this short ground alone, the impugned orders of the learned Central Information Commissioner deserve to be quashed and set aside.

59. The reasoning adopted by Shri Shailesh Gandhi, the learned Central Information Commissioner for taking a view contrary to that taken by Sh. A.N. Tiwari in his order dated 12.04.2007 (which has been extracted hereinabove), does not appeal to me. The view taken by Sh.A.N. Tiwari, Central Information Commissioner appeals to this Court in preference to the view taken by Sh. Shailesh Gandhi, Central Information Commissioner in the impugned orders. The impugned orders do not discuss, analyse or interpret the expression 'right to information' as defined in Section 2(j) of the RTI Act. They do not even address the aspect of Section 610 of the Companies Act being a special law as opposed to the RTI Act.

60. I may also observe that the approach of the Central Information Commission in seeking to invoke Section 20 of the RTI Act in the facts of the present case is wholly unjustified. By no stretch of imagination could it have been said that PIOs of the ROC had acted "*without any reasonable cause*" or "*malafidely denied the request for information or knowingly* gave incorrect, incomplete or misleading information, or destroyed information, which was the subject of the request, or obstructed in any manner the furnishing of information.. The PIOs were guided by the departmental circular No. 1/2006 dated 24.01.2006 in the view that they communicate to the respondent-querist. This view was taken by none other than the Director Inspection & Investigation in the Ministry of Company Affairs, Government of India and circulated to all Regional

Directors of Registrar of Companies and all Official Liquidators. There was nothing before the PIOs to suggest that the said view had been disproved by any judicial or quasi-judicial authority. Clearly, the PIOs acted bonafide and without any malice.

61. Even if it were to be assumed for the sake of argument, that the view taken by the learned Central Information Commissioner in the impugned order was correct, and that the PIOs were obliged to provide the information, which was otherwise retrievable by the querist by resort to Section 610 of the Companies Act, it could not be said that the information had been withheld malafide or deliberately without any reasonable cause. It can happen that the PIO may genuinely and bonafidely entertain the belief and hold the view that the information sought by the querist cannot be provided for one or the other reasons. Merely because the CIC eventually finds that the view taken by the PIO was not correct, it cannot automatically lead to issuance of a show-cause notice under Section 20 of the RTI Act and the imposition of penalty. The legislature has cautiously provided that only in cases of malafides or unreasonable conduct, i.e., where the PIO, without reasonable cause refuses to receive the application, or provide the information, or knowingly gives incorrect, incomplete or misleading information or destroys the information, that the personal penalty on the PIO can be imposed. This was certainly not one such case. If the CIC starts imposing penalty on the PIOs in every other case, without any justification, it would instill a sense of constant apprehension in those functioning as PIOs in the public authorities, and would put undue pressure on them. They would not be able to fulfill their statutory duties under the RTI Act with an independent mind and with objectivity. Such consequences would not auger well for the future development and growth of the regime that the RTI Act seeks to bring in, and may lead to skewed and imbalanced decisions by the PIOs Appellate Authorities and the CIC. It may even lead to unreasonable and absurd orders and bring the institutions created by the RTI Act in disrepute.

62. For all the aforesaid reasons, I allow the present petition and quash the impugned orders passed by Sh. Shailesh Gandhi, Central Information Commissioner. The parties are left to bear their respective costs.

ILR (2012) VI DELHI 528
W.P. (C)

VIPUL GUPTA ….PETITIONER

VERSUS

STATE & ORS. ….RESPONDENTS

(VIPIN SANGHI, J.)

W.P (C) : 3470/2012, DATE OF DECISION : 14.06.2012
W.P (C) : 3471/2012
W.P (C) : 3472/2012

Constitution of India, 1950—Article 226—Code of Criminal Procedure, 1973—Section 321—Petitioner sought quashing of communication issued by Director of Prosecution to the Principal Secretary (Home), seeking instructions as to whether the concerned APP has to press the application under Section 321 before the Court of learned ACMM for withdrawal of prosecution in case FIR Nos. 90/2000, 99/2002 and 148/2002 registered at P.S. Connaught Place and Defence Colony—Petitioners also assailed the order passed by the Hon'ble Lt. Governor agreeing with the proposal not to press the application for withdrawal so that trial may proceed on merits—Petitioners claimed that revocation of previous decision to withdraw prosecution was un-constitutional on the ground that sanction had not been obtained from all the Department—Observed, as per the impugned communication, the charge-sheet was not expressly considered by members of the Screening Committee when they recommended withdrawal of prosecution—Perusal of charge-sheets reflected that there is sufficient evidence against the accused persons in a view taken by the Director of Prosecution to which

Principal Secretary (Home) agreed-Held—the Screening Committee is not a statutory creation but formed only to aid and assist the Hon'ble Lt. Governor and the latter is not bound by the recommendation of Screening Committee—Also held, Director of Prosecution was not precluded from moving the impugned proposal, merely because he was a part of Screening Committee that had earlier recommended withdrawal of prosecution—Further held, the High Court while exercising jurisdiction under Article 226 and 227 is not obliged, in every case involving irregularity or illegality of procedure, to interfere if it appears to the Court that the said irregularity or illegality has not resulted in failure of justice—Petitioners had first approached under Section 482 Cr PC for quashing of the said FIRs but withdrew the petition reserving their right to raise all the issues at the time of hearing of the arguments on charge which hearing is yet to take place—Held, court not inclined to exercise jurisdiction.

At the outset, I may observe that this Court while exercising jurisdiction under Articles 226 and 227 of the Constitution of India is not obliged, in every case involving irregularity or illegality of procedure, to interfere, if it appears to the Court that the said irregularity or illegality has not resulted in failure of justice, and it appears to the Court that the petitioner has not suffered substantial injustice due to the complained irregularity or illegality. The Supreme Court in **D. N. Banerji V. P.H. Mukherjee and Others** AIR 1953 SC 58, observed that unless there was grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 226 and 227 of the Constitution of India to interfere. The Supreme Court in **Sangram Singh v. Election Tribunal Kotah and Another** AIR 1955 SC 425, while dealing with the scope of jurisdiction under Article 226 of the Constitution of India, observed as follows:-

"That, however is not to say that the jurisdiction will be

exercised whenever there is an error of law. The High Courts do not, and should not, act as Courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case." **(Para 19)**

This is the settled position of law, and there is no need to multiply earlier precedents. In the present cases, the petitioners had first approached this court by filing petitions under Sections 482 Cr.P.C and Article 226 of the Constitution of India to seek the quashing of the FIRs registered against them. However, they gave up the said challenge at the time of hearing, and withdrew that petitions on 4.3.2010, while reserving their right to raise all the issues at the time of hearing of the arguments on charge. Pertinently, the charge sheets stand field by the police before the Learned M.M. dealing with the cases, but the hearing on charge is yet to take place. The petitioners are free to raise all their submissions, at the stage of hearing on charge.

(Para 20)

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Arvind K. Nigam, Sr. Advocate

with Mr. Vijay Aggarwal, Mr. Mr. Gurpreet Singh & Mr. Rayjith Mark, Advocate.

FOR THE RESPONDENTS : Mr. Najmi Waziri, Standing Counsel along with Ms. Neha Kapoor, Advocate for the respondents No. 1, 3, 4 & 6. Mr. Ruchir Mishra & Mr. Mukesh Kumar Tiwari Advocates for the respondent No. 2/UOI.

CASES REFERRED TO:

1. *Sheonandan Paswan* vs. *State of Bihar and Others*, AIR 1983 SC 194.
2. *Rajender Kumar Jain* vs. *State*, AIR 1980 SC 1510.
3. *Sangram Singh* vs. *Election Tribunal Kotah and Another* AIR 1955 SC 425.
4. *D.N. Banerji* vs. *P.H. Mukherjee and Others* AIR 1953 SC 58.

RESULT: Petition dismissed.

VIPIN SANGHI, J.

1. The aforesaid writ petitions have been preferred by the petitioners, assailing the communication dated 13.12.2011 issued by the Director of Prosecution, Delhi, to the Principal Secretary (Home) bearing No. 4383/ DOP/2011 Dated 13.12.2011, whereby the Director of Prosecution sought instructions whether the concerned APP has to press the application filed before the court of the Learned ACMM, Tis Hazari Courts, Delhi Under Section 321 Cr.P.C. for withdrawal from prosecution in case FIR Nos. 90/2000, 99/2002 and 148/2002 registered at P.S. Connaught Place and Defence Colony. The petitioners also assail the order passed by the Hon'ble Lieutenant Governor on 15.12.2011 agreeing with the proposal not to press the applications for withdrawal of the aforesaid cases under Section 321 Cr.P.C. before the competent court, so that the trial may be allowed to proceed on merits. The petitioners also seek orders declaring that the revocation of the previous decision to withdraw prosecution in

the aforesaid cases registered against the petitioners is unconstitutional on the ground that sanction has not been taken from all the departments.

2. As per the case of the prosecution, the petitioners, who are stated to be the Directors of M/s Sunair Hotels Limited, approached M/ s VLS Finance Limited around December, 1994 with a proposal to finance a hotel project likely to be set up in Gol Market Area, Connaught Place, New Delhi. The petitioners represented that they would invest Rs.21 crores towards equity shares capital in the company, namely, M/s Sunair Hotels Limited, in case VLS Finance Ltd invests Rs.7 crores towards 25% equity share capital in M/s Sunair Hotels Ltd. It appears that VLS Finance Ltd invested the said amount of Rs.7 crores. VLS Finance Ltd. made complaints alleging the commission of offences under various sections of the IPC by the petitioners, on the ground that the petitioners had not made their contribution of Rs.21 crores in the equity share capital of M/s Sunair Hotels Pvt. Ltd., and had manipulated their accounts to show the making of such share capital investment. On the basis of the complaints made by the complainant M/s VLS Finance Ltd, the aforesaid FIRs came to be registered and investigated. The details of the FIRs are as follows:

Sl. No.	FIR No/ Date	Police Station	Accused Persons- Sent for Trial (as per charge-sheet)	Under Sections (as per charge-sheet)
1.	90/2000 14.02.2000	Connaught Place	1. Satya Pal Gupta 2. Kaveen Gupta 3. Vipul Gupta 4. M/s. Sunair Hotels Ltd. through its director Satya Pal Gupta	420/406/409/ 468/471477-A/ 120-B IPC
2.	99/2002 19.02.2002	Connaught Place	1. S.P. Gupta 2. Kaveen Gupta 3. Vipul Gupta 4. V.K. Bindal 5. Sanjiv Kr Bindal 6. Pradeep Kr Dhingra 7. Birender Kumar 8. Asha Ram Kakar	120B/406/409/ 420/424/467/ 468/471/ 477A IPC

3.	148/2002 28.02.2002	Defence Colony	1. S.P. Gupta 2. S.H. Siddiqui 3. Giriraj Singh 4. Pradeep Kumar Dhingra	384/406/409/ 417/422/465/ 468/471/500/ 120-B IPC

3. The charge-sheets also stand filed in these cases against the accused persons (petitioners herein) in the concerned court of the Learned Metropolitan Magistrate.

4. It appears that the petitioners assailed the aforesaid FIRs before this Court by filing Criminal M.C. Nos. 2142/2007 and 911/2003 (in respect of FIR No. 99/2002 and FIR No. 90/2000 respectively, wherein Sh. Vipul Gupta, the petitioner in W.P.(C) No.3470/2012 and W.P. (C) No. 3471/2012 is named as the accused), and W.P. (Crl.) No. 498/2005 (in respect of FIR No. 148/2002 wherein Sh. Pradep Dhingra, the petitioner in W.P. (C) No. 3472/2012 is named as the accused). The aforesaid petitions were disposed of by similar orders by this court on 4th March, 2010. The petitioners withdrew the said petitions with liberty to raise all the issues before the Trial Court at the appropriate stage i.e. at the stage of hearing of arguments on charge. That stage has not yet arrived.

5. It appears that the petitioners kept representing to the respondents for withdrawal of prosecution against them on various grounds. The petitioners have narrated in their petition the various internal departmental correspondences which took place on the said plea made by them. The petitioners state that a Screening Committee was constituted to consider their cases, along with other cases, comprising of; i) Sh. Arvind Ray, Principal Secretary (Home), ii) Sh. S.P. Garg, Principal Secretary, iii) Sh. B.S. Joon, Director of Prosecution, iv) Sh. Sandeep Goal, Joint C.P. (Crime) and v) Sh. B.M. Jain, Dy. Secretary (Home). The petitioners state that on 03.06.2011 the Screening Committee considered the cases against the petitioners in the aforesaid FIRs. The Minutes of the Meeting of 3rd June, 2011 placed on record show that the observations of the Ministry of Home Affairs placed before the Screening Committee, inter alia, read as follows:-

> "It was decided in HMA to consult the Deptt. Of Legal Affairs, Ministry of Law & Justice, who after carefully examining various issues involved in these cases, opined that as the Courts are

> generally not interfering during the course of investigation, it would not be appropriate to take steps Under Sections 173(8) Cr. P.C. as requested by Sh. S.P. Gupta in his representations. Moreover, from the status report submitted by the Delhi Police It is observed that the charge sheets/supplementary charge sheets have already been filed by the Delhi Police in the Courts and the three cases are at various stages. The Deptt. Of Legal Affairs, Ministry of Law & Justice has, however, opined that the power UNDER SECTION 321 Cr.P.C. vested in Government can be exercised in such cases in the interest of proper administration of Justice and the paramount consideration in such cases is the administration of justice.
>
> **The matter has been considered in detail carefully in MHA. As per the advice tendered by the Department of Legal Affairs, Ministry of Law & Justice keeping in view the facts of these cases, the Home Department of Government of NCT of Delhi should urgently scrutinize the above cited case FIR No. 90/2000, FIR No. 99/2002, FIR No. 148/2002 registered by the Delhi Police for taking action UNDER SECTION 321 of Cr.P.C. for withdrawal of prosecution immediately. This has the approval of Union Home Minister."**(emphasis supplied)

6. The recommendations made by the Screening Committee were to the effect that the relevant record of the cases not being available, it was premature to decide the issue of withdrawal of prosecution in the absence of the full facts of the case. Consequently, its decision was deferred by the said Committee.

7. The petitioners further state that another meeting of the Screening Committee was held on 13.09.2011. In this meeting the Committee recommended that action be taken under Section 321 Cr.P.C. for withdrawal of prosecution in respect of the aforesaid three FIRs immediately. The petitioners have placed on record the copy of the minutes of the said meeting of the Screening Committee held on 13.09.2011. The recommendation made in respect of each of the aforesaid FIRs is identical, with the minor change of the number of the FIR. In respect of FIR No.90/2000, the same reads as follows:-

"The Committee observed that the withdrawal of case FIR No. 90/2000 from prosecution was considered by the Committee in its previous meeting held on 3.6.2011 and the matter was deferred for want of the relevant record of the case. However the details/ records received from Police Department and Director of Prosecution were viewed by the Committee and it was observed that Ministry of Home Affairs has already examined the case in consultation with the Department of Legal Affairs, Law and Justice who with the approval of Union Home Minister, has directed the Home Department to urgently scrutiny scrutinize the above case for taking action under Section 321 Cr.P.C. for withdrawal of Prosecution immediately.

In view of the above the Committee decided to recommend the case for withdrawal from Prosecution."

8. The petitioners further state that on 18.11.2011 the Hon'ble Lieutenant Governor granted his approval to the recommendations of the Screening Committee for withdrawal from prosecution in respect of the aforesaid FIRs. Accordingly, on 23.11.2011 the Government of NCT of Delhi Home (General) Department issued a communication to the Director of Prosecution, Govt. of NCT of Delhi communicating the said decision. In this communication, the Government of NCT of Delhi, inter alia, stated as follows:-

"In view of the above, I am directed to say that in exercise of powers conferred under section 321 of the Code of Criminal Procedure, 1973 (Act No.2 of 1974) read with the Government of India, Ministry of Home Affairs Notification No. U-11011/2/ 74-UTL(I) dated 20.3.1974 regarding the withdrawal of prosecution proceedings, the Lt. Governor of Delhi, being satisfied that it is in public interest to do so, has decided, after keeping the provisions contained in proviso to Section 321 of the Code of Criminal Procedure, 1973 in view, that the Public Prosecutor in the above case may be permitted to move the appropriate courts of law for granting their consent to the withdrawal of the prosecution in above case.

It is, therefore, requested that the APP concerned may please be asked to move the application in the court of competent jurisdiction for withdrawal of the above mentioned case and intimate the position to this Government." (Emphasis supplied)

9. Based on the aforesaid, the Director of Prosecution, Govt. of NCT of Delhi moved applications in each of the three cases before the Learned Metropolitan Magistrate under Section 321 Cr.P.C. to seek withdrawal from prosecution. Notice was issued on these applications.

10. The grievance of the petitioners is that on 13.12.2011 Sh. B.S. Joon, Director of Prosecution, who was one of the members of the Screening Committee, sent a letter to the Principal Secretary (Home), inter alia, stating that :

"After perusal of the charge sheets of the aforesaid cases, it has been revealed that there is sufficient evidence on record against the accused persons.

Keeping in view the evidence on record, there is every likelihood, that the concerned Court may not allow the application of the State moved u/s 321 Cr.P.C. which is a pre-requisite condition, for withdrawal from the prosecution of any case."

11. He also requested that necessary instructions may be issued i.e. whether the concerned APP has to press the aforesaid applications under Section 321 Cr.P.C., or not. The petitioners submit that on the basis of the said letter dated 13.12.2011, a noting dated 14.12.2011 was made by the S.S. (Home) Sh. Arvind Ray, to the effect that the present are fit cases for revoking the recommendation of withdrawal from prosecution. Sh. Arvind Ray further sought the orders of the Hon'ble Lt. Governor on the said proposal. The petitioners state that on 15.12.2011 the Hon'ble Lt. Governor noted that he has considered the communication of the Director of Prosecution dated 13.12.2011, and the note of the Principal Secretary (Home) dated 14.12.2011, and that he agrees with the proposal that the earlier recommendation of withdrawal from prosecution of the cases in question may not be pressed before the competent court, and the trial may be allowed to proceed on merits.

12. The petitioners submit that on the basis of the aforesaid notation and approval, the Joint Secretary (Home), Govt. of NCT of Delhi, Home (General) Department, shot out a communication dated 15.12.2011 to the

Director of Prosecution informing him of the latest decision and stating that the applications for withdrawal from prosecution in the three cases be not pressed before the competent court, so that the trial of the said cases are allowed to proceed on merit.

13. The submission of learned Senior Counsel Mr. Arvind Nigam, who appears for the petitioner in W.P.(C) No.3470/2012, (which covers the submissions made in all the three cases), is that the subsequent decision taken by the respondents on the basis of the communication dated 13.12.2011 issued by Sh. B.S. Joon, Director of Prosecution, Delhi, is illegal and incompetent. He submits that the earlier recommendation made by the Screening Committee in its meeting held on 13.12.2011, was made after due consideration of all the relevant materials and aspects by the committee of five senior and responsible officers. Sh. B.S. Joon, Director of Prosecution was a member of the said Committee. Sh. B.S. Joon did not voice his dissent when the earlier recommendation was made. The unanimous recommendation of the Screening Committee was also approved by the Hon'ble L.G on 17.11.2011. On that basis applications were also moved in the concerned court under Section 321 Cr.P.C.

14. It is submitted that the subsequent decision taken by the L.G. is based on the communication dated 13.12.2011 of Sh. B.S. Joon, Director of Prosecution, and it is not explained as to what were the new facts or circumstances, which came to the notice of Sh. B.S. Joon, to initiate the process of reconsideration of the earlier recommendation. He submits that the Screening Committee did not even meet before recommending reconsideration of the earlier recommendation made in the Screening Committee meeting on 13.09.2011. The said communication was sent only to the Principal Secretary (Home) who, without recording any reasons, agreed with the recommendation to revoke the earlier recommendation dated 13.09.2011. According to the petitioners, the Screening Committee should have been reconvened before recommending to the Hon'ble Lt. Governor that the earlier recommendations be reviewed. Consequently, the remaining members of the Screening Committee were not taken into confidence, and their views were not taken on the issue whether the earlier recommendation of 13.09.2011 should be reconsidered for any reason.

15. Mr. Nigam submits that the procedure adopted by the respondents

for reviewing the earlier recommendation of the Screening Committee, and the earlier decision of the Hon'ble Lt. Governor, is arbitrary and illegal.

16. Mr. Nigam submits that the learned Additional Public Prosecutor, while discharging his functions under Section 321 of the Cr.P.C. acts independently, and not on the instructions of the State/Director of Prosecution. It was for the Additional Public Prosecutor to assess the merit of the case and to decide whether, or not, to proceed to move an application for withdrawal from prosecution in a given case. According to Mr. Nigam, the Additional Public Prosecutor in the present cases made a conscious decision to move for withdrawal from prosecution. However, the subsequent instruction issued to the Additional Public Prosecutor, not to press the application for withdrawal was illegal, as the Public Prosecutor, on this occasion, did not act independently but on the dictates of the Director of Prosecution. In this regard he places reliance on the decision of the Supreme Court in **Sheonandan Paswan V. State of Bihar and Others,** AIR 1983 SC 194. This decision, in turn, referred to the Supreme Court Judgment in **Rajender Kumar Jain v. State,** AIR 1980 SC 1510, wherein the following observations were made:-

> "Thus from the precedents of this Court; we gather,
>
> (1) Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.
>
> (2) **The withdrawal from the prosecution is an executive function of the Public Prosecutor.**
>
> (3) **The discretion to withdraw from the prosecution is that of the Public Prosecution and none else, and so, he cannot surrender that discretion to someone else.**
>
> (4) **The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.**
>
> (5) The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and,

we add, political purposes sans Tammany Hall enterprise.

(6) The Public Prosecutor is an officer of the Court and responsible to the Court.

(7) The Court performs a supervisory function in granting its consent to the withdrawal.

(8) **The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution."** (emphasis supplied)

17. Mr. Nigam submits that this court, while exercising writ jurisdiction, is not concerned with the decision on merits, but with the decision making process which has been adopted to arrive at a particular decision. It is submitted that in this case the said process is fundamentally flawed, as explained hereinabove.

18. Having heard learned Senior Counsels for the petitioners and perused the records of the cases, I am not inclined to entertain these writ petitions, or to grant any relief to the petitioners in the exercise of the discretionary jurisdiction of this court under Article 226 of the Constitution of India.

19. At the outset, I may observe that this Court while exercising jurisdiction under Articles 226 and 227 of the Constitution of India is not obliged, in every case involving irregularity or illegality of procedure, to interfere, if it appears to the Court that the said irregularity or illegality has not resulted in failure of justice, and it appears to the Court that the petitioner has not suffered substantial injustice due to the complained irregularity or illegality. The Supreme Court in **D. N. Banerji V. P.H. Mukherjee and Others** AIR 1953 SC 58, observed that unless there was grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 226 and 227 of the Constitution of India to interfere. The Supreme Court in **Sangram Singh v. Election Tribunal Kotah and Another** AIR 1955 SC 425,

while dealing with the scope of jurisdiction under Article 226 of the Constitution of India, observed as follows:-

> "That, however is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as Courts of appeal under Article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and one of the limitations imposed by the Courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into Courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case."

20. This is the settled position of law, and there is no need to multiply earlier precedents. In the present cases, the petitioners had first approached this court by filing petitions under Sections 482 Cr.P.C and Article 226 of the Constitution of India to seek the quashing of the FIRs registered against them. However, they gave up the said challenge at the time of hearing, and withdrew that petitions on 4.3.2010, while reserving their right to raise all the issues at the time of hearing of the arguments on charge. Pertinently, the charge sheets stand field by the police before the Learned M.M. dealing with the cases, but the hearing on charge is yet to take place. The petitioners are free to raise all their submissions, at the stage of hearing on charge.

21. A perusal of the impugned communication dated 13.12.2011 shows that, apparently, the charge sheet was not expressly considered by the members of the screening committee when they decided to make their recommendation for withdrawal from prosecution under section 321 Cr PC. The Director of Prosecution in his said communication dated 13.08.2011 states that after perusal of the charge sheets in these cases **"It has been revealed that there is sufficient evidence on record against the accused persons"** (emphasis supplied). Therefore, it appears

the revelation that there is sufficient evidence on record against the accused persons came only on a perusal of the charge sheets. When this communication was issued to the Principal Secretary (Home), he did not join issues with the Director of Prosecution. He did not state that the charge sheets in these cases had been considered, or that there had been application of mind to the charge sheets when the earlier recommendation was made by the screening committee on 13.09.2011. On the contrary, the Principal Secretary (Home) agreed with the said proposal made by the Director of Prosecution in the impugned communication dated 13.12.2011.

22. The aforesaid position with regard to non consideration of the charge sheets by the screening committee on the earlier occasion, when the recommendation for withdrawal from prosecution was made in the meeting held on 13.09.2011, gains support from the fact that the committee apparently proceeded on the basis that the Ministry of Home Affairs had already examined the case in consultation with the Department of Legal Affairs, Law and Justice with the approval of the Union Home Minister. Consequently, the committee made the recommendation for withdrawal from prosecution in these cases.

23. A reading of the minutes of the meeting of the screening committee dated 13.09.2011 shows that the committee apparently did not apply its own mind, or take up a thorough scrutiny of, inter alia, the charge-sheets filed in these cases. It heavily relied upon the examination of these cases by the Ministry of Home Affairs and Department of Legal Affairs, Law and Justice with the approval of the Union Home Minister. Pertinently, the observations of the Ministry of Home Affairs (reproduced in para 5 above) do not demonstrate any specific consideration of the charge-sheet by either the Department of Legal Affairs, Ministry of Law and Justice or by the Ministry of Home Affairs. In fact, the MHA required the Home Department of the GNCTD to scrutinize the cases for withdrawal from prosecution under Section 321 Cr.P.C. This exercise was not undertaken by the Screening Committee in its meeting held on 13.09.2011. There is not a whisper in the minutes of the meeting of the Screening Committee of 13.09.2011 to say that they have examined the charge-sheets in these cases and, on a perusal of the same, the Committee is of the opinion that these are fit cases for withdrawal from prosecution.

24. Though there may be some irregularity in the procedure adopted

for reconsideration of the earlier recommendation of the screening committee made on 13.09.2011, followed by the decision of the Hon'ble Lt. Governor dated 17.11.2011, the same has no significance, inter alia, for the reason that the ultimate authority to take a decision on the issue whether, or not, the state should move the proposal for withdrawal from prosecution vested in the Hon'ble Lt. Governor, and he has reviewed his decision on 15.12.2011 based on the communication dated 13.12.2011 and the note of the Principal Secretary (Home) dated 14.12.2011. The screening committee is not shown to be a statutory creation. The screening committee was formed only to aid and assist the Hon'ble Lt. Governor. He was not bound by any recommendation of the screening committee. Therefore, the failure to reconvene the screening committee to reconsider the proposal mooted by Shri B.S. Joon cannot be said to be illegal. Mr. B.S. Joon, Director of Prosecution, was also not precluded from moving the proposal that he moved on 13.12.2011 after studying the charge-sheets in these cases, merely because he was part of the screening committee which had earlier recommended withdrawal from prosecution on 13.09.2011.

25. The aforesaid irregularity of procedure in any event has caused no prejudice to the petitioners. Independent of the aforesaid remedies available to the petitioners, their right to be heard at the time of framing of the charge and to raise challenge to an order on charge, as permitted by law, is also preserved. I am, therefore, of the view that the so-called irregularity or illegality, in any event, has not led to failure of justice. It cannot be said that substantial injustice has been caused to the petitioners on account of the review of the earlier decision taken by the Hon'ble Lt. Governor.

26. The contention of the petitioners that the earlier decisions to move the applications under Section 321 Cr. P.C., in these cases, were taken independently by the learned Public Prosecutor though on the suggestion of the Director of Prosecution, whereas the decisions not to press the applications for withdrawal of prosecution was imposed or thrust upon the Additional Public Prosecutor, has no merit.

27. I have already narrated hereinabove, the communication issued on 23.1.2011 by the Government of NCT of Delhi Home (General) Department of the Govt. of NCT to the Director of Prosecution, which clearly shows that the Govt. of NCT of Delhi did not seek the approval

of the Learned P.P. or his view on the proposal whether, or not, to move an application for withdrawal from prosecution under Section 321 Cr.P.C. It was a very clear, categorical and emphatic instruction issued to the APP concerned to move applications in the court for withdrawal of the cases aforesaid, and to intimate the position to the Government.

28. Reliance placed on the decision in **Sheonandan Paswan** (Supra) does not advance the petitioners' case. In this case the Supreme Court observed:

> "Section 321 of the Code enables the Public Prosecutor or Assistant Public Prosecutor in charge of a case to withdraw from the prosecution with the consent of the court. The appellant submits, in our opinion correctly, that before an application is made under Section 321 of the Code, the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any outside influence; and secondly, that the court before which the case is pending cannot give its consent to withdraw without itself applying its mind to the facts of the case. But it cannot be said that a Public Prosecutors action will be illegal if he receives any communication or instruction from the Government... He is an appointee of the Government, Central or State (see Sections 24 and 25, Cr.P.C.), appointed for conducting in court any prosecution or other proceedings on behalf of the Government concerned. So there is the relationship of counsel and client between the Public Prosecutor and the Government. A Public Prosecutor cannot act without instructions of the Government; a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government... Section 321 of the Code does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. If the Public Prosecutor receives such instructions, he cannot be said to act under extraneous influence. On the contrary, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government."

29. Either the instruction given to the learned APP on both occasions would have to be treated as mere proposals, or on both occasions would have to be treated as definite instructions from a client to the counsel.

The Supreme Court in **Sheonandan Paswan** (Supra) has stated the legal position with regard to the scope of responsibility of the Public Prosecutor under Section 321 Cr.P.C. The facts of the present case, however, show that definite instructions were issued to the APP for withdrawal from prosecution, and it was not left by the respondents to the Learned APP to decide whether, or not, he should withdraw from prosecution.

30. There is no basis for the petitioners to contend that the decision of the learned APP to file an application under section 321 Cr.P.C was taken independently by him, whereas the subsequent decision after pursuing application under section 321 Cr PC was under the dictates of the respondent. It could also be argued that the earlier decision to move applications under Section 321 Cr.P.C was a binding instruction to the APP, whereas, the subsequent instruction given to him was to act according to his own judgment/conscience and decide whether or not to press the applications under section 321 Cr.P.C.

31. It is not disputed by the petitioners that, in the meantime, the learned M.M. has permitted the withdrawal of the application under Section 321 Cr.P.C. vide order dated 07.01.2012. It is not disputed by the petitioners that they opposed the withdrawal of the said applications under Section 321 Cr. P.C. and that they were heard by the Leaned M.M. on the said applications. It is also not in dispute that the petitioners have already preferred the remedy available to them in respect of the orders passed by the Ld. M.M., permitting the withdrawal of the applications under Section 321 Cr.P.C. Therefore, the petitioners have not only had the occasion to raise all the issues raised before this court, before the Ld. M.M., but still have the right to pursue the matter further and to raise all the issues available to them in appropriate proceedings.

32. For all the aforesaid reasons, I find no merit in these petitions and I am not inclined to exercise the discretionary jurisdiction vested in this Court under Article 226 of the Constitution of India in the facts and circumstances of these cases. The petitions are, accordingly, dismissed.

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CRL. REV. P.

R.P.G. TRANSMISSIONS LTD. (NOW KNOWN AS KEC INTERNATIONAL LIMITED) **….PETITIONER**

VERSUS

STATE & ANR. **….RESPONDENTS**

(SURESH KAIT, J.)

CRL. REV. P. NO.: 150/2001 **DATE OF DECISION: 2.7.2012**

Sick Industrial Companies Special Provisions Act, (SICA), 1985—Section 22—Negotiable Instruments Act, 1881—Section 138—Code of Criminal Procedure, 1973—Section 378, 397—Petitioner filed complaint under Section 138/141 Act against Company SAKURA and its Director including Respondent no. 2 Managing Director for dishonour of cheques on account of insufficient funds—Respondent no. 2 filed application for recalling summoning order which was dismissed by Ld. Magistrate—However, revision filed by him was allowed and Respondent on. 2 was discharged—Aggrieved petitioner invoked revisional jurisdiction for setting aside the order of discharge—According to respondent as per order of Allahabad High Court, SAKURA Company was directed not to transfer, alienate or otherwise part with possession of any equipment, immoveable assets or creating any further charge of its assets—But Ld. Sessions Courts failed to appreciate the extent of legal disability created by orders of Allahabad High Court—Also, provision of section 22A of BIFR could not be attracted as orders were not passed u/s 22A of SICA—Whereas on behalf of respondents, it was urged against order of acquittal in

favour of Respondent no. 2 appeal could be filed and not revision, which is not maintainable. Held—Section 22 of SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of offence under Sections 138 NI Act against the Company or its directors; it only creates an embargo against the disposal of assets of the company for recovery of its debts and the purpose of each embargo is to preserve the assets of the Company for being attached or sold for realization of dues of the creditors. The section does not bar payment of money by the company or its director to any person for satisfaction of their legally enforceable dues.

On the issue whether the company or a director can be prosecuted against for being having committed the offence punishable under Section 138 NI Act after the company has been declared sick under the provisions of SICA, learned Additional Sessions Judge has recorded that though it was held in **Pankaj Mehra** (supra) by the Apex Court that Section 22 of SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of offence under Section 138 NI Act against the company or its directors; the only creates an embargo against the disposal of assets of the company for recovery of its debts and the purpose of such embargo is to preserve the assets of the company for being attached or sold for realisation of dues of the creditors. The section does not bar payment of money by the company or its director to any person for satisfaction of their legally enforceable dues.

(Para 26)

Important Issue Involved: Section 22 of SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of offence under Section 138 Negotiable Instrument Act against the company or its directors. The section does not bar payment of money by the company or its director to any person for satisfaction of their legally enforceable dues.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Siddharth Luthra, Sr. Adv. With Mr.. Yashpreet Singh, Mr. Rajiv Bhatnagar, Mr. Nitin Mishra and Ms. Smriti Sinha, Advs.

FOR THE RESPONDENTS : Mr. Navin Sharma, App for State/ RI. Mr. R.K. Bharti & Mr. Mahipal Khanagwal, adv. For R-2.

CASE REFERRED TO:

1. *Inayatullah Rizvi* vs. *Rahimtuallah & Ors.* : 1981 Crl L. J. 1398.

RESULT: Revision petition dismissed.

SURESH KAIT, J.

1. Instant petition is filed being aggrieved by the order dated 18.01.2001 passed by learned Additional Sessions Judge, Delhi while setting aside the order dated 20.10.2000 passed by learned Metropolitan Magistrate.

2. The brief facts of the case are that the petitioner No.1 company had entered into an lease agreement with the company named 'Sakura Seimitsu India Limited' (hereinafter referred to as SAKURA) on 27.09.1995 tilted as Lease Agreement for equipment.

3. In compliance of the said lease agreement, respondent No.2 being the managing director and acting on behalf of Sakura issued and delivered post dated cheques for the payment of rental amount and other charges as agreed between the parties, in the said agreement.

4. The complainant/petitioner present two of the cheques issued by the respondent No.2 bearing No. 805261 and 805317 dated 27.06.1993 drawn on Punjab National Bank, New Delhi towards lease rentals for an amount of Rs. 6,37,812/- and Rs. 31,891/- respectively to its banker Vijaya Bank, R.K. Puram New Delhi. Both the above mentioned cheques were dishonoured on the grounds of 'insufficient funds' and intimation thereof was sent by the petitioner.

5. The petitioner, thereafter, did all statutory requirements finally in the absence of any response from the other side, filed the criminal case under Section 138/141 Negotiable Instrument Act, 1881 (hereinafter referred as NI Act) bearing No.769/1998 against the company Sakura and its director including respondent No.2.

6. During the pendency of the aforesaid complaint, an application was filed by the respondent No.2 seeking recalling of the summoning order in the complaint case mentioned above, which was dismissed by learned Magistrate vide order dated 20.10.2000.

7. Being aggrieved, respondent No.2 challenged the same in a revision and same was allowed vide impugned order dated 18.01.2001 and respondent No.2 was discharged.

8. The petitioner who is aggrieved by the above referred order of Sessions Court has invoked the revisional jurisdiction of this Court for seeking set aside of the order dated 18.01.2001 on the grounds amongst others i.e. the impugned order dated 18.01.2001 is bad in law and deserves to be set aside because of the fact that learned Sessions Court failed to appreciate that if all extent of the legal disability created by the orders of the Allahabad High Court on 01.04.1997 and 07.05.1997 and that the accused company Sakura was directed not to transfer, alienate or otherwise part with the possession of any equipment, immovable assets or creating any further charge over its assets.

9. In the present case, the petitioner company owed actual certain liquidated financial liability, towards the respondent and discharge of its financial liability can it no way be staid to be prohibited by the orders of Allahabad High Court.

10. Furthermore, the contention of the respondent which has been erroneously been accepted that the respondents were precluded from disposing of their immovable assets to fulfil this claim by the aforementioned order has no relevance at this stage as the offence under Section 138 NI Act provides for strict liability and such contentions/defence has no relevance at this stage or even at a later stage.

11. Learned counsel for petitioner submits that the application of Section 22A of the BIFR could not even be attracted nor the judgment reported on 2000 (2) SCC 745 has any application to the present case,

wherein the averment of the accused, though disputed is that orders have been passed under Section 536 (2) of the Companies Act and not under Section 22A SICA. That even otherwise, in the above mentioned case would not act as bar to the prosecution in every case and the facts of each case have to be seen in much as SICA exists to protect the companies which have become sick, whereas the provision of the Companies Act are regarding winding up and to close down the functioning of a company and the two statutes act in a totally separate realms and no benefit can be drawn by the accused company from the judgment in above case.

12. Vide order dated 16.02.2012, this Court observed as under:-

> "On maintainability of the instant petition, the learned counsel for the petitioner referred the order passed by this Court in Crl. Revision Petition No. 40/2012 whereby this court has held that the revision petition against the revisional order is maintainable. The copy of the above said order has been supplied to the counsel for the respondents.
>
> Learned counsel for the respondents seek adjournment as he has to go through the same."

13. Thereafter, instant petition was listed on 15.03.2012, learned counsel for respondent No.2 has raised the objection to the instant petition differently on the maintainability.

14. Learned counsel submitted that by the impugned orders the respondent has been acquitted, therefore, against the acquittal petitioner was supposed to file an appeal and not the revision, as per provisions enumerated under Section 378(4) Cr. P.C. and therefore, instant petition is not maintainable.

15. Though, the order dated 16.02.2012 was dictated in the open Court and that too in the presence of learned counsel for respondent No.2, however, this Court will independently deal with the objection raised on behalf respondent No.2,if required.

16. Learned counsel for respondent No.2 has argued that respondent No.2 was in fact acquitted by learned Additional Sessions Judge by the impugned order, therefore, against acquittal the petitioner should have filed an appeal against said order and instant petition in its form is not maintainable.

17. Learned counsel for petitioner has argued that impugned order of learned Additional Sessions Judge allowed the Criminal Revision filed by respondent. However, the present petition is filed by the petitioner invoking revisional jurisdiction of this Court to correct the illegality and proprietary of the order passed by learned Additional Sessions Judge.

18. He further submitted that as per sub-section (3) of Section 397 Cr. P.C. if an application under Section has been made by the same person, shall be entertained by 'either of them'. Sub section 3 specifically bars entertainment of application to the High Court from any person who has already applied to the Sessions Court in the revision and vice-a-versa. But, if Sessions Court allowed the revision filed by one of the parties, the other part can go to High Court in revision.

19. Learned counsel for petitioner further submitted that as per settled law, the bar of revision in sub section (3) is only confined to second revision application filed by the same person. He has also relied upon judgment delivered by the Full Bench of Andhra Pradesh High Court in **Re Puritipatti Jagga Reddy:** AIR 1979 AP 146 has held as under:-

> "9. The language of sub-sec. (3) of S. 397 contains no ambiguity. If any person has already chosen to file a revision before the High Court or to the Sessions Court under sub-sec. (1), the same person cannot prefer a further application to the other Court. To put it in other words. Sub-secs. (1) and (3) make it clear that person, aggrieved by any order or proceeding can seek remedy by way of a revision either before the High Court or the Sessions Court. Once he has availed himself of that remedy, he is precluded from approaching the other forum. It is equally manifest from the provisions that Sub- Sec (3) that this bar is limited to the same person who has already chosen to get either to the High Court or to the Sessions Court seeking a remedy and that it does not apply to the other parties or persons. Further the bar contained in sub-sec.(3) is only against that person who has ready chosen the remedy either before the High Court or before the Sessions Judge. It is not permissible to extent the bar contained under a statute to other Persons or to other fields. It is well established that the bar against seeking a remedy in a Court of

Law or against a Court of law rendering justice should be strictly construed. It is noteworthy that Sub-sec. (1) of Sec, 397 empowers the High Court or the Sessions Court to call for and examine the record of any proceeding before any inferior Court. That is to say, it can exercise this power of calling for and examining the record suo-motto also. The language of Sub-sec. (3), strictly limited as it is to a person who has chosen to seek the remedy from one of the two courts, cannot be extended to the High Court exercising its powers conferred on it under the provision of the Code. It is patent that the bar contained in sub-sec. (31 is only against the person who has already chosen his remedy before one of the two forums."

20. Further, learned counsel for petitioner relied upon the decision of Full Bench of Mumbai High Court in **Inayatullah Rizvi v. Rahimtuallah & Ors.** : 1981 Crl L. J. 1398 as under:-

"In Section 397(3) the crucial words are "no further application by the same person shall be entertained by the other of them". Similarly, the material clause in Section 399(3) is "no further proceeding by way of revision at the instance of such person shall be entertained." "It is thus clear that the bar of a second revision was only confined to cases where the criminal revision was dismissed by the Session Judge. At the instance of the person who lost the criminal revision before the Sessions Judge no revision to the High Court lies. An illustration would make the position clear. A proceeding under Section 145. Criminal P.C. between X and Y terminated before the Magistrate in favour of X. The criminal revision of Y before the Sessions Judge was dismissed. A criminal revision before the High Court at the instance of Y shall not be entertained. In the same illustration if Y's criminal revision before the Sessions Judge was allowed, a criminal revision to the High Court against the order of the Sessions Judge at the instance of X is maintainable. This is for the simple reason that the second criminal revision before the High Court is not at the instance of such person who filed the criminal revision before the Sessions Judge. On the language of Section 397(3) and Section 399(3) conclusion is irresistible that a second revision at the instance of a successful party before the

Magistrate who lost the revision before the Sessions Judge lies".

21. He further submitted that the words are significant in sub section (3) of Section 397 are "any person" and "same person". Second revision before the High Court by the "same person" who approached the Sessions Court in revision is barred. But this does not preclude another person who did not move the Sessions court to apply in revision before the High Court. Therefore, the prohibition under sub-Section (3) of Section 397 on revisional power given to the High Court is not attracted in the present petition.

22. After considering the submission of learned counsel for parties, on the similar issue, I have already recorded my view in Crl.Revision No.40/2012 tilted O.P.Dawar v. State & Anr vide order dated 25.01.2012, therefore, instant petition is maintainable.

23. I have heard learned counsels for parties.

24. On perusal of the impugned judgment, it is transpired that learned Additional Sessions Judge has opined while relying upon the case of Pankaj Mehra & Ors v. State of Maharashtra: 2000 SCC (II) 756, wherein main question involved was, whether a filing of a winding up petition simplicitor is sufficient to discharge the accused under Section 138 NI Act. The whole case revolved around the interpretation of Section 536(2) of the Companies Act which states that any disposition of property (including actionable claims) of the company and any transfer of the shares in the company or alteration in the statute of its member may after the commencement of the winding up, shall, unless the Court otherwise directs be void.

25. Learned Additional Sessions Judge further recorded that merely filing of petition for winding up does not debar the complainant to proceed with his complaint under Section 138 NI Act. If the payments are not void ab-initio, the company cannot contend that it is legally forbidden from making payment of the cheque amount when notice was issued by the payee regarding dishonour of the cheque.

26. On the issue whether the company or a director can be prosecuted against for being having committed the offence punishable under Section 138 NI Act after the company has been declared sick under the provisions of SICA, learned Additional Sessions Judge has recorded that though it

was held in **Pankaj Mehra** (supra) by the Apex Court that Section 22 of SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of offence under Section 138 NI Act against the company or its directors; the only creates an embargo against the disposal of assets of the company for recovery of its debts and the purpose of such embargo is to preserve the assets of the company for being attached or sold for realisation of dues of the creditors. The section does not bar payment of money by the company or its director to any person for satisfaction of their legally enforceable dues.

27. Admittedly, the cheques issued on dated 27.06.1997 (though the petitioner contends that the same were given at the time of initial agreement) and demand notice was sent on 15.07.1997 wherein 15 days time was given to the accused company to make the payment; however, because of the legal disability created by the orders dated 01.04.1997 and 07.05.1997 passed by the High Court of Allahabad wherein the accused company was directed not to transfer, alienate or otherwise part with the possession of any equipment, immovable assets or creating any further charge over its assets, the company found itself in a situation, as is visualised in para 19 of the judgment reported as 2000 (2) SCC 745.

28. In view of above discussion, I find no discrepancy in the impugned order passed by learned Additional Sessions Judge. Therefore, I am not inclined to interfere with. I concur with the same.

29. Since the instant petition has not been allowed, therefore, there is no requirement of recording my opinion on the issue raised in para No.15 above of this order.

30. Instant petition is dismissed with no order as to costs.

31. Trial Court Record be remitted back henceforth.

ILR (2012) VI DELHI 554
W.P. (C)

NAWAB ALI ….PETITIONER

VERSUS

GOVT. OF NCT OF DELHI & ORS. ….RESPONDENTS

(SURESH KAIT, J.)

W.P. (C) NO. : 6690/1999 DATE OF DECISION: 02.07.2012

Service Law—Promotion—Petitioner sought directions to the respondents No. 1-4 to appoint him as PGT Persian in the school respondent No. 3, in preference to respondent No. 5—Post in question found to be merit-cum-selection post—Petitioner as well as respondent no. 5 had applied for the post—Though petitioner was senior to the respondent No. 5, the fact was that respondent No. 5 had been regularly taking classes and teaching Persian in the school, respondent No. 3—departmental Promotion Committee considered the case of all the eligible candidates and selected the most suitable one—No fault found with the view taken by the Departmental Promotion Committee.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. S. Sethu Mahendran, Advocate.

FOR THE RESPONDENTS : Ms. Avnish Ahlawat and Ms. Latika Choudhary, Advocates

RESULT: Petition dismissed.

SURESH KAIT, J.

1. Vide the instant petition, the petitioner is seeking direction to the respondent Nos.1 to 4 to appoint him as PGT Persian in Anglo Arabic

Senior Secondary School, Ajmeri Gate, Delhi - 110006 in preference to respondent No.5 or any other person, and in case respondent No.5 has already been promoted as PGT (Persian), his promotion be set aside and declared as null and void.

2. The petitioner joined as Language Teacher, in the said school on 20.08.1969. He has been teaching Urdu and Persian as a Language Teacher. Whereas, respondent No.5 namely Shri Arif Husssain Kazmi joined the said school on 05.10.1976 and has also been working as language teacher and teaching Persian language since then. However, he was junior to the petitioner by about seven years.

3. A vacancy for Language Teacher (Persian) PGT arose in the said school during the year 1999. Respondent No.5 although being junior to the petitioner also applied for the same and promoted to the said post.

4. Learned counsel for petitioner submitted that the matter of fixing the seniority between the petitioner and respondent No.5 was referred to the respondent No.2 for decision. The respondent No.3 through the Deputy Education Officer, Zone – 27 vide letter No.Z/XXVII/C/99/ 9945 dated 08.02.1999 directed the respondent No.4 to appoint the petitioner as PGT Persian in preference to Arif Hussain Kazmi i.e. respondent No.5.

5. For the aforesaid promotion, DPC was held on 24.08.1999 for filling up the vacant post of PGT Persian in the above mentioned school. The said committee was headed by Professor Zahid H. Khan, as chairman. The said committee was anxious to appoint respondent No.5 in preference to petitioner.

6. He argued that the minutes of the meeting were returned by the chairman, who refused to sign the same because respondent No.5 could not be promoted from the post of TGT to the post of PGT prior to the promotion of the petitioner. Respondent Nos.3 & 4 favoured respondent No.5 against the rules.

7. The petitioner is M.A.in Persian (1st Division) from Delhi University and did B.Ed from Jamia Millia Islamia, Delhi and was the senior most teacher in the category of language teacher. The petitioner alone was entitled to be promoted as PGT Persian.

8. Being aggrieved by the decision of the DPC, petitioner made

representation to the respondent No.3 on 09.12.1998 and 15.02.1999, but all in vain.

9. Learned counsel for petitioner has also relied upon a decision of this Court on similar issue decided in W.P.C. No.591/1990 vide judgment dated 07.10.1991.

10. Undisputedly, the petitioner retired in August, 2000; despite this the petitioner did not amend the prayer in instant petition.

11. Respondent Nos.1 & 2 have filed response to instant petition wherein they have submitted that petitioner has been working in the said school since 20.08.1969 on the post of Language Teacher and has been teaching Urdu regularly; however, he never taught Persian.

12. The vacancy for PGT Persian arose on 01.02.1999. Initially, the petitioner was appointed as language teacher (Urdu) whereas respondent No.5 was appointed to the post of Language Teacher, therefore, both had applied for the post of PGT Persian.

13. Admittedly, Deputy Direction of Education, Zone No.27 mentioned above informed the Manager of the school – respondent No.3 that the respondent No.5 and petitioner were Language Teachers in the same school and both were qualified for the post of PGT Persian. But since, the petitioner was the senior most teacher, his candidature might be considered before respondent No.5.

14. Learned counsel for respondents submitted that vide aforementioned letter, it was never directed to appoint the petitioner as PGT(Persian) in preference to respondent No.5; whereas it has only been clarified the seniority position with regard to between the petitioner and respondent No.5.

15. As per the minutes of the DPC, the DPC unanimously recommended respondent No.5 to be promoted to the post of PGT(Persian) with immediate effect, because of the fact that he has been teaching Persian continuously for the last five years and, therefore, promoted to the post of PGT(Persian) by a unanimous decision of DPC dated 24.08.1999; whereas the petitioner never taught Persian, therefore, could not be promoted to the said post.

16. It is further submitted that the petitioner himself admitted vide

Annexure P-4 to the petition that he taught Persian to Middle Classes from Sessions 1978-79 to 1985-86 only and not thereafter. He joined the post of Language Teacher (Urdu) whereas the respondent No.5 had joined the school in the post of Language Teacher.

17. After hearing learned counsels for parties, it is emerged that the post in question was a 'Merit-cum-Selection post'. The petitioner and the respondent No.5 applied for the same; though the petitioner was senior to respondent No.5; still the fact remains that respondent No.5 was regularly taking classes and teaching Persian in the respondent No.3 school. The petitioner was appointed against the post of Language Teacher (Urdu); whereas the respondent No.5 was appointed against the post of Language Teacher. The promotion committee had considered the candidature of all the eligible candidates in accordance with Rule 96 of Delhi School Education Rules, 1973 and thereafter, selected the most suitable candidate.

18. The Recruitment Rules does not refer to the Persian subject, but merely clarifies that for the post of PGT in Hindi, Sanskrit and Punjabi etc Trained Graduate Teacher in Sanskrit and in Modern Indian Language concerned will be considered for promotion.

19. Admittedly, Persian is not a modern Indian language and the rules do not specify that the selection/promotion was to be made to the senior most teacher. Had the seniority only been the criteria, then there was no mean to call the eligible candidates. If the petitioner had any objection on considering the name of respondent No.5, then he would have been challenged the same at that point of time.

20. The petitioner was not the only eligible candidate. Therefore, the DPC considered the petitioner as well as respondent No.5 and finally selected respondent No.5, for the reasons discussed above.

21. In view of above discussion, I find no discrepancy in the decision of respondents by appointing respondent No.5 to the post of PGT(Persian).

22. Therefore, there is no merit in the instant petition.

23. Accordingly, same is dismissed with no order as to costs.

ILR (2012) VI DELHI 558
W.P. (C)

MANJIT SINGH ….PETITIONER

VERSUS

PUNJAB & SINDH BANK & ORS. ….RESPONDENTS

(SURESH KAIT, J.)

W.P. (C) NO. : 6766/08 DATE OF DECISION: 02.07.2012

Service Law—Departmental Proceedings—on 25.01.92, petitioner working as Manager of Bank, served with chargesheet dated 21.1.92 followed by another chargesheet dated 3.6.92 and after departmental enquiry, petitioner dismissed from service, vide order dated 2.5.95 and appeal rejected—Writ petition filed by petitioner allowed and petitioner rejoined duties on 4.8.03—Management decided to hold de novo enquiry and petitioner called upon to submit reply to chargesheets dated 25.1.92 and 3.6.92—Alongwith reply, petitioner submitted opinion of one handwriting expert—Management constituted enquiry—Presenting Officer submitted written brief with a copy supplied to petitioner, who submitted his written brief alongwith opinion of second handwriting expert—Enquiry Officer, without referring to the reports of handwriting experts, assessed the evidence and held that no allegation was proved—Disciplinary authority disagreed with the findings of enquiry officer and held that charges stood proved, so petitioner was called upon to submit his comments, which he did—disciplinary authority vide order dated 18.2.08, awarded punishment of dismissal to the petitioner—Appeal filed by petitioner rejected—Hence, the present petition—Held, although while disagreeing with the report of handwriting experts

the disciplinary authority should have recorded reasons, but disciplinary authority recorded its disagreement with the findings of the enquiry officer by way of order with detailed reasons and discussion of evidence, so there was no illegality in the order of the disciplinary authority.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Ashok Bhalla and Mr. K.G. Mishra, Advocates.

FOR THE RESPONDENTS : Mr. Jagat Arora and Mr. Rajat Arora, Advocates.

CASES REFERRED TO:

1. *Roop Singh Negi* vs. *PNB* (2009) 1 Scale 284.
2. *State of Uttaranchal & Ors.* vs. *Kharak Singh* (2008) 8 SCC 236.
3. *Debotosh Pal Choudhary* vs. *Punjab National Bank & Ors.* AIR 2002 SC 3276.
4. *Yoginath D. Bagde* vs. *State of Maharashtra* AIR 1999 SC 3734.
5. *Punjab National Bank & Ors.* vs. *Kunj Behari Mishra,* (1998) 7 SCC 84 = AIR 1998 SC 2713.
6. *Managing Director, ECIL, Hyderabad and others* vs. *B. Karunakar & Ors.* reported as 1993 4 SCC 727.

RESULT: Petition dismissed.

SURESH KAIT, J.

1. Vide the instant petition, petitioner has sought to setting aside the order dated 29.07.2008 passed by the Appellate Authority thereby and thus, quashing / setting aside chargesheet dated 25.01.1992, show cause notice dated 17.02.2007 and order of punishment dated 18.02.2008 with all consequential benefits to the petitioner with interest @ 18% per annum.

2. The facts of the case in brief are that on 25.01.1992, petitioner

was working as Manager of the Bank at Connaught Circus, New Delhi. He was placed under suspension and was served with a charge-sheet dated 21.01.1992, followed by another chargesheet dated 03.06.1992, wherein after holding mock departmental enquiry, he was dismissed from the service vide order dated 02.05.1995, against which the Appeal was also rejected by the Appellate Authority vide order dated 27.09.1996.

3. Being aggrieved, petitioner filed a C.W.P. No. 1739/1997, which was allowed by this Court vide final order and judgment dated 13.05.2003. The extract of which read as under:-

> "The net result of the discussion is that the impugned order dated 02.05.1995 of the termination of the services of the petitioner as well as the order dated 27.09.1996 passed by the appellate authority are quashed. The writ petition is allowed. However, liberty is granted to the respondent if they do desired to proceed on the basis of the said charges against the petitioner in accordance with law. The question of payment of back wages shall be decided after the decision of the respondent with regard to holding of inquiry and if the decision is taken to hold the inquiry, then after the conclusion of the said inquiry. Writ petition stands disposed of. Rule is made absolute".

4. Pursuance to the aforesaid order, petitioner submitted joining report to respondent no. 2 on 31.05.2003. In response to which, he was apprised that the said judgment was being legally examined for further appropriate action stage. Therefore, his request for allowing him to join the duties could not be considered.

5. Vide communication dated 21.07.2003, respondent Bank advised the petitioner to report for duties at its Zonal Office at Kolkata. Pursuance to which, he reported for duties on 04.08.2003.

6. While supplying the list along with copies of Management documents, respondent no. 3 decided to hold De Novo enquiry vide its order dated 18.12.2003. The petitioner was accordingly asked to submit his reply to the chargesheet dated 25.01.1992 and 03.06.1992.

7. Vide communication dated 09.01.2004, petitioner sought further time for submitting reply to chargesheets and thereafter he submitted reply to chargesheet annexing therewith opinion of Sh. S.K. Gupta,

handwriting expert and also requested respondent no.3 to keep departmental proceedings in abeyance, in view of the fact that in the intervening period CBI had registered an RC No. 64(A)/14-Bombay. The said reply dated 31.01.2004 was duly served upon respondent no. 2 on 05.02.2004.

8. Respondent no. 3 by denying the receipt of reply dated 31.01.2004, constituted an enquiry on 20.05.2004 by appointing the enquiry officer and presenting Officer.

9. Petitioner apprised respondent no. 3 on 31.05.2004 that since he had submitted reply to the chargesheets, which stood delivered to the respondent bank on 05.02.2004, and requested for recalling the decision of constituting the enquiry. The said representation mechanically, with biased approach, rejected by the respondent no.3.

10. Petitioner submitted another representation on 01.07.2004 to the disciplinary authority to recall the decision of constituting enquiry, particularly when the Bank did not make payments under Bank Guarantees to the Customs Department and had itself disputed veracity of the same, but in vain.

11. Mr.Ashok Bhalla, ld. Counsel appearing on behalf of the petitioner submitted that on 17.01.2005, Presenting Officer submitted list of Management Documents and witnesses. The aforesaid Officer examined two witnesses, thereafter examined additional witnesses. During the course of enquiry proceedings, where after petitioner submitted list of defence documents / witnesses, some of which documents were not made available to him. To cut short the time, the Enquiry Officer directed the Presenting Officer and the petitioner to submit their written submissions.

12. Accordingly, Presenting Officer submitted in brief, a copy of which was forwarded to the petitioner, who thereafter submitted Written Brief on 24.09.2005, annexing therewith opinion of another Handwriting Expert Sh. S.K. Saxena.

13. Learned counsel submitted that the Enquiry Officer without placing reliance upon any report of the Handwriting Expert, independently assessed/evaluated the evidence led before him and submitted enquiry report to respondent no. 3 on 02.11.2005 by holding that:-

> "No allegation is proved against CSO in respect of Charge Sheet dated 25.01.1992 and 03.06.1992 for want of conclusive and unrebuttable evidence."

14. Ld. Counsel further submitted that the Disciplinary Authority disagreed with the findings of enquiry officer and held that charges as levelled in the chargesheet had stood proved, therefore, he asked the petitioner to submit his comments. The said letter dated 17.02.2007 along with enquiry report dated 02.11.2005 were supplied to the petitioner vide letter dated 30.03.2007, on receipt of which the petitioner sought time up to 30.04.2007 and thereafter petitioner requested further time for 15 days to submit comments, if so advised.

15. Petitioner filed CW (P) 3482/07 inter alia challenging show cause notice dated 17.01.2007, which was disposed of by this Court vide order dated 11.05.2007, with liberty to the petitioner to assail the order of competent authority / appellate authority as to what cause of action arose.

16. Accordingly, petitioner on 12.05.2007, submitted comments in opposition to show cause notice dated 17.02.2007. Disciplinary Authority vide its order dated 18.02.2008 inflicted punishment "dismissal" of the petitioner from Bank Service under Regulation 4 (g) of Punjab & Sindh Bank Officer Employees (Discipline & Appeal) Regulation 1981 as amended from time to time (hereinafter referred to as the 'Regulation').

17. Petitioner submitted departmental appeal against the aforesaid order of punishment on 31.03.2008, which was not decided by the Appellate Authority despite the elapse of considerable period.

18. At last, petitioner filed 3rd CW(P) 4646/2008, praying therein, directions to respondent no. 2 to dispose of the appeal expeditiously. The said writ petition was disposed of by this Court vide order dated 02.07.2008 with directions to dispose of the Departmental Appeal to the petitioner within 4 weeks.

19. Learned counsel further submitted that vide order dated 29.07.2008, respondent no. 2 without correctly appreciating the legal as well as the factual submission, acting under the dictates of CVO / Higher Authorities, with malafide intentions, rejected the appeal of the petitioner and confirmed the punishment inflicted upon him.

20. The main ground amongst the other grounds is that any document produced by the Presenting Officer in the enquiry, which was not included

in the list of documents supplied along with charge sheet in terms of Regulation 6 (3) D & A Regulations is of no consequence, whatsoever, and any reliance placed upon the said document by the Disciplinary Authority, while disagreeing with the enquiry report is illegal and violative of statutory regulations.

21. The other ground is that because Regulation 6 (5) (iii) of the Punjab and Sindh Bank Discipline and Appeal Regulations provides that the Disciplinary Authority, whereas, it is not the inquiring authority, shall forward to the Enquiry Authority a list of documents by which and list of witnesses by whom the articles of charges are proposed to be substantiated, violation of which vitiates the enquiry.

22. Therefore, the disciplinary authority and the Appellate Authority totally failed to appreciate the correct interpretation of Regulation 6 (14) of D & A Regulations.

23. Mr.Ashok Bhalla, ld. Counsel for the petitioner has relied upon the law laid down by the Apex Court in case of **Managing Director, ECIL, Hyderabad and others vs. B. Karunakar & Ors.** reported as 1993 4 SCC 727 wherein it is held as under: "where the Disciplinary Authority disagreed with the findings of enquiry Officer it is incumbent upon him to record tentative reasons for disagreement with reasons of Enquiry Officer and communicate to the delinquent employee to give him an opportunity to submit the enquiry report. Only after receipt of reply from the delinquent employee, the Disciplinary Authority is to record his findings whether the charges are proved or not."

24. Ld. Counsel further submitted that the Disciplinary Authority and Appellate Authority had filed the opinion of Sh. S.K. Gupta, Handwriting Expert as DEX No. 5 on 13.06.2005 and thereafter along with written arguments dated 24.09.2005, the petitioner had also submitted the report dated 10.06.2005 of Sh. S.K. Saxena (Document Examiner and Senior Handwriting expert with 37 years of experience with CBI, Police Department, PSUs, etc. and retired as Govt. Examiner of Questioned Documents, Govt. of India) who opined as under:-

> "In spite of the fact that the pictorial appearances of the questioned signatures (signature on alleged fake BGs) resemble with those of standard signatures but the presence of so many finds of significant differences as mentioned above between the questioned

> and standard signatures along with the signs of imitation present in the questioned signatures and defective line quality of the questioned signatures lead me to the conclusion that author of the standard signatures marked S12, S4 is not the writer of the questioned signature marked Q1 and Q 17."

25. Ld. Counsel further submits that the two opinions of handwriting expert mentioned above produced by the petitioner, were neither considered nor dealt by the Disciplinary Authority while disagreeing with the findings of the Enquiry Officer, by placing reliance upon the alleged G.E.Q.D Report dated 13.09.1995.

26. More so, the Disciplinary Authority was not competent to reject the opinion of the handwriting experts produced by the petitioner, which was the correct opinion and could not be faulted on any flimsy ground.

27. Ld. Counsel has further submitted that the decision of the Disciplinary Authority and Appellate Authority as well, are factually incorrect and erroneous as they had wrongly observed in Para 11 of the communication dated 17.02.2007, the order of punishment dated 18.02.2008 and the order dated 29.07.2008 that the documents which were not made available to the petitioner were not mentioned in the list of defence documents dated 26.04.2005.

28. Ld. Counsel for the petitioner submitted that the allegations against the petitioner were as under:-

> "That Sh. Manjit Singh, Manager, unauthorizedly issued six Bank Guarantees as detailed below, favouring Asstt. Collector of Customs, Bombay on behalf of M/s. Narmada Nylon (P) Ltd., who had been maintaining a current account no. 515 with B.O. Peddar Road, Bombay.

Sr. No.	B.G. No.	Date of Issue	Amount (Rs.)
1.	1/84	29.03.1984	7,83,080.00
2.	2/84	12.05.1984	2,27,504.21
3.	27/84	25.07.1984	4,62,860.80
4.	28/84	25.07.1984	4,62,860.80
5.	32/84	27.07.1984	3,85,762.04
6.	34/84	27.07.1984	3,85,762.04
		TOTAL	27,07,749.89

Sh. Manjit Singh has not got his action confirmed or obtained sanction of competent authority for aforesaid Bank Guarantees. Thus acted unauthorizedly and beyond his delegated powers. By this the Bank is likely to suffer financial loss of Rs.27,07,7449.89 plus interest to be paid by Bank as per terms of guarantee. That Sh. Manjit Singh did not receive any request / application from the Party M/s Narmada Nylon (P) Ltd. Requesting for issue of the six bank guarantees as listed per Clause – I above. No financial papers were obtained to assess the credit worthiness of M/s. Narmada Nylon (P) Ltd., required as per practice and Head Office guidelines."

29. Ld. Counsel for the petitioner has drawn the attention of this Court to the Order dated 27.09.1996 of the Appellate Authority, wherein it is recorded as under:-

"Aggrieved by the order dated 02.05.1995 of the Disciplinary Authority Sh. Manjit Singh has filed an appeal on 09.06.1995 wherein he has contended that the orders of Disciplinary Authority are not speaking orders and there is gross violations of the principles of natural justice. That the impugned order is arbitrary as the comments of CSO on findings of enquiry officer have not been taken into account. That the concerned Bank Guarantees were recorded in Bank record and were secured by 100% margin and a commission of 2% have been charged. The Bank Guarantee was not signed by him. The charge that Bank Guarantees have been signed by him has not been proved."

30. It is further submitted that though vide communication dated 28.05.2004 , the respondent Bank assured the petitioner, that he will be given appropriate opportunity and communicated as under:-

"Now to give you the opportunity to defend your case, it has been decided in order departmental enquiry, where you will be given full opportunity to inspect the management documents, requisition the documents in your defence, and cross-examine the management witnesses and produce the witnesses in your defence, in terms of the provisions of Punjab and Sindh Bank Officer Employees. (Discipline & Appeal) Regulations, 1981.

31. The proceedings dated 01.02.2005 conducted by the respondent Bank in respect of chargesheet dated 25.01.1992 and 03.06.1992 reads as under:-

"XXXXXXXX XXXXXXXX XXXXXXXX XXXXXXXX

The PO was asked whether he has any further document / exhibit to be lodged. The P.O. submitted that he has no more documents / exhibits to be lodged at this stage. He, however, stated that he reserved the right to bring on records any relevant documents as the enquiry progresses and as the C.S.O open their defence.

XXXXXXXX XXXXXXXX XXXXXXXX

Shri Girish Kumar Gupta, Officer, IO, Mumbai was produced as Management Witness. MW-1

P.O.: The MW-1 was shown MEX 11 and above MEX 5 and asked whether the signatures on them has been done by the same person i.e. S. Manjit Singh, C.S.O. MW1: It appears that signatures were of the same as per specimen shown but are not matching hundred percent.

D.R.: Have you taken any training for handwriting examination.

MW1: No.

D.R.: Whether the signatures were done in his presence.

MW1: They were not signed in my presence.

D.R.: Have you earlier ever verified signatures of the CSO.

MW1: No, I have never come across his signatures earlier.

Witness of Sh. Dennis Robin Henry - MW-2.

MW-2 P.O. He was shown MEX No. 11 along with MEX No. 5, 6 13, 15, 17, 19, 21, 29 to 31 and asked whether the signatures are same.

MW2: I cannot comment. I have no experience. D.R.: Whether the C.S.O has signed above exhibits in your presence. MW2:No.

32. Ld. Counsel for the petitioner submitted that in the proceedings dated 13.06.2005 it is recorded as under:-

"XXXXXXXX

The CSO and Defence confirmed having received the defence documents desired by them except the following:-

1. Copy of Fact Finding Report.

2. Copies of Inspection Report for the Yrs. 84-85 & 85-86

3. Copies of loss caused to the Branch on account of these BGs in charge sheet.

4. Copy of Charge Report of B/O Peddar Road of handing over charge by the CSO to the new incumbent.

5. Copies of Investment Statement 84-85 & 85-86.

6. Copies of letter of BO Peddar Road sent to Department of Customs in response to their claims in Fake BGs.

XXXXXXXXX

XXXXXXXXX

XXXXXXXXX

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XXXXXXXXX

XXXXXXXXX

The I.O. asked the defence to submit their documents and produce their witnesses, if any.

XXXXXXXXX

XXXXXXXXX

The CSO further contended that the CSO is expecting some more documents in defence which they may be allowed to submit along with written briefs.

33. Ld. Counsel further submits that vide letter dated 13.06.2005,

petitioner communicated to the enquiry Authority as under:-

"I wish to further submit that since the required defence documents were not provided to me hence, I have to for some more documents and same will be submitted to yourself alongwith my brief in this enquiry proceedings.

34. The Enquiry Officer, in its findings in respect of the charge sheet dated 25.01.1992 and 03.06.1992 recorded as under"-

"I have gone into depth of each issue and relevant record / evidence and file and have noted that MW-4 (Sh. T.S. Uggal) has identified the signatures of CSO on alleged BGs but has used the word "appear". The dictionary meaning of "Appear" is not certain. It denotes "may be or may not be". Moreover, MW-4 has never worked along with CSO and did not see him writing or signing with his eyes. Under these circumstances, the PO should have produced the report of approved handwriting expert. But he did not make any effort to produce any report of hand writing expert whereas the report was dated 13/09/1995 could have been procured from CBI and produced during enquiry.

Submission of this report after the enquiry proceedings and annexing of this report with written brief is of no relevance. The report is required to be produced and got exhibited through some witnesses preferably the hand writing expert and given opportunity to defence side i.e. CSO to cross examine him. Hence, it cannot be relied upon.

Further, the silence of Beneficiary for about six years before involving alleged BGs also creates doubts specifically when Bank has taken opposite stand for not paying the BGs being not genuine and till date BGs have not been paid. Non-passing of any entry in Bank's Books also given the impression that the party M/s. Narmada Nylon (P) Ltd. Has masterminded the whole show and produced BGs to Custom Authorities are the basis of impersonation of CSO and the alleged signatures on BGs purportained to be signed by CSO are false and are not genuine. Hence the allegation is not proved against CSO at all.

Allegation No. 2, 3 & 4: All these allegations are interconnected

with allegation No. 1 and allegation no. 1 is the foundation on which these allegations stands.

As it is proved that BGs are bogus and are not issued by CSO and as such allegation No. 2, 3 & 4 also fails and not proved against the CSO."

35. Learned counsel further submitted that on disagreeing with the Enquiry Officer Report, the Disciplinary Authority had to record its disagreement by giving the reasons. In the absence of the same; the decision of the Disciplinary Authority is bad in law.

36. In the disagreement order, it is recorded as under:-

"Further you have stated that you were not supplied the following documents:

1. Fact finding report.

2. Inspection report for the year 1984-85 and 1985-86

3. The detail of loss caused to be branch on a/c of these fake BGs

4. Charge report of BO Peddar Road, Mumbai

5. Copies of the investment stamen for the year 1984-85 & 1985-86.

6. Copies of letter BO Peddar Road, Mumbai sent to Deptt. of Custom in response to their claim in fake BGs.

As such I have reason to draw that your demand for above said documents in the written brief is an after thought.

I have also examined the deposition of Management witnesses (MW). Sh. T.S. Uggal-Sr. Manager who deposed in his witness in the Inquiry Proceeding dates 26.04.2005 and submitted that he had seen original bank guarantee with the custom Deptt. Mumbai and replied that signature in place of branch Manager including signature of the official under seal & stamp of bank appeared to be signature of the charge sheeted Officer (You).

Then Sh. Girish Kumar Gupta-Officer deposed his witness on 01.02.2005 who also replied that it appears that signature on

BGs were of the same as per specimen.

The above deposition of witnesses cannot be set on naught rather it is in form of affirmation.

In the light of above, I disagree with findings of the Inquiry Officer and hold the allegations / charges of the said charge sheets in question as proved against you."

37. To strengthen his arguments, ld. Counsel for the petitioner has relied upon **State of Uttaranchal & Ors. Vs. Kharak Singh** (2008) 8 SCC 236, wherein it is held as under:-

"From the above decisions, the following principles would emerge:

i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

ii) XXXXXX

iii) XXXXXX

iv) XXXXXX"

38. In **Yoginath D. Bagde vs. State of Maharashtra** AIR 1999 SC 3734 it is held as under:-

"In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Enquiry Officer into the charges levelled against him but also at the stage at which those findings are considered by the Disciplinary Authority and the latter, namely, the Disciplinary Authority forms a tenative opinion that it does not agree with the findings recorded by the Enquiry Officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Enquiry Officer. This is in consonance with the requirement

of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution.

Applying the above principles to the facts of this case, it would be noticed that in the instant case the District Judge (Enquiry Officer) had recorded the findings that the charges were not proved. These findings were submitted to the Disciplinary Committee which disagreed with those findings and issued a notice to the appellant requiring him to show-cause why he should not be dismissed from service. It is true that along with the show-cause notice, the reasons on the basis of which the Disciplinary Committee had disagreed with the findings of the District Judge were communicated to the appellant but the Disciplinary Committee instead of forming a tentative opinion had come to a final conclusion that the charges against the appellant were established. The Disciplinary Committee, in fact, had acted in accordance with the statutory provisions contained in Rule 9(4)(i)(a)&(b). He was called upon to show-cause against the proposed punishment of dismissal as will be evident from the minutes of the Disciplinary Committee dated 21st June, 1993 which provide as under:-

> "Decision : Discussed. For the reasons recorded in Annexure "A" hereto, the Committee disagrees with the finding of the Enquiry Officer and finds that the charges levelled against the delinquent Judicial Officer have been proved. It was, therefore, tentatively decided to impose upon the Judicial Officer penalty of dismissal from service. Let notice, therefore, issue to the delinquent Judicial Officer calling upon him to show cause why penalty of dismissal from service as prescribed in Rule 5(1)(ix) of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 should not be imposed upon him.
>
> Show cause notice will be accompanied by a copy of the Report of the Inquiring Authority and the reasons recorded by this Committee."

These minutes were recorded after the Disciplinary Committee had considered the Enquiry Report and differed with the findings and recorded its final opinion in para 10 of its reasons as under:-

> "10. The Disciplinary Committee is of the opinion that the findings recorded by the Enquiry Officer on both the charges cannot be sustained. The Committee, after going through the oral and documentary evidence on record, is of the opinion that both the charges against the delinquent are proved. The delinquent is a Judicial Officer who has failed to maintain the absolute integrity in discharge of his judicial duties."

Along with the show-cause notice, a copy of the findings recorded by the Enquiry Officer as also the reasons recorded by the Disciplinary Committee for disagreeing with those findings were communicated to the appellant but it was immaterial as he was required to show-cause only against the punishment proposed by the Disciplinary Committee which had already taken a final decision that the charges against the appellant were proved. It was not indicated to him that the Disciplinary Committee had come only to a "tentative" decision and that he could show cause against that too. It was for this reason that the reply submitted by the appellant failed to find favour with the Disciplinary Committee.

Since the Disciplinary Committee did not give any opportunity of

hearing to the appellant before taking a final decision in the matter relating to findings on the two charges framed against him, the principles of natural justice, as laid down by a Three-Judge Bench of this Court in **Punjab National Bank & Ors. vs. Kunj Behari Mishra,** (1998) 7 SCC 84 = AIR 1998 SC 2713, referred to above, were violated.

39. In **Roop Singh Negi vs. PNB** (2009) 1 Scale 284 it is held as under:-

"Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges leveled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The 10 purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence. We have noticed hereinbefore that the only basic evidence whereupon reliance has been placed by the Enquiry Officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. Appellant being an employee of the bank, the said confession should have been proved.

Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the Enquiry Officer had made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left".

40. On the other hand, Mr. Jagat Arora, learned counsel for the respondents, submitted, the second enquiry is covered by the judgment

of this court whereby, an opportunity was granted. The petitioner was given full opportunity to rebut the show cause notice given by the Disciplinary Authority. Ld. Counsel further submitted that Regulation of the Bank is as under:-

"Where it is proposed to hold an inquiry, the Disciplinary Authority shall, frame definite and distinct charges on the basis of the allegations against the officer employee and the articles of charge, together with a statement the allegations, list of documents relief on along with copy of such documents and list of witnesses along with copy of statement of witnesses, if any, on which they are based, shall be communicated in writing to the officer employee, who shall be required to submit, within such time as may be specified by the Disciplinary Authority (not exceeding 15 days), within such extended time as may be granted by the said Authority, a written statement of his defence "Provided that wherever it is not possible to furnish the copies of documents, disciplinary authority shall allow the other employee inspection of such documents within a time specified in this behalf.

41. Ld. Counsel for the respondent has relied upon a case of **Debotosh Pal Choudhary v. Punjab National Bank & Ors.** AIR 2002 SC 3276:

"Regulation 6 (5) of the Regulations which requires the disciplinary authority shall, where it is not the inquiring authority, forward to the Inquiry Authority the following documents:-

(1) A copy of the articles of charge and statement of imputations of misconduct or misbehavour;

(2) A copy of the written statement of defence, if any, submitted by the Officer employee;

(3) A list of documents by which and list of witnesses by whom the articles of charge are proposed to be substantiated;

(4) A copy of the statement of the witnesses, if any;

(5) Evidence providing the delivery of the articles of charge under Sub-Regulation (3); and

(6) A copy of the order appointing the 'Presenting Officer' in

terms of sub-regulation

Fulfilment of some of the requirements of this Regulation is purely procedural in character. Unless in a given situation, the aggrieved party can make out a case of prejudice or injustice, mere infraction of this Regulation will not vitiate the entire enquiry.

42. Ld. Counsel further submitted that after exonerating him in the departmental enquiry, as per the rules show cause notice issued and after considering his reply, reasoned order was passed vide order dated 17.02.2007.

43. It is submitted that vide letter dated 17.02.2007 petitioner was communicated as under:-

"I have noted from the report of Inquiry Officer that "DO should have produced the report of approved handwriting expert. But he did not make any efforts to produce any report of hand writing expert whereas the report was dated 13.09.1995 and could have been procured from CBI and produced during inquiry. Submission of this report after the inquiry proceedings and annexing of this report with written briefs is of no relevance. The resort is required to be produced and got exhibited through some witnesses preferably the hand writing expert and given opportunity to defence side i.e. CSO to cross examine him. Hence it cannot be relied upon.

I have examined the case from the evidence for and against produced during inquiry process and noticed that in the inquiry proceeding dated 13.06.2005, you was allowed to submit your defense documents after the inquiry proceeding. Presenting Officer submitted report dated 13.09.1995 of the Govt. Bureau of Police Research and Development, Ministry of Home Affairs, Govt. of India, Hyderabad before the close of the case and you were given opportunity for defence on said report / opinion dated 13.09.1995.

It has been found mentioned in the letters dated 12.07.2005 and 30.07.2007 of the Inquiry Officer that report dated 13.09.1995 of the Govt. Bureau of Police Research and Development, Ministry of Home Affairs, Govt. of India, Hyderabad was allowed

and admitted by the Inquiry Officer. It was conveyed to you et supra and you submitted your comments on letter dated 12.07.2005 and 30.07.2005 vide your letter dated 26.07.2005 and 03.08.2005 respectively. It has also been agreed in the inquiry proceedings dated 13.06.2005 that both the parties will submit their briefs in order to save time and expenditure of the bank.

The version of the Inquiry Officer has been viewed in light of the regulation 6 (14) of Punjab and Sindh Bank Officer Employees (Discipline & Appeal Regulation 1981 as amended from time to time. It was correct and justified that Inquiry Officer was well within his power conferred on him by said regulation to allow any documents / evidence to the Presenting Officer before the close of the case. It is there that you were given opportunity to make defence on report dated 13.09.1995 of the Govt. Bureau of Police Research and Development, Ministry of Home Affairs, Govt. of India, Hyderabad. Thus as allowed by the Inquiry Officer the said report is a part of the inquiry proceedings and I do not agree with the following version of the Inquiry Officer.

"PO should have produced the report of approved handwriting expert. Bud did not make any efforts to produce any report of hand writing expert whereas the report was dated 13.09.1995 and could have been procured from CBI and produced during inquiry. Submission of this report after the inquiry proceedings and annexing of this report with written briefs is of no relevance. The report is required to be produced and got exhibited through some witnesses preferably the hand writing expert and given opportunity to defence side i.e. CSO to cross-examine him. Hence it cannot be relied upon."

I have perused the above documents meticulously and found that DEX-5 which is not from recognized agency and it is from private run institution. On the other hand report dated 13.09.1995 of the Govt. Bureau of Police Research and Development, Ministry of Home Affairs, Govt. Of India, Hyderabad has more with and authenticity and its testimony is recognized by every institution which concludes "The person who wrote the blue

enclosed writing stamped and marked S1 to S47 and A1 to A3 also wrote the red enclosed writings similarly stamped and marked Q1 to Q33.

Further you have stated that you were not supplied the following documents:

1. Fact finding report.
2. Inspection report for the year 1984-85 and 1985-86
3. The detail of loss caused to be branch on a/c of these fake BGs
4. Charge report of BO Peddar Road, Mumbai
5. Copies of the investment stamen for the year 1984-85 & 1985-86.
6. Copies of letter BO Peddar Road, Mumbai sent to Deptt. of Custom in response to their claim in fake BGs.

I have perused the inquiry proceeding dated 13.06.2005 and noted that Interim orders shall continue asked you to submit your defence documents and you submitted the same containing documents DEX-1 to DEX-7 which were taken on record. I also do not find mention of these documents in your list of Defence Documents.

I have also examined the deposition of Management witnesses (MW). Sh. T.S. Uggal-Sr. Manager who deposed in his witness in the Inquiry Proceeding dates 26.04.2005 and submitted that he had seen original bank guarantee with the custom Deptt. Mumbai and replied that signature in place of branch Manager including signature of the official under seal & stamp of bank appeared to be signature of the charge sheeted Officer (You).

Then Sh. Girish Kumar Gupta-Officer deposed his witness on 01.02.2005 who also replied that it appears that signature on BGs were of the same as per specimen. The above deposition of witnesses cannot be set on naught rather it is in form of affirmation."

44. In a rejoinder ld. Counsel for the petitioner has argued that the judgment relied upon by the ld. Counsel appearing on behalf of the

respondent, is prior to amendment. Therefore, has no relevance.

45. Learned counsel for respondent submitted that the petitioner was given an opportunity. Though, the department had relied upon the document, but that document had no relevance at all and the petitioner has not caused any harm to him. Therefore, the order is proper and the instant petition deserves to be dismissed.

46. More so, the petitioner has been convicted on 30.09.2005 after full trial, in a CBI case by Special Judge, Bombay.

47. Being aggrieved, the petitioner challenged the same by filing the appeal, same is pending for adjudication.

48. After hearing learned counsels for parties, the inquiry report submitted on 02.11.2005 against the petitioner, no allegation was proved in respect of the charge-sheet dated 25.01.1992 and 03.06.1992 for want of qualification and unrebuttable evidence. However, the disciplinary authority described that that the evidence of inquiry officer report established that the charges leveled in the charge-sheet against the petitioner had stood proved, therefore, the petitioner was asked to submit his comments.

49. Vide letter dated 30.03.2007, inquiry report dated 02.11.2005 was supplied to petitioner. On receipt of which, the petitioner sought time upto 30.04.2007 and thereafter, petitioner requested further time for 15 days to submit the comments.

50. Meanwhile, the petitioner filed CWP No.3482/2007, inter alia, challenging the show cause notice dated 17.01.2007 which was disposed of by this Court vide order dated 11.05.2007 with liberty to the petitioner to assail the order of competent authority / appellate authority as to what goes to the core.

51. Accordingly, the petitioner on 12.05.2007, submitted his comments to the show cause notice dated 17.02.2007. The disciplinary authority vide its order dated 18.02.2008 inflicted punishment of dismissal from the bank, under Regulation 4(g) of Punjab & Sind Bank Officers, Employees (Discipline and Appeal) Regulation, 1981, as amended from time to time.

52. Being aggrieved, against the said punishment, the petitioner filed

appeal on 31.03.2008, which was not decided by the appellate authority despite the lapse of considerable period.

53. At last, the petitioner, filed third CWP No.4646/2008 praying therein the directions to respondent No.2 to dispose of the appeal expeditiously. The said writ petition was disposed of by this Court vide order dated 02.07.2008 with directions to dispose of the appeal within four weeks.

54. The petitioner placed under suspension and served with the charge-sheet dated 29.01.1992 followed by another charge-sheet dated 03.06.1992 wherein after holding departmental enquiry he was dismissed from the service vide order dated 02.05.1995 against which the petitioner preferred the appeal; which was also rejected by the appellate authority vide order dated 27.09.1996.

55. Being aggrieved, the petitioner, filed WP(C) No.1739/1997, which was allowed by this Court vide judgment dated 13.05.2003, and liberty was granted to the respondent, if they desire to proceed on the basis of the charges against the petitioner in accordance with law. It is further directed that the question of payment of back wages shall be decided after the decision of the respondent regarding holding of inquiry and if the decision is taken to hold the inquiry, then after the conclusion of the said inquiry.

56. Thereafter, vide communication dated 23.07.2003, respondent bank advised the petitioner to report for duties at its Zonal Office at Kolkata; to which he reported for duty on 04.08.2003.

57. While supplying the list alongwith the copies of management document, respondent No.3 decided to hold de-novo inquiry vide its order dated 18.12.2003. The petitioner was accordingly asked to submit his reply to the charge-sheets dated 21.01.1992 and 03.06.1992. Vide communication dated 09.01.2004, the petitioner sought for annexing the opinion of Shri S.K.Gupta, handwriting expert and also requested respondent No.3 to keep the department proceedings in abeyance in view of the fact that in the intervening period, CBI had registered RC No.64(A)/14-Bombay. The said reply dated 13.01.2004 was duly served upon respondent No.2 on 05.02.2004.

58. It is emerged that the petitioner apprised respondent No.3 on

31.05.2004 about submitting the reply to the charge-sheet and requested for recalling its decision to constituting the inquiry. The said representation was rejected by the respondent No.3. By another representation of the petitioner dated 01.07.2004 to the disciplinary authority to recalling the decision of constituting the inquiry particularly when the bank did not make the payment under bank guarantees to the Customs Department and had itself disputed the veracity of the same. But in way, the inquiry officer without placing the reliance upon any report of the handwriting expert, independently assessed/evaluated the evidence led before him and opined that no allegations proved against CSO in respect of the charge-sheets dated 21.01.1992 and 03.06.1992 for want of conclusive and unrebuttable evidence.

59. The disciplinary authority disagreed with the findings of the inquiry officer and held that the charges levelled in the charge-sheets had stood proved. Finally, the disciplinary authority vide order dated 18.02.2008 inflicted the punishment of dismissal of the petitioner from service of the bank under Regulation 4(g) of the said Regulation.

60. The appeal of the petitioner was also dismissed vide order dated 31.03.2008. Finally, vide order 29.07.2008 rejected the appeal of the petitioner and confirmed the punishment inflicted upon him.

61. The law has been settled in case of **B.Karunakar** (supra) that where the disciplinary authority disagreed with the findings of the inquiry officer, then it is incumbent upon him to record reasons for disagreeing with the reasons of the inquiry officer and communicated to the delinquent employee to afford him an opportunity to submit the inquiry report. Only after receipt of the reply from the delinquent employee, the disciplinary authority is to record his finding whether the charges are proved or not.

62. Admittedly, the opinion of Shri S. K. Saxena has not been relied upon by the respondents. No doubt, while disagreeing with the said report, the disciplinary authority should been have recorded the reasons of not relying upon. But I find no reasons to discard the report of Sh.S. K. Gupta, handwriting expert.

63. Shri Girish Kumar Gupta, Investigating Officer, Mumbai was produced as management witness (MW1). The question was asked by the petitioner whether the signatures on the document MEX-11 and MEX-5 has been done by the same person i.e. the petitioner. He replied

the signatures were of the same as per the specimen shown, but are not matching 100%.

64. I find the disciplinary authority as recorded its disagreement while relying upon the fact finding inquiry, inspection report for the year 1984-85, 1985-86; the details of the loss caused to the Branch on account of these fake Bank Guarantees; charge report of Branch Office Peddar Road, Mumbai; copies of the investment payment for the year 1984-85, 1985-86 and the copies of letter from B.O. Peddar Road, Mumbai sent to the Department of Customs in response to their claim for fake B.Gs. and rightly opined that after examining the depositions of the management witness (MW) Shri T. S. Uggal, Senior Manager, who deposed that on 26.04.2005 he had seen the Bank Guarantee with the Customs Department, Mumbai.

65. Also relied upon that the signatures in place of Branch Manager including the signatures of the official under seal and stamp of the bank, appears to be the signature of the charge-sheeted officer. Also relied upon, Shri Girish Kumar Gupta, IO who stated that the signatures on the BGs were same as per the specimen signatures. Thereafter, the disciplinary authority and the appellate authority confirmed the opinion by not agreeing with the findings recorded by the inquiry officer.

66. The petitioner has been given proper opportunity. During inquiry, he was asked to exhibit or lodge any document; he kept his right reserved to bring as the C.S.O. open their defence. Therefore, there is no violation of the natural justice.

67. I find no discrepancy in the impugned orders.

68. Instant petition is accordingly dismissed.

69. No order as to costs.

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MAC. APP.

NEW INDIA ASSURANCE CO. LTD. ….APPELLANT

VERSUS

GEETA & ORS. ….RESPONDENT

(G.P. MITTAL, J.)

MAC. APP. NO. : 479/2004 DATE OF DECISION: 02.07.2012

Motor Vehicle Act, 1988—Indian Evidence Act, 1872—Section 63—Limited liability The sole ground of challenge is that the Appellant having successfully proved that there was limited liability of Rs. 50,000/- as a premium of Rs. 240/- only was charged for covering third party risk, the Claims Tribunal erred in fastening the entire liability on the Insurance Company—The Claims Tribunal rejected the plea of limited liability—Admittedly, no evidence was led by the owner (the fifth Respondent) that the notice was not received by him. Rather, he preferred himself to be proceeded ex-parte. The notice and the postal receipt were duly proved. In the circumstances, the Claim Tribunal's finding that the notice under Order XII Rule 8 CPC was not proved to have been served upon the owner, cannot be sustained—Similarly, the Claims Tribunal's rejection of the service of notice on the ground that notice ought to have been sent to Bank of India, to whom the policy was sent, is also misconceived. There is nothing to indicate on the copy of the policy Ex. RW-1/D that the original policy was sent to the Bank of India. In the circumstances the Appellant's right to lead secondary evidence on the ground that no notice was sent to the Bank of India cannot be defeated—The Claims Tribunal's observation that the word

"unlimited" finds mention in the printed form of Ex. Rw-1/C at one place, is also of not much consequence, as the Court is concerned with the payment of premium under various clauses. Similarly, a copy of the proposal form 'Mark B' (the same has not been proved) was placed on record, in the course of his cross—examination recorded on 19.9.2002. The Claims Tribunal opined that in para 11 there was mention of payment of premium towards the unlimited liability. This finding was without any material, in as much as a premium of Rs. 440/- and Rs. 1700/- was towards own damage and Rs. 60/- was towards terrorist risk. Thus, it cannot be said that there was unlimited coverage in respect of third party risk vide proposal form Mark B—The vital question for consideration, however, is whether the Appellant produced secondary evidence within the meaning of Section 63 of the Indian Evidence Act, 1872 (the Evidence Act) so as to rely on the copy of the insurance policy Ex. Rw-1/C produced by the Appellant—The document produced is only a photocopy of the renewal notice. The same does not fall under any of the five clauses of section 63 of the Evidence Act and therefore, it cannot be looked into. In the absence of proof of the insurance policy, the Appellant has failed to prove that its liability was limited to Rs. 50000/-. It is therefore, held that the Appellant's liability was unlimited. The claims Tribunal's findings that the Appellant's liability was unlimited, cannot be faulted.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. L.K. Tyagi, Advocates. Ms. Debopama Roy, adv. For IRDA.

FOR THE RESPONDENT : Mr. Ashok Popli, Adv. For R-1.

CASES REFERRED TO:

1. *Tejinder Singh Gujral* vs. *Inderjit Singh & Anr.,* (2007) 1 SCC 508.
2. *J. Yashoda* vs. *K. Shobha Rani,* (2007) 5 SCC 730.
3. *New India Assurance Company Limited* vs. *Darshan Singh & Ors.,* 1992 ACJ 533.

RESULT: Dismissed

G.P. MITTAL, J.

1. The Appellant New India Assurance Company Limited takes exceptions to the judgment dated 31.07.2004 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby while awarding a compensation of Rs. 1,75,000/- for the death of Indeshwar Rai, the Appellant's plea of limited liability of Rs. 50,000/- in terms of the policy was rejected. The Appellant was directed to pay the entire compensation of Rs. 1,75,000/- as awarded by the Claims Tribunal.

2. On 07.10.1988 at about 11:00 A.M. the deceased and one Surender (PW-2) were proceeding on their respective bicycles towards Nehru Place. The deceased was run over by a speeding bus No.DEP-7259 driven by the Fourth Respondent (Ved Prakash).

3. During inquiry before the Claims Tribunal, it was claimed that the deceased was working as a mason with M/s. S.Tirath Singh Engineers and was getting a salary of Rs. 1500/- per month. The Claims Tribunal assessed the deceased's income to be Rs. 1125/- per month and computed the loss of dependency as Rs. 1,62,000/-. On adding a sum of Rs. 13,000/- towards non-pecuniary heads, the overall compensation of Rs. 1,75,000/- was awarded.

4. The finding on negligence or on quantum of compensation is not challenged by either of the parties.

5. The sole ground of challenge is that the Appellant having successfully proved that there was limited liability of Rs.50,000/-, as a premium of Rs. 240/- only was charged for covering third party risk, the Claims Tribunal erred in fastening the entire liability on the Insurance Company.

6. It is important to note that Respondents No.4 and 5 (the driver and the owner of the bus) did not contest the proceedings before the Claims Tribunal and they were ordered to be proceeded ex-parte. The

written statement was filed by the Appellant Insurance Company pleading limited liability. The issue of limited liability was dealt with by the Claims Tribunal as under:-

"12. As regards preliminary objection No.5, it was submitted by the Respondent No.3 Insurance Company that its maximum liability was limited to Rs. 50,000/- only, as set out in Section 95 of the Motor Vehicles Act, 1939 and the terms of the policy issued by it for third party claims. In order to substantiate this plea of limited liability, the Respondent No.3 Insurance Company adduced the evidence of RW-1 Shri Surender Kalra, Claims Assistant, M/s. New India Assurance Company Limited. RW-1 Shri Surinder Kalra, in his testimony, testified that he had brought the carbon copy of the insurance policy issued in the name of Shri Chand Singh (Respondent No.2). He further testified that a notice dated 20.7.2000 had been issued to the insured, copy whereof was Exhibit RW1/A, that the said notice had been sent by registered cover and its postal receipt was Exhibit RW1/B. He further deposed that the carbon copy of the policy was Exhibit RW1/C and the carbon copy of the cover note was Exhibit PW1/D. As per the terms of the policy, he deposed, third party risk covered by the policy was Rs. 50,000/- for one accident as the premium charged for this risk was Rs. 240/- only. Cover note had been issued by Shri P.K. Mahant, Development Officer while the policy had been issued by Shri J.R. Nagpal, Assistant Administrative Officer and he identified their respective signatures on the said documents. He had brought the Indian Motor Tariff, copy whereof was Exhibit PW1/E. No extra premium, he stated, had been charged from the insured for any increase in the insurer's liability beyond the statutory limit of liability.

13. The cross-examination of RW-1 Surinder Kalra is significant. In the course of his said cross-examination by the counsel for the petitioners, the witness was compelled to admit that both Shri P.K.Mahant who had issued the cover note and Shri J.R.Nagpal who had issued the insurance policy were still working with the company, and as such both were available in the office of the Company, while he had been posted in the office of the Company in August, 1988, that is, after the issuance of both the

cover note the policy. He was further compelled to admit that he could not say what were the conditions of the insurance policy as the policy had not been dispatched in his presence. Relying upon these admissions made by the witness, counsel for the petitioners vehemently contended that neither of the author of the cover note nor the author of the insurance policy had been examined by the Insurance Company although both were admittedly still working with the Insurance Company and available at the time when the statement of RW-1 was recorded. RW-1, it was further contended by counsel for the petitioners, had no knowledge of the terms and the conditions of the insurance policy as he had been posted in the office of the insurance company on a subsequent date.

14. Counsel for the petitioners further placed reliance upon the admission made by RW-1 Surender Kalra in his cross-examination, that he had not brought the office copy of the policy of insurance, to contend that the office copy of the insurance policy not having been produced by the Insurance Company, it was not at all clear from which copy the carbon copy Exhibit PW1/C had been prepared. Learned counsel for the petitioners also strongly relied upon the admission made by the RW-1 in his cross-examination that in the Certificate of Insurance the work "Unlimited" was recorded.

15. From the above evidence on record, in my view, it is abundantly clear that there is no proof regarding service of notice on the insured for production of the original insurance policy. No Acknowledgement Due Card etc. has been filed. It also emerges from the record that a copy of the policy was sent to the concerned bank, viz., the Bank of India, Parliament Street, New Delhi, but admittedly no notice has been given by the Insurance Company to the said bank to produce the same. Then again, it has been admitted by RW-1 that the authors of the cover note and the insurance policy were still working in the Insurance Company. The question which begs an answer is; Why have the authors of the cover note and the insurance policy not being produced in the witness box? I am afraid no answer is forthcoming. Significantly also, in answer to a query put to

him in this regard, RW-1 admitted that in the certificate of insurance the word "unlimited" was recorded. I also find on the record a copy of the proposal form, in Column No.11 whereof extra premium is shown to have been paid for third party claims. In the circumstances, in my view, it is not possible to hold that the liability of the insurance company was limited to Rs. 50,000/- only, that is, the amount of statutory limit of liability."

7. The Fifth Respondent (Chand Singh) was the owner of the bus No.DEP-7259. The insurance policy was issued to him. RW-1 Surender Kalra deposed that a notice (copy of which is Ex.RW-1/A) under Order XII Rule 8 CPC was sent to the Fifth Respondent under registered cover. The witness proved the postal receipt as Ex.RW1-B. He deposed that despite service of the notice, the insured failed to produce the original insurance policy.

8. The Claims Tribunal rejected the plea of limited liability on the grounds:-

(i) that service of notice on the owner of the bus to produce the original policy has not been established; (ii) that a copy of the policy was sent to the Bank of India, Parliament Street, New Delhi Branch but no notice was given to the said Bank to produce the same; and

(iii) that authors of cover note and Insurance Policy were still alive and working with the Appellant Insurance Company, still they were not produced to prove the policy.

9. As far as service of notice is concerned, the office copy of the notice Ex.RW-1/A and its postal receipt Ex.RW-1/B were duly proved. The service of the notice was disbelieved on the ground that the acknowledgement card was not produced by the Appellant Insurance Company. It may be noticed that many a time when a letter is sent through Registered Post, an acknowledgement card is not received back. The question is whether presumption of service can be raised when letter is dispatched and a postal receipt is proved on record.

10. In **C.C.Alavi Haji v. Palapetty Muhammed and Anr.,** (2007) 6 SCC 555, a three Judge Bench of the Supreme Court dealt with the question of presumption of service when a letter is posted. The relevant portion of the report in **C.C.Alavi Haji** (supra) is extracted hereunder:-

"12. Therefore, the moot question requiring consideration is in regard to the implication of Section 114 of the Evidence Act, 1872 insofar as the service of notice under the said proviso is concerned. Section 114 of the Evidence Act, 1872 reads as follows:

"114. Court may presume existence of certain facts. -

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The court may presume -

(f) that the common course of business has been followed in particular cases;

13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the court that the common course of business renders it probable that a thing would happen, the court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the GC Act is a far stronger presumption. Further, while Section 114 of the Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of the GC Act is extracted

below:

> "27. Meaning of service by post. - Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve' or either of the expression 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed....."

11. Admittedly, no evidence was led by the owner (the Fifth Respondent) that the notice was not received by him. Rather he preferred himself to be proceeded ex-parte. The notice and the postal receipt were duly proved. In the circumstances, the Claims Tribunal's finding that the notice under Order XII Rule 8 CPC was not proved to have been served upon the owner cannot be sustained.

12. Similarly, the Claims Tribunal's rejection of the service of notice on the ground that notice ought to have been sent to Bank of India, to whom the policy was sent, is also misconceived. It appears from Ex.PW-

1/C and PW-1/D that the vehicle was hypothecated to Bank of India. A copy of the Insurance Policy might have been sent to the Bank of India. There is nothing to indicate on the copy of the policy Ex.RW-1/C and the copy of the cover note Ex.RW-1/D that the original policy was sent to the Bank of India. In the circumstances, the Appellant's right to lead secondary evidence on the ground that no notice was sent to the Bank of India cannot be defeated.

13. The Claims Tribunal's observations that the word "unlimited" finds mention in the printed form of Ex.RW-1/C at one place, is also of not much consequence as the Court is concerned with the payment of premium under various clauses. Similarly, a copy of the proposal form 'Mark B' (the same has not been proved) was placed on record in the course of his cross-examination recorded on 19.09.2002. The Claims Tribunal opined that in para 11 there was mention of payment of premium towards the unlimited liability. This finding was without any material, in as much as a premium of Rs. 440/- and Rs. 1700/- was towards own damage and Rs. 60/- was towards terrorist risk. Thus, it cannot be said that there was unlimited coverage in respect of third party risk vide proposal form 'Mark B'.

14. The vital question for consideration, however, is whether the Appellant produced secondary evidence within the meaning of Section 63 of the Indian Evidence Act, 1872 (the Evidence Act) so as to rely on the copy of the insurance policy Ex.RW-1/C produced by the Appellant. It would be fruitful to extract Section 63 of the Evidence Act hereunder:-

> **"63. Secondary Evidence -**
>
> Secondary evidence means and includes:-
>
> (1). Certified copies given under the provisions hereinafter contained;
>
> (2). Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy and copies compared with such copies;
>
> (3). Copies made from or compared with the original;
>
> (4). Counterparts of documents as against the parties who did not execute them;

(5). Oral accounts of the contents of a document given by some person who has himself seen it."

15. An illegible carbon copy of the insurance policy which was marked as Ex.RW-1/C was produced by RW-1. An equally illegible photocopy 'Mark A' was also produced. A perusal of Ex.RW-1/C reveals that it is only a renewal notice. Ex.RW-1/C does not appear to be signed by any person. When RW-1 was cross-examined on the alleged carbon copy of the insurance policy, he admitted that he did not bring the office copy of the insurance policy. Thus, it is apparent that Ex.RW-1/C was not a carbon copy of the policy prepared in the same process. However, the process through which Ex.RW-1/C was prepared is not known. Ex.RW-1/C does not fall under any of the five Clauses of Section 63 of the Evidence Act. Therefore, it cannot be said to be secondary evidence so as to admit the same under Section 63 of the Evidence Act. Apart from this, RW-1 made very important admission. He stated that policy was issued by Mr. Nagpal and also admitted that Mr. Nagpal was still available and was working with the Appellant Insurance Company. He then stated that the cover note was prepared by Mr. P.K.Mahant, who was also available in the office. Mr. Nagpal and Mr. Mahant were the persons who could have stated about the insurance policy purported to have been issued in favour of Chand Singh, the owner of the vehicle. Since the carbon copy Ex.RW-1/C does not satisfy the test of secondary evidence, the same is not admissible in evidence and was rightly rejected by the Claims Tribunal. This finding is supported by the judgment of the Supreme Court in **J. Yashoda v. K. Shobha Rani,** (2007) 5 SCC 730. In para 8, the Supreme Court held as under:

> "8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence."

16. The document produced is only a photocopy of the renewal notice. The same does not fall under any of the five clauses of Section 63 of the Evidence Act and, therefore, the same cannot be looked into. In the absence of proof of the insurance policy, the Appellant has failed to prove that its liability was limited to Rs. 50,000/-. I, therefore, hold

that the Appellant's liability was unlimited. I am supported in this view by the report of the Supreme Court in **Tejinder Singh Gujral v. Inderjit Singh & Anr.,** (2007) 1 SCC 508. Relevant para of the report is extracted hereunder:-

> "13. The learned Tribunal, however, committed an error in opining that the insurance policy was not required to be proved. Learned Single Judge of the High Court, in our opinion, rightly held that the insurance policy having not brought on records, a presumption would arise that the liability of the insurer was unlimited....."

17. In **Chandro Devi & Ors. v. Jit Singh & Ors.,** 1989 ACJ 41, this court held that in the absence of proof of the insurance policy by the insurance company it shall be presumed that the liability of the insurance company is unlimited. Relevant para of the report says:-

> "The insurance company must prove that the policy in question is the 'Act only' policy. The amount mentioned by the statute is the minimum amount. But the policy can always cover higher risk to third party by taking additional premium. It is obligatory on the part of the insurance company to prove the insurance policy and its terms and conditions. In a number of decisions by this court, it has been held that where the insurance company has to produce the insurance policy or prove the same in accordance with law, then, it shall be presumed that the liability of the insurance company is unlimited. As I have already held that the insurance company has failed to prove the insurance policy in accordance with law, so I hold that the liability of the insurance company is unlimited in the present case."

18. A Division Bench of this Court in **New India Assurance Company Limited v. Darshan Singh & Ors.,** 1992 ACJ 533 held that where the Insurance Company wish to take a defence (in a Claim Petition) that its liability was not in excess of statutory liability it should file a copy of the insurance policy along with its defence. It was observed that a printed copy of the policy would not be enough to prove the plea of limited liability.

19. In view of the foregoing discussion, the Claims Tribunal's finding that the Appellant's liability was unlimited cannot be faulted.

20. The Appeal is devoid of any merit; the same is accordingly dismissed.

21. By an order of this Court dated 07.12.2004 the execution proceedings were ordered to be stayed, subject to deposit of the entire award amount with the Claims Tribunal. It appears that a sum of Rs. 25,000/- along with proportionate interest was ordered to be released by order dated 18.05.2005. Rest of the amount lying deposited with the Claims Tribunal shall be released in favour of the Respondents No.1 to 3 (the Claimants) in terms of the order passed by the Claims Tribunal.

22. The statutory amount of Rs. 25,000/- shall be refunded to the Appellant Insurance Company.

ILR (2012) VI DELHI 593
CS (OS)

BIRLA TEXTILE MILLS ….PLAINTIFF

VERSUS

ASHOKA ENTERPRISES & ORS. ….DEFENDANTS

(REVA KHETRAPAL, J.)

CS (OS) NO. : 1857/1998 DATE OF DECISION: 06.07.2012
I.A. NO. : 1337/10

Limitation Act, 1963—Section 21, 22—Original suit for recovery against husband as proprietor of a Defendant 1, within limitation—After coming to know that actually wife is the proprietor and not the husband, Plaintiff moved application for amendment of plaint by impleading wife—Plaintiff contends that the husband though his conduct all along represented and held himself out to be the Proprietor of Defendant 1. Held—Husband and wife have acted in concert with one another to avoid any liability being fastened upon them for the transactions with the plaintiff. Plaintiff bona fide believed husband to be the proprietor—Omission to implead wife bona fide mistake and Proviso to Section 21 squarely applicable. Suit not barred by limitation.

Having considered the aforesaid contentions of Mr. Sibal, the Court is of the opinion that the defendant No.2 and the defendant No.3, who are husband and wife, have acted in concert with one another to avoid any liability being fastened upon them for the transactions with the plaintiff for which they owed money to the plaintiff. The plaintiff bonafide believed the defendant No.2 to be the sole proprietor of the defendant No.1 firm and on coming to know of the fact that it was the wife of the defendant No.2 who was in fact the proprietor, the plaintiff without any delay moved an application for amendment of the plaint. In such circumstances, the omission to impleaded defendant No.3 clearly was a bonafide mistake and in such circumstances the Proviso to Section 21 of the Limitation Act, 1963 (which Proviso did not exist in the Limitation Act of 1908) is squarely applicable to the facts of the present case. The instant suit, therefore, must be deemed to have been instituted on the date of the original institution of the suit and cannot be said to be barred by limitation. **(Para 28)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Amit Sibal, Ms. Priyanka Kalra and Mr. Anirban Sen, Advocates.

FOR THE DEFENDANTS : Defendant are ex parte.

CASE REFERRED TO:

1. *Gopalakrishnan Chettiar and Anr.* vs. *Annamma Devassye and Ors.,* AIR 1991 Kerala 72.
2. *Karuppaswamy and Ors.* vs. *C. Ramamurthy,* (1993) 4 SCC 41.

REVA KHETRAPAL, J.

1. The plaintiff has filed the abovementioned suit against the defendants praying, inter alia, for a decree of recovery of Rs. 46,16,945/- (Rupees Forty Six Lacs Sixteen Thousand Nine Hundred and Forty Five Only) with costs of the suit and future interest @ 24% per annum from the date of the institution of the suit, i.e., from 28.08.1998 until realisation.

2. The plaintiff is a partnership firm engaged in the business of manufacture and sale of yarn and is duly registered under the Indian Partnership Act at Calcutta with the Registrar of Firms.

3. The defendant No.1 firm had been purchasing cotton yarn from the plaintiff firm at Delhi for the last 12-13 years prior to the institution of the suit. The amount of bills raised on the defendant No.1 were payable within seven days therefrom, failing which interest on overdue payment was also liable to be paid @ 24% per annum according to agreement, market usage and law.

4. It is the case of the plaintiff that the plaintiff firm maintains regular Books of Accounts in which there is an account of the defendants. Bills raised on the defendants for purchases made and bills/debit notes raised for interest on overdue payments were duly debited to the account of the defendants and payments made were duly credited. It is also the case of the plaintiff that the defendants had been paying interest on overdue payments all through their dealings with the plaintiff firm. Further, all the bills raised on the defendants for the purchase of yarn prior to 09.01.1996 were paid for. Only the bills as per the details given in the plaint remain outstanding and the amounts thereof totalling Rs. 33,25,896/- (Rupees Thirty Three Lacs Twenty Five Thousand Eight Hundred and Ninety Six Only) remain due to the plaintiff from the defendants. The defendants are also liable to pay interest on account of late payment of the bills referred to in the plaint in respect of which debit notes were raised on the defendants as per details given in the plaint. The total amount claimed for interest on account of late payment of bills is Rs. 93,726/-. The defendants are further liable to pay Rs. 11,97,323/- as interest on the amount of Rs. 33,25,896/- @ 24% per annum as per agreement, market usage and law. Thus, a sum of Rs. 46,16,945/- is payable to the plaintiff by the defendants with costs of the suit and future

interest @ 24% per annum.

5. On service of summons of the suit on the defendants through substituted service by publication, the defendant No.2 – Mr. Vinod Aggarwal arrayed as proprietor of the defendant No.1 Date of Decision: 06.07.2012Date of Decision: 06.07.2012Date of Decision: 06.07.2012 M/s. Ashoka Enterprises – under which trade name he had been carrying on the business in yarn with the plaintiff, filed written statement. In the said written statement, apart from other objections taken by the defendant No.2, the main defence raised was that there was no privity of contract between the plaintiff and the defendant No.2. The defendant No.2 contended that he is not and never was the sole proprietor of defendant No.1. According to the defendant No.2, the firm M/s. Ashoka Enterprises does not belong to him. He had never received any supplies and, therefore, there was no question of making any payment to the plaintiff.

6. On the basis of the aforesaid pleadings, the following issues were framed on 27th October, 2005:-

"1) Whether the plaintiff is a partnership firm duly registered under the Partnership Act and Mr. R.K. Aggarwal, who has signed and verified the plaint, is competent to do so? OPP

2) Whether there is privity of contract between the plaintiff and the defendants, as mentioned in the preliminary objection no.1? OPP

3) Whether the plaintiff is entitled to the amount claimed in the suit? OPP

4) Whether the plaintiff is entitled to interest? If so, at what rate? OPP

5) Relief."

7. The plaintiff examined its witness Mr. R.K. Aggarwal as PW1 and the defendant No.2 Mr. Vinod Aggarwal appeared in the witness box as DW1 in support of his defence. The learned Single Judge by his judgment and order dated May 16, 2006 held that the plaintiff had failed to prove that the defendant No.2 was the sole proprietor of the defendant No.1; there was no privity of contract between the plaintiff and the

defendants; and hence the suit against the defendant No.1 was liable to fail. The suit was accordingly dismissed in view of the findings rendered by the learned Single Judge on Issue No.2.

8. At this juncture, in a separate proceeding in connection with the re-allocation of industrial units outside Delhi, the business of the plaintiff was ordered to be shut down under the orders of the Hon'ble Supreme Court and subsequently the works were re-allocated to Baddi (H.P.). In view of the findings of this Court and consequent dismissal of the suit, efforts were made to trace the records to determine the actual proprietor of the defendant No.1 firm. Ultimately, the plaintiff discovered some counterfoils of ST-1 Forms issued by the Sales Tax Authorities to M/s. Ashoka Enterprises (the defendant No.1) for onward transmission to the plaintiff and it was revealed that the actual proprietor of the firm was Mrs. Beena Aggarwal, wife of Mr. Vinod Aggarwal, the defendant No.2.

9. On discovery that the actual proprietor of defendant No.1 is the wife of Mr. Vinod Aggarwal, namely, Mrs. Beena Aggarwal, the plaintiff challenged the judgment and order of the learned Single Judge dated 16.05.2006 before the Division Bench of this Court in RFA(OS) No.95/2006 and filed along with the appeal an application for impleadment of Mrs. Beena Aggarwal and amendment of the plaint by substituting the name of Mrs. Beena Aggarwal as the proprietor of the proprietorship concern in place of Mr. Vinod Aggarwal.

10. By its order dated September 12, 2008, the Division Bench allowed the impleadment of Mrs. Beena Aggarwal in the capacity of defendant No.3, being a proper and necessary party and the consequent amendment of the plaint.

11. Thereafter, the Division Bench by its order dated 08.12.2009 remanded the matter to the Original Side of this Court, observing that as a sequel to the judgment dated 12.09.2008, Suit No.1857/1998 stood revived. The appellant (the plaintiff) was directed to file certified copies of the amended plaint, written statement to it, as well as the replication, i.e., the pleadings that had been filed in the appeal on the file of Suit No.1857/1998, i.e., the present suit.

12. After the remand of the instant suit to the learned Single Judge, the defendant No.3, who had till date not entered appearance despite service of notice upon her in the Appeal, was again sought to be served

at the address of the defendant Nos.1 and 2 at 319, Kucha Ghasi Ram, Chandni Chowk, Delhi, but having evaded service was served by way of publication. Despite service by publication on the defendants No.1 to 3, however, none of the defendants appeared in the ongoing proceedings in the suit. Therefore, by order dated October 07, 2010, defendant No.3 was proceeded ex parte and by order dated 12.12.2011 defendants No.1 and 2 were also proceeded ex parte.

13. Subsequent to the remand of the suit, the plaintiff filed an additional affidavit by way of evidence and additional documents including the copy of the Electoral Roll of the defendants No.2 and 3 to indicate that Smt. Beena Aggarwal (the defendant No.3) is the wife of Shri Vinod Aggarwal (the defendant No.2) and resides with all the family members at the given address of 319, Kucha Ghasi Ram, Chandni Chowk, Delhi and the business of the proprietorship concern (the defendant No.1) is also carried on from the said address.

14. The Court has heard Mr. Amit Sibal, the learned counsel for the plaintiff and with his assistance gone through the evidence on record, including the documentary evidence. Issue-wise findings of the Court are recorded below.

15. ISSUE No.1

"Whether the plaintiff is a partnership firm duly registered under the Partnership Act and Mr. R.K. Aggarwal, who has signed and verified the plaint, is competent to do so? OPP"

16. In order to prove this issue, the plaintiff has placed on record certified copy of the certificate of Registration of the Firm, duly registered by the Registrar of Firms at Calcutta as Ex.P1 and a copy of Power of Attorney in favour of Mr. R.K. Aggarwal as Ex.P2. There is no cross-examination of PW1 on this aspect. This issue is accordingly decided in favour of the plaintiff and against the defendants.

17. ISSUE No.2

"Whether there is privity of contract between the plaintiff and the defendants, as mentioned in the preliminary objection no.1? OPP"

18. As noted above, on account of the finding rendered by the

learned Single Judge that the plaintiff had failed to prove that the defendant No.2 was the sole proprietor of the defendant No.1, the suit against the defendant No.1 had been dismissed by the learned Single Judge by his order dated May 16, 2006. Subsequently, the plaintiff was permitted to amend the plaint by the orders of the Division Bench dated 12th September, 2008 passed in RFA(OS) No.95/2006. No written statement to the amended plaint has been filed by the defendant No.3, who had been newly added, to counter the averment of the plaintiff that the defendant No.3 was a sole proprietor of the defendant No.1 firm. In the written statement of the defendant No.2 to the amended plaint filed before the Division Bench, however, an objection was raised by the defendant No.2 that a fresh suit for recovery of money against the defendant No.3 was barred by limitation in view of the provisions of Sub-Rule 5 of Order I Rule 10, which read as under:-

> "Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

19. The case of the plaintiff, on the other hand, is that the Proviso to Section 21 of the Limitation Act, 1963 stipulates that where a Court is satisfied that the omission to include the defendant is due to a mistake made in good faith, it may direct that the suit as regards such defendant shall be deemed to have been instituted on an earlier date.

20. To be noted at this juncture that the Division Bench while allowing the plaintiff's application for adding the defendant No.3 as a party defendant to the suit and dealing with the issue of limitation raised by the defendant No.2 made the following pertinent observations:-

> "15. As far as the issue of limitation is concerned, we are of the opinion that this plea is certainly available to the newly proposed Defendant No.3. However, as mentioned above, if the Appellant's version in the amendment application is taken as true, then by virtue of Proviso to Section 21 of the Limitation Act, the suit as regard to the new defendant could be deemed to have been instituted on an earlier date. In our opinion, the issue of limitation in the present case is a mixed question of fact and law and the same would have to be decided at the stage of final determination of the present appeal."

21. On the aforesaid aspect of the matter, Mr. Amit Sibal, the learned counsel for the plaintiff contended that the original suit for recovery was filed within the period prescribed under the provisions of the Limitation Act. On the suit being dismissed on the limited issue of 'privity of contract', at the first instance of the discovery of the fact that the defendant No.2 was not the proprietor of the proprietorship concern and the real proprietor was the wife of the defendant No.3, Mrs. Beena Aggarwal, the plaintiff challenged the order dated 16.05.2006 before the Division Bench in RFA(OS) No.95/2006 and filed an application for amendment of the plaint by impleadment of the defendant No.3. The amendment to the plaint was purely formal and did not alter the cause of action on the basis of which the real lis was raised and the suit was filed. In such circumstances, the Proviso to Section 21 of the Limitation Act, 1963 would be squarely applicable in the instant case, as the omission to include defendant No.3 was due to bonafide mistake by the plaintiff.

22. In order to substantiate his aforesaid contention, Mr. Sibal placed reliance on a judgment of the Kerala High Court in **Gopalakrishnan Chettiar and Anr. vs. Annamma Devassye and Ors.,** AIR 1991 Kerala 72 and of the Supreme Court in **Karuppaswamy and Ors. vs. C. Ramamurthy,** (1993) 4 SCC 41. The facts in the case of **Gopalakrishnan Chettiar** (supra) relied upon by Mr. Sibal are identical with the facts in the present case. In the said case, a suit for damages was filed against the proprietor and employees of a photo studio. One of the employees was impleaded as the proprietor of the studio and later the real proprietor was impleaded by way of amendment. The Court opined that there was no omission in impleading the proprietor, but only a bonafide mis-description, which was subsequently rectified. In the circumstances, under the Proviso to Section 21 of the Act, the Court held that it has power, if it is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, to direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on an earlier date.

23. The Supreme Court in **Karuppaswamy's** case (supra) had examined the provisions of Section 21 of the Limitation Act, 1963 in juxtaposition with the provisions of Section 22 of the Indian Limitation Act, 1908. For the facility of ready reference, the said provisions are reproduced hereunder:-

Section 22 of Limitation Act, 1908

"Effect of substituting or adding new plaintiff on defendant. - Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. (2) Nothing in Sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

Section 21 of Limitation Act, 1963

"Effect of substituting or adding new plaintiff or defendant.–

(1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

24. In **Karuppaswamy** (supra), the question which arose was whether a suit filed against a dead person is non est and whether that dead person impleaded could be substituted by his heirs and legal representatives or they could be added as parties to the suit. On examination of the sweep of the relevant provisions of the Act governing the subject, unamended and amended, the Supreme Court concluded as follows:-

"4. A comparative reading of the proviso to sub-section (1) shows that its addition has made all the difference. It is also clear that the proviso has appeared to permit correction of errors which have been committed due to a mistake made in good faith but only when the court permits correction of such mistake. **In**

that event its effect is not to begin from the date on which the application for the purpose was made, or from the date of permission but from the date of the suit, deeming it to have been correctly instituted on an earlier date than the date of making the application. The proviso to sub-section (1) of Section 21 of the Act is obviously in line with the spirit and thought of some other provisions in Part III of the Act such as Section 14 providing exclusion of time of proceeding bona fide in court without jurisdiction, when computing the period of limitation for any suit, and Section 17(1) providing a different period of Limitation starting when discovering a fraud or mistake instead of the commission of fraud or mistake. While invoking the beneficient proviso to sub-section (1) of Section 21 of the Act an averment that a mistake was made in good faith by impleading a dead defendant in the suit should be made and the court must on proof be satisfied that the motion to include the right defendant by substitution or addition was just and proper, the mistake having occurred in good faith. The court's satisfaction alone breathes life in the suit."

25. It is the contention of Mr. Sibal that in the present case, the defendant No.2 – Mr. Vinod Aggarwal was arrayed by the plaintiff as the sole proprietor of the defendant No.1, M/s. Ashoka Enterprises in view of the fact that the defendant No.2 was conducting the day-to-day affairs of the the defendant No.1 and had regular business dealings with the plaintiff and its officials spread over a span of 12 to 13 years. In these circumstances, since Mr. Vinod Aggarwal through his acts and conduct had all along represented and held himself out to be the proprietor of the defendant No.1 M/s. Ashoka Enterprises, the plaintiff had no reason to believe that Mr. Vinod Aggarwal was not the proprietor of the said proprietorship concern. The factum of Mr. Vinod Aggarwal not being a proprietor of the defendant No.1 proprietorship concern was never disclosed to the plaintiff. Thus, based on a bonafide belief, the plaintiff had impleaded Mr. Vinod Aggarwal as defendant No.2 in the array of parties, in the capacity of proprietor of defendant No.1.

26. Mr. Sibal highlighted that since the very beginning, i.e., from the time the suit for recovery was filed by the plaintiff, the defendant No.2 in the context of proprietorship of the defendant No.1 firm had

been trying to mislead the Court, and had even made false statements in the Court when his evidence was being recorded. Thus, the defendant No.2 stated in his cross-examination dated 3rd May, 2006 that the name of his wife was "Vani Aggarwal", whereas in fact it is Beena Aggarwal. Mr. Sibal placed reliance on a copy of the Electoral Roll to submit that the said document conclusively shows that it is Smt. Beena Aggarwal who is the wife of Shri Vinod Aggarwal and is residing with all his other family members at 319, Kucha Ghasi Ram, Chandni Chowk, Delhi. The defendant No.1 firm also used the same address and all notices to the defendants Nos.1 to 3 were issued and sent to the same address.

27. Mr. Sibal further contended that the defendant No.2 was conscious of the fact that he was deliberately suppressing facts within his knowledge which he ought to have disclosed to this Court. In the written statement filed by him in response to the averment that the defendant No.2 was the proprietor of the defendant No.1 proprietorship concern, he simply denied that he was the proprietor of the defendant No.1. However, he did not disclose that his wife Smt. Beena Aggarwal was the actual proprietor of the defendant No.1 proprietorship concern. Thus, the reply given by the defendant No.1 to paragraph 2 of the plaint was evasive and against the mandate provided in Order VIII Rule 4 of the Code of Civil Procedure, which requires the defendant to state the precise facts which are within his knowledge.

28. Having considered the aforesaid contentions of Mr. Sibal, the Court is of the opinion that the defendant No.2 and the defendant No.3, who are husband and wife, have acted in concert with one another to avoid any liability being fastened upon them for the transactions with the plaintiff for which they owed money to the plaintiff. The plaintiff bonafide believed the defendant No.2 to be the sole proprietor of the defendant No.1 firm and on coming to know of the fact that it was the wife of the defendant No.2 who was in fact the proprietor, the plaintiff without any delay moved an application for amendment of the plaint. In such circumstances, the omission to impleaded defendant No.3 clearly was a bonafide mistake and in such circumstances the Proviso to Section 21 of the Limitation Act, 1963 (which Proviso did not exist in the Limitation Act of 1908) is squarely applicable to the facts of the present case. The instant suit, therefore, must be deemed to have been instituted on the date of the original institution of the suit and cannot be said to be barred by limitation.

29. Issue No.2 is accordingly answered in the affirmative in favour of the plaintiff and against the defendants.

30. <u>ISSUE NO.3, ISSUE NO.4 and ISSUE NO.5</u>

"3. Whether the plaintiff is entitled to the amount claimed in the suit? OPP"

"4. Whether the plaintiff is entitled to interest? If so, at what rate? OPP"

"5. Relief."

Issue Nos. 3, 4 and 5 are being dealt with together for the sake of convenience and in order to avoid prolixity.

31. In order to substantiate its case as delineated in the plaint, the plaintiff adduced the evidence of PW1 Shri R.K. Aggarwal, who, in addition to the affidavit by way of evidence tendered by him on 20.02.2006 (Ex.PW1/A), relied upon his additional affidavit Ex.PW1/B and proved on record documents Ex.P1 to Ex.P78. In his affidavit Ex.PW1/A , PW1 Shri R.K. Aggarwal reiterated the contents of the plaint and categorically stated that the outstanding bills of the plaintiff totalling Rs. 33,25,896/- remained due and payable to the plaintiff from the defendants. The defendants had made late payment of the bills referred to in paragraph 7 of the plaint, in respect whereof the plaintiff firm had raised 15 debit notes for a total sum of Rs. 93,726/- on account of interest for the late payments of the said bills. Documents **Ex.P3 to Ex.P36** were proved on record by the witness, being invoices/bills for the goods purchased by the defendant No.1 which were debited to the ledger account of the defendant No.1 during the period intervening 19.01.1996 to 22.03.1996. He also proved on record documents **Ex.P37 to Ex.P49**, being carbon copies of the debit notes raised on the defendant No.1 and debited to their account on account of interest for late payment of bills/invoices as detailed in the plaint. The original contracts **Ex.P50 to Ex.P61**, the list of debit notes Ex.P62 and the list of unpaid bills **Ex.P63**, were also proved on record by the witness. The true copy of the Ledger for the period 01.04.1995 to 31.03.1996 was proved as **Ex.P64**, the legal notice issued to the defendants through counsel as Ex.P65, postal receipts as **Ex.P66** and AD Card as **Ex.P67**.

32. In his additional affidavit by way of evidence (Ex.PW1/B), PW1 Shri R.K. Aggarwal categorically stated that defendant No.3 was the proprietor of the defendant No.1 firm. The defendant No.2 Mr. Vinod Aggarwal was the husband of the defendant No.3, who had never disclosed the fact that he was not the proprietor of the defendant No.1 firm during the course of his business dealings with the plaintiff spread over a span of 12 to 13 years. He stated that in the year 2000 when the plaintiff firm was re-located to Baddi (H.P.), ST-1 Forms issued by the Sales Tax Authorities to the defendant No.1 for onward submission to the plaintiff were traced out from which it was revealed that actually the proprietor of the defendant No.1 firm was Beena Aggarwal (defendant No.3). The original copies of the said ST-1 Forms at Serial Nos.2JA 020957 to 2JA 020962; 2JA 020968, 2JA 020969, 2JA 020972 and 2JA 020974 were **Ex.P68 to Ex.P77**. The copy of the Electoral Roll in which it is clearly mentioned that Smt. Beena Aggarwal is the wife of Shri Vinod Aggarwal and residing with him and other family members at 319, Kucha Ghasi Ram, Chandni Chowk, Delhi was **Ex.P78**.

33. Although PW1 was extensively cross-examined on his affidavit by way of evidence tendered by him on 20.02.2006 (Ex.PW1/A), nothing worthwhile emerged from his said cross-examination to discredit the testimony of the witness in any manner. The averments made by him in his additional affidavit by way of evidence Ex.PW1/B, tendered in evidence by him after the remand of the suit by the Division Bench to this Court, however remained unchallenged and unrebutted on record.

34. Subsequent to the remand of the case, no evidence in defence was adduced by any of the defendants, who, as stated above, were proceeded *ex parte* in default of appearance. The inevitable result is that the testimony of PW1 Shri R.K. Aggarwal must prevail and be accepted as true and correct.

35. From the aforesaid, it is amply clear that there are three components to the claim of the plaintiff. The first component relates to bills raised on the defendants for the purchase of yarn subsequent to 09.01.1996 which have not been paid for. The plaintiff has adduced evidence to prove the said unpaid bills (Ex.P3 to Ex.P36) and the amounts outstanding against each of the said bills, totalling Rs. 33,25,896/-. The details of the said bills are as follows:-

	BILL NO.	DATE	AMOUNT Rs. P.
1	Cy 3735	19.01.96	2,73,136.00
2	Cy 3834	30.01.96	37,619.00
3	Cy 3892	20.02.96	37,619.00
4	Cy 3898	03.02.96	36,418.00
5	Cy 3904	03.02.96	49,165.00
6	Cy 3905	03.02.96	94,347.00
7	MMY 2795	03.02.96	63,032.00
8	MMY 2796	03.02.96	90,045.00
9	Cy 3920	05.02.96	37,619.00
10	Cy 3954	08.02.96	81,041.00
11	Cy 3962	08.02.96	20,985.00
12	MMY 2860	09.01.96	90,045.00
13	Cy 3976	09.01.96	75,239.00
14	Cy 3977	09.01.96	36,418.00
15	Cy 4039	16.02.96	1,40,470.00
16	Cy 4057	19.02.96	94,048.00
17	Cy 4058	19.02.96	75,638.00
18	MMY 2985	22.02.96	90,045.00
19	MMY 2986	22.02.96	90,045.00
20	Cy 4097	22.02.96	60,028.00
21	Cy 4098	22.02.96	54,027.00
22	Cy 4099	22.02.96	1,23,063.00
23	Cy 4121	24.02.96	1,39,471.00
24	Cy 4141	27.02.96	62,431.00
25	MMY 3081	02.03.96	98,212.00
26	Cy 4184	02.03.96	1,24,862.00
27	Cy 4205	07.03.96	1,12,856.00
28	Cy 4279	14.03.96	2,33,076.00
29	Cy 4284	14.03.96	54,027.00
30	Cy 4306	16.03.96	54,027.00

31	Cy 4307	16.03.96	37,619.00
32	Cy 4319	16.03.96	1,51,276.00
33	Cy 4333	16.03.96	1,96,450.00
34	Cy 4339	18.03.96	1,15,559.00
35	Cy 4385	22.03.96	1,96,938.00
			Rs. 33,25,896.00

36. The second component of the claim of the plaintiff pertains to the interest payable on the aforesaid amount of ' 33,25,896/- (Rupees Thirty Three Lacs Twenty Five Thousand Eight Hundred and Ninety Six Only) @ 24% as per agreement, market usage and law. The following debits notes (Ex.P-37 to Ex.P49) for interest on account of late payment of the bills referred to hereinabove were raised on the defendants as per details given hereunder:-

	Debit Note No.	Date	Amount Rs. P	Relating to items referred to in para 9 of the plaint.
1	YD 967	5.1.96	3745.00	1 & 2
2	YD977	8.1.96	7014.00	3 to 8
3	YD991	13.1.96	3137.00	9 to 11
4	YD998	15.1.96	3143.00	12 to 14
5	YD1009	18.1.96	6952.00	15 to 18
6	YD1023	22.1.96	2346.00	19 to 20
7	YD1039	29.1.96	7680.00	21 to 25
8	YD1045	31.1.96	2757.00	26 to 27
9	YD1058	5.2.96	3957.00	28 to 29
10	YD1098	19.2.96	4736.00	30
11	YD1104	20.2.96	4990.00	31

12	YD1129	27.2.96	6865.00	32 & 33
13	YD1146	6.3.96	6471.00	34 to 36
14	YD1172	15.3.96	14744.00	37 to 41
15	YD1181	18.3.96	15361.00	42 to 44
			Total	Rs. 93,916.00
			Less Excess	Rs. 190.00

Total due on account of interest for late payment of Bills thus amounts to Rs. 93,726/-.

37. The third component of the claim of the plaintiff comprises of the amounts due to the plaintiff from the defendants on account of late payment of the bills as borne out from the debit notes (Ex.P50 to Ex.P61), details whereof are as follows:-

	Bill No.	Date of Bill	Amount Rs. P.	Due Date	Date of Payment	Delay No. of day
1	Cy 3153	4.12.95	56,028.00	11.12.95	4.1.956	23
2	Cy 3234 & 3235	6.12.95	2,09,855.00	13.12.95	4.1.96	21
3	Cy 3236	06.12.95	78,037.00	21.12.95	6.1.96	16
4	Cy 3268	8.12.95	60,028.00	23.12.95	6.1.96	14
5	Cy 3269 Cy 3271	8.12.95	1,10,550.00	15.12.95	6.1.96	22
6	Cy 3293 Cy 3294	11.12.95	2,44,223.00	18.12.95	6.1.96	19
7	Cy 3343	15.12.95	33,617.00	22.12.95	6.01.96	15
8	Cy 3348	16.12.95	71,617.00	23.12.95	6.1.96	14

9	Cy 3349	16.12.95	1,20,057.00	31.12.95	12.1.96	12
10	Cy 3352	16.12.95	98,450.00	23.12.95	12.1.96	20
11	Cy 3361 Cy 3367	15.12.95	75,658.00	25.12.95	12.1.96	18
12	Cy 3384	19.12.95	1,26,363.00	26.12.95	12.1.96	18
13	Cy 3393 Cy 3394 Cy 3396	20.12.95	1,27,662.00	27.12.95	13.1.96	17
14	Cy 3421	22.11.95	22,411.00	29.12.95	13.1.96	15
15	Cy 3360	18.12.95	1,43,212.00	25.12.95	19.1.96	23
16	Cy 2422	22.12.95	1,26,138.00	29.12.95	19.1.96	21
17	3441	23.12.95	76,838.00	7.1.96	19.1.96	12
18	3439 3442	22.12.95	1,85,375.00	30.12.95	19.1.96	20
19	Cy 3477	26.12.95	1,48,463.00	2.1.96	20.1.96	18
20	Cy 3503	28.12.95	56,028.00	4.1.96	20.1.96	16
21	Cy 3445	23.12.95	63,070.00	30.12.95	27.1.96	28
22	Cy 3448	23.12.95	17,109.00	7.1.96	27.1.96	20
23	Cy 3504	28.12.95	2,06,026.00	4.1.96	27.1.96	23
24	Cy 3523 3528	1.1.96	65,718.00	16.1.96	27.1.96	11
25	Cy 3521 3522 3527	1.1.96	2,16,391.00	8.1.96	27.1.96	19
26	Cy 35.67 35.68	5.1.96	1,98,295.00	12.1.96	30.1.96	18
27	Cy 3570	5.1.96	62,351.00	20.1.96	30.1.96	10

	3572					
28	Cy 3524	1.1.96	2,40,113.00	16.1.96	3.1.96	18
29	Cy 3595	6.2.96	82,042.00	13.1.96	3.2.96	21
30	Cy 3555	3.1.96	2,40,113.00	18.1.96	17.02.96	30
31	Cy 3584	6.1.96	2,05,105.00	13.01.96	19.2.96	37
32	Cy 3581	6.1.96	82,042.00	13.1.96	26.2.96	44
33	Cy 3661 3664	13.1.96	1,84,594.00	20.1.96	26.2.96	37
34	Cy 3586	6.1.96	32,416.00	13.1.96	2.3.96	49
35	Cy 3660	13.1.96	1,08,054.00	20.1.96	2.3.96	42
36	Cy 3662	121.1.96	1,09,295.00	28.1.96	2.3.96	34
37	Cy 3665 3667	13.1.96	2,31,117.00	20.1.96	14.3.96	54
38	Cy 3744 3745	20.1.96	92,847.00	27.1.96	14.3.96	47
39	Cy 3748	20.1.96	1,03,792.00	4.2.96	14.3.96	39
40	Cy 2504	13.1.96	9,0005.00	13.2.96	14.3.96	30
41	Cy 2604	15.1.96	45,023.00	15.2.96	14.3.96	28
42	Cy 3813 to 3815	27.1.96	3,33,768.00	3.2.96	16.3.96	42
43	Cy 3822	29.1.96	1,93,065.00	5.2.96	16.3.96	40
44	Cy 2725	27.1.96	90,045.00	27.2.96	16.3.96	18

38. The plaintiff has also placed on record a chart setting out the corresponding bill number for each certificate and for the ease of reference the copy of each Form ST-1 signed by the defendant No.3 Mrs. Beena Aggarwal in the capacity of the proprietor of defendant No.1, Ashoka

Enterprises, which is as follows:-

Sl.No.	Certificate no.	For Bills
1.	21 A 020973	3735
2	21 A 020975	3334, 2795, 2796
3	21 A 020976	3962, 3954, 2860, 3905, 3905, 3898, 3892
4	21 A 020977	4205, 4279, 4039
5	21A 020978	4099, 4098, 2986, 2985, 4057, 3920
6	21 A 020979	4333, 3976, 4307, 4306, 4284, 4058
7	21 A 020980	4184, 4141, 4121, 4097, 3081
8	21 A 020981	3977, 4385, 4339, 4319

39. The aforesaid evidence adduced by the plaintiff is unrebutted and unchallenged on record. The inevitable conclusion is that it must be held that a sum of ' 33,25,896/- (Rupees Thirty Three Lacs Twenty Five Thousand Eight Hundred and Ninety Six Only) is due to the plaintiff from the defendants on account of yarn purchased as per bills Ex.P3 to Ex.P36; Rs. 93,726/- (Rupees Ninety Three Thousand Seven Hundred and Twenty Six Only) on account of debit notes raised towards interest for late payment of the bill amounts Ex.P37 to Ex.P49 and Rs. 11,97,323/- (Rupees Eleven Lacs Ninety Seven Thousand three Hundred and Twenty Three Only) on account of interest upto the date of filing of the suit on the aforesaid amount of Rs. 33,25,896/-, i.e., in all, a total sum of Rs. 46,16,945/- (Rupees Forty Six Lac Sixteen Thousand Nine Hundred and Forty Five Only).

40. The suit is therefore decreed by passing a decree in the sum of Rs. 46,16,945/- (Forty Six Lac Sixteen Thousand Nine Hundred and Forty Five). Registry is directed to draw up a decree sheet accordingly.

41. CS(OS) 1857/1998 and IA No. 1337/2010 stand disposed of in the above terms.

ILR (2012) VI DELHI 612
CM (M)

DR. ASHOK JOLLY **....PETITIONER**

VERSUS

SHASHI PRABHA **....RESPONDENT**

(M.L. MEHTA, J.)

CM (M) NO. : 770/2012 **DATE OF DECISION: 11.07.2012**

Delhi Rent Control Act, 1958—Section 14 (1)(e)—Code of Civil Procedure, 1908—Order VI Rule 17—After completion of pleadings on the application seeking leave to defend the proceedings under Section 14 (1)(e) of the Act, petitioner tenant filed amendment application seeking to bring on record subsequent developments to the effect that respondent landlord had filed two eviction petitions against tenants of two other shops situated at the ground floor of the property adjacent to the suit shop, which were allowed and now respondent landlord was in possession of those two shops, to meet his requirements—ARC dismissed the application—Challenged, held in para 18(a) of the petition itself, the respondent landlord had clearly pleaded that he required all the three shops and that he was filing eviction petition against the other two tenants as well, as such the outcome of those two eviction petitions cannot be termed as subsequent development—Impugned order upheld.

Order 6 Rule 17, CPC provides the opportunity to the tenant/defendant to amend the application for leave to defend after obtaining prior permission of Court if any subsequent development takes place which is essential to bring on record for the adjudication of the eviction petition.

From the perusal of the eviction petition, it is evident that in Para 18 (a), the respondent has mentioned in unequivocal terms that he requires all the three shops situated on the ground floor of the suit property for the business of his son. It was also mentioned by the respondent that he is also filing the eviction petition against the two other tenants occupying the adjacent premises. Since this fact was already disclosed by the respondent in the eviction petition, the outcome of the other two eviction petitions does not qualify to be termed as a subsequent development which was not in the notice of the court previously. From the inception of the eviction petition, the respondent has maintained his stand that he is in need of all the three shops on the ground floor of his property. Now that, he has been granted eviction decree in respect of the other two shops, this fact does not contain any information that could lend weight to the petitioner's case or could adversely affect the respondent's stand. In the facts and circumstances of the case, I do not consider that the possession of the other two shops on the ground floor of the suit premises reverting to the respondent is an event which could merit grant of leave to amend the application filed under Section 25-B of DRCA. **(Para 7)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Ratan K. Singh, with Mr. Nikhilesh Krishnan, Mr. Gaurav Dudeja, Mr. Suraj Prakash, Mr. Sarad Sunny Advocates.

FOR THE RESPONDENTS : Mr. R.S. Sahni with respondent in person.

CASE REFERRED TO:

1. *Ved Prakash and Anr.* vs. *Om Prakash Jain*, CM (M) 759/2009.

RESULT: Petition dismissed.

M.L. MEHTA, J. (Oral)

1. The present petition has been filed under Article 227 of the Constitution of India challenging the order dated 24.05.2012 passed by the ld. ARC, whereby the application filed by the petitioner under Order 6 Rule 17 of the Code of Civil procedure (here in after referred to as CPC) was dismissed.

2. The brief factual matrix of the case is that the respondent is an owner of entire property No.D-62, Kirti Nagar, Delhi comprising of ground floor, first floor and second floor. The ground floor has three rooms, one of which is tenanted to the petitioner from where he runs a clinic. The respondent filed an eviction petition under Section 14 (1) (e) read with Section 25-B of the Delhi Rent Control Act (DRCA) against the petitioner in respect of the said shop, alleging bonafide requirement of the shop for enabling her son to setup his business in the said shop. Upon receiving summons, the petitioner filed an application praying for grant of leave to defend and raised various objections against the eviction petition. Consequently, reply to the application for grant of leave to defend was filed by the respondent.

3. After filing the rejoinder to the application, the petitioner filed the application for amendment of the application for leave to defend, submitting that he requires bringing on record subsequent developments which are necessary for the disposal of the eviction petition. It was submitted by him that the respondent had filed two eviction petitions against the tenants of the two other shops situated at the ground floor of the property, adjacent to the shop occupied by him, which were allowed and the respondent was now in possession of those two shops which would meet his requirements. The said application was dismissed by the ld.ARC rejecting the submission of the petitioner. Hence, the present petition.

4. The petitioner has reiterated the contentions that were put up by him before the learned ARC. The main thrust of his arguments is that as the two shops on the ground floor of the suit premises are now available to the respondent, the requirement as alleged in the eviction petition stands fulfilled and hence, the petitioner should not be forced to vacate the shop in his occupancy. Reliance has been placed on **Ved Prakash and Anr. Vs. Om Prakash Jain,** CM (M) 759/2009 decided on 07.08.2009 to emphasize that if the amendment application had been filed

within the stipulated time then the applicant should be allowed to bring on record subsequent developments.

5. On the other hand, the respondent has contended that in the eviction petition filed by him, he had already pleaded the requirement of all the three shops situated on the ground floor of the suit premises and hence, the subsequent possession of the other two shops does not meet his requirements entirely and this event can certainly be not termed as one which was required to be brought on record or be called a subsequent event.

6. I have heard the rival submission of the parties and perused the record.

7. Order 6 Rule 17, CPC provides the opportunity to the tenant/ defendant to amend the application for leave to defend after obtaining prior permission of Court if any subsequent development takes place which is essential to bring on record for the adjudication of the eviction petition. From the perusal of the eviction petition, it is evident that in Para 18 (a), the respondent has mentioned in unequivocal terms that he requires all the three shops situated on the ground floor of the suit property for the business of his son. It was also mentioned by the respondent that he is also filing the eviction petition against the two other tenants occupying the adjacent premises. Since this fact was already disclosed by the respondent in the eviction petition, the outcome of the other two eviction petitions does not qualify to be termed as a subsequent development which was not in the notice of the court previously. From the inception of the eviction petition, the respondent has maintained his stand that he is in need of all the three shops on the ground floor of his property. Now that, he has been granted eviction decree in respect of the other two shops, this fact does not contain any information that could lend weight to the petitioner's case or could adversely affect the respondent's stand. In the facts and circumstances of the case, I do not consider that the possession of the other two shops on the ground floor of the suit premises reverting to the respondent is an event which could merit grant of leave to amend the application filed under Section 25-B of DRCA.

8. The ratio laid down in **Ved Prakash and Anr.** (supra) is that amendment because of subsequent development has to be done within stipulated time with prior permission of court. This settled legal position

is not disputed, but in the present case, the question before us is as to whether the development as alleged by the petitioner is subsequent and not in prior notice of the court or not. Consequently, the judgment of **Ved Prakash** (supra) is not applicable to the present case.

9. In view of the above discussion, I find no infirmity or illegality in the impugned order of the learned ARC.

10. The petition is hereby dismissed.

ILR (2012) VI DELHI 616
LPA

TOPS SECURITY LTD. ….APPELLANT

VERSUS

SUBHASH CHANDER JHA ….RESPONDENT

(BADAR DURREZ AHMED & SIDDHARTH MRIDUL, JJ.)

LPA NO. : 1044/2011 & 1045/2011 **DATE OF DECISION: 16.07.2012**

Industrial Disputes Act, 1947—Section 33(2)(b), 33A—Whether non compliance of the provisions of S. 33(2)(b) would ipso facto mean that an order of dismissal passed by the employer, would be ineffective—Whether the employee in such a circumstance be required to file an application u/s 33A for having the said order of dismissal being declared as void ab-initio Held—if mandatory conditions of S. 33(2)(b) are contravened, the order of dismissal would have no effect in law—If this happens it is not at all necessary for an employee to file a complaint u/s 33A to have the order of dismissal/termination set aside—Employee may file complaint u/s 33A seeking relief of

reinstatement and back wages—Only thing that needs to be done by the Tribunal in such a case is to direct that the employee be given a appropriate relief by way of reinstatement and back wages—The Tribunal is not required to go into the question of whether the dismissal was good or bad, on merits.

It is, therefore, abundantly clear that the employee may file a complaint with regard to the relief that is required to be given to the employee in respect of the contravention of the provisions of Section 33. In other words, where no application seeking an approval under Section 33(2)(b) of the said Act is made by the employer, the employee may yet make a complaint under Section 33A seeking relief of reinstatement and payment of back wages. It is that dispute which will be taken up by the Industrial Tribunal which will obviously go into the question as to whether there has been or there has not been compliance with the mandatory provisions of Section 33(2)(b) of the said Act. Once the Tribunal comes to the conclusion that the mandatory provisions have been contravened, the only thing that needs to be done by the Tribunal is to direct that the employee be given an appropriate relief by way of reinstatement and by making an order with regard to back wages. The Tribunal is not required to go into the question of as to whether the dismissal was good or bad, on merits. **(Para 21)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. K.C Dubey And Mr. Atul Tripathi, Advocates.

FOR THE RESPONDENTS : Mr. Ashwini Kumar Sakhija and Mr. Prabhakar, Advocates.

CASE REFERRED TO:

1. *Tops Security Limited* vs. *Subhash Chander Jha* WP(C) No.6228/2011.

2. *Jaipur Z.S.B.Bank Ltd.* vs. *Shri Ram Gopal Sharma and Anr* : AIR 2002 Supreme Court 643.

3. *The Hindustan General Electrical Corporation Ltd.* vs. *Bishwanath Prasad And Another* :1971 (2) SCC 605.

4. *Punjab National Bank Ltd.* vs. *All India Punjab National Bank Employees' Federation and Another* :AIR 1960 SC 160.

5. *Batuk K. Vyas* vs. *Surat Borough Municipality and others* :1952 II L.L.J. 178.

RESULT: Appeals dismissed.

BADAR DURREZ AHMED, J. (ORAL)

1. These two appeals raise identical issues and involve virtually similar facts and are, therefore, being disposed of together. The appeals arises out of WP(C) No.6228/2011 and WP(C) No.6236/2011 in respect of which orders were passed by the learned Single Judge on 26th August, 2011 dismissing both the writ petitions filed on behalf of the appellant herein. For the sake of convenience, we shall refer only to the facts of LPA No.1044/2011which arises out of WP(C) No.6228/2011 (**Tops Security Limited v. Subhash Chander Jha**).

2. The point in issue is whether the non-compliance of the provisions of Section 33(2)(b) of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the said Act') would ipso facto mean that an order of dismissal passed by the employer would be ineffective? The additional question is whether the employee, in such a circumstance, would be required to file an application under Section 33A of the said Act for having the said order of dismissal being declared as void ab initio?

3. The facts of LPA No.1044/2011are that an industrial dispute namely ID No.43/2008 was pending before the Industrial Tribunal and had arisen out of reference order of F.24(1154)/06/Lab./2547-51 dated 28.02.2008 between the said workman and the management of Tops Security Limited. During the pendency of the said industrial dispute, the services of the workman were terminated w.e.f. 26th November, 2008. It is an admitted position that the provisions of Section 33(2)(b) of the said Act had not been complied with by the employer. This is so because the wages for one month which were required to be paid had not been

paid at the time of discharge/dismissal but were only tendered much later. Apart from this, the employer had also not made an application to the Industrial Tribunal before which the said industrial dispute was pending for approval of the action of termination taken by the employer. Thus, on both counts, that is, on the ground of non-payment of one month's wages at the time of alleged termination and, secondly, because of the fact that no approval was sought from the Industrial Tribunal by the employer, the provisions of Section 33(2)(b) of the said Act had, admittedly, been contravened.

4. Since the mandatory provisions of Section 33(2)(b) of the said Act had been violated, the workman through his counsel, sent a demand notice dated 10th December, 2008 seeking reinstatement with full back wages. However, the management did not reply to the notice nor did it accept the demand made by the workman. It is in these circumstances that the workman, left with no other alternative, filed the complaint under Section 33A read with Section 33(2)(b) of the said Act before the Industrial Tribunal Number 1, Karkardooma Courts, Delhi where its earlier industrial dispute was pending. We may point out that although the workman had taken the point that his dismissal from service was itself in violation of the various principles such as non-issue of charge-sheet, not holding of any domestic enquiry etc, the workman had, alternatively, taken the plea that the management had not complied with the provisions of Section 33(2)(b) of the said Act and therefore, the termination had become void ab initio or, in other words, the termination has not at all taken effect. Before the said Industrial Tribunal, the workman had taken support from the decision of the Supreme Court in the case of **Jaipur Z.S.B.Bank Ltd. v. Shri Ram Gopal Sharma and Anr** : AIR 2002 Supreme Court 643.

5. Thereafter, the Industrial Tribunal considered the complaint filed under Section 33A of the said Act and came to the conclusion that the management had, indeed, contravened the provisions of Section 33 (2)(b) of the said Act and, as a consequence, without going into the merits of the termination of service itself, on account of the fact of contravention of the mandatory provisions of Section 33(2)(b) of the said Act, directed that the workman be reinstated with 50% back wages from the date of his dismissal from service.

6. Being aggrieved by the said award dated 22nd March, 2011 passed by the said Industrial Tribunal, the appellant herein filed a Writ Petition being WP (C) No. 6228/2011. A similar writ petition was filed in respect of the Industrial Tribunal Award dated 23rd February, 2011 which resulted in filing of the other writ petition namely WP (C) No. 6236/2011 which has given rise to LPA No. 1045/2011.

7. By virtue of the impugned orders dated 26th August, 2011 in both the writ petitions, the learned Single Judge of this Court dismissed both writ petitions and, after following the decision of the Supreme Court in the case of **Jaipur Z.S.B.V. Bank** (Supra), came to the conclusion that there was no requirement for the Tribunal to direct the management to prove its conduct in a Section 33A proceedings after it was found that the mandatory requirement of Section 33(2)(b) of the said Act had not been complied with.

8. According to the learned counsel for the appellant, once an application had been filed under Section 33A of the said Act then it had to be treated as a full-fledged industrial dispute and the same had to be adjudicated as if it was a dispute referred to or pending before it in accordance with the provisions of the said Act and that a full-fledged award ought to have been passed and presented to the appropriate Government. According to the learned counsel for the appellant, since the Industrial Tribunal only examined the aspect as to whether there was compliance with the provisions of Section 33(2)(b) of the said Act and did not further examine the merits behind the termination order, the requirement of Section 33A had not been met as there was no full-fledged adjudication and, therefore, the awards passed by the Industrial Tribunal were liable to set-aside. The learned counsel for the appellant submitted that there was a distinction between the violation of the provisions of Section 33(2) (b) of the said Act and an adjudication under Section 33A and this had been clearly brought out by the decision of the Division Bench of the Bombay High Court in the case of **Batuk K. Vyas v. Surat Borough Municipality and others** :1952 II L.L.J. 178 as also by the decision of the Supreme Court in the case of **Punjab National Bank Ltd. v. All India Punjab National Bank Employees' Federation and Another** :AIR 1960 SC 160 and **The Hindustan General Electrical Corporation Ltd. v. Bishwanath Prasad And Another** :1971 (2) SCC 605. He submitted that under Section 33A, the substantive dispute with

regard to the dismissal/termination had to be adjudicated by the Industrial Tribunal. It was not sufficient for the Industrial Tribunal to only come to the conclusion that the provisions of Section 33(2)(b) of the said Act had been contravened but, to also enter upon an adjudication with regard to the substantive dispute qua dismissal/termination.

9. The learned counsel appearing on behalf of the workmen, in these appeals, submitted that the issues stood closed by virtue of the decision of a Constitution Bench of the Supreme Court in the case of **Jaipur Z.S.B.V. Bank** (Supra). It was contended by the learned counsel for the respondents that once there was a violation of the provisions of Section 33(2)(b) of the said Act, it would amount to the termination not taking affect at all. In other words, it would have to be construed as if the termination order had not been passed at all. That being the position, there was no requirement for a further adjudication to declare the termination as being null and void. According to the learned counsel for the respondent, the non-compliance of the mandatory provisions of Section 33(2)(b) of the said Act, by itself, would render the termination void ab initio. He also submitted that the decision of the Constitution Bench of the Supreme Court in the case of **Jaipur Z.S.B.V. Bank** (Supra) was clear on this point.

10. The relevant provisions of Section 33 and 33A are set out here in below:-

> "33 Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings:-
>
> (1) xxxx xxxx xxxx xxxx
>
> (2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with standing orders applicable to a workman concerned in such dispute or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman-
>
> (a) Alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

> (b) For any misconduct not connected with the dispute, discharge or punish, whether by dismissal
>
> or otherwise, that workman:
>
> Provided that no such workman shall be discharged of dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.
>
> xxxx xxxx xxxx xxxx xxxx"
>
> **"33A Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceeding:-**Where an employer contravenes the provisions of section 33 during the pendency of proceedings before a conciliation officer, Board, an arbitrator, Labour court, Tribunal or National Tribunal any employee aggrieved by such contravention, may make a complaint in writing, in the prescribed manner,-
>
> (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and
>
> (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly."

11. A plain reading of Section 33(2) (b) would suggest that during the pendency of any proceeding in respect of an industrial dispute, the employer has been permitted under certain circumstances, to discharge or punish, whether by dismissal or otherwise, the workman with whom there is a pending dispute. However, there is a proviso attached to the same. The said proviso requires that no such workman shall be discharged

or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

12. As pointed out earlier, it is an admitted position that the conditions stipulated in the said proviso have not been complied with by the appellants herein. In other words, the wages for one month had not been paid along with the termination order nor did the employer (i.e. appellant herein) make any application seeking approval of the action taken by it, before the Industrial Tribunal, where another industrial dispute was pending between the parties. There is obviously no question of any approval having been granted or refused by the Industrial Tribunal inasmuch as the appellants did not even seek any such approval of the Industrial Tribunal by making an application.

13. Section 33A which has been set out above makes it clear that where an employer contravenes the provisions of Section 33, which also include the mandatory provisions of Section 33(2) (b) of the said Act, in the course of the pendency of proceedings before the Industrial Tribunal, the aggrieved employee may make complaint in writing to the Industrial Tribunal and on the receipt of such a complaint, the said Tribunal is required to adjudicate the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of the said Act and is required to submit its award to the appropriate Government. The provisions of the said Act as would be applicable for an industrial dispute would apply accordingly. In other words, Section 33A provides a short-cut or a summary procedure insofar as an aggrieved employee is concerned. Instead of the employee taking the normal route of Section10 of the said Act, requiring the appropriate Government to make a reference, the employee can straightaway file a complaint before the Industrial Tribunal before which there is another pending industrial dispute between him and the employer. When such a complaint is made, the Industrial Tribunal is to treat it as a dispute referred to it or pending before it and is required to adjudicate upon the same. The question that arises is-what does the Industrial Tribunal adjudicate upon? In the backdrop of the factual position of the present case, does the Industrial Tribunal adjudicate upon the merits of the dismissal/termination itself or does it merely adjudicate upon the question as to whether there has or has not been a contravention of the provisions of Section33(2)(b) of the said Act?

14. It is in this regard that various decisions have been cited by the learned counsel for the parties. We may point out that the decisions cited by the learned counsel for the appellant do tend to support his contention that although there may be contravention of the mandatory provisions of Section 33(2)(b) of the said Act, there is still the requirement of the Industrial Tribunal to decide the dispute in totality and to go into the merits of the substantive dispute between the employee and the employer in so far as the question of termination/dismissal is concerned. For example, in **Batuk K. Vyas** (Supra), the Division Bench of the Bombay High Court observed as under:-

> "It seems to us difficult in the language used by section 33A to hold that the ambit and scope of the inquiry to be held by the tribunal is as limited as Mr. Phadke would suggest. If the intention of the legislature was that all that the tribunal could do under section 33A was merely to determine the simple question whether a change to the prejudice of the workman had been brought about by the employer without the express permission in writing of the tribunal, and if that decision was against the employer, the only power that the tribunal had was to restore the status quo, it seems to us that the language used by the legislature in section 33A would have been very different from the language it has actually used. The very fact that the legislature treats the complaint as if it were a dispute referred to or pending before it, goes to show that the jurisdiction of the tribunal was not limited merely to consider the question of contravention of section 33 but to decide on the substantive dispute between the employer and the workman with regard to the change in the conditions of service or the discharge of the employee by the employer."

15. In **Punjab National Bank Ltd.**(Supra), a Bench comprising of three Hon'ble Judges of the Supreme Court observed as under:-

> "(32) After this section was thus enacted the scope of the enquiry contemplated by it became the subject matter of controversy between the employers and the employees. This Court had occasion to deal with this controversy in the case of the **Automobile Products of India, Ltd.,** 1955-1 SCR 1241: ((S) AIR 1955 SC 258) (supra). Das J., as he then was, who delivered the judgment of the Court construed S. 33A of the Act

and the corresponding S. 23 of Act 48 of 1950 which applied to the Labour Appellate Tribunal then in existence, and observed that

"the scheme of the section clearly indicates that the authority to whom the complaint is made is to decide both the issues, viz., (1) the effect of contravention, and (2) the merits of the act or order of the employer." "The provision in the section that the complaint shall be dealt with by the tribunal as if it were a dispute referred to or pending before it quite clearly indicates", said the learned Judge, "that the jurisdiction of the authority is not only to decide whether there has been a failure on the part of the employer to obtain the permission of the authority before taking action but also to go into the merits of the complaint and grant appropriate reliefs (p. 1253)".

It was urged before this Court that in holding an enquiry under S. 33A the tribunal's duty was only to find out whether there had been a contravention of S.33, and if it found that there was such a contravention to make a declaration to that effect. The argument was that no further question can or should be considered in such an enquiry. This contention was, however, rejected."

16. Finally, in another decision of three Hon'ble Judges of the Supreme Court in the case of **The Hindustan General Electrical Corporation Ltd.** (Supra), it was once again observed as under:-

"The scope of Section 33 and 33-A was examined by this Court in several cases to some of which we shall presently refer. Section 33(1) has obviously no application to the facts of this case. Section 33(2) relates to the dismissal, discharge, etc., of a workman for any misconduct not connected with an industrial dispute during the pendency of any conciliation proceeding before a conciliation officer or a Board etc. unless he had been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer. Section 33-A enables a workman who has been punished by dismissal or discharge etc. to make a complaint in writing to a Labour court,

Tribunal or National Tribunal when an employer contravenes the provisions of Section 33during the pendency of proceeding before Labour Court, Tribunal or National Tribunal etc. If such a compliant is made, the Labour court, Tribunal etc. is to adjudicate upon the complaint as if it were a dispute referred to or pending before it and in accordance with the provisions of the Act submit its award to the appropriate Government. In other words, when the conditions laid down in Section 33-A apply a workman who is punished as mentioned therein does not have to wait for a reference of an industrial dispute by an appropriate authority under Section 10 of the Act for adjudication of the dispute but can himself prefer his complaint which is to be treated in the same way as a dispute under Section 10. These sections do not lend themselves to the construction that as soon as the Labour Court, Tribunal etc. finds that there has been a violation of Section 33 it should award reinstatement. It must go through the proceedings which would have to be taken under Section 10 and it would be the duty of the Labour Court etc. to examine the merits of the case in the light of the principles formulated in the **Indian Iron and Steel Co's** case (supra)."

17. As mentioned above while these decisions do tend to support the arguments advanced by the learned counsel for the appellants, but that would be of no use to him in view of the fact that a Constitution Bench of the Supreme Court in the case of **Jaipur Z.S.B.V. Bank** (Supra), has clearly held to the contrary. In **Jaipur Z.S.B.V. Bank** (Supra), the Supreme Court was considering the following question:-

"If the approval is not granted under Section 33(2)(b) of the Industrial Disputes Act, 1947 whether the order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of dismissal and whether failure to make application under Section 33(2)(b) would not render the order of dismissal inoperative?"

18. The above extract would reveal that there are essentially two questions rolled into one. The first question was with regard to the date from which the order of dismissal would become ineffective. Would it become ineffective from the date it was passed or from the date of non-approval of the order of dismissal. However, this question arises only in

a situation where an approval which has been sought under Section 33(2)(b) of the said Act has not been granted or, to put it positively, has been rejected by the Tribunal. We are, however, concerned with the second question which deals with the issue of whether failure to make an application under Section 33(2)(b) would not render the order of dismissal inoperative? The Supreme Court has answered this question by holding that the failure to make an application under Section 33(2)(b) of the said Act would amount to non-compliance with the mandatory provisions of the said Act and that, by itself, would render the order of dismissal to be inoperative. In other words, if the mandatory conditions of Section 33(2)(b) of the said Act are contravened, while passing the order of the dismissal, the same would have no effect in law.

19. The scope of Section 33(2)(b) as well as Section 33A of the said Act has been discussed in detail by the Supreme Court in paragraph 14, 15 & 16. The same reads as under:-

> "14. Where an application is made under Section 33(2)(b), Proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b)dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement. But on the other hand, if approval is given by the authority and if the employee is aggrieved

by such an approval, he is entitled to make a complaint under Section 33A challenging the order granting approval on any of the grounds available to him. Section 33A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where the industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and thereafter adjudication. In this view, it is not correct to say that even though where the order of discharge or dismissal is inoperative for contravention of the mandatory conditions contained in the proviso or where the approval is refused, a workman should still make a complaint under Section 33A and that the order of dismissal or discharge becomes invalid or void only when it is set aside under Section 33A and that till such time he should suffer misery of unemployment in spite of statutory protection given to him by the proviso to Section 33(2)(b). It is not correct to say that where the order of discharge or dismissal becomes inoperative because of contravention of proviso to Section 33(2)(b), Section 33A would be meaningless and futile. The said Section has a definite purpose to serve, as already stated above, enabling an employee to make a complaint, if aggrieved by the order of the approval granted.

15. The view that when no application is made or the one made is withdrawn, there is no order of refusal of such application on merit and as such the order of dismissal or discharge does not become void or inoperative unless such an order is set aside under Section 33A, cannot be accepted. In our view, not making an application under Section 33(2)(b) seeking approval or withdrawing an application once made before any order is made thereon, is a clear case of contravention of the proviso to Section 33(2)(b). An employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. If it is so done, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scrutiny of the authority in the matter of granting approval of the action taken by him.

Adherence to and obedience of law should be obvious and necessary in a system governed by rule of law. An employer by design can avoid to make an application after dismissing or discharging an employee or file it and withdraw before any order is passed on it, on its merits, to take a position that such order is not inoperative or void till it is set aside under Section 33A notwithstanding the contravention of Section33(2)(b), proviso, driving the employee to have recourse to one or more proceeding by making a complaint under Section 33A or to raise another industrial dispute or to make a complaint under Section 31(1). Such an approach destroys the protection specifically and expressly given to an employee under the said proviso as against possible victimization, unfair labour practice or harassment because of pendency of industrial dispute so that an employee can be saved from hardship of unemployment."

16. Section 31 speaks of penalty in respect of the offences stated therein. This provision is not intended to give any remedy to an aggrieved employee. It is only to punish the offender. The argument that Section 31 provides a remedy to an employee for contravention of Section 33 is unacceptable. Merely because penal provision is available or a workman has a further remedy under Section 33A to challenge the approval granted, it cannot be said that the order of discharge or dismissal not become inoperative or invalid unless set aside under Section 33A. There is nothing in Section 31, 33 and 33A to suggest otherwise even reading them together in the context. These Sections are intended to serve different purposes."

20. As would be noticed upon a reading of the above extract, the Supreme Court specifically provided that Section 33A is available only to an employee and is intended to save his time and trouble inasmuch as he can straightaway make a complaint before the very authority where an industrial dispute is already pending between the parties challenging the order of approval instead of making efforts to raise an industrial dispute, get a reference and, thereafter, an adjudication. It is also clearly pointed out that the employer who does not make an application under Section 33(2)(b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application.

As such, the Supreme Court came to the conclusion that the non-compliance of the mandatory provisions of Section 33(2)(b) of the said Act would by itself amount to the order of dismissal being void or inoperative. If this happens, it is not at all necessary for an employee to file a complaint under Section 33A to have the order of dismissal/ termination set-aside following an adjudication on merits.

21. It is, therefore, abundantly clear that the employee may file a complaint with regard to the relief that is required to be given to the employee in respect of the contravention of the provisions of Section 33. In other words, where no application seeking an approval under Section 33(2)(b) of the said Act is made by the employer, the employee may yet make a complaint under Section 33A seeking relief of reinstatement and payment of back wages. It is that dispute which will be taken up by the Industrial Tribunal which will obviously go into the question as to whether there has been or there has not been compliance with the mandatory provisions of Section 33(2)(b) of the said Act. Once the Tribunal comes to the conclusion that the mandatory provisions have been contravened, the only thing that needs to be done by the Tribunal is to direct that the employee be given an appropriate relief by way of reinstatement and by making an order with regard to back wages. The Tribunal is not required to go into the question of as to whether the dismissal was good or bad, on merits.

22. In view of the foregoing, we do not find any fault with the orders passed by the learned Single Judge as also the awards made by the Industrial Tribunal. Consequently, these appeals are dismissed. There shall be no order as to costs. The back wages which were deposited with the Registrar of this Court are directed to be released to the respondents within a week.

ILR (2012) VI DELHI 631
MAC. APP.

NATIONAL INSURANCE CO. LTD. ….APPELLANT

VERSUS

CHARANJEET KAUR @ SIMMI & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. : 734/2010 DATE OF DECISION: 16.07.2012

Motor Vehicles Act, 1988—Section 168—Award challenged by the Insurance Company on the ground that deceased's (a government employee) widow given employment by the deceased's employer; therefore, pecuniary advantage on account of the death of her husband received by her should have been deducted while awarding loss of decendency—Held, only those amounts which are payable to the claimant only by reason of death of injury in an accident are liable to be deducted—Widow got employment not on account of accidental death, but on the basis of a circular of the Government providing for employment on compassionate ground to the dependents on the family members of a Government servant, dying in harness—Appointment did not have any relation with the accidental death—Widow was to be paid not because of the death of her husband but because of the work performed by her as an employee—Thus, salary or any portion thereof being paid to the widow, would not be deductible from the loss of dependency granted to the dependents.

Turning to the facts of the instant case. It is no where the Appellant's case that the deceased's widow got an employment on account of accidental death. The learned counsel for the Claimants placed on record a copy of the

office Memorandum No.14014/6/94-Estt (D), dated 09.10.1998 issued by the Govt. of India which provides for an appointment on compassionate ground to a dependent family members of Govt. servant dying in harness or who has retired on medical grounds. In the circumstances, the appointment of Smt. Charanjeet Kaur had no relation with the accidental death. **(Para 9)**

Important Issue Involved: Only those amounts which are payable to the claimant/claimants only by reason of death or injury in an accident are liable to be deducted white awarding loss of dependency.

[La Ga]

APPEARANCES:

FOR THE APPELLANT : Mr. Manoj R. Sinha, Advocates.

FOR THE RESPONDENTS : Mr. O.P. Mannie. Advocate for R-1 to R-3.

CASES REFERRED TO:

1. *Bhakra Beas Management Board* vs. *Kanta Aggarwal & Ors.*, (2008) 11 SCC 366.
2. *State of Haryana* vs. *Jasbir Kaur*, (2003) 7 SCC 484.
3. *United India Insurance Co. Ltd. & Ors.* vs. *Patricia Jean Mahajan & Ors.*, (2002) 6 SCC 281.
4. *Helen C. Rebello (Mrs.) & Ors.* vs. *Maharashtra State Road Transport Corporation and Anr.*, (1999)1 SCC 90.
5. *Gobald Motor Service Ltd. & Anr.* vs. *R.M.K. Veluswami & Ors.*, AIR 1962 SC 1.

RESULT: Appeal Dismissed.

G.P. MITTAL, J. (ORAL)

1. Appellant National Insurance Company Limited impugns a judgment dated 04.10.2010 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of Rs. 20,54,590/- was awarded

for the death of Kulbir Singh Sandhu who died in a motor vehicle accident which occurred on 18.08.2005.

2. The only ground of challenge raised during the hearing of the Appeal is that Smt. Charanjeet Kaur, the deceased's widow was given employment by the deceased's employer (i.e. Safdarjang Hospital) on a Group D post and thus, the pecuniary advantage on account of death should have been deducted by the Claims Tribunal while awarding loss of dependency. The compensation envisaged under Section 168 of the Motor Vehicles Act, 1988 (the Act) has to be just and reasonable. It cannot be a bonanza or the source of profit. Thus, the salary obtained by Charanjeet Kaur, being a pecuniary advantage on account of Kulbir Singh Sandhu's death should have been deducted while calculating the loss of dependency. Reliance is placed on the Supreme Court report in **Bhakra Beas Management Board v. Kanta Aggarwal & Ors.,** (2008) 11 SCC 366.

3. Section 168 of the Act enjoins a Claims Tribunal to determine the amount of compensation which is just and reasonable. It can neither be a source of profit nor should it be a pittance. In **State of Haryana v. Jasbir Kaur,** (2003) 7 SCC 484, the Supreme Court held as under:

> "7. It has to be kept in view that the Tribunal constituted under the Act as provided in Section 168 is required to make an award determining the amount of compensation which is to be in the real sense 'damages' which in turn appears to it to be 'just and reasonable'. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be 'just and it cannot be a bonanza; not a source of profit; but the same should not be a pittance. The courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be 'just' compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or

> mode adopted for assessing compensation has to be considered in the background of 'just' compensation which is the pivotal consideration. Though by use of the expression 'which appears to it to be just' a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression 'just' denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just."

4. In **Bhakra Beas Management Board** (supra), the Supreme Court largely relied on **United India Insurance Co. Ltd. & Ors. v. Patricia Jean Mahajan & Ors.,** (2002) 6 SCC 281, a three Judges Bench decision in **Gobald Motor Service Ltd. & Anr. v. R.M.K. Veluswami & Ors.,** AIR 1962 SC 1; and **Helen C. Rebello (Mrs.) & Ors. v. Maharashtra State Road Transport Corporation and Anr.,** (1999)1 SCC 90.

5. In **Helen C. Rebello** (supra), the question before the Supreme Court was whether the amount received under Life Insurance Policy was liable to be deducted on the principle of balancing the loss and gain. The Supreme Court referred to the Law of Torts by Fleming and differentiated between the amount received under the Life Insurance Policy and an Accident Insurance Policy. It was, thus held that the payment received under the Life Insurance Policy was not deductible whereas the payment received under the Personal Accident Insurance was deductible. The reason was that in case of payment received under the accident insurance policy, the amount was receivable only on account of death in an accident and not otherwise, whereas in case of Life Insurance Policy, the amount was receivable irrespective of the death. Thus, the fact that the payment was made under independent contract of insurance was not of much import. Moreover, the use of the word "just" in Section 168 of the Act, confers wider discretion to the Claims Tribunal. The Claims Tribunal, therefore, has to see that the compensation awarded is neither niggardly nor a source of profit. Paras 26, 27, 28, 32, 33 and 34 of the report in **Helen C. Rebello** (supra) are extracted hereunder:

> "26. This Court, in this case did observe, though did not decide, to which we refer that the use of the words, "which appears to it to be just" under Section 110-B gives wider power to the

Tribunal in the matter of determination of compensation under the 1939 Act. There is another case of this Court in which there is a passing reference to the deduction out of the compensation payable under the Motor Vehicles Act. In **N. Sivammal v. Managing Director, Pandian Roadways Corpn.** this Court held that the deduction of Rs 10,000 receivable as monetary benefit to the widow of the pension amount, was not justified. So, though deduction of the widow's pension was not accepted but for this, no principle was discussed therein. However, having given our full consideration, we find there is a deliberate change in the language in the later Act, revealing the intent of the legislature, viz., to confer wider discretion on the Tribunal which is not to be found in the earlier Act. Thus, any decision based on the principle applicable to the earlier Act, would not be applicable while adjudicating the compensation payable to the claimant in the later Act.

27. Fleming, in his classic work on the Law of Torts, has summed up the law on the subject in these words. This is also referred to in **Sushila Devi v. Ibrahim**:

"The pecuniary loss of such dependant can only be ascertained by balancing, on the one hand, the loss to him of future pecuniary benefit, and, on the other, any pecuniary advantage which, from whatever source, comes to him by reason of the death. ... **There is a vital distinction between the receipt of moneys under accident insurance and life assurance policies. In the case of accident policies, the full value is deductible on the ground that there was no certainty, or even a reasonable probability, that the insured would ever suffer an accident. But since man is certain to die, it would not be justifiable to set off the whole proceeds from a life assurance policy, since it is legitimate to assume that the widow would have received some benefit, if her husband had pre-deceased her during the currency of the policy or if the policy had matured during their joint lives.** The exact extent of permissible reduction, however, is still a matter of uncertainty...." (emphasis supplied)

28. Fleming has also expressed that the deduction or set-off of

the life insurance could not be justifiable. When he uses the words "not be justifiable" he refers to one's conscience, fairness and contrary to what is just. In this context, the use of the word "just", which was neither in the English 1846 Act nor in the Indian 1855 Act, now brought in under the 1939 Act, gains importance. This shows that the word "just" was deliberately brought in Section 110-B of the 1939 Act to enlarge the consideration in computing the compensation which, of course, would include the question of deductibility, if any. This leads us to an irresistible conclusion that the principle of computation of the compensation both under the English Fatal Accidents Act, 1846 and under the Indian Fatal Accidents Act, 1855 by the earlier decisions, were restrictive in nature in the absence of any guiding words therein, hence the courts applied the general principle at the common law of loss and gain but that would not apply to the considerations under Section 110-B of the 1939 Act which enlarges the discretion to deliver better justice to the claimant, in computing the compensation, to see what is just. Thus, we find that all the decisions of the High Courts, which based their interpretation on the principles of these two Acts, viz., the English 1846 Act and the Indian 1855 Act to hold that deductions were valid cannot be upheld. As we have observed above, the decisions even with reference to the decision of this Court in Gobald Motor Service where the question was neither raised nor adjudicated and that case also, being under the 1855 Act, cannot be pressed into service. Thus, these courts by giving a restrictive interpretation in computation of compensation based on the limitation of the language of the Fatal Accidents Act, fell into an error, as it did not take into account the change of language in the 1939 Act and did not consider the widening of the discretion of the Tribunal under Section 110-B. The word "just", as its nomenclature, denotes equitability, fairness and reasonableness having a large peripheral field. The largeness is, of course, not arbitrary; it is restricted by the conscience which is fair, reasonable and equitable, if it exceeds; it is termed as unfair, unreasonable, unequitable, not just. Thus, this field of wider discretion of the Tribunal has to be within the said limitations and the limitations under any provision of this Act or any other

provision having the force of law....."

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32. So far as the general principle of estimating damages under the common law is concerned, it is settled that the pecuniary loss can be ascertained only by balancing on one hand, the loss to the claimant of the future pecuniary benefits that would have accrued to him but for the death with the "pecuniary advantage" which from whatever source comes to him by reason of the death. In other words, it is the balancing of loss and gain of the claimant occasioned by the death. But this has to change its colour to the extent a statute intends to do. Thus, this has to be interpreted in the light of the provisions of the Motor Vehicles Act, 1939. It is very clear, to which there could be no doubt that this Act delivers compensation to the claimant only on account of accidental injury or death, not on account of any other death. Thus, the pecuniary advantage accruing under this Act has to be deciphered, correlating with the accidental death. The compensation payable under the Motor Vehicles Act is on account of the pecuniary loss to the claimant by accidental injury or death and not other forms of death. If there is natural death or death by suicide, serious illness, including even death by accident, through train, air flight not involving a motor vehicle, it would not be covered under the Motor Vehicles Act. Thus, the application of the general principle under the common law of loss and gain for the computation of compensation under this Act must correlate to this type of injury or death, viz., accidental. If the words "pecuniary advantage" from whatever source are to be interpreted to mean any form of death under this Act, it would dilute all possible benefits conferred on the claimant and would be contrary to the spirit of the law. If the "pecuniary advantage" resulting from death means pecuniary advantage coming under all forms of death then it will include all the assets moveable, immovable, shares, bank accounts, cash and every amount receivable under any contract. In other words, all heritable assets including what is willed by the deceased etc. This would obliterate both, all possible conferment of economic security to the claimant by the deceased and the intentions of the legislature. By such an

interpretation, the tortfeasor in spite of his wrongful act or negligence, which contributes to the death, would have in many cases no liability or meagre liability. In our considered opinion, the general principle of loss and gain takes colour of this statute, viz., the gain has to be interpreted which is as a result of the accidental death and the loss on account of the accidental death. Thus, under the present Act, whatever pecuniary advantage is received by the claimant, from whatever source, would only mean which comes to the claimant on account of the accidental death and not other forms of death. The constitution of the Motor Accident Claims Tribunal itself under Section 110 is, as the section states:

> "... for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, ...".

33. Thus, it would not include that which the claimant receives on account of other forms of deaths, which he would have received even apart from accidental death. Thus, such pecuniary advantage would have no correlation to the accidental death for which compensation is computed. Any amount received or receivable not only on account of the accidental death but that which would have come to the claimant even otherwise, could not be construed to be the "pecuniary advantage", liable for deduction. However, where the employer insures his employee, as against injury or death arising out of an accident, any amount received out of such insurance on the happening of such incident may be an amount liable for deduction. However, our legislature has taken note of such contingency through the proviso of Section 95. Under it the liability of the insurer is excluded in respect of injury or death, arising out of and in the course of employment of an employee."

34. This is based on the principle that the claimant for the happening of the same incidence may not gain twice from two sources. This, it is excluded thus, either through the wisdom of the legislature or through the principle of loss and gain through deduction not to give gain to the claimant twice arising from the same transaction, viz., the same accident. It is significant to

record here in both the sources, viz., either under the Motor Vehicles Act or from the employer, the compensation receivable by the claimant is either statutory or through the security of the employer securing for his employee but in both cases he receives the amount without his contribution. How thus an amount earned out of one's labour or contribution towards one's wealth, savings, etc. either for himself or for his family which such person knows under the law has to go to his heirs after his death either by succession or under a Will could be said to be the "pecuniary gain" only on account of one's accidental death. This, of course, is a pecuniary gain but how this is equitable or could be balanced out of the amount to be received as compensation under the Motor Vehicles Act. There is no corelation between the two amounts. Not even remotely. How can an amount of loss and gain of one contract be made applicable to the loss and gain of another contract. Similarly, how an amount receivable under a statute has any corelation with an amount earned by an individual. Principle of loss and gain has to be on the same plane within the same sphere, of course, subject to the contract to the contrary or any provisions of law."

6. In para 33 of the report, the Supreme Court clarified that it would not include the pecuniary advantage which the Claimant receives on account of other forms of death. In other words, any pecuniary advantage received by the legal representatives which had no co-relation with the accidental death, was not to be deducted from the pecuniary loss suffered by the Claimants.

7. Similarly, in **Patricia Jean Mahajan** (supra), the Supreme Court while not deducting the sum received on account of family pension and social security had in its mind that these payments had no co-relation between the compensation payable on account of accidental death and death on account of illness or otherwise. The Supreme Court emphasized that the principle of balancing between losses and gains must have some co-relation with the accidental death by reason of which alone the Claimant had received the amounts. Paras 34 and 36 of the report are extracted hereunder:

"34. Shri P.P. Rao, learned counsel appearing for the claimants submitted that the scope of the provisions relating to award of

compensation under the Motor Vehicles Act is wider as compared to the provisions of the Fatal Accidents Acts. It is further indicated that Gobald case is a case under the Fatal Accidents Acts. For the above contention he has relied upon the observation made in Rebello case. It has also been submitted that only such benefits, which accrued to the claimants by reason of death, occurred due to an accident and not otherwise, can be deducted. Apart from drawing a distinction between the scope of provisions of the two Acts, namely, the Motor Vehicles Act and the Fatal Accidents Act, this Court in Helen Rebello case accepted the argument that the amount of insurance policies would be payable to the insured, the death may be accidental or otherwise, and even where the death may not occur the amount will be payable on its maturity. The insured chooses to have insurance policy and he keeps on paying the premium for the same, during all the time till maturity or his death. It has been held that such a pecuniary benefit by reason of death would not be such as may be deductible from the amount of compensation.

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36. **We are in full agreement with the observations made in the case of Helen Rebello that principle of balancing between losses and gains, by reason of death, to arrive at the amount of compensation is a general rule, but what is more important is that such receipts by the claimants must have some correlation with the accidental death by reason of which alone the claimants have received the amounts. We do not think it would be necessary for us to go into the question of distinction made between the provisions of the Fatal Accidents Act and the Motor Vehicles Act.** (emphasis supplied). According to the decisions referred to in the earlier part of this judgment, it is clear that the amount on account of social security as may have been received must have a nexus or relation with the accidental injury or death, so far to be deductible from the amount of compensation. There must be some correlation between the amount received and the accidental death or it may be in the same sphere, absence (sic) the amount received shall not be deducted from the amount of compensation. Thus, the amount

received on account of insurance policy of the deceased cannot be deducted from the amount of compensation though no doubt the receipt of the insurance amount is accelerated due to premature death of the insured. So far as other items in respect of which learned counsel for the Insurance Company has vehemently urged, for example some allowance paid to the children, and Mrs Patricia Mahajan under the social security system, no correlation of those receipts with the accidental death has been shown much less established. Apart from the fact that contribution comes from different sources for constituting the fund out of which payment on account of social security system is made, one of the constituents of the fund is tax which is deducted from income for the purpose. We feel that the High Court has rightly disallowed any deduction on account of receipts under the insurance policy and other receipts under the social security system which the claimant would have also otherwise been entitled to receive irrespective of accidental death of Dr Mahajan. If the proposition "receipts from whatever source" is interpreted so widely that it may cover all the receipts, which may come into the hands of the claimants, in view of the mere death of the victim, it would only defeat the purpose of the Act providing for just compensation on account of accidental death. Such gains, maybe on account of savings or other investment etc. made by the deceased, would not go to the benefit of the wrongdoer and the claimant should not be left worse off, if he had never taken an insurance policy or had not made investments for future returns."

8. Thus, on the basis of the ratio in **Helen C. Rebello** (supra) and **Patricia Jean Mahajan** (supra), it can be safely concluded that only those amounts which are payable to the Claimant/Claimants only by reason of death or injury in an accident are liable to be deducted.

9. Turning to the facts of the instant case. It is no where the Appellant's case that the deceased's widow got an employment on account of accidental death. The learned counsel for the Claimants placed on record a copy of the office Memorandum No.14014/6/94-Estt (D), dated 09.10.1998 issued by the Govt. of India which provides for an appointment on compassionate ground to a dependent family members of Govt. servant dying in harness or who has retired on medical grounds. In the

circumstances, the appointment of Smt. Charanjeet Kaur had no relation with the accidental death.

10. Moreover, Charanjeet Kaur, the deceased's widow would get the salary of a Group D employee as against the deceased who was working as an Assistant in the same department. I would not comment on the circumstances under which Charanjeet Kaur had to accept the post of a Group D employee while her husband was working at a good position in the same office. Moreover, Charanjeet Kaur would be paid the salary not because of her husband's death but because of the work performed by her as a Group D employee.

11. The judgment in **Bhakra Beas** (supra) relied upon by the learned counsel for the Appellant is not attracted to the facts of the present case. Rather, the earlier judgments in **Gobald Motor** (supra), **Helen C. Rebello** (supra) and **Patricia Jean Mahajan** (supra) are binding precedents.

12. In view of the foregoing discussion, it cannot be said that the salary or any portion thereof being paid to Smt. Charanjeet Kaur, who was employed as a Group D employee in Kulbir Singh Sandhu's (deceased's) office, would be deductible from the loss of dependency granted to the dependents.

13. The Appeal is devoid of any merit. The same is accordingly dismissed.

14. The statutory deposit of Rs. 25,000/- be refunded to the Insurance Company.

15. Pending Applications stand disposed of.

ILR (2012) VI DELHI 643
MAC. APP.

RAKHI ….APPELLANT

VERSUS

SATISH KUMAR & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. : 390/2011, DATE OF DECISION: 16.07.2012
MAC. APP. : 339/2011

Motor Vehicles Act, 1988—Claims Tribunals awarded compensation in favour of claimants taking deceased's income as per minimum wages of a matriculate, on date of accident—Appeal filed before High Court by claimants for enhancement of compensation—Plea taken, Claims tribunal should have considered vocation of deceased while assessing damages to claimant—Claims tribunals ought to have granted compensation on basis of minimum wages, future prospects of deceased and increase in salary on account of inflation—Salary of a person in private employment is also bound to increase with passage of time—Per Contra plea taken, *Santosh Devi* did not deal with case of minimum wages—Salary certificate proved deceased's income to be Rs. 4,000/- per month—Claims Tribunal fell into error in awarding compensation on basis of minimum wages which were Rs. 4,081/- per month—Judgment in *Santosh Devi* must be taken per incuram—Held—In *Dhaneshwari,* this court considered various Single Bench decisions of this court and Division Bench decisions of this Court in case of *Kumari Lalita* and *Rattan Lal Mehta* and held that Division Bench decision of this Court which laid down that future inflation was built in 'in multiplier method' was

a binding precedent as there was no contrary judgment of Supreme Court—Although inflation was built in 'in multiplier method, but in Indian context where inflation was very high, multiplier method did not take care of inflation completely—Granting of increase in income on account of inflation is distinguishable from future prospects—Question of granting increase on account of inflation to income of a person getting a fixed salary or a self employed, i.e. skilled and unskilled worker like barber, blacksmith, cobbler, mason, carpenter etc. at time of his death was not before Supreme Court. Observations in *Sarla Verma* were explained and distinguished by Supreme Court in case of Santosh Devi and it was said persons getting fixed salary and self employed persons would also increase their wages with passage of time on account of inflation—There is no conflict between earlier judgments of SC in *Susamma Thomas, Sarla Dixit, Bijoy Kumar Dugar* and *Sarla Verma* which dealt with increase in income on account of future prospects and *Santosh Devi* which dealt with inflation—Persons who are getting fixed salary or who are self employed as menial, skilled and unskilled workers like barber, blacksmith, cobbler, mason, carpenter etc. would be entitled to increase in income to extent of 30% on account of inflation when deceased or victim is aged upto 50 years—In instant case, there was no evidence of bright future prospects of the deceased—Claimants are entitled to increase of 30% in salary on account of inflation—Compensation increased.

Important Issue Involved: (A) The persons who are getting fixed salary or who are self employed as menial, skilled and unskilled workers, like barber, blacksmith, cobbler, mason, carpenter, etc. would be entitled to an increase in the income to the extent of 30% on account of inflation, when the deceased or the victim is aged upto 50 years.

(B) Although the inflation was built in 'in the multiplier method' but in the Indian extent where the inflation was very high, the multiplier method did not take care of the inflation completely.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Mr. S.N. Parashar, Advocate.

FOR THE RESPONDENTS : Ms. Rameeza Hakeem, Advocates for the Respondent No. 3 Insurance Company. Mr. Atul Nanda, Sr. Advocates, Amicus Curaie.

CASES REFERRED TO:

1. *Santosh Devi* vs. *National Insurance Company Ltd. & Ors,* MANU/SC/0322/2012.
2. *Smt. Dhaneshwari Devi & Anr.* vs. *Tejeshwar Singh & Ors.,* Manu/DE/1050/2012 MAC APP. No.997/2011 decided on 07.03.2012.
3. *Oriental Insurance Company Limited* vs. *Smt. Rajni Devi & Ors.* MAC APP.286/2011.
4. *Laxman* vs. *Oriental Insurance Co. Ltd.,* (2011) 10 SCC 756.
5. *Sanjay Batham* vs. *Munnalal Parihar,* (2011) 10 SCC 665.
6. *Govind Yadav* vs. *New India Insurance Co. Ltd.* (2011) 10 SCC 683.
7. *Ibrahim* vs. *Raju,* (2011) 10 SCC 634.
8. *Smt. Gulabeeya Devi* vs. *Mehboob Ali & Ors.* MAC APP.463/2011.
9. *IFFCO TOKIO Gen. Ins. Co. Ltd. v. Rooniya Devi & Ors.* MAC APP.189/2011.
10. *Safiya Bee* vs. *Mohd. Vajahath Hussain Alias Fasi,* 2011(2) SCC 94.

11. *Union of India & Ors.* vs. *S.K. Kapoor,* (2011) 4 SCC 589.
12. *Sarla Verma & Ors.* vs. *Delhi Transport Corporation & Anr,* (2009) 6 SCC 121.
13. *Reshma Kumari* vs. *Madan Mohan* (2009) 13 SCC 422.
14. *R.K. Malik* vs. *Kiran Pal* (2009) 14 SCC 1.
15. *New India Assurance Co. Ld.* vs. *Vijay Singh* MAC APP. 280/2008.
16. *Om Kumari & Ors.* vs. *Shish Pal & Ors,* 140 (2007) DLT 62.
17. *National Insurance Co. Ltd.* vs. *Pooja & Ors.,* II, (2007 ACJ 1051).
18. *Bijoy Kumar Dugar* vs. *Bidya Dhar Dutta & Ors,* (2006) 3 SCC 242.
19. *Narinder Bishal & Anr.* vs. *Rambir Singh & Ors.,* MAC APP. 1007-08/2006.
20. *National Insurance Co. Ltd.* vs. *Pooja & Ors.,* II (2006) ACC 382 (2007 ACJ 1051).
21. *Smt. Anari Devi* vs. *Shri Tilak Raj & Anr.,* II (2004) ACC 739; (2005 ACJ 1397).
22. *M.S. Grewal* vs. *Deep Chand Sood* (2001) 8 SCC 151.
23. *Lata Wadhwa* vs. *State of Bihar* (2001) 8 SCC 197.
24. *Sarla Dixit* vs. *Balwant Yadav* (1996) 3 SCC 179.
25. *Rattan Lal Mehta* vs. *Rajinder Kapoor & Anr.* II (1996) ACC 1 (DB).
26. *General Manager, Kerala State Road Transport Corporation, Trivandrum* vs. *Susamma Thomas (Mrs.) and Ors.* (1994) 2 SCC 176.
27. *Kerala SRTC* vs. *Susamma Thomas* (1994) 2 SCC 176.
28. *Delhi Transport Corporation and Anr.* vs. *Kumari Lalita* 22 (1982) DLT 170 (DB).
29. *Todorovic* vs. *Waller,* (1981) 150 C.L.R. 402.
30. *M.P.S.R.T.C.* vs. *Sudhakar,* AIR 1977 SC 1189.

31. *Mallet* vs. *Mc Monagle,* 1970 AC 166.

32. *Chesapeake & Ohio Rly* vs. *Kelly* (1916) 241 U.S. 485.

RESULT: Appeal disposed of.

G.P. MITTAL, J.

1. These two Appeals (MAC. APP. No.390/2011 and MAC. APP. No.539/2012) arise out of a judgment dated 04.01.2011 whereby a compensation of Rs. 7,04,393/- was awarded in favour of Ms. Rakhi and other Claimants (in MAC. APP. 390/2011) for the death of Gajender Pal Singh who died in an accident which occurred on 08.07.2008.

2. By impugned judgment, the Motor Accident Claims Tribunal(the Claims Tribunal) found that the accident was caused on account of rash and negligent driving of bus No. DL-1PB-9008 by the First Respondent. During inquiry before the Claims Tribunal, a salary certificate Ex.PW1/3 was produced to show that the deceased was working as a Security Supervisor and was getting a salary of Rs. 4,000/- per month. The Claims Tribunal found that the deceased was a matriculate. The minimum wages of a matriculate on the date of the accident were Rs. 4,081/- per month. Thus, the Claims Tribunal took the deceased's income to be Rs. 4,081/- per month, deducted 1/4th towards personal and living expenses (as the number of dependents were four) and adopted a multiplier of 17 (as the deceased was aged 27 years) to compute the loss of dependency as Rs. 6,24,393/-. In addition, the Claims Tribunal awarded a sum of Rs. 10,000/- towards medical expenses as the deceased remained under treatment in Fortis Hospital before he succumbed to the injuries; Rs. 40,000/- towards loss of love and affection, Rs. 10,000/- each towards loss of consortium, funeral expenses and loss to estate. The Claims Tribunal opined that the Claimants were not entitled to any addition on account of future prospects as the deceased was in private employment.

3. For the sake of convenience, the Appellants in MAC. APP. No.390/2011(for enhancement of compensation) shall be referred to as the Claimants and the Cross-Objectionist (ICICI Lombard General Insurance Co. Ltd.) shall be referred to as the Insurance Company.

4. The finding on negligence has not been challenged in the Cross-Objections. The same, therefore, becomes final between the parties.

5. The following contentions are raised on behalf of the Claimants: (i) The Claims Tribunal should have considered the vocation of the deceased while assessing the damages to the Claimants. (ii) The Claims Tribunal ought not to have granted the compensation on the basis of minimum wages; future prospects of the deceased and increase in salary on account of inflation should also have been considered.

6. On the other hand, on behalf of the Insurance Company it is urged that the salary certificate Ex.PW1/3 proved the deceased's income to be '4,000/- per month. The Claims Tribunal fell into error in awarding compensation on the basis of minimum wages which were '4,081/- per month.

7. It is urged by the learned counsel for the Claimants that the salary of a person in private employment is also bound to increase with the passage of time as was observed by the Supreme Court in **Santosh Devi v. National Insurance Company Ltd. & Ors,** MANU/SC/0322/2012. It is contended that the judgment of this Court in **Smt. Dhaneshwari Devi & Anr. v. Tejeshwar Singh & Ors.,** Manu/DE/1050/2012 MAC APP. No.997/2011 decided on 07.03.2012 and **Rattan Lal Mehta v. Rajinder Kapoor & Anr.** II (1996) ACC 1 (DB) were impliedly overruled by the Supreme Court in **Santosh Devi** (Supra) where it was held that although the increase in the salaries in private sector did not keep pace with the increase in the salary of the Government employees, but with the passage of time there is increase in the salary of the persons employed in organized and unorganized sectors on account of inflation and in the income of the self-employed persons.

8. Per contra, it is contended by the learned counsel for the Respondent Insurance Company that Santosh Devi(supra) did not deal with the case of minimum wages. The observations of the Supreme Court in the said case must be treated as being confined to the facts of that case instead of laying down the law that benefit of inflation is to be given to the persons getting fixed salary or who are self-employed(i.e. skilled and unskilled worker, barber, blacksmith, cobbler, mason, carpenter, etc. etc.).

9. Mr. Atul Nanda, the learned Amicus points out that in **General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs.) and Ors.** (1994) 2 SCC 176, **Sarla Dixit v.**

Balwant Yadav, (1996) 3 SCC 179 down to **Bijoy Kumar Dugar v. Bidya Dhar Dutta & Ors,** (2006) 3 SCC 242 it was held that increase on account of future prospects is to be given only when there is evidence with regard to bright future prospects. It is urged that the Supreme Court in **Sarla Verma & Ors. v. Delhi Transport Corporation & Anr,** (2009) 6 SCC 121 referred to **Susamma Thomas** (supra), **Sarla Dixit** (supra) and various other judgments and tried to bring about uniformity in grant of compensation to the victims of road accidents while holding that increase on account future prospects can be granted only on the basis of evidence in this regard.

10. It is contended that the judgments in **Susamma Thomas**(supra), **Sarla Dixit**(supra) **Bijoy Kumar Dugar**(supra), **Sarla Verma**(supra) and **Santosh Devi**(supra) were rendered by a two Judge Bench of the Supreme Court. The earlier decision in **Susamma Thomas**(supra), **Sarla Dixit**(supra) and Bijoy Kumar Dugar must be taken as binding precedent as they were not referred in **Santosh Devi**(supra). If the two Judge Bench in **Santosh Devi**(supra) did not agree with **Sarla Verma**(supra), a reference should have been made to a larger Bench. It is stated that the judgment in **Santosh Devi**(supra) must be taken per incuram. Reliance is placed on **Safiya Bee v. Mohd. Vajahath Hussain Alias Fasi,** 2011(2) SCC 94 and **Union of India & Ors. v. S.K. Kapoor,** (2011) 4 SCC 589 where it was held that if a Bench of equal strength did not agree with the view taken by a coordinate Bench of equal strength (in an earlier decision), judicial discipline and practice required them to refer the issue to a larger Bench. It was held that the learned Judges were not right in overruling the judgment by a coordinate Bench of equal strength.

11. In **Dhaneshwari** (supra) this Court considered various Single Bench decisions of this Court including **Smt. Anari Devi v. Shri Tilak Raj & Anr.,** II (2004) ACC 739; (2005 ACJ 1397), **National Insurance Co. Ltd. v. Pooja & Ors.,** II (2006) ACC 382 (2007 ACJ 1051), **Om Kumari & Ors. v. Shish Pal & Ors,** 140 (2007) DLT 62, **Narinder Bishal & Anr. v. Rambir Singh & Ors.,** MAC APP. 1007-08/2006, decided on 20.02.2008, **New India Assurance Co. Ld. v. Vijay Singh** MAC APP. 280/2008 decided on 09.05.2008; **Oriental Insurance Company Limited v. Smt. Rajni Devi & Ors.** MAC APP.286/2011 decided on 06.01.2012; **Smt. Gulabeeya Devi v. Mehboob Ali & Ors.** MAC APP.463/2011 decided on 10.01.2012 and **IFFCO TOKIO Gen. Ins. Co. Ltd. v. Rooniya Devi & Ors.** MAC APP.189/2011 decided on 30.01.2012 and a Division Bench decisions of this Court in **Delhi Transport Corporation and Anr. v. Kumari Lalita** 22 (1982) DLT 170 (DB) and **Rattan Lal Mehta v. Rajinder Kapoor & Anr.** II (1996) ACC 1 (DB). This Court held that **Rattan Lal Mehta** (supra) being a Division Bench decision of this Court which laid down that future inflation was built-in 'in the multiplier method' was a binding precedent as there was no contrary judgment of the Supreme Court on this point. Para 38 of the report in **Dhaneshwari**(supra) is extracted hereunder:

> "38. The Division Bench went on to add that multiplier takes care of inflation. In fact, when the rates of interest are high as in the Indian context, any multiplier above 15 would definitely take care of some inflation. Before demonstrating the same in a tabulated form, I would refer to the relevant portion of the report in **Rattan Lal Mehta** (supra) hereunder:-
>
> **"Multiplier takes care of inflation**
>
> The mathematical formula which is used in the law of Economics (See Prof. A Samuelson of the Massechusetts Institute of Technology in his Textbook on Economics (10th Ed. 1980 at p. 609) shows that the discount rate for discounting future payments to present value occurs in the dominator and that is why a lower interest rate would result in a higher multiplier and that is why the 'real rate' of interest enunciated by Fisher was applied by Lord Diplock in **Mallet v. Mc Monagle,** 1970 AC 166. That case has been followed by our Supreme Court in **M.P.S.R.T.C. v. Sudhakar,** AIR 1977 SC 1189 and in **KSRTC v. Susamma Thomas** (supra). The rate adopted is of a 'stable period of currency' say 4% or 5% so that multipliers will be larger and help full compensation. It must be noted here that if we adopt a higher rate of interest for reducing future payments to present values the multiplier will be very small, as the rate of interest occurs, in the formula, in the denominator. That is why a smaller rate of interest applicable to stable periods is prescribed by Economists of the highest repute like Fisher or Prof. Samuelson and in all books dealing with Economics and Insurance. This is also the principle in pension commutations. Government of India has applied a rate of 3.5% or 4.5% only. Otherwise if higher

rates of interest are applied pension commutations will get reduced to smaller figures. Superior Courts in England, Australia, Canada and USA have accepted this principle of Economics and held that rate of discount for converting future payments to present value must relate to stable periods of currency.

29. In a celebrated passage Lord Diplock said "In estimating the loss, money should be treated as retaining its value at the date of the Judgment and in calculating the present value of annual payments which would have been received in future years, interest rates appropriate to time of stable currency such as 4 per cent to 5 per cent should be adopted". That was to be the discount rate for reducing future earnings/losses to present value. In England it was to be 4% or 5%. In Australia, in **Todorovic vs. Waller,** (1981) 150 C.L.R. 402, the High Court followed Lord Diplock's judgment and advocated a discount rate of 3% for converting future payments to present value. In the Canadian trilogy of cases, referred to earlier, the Diplock theory was accepted and a rate of 7% was applied. In U.S.A. the same principles were set out in **Chesapeake & Ohio Rly vs. Kelly** (1916) 241 U.S. 485 and recently in **Jones and Laughlin vs. Pfeifer,** 462 U.S. 523 (1983), proposing 3%.

30. In **Bhagwandas** case, AIR 1988 99 after referring to the rate applied by Government of India in regard to pension commutations and the other data relating to inflation, a 'real rate' of 4% was applied in our country and a multiplier Table was worked out on that basis. The above judgment was affirmed by a **Division Bench in Naravva' vs. V.R. Shangde,** 1989 ACJ 715 by Jeevan Reddy, J. (as he then was) and V.N. Rao, J. The multipliers evolved in Bhagwanda's case compare very favourably with the statutory multiplier Table published in the amendment to the Motor Vehicles Act in 1994. A smaller discount rate relatable to a stable period of currency reduces future payments (say) of 1997,1998 and so on, by giving a higher multiplier in present and leaves it to the recipient of the money to make a proper investment today of the said monies. There is voluminous literature on this subject (See: Inflation, Taxation & Damage Assessment (1980) Can B. Rev. 280; 1974 Economic Journal p. 130 by R. Kidner

& K. Richards; Damages for Personal Injury & the Effect of Future Inflation (1982) 56 Aust L.J. 168; Economic Analysis vs. Court room Controversy, The Present Value of Future Earnings : John A. Carlson Vol. 62 ABAJ 628; Tort Damages for Loss of Future Earnings (1986) 34 Amer J. Comp. L (Supp) 141; Economic Theory & Present Value of Future Lost Earnings : Anderson & Roberts (1985) U. Miami L.R. 725); A plain English approach to loss of Future Earning Capacity (1985) 24 Washburn LJ. 253;) See also leading books, Munkman; Kemp P. Keap; MC Grregor; Warfield; John A Fleming etc.

31. After the pecuniary damages are arrived at, Courts are also awarding 12% interest generally on the sum arrived at. Together with that interest, the amount comes into the plaintiffs' hands.

No deduction is to be made from the sum arrived at by using multiplier:

32. As the statutory multiplier reduces, by means of a mathematical formula (see the formula explained in **Bhagwandas'** case AIR 1988 AP 99), the future amounts to present value, there is no need to further deduct 1/3 or 1/4. The multiplier takes in not only mortality and future inflation but also the fact that the claimants are receiving an accelerated payment once and for all". (emphasis supplied)

12. This Court tried to demonstrate that although the inflation was built-in 'in the multiplier method' but in the Indian context where the inflation was very high, the multiplier method did not take care of the inflation completely. This Court made certain tables i.e. one to assume the real value of money at 4%, i.e. inflation @ 4% per annum and rate of interest @ 8% per annum where the compensation awarded lasted for over 30 years which will happen when a person dies young; and the second table where the actual rate of interest and actual rate of inflation was taken where the compensation awarded lasted for 22 years which showed that the multiplier method on account of inflation (in this country) did not take care of the loss of dependency fully. Para 41 of the report in **Dhaneshwari** (supra) is extracted hereunder:

"41. I have obtained the Bank rates of interest (of Nationalized Banks) and compared it with the inflation prevailing in the country.

I have attempted three tables to demonstrate whether the rate of interest in the Indian context takes care of the inflation or not.

TABLE - I

- It is assumed that the deceased who is aged 26 years dies leaving behind a widow, a mother and two minor children.
- In this Table a notional amount of Rs.800/- is taken to be the income of the deceased and therefore the capital amount is arrived at Rs.1,22,400/- (Rs. 800 – 1/4th x 12 x 17).
- The dependency is taken to be Rs. 800 p.m - 1/4th (Rs.600) x 12 = 7200 p.a. in 1990.
- Further, a notional interest and inflation rate of 8% and 4% respectively, is taken into consideration which is an assumption of 'real rate of interest' (actual inflation rate – actual interest rate) in stable economy.
- The dependency is increased according to the inflation i.e. 4% and the interest on the Capital amount is taken @ of 8%.

The compensation lasts for over 30 years.

S. No.	Year	Capital Amount	Interest Received	Dependency	Rate of Interest	Infl-ation	Excess Amount
1.	1990	1,22,400	9,792	=600x12 =7,200	8%	4%	2,592
2.	1991	1,24,992	9,999	=7,200+288 =7,488	8%	4%	2,511
3.	1992	1,27,503	10,200	=7,488+299 =7,787	8%	4%	2,413
4.	1993	1,29,916	10,393	=7,787+311 =8,098	8%	4%	2,295
5.	1994	1,32,211	10,576	=8,098+324 =8,421	8%	4%	2,155
6.	1995	1,34,366	10,749	=8,421+336 =8,757	8%	4%	1,992
7.	1996	1,36,358	10,908	=8,757+350 =9,107	8%	4%	1,801

8.	1997	1,38,159	11,052	=9,107+364 =9,471	8%	4%	1,581
9.	1998	1,39,740	11,179	=9,471+378 =9,849	8%	4%	1,330
10.	1999	1,41,070	11,285	=9,849+393 =10,242	8%	4%	1,043
11.	2000	1,42,113	11,369	=10,242+409 =10,651	8%	4%	718
12.	2001	1,42,831	11,426	=10,651+426 =11,077	8%	4%	349
13.	2002	1,43,180	11,454	=11,077+443 =11,520	8%	4%	-65
14.	2003	1,43,114	11,449	=11,520+460 =11,980	8%	4%	-530
15.	2004	1,42,583	11,406	=11,980+479 =12,459	8%	4%	-1,053
16.	2005	1,41,530	11,322	=12,459+498 =12,957	8%	4%	-1,634
17.	2006	1,39,895	11,191	=12,957+518 =13,475	8%	4%	-2,283
18.	2007	1,37,611	11,008	=13,475+539 =14,014	8%	4%	-3,005
19.	2008	134605	10,768	=14,014+560 =14,574	8%	4%	-3,805
20.	2009	1,30,799	10,463	=14,574+582 =15,156	8%	4%	-4,692
21.	2010	126106	10,088	=15,156+606 =15762	8%	4%	-5,673
22.	2011	1,20,432	9,634	=15,762+630 =16,392	8%	4%	-6,757
23.	2012	1,13,674	9,093	=16,392+656 =17,048	8%	4%	-7,954
24.	2013	1,05,719	8,457	=17048+681 =17,729	8%	4%	-9,272

25.	2014	96,447	7,715	=17,729+710 =18,439	8%	4%	-10,723
26.	2015	85,723	6,857	=18,439+737 =19,176	8%	4%	-12,318
27.	2016	73,404	5,872	=19,176+767 =19,943	8%	4%	-14,070
28.	2017	59,333	4,746	=19,943+798 =20,741	8%	4%	-15,994
29.	2018	43,338	3,467	20,741+829 =21,570	8%	4%	-18,102
30.	2019	25,235	2,018	21,570+863 =22,433	8%	4%	-20,414
31.	2020	4,820		22,433+897 =23,330	8%	4%	

TABLE - II

- In this Table a notional amount of Rs.800/- is taken to be the income of the deceased and therefore the capital amount is arrived at Rs.1,22,400/- (Rs. 800 – 1/4th x 12 x 17).
- The dependency is taken to be Rs.800/- p.m – 1/4th (Rs.600) x 12 = 7200 in 1990. For the subsequent years the actual inflation rate is applied to increase the dependency accordingly.
- The capital amount is being increased as per the actual Bank interest rate on long term fixed deposit.
- The compensation lasts for about 21 years.

S. No.	Year	Capital Amount	Interest Received	Dependency	Rate of Interest	Infl-ation	Excess Amount
1.	1990	1,22,400	12,240	=600x12 =7,200	10%	8.9%	5,040
2.	1991	1,27,440	14,018	=7,200+993 =8,193	11%	13.8%	5,825
3.	1992	1,33,265	16,658	=8,193+958 =9,151	12.5%	11.7%	7,507

4.	1993	1,40,772	14,781	=9,151+576 =9,727	10.5%	6.3%	5,054
5.	1994	1,45,826	14,582	=9,727+992 =10,719	10%	10.2%	3,863
6.	1995	1,49,689	17,363	=10,719+1,093 =11,812	11.6%	10.2%	5,551
7.	1996	1,55,240	19,560	=11,812+1,051 =12,863	12.6%	8.9%	6,697
8.	1997	1,61,937	18,298	=12,863+939 =13,802	11.3%	7.3%	4,496
9.	1998	1,66,433	18,307	=13,802+1821 =15,623	11%	13.2%	2,684
10.	1999	1,69,117	17,757	=15,623+718 =16,341	10.5%	4.6%	1,416
11.	2000	1,70,533	15,689	=16,341+637 =16,978	9.2%	3.9%	-1,288
12.	2001	1,69,244	14,047	=16,978+747 =17,725	8.3%	4.4%	-3,677
13.	2002	1,65,566	11,424	=17,725+655 =18,380	6.9%	3.7%	-6,955
14.	2003	1,58,610	9,199	=18,380+698 =19,078	5.8%	3.8%	-9,878
15.	2004	1,48,731	8,180	=19,078+744 =19,822	5.5%	3.9%	-11,641
16.	2005	1,37,089	8,225	=19,822+1,228 =21,050	%	6.2%	-12,824
17.	2006	1,24,264	8,449	=21,050+1,326 =22,376	6.8%	6.3%	-13,926

18.	2007	1,10,337	9,930	=22,376+1,409 =23,785	9%	6.3%	-13,855
19.	2008	96,482	8,876	=23,785+1,974 =25,759	9.2%	8.3%	-16,882
20.	2009	79,599	6,367	=25,759+2,781 =28,540	8%	10.8%	-22,172
21.	2010	57,426	4,307	=28,540+3,396 =31,936	7.5%	11.9%	-27,628
22.	2011	29,797	2,681	=31,936+3,864 =35,800	9%	12.1%	-33,118
23.	2012	-3,321			9%	9.2%	

13. The learned Single Judges of this Court while granting increase in the income on account of inflation distinguished between future prospects and increase on account of inflation. The observations of the learned Single Judges in **National Insurance Co. Ltd. v. Pooja & Ors.,** II, (2007 ACJ 1051), **Om Kumari & Ors. v. Shish Pal & Ors,** 140 (2007) DLT 62, **Narinder Bishal & Anr. v. Rambir Singh & Ors.,** MAC APP. 1007-08/2006, decided on 20.02.2008 and **New India Assurance Co. Ld. v. Vijay Singh** MAC APP. 280/2008 decided on 09.05.2008 as taken in **Dhaneshwari**(supra) are extracted hereunder:

> "6. Then, there is a report of **National Insurance Co. Ltd. v. Pooja & Ors.,** II (2006) ACC 382 (2007 ACJ 1051) decided by the Learned Single Judge on 19.04.2006. Here again, increase in the minimum wages was given holding as under:-
>
> "15. The deceased expired in 1999. At that time he was 30 years old. Due to inflation and rapid economic progress, minimum wages have been going up. The deceased had long working life ahead of him. It was natural that his earnings in normal course would have gone up in the next about 30 years. Loss of dependency is calculated keeping in view the monetary loss suffered by the dependants in future. Therefore, ld. Tribunal was justified in not ignoring the possibility of increase in earnings/ income due to inflation, price rise, etc. of the deceased and

> taking this factor into consideration."
>
> 7. In **Om Kumari & Ors. v. Shish Pal & Ors,** 140 (2007) DLT 62, while giving the increase on account of minimum wages, another Learned Single Judge held as under:-
>
> "16. The future prospects may not be linked to promotional avenues but certainly would be linked to the inflation and increased wages over the years.
>
> 17. I have before me the minimum wages notified under the Minimum Wages Act, 1948, which show that pertaining to matriculates, minimum wages have risen from Rs. 325/- per month as on 1.1.1980 to Rs. 1,014 per month as on 1.5.1989. The same have risen to Rs. 2,796 per month as on 1.2.1999. Between 1.1.80 and 1.5.1989, the percentage increase is slightly over 200. Over the next 10 years, percentage increase is approximately 180.
>
> 18. Minimum wages are notified keeping into account the inflationary trends and cost indices. These are the minimum wages which law presumes would be required for a person to sustain himself at the minimum level of subsistence."
>
> 8. In **Narinder Bishal & Anr. v. Rambir Singh & Ors.,** MAC APP. 1007-08/2006, decided on 20.02.2008, a distinction was drawn between future prospects and increase granted on account of inflation by the learned Single Judge of this Court. It was held that minimum wages has co-relation with the growth and development of the nation's economy, postulating increase in the price index, reduction of purchasing power and depreciation in the value of currency. This Court granted 50% increase in the minimum wages holding as under:-
>
> "16. The future prospects would necessarily mean advancement in future career, earnings and progression in one's life. It could be considered by seeing, from which post a person began his career, what avenues or prospects he has while being in a particular avocation and what targets he/she would finally achieve at the end of his career. The promotional avenues, career progression, grant of selection grades etc. are some of the broad

features for considering one's future prospects in one's career.

17. The minimum wage, in the very context of economy has a correlation with the growth and development of the nation's economy, postulating increase in the price index, reduction of purchasing power with the denunciation of currency value and consequent fixation of minimum wages giving some periodical increase so as to ensure sustenance and survival of the workman class. Keeping this in view, under no circumstance the revision of minimum wages can be treated on the same footing with the factor of future prospects.

18. For instance, minimum wages of unskilled workman in the year 2000 were Rs. 2524/- under the Minimum Wages Act. The said minimum wages in the year 2007 for the same class of unskilled workman came to be Rs. 3470/- under the Act. This increase is not due to any promotion of unskilled workman or any kind of advancement in his career but the same are due to increase in the price index and cost of living which are the determining factors taken into consideration for increasing the wages under the Minimum Wages Act. The nature of job of unskilled workman will not change as the same shall remain unchanged. The same principle may be true even in the case of business or trade or other such allied activities where the future prospects of the deceased can be considered on the basis of his assets, income tax return, wealth tax return, balance sheet etc. But as far as the increase in the minimum wages is concerned the same takes into consideration the price indeed and the inflationary trends and the same have no correlation with the future prospects of a skilled, semi-skilled or an unskilled workman.

19. In the light of the above discussion, I find myself in agreement with the argument of counsel for the appellants that in the given facts and circumstances of the case, the Tribunal ought to have taken into consideration the revision in the minimum wages so as to determine just and fair compensation. In all cases where the claimants are able to sufficiently establish the income of the deceased, the benefit of granting any compensation for future prospects can be taken into consideration only when sufficient and reliable evidence is placed and proved by the claimants as

per the dictum laid down in **Bijov Kumar Dugar v. Bidva Dhar Dutta and Others,** (2006) 3 SCC 242. While in other cases where in the absence of sufficient evidence, the Tribunal applied the yardstick of minimum wages, in all such cases, the Tribunals can take judicial notice of the revision of minimum wages, as laid down under the Minimum Wages Act."

9. In **New India Assurance Co. Ld. v. Vijay Singh** MAC APP. 280/2008 decided by this Court on 09.05.2008, yet another Learned Single Judge relying on **Narinder Bishal** (supra) also drew a distinction between the grant of future prospects which is given on account of advancement in career and progression in employment, on the one hand and increase in the minimum wages which is granted on account of inflation on the other hand. The learned Single Judge held as under:-

".. The future prospects would necessarily mean advancement in future career, earnings and progression in one's life. It could be considered by seeing, from which post a person began his career, what avenues or prospects he has while being in a particular avocation and what targets he/she would finally achieve at the end of his career. The promotional avenues, career progression, grant of selection grades etc. are some of the broad features for considering one's future prospects in one's career.

The minimum wage, in the very context of economy has a correlation with the growth and development of the nation's economy, postulating increase in the price index, reduction of purchasing power with the denunciation of currency value and consequent fixation of minimum wages giving some periodical increase so as to ensure sustenance and survival of the workman class. Keeping this in view, under no circumstance the revision of minimum wages can be treated on the same footing with the factor of future prospects.

10. In all cases where the claimants are able to sufficiently establish the income of the deceased, the benefit of granting any compensation for future prospects can be taken into consideration only when sufficient and reliable evidence is placed and proved by the claimants as per the dictum laid down in **Bijov Kumar**

Dugar v. Bidya Dhar Dutta and Others, (2006) 3 SCC 242. While in other cases, where in the absence of sufficient evidence, the Tribunal applies the yardstick of minimum wages, in all such cases, the Tribunals can take judicial notice of the revision of minimum wages, as laid down under the Minimum Wages Act."

14. In **Reshma Kumari v. Madan Mohan** (2009) 13 SCC 422, the Supreme Court observed that unlike other developed countries, the interest rates in India do not rise with the rise in inflation and posed a question whether the practice of taking inflation into consideration was wholly incorrect? Paras 47, 48 and 49 of the report are extracted hereunder:

> "47. One of the incidental issues which has also to be taken into consideration is inflation. Is the practice of taking inflation into consideration wholly incorrect? Unfortunately, unlike other developed countries in India there has been no scientific study. It is expected that with the rising inflation the rate of interest would go up. In India it does not happen. It, therefore, may be a relevant factor which may be taken into consideration for determining the actual ground reality. No hard-and-fast rule, however, can be laid down therefor.
>
> 48. A large number of English decisions have been placed before us by Mr. Nanda to contend that inflation may not be taken into consideration at all. While the reasonings adopted by the English courts and its decisions may not be of much dispute, we cannot blindly follow the same ignoring ground realities.
>
> 49. We have noticed the precedents operating in the field as also the rival contentions raised before us by the learned counsel for the parties with a view to show that law is required to be laid down in clearer terms."

15. In its subsequent reports in **Laxman v. Oriental Insurance Co. Ltd.,** (2011) 10 SCC 756, **Sanjay Batham v. Munnalal Parihar,** (2011) 10 SCC 665, **Govind Yadav v. New India Insurance Co. Ltd.** (2011) 10 SCC 683, and **Ibrahim v. Raju,** (2011) 10 SCC 634 also the Supreme Court referred to para 47 of the report in **Reshma Kumari** (supra) but did not lay down any guidelines as to how and upto what extent the inflation is to be taken into consideration in awarding a just compensation.

16. Thus, in the absence of any judgment by the Supreme Court whether inflation was to be considered or not for grant of compensation to the victims of the accidents, this Court held that the Division Bench Judgment of this Court in Rattan Lal Mehta (supra) was a binding precedent.

17. It is true that a coordinate Bench of equal strength cannot overrule an earlier judgment. The question is whether the judgment in **Santosh Devi**(supra) is contrary to the judgments in **Susamma Thomas**(supra), **Sarla Dixit**(supra) **Bijoy Kumar Dugar**(supra), **Sarla Verma**(supra). In **Susamma Thomas** (supra), evidence was produced to show that with the passage of time, the monthly salary of deceased would have risen from Rs.103/- per month to 2,000/- per month. In **Sarla Dixit**(supra), the deceased was employed as a Captain in the Indian Army. His salary was Rs. 1543/- per month. Evidence was led to prove that he had meritorious record. The compensation was awarded assuming his salary to be Rs. 2200/- per month. In **Bijoy Kumar Dugar**(supra), the Supreme Court held increase in compensation for the future prospects can be granted when there is evidence with regard to the same. Paras 9 and 11 of the report are extracted hereunder:

> "9. We have gone through the ratio of the above decisions relied upon by the claimants in support of the submission for the enhancement of the amount of compensation. In G.M., Kerala SRTC case the claimants had satisfactorily proved on record that the deceased person in that case had a more or less stable job in the newspaper establishment of Malayala Manorama on a monthly salary of Rs. 1032/-.
>
> On the basis of the evidence found on record in regard to the prospects of the advancement in the future career of the deceased, this Court has made higher estimate of monthly income at Rs. 2000/- per month as the gross income and granted relief to the claimants.
>
> x x x x x x x x
>
> 11. In the present case, as noticed, there is no evidence brought on record by the claimants to show the future prospects of the deceased. This contention, in our view, is not tenable to sustain it."

18. In **Sarla Verma**(supra), the case related to the death of a Scientist who was in Government Service. 50% increase was granted in the deceased's salary while awarding loss of dependency. In para 24 of the report, it was observed that where the deceased was self-employed or a person getting fixed salary the Courts would usually consider the actual income at the time of his death for the purpose of computing the loss of dependency. The question of granting increase on account of inflation to the income of a person getting a fixed salary or a self employed, i.e. skilled and unskilled worker, like barber, blacksmith, cobbler, mason, carpenter, etc. etc. at the time of his death was not before the Supreme Court. The Supreme Court in Santosh Devi(supra) referred to an earlier decision in **R.K. Malik v. Kiran Pal** (2009) 14 SCC 1 and observed that damages awarded should be an adequate sum of money that would place the party in the same position as if he had not suffered on account of the wrong. Para 12 of the report is extracted hereunder:

> "12. In **R.K. Malik v. Kiran Pal** (2009) 14 SCC 1, the two Judge Bench while dealing with the case involving claim of compensation under Section 163-A of the Act, noticed the judgments in **M.S. Grewal v. Deep Chand Sood** (2001) 8 SCC 151, **Lata Wadhwa v. State of Bihar** (2001) 8 SCC 197, **Kerala SRTC v. Susamma Thomas** (1994) 2 SCC 176, **Sarla Dixit v. Balwant Yadav** (1996) 3 SCC 179 and made some of the following observations, which are largely reflective of the philosophy that victims of the road accidents and/or their family members should be awarded just compensation:
>
> "In cases of motor accidents the endeavour is to put the dependants/claimants in the pre-accidental position. Compensation in cases of motor accidents, as in other matters, is paid for reparation of damages. The damages so awarded should be adequate sum of money that would put the party, who has suffered, in the same position if he had not suffered on account of the wrong. Compensation is therefore required to be paid for prospective pecuniary loss i.e. future loss of income/dependency suffered on account of the wrongful act. However, no amount of compensation can restore the lost limb or the experience of pain and suffering due to loss of life. Loss of a child, life or a limb can never be eliminated or ameliorated completely.

> To put it simply-pecuniary damages cannot replace a human life or limb lost. Therefore, in addition to the pecuniary losses, the law recognises that payment should also be made for non-pecuniary losses on account of, loss of happiness, pain, suffering and expectancy of life, etc. The Act provides for payment of "just compensation" vide Sections 166 and 168. It is left to the courts to decide what would be "just compensation" in the facts of a case."

19. With regard to inflation, the Supreme Court observed that because of the inflation, the salaries of Government and public sector employees have increased manifold and also for those working in the private sector there has been an increase to some extent though not keeping pace with the increase in the Government sector. It was observed that the persons on a fixed salary or self-employed, would also increase the cost of their labour and they would get an increase of 30% while computing the loss of dependency. Para 14 of the report is extracted hereunder:

> "14.....In our view, it will be naive to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self- employed or who get fixed income/emoluments. They are the worst affected people. Therefore, they put extra efforts to generate additional income necessary for sustaining their families. The salaries of those employed under the Central and State Governments and their agencies/instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures and total emoluments of those in higher echelons of service will cross the figure of rupees one lac. Although, the wages/income

of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the Government employees and those employed in private sectors but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching cloths. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason etc. Therefore, we do not think that while making the observations in the last three lines of paragraph 24 of Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30 per cent increase in his total income over a period of time and if he / she becomes victim of accident then the same formula deserves to be applied for calculating the amount of compensation."

20. Thus, the observations made by the Supreme Court in para 24 of the report in Sarla Verma were explained and distinguished and it was said the persons getting fixed salary and self-employed persons would also increase their wages with the passage of time on account of inflation. The question of increase on account of inflation was not considered by the Supreme Court in **Susamma Thomas**(supra), **Sarla Dixit**(supra) **Bijoy Kumar Dugar**(supra) and **Sarla Verma**(supra). It may be noticed that minimum wages of an unskilled worker on 01.01.1980 were Rs. 240/- which rose to Rs. 6,656/- on 01.10.2011. Thus, the increase in income on account of inflation in our country is very fast. In para 47 to 51 of **Dhaneshwari**(supra), this Court observed as under:

"47. I have obtained data which shows that during the last 26

years the income of the same category of employees has grown up by about 15 times on account of inflation and growth in the economy.

Sl.No.	*Group of Employees*	*Initial salary (including allowances) as on Ist January, 1986*	*Initial salary (including allowances) as on Ist January, 2012*
1.	Group D	930/-	14,108/-
2.	LDC	1245/-	15,480/-
3.	Section Officer	2550/-	36,650/-
4.	Under Secretary to Govt. of India	3700/-	52,714/-

48. Apart from this almost everybody working in the govt. department gets at least 4 to 5 promotions during their tenure. A Clerk at least becomes a Section Officer, an Assistant becomes a Director in the Govt. of India if not a Joint Secretary, a Civil Servant (IAS) becomes an Additional Secretary, if not a Secretary. In private sectors pastures are much greener for some and not so rosy for the others.

49. The question is whether in all cases, the Courts are providing compensation which can be said to be just and fair.

50. It will be seen that the compensation is far less than the just compensation as envisaged under the Act mainly on account of inflationary trend in this country. Though the multiplier method does take care of future inflation as held by the Division Bench of this Court in **Rattan Lal Mehta** (supra) yet, on account of inflation which remains in double digits in our country most of the times, even after the increase granted on account of future prospects the compensation awarded is not able to take care of the actual loss of dependency.

51. It is respectfully submitted that I am bound by the Division Bench judgment of this Court in **Rattan Lal Mehta** (supra) which on the aspect of the multiplier taking care of future inflation

was not brought to the notice of this Court earlier and more importantly escaped my attention. Thus, increase in minimum wages on account of inflation given by the learned Single Judges of this Court in various cases including the one which have been extracted hereinabove, was not permissible."

21. In my view, there is no conflict between the earlier judgments of the Supreme Court in **Susamma Thomas**(supra), **Sarla Dixit**(supra) **Bijoy Kumar Dugar**(supra) and **Sarla Verma**(supra) which dealt with the increase in the income on account of future prospects and **Santosh Devi**(supra) which dealt with the increase in income due to inflation. Thus, on the basis of the judgment in **Santosh Devi**(supra) it can very well be said that the persons who are getting fixed salary or who are self employed as menial, skilled and unskilled workers, like barber, blacksmith, cobbler, mason, carpenter, etc. etc. would be entitled to an increase in the income to the extent of 30% on account of inflation when the deceased or the victim is aged upto 50 years.

22. Turning to the facts of the instant case. The deceased's income was proved to be Rs. 4,000/- per month by virtue of the salary certificate Ex.PW1/3. There was no evidence of his bright future prospects. The Claimants are entitled to an increase of 30% in the salary on account of inflation. The loss of dependency works out to be Rs. 7,95,600/-(`4000 + 30% x 3 ÷ 4 x 12 x 17.

23. A compensation of Rs. 40,000/- was awarded towards loss of love and affection. Generally, a sum of Rs. 25,000/- is awarded under this head. In the absence of any challenge to this finding, I would not like to interfere with the same. The Claims Tribunal awarded a sum of Rs. 10,000/- towards the expenditure for the deceased's treatment, till he succumbed to the injuries, and a sum of Rs. 10,000/- each was awarded towards loss to estate, loss to consortium and funeral expenses. The overall compensation thus comes to Rs. 8,75,600/-.

24. The enhanced compensation of Rs. 1,71,207/- shall carry interest @ 7.5% per annum as awarded by the Claims Tribunal. The enhanced compensation shall enure for the benefit of the deceased's widow i.e. Claimant Rakhi. 75% of the enhanced compensation shall be held in Fixed Deposit for a period of three years, six years and nine years in equal proportion. The Claimants shall be entitled to quarterly interest

which shall be utilized by her for her own and for the benefit of the three minor children.

25. The ICICI Lombard General Insurance Co. Ltd. is directed to deposit the enhanced amount along with interest in the name of Claimant with UCO Bank, Delhi High Court Branch within six weeks.

26. The Appeals are disposed of in above terms.

27. The statutory amount of Rs. 25,000/- shall be refunded to the Appellant ICICI Lombard General Insurance Co. Ltd.

28. The pending Applications stand disposed of.

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RFA

ST. JOHN'S SCHOOL & ANR. ….APPELLANT

VERSUS

ASHA BHAN ….RESPONDENT

(V.K. JAIN, J.)

RFA NO. : 446/2003 DATE OF DECISION: 19.07.2012

Constitution of India, 1950—Article 226—Whether a private employer is entitled to terminate the services of the respondent teacher at any time, without giving any reason—Held—If termination is actuated on mala fides then damages can be claimed—A contrary view would give a handle to an unscrupulous employer to take vengeance on the employees who refuse to be party to an illegal or unlawful act on the part of the employer and therefore would be against public policy. However, even in such a case enforcement of contract of employment cannot be sought—Even if the dismissal

or termination of an employee from services is illegal he is not entitled to whole of the back wages as a matter of right and the Court needs to award a suitable compensation after considering all the facts and circumstances of the case.

Yet another reason given by the appellants/defendants for dispensing with the services of the plaintiff/respondent is that since the number of teachers in the school had declined quite substantially, the teachers in the school had become surplus and therefore, 11 of them had left the service during the year 2001. In his cross examination, DW1 Sh. A.J. Philip stated that out of 21 teachers working in the school, 11 had resigned and the services of two teachers were terminated, thereby leaving nine working teachers in the school, all of whom were permanent. He admitted that since October 2001 they had employed four teachers, though he claimed that they were employed for intermittent period. He however admitted that one Mrs. Reena Sharma who started working from 23.8.2001 was continuing till date. Mrs. Saroj Sabharwal, who joined the school on 1.8.2001 worked till 8.8.2001, and thereafter she again joined work on 22.4.2002. He admitted that Mrs. Shaila Verghese who joined school on 20.9.2001 and Mrs. Saraswati who joined on 10.7.2002 were still working. I fail to appreciate how it can be said that the respondents had become surplus, when the school engaged two more teachers namely Reena Sharma and Mrs. Shaila Verghese just before terminating her services. Moreover, this is not the case of the appellants/defendants that they had followed the principle of last come and first go in terminating the services of the alleged surplus teachers. The principle to be adopted in such cases ordinarily is that the person who joined services last, goes first. No particular reason has been given by the defendant/appellant for engaging two teachers, while almost simultaneously dispensing with the services of the plaintiff/respondent. In these circumstances, there is no escape from the conclusion that the justification given by the appellants/defendants for terminating the service of the plaintiff/respondent is absolutely

sham and frivolous. It would not be unsafe to presume in such circumstances that the services of the plaintiff/respondent were terminated not on account of her being overage or surplus, but on account of her resisting continued involuntary deduction from her salary. The termination of her service, therefore, was clearly a mala fide act with a view to punish her on account of her refusing to accept a reduced salary. Even if it is presumed that the appointment of the plaintiff/respondent was not for a fixed term or till her reaching a particular age, it can hardly be disputed that an employee termination of whose services is actuated by mala fide would be entitled to appropriate damages though he/she cannot seek enforcement of the contract. A contrary view would give a handle to an unscrupulous private employer to take vengeance on the employees, who refuses to be party to an illegal or unlawful act on the part of the employer and therefore would be against the public policy. The right of an employer to terminate the service of an employee, who does not enjoy any statutory protection on account of his unsuitability to the job entrusted to him on account of his having become surplus, is altogether different from an action, which is actuated by malafide and therefore unsustainable in law. **(Para 12)**

[An Ba]

APPEARANCES;

FOR THE APPELLANT : Mr. V.K. Rao with Mr. Biraja Mahapatra, Mr. Manoj V. George and Mr. K. Gireesh Kumar, Advocates.

FOR THE RESPONDENT : Mr. P.K. Aggarwal with Ms. Mercy Hussain, Advocates.

CASES REFERRED TO:

1. *U.P. State Electricity Board* vs. *Laxmi Kant Gupta* 2009 LLR 1.
2. *Haryana State Electronics Development Corporation* vs. *Mamni* AIR 2006 SC 2427.

3. *U.P. State Brassware Corporation Ltd. & Anr.* vs. *Udai Narain Pandey* AIR 2006 SC 586.

4. *Kendriya Vadyalaya Sangathan & Anr.* vs. *S.C.Sharma* (2005) IILJ 153 SC.

5. *Allahabad Jal Sansthan* vs. *Daya Shankar Rai and Anr.* (2005) IILLJ 847 SC.

6. *Pearlite Liners (P) Ltd.* vs. *Manorama Sirsi* (2004) 3 SCC 172.

7. *Hindustan Motors Ltd.* vs. *Tapan Kumar Bhattacharya & Anr.* (2002) IILLJ 1156 SC.

8. *Sanjay Gupta (Dr.)* vs. *Shroff's (Dr.) Charity Eye Hospital* 2002 VII AD (Delhi) 580.

9. *P.G.I of Medical Education and Research Chandigarh* vs. *Raj Kumar* (2001) 2 SCC 54.

10. *S.P.Bhatnagar* vs. *Indian Oil Corporation* 1994 III AD(Delhi) 898.

11. *N.P.Mathai* vs. *The Federal Bank Ltd.* (decided on 6th November, 1992 by High Court of Kerala) MANU/KE/0322/1992.

12. *Vaish Degree College, Shamli & Ors.* vs. *Lakshmi Narain & Ors.* AIR 1976 SC 888.

13. *S.S. Shetty* vs. *Bharat Nidhi Ltd.* (1958) SCR 442.

V.K. JAIN, J.

1. This appeal is directed against the judgment and decree dated 17.03.2003, whereby a decree for recovery of Rs.8,81,667/- with proportionate costs and pendente lite and future interest @ 10% per annum was passed in favour of the respondent and against the appellants. The facts giving rise to filing of this appeal can be summarized as under:-

The respondent/plaintiff was employed as a Nursery/KG teacher with appellant No. 1 St. John's School, which is being run and managed by appellant No. 2 Delhi Mar Thoma Church Society. The services of the plaintiff/respondent were terminated with effect from 01.10.2001. The case of the plaintiff/respondent is that though her salary was Rs.7331/- per month, the appellants/defendants were wrongfully and illegally

deducting a sum of Rs 2706/- per month from her salary and when she protested against such deduction, the defendants/appellants threatened to terminate her services. A sum of Rs 64,896/- was deducted from her salary in this manner, in about 24 months. This was also her case that on a strong protest by her in July-August, 2001, the defendants/appellants offered her a package of 05 month salary in case she submitted her resignation. They also threatened her to resign or else they would terminate her services, in case the offer was not accepted by her. According to the plaintiff/respondent, she refused to resign as a result of which she was not allowed to take classes with effect from 01.08.2001 and subsequently her services were terminated with effect from 01.10.2001. She accordingly claimed Rs 64,896/- being the amount wrongfully deducted from her services, Rs 21,993/- as arrears of salary, Rs 7,18,438/- on account of damages for illegal and wrongful termination of her services and Rs 50,000/- on account of damages for mental sufferings.

2. The defendants/appellants filed written statement contesting the suit. They took a preliminary objection that the contract of service, being personal in nature, was not enforceable. They also claimed that the suit was barred under Order II Rule 2 of Code of Civil Procedure since damages were not claimed by the plaintiff/respondent in an earlier suit which she had withdrawn. As regards deductions made from the salary of the plaintiff/respondent, they alleged that the plaintiff/respondent was making a voluntary donation of Rs 2706/- per month and there was no pressure on her to make such donation. They also disputed their liability to pay any arrears of amount and also denied having caused any mental agony to the plaintiff/respondent. They also claimed that the plaint did not disclose any cause of action.

3. The following issues were framed by the learned Trial Judge on the pleadings of the parties:-

i. Whether the plaintiff is entitled to recover Rs 64,902/- on account of wrongful deduction from her salary? OPP

ii. Whether the plaintiff is entitled to recover Rs 21,993/- on account of arrears of unpaid salary? OPP

iii. Whether the plaintiff is entitled to Rs 7,18,438/- on account of damages for illegal termination of her services? OPP

iv. Whether the plaintiff is entitled to recover Rs 50,000/- on account of damages for causing mental torture? OPP

v. Whether the plaintiff is entitled to recover interest from the defendants? If so, at what rate, on what amount and for what period? OPP

vi. Whether the claim of the plaintiff is liable to be rejected under Order 7 Rule 11 CPC for disclosing no cause of action? OPD

vii. Whether the suit of the plaintiff is barred under Order II Rule 2 CPC? OPD

viii. Relief.

Issue No. 2

4. As far as salary for the month of August, 2001 is concerned, as noted by the learned Trial Judge even in the written statement, the defendants/appellants did not dispute their liability to pay the said amount. This liability has not been disputed even in the evidence produced by the appellants/defendants. As regards salary for the month of September, 2001, the case of the defendants/appellants is that the plaintiff/respondent had not worked during that month. In her affidavit by way of evidence, the plaintiff/respondent stated that since 01.09.2001, she was not allowed to enter the school and mark her attendance. She, however, admitted that she had attended the school on 01.09.2001. In rebuttal, DW-1 Shri A.J. Phillip, Honorary Secretary of appellant No. 2-Society and DW-2 Mr P.S. Jolly, Accountant/Office In-charge of appellant No. 1 - School have stated that the plaintiff/respondent attended the school only for one day in the month of September, 2001 and that they never disallowed her to enter the school premises in the month of September, 2001. The plaintiff/respondent has, in her deposition, claimed that the gates of the school were closed after 01.09.2001. This, however, has been repudiated by DW-1 and DW-2 who stated that the gates remained open for everyone in the month of September, 2001. The learned Trial Judge has awarded salary for the month of September, 2001 to the plaintiff/respondent primarily on the ground that the averment by her in para 7 of the plaint that since 01.09.2001 she was not allowed to enter the school and mark her attendance was not specifically denied by the defendants/appellants and, therefore, amounts to admission of the averment made by her. I,

however, find that the observation made by the learned Trial Judge is factually incorrect. In para 7 of the written statement, it has been specifically denied that the plaintiff/respondent was not allowed to enter the school from 01.09.2001. Hence, there is absolutely no admission of the averment made by the plaintiff/respondent in this regard.

No notice or protest letter by the plaintiff/respondent to the defendants/appellants, claiming therein that she was not allowed to attend the school in the month of September, 2001. Had the plaintiff/respondent not been allowed to enter the school after 01.09.2001, she would at least have lodged a written protest with the school in this regard. That, however, was not done. Even otherwise, it is difficult to accept that the gate of the school remained closed in the month of September, 2001. Admittedly, more than 250 children were studying in the school in September, 2001 and a number of teachers were also working in the school at that time. Had the gates of the school been closed, neither those teachers nor the students would have been able to attend the school. This is not the case of the plaintiff/respondent that though the gates were opened for students, other teachers/staff members and visitors, she was prevented by the Security Guard or Gate Keeper from entering the school. In these circumstances, it is difficult to hold that the plaintiff/respondent was entitled to salary for the whole of the month of September, 2001. In my view, since she attended the school only on 01.09.2001, she would be entitled to 01 day's salary in the month of September, 2001.

Issue No. 1

5. It is an admitted position that a sum of Rs 6490/- was deducted from the salary of the plaintiff/respondent. The deduction was made at the rate of Rs 2706/- per month with effect from July, 1999. The case of the appellants/defendants is that this amount was paid by the plaintiff/respondent as voluntary donation, whereas the case of the plaintiff/respondent is that since the appellants/defendants had threatened to terminate her services in case she did not agree to the said deduction from her salary, she had no option, but to succumb to this pressure from them. Admittedly, the salary of the plaintiff/respondent at the relevant time was Rs 7331/- per month. It is difficult to accept that a person earning such a meager salary would make voluntary donation to the extent of more than 1/3 of her salary and that too for a consecutive period of about 24 months. Yet another circumstance which rules out this deduction being

a voluntary donation is the odd amount deducted every month from the salary of the plaintiff/respondent. If a person wants to make a voluntary donation, he/she would normally contribute a flat amount and not an odd amount such as Rs 2706 per month. The case of the plaintiff/respondent is that since she protested vehemently in July/August, 2001, against this involuntary deduction from her salary, she was asked to either resign or face termination and when she refused to resign, her services were terminated. In these circumstances, I see no reason to interfere with the finding of the learned Trial judge that the plaintiff/respondent was entitled to recover Rs 64902/- being the amount illegally deducted from her salary. The issue has, therefore, rightly been decided in favour of the plaintiff/respondent and against the defendants/appellants.

Issue No. 6

6. It has been alleged in the written statement that the suit having been filed without cause of action is liable to be rejected under Order VII Rule 11 of the Code of Civil Procedure. I fail to appreciate how it can be said that the suit does not disclose any cause of action. The case of the plaintiff/respondent is there her services were terminated, there was unlawful deduction from her salary and she had not paid salary for the months of August and September, 2001. All these allegations disclosed sufficient cause of action to file a suit for recovery of money.

The issue has, therefore, right been decided in favour of the plaintiff/respondent and against the defendants/appellants.

Issue No. 7

7. It was contended by the learned counsel for the defendants/appellants that the services of the plaintiff/respondent having been terminated before she filed the earlier suit for injunction, the subsequent suit for recovery of money being based on the same cause of action, is hit by Order II Rule 2 of Code of Civil Procedure.

Admittedly, the plaintiff/respondent, while withdrawing the previously instituted suit, had obtained permission of the Court to file a fresh suit on the same cause of action. A perusal of the order dated 06.08.2002 would show that the plaintiff/respondent stated that she did not want to pursue the suit in the present form and wanted to withdraw the same with liberty to file a fresh suit. The Court, while dismissing the suit as

withdrawn, directed that she may file a fresh suit if it is maintainable according to law and subject to the provisions of Limitation Act. The suit for recovery of money is otherwise maintainable in law and having been filed on 07.08.2002, is within the prescribed period of limitation.

Order XXIII Rule 3 of the Code of Civil Procedure, to the extent it is relevant, provides that where the Court is satisfied that the suit must fail by the reason of some formal defect, or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit, it may, grant the plaintiff, permission to withdraw such suit, with liberty to institute a fresh suit in respect of the subject-matter of such suit. The subject-matter is nothing, but, cause of action, to institute the suit. The consequence of a suit being withdrawn and permission being granted by the Court to file a fresh suit on the same cause of action is as if the first suit was never filed. There is no decree passed in such a case, since withdrawal of the suit does not come in the definition of decree given in Section 2(2) of the Code. Therefore, there would be no scope for applicability of Order II Rule 2 of the Code of Civil Procedure to such a fresh suit which is filed consequent to the permission granted by the Court at the time of withdrawal of the earlier suit. Any relief which is not claimed in the withdrawn suit can be claimed in the fresh suit, even if it is based on the same cause of action. The issue has rightly been decided against the defendants/appellants.

Issues No. 3, 4, 5 and 8

The case of the appellants/defendants is that as private employers, they were entitled to terminate the services of the plaintiff/respondent at any time, without giving any reason and therefore plaintiff/respondent was not entitled to any damages on account of termination of her services.

9. It was held by the Supreme Court in **Vaish Degree College, Shamli & Ors. v. Lakshmi Narain & Ors.** AIR 1976 SC 888 that a contract for personal service cannot be specifically enforced and a court normally would not give a declaration that the contract subsists and such an employee even after having been removed from service cannot be deemed to be in service against the will and consent of the employer. This rule is subject to three well-recognised exceptions: (i) where a public servant is sought to be removed from service in contravention of the provisions of Article 311 of the Constitution of India; (ii) where a

worker is sought to be reinstated on being dismissed under the Industrial Law; and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the statute.

In **Pearlite Liners (P) Ltd. v. Manorama Sirsi** (2004) 3 SCC 172, the Supreme Court observed that a case of private employment would normally be governed by the terms of the contract between the parties. In **Sanjay Gupta (Dr.) v. Shroff's (Dr.) Charity Eye Hospital** 2002 VII AD (Delhi) 580, this Court held that if termination of services of the appellant was illegal, his remedy was to file a suit for damages.

In **N.P.Mathai v. The Federal Bank Ltd.** (decided on 6th November, 1992 by High Court of Kerala) MANU/KE/0322/1992 the appellant was Manager in Trivendrum Branch of the defendant bank. His services were terminated by the bank and one month's salary in lieu of notice was given to him while terminating his service. The case of the appellant was that the termination order was a penal action which had not preceded by an inquiry and therefore was invalid. This was also his contention that the contract of service did not empower the defendant to terminate his services without sufficient reasons and his services were to endure till superannuation. The appellant sought a declaration that he continued to be in service. Alternatively, he claimed damages by way of compensation for wrongful termination of his services. He was 44 years old at the time when his services were terminated and had he continued in service, he would have superannuated on reaching the age of 60 years. However, before the High Court, the appellant did not press for reinstatement and the compensation claimed by him was also reduced. The defendant however, contended that it had got the right to terminate the services of the plaintiff under Rule 28 and the termination was in accordance with said Rule. This was also the case of the plaintiff before the Court that the action taken by the defendant was without bona fides and he had been removed from service because he was a stumbling block in the way of promotion and prospects of brother of Chairman of the defendant bank. The defendant contended that the principles of natural justice could not be imported in the matter of enforcing the contract and were not applicable to termination of a contract by one of the parties to the contract. The High Court, on an analysis of the facts and circumstances of the case, was of the view that the plaintiff's services were terminated for an alleged misconduct and the termination order was

passed to avoid an inquiry which the bank was bound to do under its own Code and therefore was in reality, a disciplinary action. The Court therefore directed payment of compensation to the plaintiff for a wrongful termination of his services.

10. In the case before this Court, the appointment letter issued to the plaintiff/respondent to the extent it is relevant reads as under:-

> "On behalf of the Executive Committee of the Society I am to inform you that you have been selected for the post of Teacher effective from the 14th day of September, 1983 on a consolidated salary of Rs.300/- P.M. in the pay scale of Rs.300-10-350-EB-20-550-25-625.
>
> 2. Your appointment in the first instance, shall be probationary for a period of 12 months, subject to your services being found satisfactory, the same will be made regular."

It would thus be seen that there was no clause in the appointment letter for terminating the services of the plaintiff/respondent. The letter whereby the services of the plaintiff were terminated w.e.f. 1st October, 2001 also does not indicate any contractual provision entitling the defendants/appellants to terminate the services of the plaintiff/respondent. In the context of retrenchment under Sec. 25F of Industrial Disputes Act, it was held in (2000) III LLJ 713 (MP) that in the absence of a clause in the agreement or letter of appointment for termination of service, retrenchment was not permissible. In any case, as far as the case before this Court is concerned, though the appointment was not for a fixed period or till the plaintiff/respondent reached a particular age, the use of the words 'will be made regular' in the letter of appointment clearly indicates that the appointment was to subsist till a teacher appointed on regular basis would retire from the service of the school. In the absence of any contractual power to the defendants/appellants to terminate the services of the plaintiffs/respondents she was entitled to continue in service till the normal age of superannuation of the teachers employed by the defendant/appellants. In case of any pre-mature termination of her services, the respondent/plaintiff was entitled to appropriate damages though she could not have sought enforcement of the contract under which she was employed by the appellants/defendants.

11. The case of the plaintiff is that her services were terminated

since she had vehemently protested against the involuntary deduction from her salary towards donation and her refusal to accept the offer of VRS extended to her by the defendants/appellants. In reply, this is not the plea taken by the appellants/defendants that they had, in their wisdom, terminated the services of the plaintiff/respondent and they were not bound to disclose the reasons which led to such an action being taken by them. Their case is that since they were seeking recognition of the school, they were required to comply with the conditions imposed by the Directorate of Education for granting recognition and since the plaintiff/respondent, being more than 45 years old was overage, she was not qualified to be appointed as a teacher, her continuance in service, being contrary to the conditions imposed by the Directorate of Education, would have resulted in recognition being denied to the school. The onus was upon the appellants/defendants to prove that the Directorate of Education had, imposed a condition that the recognition to the school would be granted only if the services of those teachers who are overage as per the eligibility criteria laid down by it, were dispensed with. No document was, however, produced by the defendant/appellants to prove any such condition on the part of the Directorate of Education. No official from the office of Directorate of Education was produced to prove such a condition. As noted earlier, DW1 Sh. A.J. Philip and DW2 Sh. P.S. Jolly, are the only witnesses produced by the defendants. Both of them are private witnesses being the office bearers of the appellants. According to DW1, A.J. Philip, two officers from the Directorate of Education had orally told them that two teachers, including the plaintiff/respondent, were overage though they did not give in writing to them in this regard. Since neither the names of those officials were given nor were they produced in the witness box, no reliance can be placed upon this part of deposition of DW1. According to DW1, Govt. regulation was that on the date of application for recognition, a lady teacher should not be 45 years of age and the plaintiff/respondent was more than 45 years of age at the time they applied for recognition. However, no such regulation was produced during trial. Oral deposition of DW1 with respect to regulation referred by him cannot be accepted, particularly when neither any official from Directorate of Education was produced nor any communication stipulating such a condition was filed by the defendants/appellants. It would only be appropriate to take note of Rule 50 of Delhi Education Rules, 1973 at this stage. This Rule prescribes the conditions

for recognition of a private school. I need not burden the record by reproducing those conditions, suffice it to say that there is no condition that a private school seeking recognition should not have a serving teacher who is more than 45 years old. In these circumstances, I have no hesitation in holding that the appellants/defendants failed to prove that the Directorate of Education had made it a pre-requisite condition for granting recognition to the appellant school that none of the teachers working in the school at the time of seeking recognition should be more than 45 years of age.

12. Yet another reason given by the appellants/defendants for dispensing with the services of the plaintiff/respondent is that since the number of teachers in the school had declined quite substantially, the teachers in the school had become surplus and therefore, 11 of them had left the service during the year 2001. In his cross examination, DW1 Sh. A.J. Philip stated that out of 21 teachers working in the school, 11 had resigned and the services of two teachers were terminated, thereby leaving nine working teachers in the school, all of whom were permanent. He admitted that since October 2001 they had employed four teachers, though he claimed that they were employed for intermittent period. He however admitted that one Mrs. Reena Sharma who started working from 23.8.2001 was continuing till date. Mrs. Saroj Sabharwal, who joined the school on 1.8.2001 worked till 8.8.2001, and thereafter she again joined work on 22.4.2002. He admitted that Mrs. Shaila Verghese who joined school on 20.9.2001 and Mrs. Saraswati who joined on 10.7.2002 were still working. I fail to appreciate how it can be said that the respondents had become surplus, when the school engaged two more teachers namely Reena Sharma and Mrs. Shaila Verghese just before terminating her services. Moreover, this is not the case of the appellants/defendants that they had followed the principle of last come and first go in terminating the services of the alleged surplus teachers. The principle to be adopted in such cases ordinarily is that the person who joined services last, goes first. No particular reason has been given by the defendant/appellant for engaging two teachers, while almost simultaneously dispensing with the services of the plaintiff/respondent. In these circumstances, there is no escape from the conclusion that the justification given by the appellants/defendants for terminating the service of the plaintiff/respondent is absolutely sham and frivolous. It would not be unsafe to presume in such circumstances that the services of the plaintiff/

respondent were terminated not on account of her being overage or surplus, but on account of her resisting continued involuntary deduction from her salary. The termination of her service, therefore, was clearly a mala fide act with a view to punish her on account of her refusing to accept a reduced salary. Even if it is presumed that the appointment of the plaintiff/respondent was not for a fixed term or till her reaching a particular age, it can hardly be disputed that an employee termination of whose services is actuated by mala fide would be entitled to appropriate damages though he/she cannot seek enforcement of the contract. A contrary view would give a handle to an unscrupulous private employer to take vengeance on the employees, who refuses to be party to an illegal or unlawful act on the part of the employer and therefore would be against the public policy. The right of an employer to terminate the service of an employee, who does not enjoy any statutory protection on account of his unsuitability to the job entrusted to him on account of his having become surplus, is altogether different from an action, which is actuated by malafide and therefore unsustainable in law.

13. The next question which comes up for consideration is as to what should be the quantum of damages which should have been awarded to the plaintiff/respondent on account of pre-mature termination of her services. No evidence has been led by the parties to prove the normal date of superannuation of a teacher in the school. The appointment letter issued to the plaintiff/respondent did not stipulate the age of her retirement. The defendants/appellants did not lead any evidence to prove at what age the teacher employed in their school were normally superannuating. The retirement age of the teachers employed by them being a fact exclusively in the knowledge of the defendants/appellants, the onus was upon them to produce such evidence. That, however, was done by the defendants/ appellants. The case of the plaintiff/respondents is that the age of her retirement from service was 60 years. In the absence of any evidence to the contrary from the defendants/appellants, I have no hesitation in accepting that the normal age of superannuation of teachers employed in the appellants, school was 60 years.

It is not in dispute that had the plaintiff/respondent continued in service till she was 60 years old, even without taking any increment, Dearness Allowance or promotion etc. into consideration, would have received Rs.7,18,438/- as salary. The learned trial Judge has awarded the

whole of that amount as damages.

14. In **S.S. Shetty v. Bharat Nidhi Ltd.** (1958) SCR 442, the appellant before the Supreme Court was discharged from service on the ground that he had become surplus. An industrial dispute was thereupon referred by the Central Government to the Industrial Tribunal at Calcutta for adjudication. The order of discharge of the appellant was held to be illegal and he was directed to be reinstated with wages from the date of discharge. The respondent however, failed to implement the decision of the Labour Appellate Tribunal within the prescribed period. Thereupon, the appellant before the Supreme Court claimed a sum of Rs. 47,738/- from the respondent as compensation. The Tribunal awarded a sum of Rs.1,000/- to him. The appeal filed by him having been dismissed by Labour Appellate Tribunal, he approached the Supreme Court by way of Special Leave Petition. The Supreme Court, after considering all the circumstances of the case, computed the benefit of reinstatement at Rs.12,500/- and awarded that amount to the appellant, during the course of judgment, Supreme Court, inter alia, observed as under:-

> "The position as it obtains in the ordinary law of master and servant is quite clear. The master who wrongfully dismisses his servant is bound to pay him such damages as will compensate him for the wrong that he has sustained. "They are to be assessed by reference to the amount earned in the service wrongfully terminated and the time likely to elapse before the servant obtains another post for which he is fitted. If the contract expressly provides that it is terminable upon, e.g., a month's notice, the damages will ordinarily be a month's wages.....No compensation can be claimed in respect of the injury done to the servant's feeling by the circumstances of his dismissal, nor in respect of extra difficulty of finding work resulting from those circumstances. A servant who has been wrongfully dismissed must use diligence to seek another employment, and the fact that he has been offered a suitable post may be taken into account in assessing the damages." (Chitty on Contracts, 21st Ed., Vol. (2), p.559 para. 1040).
>
> If the contract of employment is for a specific term, the servant would in that event be entitled to damages the amount of which would be measured prima facie and subject to the rule of mitigation

in the salary of which the master had deprived him. (Vide Collier v. Sunday Referee Publishing Co., Ltd.). The servant would then be entitled to the whole of the salary, benefits etc. which he would have earned had he continued in the employ of the master for the full term of the contract, subject of course to mitigation of damages by way of seeking alternative employment.

Such damages would be recoverable by the servant for his wrongful dismissal by the master only on the basis of the master having committed a breach of the contract of employment. If, however, the contract is treated as subsisting and a claim is made by the servant for a declaration that he continues in the employ of the master and should be awarded his salary, benefits, etc., on the basis of the continuation of the contract, the servant would be entitled to a declaration that he continues in the employ of the master and would only be entitled to the payment of salary, benefits, etc., which accrued due to him up to the date of the institution of the suit."

In **S.P.Bhatnagar v. Indian Oil Corporation** 1994 III AD(Delhi) 898, the appellant was placed under suspension and was dismissed from service on the basis of finding recorded in a departmental inquiry held against him. A suit was filed by him challenging his dismissal and seeking reinstatement or in the alternative Rs.50,000/- as damages for wrongful dismissal. The learned Additional District Judge awarded a sum of Rs.2250/- to him as damages. He filed an appeal before this Court and during the pendency of the appeal he filed an application for additional evidence enhancing his claim for damages from Rs.50,000/- to Rs.25,32,750/-. The application was however, dismissed. The Division Bench which disposed of the appeal held that the inquiry held against the plaintiff was bad in law and the finding arrived at therein was perverse based on no evidence. It was held that he was entitled to declaration that he continued in service till he attained the age of superannuation on 28th July 1994 and to full back-wages and other benefits from the date of dismissal. The Court directed the defendant to compute them along with all retirement benefits including pension etc. A decree in those terms was passed accordingly. In an appeal filed by the respondent, it was agreed that the plaintiff was not entitled to reinstatement but was entitled to get damages on the ground of wrongful dismissal in view of the fact that he had

already attained the age of superannuation. Supreme Court directed the parties to lead evidence, to determine quantum of damages. After remand by Supreme Court the plaintiff sought a decree for Rs.71,46,268/-. The Division Bench noted that as per the reply affidavit of the defendant/ respondent the plaintiff was entitled to a sum of Rs.605142.27 towards pay and allowance. This figure was arrived at on the basis of the revised pay on account of revision of the pay scales firstly on 1.8.1974 and then on 1.8.1882. The aforesaid amount was awarded by this Court to the plaintiff as damages. His claim for compensation for harassment and mental torture was negated by this Court. While doing so, this Court relied upon the decision of Supreme Court in **S.S. Shetty** (supra) wherein it was held that no compensation can be claimed in respect of injury done to the servant's feelings by the circumstances of the dismissal.

I, however, notice that there has been some shift in the approach of the Apex Court, with respect to payment of back wages, in case the dismissal of the employee from service is found to be bad in law. In **P.G.I of Medical Education and Research Chandigarh v. Raj Kumar** (2001) 2 SCC 54, the Supreme Court observed as under:

"Payment of back-wages having a discretionary element involved in it has to be dealt with, in the facts and circumstances of each case and no straight-jacket formula can be evolved, though, however, there is statutory sanction to direct payment of back-wages in its entirely. As regards the decision of this Court in Hindustan Tin Works (P) Ltd. be it noted that though broad guidelines, as regards payment of back-wages, have been laid down by this Court but having regard to the peculiar facts of the matter, this Court directed payment of 75% back-wages only."

In **U.P. State Brassware Corporation Ltd. & Anr. v. Udai Narain Pandey** AIR 2006 SC 586, the Supreme Court inter alia observed as under:

"A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an industrial court shall lose much of its significance. The changes brought about by the subsequent decisions of this Court probably having regard to the changes in the policy decisions of the government in the wake of prevailing market economy

globalization, privatization and outsourcing is evident."

In **Allahabad Jal Sansthan v. Daya Shankar Rai and Anr.** (2005) IILLJ 847 SC, the Supreme Court inter alia observed as under:

> "We have referred to certain decisions of this Court to highlight that earlier in the event of an order of dismissal being set aside, reinstatement with full back-wages was the usual result. But now with the passage of time, it has come to be realized that industry is being compelled to pay the workman for a period during which he apparently contributed little or nothing at all, for a period that was spent unproductively, while the workman is being compelled to go back to a situation which prevailed many years ago when he was dismissed. It is necessary for us to develop a pragmatic approach to problems dogging industrial relations. However, no just solution can be offered but the golden mean may he arrived at."

In **Kendriya Vadyalaya Sangathan & Anr. v. S.C. Sharma** (2005) IILJ 153 SC, the Supreme Court granted only 25% of total back-wages to the respondent. In **Hindustan Motors Ltd. v. Tapan Kumar Bhattacharya & Anr.** (2002) IILLJ 1156 SC, the Supreme Court awarded 50% of the back-wages till the date of reinstatement of the respondent. In **U.P. State Electricity Board v. Laxmi Kant Gupta** 2009 LLR 1, the Supreme Court referring to its decision in **U.P. State Brassware Corporation Ltd.** (supra) and **Haryana State Electronics Development Corporation v. Mamni** AIR 2006 SC 2427 inter alia observed as under:

> "Thus it is evident that there has been a shift in the legal position which has been modified by this Court and now there is no hard and fast principle now that on the termination of service being found to be illegal, the normal rule is re-instatement with back-wages. Compensation can be awarded instead, at the discretion of the Labour Court, depending on the facts and circumstances of the case."

The proposition of law, which emerges from these judgments, is that even if the dismissal or termination of an employee from service is illegal, he is not entitled to whole of the back-wages as a matter of right, and the Court needs to award a suitable compensation after considering all the facts and circumstances of the case before it.

15. This also cannot be disputed that the plaintiff/respondent should have tried to mitigate her loss either by taking alternative employment or generating alternative sources of income. As regards the plaintiff/respondent taking up another employment as a teacher, this is appellants, own case that the defendant/respondent was overage for being employed as a teacher in a school. Therefore, she could not have got appointment as a teacher. It is, however, difficult to dispute that being a qualified teacher, the plaintiff/respondent could have taken up assignment such as home tuitions to earn her livelihood. There is no evidence of any such attempt having been made by the plaintiff to mitigate her damages either by exploring alternative avenues of employment or by trying to take home tuitions. She could also have sought appointment in a private coaching centre. There is no evidence of that option having been explored by her.

16. Taking into consideration all the facts and circumstances of the case, I am of the view that the ends of justice would be met if the plaintiff/respondent is awarded an all inclusive compensation/damages amounting to Rs.3,50,000/- on account of wrongful termination of her services.

17. Thus, the plaintiff/respondent is entitled to recover the following amounts from the defendants/appellants:

(i) Rs.64,902/- being the amount wrongfully deducted from her salary

(ii) Rs.7,331/- towards arrears of salary for August, 2001.

(iii) Rs. 244/- towards salary of one day in September, 2001 and

(iv) Rs.3,50,000/- being the consolidated damages on account of wrongful termination of her services, thereby making a total of Rs.4,22,477/-.

The issues are decided accordingly.

18. For the reasons stated hereinabove, a decree for recovery of Rs.4,22,477/- with proportionate costs and pendente lite and future interest @ 6% per annum is passed in favour of the plaintiff/respondent and against the defendants/appellants. The appeal stands disposed of. Decree sheet be prepared accordingly. TCR be sent back.

ILR (2012) VI DELHI 687
W.P. (C)

SURINDER KUMAR JAIN ….PETITIONER

VERSUS

DDA & ANR. ….RESPONDENTS

(SUNIL GAUR, J.)

W.P. (C) NO: 434/1993 DATE OF DECISION: 20.07.2012

Constitution of India, 1950—Article 226 & 227—Writ petition filed by the petitioner to quash the communication dated 6th October 1986 and 12th December 1990 of the Delhi Development Authority (DDA) cancelling the allotment of the property. In the first communication, it was disclosed that the petitioner had obtained the allotment of the subject property by filling a false affidavit regarding not owning any residential property in Delhi, and after securing allotment the petitioner transferred the property to his brother—In the counter affidavit by the first respondent, DDA, it is maintained that the allotment of the subject property was made to Shri Ramesh Kumar Jain, brother of the petitioner and upon submissions of certain documents by the second respondent, Cooperative Society on 7th July 1984, Membership rights of the subject property were transferred in favour of the petitioner on 25th July 1985 and thereafter it was found by the first respondent that the original allottee of the subject property i.e. petitioner brother had obtained the allotment of the subject property by filing a false affidavit to the effect that he or his dependants do not own any other property in Delhi whereas petitioner afore-named brother was in possession of another property No. D-

15, Ashok Vihar, Delhi and accordingly, he was put to Notice but petitioner's brother had not responded to the Show Cause Notice sent to him in the year 1985 and again in the year 1986 and thus, left with no alternative, the first respondent had cancelled the allotment of the subject property. Held—That despite the transfer of the membership in favour of the petitioner in July, 1985 on the strength of Communication it was open to the first respondent to have cancelled the allotment of the subject property on account of furnishing of the false affidavit by original allottee i.e. petitioner's afore-named brother. Such a view is being taken because no premium on dishonesty can be placed if petitioner afore-named brother had surrendered the membership of the Society of the second respondent then he should not have submitted indemnity Bond with affidavit asserting that neither he nor his dependant relations own any other property in Delhi.

Having considered the submissions advanced and upon perusal of the material on record and the decisions cited, this Court is of the considered opinion that despite the transfer of the membership in favour of the petitioner in July, 1985, on the strength of Communication (Annexure P-12), it was open to the first respondent to have cancelled the allotment of the subject property on account of furnishing of the false affidavit (Annexure- P-8 colly) by original allottee i.e. petitioner's afore-named brother. Such a view is being taken because no premium on dishonesty can be placed. If petitioner's afore-named brother had surrendered the membership of the Society of the second respondent, then he should not have submitted Indemnity Bond with affidavit (Annexure P-8 colly) asserting that neither he nor his dependant relations own any other property in Delhi.

(Para 12)

Important Issue Involved: False facts tendered in an affidavit to the Delhi Development Authority or other government agencies can lead to cancellation of allotment of property.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Rakesh Munjal, Senior Advocate with Mr. Maneesh Goyal, Adv.

FOR THE RESPONDENTS : Mr. Rajiv Bansal & Mr. Rahul Bhandari, Advs, For R-1/DDA

CASE REFERRED TO:

1. *Ms. Jasjit Kaur* vs. *Registrar Cooperative Act & Ors.* W.P.(C) No. 686/1992.

RESULT: Petition dismissed.

SUNIL GAUR, J.

1. Petitioner's application of 3rd September, 1990 for restoration of Plot No. 23 in Vardhman Cooperative House Building Society Ltd. at Arihant Nagar near Punjabi Bagh, New Delhi (hereinafter referred to as the 'subject property') stood declined by the first respondent vide cryptic Communication of 12th December, 1990 (Annexure P-15). However, the basis to cancel the allotment of the aforesaid property made to petitioner's brother - Shri Ramesh Kumar Jain, is disclosed by the first respondent in its Communication of 6th October, 1986 (Annexure P-11) to petitioner's afore-named brother.

2. Above said two Communications (Annexures P-11 & P-15) of the first respondent are impugned in this petition. In the first Communication (Annexure P-11) it was disclosed by the first respondent to petitioner's afore-named brother that he had obtained the allotment of the subject property by filing a false affidavit regarding not owning any residential property in Delhi whereas he had already owned another residential property in Delhi and that after obtaining the allotment of the subject property, he had subsequently transferred it in the name of his brother i.e. the petitioner.

3. In the draw of lots held by the first respondent in January, 1984 the subject property stood allotted to petitioner's afore-named brother and as per petitioner, he had raised objection to it and he was assured that the unintentional mistake would be rectified. Petitioner relies upon documents Annexures P-1 to P-4 to assert that the membership of petitioner's afore-named brother in Vardhman Cooperative House Building Society Ltd. stood transferred in the name of the petitioner way back in the year 1976 and this is so evident from the list of members (Annexure P-4) of aforesaid Cooperative Society, wherein the name of the petitioner figures at serial no.151 and copy of the Receipts (Annexures P-5 & P-6) showing the payment of subscription fees to the aforesaid Cooperative Society since the year 1986 are on record. Transfer of the subject property in the name of the petitioner was disclosed to the first respondent by the Secretary of the aforesaid Society vide letter of 25th July, 1985 (Annexure P-9).

4. Again vide letter of 13th November, 1987 (Annexure P-12) the Assistant Registrar of the Cooperative Societies had called upon the first respondent to consider petitioner's case for allotment of the subject property in the place of Shri Ramesh Kumar Jain, as the resignation of Shri Ramesh Kumar Jain was accepted on 24th February, 1976. Petitioner's Representations made to the first respondent in the year 1988 (Annexure P-12 colly) did not yield any result and even the legal Notice sent on behalf of the petitioner in July, 1992 to the first respondent was of no avail. However impugned Communication (Annexure P-15) refers to petitioner's letter of 3rd September, 1990, which is not on record. In any case, petitioner has laid challenge to the Communication (Annexure P-15) after a period of about three years and the explanation for this delay furnished by the petitioner is that he was unwell for a long time.

5. On merits, the principal contention urged by learned senior counsel on behalf of the petitioner is that the petitioner is the member of the Cooperative Society since the year 1976 and the disqualification of petitioner's brother is immaterial, as allotment of the subject property ought to have been made in the name of the petitioner and so, a mandamus be issued to the first respondent to restore the subject property in the name of the petitioner.

6. In the counter affidavit by the first respondent- DDA, it is maintained that the allotment of the subject property was made to Shri

Ramesh Kumar Jain, brother of the petitioner and upon submissions of certain documents by the second respondent- Cooperative Society on 7th July, 1984, membership rights of the subject property were transferred in favour of the petitioner on 25th July, 1985 and thereafter, it was found by the first respondent that the original allottee of the subject property i.e. petitioner's brother had obtained the allotment of the subject property by filing a false affidavit to the effect that he or his dependants do not own any other property in Delhi whereas petitioner's afore-named brother was in possession of another property No. D-15, Ashok Vihar, Delhi and accordingly, he was put to Notice but petitioner's brother had not responded to the Show Cause Notice sent to him in the year 1985 and again in the year 1986 and thus, left with no alternative, the first respondent had cancelled the allotment of the subject property.

7. It also stands disclosed in the counter affidavit by the first respondent that Registrar of Cooperative Societies had cleared the membership of petitioner's afore-named brother vide letter of 12th December, 1983 and accordingly, the allotment of the subject property was made to him vide letter of 23rd February, 1984.

8. In the counter affidavit filed by the second respondent, it is maintained that the membership of Shri Ramesh Kumar Jain was transferred in the name of the petitioner w.e.f. 17th February, 1976 and the same was approved by the Registrar of Cooperative Societies and since the subject property has not been allotted to the petitioner and is still lying vacant, so, petitioner be considered for allotment of the subject property in the place of Shri Ramesh Kumar Jain.

9. It was contended by learned senior counsel for the petitioner that the Registrar, Cooperative Societies vide Communication of 13th November, 1987 (Annexure P-12) had intimated the first respondent that consequent upon the resignation of Shri Ramesh Kumar Jain from the membership of the Society of the second respondent, petitioner has been substituted as a member and he may be considered for allotment of the subject property in place of Shri Ramesh Kumar Jain and infact, this Communication was acted upon by the first respondent who had transferred the ownership of the subject property in the name of the petitioner but when the Lease Deed was to be executed, the allotment in question has been cancelled on account of concealment by petitioner's afore-named brother of not owning any property in Delhi, which was

immaterial as the allotment of the subject property ought to have been made in the name of the petitioner and not his brother.

10. Attention of this Court was drawn to an unreported decision in W.P.(C) No. 686/1992, '**Ms. Jasjit Kaur Vs. Registrar Cooperative Act & Ors.**', rendered on February 16, 2006 holding that once the Society has approved the transfer, then if any affidavit was required, it was of the transferee and not the transferor of the membership of the Society and so, the incorrect affidavit of the transferor was of no avail.

11. It was pointed out by learned counsel for the respondent that what distinguishes the aforesaid decision is that it remains uncontroverted that the name of petitioner's afore-named brother was recommended by the second respondent to the respondent- DDA and so, the allotment of the subject property was rightly made in favour of Shri Ramesh Kumar Jain and the factum of transfer of membership in favour of the petitioner was made known only after the draw of lots, that too vide Communication of 13th November, 1987 (Annexure P-12). Thus, it is contended by counsel for the first respondent that the allotment of the subject property was rightly made in favour of petitioner's brother Shri Ramesh Kumar Jain and has been rightly cancelled on account of filing of a false affidavit to the effect that he did not own any other property in Delhi.

12. Having considered the submissions advanced and upon perusal of the material on record and the decisions cited, this Court is of the considered opinion that despite the transfer of the membership in favour of the petitioner in July, 1985, on the strength of Communication (Annexure P-12), it was open to the first respondent to have cancelled the allotment of the subject property on account of furnishing of the false affidavit (Annexure - P-8 colly) by original allottee i.e. petitioner's afore-named brother. Such a view is being taken because no premium on dishonesty can be placed. If petitioner's afore-named brother had surrendered the membership of the Society of the second respondent, then he should not have submitted Indemnity Bond with affidavit (Annexure P-8 colly) asserting that neither he nor his dependant relations own any other property in Delhi.

13. Since the second respondent had forwarded the name of petitioner's afore-named brother to the first respondent to be included in the draw of lots held in the year 1984, therefore, petitioner cannot be

heard to say that allotment of the subject property ought to have been made to him instead of being made to his afore-named brother. As it remains uncontroverted that the affidavit filed by petitioner's afore-named brother was false, so the first respondent was fully justified in cancelling the allotment of the subject property. Reliance placed upon decision in **Jasjit Kaur** (Supra) is of no avail as the inter se dispute in the said case was between the allottee and the Registrar of Cooperative Societies, Building Society etc.

14. Consequently, finding no substance in this petition, it is dismissed with no order as to costs.

ILR (2012) DELHI 693
C.R.P.

DEEPAK RASTOGI **…PETITIONER**

VERSUS

FLEXI RESOURCE SOLUTION PVT. LTD. **….RESPONDENT**

(M.L. MEHTA, J.)

C.R.P. NO. : 201/2010 **DATE OF DECISION: 23.07.2012**

Code of Civil Procedure, 1908—Order 12 Rule 6—Revision petition filed against the dismissal of application of the petitioner under Order 12 Rule 6—Mother of petitioner executed lease deed in favour of respondent company for a period of three years—and bequeathed the suit premises to the petitioner by way of will—At the expiry of period of lease, the petitioner sent legal notice to company for vacating the premises—Thereafter filed suit for possession, mesne profits and damages—Respondent denied receiving legal notice—Petitioner moved an application under

Order 39 rule 6—Court ordered to pay the arrears of the admitted rent after Petitioner moved an application under Order 12 Rule 6 CPC for decree of admission arguing that since tenancy is not denied and based on the presumption which is drawn in the regard to delivery of legal notice, the respondent should be deemed to have received the legal notice and therefore prayed for decree of possession. Civil Judge dismissed the application holding that the admission must be made either orally or in writing and cannot he presumed by mere sending a legal notice without any proof of service Held—Admission cannot be imposed on the parties to a suit and it has to be made without any room for misinterpretation-it must be clear unambiguous, unconditional and unequivocal. In the instant case, there is no admission at all by the respondent The petitioner has miserably failed to prove the fact that the notice was ever served on the respondent as the legal notice has been returned unclaimed and hence, does not constitute valid service. There is absolutely no iota of evidence to show that any admission regarding the determination of tenancy or receipt of notice, has ever been made by the respondent.

Admission cannot be imposed on the parties to a suit and it has to be made without any room for misinterpretation. As stated above, it must be clear, unambiguous, unconditional and unequivocal. In the instant case, there is no admission at all by the respondent. The petitioner has miserably failed to prove the fact that the notice was ever served on the respondent. If the receipt of legal notice by the respondent has not been proved, then how can it be assumed that an admission regarding termination of the tenancy has been made by the respondent? There is no doubt that Section 51 of the Companies Act defines the mode of service of documents on a company, but in the present case, the legal notice has been returned 'unclaimed' and hence does not

constitute valid service. The petitioner has attempted to elicit a decree of eviction by hoodwinking the Court and twisting the settled legal position in his favour. There is absolutely no iota of evidence to show that any admission regarding the determination of tenancy or receipt of notice has ever been made by the respondent. Undisputedly, the contention of the petitioner that he is entitled to a judgment on admission, is untenable. **(Para 10)**

Important Issue Involved: A judgment on admission by the defendant under Order 12 rule 6 Civil Procedure Code is not a matter of right and rather is a matter of discretion of the court. If a case involves questions which cannot be conveniently disposed of on a motion under this Rule, the court is free to refuse exercising discretion in favour of the party invoking it. Where the defendants have raised objections which go to the very root of the case, if would not be proper to exercise this discretion and pass a decree in favour of the plaintiff.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Daljit Singh, Sr. Adv. With Mr. Ujjawal Jha, Adv

FOR THE RESPONDENT : Mr. Chetan Shandilya, Adv.

CASES REFERRED TO:

1. *Hill Elliott & Co. Ltd.* vs. *Bhupinder Singh* 2011(121) DRJ 438 (DB).
2. *Abhinav Outsourcing Pvt. Ltd.* vs. *Sunita Seth* 186(2012) DLT 689.
3. *State Bank of India* vs. *M/s Midland Industries,* AIR 1988 Delhi 153.

RESULT: Petition dismissed.

M.L. MEHTA, J.

1. The present revision petition has been filed under Section 115 Code of Civil Procedure (CPC) against the order dated 27.11.2010 passed by ld. Civil Judge, whereby the application of the petitioner under Order 12 Rule 6 CPC for decree of possession was dismissed.

2. The brief facts of the case are that the mother of the petitioner, Vijaylaxmi Rastogi executed a lease deed dated 11.09.2004 in favour of the respondent company in respect of her property no. 609, Madhuban, 55, Nehru Place, New Delhi (hereinafter referred as suit premises) for a period of three years. Late Vijaylaxmi Rastogi bequeathed the suit premises to the petitioner by way of Will dated 17.02.2007. Upon expiry of the period of lease in September 2007, the petitioner allegedly sent a legal notice dated 05.12.2007 to the respondent, calling for vacating the suit premises. The petitioner then proceeded to file a suit for possession, mesne profits and damages against the respondent, presently pending in the Court of ld. Civil Judge. The respondent filed the written statement along with various objections regarding the maintainability of the suit and out rightly denied the receipt of legal notice. The petitioner then moved an application under Order 39 Rule 6 of CPC wherein the respondent was directed by the court vide order dated 15.12.2009 to pay the arrears of admitted rent from January 2008 and also the rent on monthly basis till the disposal of the suit.

3. The petitioner then moved an application under Order 12 Rule 6 CPC before the ld. Civil Judge for a decree on admission. It was claimed by the petitioner that although the respondent has denied the receipt of legal notice, but the fact of tenancy has not been denied and based on the presumption which is drawn in regard to delivery of legal notice, the respondent should be deemed to have received the legal notice and prayed for a decree of possession. Dismissing the said application, the ld. Civil Judge observed that there has never been any admission on behalf of the respondent regarding receipt of legal notice. It was concluded by the ld. Civil Judge that admission must be made either orally or in writing and cannot be presumed by mere sending a legal notice without any proof of its service.

4. The said order has been challenged by the learned counsel for petitioner on the ground that the trial Court failed to appreciate that non-

filing of certificate from Department of Posts is not fatal as the regd. A.D. and U.P.C. was placed on record by him to prove the fact of service of notice to the respondent. Attention has also been drawn towards Section 51 of the Companies Act to prove that the documents are deemed to be validly served by sending them to the registered office of the company. The learned counsel for the petitioner has relied upon **Hill Elliott & Co. Ltd. vs. Bhupinder Singh** 2011(121) DRJ 438 (DB) and **Abhinav Outsourcing Pvt. Ltd. vs. Sunita Seth** 186(2012) DLT 689 among others, to emphasize the fact that judgment on admission can be passed when a valid notice terminating the tenancy after expiry of the lease period is duly served upon the tenant.

5. On the other hand, the learned counsel for the respondent has urged that nothing has been adduced by the petitioner to prove the service of legal notice and hence no admission regarding termination of tenancy can be presumed to have been made by the respondent. It has been further submitted that admission must be made in unambiguous terms by a party in order to facilitate the passing of judgment under Order 12 Rule 6 CPC , which is absent in the present case and hence the order of the ld. Civil Judge declining the application for judgment on admission , confirms to the legislative intent.

6. I have heard the rival submissions and perused the record.

7. The present case raises a short question of law that whether mere sending of a legal notice, without any proof of its service, can be deemed to constitute valid admission of the fact of termination of tenancy by the defendant? And whether a judgment under Order 12 Rule 6 CPC can be passed on the presumption of service of legal notice in the absence of any oral or written admission by a party?

8. Order 12 Rule 6 CPC is enacted for the purpose of expediting the trials; if there is any admission on behalf of the defendant or an admission can be inferred from the facts and circumstances of the case without any dispute. The said rule is an enabling provision which confers discretion on the Court to deliver a speedy judgment on admission and to the extent of the claim admitted by one of the parties of his opponent's claim. However, a judgment on admission is not a matter of right and rather is a matter of discretion of the Court and is neither mandatory nor it is peremptory. This rule applies wherever there is a clear admission of

facts in the face of which it is impossible for the party making it, to succeed. Elucidating on the scope of Order 12 Rule 6 CPC, this Court in **State Bank of India vs. M/s Midland Industries,** AIR 1988 Delhi 153, held thus:

> "There is no doubt that Rule 6 of Order 12 has been couched in a very wide language. However, before a court can act under Rule 6, admission must be clear, unambiguous, unconditional and unequivocal. Furthermore a judgment on admission by the defendant under Order 12 rule 6 Civil Procedure Code is not a matter of right and rather is a matter of discretion of the court, no doubt such discretion has to be judicially exercised. If a case involves questions which cannot be conveniently disposed of or a motion under this rule the court is free to refuse exercising discretion in favour of the party invoking it. It is not in each case where Order 12 rule 6 Civil Procedure Code is invoked that the court would be obliged to pass a decree which case would depend upon its own peculiar facts. Where the defendants have raised objections which go to the very root of the case, it would not be proper to exercise this discretion and pass a decree in favour of the plaintiff. The purpose of Order 12 rule 6 Civil Procedure Code is to avoid waiting by the plaintiff for part of the decree when there is a clear, unequivocal, unambiguous and unconditional admission of the defendant in respect of the claim of the defendant. The rule only secures that if there is no dispute between the parties, and if there is on the pleadings or otherwise such an admission as to make it plain that the plaintiff is entitled to a particular order or judgment he should be able to obtain it at once to the extent of admission. But the rule is not intended to apply where there are serious questions of law to be asked and determined. Likewise where specific issues have been raised in spite of admission on the part of the defendants the plaintiff would be bound to lead evidence on those issues and prove the same before he becomes entitled to decree and the plaintiff in that event cannot have a decree by virtue of provision of Order 12 rule 6 Civil Procedure Code without proving those issues."

9. Now, let us proceed to examine whether in the light of the facts and circumstances of the present case, the ld. Civil Judge was within its

jurisdiction to dismiss the application of the petitioner for a judgment on admission or not. From the perusal of the record, it is evident that there is no admission by the respondent regarding even the receipt of legal notice, let alone its contents. The regd. A.D. and U.P.C. placed on record by the petitioner are no doubt a conclusive proof of sending of notice by the petitioner, but cannot be deemed to be a proof of the respondent receiving the same. There is no endorsement by the postal department to the effect of receipt of the notice by the respondent. The petitioner has sought a decree of eviction on the ground of a legal notice sent by him. Naturally, the procedure laid in the statutes cannot be simplified and moulded to such an extent that would amount to miscarriage of justice. If mere sending of legal notice terminating the tenancy by the landlord would be deemed to be constituted as admission of its receipt and contents by the tenant, then the legislations regulating the eviction procedures are an exercise in vain.

10. Admission cannot be imposed on the parties to a suit and it has to be made without any room for misinterpretation. As stated above, it must be clear, unambiguous, unconditional and unequivocal. In the instant case, there is no admission at all by the respondent. The petitioner has miserably failed to prove the fact that the notice was ever served on the respondent. If the receipt of legal notice by the respondent has not been proved, then how can it be assumed that an admission regarding termination of the tenancy has been made by the respondent? There is no doubt that Section 51 of the Companies Act defines the mode of service of documents on a company, but in the present case, the legal notice has been returned 'unclaimed' and hence does not constitute valid service. The petitioner has attempted to elicit a decree of eviction by hoodwinking the Court and twisting the settled legal position in his favour. There is absolutely no iota of evidence to show that any admission regarding the determination of tenancy or receipt of notice has ever been made by the respondent. Undisputedly, the contention of the petitioner that he is entitled to a judgment on admission, is untenable.

11. In the case of **Hill Elliott & Co. Ltd. vs. Bhupinder Singh** (supra) and **Abhinav Outsourcing Pvt. Ltd. vs. Sunita Seth** (supra), there was valid service of notice terminating the tenancy, proved by the confirmation given by postal authorities and hence the admission was inferred by the Courts. Clearly, there is absence of any proof of service

of the legal notice and hence no presumption can be drawn regarding the admission of determination of tenancy by the respondent. The cases relied upon by the petitioner being distinguishable on facts, are of no help to the petitioner.

12. In view of the above discussion, I am of the considerate opinion that the order passed by the ld. Civil Judge, to which the petitioner has taken an exception, is based on sound reasoning and correct appreciation of material on record and requires no interference. I find no illegality or perversity in the impugned order. Keeping in mind the false and frivolous plea taken up by the petitioner twice in a row, I am of the opinion that ends of justice would be met by imposing a cost of Rs. 5000/- on the petitioner. The petition being without any merit is hereby dismissed.

ILR (2012) VI DELHI 700
CS (OS)

MALKIAT SINGH JOHAL ….PLAINTIFF

VERSUS

PRAN CHOPRA & ORS. ….DEFENDANT

(V.K. JAIN, J.)

CS (OS) : 1806/2011, DATE OF DECISION: 26.07.2012
CS (OS) NO. : 1509/2007

Code of Civil Procedure, 1908—Order VII Rule 11—Agreement between the plaintiff and defendant to sell the second floor of the property along with the terrace rights—plaintiff was a tenant and notice dated 16.7.2007 terminating the tenancy was served upon him—As per plaintiff the defendant received a sum of Rs. 5 Lakh in cash and Rs. 2 Lakh in cheque and issued a receipt on 18.8.2007—It was also agreed that the sale deed will

be executed within one year—However the execution of the sale documents was deferred; the time for execution was extended on one pretext or other by the defendants—On 09.05.2011 the court bailiff came to suit premises to execute warrant of possession, which the defendant no. 3 had obtained against the plaintiff—Hence, the Suit for specific performance of agreement to sell—Defendant filed an application under Order VII, Rule 11 for rejection of plaint. Held—It is settled preposition of law that while considering an application under Order VII Rule 11 CPC, the Court can take into consideration only the averments made in the plaint and the documents filed by plaintiff. Neither the written statement nor the documents filed by the defendant can be considered at this stage. It is also settled preposition of law that the truthfulness or otherwise of the averments made in the plaint cannot be gone into at this stage and the averments have to be taken at their face value and as correct. It is difficult to say at this stage that the plaint does not disclose any cause of action to file the present suit for specific performance of the agreement set up by the plaintiff or for grant of declaration claimed by him. The plaintiff claims an Agreement to Sell in his favour and he says that he was all along ready and willing to perform his part of contract and it is the defendants 1 & 2 who avoided completion of the transition. The entire averments essential in a suit for specific performance of an Agreement to sell have, thus, been made.

In view of the averments made in para 8 of the plaint, as referred earlier in this order, as well as other averments made in the plaint, it is difficult to say at this stage that the plaint does not disclose any cause of action to file the present suit for specific performance of the agreement set up by the plaintiff or for grant of declaration claimed by him. He claims an Agreement to Sell in his favour, he says that he was all along ready and willing to perform his part of

contract and it is the defendants 1&2, who avoided completion of the transition. All the averments essential in a suit for specific performance of an Agreement to Sell have thus been made. **(Para 5)**

Important Issue Involved: Code of Civil Procedure 1908 (CPC)—The real object of Order 7 Rule 11 of the CPC is to keep irresponsible law suits out of the Courts and discard bogus and irresponsible litigation, however at the same time the court cannot consider the disputed question of law at the time of considering the said application.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. B.B. Gupta, Adv.

FOR THE DEFENDANT : Mr. Sanjiv Puri, Sr. Adv. With Mr. Kumar Dushyant, Advs.

CASES REFERRED TO:

1. *Avtar Singh Narula & Anr.* vs. *Dharambir Sahni & Anr.* 150 (2008) DLT 760 (DB).
2. *Popat and Kotecha Property* vs. *State Bank of India Staff Assn.* 2005 7 SCC 510.

RESULT: Application dismissed.

V.K.JAIN, J. (ORAL)

IA No.16007/2011 in CS(OS) 1806/2011

1. This is a suit for specific performance of an Agreement to Sell alleged to have been executed on 18.08.2007 whereby defendants no.1 and 2 agreed to sell the second floor of the property bearing number F-7/7, Vasant Vihar, New Delhi - 110057, along with terrace rights, to plaintiff for a consideration of Rs.65,00,000/-. The plaintiff was a tenant in the aforesaid premises and a notice dated 16.7.2007 terminating the tenancy of the plaintiff was given to him. The case of the plaintiff is that after issuance of notice to him, the defendants expressed desire to sell

the premises in question and the matter was negotiated through Anil Kumar and Rahul Arora, both dealing in real estate. It is also the case of the plaintiff that the defendants no.1 and 2 executed a receipt on 18.8.2007 after receiving a sum of Rs.5 lac in cash and Rs.2 lac by way of two separate cheques. According to plaintiff, it was also agreed that the sale deed will be executed within one year and the balance sale consideration would be paid at the time of execution of the sale deed.

2. It has been further alleged in para 8 of the plaint that thereafter to plaintiff had continued to approach defendants no.1 and 2 with the offer of the entire balance sale consideration for the suit property but on each and every such request of the plaintiff, the defendants no.1 and 2 always sought extension of time on one or the other pretext. The plaintiff, on the request of defendants, agreed to defer the execution of the sale documents and kept on waiting for signal from them. However, on 9.5.2011, the Court Bailiff came to the suit premises to execute a warrant of possession which defendant no.3 had obtained against the plaintiff in respect of the premises, subject matter of the agreement. The case of the plaintiff is that only then he could realize the malafide intentions of the defendants and came to know that the aforesaid second floor with terrace rights had been sold to defendant no.3. The plaintiff is now seeking specific performance of the agreement dated 11.8.2007. He is also seeking declaration that the sale deed executed by defendants no.1 and 2 in favour of defendant no.3 is null and void and not binding on him.

3. This application has been filed by defendants for rejection of the plaint. The contention of learned counsel for the defendants is that the plaint does not disclose any cause of action and the suit is barred by limitation.

4. It is settled preposition of law that while considering an application under Order VII Rule 11 CPC, the Court can take into consideration only the averments made in the plaint and the documents filed by plaintiff. Neither the written statement nor the documents filed by the defendant can be considered at this stage. It is also settled preposition of law that the truthfulness or otherwise of the averments made in the plaint cannot be gone into at this stage and the averments have to be taken at their face value and as correct. In **Avtar Singh Narula & Anr. Vs. Dharambir Sahni & Anr.** 150 (2008) DLT 760 (DB), this Court reiterated that the power to reject the plaint has to be exercised sparingly and cautiously

though it does have the power to reject the plaint in a proper case.

In **Popat and Kotecha Property v. State Bank of India Staff Assn.** 2005 7 SCC 510, Supreme Court noted that the real object of Order 7 Rule 11 of the Code of Civil Procedure is to keep irresponsible law suits out of the Courts and discard bogus and irresponsible litigation. It was further held that dispute questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 of CPC.

5. In view of the averments made in para 8 of the plaint, as referred earlier in this order, as well as other averments made in the plaint, it is difficult to say at this stage that the plaint does not disclose any cause of action to file the present suit for specific performance of the agreement set up by the plaintiff or for grant of declaration claimed by him. He claims an Agreement to Sell in his favour, he says that he was all along ready and willing to perform his part of contract and it is the defendants 1&2, who avoided completion of the transition. All the averments essential in a suit for specific performance of an Agreement to Sell have thus been made.

6. As regards, limitation, Article 54 of the Limitation Act applies to a suit for specific performance of a contract and the period of limitation provided is three year from the date fixed for the purpose or if no such date is even when the plaintiff has noticed that the performance is refused. In the present case, the case of the plaintiff is that the transaction was to be completed within one year from 17.8.2007 i.e. by 17.8.2008. The suit filed on 26.7.2011, is well within the time, if the period of limitation is computed from 17.8.2008.

7. Mr. Puri points out that neither the original receipt has been filed nor was any notice sent to defendants asking them to perform the agreement set up on the plaint. As far as filing of the original receipt is concerned, the learned counsel for the plaintiff states that case of the plaintiff is that the document has been lost and an FIR in this regard has already been filed. Non-filing of the original documents in these circumstances cannot be a ground for rejection of the plaint. As regards service of notice, it is not a legal requirement that before seeking specific performance of an agreement, a notice in writing is to be given to the party for default. Therefore, failure on the part of plaintiff to give a notice in writing to the defendants asking them to perform the agreement dated 18.8.2007 cannot be a ground for rejection of the plaint, which can

be rejected only on one or more of the grounds specified in Order VII Rule 11 of Code of Civil Procedure.

There is absolutely no merits in the application and the same is dismissed with costs. The cost is quantified at Rs.25,000/-.

IA No.11823/2011 in CS(OS) No. 1806/2011(under Order XXXIX Rule 1 and 2 CPC)

Dismissed as not pressed at this stage.

CS(OS) 1806/2011 & CS(OS) 1509/2007

The learned counsel for the parties submits that CS(OS) No.1509/2011 and CS(OS) No. 1509/2007 be consolidated. Ordered accordingly. CS(OS) 1509/2007 would be treated as main suit and the evidence would be recorded in that suit but will be read for the purpose of disposal.

Pleadings in the cases are complete. On the pleadings of the parties, following common issues are framed:

(i) Whether the defendants no.1 and 2 in CS(OS) No. 1806/2011 vide agreement to sell/ receipt dated 18.8.2007 had agreed to sell the second floor with terrace rights of the property bearing number F-7/7, Vasant Vihar, New Delhi – 110 057 to the plaintiff namely Shri Malkiat Singh Juhal for a consideration of Rs.65 lac and had received a part consideration of Rs.10 lac from him? OPP in CS(OS) No.1806/2001.

(ii) Whether the plaintiff in CS(OS) No.1806/2011 has always been ready and willing to perform his part of the alleged agreement to sell dated 18.8.2007? OPP

(iii) Whether the plaintiff in CS(OS) No.1806/2011 is entitled to specific performance of the alleged agreement/ receipt dated 18.8.2007? OPP

(iv) Whether the plaintiff in CS(OS) No.1806/2011 is entitled to specific performance of the alleged agreement dated 18.8.2007? OPP

(v) Whether the plaintiff in CS(OS) No. 18.8.2007 is entitled to a declaration sought by him? OPP

(vi) Whether this Court has no pecuniary jurisdiction to try the suit CS(OS) 1509/2007? OPP in CS(OS) No.1509/2007

(vii) Whether termination of the tenancy of the defendant in CS(OS) 1509/2007 was illegal? OPD in CS(OS) No.1509/2007

(viii) Whether the plaintiff in CS(OS) 1509/2007 is entitled to possession of the suit premises? OPP in CS(OS) 1509/2007

(ix) Whether the plaintiff is entitled to damages for use and occupation and, if so, at what rate and to what amount? OPP in CS(OS) No.1509/2007

Affidavits by way of evidence be filed by the parties within six weeks. At the request of learned counsel for the plaintiff in CS(OS) No.1509/2007, which is not opposed by Mr B.B. Gupta, Mr. D.S. Bawa (Retired Additional District & Sessions Judge) is appointed as Local Commissioner to record the evidence of the parties. The fee of the Local Commissioner is fixed at Rs.50,000/-, which shall be paid by the plaintiff in CS(OS) No. 1509/2007. The parties are directed to appear before the Local Commissioner on 31.8.2012 for fixing dates of recording of cross examination of the witnesses. Registry is directed to produce the original files before the Local Commissioner as and when required by him.

ILR (2012) VI DELHI 707
ITA

COMMISSIONER OF INCOME TAX-IV ….APPELLANT

VERSUS

DELHI STATE INDUSTRIAL & INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. ….RESPONDENT

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

ITA : 1208/2011 DATE OF DECISION: 27.07.2012

Income Tax Act, 1961—Section 2(24)—Whether interest paid on income tax refund, bears the character of income and is therefore, exigible to tax—Held—Unless there is an exact indication in the Act interest payable on income tax refunds fulfills the basic character as income cannot be ignored—The amount cannot be treated as interest income since the assessee did not earn it through conscious choice or voluntarily, nor was it engaged in the activity of investing its amount and earning interest—However, the basic characteristic of income being what it is, amount received towards statutory interest, has to be subject to tax under the head income from other source—Appeal allowed.

This Court is of the opinion that the view taken by the assessing officer and the appellate commissioner is correct. Unless there is an exact indication in the Income Tax Act itself, that interest payable on income tax refund amounts fulfill the basic character as income (defined under Section 2(24) of the Income Tax Act) cannot be ignored. It is no doubt true that this amount cannot be treated as interest income since the assessee did not earn it through conscious choice or voluntarily, nor was it engaged in the activity of investing its amount and earning interest. However, the

basic characteristic of income being what it is, the amount received towards statutory interest has to be subject to tax under the head 'income from other sources'. **[Para 7]**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. N.P. Sahni, Sr. Standing Counsel with Mr. Ruchesh Sinha, Jr. Standing Counsel.

FOR THE RESPONDENT : Ms. Anusuiya Salwan & Mr. Vikas Sood. Advocates.

RESULT: Appeal allowed.

S. RAVINDRA BHAT (OPEN COURT)

1. Revenue claims to be aggrieved by the order of the Income Tax Appellate Tribunal (ITAT) to the extent that it allowed the assessee's appeal, holding that the sum of Rs.2, 57, 55, 508/- crores received as interest on income tax refund, does not require to be assessed.

2. We have heard learned counsel. The following questions of law arises, viz, "whether interest paid on income-tax refund bears the character of income and is, therefore exigible to tax".

3. Brief facts necessary for the purpose of this case are that the assessee, an undertaking of the Govt. of NCT of Delhi, had received the grants. They were brought to tax and the assessee was directed to pay income tax. Subsequently, the refund was claimed and allowed to the extent of Rs.41.89/- crores. This also included a sum of Rs.2,57,55,508/- as interest. The assessee argued that this amount could not be brought to tax. The assessing officer rejected this argument and included it in the computation of income. The appellate commissioner, who was approached by the assessee confirmed the addition holding as follows:

> "3.2 In have considered the submissions made by the authorized representative of the appellant company. The interest of Rs.2,57,55,508/- has been received during the year by the appellant on the refund of income tax. It has been submitted that the appellant had paid tax in respect of scheme of relocation of

industries and common effluent treatment plant (CETP Scheme) But subsequently, after the passing of the orders by the Appellate Authorities, the appellant got relief on the issue and as a result refund of income tax was received which was inclusive of interest of Rs.2,57,55,508/-. The contention of the appellant is that since the matter regarding interest earned on the surplus funds of these schemes is covered by the orders of various Appellate Authorities, the interest of Rs.2,57,55,508/- would also be exempt from tax along the same lines. However, I do not agree with the appellant's contention because the sum of Rs.2,57,55,508/- in question is not the interest earned directly from the funds of the relocation and CETP schemes but is rather interest on income tax refund, which is exigible to tax. The matter is not covered by the orders of Higher Appellate Authorities in the appellant's case as contended because the issue dealt with in the appellant's case in earlier years was interest earned on the surplus funds of the schemes owned by the Delhi Administration and merely governed by the appellant. Here the issue is interest on income tax refund, which is chargeable to tax. The assessing officer has rightly added this amount to the income of the appellant and I uphold this action of the assessing officer. This ground of appeal is dismissed."

4. The Tribunal's reasoning allowing the assessee's appeal is extracted below:-

"19. We have heard the rival contentions and perused the records. We find that assessee had paid taxes in respect of scheme relating to allocation of industries and CETP Scheme. Subsequently, as per the orders of the appellate authorities, the refund was allowed to the assessee to the extent of Rs.41.89 crores which also included interest to the extent of Rs.2,57,55,508/-. This was claimed by the assessee to be attributed to the refund of tax relating to relocation of industries and CETP Scheme. It was further claimed that since the matter regarding interest earned on the surplus funds of these schemes is covered by the orders of the various appellate authorities, the interest of Rs.2,57,55,508/- would also be exempt from tax along with the same lines. This was not accepted by the Ld. Commissioner of Income Tax

(Appeals) and he held that a sum of Rs.2,57,55,508/- in question is not the interest earned directly form the funds of the relocation and CETP schemes but is rather interest on income tax refund, which is exigible to tax. In this regard, it is assessee's plea that the entire refund including the interest belongs to the Government of Delhi and as such it is not exigible to tax in the hands of the assessee. It has further been claimed that assessee had paid the entire amount including the interest to the Delhi Government. We find considerable cogency in the assessee's plea that when the interest itself is not chargeable to tax, the consequential refund was also not chargeable to tax. We find cogency in the contention of the assessee that when Ld. Commissioner of Income Tax (Appeals) has decided to the effect that there is no tax liability in respect of interest relating to relocation of industries and CETP, consequential refund and interest on the same, cannot be chargeable to tax. In this regard, however we note that necessary evidence as to whether the entire amount has been paid to the Delhi Government or not is not available. Hence, we direct the Assessing Officer to certify the same and allow the assessee's claim accordingly."

5. The Revenue contends that the assessee had paid tax in respect of scheme of relocation of industries, formulated by the Govt. It contested the taxability of the amount; and was successful before the income tax authority who directed refund tax. The amount refunded included interest on the tax deposited. It was contended that even though there was no taxable event that amount wrongly assessed to tax, had to be refunded, by virtue of mandate under the Income-tax Act. Interest was payable and to the extent of interest component the assessee had to pay income tax as it constituted "income from other sources". In the absence of any statutory exemption, the interest on the refunded amount could not be exempted from tax.

6. Learned counsel for the assessee on the other hand, contended that when in principle the tax deposited was a subject of wrong extraction, the interest earned on it and paid as a result of law could itself not be considered as income and therefore, was not liable to taxable.

7. This Court is of the opinion that the view taken by the assessing officer and the appellate commissioner is correct. Unless there is an

exact indication in the Income Tax Act itself, that interest payable on income tax refund amounts fulfill the basic character as income (defined under Section 2(24) of the Income Tax Act) cannot be ignored. It is no doubt true that this amount cannot be treated as interest income since the assessee did not earn it through conscious choice or voluntarily, nor was it engaged in the activity of investing its amount and earning interest. However, the basic characteristic of income being what it is, the amount received towards statutory interest has to be subject to tax under the head 'income from other sources'.

8. In the result, the question is answered in favour of the revenue and in the affirmative; the appeal has to succeed. The order of the assessing officer, to the extent discussed above, is hereby restored. The appeal is allowed in the above terms.

ILR (2012) VI DELHI 711
MAC. APP.

ICICI LOMBARD GENERAL INSURANCE CO. LTD. ....APPELLANTS

VERSUS

KANTI DEVI & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 645/2012, 651/2012, 655/2012, 594/2012, 588/2012, 689/2012 DATE OF DECISION: 30.07.2012

Motor Vehicles Act, 1988—Sections 166 and 163-A—Claim for compensation—Sections 168 and 169 conducting enquiry—Section 172 award of costs—Section 176 framing of rules—Delhi Motor Vehicles

Rules 1993—Chapter IX Rules 118 and 119—Delhi Motor Accident Claim Tribunal Rules 2008 Rule 32 vesting of powers of Civil Court—Code of Civil Procedure, 1908—Section 35 Order XXA Award of Costs—Delhi High Court Rules Vol. Chapter 16 Part-B Rules 1, 1A and 9 Counsel's Fee out of pocket expenses whether can be awarded by the Claims Tribunal.

MAC. APP. 645/2012

Compensation of Rs. 7,90,000/- awarded on the basis of settlement between the parties Rs. 21,000/- awarded as counsel's fee—Aggrieved Insurance Co. preferred appeal—Held dispute amicably settled, no agreement to pay counsel's fee, no certificate of fee filed, award of counsel's fee not in consonance with Delhi High Court Rules—Order set aside.

CM (M) 651/2012

Settlement reached between parties. Compensation Rs. 60,000/- awarded Rs. 5000/- awarded towards counsel's fee paid after deducting TDS—Show cause notice issued to the Managing Director of Insurance Company towards counsel's fee paid after deducting TDS. Held—No agreement regarding payment of counsel's fee- no ground for issuance of show cause notice award of counsel's fee illegal—Order set aside.

MAC. APP. 655/2012

Settlement reached between the parties. Compensation of Rs. 4,50,000/- awarded Rs. 25,000/- awarded as counsel's fee—Aggrieved Insurance Co. preferred appeal. Held, award of counsel's fee beyond the terms of settlement, no certificate of counsel's fee placed on record, not in consonance with law—Order set aside.

MAC. APP. 594/2012

Settlement arrived at between the parties

compensation of Rs. 9,00,000/- awarded towards full and final settlement Rs. 50,000/- awarded as counsel's fee. Held—Counsel's fee not permissible—Order set aside.

MAC. APP. 588/2012

Settlement reached between the parties compensation of Rs. 90,000/- awarded towards full and final settlement between the parties Rs. 10,000/- awarded as counsel's fee—Held respondent not entitled to the counsel's fee—Insurance Co. cannot be directed to pay the fee directly to the counsel—Order set aside.

MAC. APP. 689/2012

Settlement reached between the parties compensation of Rs. 4,50,000/- awarded towards full and final settlement Rs. 25,000/- awarded as counsel's fee—Review Petition filed for waiving the counsel's fee dismissed with cost of Rs. 25,000/- with directions to recover from the salary of authorized officer. Held—Order set aside.

It is true that Section 172 of the Act empowers a Claims Tribunal to award compensatory costs only in the eventualities as mentioned in Clause (a) and (b) of Section 172 sub-Section (1). Section 35 (A) of the Code contains similar provisions regarding award of compensatory costs in respect of false or vexatious claims or defences. **(Para 8)**

A bare reading of Section 169 (2) of the Act would show that the powers of Civil Courts have been conferred on a Claims Tribunal only for specific purposes as mentioned therein which certainly does not include the power to impose costs. However, Section 176 of the Act empowers the State Govt. to frame Rules for the purpose of carrying into effect the provisions given in Sections 165 to 174 of the Act and, in particular, as regard to the procedure to be followed by the Claims Tribunal and also with regard to the powers which

are vested in a Civil Court which may be exercised by a Claims Tribunal. **(Para 10)**

Rule 119, therefore, also does not confer any power upon the Claims Tribunal with respect to the imposition of costs. The Govt. of NCT of Delhi framed another set of Rules, namely, the Delhi Motor Accident Claims Tribunal Rules, 2008 (the Claims Tribunal Rules, 2008) in exercise of its power under Section 176 of the Act. The said Rules, however, superseded the provisions of the Delhi Motor Vehicle Rules, 1993 insofar as the provisions relating to the Claims Tribunal in Chapter IX are concerned. **(Para 12)**

Thus, by virtue of Rule 32 of the Claims Tribunal Rules, 2008, the Claims Tribunal can exercise all the powers of a Civil Court and in doing so it has to follow the procedure laid down in the Code. It can be seen that the scope of power exercisable by the Claims Tribunal has thus been completely widened by virtue of the Claims Tribunal Rules, 2008, which means that the Claims Tribunal can exercise the powers of a Civil Court as laid down in the Code. Therefore, it would not be correct to say that the Claims Tribunal is empowered only to order payment of compensatory costs in cases of vexatious claims and defences and not otherwise. In other words, the Claims Tribunal would be competent to award costs like any other Civil Court under Section 35 read with Order XXA of the Code and subject to the Rules framed by the Delhi High Court in this regard. **(Para 15)**

A perusal of Section 35 read with Order XXA of the Code would show that normally the costs shall follow the event and in case the Court directs otherwise, it is required to state reasons in writing. It is further revealed that expenditure in serving any notice required by law or even otherwise; expenditure incurred on typing, writing and printing of pleadings; charges paid by party for inspection of the Court's record; expenditure incurred by a party for producing witnesses; and in case of Appeal the charges incurred by a party for obtaining copy of the judgment and decree; are

broadly payable without limiting the scope of the costs. **(Para 18)**

The learned Single Judge of this Court in **Rajesh Tyagi & Ors. v. Jaibir Singh & Ors.,** FAO No.842/2003, decided on 21.12.2009 issued certain guidelines whereby the Delhi Police and the Insurance Companies agreed to follow certain set of procedures called the Claims Tribunal Agreed Procedure (the Agreed Procedure) in which the Delhi High Court extended the scope of Section 158 (6) of the Act and enjoined upon the police officer to furnish the DAR within 30 days of the accident and to forward it to the Claims Tribunal with duly verified documents (copy of the report under Section 173 of the Code, FIR, photographs, site plan, mechanical inspection report, seizure memo, photocopies of documents mentioned in Clause 3 (2) of the Agreed Procedure etc. etc.). A copy of the DAR is also to be made available to the Nodal Officer appointed by the Insurance Company on payment of certain charges. As per Chapter 3, Rule 6(3) of the Agreed Procedure, the Insurance Company is expected to make a reasoned offer within 30 days. The said reasoned offer which is to be treated as a legal offer can be accepted by the Claimant immediately or within the prescribed period. There is no embargo in extending the legal offer by the Insurance Company either through the nominated counsel or otherwise. In other words, the Insurance Company can make an offer of a just compensation in accordance with law which may be accepted by the Claimant without there being any requirement to hold an inquiry by the Claims Tribunal under Section 168 of the Act. Obviously, there is no contest between the parties and no Claim Petition has been filed in such a case. Even when DAR filed by the IO is treated as a Claim Petition and the offer of compensation is accepted by the Claimant on any later date; obviously, the offer given by the Insurance Company shall govern the payment of costs. In other words, no amount shall be payable towards the costs of the proceedings including the Counsel's fee except when

specifically agreed to by the parties when any Claim Petition is decided on the basis of a mutual settlement. **(Para 24)**

No formal procedure is required for an amicable settlement between the parties. There may not be any legal offer by the Insurance Company for want of verification of any document or for want of any document or because it has any statutory defence available or even otherwise if the Insurance Company is not inclined to settle. The Claimant/Claimants and the driver, owner or the Insurer may enter into any settlement or compromise during the course of inquiry held by a Claims Tribunal. The Claims Tribunal is empowered to ensure that the compensation offered is just and reasonable. If it is found to be just, an award can be passed on the basis of the settlement reached between the parties. If the Claims Tribunal finds that the compensation is not just, the Claims Tribunal may be entitled to proceed further with the inquiry to arrive at the just compensation payable to the Claimant/Claimants. At the same time, it is not within the domain of the Claims Tribunal to accept the settlement and hold the compensation to be just and at the same time award costs over and above the compensation agreed to by the parties and costs, if any, offered by the driver, owner or the Insurer. **(Para 25)**

There is no privity of contract with the Counsel and there is no statutory obligation for a party to pay the costs of proceedings to the Counsel. If a lawyer client agreement is filed before the conclusion of the case and it provides for direct payment of the counsel's fee to him only then the Claims Tribunal can order for payment of counsel's fee directly to the counsel. **(Para 30)**

(i) The Claims Tribunal is empowered to award costs in a Claim Petition in terms of Section 35 read with Order XXA of the Code.

(ii) The Claims Tribunal is entitled to award the Counsel's fee in accordance with Rule 1 read with Rule 1A and Rule 9 of Chapter 16 Volume I of the Rules extracted earlier.

(iii) In case of compromise/settlement of the claims, the Claims Tribunal is not entitled to go beyond the settlement reached between the parties. If the settlement does not provide for payment of any Counsel's fee, it shall not be within the domain of the Claims Tribunal to award the Counsel's fee.

(iv) If the compensation is awarded on the basis of DAR in pursuance of the legal offer made by the Insurer, the Claims Tribunal is not empowered to award any costs unless it forms part of the legal offer.

(v) The counsel fee can be directly paid to the counsel only when a specific agreement is filed and the Claimant requires payment of fee directly to the counsel because only then the Claimant would be liable to reimburse the fee or part thereof in case the award is set aside or varied. **(Para 32)**

Important Issue Involved: (A) Section 172 of the Motor Vehicles Act empowers a Claims Tribunal to award compensatory costs only in eventualities as mentioned in Clause (a) and (b) of Section 172 (1). Section 35 (A) of the code contains similar provisions regarding award of compensatory costs in respect of false or vexatious claims or defences.

(B) Section 169 (2) of the Motor Vehicles Act shows that the powers of Civil Courts have been conferred on a Claim Tribunal only for specific purpose as mentioned therein which does not include the power to impose costs.

(C) Rule 119 of Delhi Motor Vehicle Rules 1993 also does not confer any power upon the Claims Tribunal with respect to the imposition of costs.

(D) By virtue of Rule 32 of the Claims Tribunal Rules 2008, the Claims Tribunal can exercise all the powers of Civil Court and in doing so it has to follow the procedure laid down in the Code. The scope of power exercisable by the Claims Tribunal has been completely widened by virtue of the Claims Tribunal Rules 2008. Therefore, it would not be correct to say that the Claims Tribunal is empowered only to order payment of compensatory costs in cases of vexatious claims and defences and not otherwise. In other words, the Claims Tribunal would be competent to award costs like any other Civil Court under Section 35 read with order XXA of the Code and subject to the Rules framed by the Delhi High Court in this regard.

(E) Under Section 35 read with order XXA of the Code, the expenditure in serving any notice required by law or even otherwise; expenditure incurred on typing, writing and printing of pleadings, charges paid by party for inspection of Court's record; expenditure incurred by a party for obtaining copy of the judgment and decree; are broadly payable without limiting the scope of costs.

(F) No amount shall be payable towards the cost of proceedings including the counsel's fee except when specifically agreed to by the parties when any claim petition is decided on the basis of a mutual settlement.

(G) It is not within the domain of the Claims Tribunal to accept the settlement and hold the compensation to be just and at the same time award costs over and above the compensation agreed to by the parties as costs, if any, offered by the driver, owner or the Insurer.

(H) There is no statutory obligation for a party to pay the costs of proceedings to the counsel. If a lawyer client agreement is filed before the conclusion of the case and it provides for direct payment of the counsel's fee to him only then the Claims Tribunal can order for payment of counsel's fee directly to the counsel.

(i) The claims Tribunal is empowered to award costs in a Claim Petition in terms of Section 35 read with Order XXA of the Civil Procedure Code.

(ii) The Claims Tribunal is entitled to award the counsel's fee in accordance with Rule read with Rule 1A and Rule 9 of Chapter 16 Volume I of the Delhi High Court Rules.

(iii) In case of compromise/settlement of the claims, the Claims Tribunal is not entitled to go beyond the settlement reached between the parties. If the settlement does not provide for payment of any counsel's fee, it shall not be within the domain of the Claims Tribunal to award the counsel's fee.

(iv) If the compensation is awarded on the basis of DAR in pursuance of the legal offer made by the Insurer, the Claims Tribunal is not empowered to award any costs unless it forms part of the legal offer.

(v) The counsel's fee can be directly paid to the counsel only when a specific agreement is filed and the Claimant requires payment of fee directly to the counsel because only then the Claimant would be liable to reimburse the fee or part thereof in case the award is set aside or varied.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Ms. Suman Bagga, Advocate, Mr. Pradeep Gaur, Advocate with Mr. Amit Gaur and Mr. Shashank Sharma, Md. Shantha Devi Raman Advocate.

FOR THE RESPONDENTS : Mr. Pankaj Kumar Daval, Advocate, Mr. Ashok Popli, Advocate, Mr. Abhishek Sharma with Mr. Rahul Rohtagi, Advocates.

CASES REFERRED TO:

1. *Sat Prakash & Ors.* vs. *Jagdish & Ors.* FAO No.365/1999, decided on 26.03.2010.
2. *Rajesh Tyagi & Ors.* vs. *Jaibir Singh & Ors.*, FAO No.842/2003, decided on 21.12.2009.

RESULT: Appeals allowed, directions issued.

G.P. MITTAL, J.

1. In these Appeals (MAC.APP. 645/2012, CM (M) 651/2012, MAC.APP.655/2012, MAC.APP.594/2012, MAC.APP. 588/2012, and MAC.APP. 689/2012), a common question of law and fact arises for consideration; whether the Claims Tribunal could have awarded the Counsel's fee or out of pocket expenses while deciding a Claim Petition filed under Section 166/163-A of the Motor Vehicles Act, 1988 (the Act).

2. Since the Appellants do not dispute the award of compensation and challenge the judgment only on the question of award of counsel's fee and out of pocket expenses, it is not necessary to deal with the manner of accident and the quantum of compensation awarded. I would advert to the circumstances of awarding costs in each case a little later and would first deal with the general principles governing award of costs.

3. The common case set up by the Appellant Insurance Companies in these Appeals/Petition is that the Motor Vehicles Act, 1988 is a Code in itself which governs the payment of costs in certain situations. The Claims Tribunal cannot go beyond the provisions contained in the statute

to award costs. The Insurance Companies rely on Section 172 of the Act, which is extracted hereunder:-

"172. Award of compensatory costs in certain cases.

(1) Any Claims Tribunal adjudicating upon any claim for compensation under this Act, may in any case where it is satisfied for reasons to be recorded by it in writing that-

(a) the policy of insurance is void on the ground that it was obtained by representation of fact which was false in any material particular, or

(b) any party or insurer has put forward a false or vexatious claim or defence, such Tribunal may make an order for the payment, by the party who is guilty of misrepresentation or by whom such claim or defence has been put forward of special costs by way of compensation to the insurer or, as the case may be, to the party against whom such claim or defence has been put forward.

(2) No Claims Tribunal shall pass an order for special costs under sub-section (1) for any amount exceeding one thousand rupees.

(3) No person or insurer against whom an order has been made under this section shall, by reason thereof be exempted from any criminal liability in respect of such mis-representation, claim or defence as is referred to in sub-section (1).

(4) Any amount awarded by way of compensation under this section in respect of any misrepresentation, claim or defence, shall be taken into account in any subsequent suit for damages for compensation in respect of such misrepresentation, claim or defence..

4. In view of the provision extracted above, it is urged by the learned counsels for the Insurance Companies that the Claims Tribunal is entitled to award costs only in two eventualities mentioned in Section 172 (1) (a) and (b) above. Thus, where an Insurer has not put up any false or vexatious defence, no costs can be imposed upon an Insurer.

5. In the alternative, it is contended that even if it is admitted that

costs can be awarded by the Claims Tribunal like any other Civil Court, the same has to be in consonance with the provisions of the Code of Civil Procedure, 1908 (the Code) and the Rules framed by the Delhi High Court (the Rules) in this regard.

6. On the other hand, it is urged by the learned counsels for the Respondents that the provisions of the Code are applicable for conducting an inquiry in a Claim Petition under Sections 168 and 169 of the Act. Therefore, the provisions of Section 35 of the Code are impliedly extended to the proceeding before the Claims Tribunal. The Claims Tribunal and the High Court of Delhi while dealing with a Petition or an Appeal under the Act thus have all the powers to award reasonable costs while deciding a Claim Petition or an Appeal.

7. In view of the submissions raised, the following questions need to be addressed:-

(1) Whether any costs can be awarded by the Claims Tribunal holding an inquiry in a Claim Petition under Section 168 of the Act?

(2) If so, what is the extent and limitation in awarding the costs including in the cases decided on merits or on the basis of Accident Information Report (AIR) or Detailed Accident Report (DAR) or before and after settlement of issues or otherwise on a settlement between the parties.

QUESTION NO.1:-

8. It is true that Section 172 of the Act empowers a Claims Tribunal to award compensatory costs only in the eventualities as mentioned in Clause (a) and (b) of Section 172 sub-Section (1). Section 35 (A) of the Code contains similar provisions regarding award of compensatory costs in respect of false or vexatious claims or defences.

9. A Claim Petition filed under Section 166 of the Act has to be inquired into and compensation must be awarded as provided under Section 168 of the Act. Section 169 (2) of the Act also lays down the procedure and powers of the Claims Tribunal. It is extracted hereunder:-

"169. Procedure and powers of Claims Tribunals.

(1) x x x x x

(2) The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) x x x x x.

10. A bare reading of Section 169 (2) of the Act would show that the powers of Civil Courts have been conferred on a Claims Tribunal only for specific purposes as mentioned therein which certainly does not include the power to impose costs. However, Section 176 of the Act empowers the State Govt. to frame Rules for the purpose of carrying into effect the provisions given in Sections 165 to 174 of the Act and, in particular, as regard to the procedure to be followed by the Claims Tribunal and also with regard to the powers which are vested in a Civil Court which may be exercised by a Claims Tribunal.

11. Govt. of NCT of Delhi in exercise of its power under Section 176 and under other Sections of the Act framed Delhi Motor Vehicle Rules, 1993. Chapter IX of the Delhi Motor Vehicle Rules deals with the provisions in relation to the Claims Tribunal. Rule 118 of the Delhi Motor Vehicle Rules lays down the procedure to be adopted by the Claims Tribunal. Rule 119 of the Delhi Motor Vehicle Rules further makes applicable certain other provisions of the First Schedule of the Code to the proceedings before the Claims Tribunal. Rule 119 of the Delhi Motor Vehicle Rules reads as under:-

"119. Power vested in the Civil Court which may be exercised by Claims Tribunal.- The following provisions of the first schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to proceedings before the Claims Tribunal, namely:-

(a) Order V, (Issue and Service of Summons) Rules 9 to 13 and 15 to 39;

(b) Order IX (Appearance of Parties and Consequence of Non-appearance);

(c) Order XIII (Production, Impounding and Return of Documents), Rules 3 to 10;

(d) Order XVI (Summoning and Attendance of Witnesses), Rules 2 to 21;

(e) Order XVII (Adjournments) and;

(f) Order XXIII (Withdrawal and Adjustment of Suits), Rules 1 to 3..

12. Rule 119, therefore, also does not confer any power upon the Claims Tribunal with respect to the imposition of costs. The Govt. of NCT of Delhi framed another set of Rules, namely, the Delhi Motor Accident Claims Tribunal Rules, 2008 (the Claims Tribunal Rules, 2008) in exercise of its power under Section 176 of the Act. The said Rules, however, superseded the provisions of the Delhi Motor Vehicle Rules, 1993 insofar as the provisions relating to the Claims Tribunal in Chapter IX are concerned.

13. The preamble to the Claims Tribunal Rules, 2008 reads as under:-

"In exercise of the powers conferred by section 176 read with clause (41) of section 2 and sub-section (1) of section 212 of Motor Vehicles Act, 1988 (59 of 1988), and in partial supersession of Chapter IX of the Delhi Motor Vehicles Rules, 1993 relating to Claims Tribunals, made vide this Government's Notification No. F 2(1)/93-Law dated the 21st June, 1993, the Lieutenant Governor of the National Capital Territory of Delhi is pleased to make the following rules, namely....

14. Rule 32 of the Claims Tribunal Rules, 2008 vests the Claims Tribunal with all the powers of a Civil Court in discharging its function as laid down in the Code. The same is extracted hereunder:-

"32. **Vesting of powers of Civil Court in the Claims Tribunal** - Without prejudice to the provisions of Section 169 of the Act every Claims Tribunal shall exercise all the powers of a Civil Court, and in doing so for discharging its functions it shall follow the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908)."

15. Thus, by virtue of Rule 32 of the Claims Tribunal Rules, 2008, the Claims Tribunal can exercise all the powers of a Civil Court and in doing so it has to follow the procedure laid down in the Code. It can be seen that the scope of power exercisable by the Claims Tribunal has thus been completely widened by virtue of the Claims Tribunal Rules, 2008, which means that the Claims Tribunal can exercise the powers of a Civil Court as laid down in the Code. Therefore, it would not be correct to say that the Claims Tribunal is empowered only to order payment of compensatory costs in cases of vexatious claims and defences and not otherwise. In other words, the Claims Tribunal would be competent to award costs like any other Civil Court under Section 35 read with Order XXA of the Code and subject to the Rules framed by the Delhi High Court in this regard.

QUESTION No.2:-

16. Coming to the second question; it is urged by the learned counsels for the Appellant Insurance Companies that the Delhi High Court has framed Rules with regard to the payment of costs including the Counsel's fee. Part B of Chapter 16 Volume 1 of the Delhi High Court Rules (the Rules) governs the payment of the Counsel's fee in addition to the costs incurred by a Claimant in pursuing the proceedings before a Civil Court.

17. Section 35 & Order XXA of the Code which deal with the payment of costs and Rule 1; Rule 1A; Rule 2; Rule 8; Rule 9; Rule 12 and Rule 16 of Chapter 16 Volume 1 Part B of the Delhi High Court Rules (for short the Rules), which deals with the Counsel's fee are extracted hereunder:-

> **"35. Costs.**
>
> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of law for the time being in force, the costs of an incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

> (2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing..
>
> **"ORDER XXA. COSTS**
>
> **Rule 1.** Provisions relating to certain items:- Without prejudice to the generality of the provisions of this Code relating to costs, the Court may award costs in respect of -
>
> (a) expenditure incurred for the giving of any notice required to be given by law before the institution of the suit;
>
> (b) expenditure incurred on any notice which, though not required to be given by law, has been given by any party to the suit to any other party before the institution of the suit;
>
> (c) expenditure incurred on the typing, writing or printing of pleadings filed by any party;
>
> (d) charges paid by a party for inspection of the records of the Court for the purposes of the suit;
>
> (e) expenditure incurred by a party for producing witnesses, even though not summoned through Court, and (f) in the case of appeals, charges incurred by a party for obtaining any copies of judgments and decrees which are required to be filed along with the memorandum of appeal..
>
> **2. Costs to be awarded in accordance with the rules made by High Court**- The award of costs under this rule shall be in accordance with such rules as the High Court may make in that behalf.
>
> x x x x x x x x x x
>
> **"Rule 1. Suit for recovery of property, breach of contract or damages** - In suits for the recovery of money or of specific property or a share of specific property, whether immoveable or moveable, or for the breach of any contract or for damages:
>
> (a) If the amount or value of property, debt or damages decreed shall not exceed Rs. 25,000/- at 10 per cent on the amount or value decreed.

(b) If the amount of value shall exceed Rs. 25,000/- and not exceed Rs. 50,000/-, on Rs. 25,000/- at 10 per cent and on the remainder at 8 per cent.

(c) If the amount or value shall exceed Rs. 50,000/- and not exceed Rs. one lakh, on Rs. 50,000/- as above and on the remainder at 4 per cent.

(d) If the amount or value shall exceed Rs. 1,00,000/- and not exceed Rs. 5,00,000/- on Rs. 1,00,000/- as above and on the remainder at 2 per cent.

(e) If the amount or value shall exceed Rs. 5,00,000/- on Rs. 5,00,000/- as above and on the remainder at one per cent subject, however, that in no case the amount of fee shall exceed Rs. 20,000/-..

"Rule 1A. In the case of:

(i) Summary suits under Order XXXVII of the first Schedule to the Code of Civil Procedure, 1908, where the defendant does not appear or where leave to defend is refused or where a decree is passed on the defendant failing to comply with the conditions on which leave to defend was granted and appeals against decrees in suits.

(ii) Suit, the claim in which is admitted but only time or instalment for payment is asked for.

(iii) Suit which is got dismissed by a plaintiff for want of prosecution before settlement of issues or recording of any evidence, except evidence under Rule 2 of Order X of the Code of Civil Procedure.

(iv) Suit which is withdrawn before the settlement of issues or recording of any evidence except evidence under Rule 2 of Order X of the Code of Civil Procedure.

(v) Suit in which judgment is given on admission under Rule 6 of Order XII in the First Schedule to the Code of Civil Procedure, 1908, before the settlement of issues or recording of any evidence except evidence under Rule 2 of Order X of the Code of Civil Procedure.

(vi) Short causes, commercial causes and long causes in which no written statement is filed and appeals from decrees in such suits.

(vii) Suits compromised before the settlement of issues or recording of evidence except evidence under Rule 2 of Order X of the Code of Civil Procedure.

(viii) Any formal party to a suit or appeal, e.g., a trustee or estate holder who only appears to submit to the orders of the Court and asks for his costs.

(ix) A suit or appeal which has abated.

(x) A Plaint returned for presentation to the proper Court, the amount of Advocate's fees to be allowed shall be fixed by the Court disposing of the matter and shall not exceed 1/2 of that payable according to the rate specified in sub-rule (l) above:

Provided that in no case falling under this sub-rule the Advocate's fee shall be less than Rs. 500/-.

Rule 2. Others Suits - In suits for injuries to the person or character of the plaintiff, such as for assault or defamation or for injuries to the property, or to enforce rights where the pecuniary value of such injury or right cannot be exactly defined, as in suits for the partition of joint property where partition is improperly resisted or any other suit of the kinds specified in the rules made by the High Court under Section 9 of the Suits Valuation Act, 1887 for the valuation of suits which do not admit of being satisfactorily valued, if the plaintiff succeeds, the Court may order the fee allowed to the plaintiff to be calculated with reference either to the amount decreed or according to the valuation of the suit according to such a sum as the Court shall think reasonable and shall fix with reference to the importance of the subject of dispute but the same shall not be less than Rs. 500/- and shall not exceed Rs. 5,000/-.

Rule 8. Miscellaneous proceedings-In any miscellaneous proceedings or for any matter other than that of appearing, acting or pleading in a suit prior to decree, the fee shall not exceed:

(i) rupees two hundred and forty in the Court of a District Judge or of an officer exercising the powers of a Subordinate Judge of the 1st, 2nd, 3rd and 4th class or in a Court of Small Causes; and

(ii) rupees forty-eight in the Court of an officer exercising the powers of a Subordinate Judge in respect of cases the value of which is below Rs. 1,000.

Rule 9. Undefended suits-If a suit in any Court of original jurisdiction be undefended, the fee shall be calculated at one-half the sum at which it would have been charged had the suit been defended.

x x x x x x x x x x

Rule 12. Appeals-In appeals the fee shall be half of the fee calculated on the same scale as in the original suits and the principles of the above rules as to original suits shall be applied, as nearly as may be.

x x x x x x x x x x

Rule 16. Certificate as to fees to be filled by counsel in the Court of District Judges-Not withstanding anything contained in the rules and not withstanding any order of the Presiding Officer, no fee to any legal practitioner appearing in civil appeals, or original suits in the Court of District Judges shall except, as in these rules hereinafter provided, be allowed on taxation between party and party, or shall be included in any decree or order, unless the party claiming to have such fee allowed shall, before the final hearing, fill in the Court, a certificate signed by the legal practitioner certifying the amount of the fee or fees actually paid by or on behalf of his client to him or to any other legal practitioner in whose place he may have appeared..

18. A perusal of Section 35 read with Order XXA of the Code would show that normally the costs shall follow the event and in case the Court directs otherwise, it is required to state reasons in writing. It is further revealed that expenditure in serving any notice required by law or even otherwise; expenditure incurred on typing, writing and printing of pleadings; charges paid by party for inspection of the Court's record;

expenditure incurred by a party for producing witnesses; and in case of Appeal the charges incurred by a party for obtaining copy of the judgment and decree; are broadly payable without limiting the scope of the costs.

19. It is urged on behalf of the Appellant Insurance Companies that the proceedings in a Petition under Section 166 of the Act or for that matter under Section 163-A of the Act are miscellaneous proceedings covered under Rule 8 of the Rules and the Counsel's fee shall be payable on the scale as mentioned in Rule 8. Rule 8 extracted earlier apply to misc. proceedings or for any matter other than that of appearing, pleading etc. in a suit prior to the decree.

20. On the other hand, Rule 1 of Chapter 16 Volume 1 Part B of the Rules is very widely worded and also includes Suit for damages. A Claim Petition under Section 166/163-A is in respect of damages for the injuries caused to the Claimant payable by the driver, the owner and the Insurer. Thus, in my view Rule 1 is the appropriate Rule which would apply to the Claim Petition under the Act. In the circumstances, apart from the award of costs under other heads, as mentioned under Order XXA, the Counsel's fee shall be payable on the scale as given in Rule 1.

21. It may be mentioned that the inquiry conducted by a Claims Tribunal is not more complex than a recovery suit or a suit for breach of contract or for damages. Thus, the scale of fees in Rule 1 of the Rules would be more than adequate to meet the expenses towards the Counsel's fee.

22. Moreover, as per Rule 1A in case of a decision made in a Claim Petition decided without contest, the payment of fees is not to exceed one-half of what is provided in Rule 1, as extracted earlier.

23. Section 158 (6) of the Act provides for filing of AIR by the police officer investigating the accident case or by the Officer In-Charge of the Police Station to the concerned Claims Tribunal. Under Section 166 (4) of the Act, the AIR forwarded by the police officer can be treated as an Application for compensation under the Act.

24. The learned Single Judge of this Court in **Rajesh Tyagi & Ors. v. Jaibir Singh & Ors.,** FAO No.842/2003, decided on 21.12.2009 issued certain guidelines whereby the Delhi Police and the Insurance

Companies agreed to follow certain set of procedures called the Claims Tribunal Agreed Procedure (the Agreed Procedure) in which the Delhi High Court extended the scope of Section 158 (6) of the Act and enjoined upon the police officer to furnish the DAR within 30 days of the accident and to forward it to the Claims Tribunal with duly verified documents (copy of the report under Section 173 of the Code, FIR, photographs, site plan, mechanical inspection report, seizure memo, photocopies of documents mentioned in Clause 3 (2) of the Agreed Procedure etc. etc.). A copy of the DAR is also to be made available to the Nodal Officer appointed by the Insurance Company on payment of certain charges. As per Chapter 3, Rule 6(3) of the Agreed Procedure, the Insurance Company is expected to make a reasoned offer within 30 days. The said reasoned offer which is to be treated as a legal offer can be accepted by the Claimant immediately or within the prescribed period. There is no embargo in extending the legal offer by the Insurance Company either through the nominated counsel or otherwise. In other words, the Insurance Company can make an offer of a just compensation in accordance with law which may be accepted by the Claimant without there being any requirement to hold an inquiry by the Claims Tribunal under Section 168 of the Act. Obviously, there is no contest between the parties and no Claim Petition has been filed in such a case. Even when DAR filed by the IO is treated as a Claim Petition and the offer of compensation is accepted by the Claimant on any later date; obviously, the offer given by the Insurance Company shall govern the payment of costs. In other words, no amount shall be payable towards the costs of the proceedings including the Counsel's fee except when specifically agreed to by the parties when any Claim Petition is decided on the basis of a mutual settlement.

25. No formal procedure is required for an amicable settlement between the parties. There may not be any legal offer by the Insurance Company for want of verification of any document or for want of any document or because it has any statutory defence available or even otherwise if the Insurance Company is not inclined to settle. The Claimant/ Claimants and the driver, owner or the Insurer may enter into any settlement or compromise during the course of inquiry held by a Claims Tribunal. The Claims Tribunal is empowered to ensure that the compensation offered is just and reasonable. If it is found to be just, an award can be passed on the basis of the settlement reached between the parties. If the Claims Tribunal finds that the compensation is not just, the

Claims Tribunal may be entitled to proceed further with the inquiry to arrive at the just compensation payable to the Claimant/Claimants. At the same time, it is not within the domain of the Claims Tribunal to accept the settlement and hold the compensation to be just and at the same time award costs over and above the compensation agreed to by the parties and costs, if any, offered by the driver, owner or the Insurer.

26. It is also a grievance of the Insurance Companies in some of the Appeals that it is not permissible to pay the Counsel's fee directly to the Counsel as it may be difficult to have a separate account of the Counsel.

27. It is urged that the Insurance Company is statutorily liable to pay the compensation only to the Claimant and the costs of litigation, if any, including the Counsel's fee is also payable to the Claimant/Claimants. The Counsel's fee cannot be ordered to be paid to the Counsel.

28. In the case of **Sat Prakash & Ors. v. Jagdish & Ors.** FAO No.365/1999, decided on 26.03.2010, a learned Single Judge of this Court echoed the sentiments that the lawyers are the officers of the Court and they must be paid their fee with dignity. It was observed that whenever the lawyer client agreement is filed before or at the time of final hearing of the case, the cost equivalent to the reasonable fee may be awarded and may be paid to the counsel directly by the Insurance Company. Para 11 of the Sat Prakash is extracted hereunder:-

> "11. Considering that the lawyers are the officers of the Court and they are entitled to their legal fees with dignity and so far as the claimants are concerned, they are entitled to the reasonable cost of litigation, it is desirable that wherever the lawyer – client agreement is filed before or at the time of final hearing of the case, the cost equivalent to the reasonable fee may be awarded and the Insurance Companies be directed to deposit the said cost by means of a separate cheque in the name of the claimant's counsel to be deposited with the Bank along with the award amount to be released by the Bank directly to the counsel. The Insurance companies should also deposit the fee of their counsel by means of a separate cheque drawn in the name of their counsel with the Bank simultaneously along with the award amount to be released by the Bank to the Insurance Company's

counsel."

29. In Sat Prakash the question of payment of costs was not directly before the Court. The Rules and the provisions regarding payment and extent of the Counsel's fee were not examined by the learned Single Judge. It has to borne in mind that there is no statutory provision for payment of the Counsel's fee directly to the Counsel by an opposite party.

30. There is no privity of contract with the Counsel and there is no statutory obligation for a party to pay the costs of proceedings to the Counsel. If a lawyer client agreement is filed before the conclusion of the case and it provides for direct payment of the counsel's fee to him only then the Claims Tribunal can order for payment of counsel's fee directly to the counsel.

31. Further, in an Appeal, the Superior Court may set aside or vary the order passed by the Claims Tribunal under any head including the Counsel's fee. How the driver, the owner or the Insurance Company will recover the Counsels fee or part thereof if the order with regard to it is set aside or varied. Moreover, an aggrieved party may challenge an award passed by the Claims Tribunal on negligence, quantum of compensation, liability or even the payment of the costs. Such an order may be detrimental to the Claimant and the Counsel may doubly benefit. For instance, a Claimant may enter into an agreement for payment of the Counsel's fee either at the time of filing of the Claims Petition or in installments during the various stages of the proceedings. Thus, a Claimant may have paid the full fee to the Counsel and may be entitled to the payment of the said fees (as costs) in accordance with the scale as provided in the Delhi High Court Rules. But, because of the order passed by a Claims Tribunal, the Counsel may also get the fee over and above the agreement between the Claimant and the Counsel. Instances have come to the notice of this Court where very exorbitant fee was awarded to the Counsel for the Claimant by the Claims Tribunal, the amount was attached and Counsel's fee was paid before any Appeal could be filed by the opposite party.

32. To sum up, it is directed :-

(i) The Claims Tribunal is empowered to award costs in a Claim Petition in terms of Section 35 read with Order XXA of the Code.

(ii) The Claims Tribunal is entitled to award the Counsel's fee in accordance with Rule 1 read with Rule 1A and Rule 9 of Chapter 16 Volume I of the Rules extracted earlier.

(iii) In case of compromise/settlement of the claims, the Claims Tribunal is not entitled to go beyond the settlement reached between the parties. If the settlement does not provide for payment of any Counsel's fee, it shall not be within the domain of the Claims Tribunal to award the Counsel's fee.

(iv) If the compensation is awarded on the basis of DAR in pursuance of the legal offer made by the Insurer, the Claims Tribunal is not empowered to award any costs unless it forms part of the legal offer.

(v) The counsel fee can be directly paid to the counsel only when a specific agreement is filed and the Claimant requires payment of fee directly to the counsel because only then the Claimant would be liable to reimburse the fee or part thereof in case the award is set aside or varied.

33. Now it is time to turn to each of the case:

MAC APP.645/2012

34. This Appeal relates to an award of compensation of Rs. 7,90,000/-. It appears that a DAR was filed on 08.12.2010. The Presiding Officer of the Claims Tribunal was on leave on the next date i.e. 24.01.2011. Thereafter, an offer of settlement was given on the next date i.e. 14.02.2011. A Claim Petition was filed on 25.04.2011 and DAR was attached with the Claim Petition.

35. The written statement was filed by the Appellant Insurance Company on 25.04.2011. On 14.07.2011, the learned Presiding Officer of the Claims Tribunal observed that the Insurance Company had already given the offer of settlement in writing to the Claimants. As the offer did not materialize the case was fixed for evidence. Ultimately on, 12.04.2012 the parties reached a settlement which was recorded by the Claims Tribunal.

36. While disposing of the Claim Petition on the basis of settlement and directing the payment of compensation, the Claims Tribunal directed that a sum of Rs. 21,000/- shall be paid to the Counsel for the Respondent (the Claimant) as the Counsel's fee. This is not in consonance with the Delhi High Court Rules on two grounds; firstly, that the dispute between the parties was amicably settled and there was no agreement to pay the counsel's fee and secondly, no certificate of fee was filed before the final hearing as provided under Rule 16 of Chapter 16 Volume I Part B of the Delhi High Court Rules.

37. The impugned order so far as it awards a sum of Rs. 21,000/- towards Counsel's fee is hereby set aside.

38. The statutory deposit of Rs. 25,000/-, if any, be refunded to the Appellant Insurance Company.

39. Pending Applications stand disposed of.

CM (M) 651/2012

40. In this case, a settlement was reached between the parties to pay the compensation of Rs. 60,000/- in full and final settlement. Thereafter, the Claims Tribunal awarded a sum of Rs. 5,000/- towards Counsel's fee which was paid after deducting the TDS.

41. The Claims Tribunal very strangely by its order dated 18.05.2012 issued Show Cause Notice to the Managing Director of the Insurance Company for violating the directions of the Claims Tribunal.

42. Since the order directing the payment towards the Counsel's fee, without there being any agreement in this regard, could not have been passed by the Claims Tribunal, there was no ground to issue any show cause notice for deducting TDS on the Counsel's fee. I need not go into the question whether the Petitioner Insurance Company was competent to deduct the TDS or not.

43. In view of my observations that the order directing payment of Counsel's fee itself was illegal, the impugned order dated 18.05.2012 is set aside.

44. The Petition is allowed in above terms.

45. The statutory deposit of Rs. 25,000/-, if any, be refunded to the Petitioner Insurance Company.

46. Pending Applications stand disposed of.

MAC APP.655/2012

47. This Appeal relates to a Claim Petition which was fixed for evidence. On 27.04.2012, the parties sought an adjournment to explore the possibility of an amicable settlement. Ultimately on 01.05.2012 the settlement was reached whereby, the First Respondent agreed to accept a sum of Rs. 4,50,000/- in full and final settlement for having suffered injuries in a motor vehicle accident.

48. The Appellant Insurance Company is aggrieved by the order for payment of Counsel's fee of Rs. 25,000/- which was not in consonance with the law as it was beyond the terms of settlement and no certificate towards the Counsel's fee was placed on record before the Claims Tribunal.

49. The order dated 01.05.2012 to the extent it relates to the Counsel's fee of Rs. 25,000/- is set aside.

50. The Appeal is allowed in above terms.

51. The statutory deposit of Rs. 25,000/-, if any, be refunded to the Petitioner Insurance Company.

52. Pending Applications stand disposed of.

MAC APP.594/2012

53. This Appeal relates to the death of one Sunder Lal. Respondents No.1 to 5 agreed to accept a compensation of Rs. 9,00,000/- towards full and final settlement. The order so far as it directs payment of Counsel's fee of Rs. 50,000/- is set aside, for the reasons stated earlier.

54. The Appeal is allowed in above terms.

55. The statutory deposit of Rs. 25,000/-, if any, be refunded to the Petitioner Insurance Company.

56. Pending Applications stand disposed of.

MAC APP.588/2012

57. The Appeal relates to a motor vehicle accident which occurred on 10.11.2011. The First Respondent Ramji Sahani suffered injuries in the accident. A DAR was filed on 01.03.2012. The Appellant filed a written statement admitting the factum of accident and validity of the driving licence. The First Respondent accepted a sum of Rs. 90,000/- towards full and final settlement on account of the injuries suffered in the accident. It was not part of the settlement that a sum of Rs. 10,000/- was to be paid by the Appellant Insurance Company to Mr. A.K. Singh, Advocate as Counsel's fee, as had been directed by the Claims Tribunal.

58. In view of my findings in the earlier part of the judgment, the First Respondent was not entitled to the Counsel's fee. Moreover, as stated earlier, the Appellant Insurance Company cannot be directed to pay fees directly to the Counsel.

59. The impugned order is accordingly set aside.

60. The Appeal is allowed in above terms.

61. The statutory deposit of Rs. 25,000/- be refunded to the Appellant Insurance Company.

62. Pending Applications stands disposed of.

MAC APP.689/2012

63. In this case, the Claim Petition was settled on payment of Rs. 4,50,000/- as compensation towards full and final settlement. A separate order was passed on payment of Rs. 25,000/- towards Counsel's fee, which was stayed by this Court by order dated 01.06.2012.

64. A Review Petition was filed before the Claims Tribunal for waiving the Counsel's fee of Rs. 25,000/-. While dismissing the said Review Petition, the costs of Rs. 25,000/- was imposed upon Mr. Harinder Kumar, Authorized Officer of the Insurance Company. It was directed to recover the amount of Rs. 25,000/- from the salary of said Mr. Harinder Kumar.

65. I have already held above as to the eventualities and the extent to which the Counsel's fee is payable. The Claims Tribunal acted in hot haste in imposing the costs of Rs. 25,000/- on an official of the Insurance

Company without any reasonable ground.

66. Order dated 30.05.2012 imposing costs of Rs. 25,000/- on Mr. Harinder Kumar is set aside.

67. The Appeal is allowed in above terms.

68. The statutory deposit of Rs. 25,000/-, if any, be refunded to the Appellant Insurance Company.

69. Pending Applications stand disposed of.

70. A copy of the judgment be transmitted to the District Judges for information of the Claims Tribunal.

ILR (2012) VI DELHI 738
W.P.

DELHI PUBLIC SCHOOL ….PETITIONER

VERSUS

MANJU ….RESPONDENT

(MUKTA GUPTA, J.)

W.P. NO. : 4262/2008 DATE OF DECISION: 31.07.2012

Constitution of India, 1950—Article 226, Industrial Disputes Act, 1947—Respondent employed as Aya in Petitioner School for 2 years on compassionate ground-Respondent stopped coming and raised industrial dispute of illegal termination—Industrial Adjudicator ordered reinstatement with 75% back wages—Held—When no post existed, the Respondent could not be reinstated with 75% back wages—Respondent not appointed through a regular selection procedure against a vacancy—Relief granted modified—Petitioner

directed to pay Rs. 1 lac compensation to the Respondent.

In view of the aforesaid settled position and the fact that no post existed, the Respondent could not be directed to be reinstated with 75% back wages. The Respondent worked only for two years and was not appointed through a regular selection procedure against a vacancy. The relief granted to the Respondent is thus required to be modified. It is, therefore, directed that the Petitioner will pay to the Respondent a compensation of Rs. 1 lakh. The Petitioner has already deposited 50% of the award amount in this Court which is lying in the FDR in terms of order dated 30th May, 2008. The Registry is directed to release a sum of Rs. 1 lakh to the Respondent and return the balance amount with interest, if any, to the Petitioner. **(Para 12)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Pramod Gupta and Mr. Udit Gupta, Advocates.

FOR THE RESPONDENT : Mr. Rama Shankar and Mr. Shivam Garg, Advocates.

CASES REFERRED TO:

1. *Jagbir Singh* vs. *Haryana State Agriculture Marketing Board and another,* 2009 (15) SCC 327.
2. *Mahboob Deepak* vs. *Nagar Panchayat, Gajraula* (2008) ILLJ 855 SC.
3. *Sita Ram* vs. *Moti Lal Nehru Farmers Training Institute,* (2008) 5 SCC 75.
4. *M.P. Admn.* vs. *Tribhuban* [(2007) 9 SCC 748 : (2008) 1 SCC (L&S) 264 : (2007) 5 Scale 397].
5. *Uttaranchal Forest Development Corpn.* vs. *M.C. Joshi* [(2007) 9 SCC 353 : (2007) 2 SCC (L&S) 813 : (2007) 3 Scale 545].

6. *Madhya Pradesh Administration* vs. *Tribhuban,* 2007 LLR 785.
7. *Jasbir Singh* vs. *Punjab & Sind Bank and Ors.* reported in (2007) 1 SCC 566.
8. *Jaipur Development Authority* vs. *Ramsahai* [(2006) 11 SCC 684 : (2007) 1 SCC (L&S) 518].
9. *M.P. Housing Board and Anr.* vs. *Manoj Shrivastava,* (2006) IILLJ 119 SC.
10. *State of M.P. and Ors.* vs. *Arjunlal Rajak,* (2006) IILLJ 104 SC.
11. *M.P. State Agro Industries Development Corporation Ltd. and Anr.* vs. *S.C. Pandey,* (2006) IILLJ 215 SC.
12. *Secretary, State of Karnataka and Ors.* vs. *Umadevi (3) and Ors.,* (2006) IILLJ 722 SC.

RESULT: Petition disposed.

MUKTA GUPTA, J.

1. By the present petition the Petitioner impugns the award dated 23rd November, 2007 whereby the termination of the Respondent was held to be illegal, unjustified and in gross violation of principles of natural justice and provisions of Industrial Disputes Act, 1947 (in short 'ID Act). The relief granted to the Respondent was reinstatement with 75% back wages and all consequential benefits accruing to her during the intervening period.

2. Briefly the facts giving rise to the present petition are that the Respondent was appointed as Aya on the basis of a request letter dated 5th July, 1999 with the Petitioner wherein she stated that she came to know that the Petitioner required a lady to work in the school, she was poor and her husband was unwell who could not go for work and in case she was given a job she would do it willing and happily. It is the case of both the parties that the Respondent worked as Aya with the Petitioner for nearly two years. The Petitioner contends that there is no actual post of Aya in the Petitioner School and the Respondent was employed only on compassionate ground. In January, 2000 the Respondent stopped coming for her duties and thereafter raised an industrial dispute

on 12th December, 2000. A reference was sent to the learned Industrial Adjudicator in the following terms:

> "Whether the services of Smt. Manju have been terminated illegally and/or unjustifiably by the management and it so, to what relief is she entitled and what directions are necessary in this respect?"

3. After both the parties adduced their evidence, the learned Tribunal passed the impugned award. The Respondent in support of her employment for the period 1st March, 1998 till 2nd February, 2000 has produced the photocopy of the provident fund account for the period 1998-99.

4. During the course of arguments learned counsel for the Petitioner did not challenge the validity of the impugned award to the extent it declares the termination as illegal and unjustified as the Respondent had completed 240 days in the preceding 12 calendar months. However, he seriously contended that no other person was retained as Aya by the Petitioner after the termination of the Respondent as admitted by the Respondent and thus the relief granted in the award of reinstatement with 75% back wages and consequential relief was contrary to the law laid down by the Hon'ble Supreme Court. The Hon'ble Supreme Court in a catena of judgments has laid down that even if the termination is unjustified and illegal, reinstatement with back wages is not automatic. A number of factors are required to be considered judiciously before grant of relief of reinstatement such as whether the workman is a daily wager, not holding permanent post, the period of service rendered by the workman, the nature of appointment and availability of post etc. It is contended that during the pendency of the present petition, the Petitioner has already paid Rs. 2.5 lakhs to the Respondent and besides that the Petitioner has also deposited with this Court 50% of the award amount, which is kept in the form of FDR as per order dated 30th May, 2008.

5. Learned counsel for the Respondent does not refute the contention that there is no evidence on record that after terminating the services of the Respondent, the Petitioner employed any other person as Aya in the school. He however, states that there is no illegality in the order directing reinstatement with 75% back wages and in a writ petition under Article 226 of the Constitution of India, this Court will not interfere until and unless the relief granted by the Industrial Tribunal is found contrary to the law or perverse.

6. I have heard learned counsel for the parties and perused the record.

7. The short issue for determination is whether in the facts of the present case the Industrial Tribunal after returning a finding that the termination was illegal, unjustified, contrary to the provisions of law and principles of natural justice was justified in directing reinstatement with 75% back wages. In paragraph 35 of the impugned award the learned Tribunal observed that since it has been stated that the husband of the workman was ill and was not working anywhere, it is only the workman who must be bearing expenses of the family till date, and it is but natural that throughout these 7 years the workman would not have been absolutely without any gainful employment of any kind. Having observed that the Respondent would not be without gainful employment all these years, the learned Trial Court erred in awarding relief of reinstatement with back wages to the tune of 75% with all consequential benefits. Further the learned Tribunal ought to have taken into consideration the criteria laid down by the Hon'ble Supreme Court before granting the relief that the workman was not employed as a regular employee through the proper selection procedure or that a regular post existed.

8. In **Sita Ram v. Moti Lal Nehru Farmers Training Institute,** (2008) 5 SCC 75, the Hon'ble Supreme Court considered the question as to whether the Labour Court was justified in awarding reinstatement of the appellants therein:

> "21. The question, which, however, falls for our consideration is as to whether the Labour Court was justified in awarding reinstatement of the appellants in service.
>
> 22. Keeping in view the period during which the services were rendered by the respondent (sic appellants); the fact that the respondent had stopped its operation of bee farming, and the services of the appellants were terminated in December 1996, we are of the opinion that it is not a fit case where the appellants could have been directed to be reinstated in service.
>
> 23. Indisputably, the Industrial Court, exercises a discretionary jurisdiction, but such discretion is required to be exercised judiciously. Relevant factors therefor were required to be taken into consideration; the nature of appointment, the period of

appointment, the availability of the job, etc. should weigh with the court for determination of such an issue.

24. This Court in a large number of decisions opined that payment of adequate amount of compensation in place of a direction to be reinstated in service in cases of this nature would subserve the ends of justice. (See **Jaipur Development Authority v. Ramsahai** [(2006) 11 SCC 684 : (2007) 1 SCC (L&S) 518], **M.P. Admn. v. Tribhuban** [(2007) 9 SCC 748 : (2008) 1 SCC (L&S) 264 : (2007) 5 Scale 397] and **Uttaranchal Forest Development Corpn. v. M.C. Joshi** [(2007) 9 SCC 353 : (2007) 2 SCC (L&S) 813 : (2007) 3 Scale 545].)

25. Having regard to the facts and circumstances of this case, we are of the opinion that payment of a sum of Rs 1,00,000 to each of the appellants, would meet the ends of justice. This appeal is allowed to the aforementioned extent. In the facts and circumstances of this case, there shall be no order as to costs."

9. In **Mahboob Deepak v. Nagar Panchayat, Gajraula** (2008) ILLJ 855 SC, it was observed:

"6. Such termination of service, having regard to the fact that he had completed 240 days of work during a period of 12 months preceding the said date, required compliance with the provisions of Section 6N of the U.P. Industrial Disputes Act. An order of retrenchment passed in violation of the said provision although can be set aside but as has been noticed by this Court in a large number of decisions, an award of reinstatement should not, however, be automatically passed.

7. The factors which are relevant for determining the same, inter alia, are:

(i) whether in making the appointment, the statutory rules, if any, had been complied with;

(ii) the period he had worked;

(iii) whether there existed any vacancy; and

(iv) whether he obtained some other employment on the date of termination or passing of the award.

8. The respondent is a local authority. The terms and conditions of employment of the employees are governed by a statute and statutory rules. No appointment can be made by a local authority without following the provisions of the recruitment rules. Any appointment made in violation of the said rules as also the constitutional scheme of equality as contained in Articles 14 and 16 of the Constitution of India would be a nullity.

9. Due to some exigency of work, although recruitment on daily wages or on an ad hoc basis was permissible, but by reason thereof an employee cannot claim any right to be permanently absorbed in service or made permanent in absence of any statute or statutory rules. Merely because an employee has completed 240 days of work in a year preceding the date of retrenchment, the same would not mean that his services were liable to be regularised.

10. Applying the legal principles, as noticed hereinbefore, the relief granted in favour of the appellant by the Labour Court is wholly unsustainable. The same also appears to be somewhat unintelligible.

11. The High Court, on the other hand, did not consider the effect of non-compliance with the provisions of Section 6N of the U.P. Industrial Disputes Act, 1947. The appellant was entitled to compensation, notice and notice pay.

12. It is now well settled by a catena of decisions of this Court that in a situation of this nature instead and in place of directing reinstatement with full back wages, the workmen should be granted adequate monetary compensation. (See **M.P. Admn. v. Tribhuban** (2007) 9 SCC 748.)

13. In this view of the matter, we are of the opinion that as the appellant had worked only for a short period, the interest of justice will be subserved if the High Court's judgment is modified by directing payment of a sum of Rs 50,000 (Rupees fifty thousand only) by way of damages to the appellant by the respondent. Such payment should be made within eight weeks from this date, failing which the same will carry interest at the rate of 9% per annum.

10. In **Madhya Pradesh Administration vs. Tribhuban,** 2007 LLR 785 their Lordships held:

> "5. The question, however, which arises for consideration is as to whether in a situation of this nature, the learned Single Judge and consequently the Division Bench of the Delhi High Court should have directed re-instatement of the Respondent with full back wages. Whereas at one point of time, such a relief used to be automatically granted, but keeping in view several other factors and in particular the doctrine of public employment and involvement of the public money, a change in the said trend is now found in the recent decisions of this Court. This Court in a large number of decisions in the matter of grant of relief of the kind distinguished between a daily wager who does not hold a post and a permanent employee. It may be that the definition of "workman" as contained in Section 2(s) of the Act is wide and takes within its umbrage all categories of workmen specified therein, but the same would not mean that even for the purpose of grant of relief in an industrial dispute referred for adjudication, application for constitutional scheme of equality adumbrated under Articles 14 and 16 of the Constitution of India, in the light of a decision of a Constitution Bench of this Court in **Secretary, State of Karnataka and Ors. v. Umadevi (3) and Ors.,** (2006) IILLJ 722 SC, and other relevant factors pointed out by the Court in a catena of decisions shall not be taken into consideration.
>
> 6. The nature of appointment, whether there existed any sanctioned post or whether the officer concerned had any authority to make appointment are relevant factors. See **M.P. Housing Board and Anr. v. Manoj Shrivastava,** (2006) IILLJ 119 SC, **State of M.P. and Ors. v. Arjunlal Rajak,** (2006) IILLJ 104 SC and **M.P. State Agro Industries Development Corporation Ltd and Anr. v. S.C. Pandey,** (2006) IILLJ 215 SC. Our attention has been drawn to a recent decision of this Court in **Jasbir Singh v. Punjab & Sind Bank and Ors.** reported in (2007) 1 SCC566 by the learned Counsel appearing on behalf of the Respondent. We do not see as to how the said decision is applicable to the fact of the present case.

11. In **Jagbir Singh vs. Haryana State Agriculture Marketing Board and another,** 2009 (15) SCC 327 the workman was engaged as a daily wager. He was paid consolidated monthly wages. He worked with the Respondent upto 18th July, 1996. Thereafter his services came to an end. He raised an industrial dispute contending that his services were retrenched illegally in violation of Section 25-F of the ID Act. He claimed reinstatement with continuity of service with full back wages. The Industrial Tribunal-cum-Labour Court held that the workman had worked for more than 240 days and the Respondent violated Section 25-F by not giving him notice, pay in lieu of notice and retrenchment compensation before his termination. The Labour Court, accordingly, declared that the workman was entitled to reinstatement with continuity of service and full back wages from the date of demand notice i.e. 27th January, 1997. The Respondents challenged the award before the High Court which set aside the award holding that the workman was neither entitled to be reinstated nor could he be granted back wages. In this backdrop of the matter, the Hon'ble Supreme Court held that High Court erred in not awarding compensation to the workman while upsetting the award of reinstatement and back wages and granted compensation of Rs.50,000/- to the workman. The relevant paras of the Report reads as under:-

> 7. It is true that earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention to the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice. 8-13. .....
>
> 14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240

days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.

15. Therefore, the view of the High Court that the Labour Court erred in granting reinstatement and back wages in the facts and circumstances of the present case cannot be said to suffer from any legal flaw. However, in our view, the High Court erred in not awarding compensation to the appellant while upsetting the award of reinstatement and back wages.

16. As a matter of fact, in all the judgments of this Court referred to and relied upon by the High Court while upsetting the award of reinstatement and back wages, this Court has awarded compensation.

17. While awarding compensation, a host of factors, inter alia, manner and method of appointment, nature of employment and length of service are relevant. Of course, each case will depend upon its own facts and circumstances.

18. In a case such as this where the total length of service rendered by the appellant was short and intermittent from 1-9-1995 to 18-7-1996 and that he was engaged as a daily wager, in our considered view, a compensation of Rs 50,000 to the appellant by Respondent 1 shall meet the ends of justice. We order accordingly. Such payment should be made within six weeks from today failing which the same will carry interest @ 9% per annum."

12. In view of the aforesaid settled position and the fact that no post existed, the Respondent could not be directed to be reinstated with 75% back wages. The Respondent worked only for two years and was not appointed through a regular selection procedure against a vacancy. The relief granted to the Respondent is thus required to be modified. It is, therefore, directed that the Petitioner will pay to the Respondent a compensation of Rs. 1 lakh. The Petitioner has already deposited 50% of the award amount in this Court which is lying in the FDR in terms of order dated 30th May, 2008. The Registry is directed to release a sum

of Rs. 1 lakh to the Respondent and return the balance amount with interest, if any, to the Petitioner.

13. Writ petition is disposed of accordingly.

ILR (2012) VI DELHI 748
CS (OS)

KAILASH NEWAR & ANR. ….PLAINTIFFS

VERSUS

SATISH NEWAR & ANR. ….DEFENDANTS

(V.K. JAIN, J.)

CS (OS) : 2336/2008 DATE OF DECISION: 03.08.2012

Specific Relief Act, 1963—Suit filed for specific performance of a memorandum of understanding ("MoU") dated 28th August /11th September 2001. Parties to the suit were family members carrying on various businesses and owned different properties—disputes arose about a property situated at Faridabad, which was subsequently resolved through intervention of an arbitrator and an MOU was entered into—It is alleged that plaintiff executed release/relinquishment deed, but the defendant failed to transfer their right, title and interest of plot at Faridabad and also failed to pay a loan of Rs. 1 crore—Earlier the plaintiff filed the suit CS (OS) 1048/2004 for declaring the said MOU cancelled/revoked/incapable of being performance/null and void and not legally enforceable—However, the defendants were willing to perform their part of obligation. Learned Single Judge while dismissing interlocutory applications observed that the suit was

barred by limitation—The Division Bench while disposing of the appeal, observed that it was open to the appellants/plaintiffs to withdraw the suit and file a fresh suit and it would be equally open to the respondents/defendants to take whatever legal plea were available to them including the plea of limitation- In the present suit the defendants filed IA No. 3042/ 2009 under Order VII Rule 11 for rejection of the plaint on the ground that it does not disclose any cause of action is barred by law, specifically barred by limitation and also barred by principles of res judicata. It is also alleged in the plaint that CS (OS) 1048/2004 which the plaintiff had earlier filed against the defendants was in Contradiction to the instant suit since the allegations in that suit were to the effect that MOU had been obtained by fraud and without consent of the plaintiff whereas in the present suit they were seeking specific performance of that very MOU. Held—In the present suit, the plaintiffs are seeking specific performance of the very same MOU, which they had in the previous suit claimed to be tainted with fraud and misrepresentation and, therefore, not enforceable in law—The plaintiffs, therefore, want to take a plea which is absolutely contrary to the plea taken in the previous suit; are mutually destructive. Having made an election by seeking to challenge the validity of the MOU and seeking its annulment. The plaintiffs are now stopped in law, from seeking specific performance of that very agreement between the parties. Section 16(c)—The specific Relief Act, 1963—Held that the plaintiff had nowhere in the petition mentioned that they had always been ready and willing to perform their part of the obligation. Though such an averment can be pleaded by way of amendment, the previous suit, repudiating the MOU and seeking its annulment leaves no doubt that at the time of filing the previous suit, they were not ready and willing to perform all their obligations under the MOU.

In CS(OS) No. 1048/2004, a copy of which has been filed by them, the plaintiffs, inter alia, stated as under:-

> "5. That thereafter, the defendants No. 1 and 2, with mala fide intentions, induced the plaintiff by misrepresentation and fraud to sign unregistered document titled Memorandum of Understanding dated 11th September, 2001 which was signed by the defendants No. 1 and 2 on 28.08.2001 itself.
>
> 9. That thereafter in performance of the said MoU, defendants No. 1 and 2 got the plaintiffs to sign, execute and register release/relinquishment deeds and a gift deed detailed below on 11.09.2001 where by the defendants No. 1 and 2 got the plaintiffs to transfer their rights in various portions of the built up property bearing 5, B.D. Estate, Lancers Road, Timarpur, Delhi in favour of the defendant No. 1, but however the defendants No. 1 and 2 failed to transfer their rights, title or interest in property bearing No. 116, Sector-59, Faridabad, Haryana in favour of the plaintiffs despite their assurance that the same shall be within a week of registration of the release/ relinquishment deeds. (emphasis supplied)
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> 10. That it is submitted that the plaintiffs bonafidely acted on the said MoU and performed their initial part of the said MoU, in good faith believing the representations of the defendants No. 1 and 2 that they shall be performing their part of the obligations and further that they shall be executing their part of the documents immediately upon the execution of documents by the plaintiffs.
>
> 12. That aforesaid release deeds/relinquishment deeds, gift deed etc. were acquired by the defendants No. 1 and 2 by making false representations and inducement with malafide intentions that the defendants No. 1 and 2 shall pay the loan of the Bank of Rajasthan

amounting to Rs 1 crore (Aprox.), raised by M/s. Excellent Hosiery Products against property No. 101, Sector-24, Faridabad, Haryana and further the defendants No. 1 and 2 would execute necessary documents of transfer of property bearing No. 116, Sector-59, Faridabad, Haryana, which was acquired in the name of M/s. Excellent Hosiery Product in favour of the plaintiffs.

19. That it is now in the interest of justice that the release deeds and gift deed as detailed above obtained by defendants No. 1 and 2 by misrepresentation and fraud be declared as null and void and the same be directed to be cancelled. If the said documents are left outstanding the same may cause serious injuries to the plaintiffs.

20. That the MoU between the plaintiffs and the defendants No. 1 and 2 has been legally frustrated and is not capable of being enforced/performed. Further as the defendants No. 1 and 2 have failed to perform their obligations under the terms of the said MoU, the said MoU dated 11.09.2001 has stood cancelled/revoked/is incapable of being performed/is null and void. The plaintiffs are entitled to be placed in the same situation as they were at the time of signing of the MoU and the aforesaid registered deed as detailed in para 9 above are liable to be cancelled and the properties belonging to plaintiffs are liable to be restored back to the plaintiffs.

24. It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:-

a. pass a decree of declaration in favour of the plaintiffs and against the defendants No.1 and 2 that the MoU dated 28.08.2001 stands cancelled/revoked/ is in incapable of being performed/is null and void and the same is not legally enforceable on the plaintiffs."

It would thus be seen from a perusal of the above extracted averments made in CS(OS) 1048/2004 that not only had the plaintiffs abandoned the MoU are now seeking to enforce, also sought the same to be declared null and void, having been obtained by misrepresentation, inducement and fraud. They made a specific prayer to the Court in this regard. They also claimed that the said MoU had been frustrated and had become incapable of performance.

In the present suit, the plaintiffs are seeking specific performance of the very same MoU, which they had in the previous suit, claimed to be tainted with fraud and misrepresentation and, therefore, not enforceable in law. The plaintiffs, therefore, want to take a plea which is absolutely contrary to the plea taken in the previous suit. In fact, the plea taken by the plaintiffs in the previous suit and the plea taken in the present suit with respect to the MoU dated 11.09.2001, are mutually destructive. Having made an election by seeking to challenge the validity of the MoU and seeking its annulment, the plaintiffs are now estopped in law from seeking specific performance of that very agreement between the parties. **(Para 8)**

The case of the plaintiffs is that the loan taken from Bank of Rajasthan was agreed to be paid by the defendants. This was one of the obligations to be performed by the defendants under the MoU dated 11.09.2001. It is alleged in para 12 of the plaint that since the defendants failed to pay the dues of the bank, OA No. 211/2002 was filed by it against the firm as well as the plaintiffs as guarantors. It is also alleged that a notice dated 31.12.2002 was issued by the bank to the plaintiffs as well as Sarda Solvent Extraction Pvt. Ltd under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFESI) Act. On receipt of notice of the OA and notice dated 31.12.2002, the plaintiffs had notice that the defendants committed breach of the contract by not paying the dues of the bank. Computed from 31.12.2002, the suit is still barred by limitation. It appears that the dues of the

bank have since been paid by the plaintiffs. The suit for recovery of the amount, on account of payment having been made by the plaintiffs could be within limitation, but, the suit for a direction to the defendants to pay that amount to the plaintiffs, when instituted, was barred by limitation.

(Para 13)

Important Issue Involved: The principle that a person may not approbate and reprobate expresses two propositions (1) that the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile. (2) That he will be regarded , in general at any rate. As having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFFS : Mr. J.P. Sengh, Sr. Advocate Ms. Gurkamal and Mr. Sumit Batra.

FOR THE DEFENDANTS : Mr. Arvind K. Nigam, Sr. Advocate with Mr. Sumehar Bajaj.

CASE REFERRED TO:

1. *Asha Sharma* vs. *Sanimya Vajijiya Pvt. Ltd. and Others* [IA Nos. 9577/2007 in CS(OS) No.1883/2006 (decided on 20.08.2008).
2. *Mayar (H.K.) Ltd. & Ors.* vs. *Owners & Parties, Vessel M.V. Fortune Express & Ors.,* (2006) 3 SCC 100.
3. N.V. Srinivasa Murthy *vs.* Mariyamma, (2005) 5 SCC 548.
4. *Bank of India* vs. *O.P. Swarnakar* [(2003) 2 SCC 721.
5. *T. Arivandandam* vs. *T.V. Satyapal* 1977 (4) SCC 467.
6. *Cooke* vs. *Rickman* [(1911) 2 KB 1125].

7. *Hawlett* vs. *Tarte* (1) C.B. (N.S.) 813.

RESULT: Suit dismissed.

V.K. JAIN, J.

1. This is a suit for specific performance of a Memorandum of Understanding and grant of damages. Defendant No.1 is the brother of plaintiff No.1 and defendant No.2 is the wife of defendant No.1. Plaintiff No.2 is the wife of plaintiff No.1. The parties to the suit were carrying various businesses and owned different properties in the names of the various partnerships/companies formed by them. One of such properties was property bearing No.116, Sector 59, Faridabad. Certain disputes arose between the parties which were resolved through intervention of an arbitrator and an MOU dated 28th August/11th September, 2001 was entered into between.

2. In the parties. The MOU, to the extent it is relevant, provided that plot No. 116, Sector 59, Faridabad which had been acquired in the name of M/s Excellent Hosiery Products, shall belong to the plaintiffs. It was further agreed that the loans raised by another firm Excellent Hosiery Products against the above referred plot shall be repaid by the defendants immediately on the plaintiffs relinquishing/transferring their share in property No. 5, B.D. Estate, Lancers Road, Timarpur, Delhi, in favour of defendant Nos. 1 and 2. It is alleged that pursuant to the aforesaid MOU, the plaintiffs executed release/relinquishment deeds as also a gift deed in favour of the defendants, but on their part, the defendants failed to transfer their right, title and interest in plot No. 116, Sector 59, Faridabad to the plaintiffs, despite their assurance that the same would be done within a week of registration of the release deed/relinquishment deeds. It is further alleged that the defendants also failed to pay the loan of about Rs. 1 crore which M/s Excellent Hosiery Products has raised from Bank of Rajasthan against another property which also had come to the share of the plaintiffs.

The plaintiffs filed CS(OS) 1048/2004 for declaring the said MOU cancelled/revoked/incapable of being performed/null and void and not legally enforceable. Consequential reliefs were also sought in the said suit. The defendants filed written statement affirming their readiness and willingness to perform their part of the obligation contained in the said MOU. Two applications, including an application for amendment of plaint,

filed in the aforesaid suit having been dismissed by learned Single Judge of this Court, the plaintiff filed FAO(OS) 442/2007 which was disposed of by a Division Bench of this Court vide order dated 28.7.2008. The learned Single Judge, while dismissing IA Nos. 5891/2005 and 3310/2007 in CS(OS) 1048/2004, had observed that the suit was barred by limitation. The Division Bench while disposing of the appeal, made it clear that the observations were made while deciding an application under Order VI R. 17 CPC. It was further observed that it was open to the appellants/plaintiffs to withdraw the suit and file a fresh suit and when such a suit is filed it would be equally open to the respondent/defendant to take whatever legal plea were available to them, including the plea of limitation.

3. It is further alleged in the plaint that in September, 2003, plaintiffs came to know that defendant No.1 had since 1998 been prosecuting a suit titled **Excellent Hosiery Product v. HSIDC** in respect of plot No. 116, Sector 59, Faridabad, wherein he had challenged the enhanced charges claimed by HSIDC in respect of the above referred plot and had also challenged threatened resumption of the plot by HSIDC, on account of failure to pay enhanced charges. It is alleged that in July, 2004, plaintiff No.1 sought substitution in that civil suit and was actually substituted as such. The suit was later withdrawn by plaintiff No.1 under legal advice.

4. It is alleged that the market value of the aforesaid plot on the date of signing the MOU was Rs. 1 crore and the defendants are liable to pay that much amount to the plaintiff along with interest thereon at the rate of 12% per annum w.e.f. 11.09.2001. It is claimed that the defendants are also liable to pay all the dues of Bank of Rajasthan amounting to Rs.95,50,532.49 along with interest @ 19% per annum in terms of MOU dated 11.9.2001. The amount of interest claimed by the plaintiffs on the damages of Rs. 1 crore is Rs. 1,28,04,530/- till 31st August, 2008. The plaintiffs have accordingly claimed the following reliefs in the present suit.

> "a. pass a decree of specific performance thereby directing the defendants no.1 and 2 to perform their part of the obligations as stated in the Memorandum of Understanding dated 11th September, 2001 duly executed between the plaintiffs and the defendants no.1 and 2;
>
> b. pass a decree of damages thereby directing the defendants no.1 and 2 to pay a sum of Rs.2,28,04,530/- (Rupees two crores twenty eight lacs four thousand five hundred and thirty only) to the plaintiffs alongwith interest, pendentelite and future interest till realization, at the rate of 12% p.a. compounded quarterly"

5. The defendants have filed IA No. 3042/2009 under Order VII Rule 11 of the Code of Civil Procedure for rejection of the plaint on the ground that it does not disclose any cause of action, is barred by law, specifically barred by limitation and also barred by principles of res judicata. It is alleged in the plaint that CS(OS) 1048/2004, which the plaintiff had earlier filed against the defendants, was in contradiction to the instant suit since the allegations in that suit were to the effect that the MOU had been obtained by fraud and without consent of the plaintiff, whereas in the present suit they were seeking specific performance of that very MOU. It is also alleged that in the instant suit, the plaintiffs have not even averred that they were ready and willing to perform their part of the obligation under the said MOU which is a pre-condition for seeking specific performance of an agreement.

6. The application has been opposed by the plaintiffs. In their reply, the plaintiffs have claimed that the suit is within limitation as cause of action of filing the suit arose on various dates when the defendants did not perform their part of the MOU. It is further alleged that the cause of action also arose when the defendants filed written statement in CS(OS) 1048/2004 stating therein that all major terms of the MOU had already been accepted implemented and acted upon and that as far as the remaining terms were concerned, they were ready and willing to do whatever was necessary.

7. It is settled proposition of law that while considering an application under Order VII Rule 11 of CPC for rejection of plaint, the Court can take into consideration only the averments made in the plaint and the documents filed by the plaintiff. Neither the defence taken in the written statement nor the documents filed by the defendant can be looked into at this stage. It is also a settled proposition of law that the truthfulness or otherwise of the averments cannot be examined while considering such an application.

8. In CS(OS) No. 1048/2004, a copy of which has been filed by

them, the plaintiffs, inter alia, stated as under:-

"5. That thereafter, the defendants No. 1 and 2, with mala fide intentions, induced the plaintiff by misrepresentation and fraud to sign unregistered document titled Memorandum of Understanding dated 11th September, 2001 which was signed by the defendants No. 1 and 2 on 28.08.2001 itself.

9. That thereafter in performance of the said MoU, defendants No. 1 and 2 got the plaintiffs to sign, execute and register release/relinquishment deeds and a gift deed detailed below on 11.09.2001 where by the defendants No. 1 and 2 got the plaintiffs to transfer their rights in various portions of the built up property bearing 5, B.D. Estate, Lancers Road, Timarpur, Delhi in favour of the defendant No. 1, but however the defendants No. 1 and 2 failed to transfer their rights, title or interest in property bearing No. 116, Sector-59, Faridabad, Haryana in favour of the plaintiffs despite their assurance that the same shall be within a week of registration of the release/relinquishment deeds. (emphasis supplied)

10. That it is submitted that the plaintiffs bonafidely acted on the said MoU and performed their initial part of the said MoU, in good faith believing the representations of the defendants No. 1 and 2 that they shall be performing their part of the obligations and further that they shall be executing their part of the documents immediately upon the execution of documents by the plaintiffs.

12. That aforesaid release deeds/relinquishment deeds, gift deed etc. were acquired by the defendants No. 1 and 2 by making false representations and inducement with malafide intentions that the defendants No. 1 and 2 shall pay the loan of the Bank of Rajasthan amounting to Rs 1 crore (Aprox.), raised by M/s. Excellent Hosiery Products against property No. 101, Sector-24, Faridabad, Haryana and further the defendants No. 1 and 2 would execute necessary documents of transfer of property bearing No. 116, Sector-59, Faridabad, Haryana, which was acquired in the name of M/s. Excellent Hosiery Product in favour of the plaintiffs.

19. That it is now in the interest of justice that the release deeds

and gift deed as detailed above obtained by defendants No. 1 and 2 by misrepresentation and fraud be declared as null and void and the same be directed to be cancelled. If the said documents are left outstanding the same may cause serious injuries to the plaintiffs.

20. That the MoU between the plaintiffs and the defendants No. 1 and 2 has been legally frustrated and is not capable of being enforced/performed. Further as the defendants No. 1 and 2 have failed to perform their obligations under the terms of the said MoU, the said MoU dated 11.09.2001 has stood cancelled/revoked/ is incapable of being performed/is null and void. The plaintiffs are entitled to be placed in the same situation as they were at the time of signing of the MoU and the aforesaid registered deed as detailed in para 9 above are liable to be cancelled and the properties belonging to plaintiffs are liable to be restored back to the plaintiffs.

24. It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to:-

a. pass a decree of declaration in favour of the plaintiffs and against the defendants No.1 and 2 that the MoU dated 28.08.2001 stands cancelled/revoked/is in incapable of being performed/is null and void and the same is not legally enforceable on the plaintiffs."

8. It would thus be seen from a perusal of the above extracted averments made in CS(OS) 1048/2004 that not only had the plaintiffs abandoned the MoU are now seeking to enforce, also sought the same to be declared null and void, having been obtained by misrepresentation, inducement and fraud. They made a specific prayer to the Court in this regard. They also claimed that the said MoU had been frustrated and had become incapable of performance.

In the present suit, the plaintiffs are seeking specific performance of the very same MoU, which they had in the previous suit, claimed to be tainted with fraud and misrepresentation and, therefore, not enforceable in law. The plaintiffs, therefore, want to take a plea which is absolutely contrary to the plea taken in the previous suit. In fact, the plea taken by the plaintiffs in the previous suit and the plea taken in the present suit

with respect to the MoU dated 11.09.2001, are mutually destructive. Having made an election by seeking to challenge the validity of the MoU and seeking its annulment, the plaintiffs are now estopped in law from seeking specific performance of that very agreement between the parties.

9. In **Bank of India v O.P. Swarnakar** [(2003) 2 SCC 721, the Supreme Court referred to the following passage from Halsbury's Law of England, 4th Edn. Vol.16 (Reissue), para 957:

> "On the principle that a person may not approbate and reprobate and special species of estoppels has arisen. The principle that a person may not approbate and reprobate expresses two propositions"
>
> (1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.
>
> (2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent."

In **Asha Sharma v. Sanimya Vajijiya Pvt. Ltd. and Others** [IA Nos. 9577/2007 in CS(OS) No.1883/2006 (decided on 20.08.2008), the respondent before this Court sought declaration that the documents executed by Smt. Satyawati Sharma in the year 1995 in relation to the suit property were void and illegal. It was noted by this Court that respondent had earlier approached this Court by way of a Civil Revision No.316/2004 wherein they had stated that they were not disputing the sale deed executed by Smt. Satyawati Sharma, Rejecting the plaint, a learned Single Judge of this Court, inter alia, held as under:-

> "18. A litigant who approaches the court for relief should not be doing so, in derogation of a previously held and articulated position. It needs hardly be emphasized that inconsistent pleas are not permitted in the same action. Equally inconsistent pleas are not permitted in two different actions. This was held to be so in **Cooke v. Rickman** [(1911) 2 KB 1125]. The Court there held that the rule of estoppel could not be restricted to a matter in issue, stating:

> "..... The rule laid down in **Hawlett v. Tarte** (1) C.B. (N.S.) 813 - was that if the defendant in a second action attempts to put on the, record a plea which is inconsistent with any traversable allegation in a former action between the same parties there is an estoppel. ..." xxx

20. The plaintiffs categorically stated, in the previous revisional proceeding that they were not challenging the sale deeds of 1995; they have also averred to that effect, in the revision petition, admittedly filed by them. Also, the revision itself arose out of an application filed by the applicant defendants here, under Order 22 Rule 10, CPC. The plaintiff's predecessor in interest, as a matter of pleading, categorically averred having executed the sale deeds. She contested the right to recover rents for a certain period, and having conferred residual rights. However, as far as validity of the impugned sale deeds are concerned, she did not deny them.

21. In the totality of the above circumstances, the court is of the opinion that the plaintiffs are estopped from maintaining the suit; they are also deemed to have acquiesced to the applicant's title. The averments in the suit are not that they became aware of the so called fraud, after the order of this court; indeed, the cause of action, according to them, arose after the death of Satyawati Sharma.

22. In the decision reported as **N.V. Srinivasa Murthy v. Mariyamma,** (2005) 5 SCC 548, while adverting to the **T. Arivandandam v. T.V. Satyapal** 1977 (4) SCC 467 it was held: "This is a fit case not only for rejecting the plaint but imposing exemplary costson the appellant on the observations of this Court in the case of T. Arivandandam v. T.V. Satyapal:

"The trial court must remember that 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, it should exercise its power under Order 7 Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, the court must nip it in the bud at the first hearing by examining the party searchingly

under Order 10 CPC. An activist judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men (Chapter 11) and must be triggered against them."

23. The previous pleadings adverted to above, by this court, clearly estop the plaintiffs from disputing the validity of the documents, impugned in these proceedings. Though the suit alleges fraud, the elements and basis of such fraud are tell tale and vague. The suit is a disguised attempt to attack the title to something which the vendor herself did not dispute in her lifetime; the plaintiffs elected in their pleadings, in the revision, not to challenge these documents. Therefore, the suit is not maintainable on the principle of estoppel by pleading, and acquiescence.

24. In view of the above discussion, the plaint in the suit is barred, under Order VII, Rule 11 (d), CPC. It is accordingly rejected. The suit and all pending applications are therefore rejected."

An appeal against this order was preferred by the plaintiff before this Court. Rejecting the appeal, a Division Bench of this Court vide its decision dated 11.05.2012 in **Asha Sharma and Ors. v Sanimiya Vanijiya P. Ltd. and Others** RFA(OS) No.35/2009, inter alia, observed and held as under:

"19. By admitting having executed six sale-deeds by her when she filed Suit No.2361/1996, if not more, Satyawati Sharma manifested her knowledge of the existence of the six sale-deeds. In her reply to the application under Order XXII Rule 10, she opposed impleadment by stating that the right transferred by her under the six sale-deeds was prior to when she filed the suit. She pleaded that Order XXII Rule 10 would apply where interest is transferred during pendency of a suit. Thus, the contention of the appellants that Satyawati Sharma never executed the six sale deeds is a plea which is barred by the principle of estoppel by RFA (OS) 35/2009 pleading. Satyawati Sharma never questioned the six sale-deeds executed by her inspite of being having

knowledge thereof and there is thus clearly estoppel by acquiescence. The appellants, while filing the Civil Revision Petition No.316/2004 clearly admitted to Satyawati Sharma having executed the six sale-deeds, validity whereof was never questioned by them. Principle of estoppel by pleading is squarely attracted to the appellants as well.

21. Submission urged by learned senior counsel for the appellants that Order VII Rule 11(d) of the Code of Civil Procedure relates to when the suit appears from the statement in the plaint to be barred by law, and that the plea of estoppel by pleading cannot apply for the plaint to be rejected, is noted and rejected by us for the reason the law pertaining to estoppel by pleading would result in a suit being barred by law. Needless to state, if with reference to previous pleadings in a suit, a party is barred from pleading to the contrary in a subsequent suit, the principle of estoppel by pleading is squarely attracted.

22. Besides, a Court of Record has inherent power which a court of justice must possess to prevent misuse of its procedures in relation to an action initiated which would amount to an abuse of the process of the law. In the decision reported as (2006) 3 SCC 100 **Mayar (H.K.) Ltd. & Ors. vs. Owners & Parties, Vessel M.V. Fortune Express & Ors.,** the Supreme Court had held that the power of a Court to reject a plaint which is an abuse of the process of the law is not restricted to Order VII Rule 11 of the Code and if it is warranted, the inherent power of the Court can always be invoked."

The view taken in the above referred decision squarely applies to the case before this Court. The plaintiffs having repudiated the MoU dated 11.09.2001 in the previous suit, they are estopped from seeking enforcement of the very same MoU and the plaint is liable to be rejected on this ground alone.

10. Coming to the plea of limitation, Article 54 of Limitation Act prescribes a period of limitation of three years for a suit for specific performance of a contract, beginning from the date fixed for purpose or if no such date is fixed when the plaintiff has noticed that performance is refused.

11. In the case before this Court, the plaintiffs have specifically alleged in para 9 of the plaint that in pursuance of the MoU, the defendants got them to sign, execute and register lease/relinquishment deed and a gift deed on 11.09.2001, but they failed to transfer their rights in property No. 116, Sector 59, Faridabad in favour of the plaintiffs, despite their assurance that the same shall be done within a week of registration of the release/relinquishment deeds.

It has also been alleged in para 8 of the plaint that it was further agreed between the parties that the loans raised by M/s Excellent Hosiery Products against property No. 101, Sector 24, Faridabad shall be repaid by defendants 1 and 2 immediately after the plaintiffs relinquished/ transferred their share in property No. 5, B.D. Estates, Lancer Road, Timarpur, Delhi in their favour.

This is further alleged in para 9 of the plaint that the gift deed was got signed by defendants No. 1 and 2 from plaintiffs for transfer of rights in property No. 5, B.D. Estates, Lancer Road, Timarpur, Delhi, on 11.09.2001.

In para 13 of the plaint, it has been alleged that the cause of action for filing the suit arose on various dates when the defendants did not perform their part of MoU dated 11.09.2001.

It has also been alleged in para 13 of the plaint that as per the terms of MoU, the existing water arrangements between M/s Sarda Solvent Extraction Pvt. Ltd and M/s Harsh Raghun & Co. Pvt Ltd. was to continue, but defendant No. 1 with total disregard to his representations discontinued and disturbed the water supply to M/s Sarda Solvent Extraction Pvt. Ltd. to the same effect is the averment made in para 14 of the previous suit.

It has also been alleged in para 25 of the plaint that pendency of the suit filed by the defendants against HSIDC was never disclosed to them and plaintiff No. 1 had, in July, 2004, sought substitution in that civil suit and was subsequently substituted as plaintiff therein.

12. Thus, this is plaintiffs' own case in this suit is that the defendants had agreed to transfer their rights in property No. 116, Sector 59, Faridabad to them, within one week of registration of the release/relinquishment deeds. Even with respect to the loans which had been raised by M/s

Excellent Hosiery Products against property No. 101, Sector 24, Faridabad, the case of the plaintiffs is that the same were to be repaid by the defendants immediately after the plaintiffs relinquishing/transferring their share in property No. 5, B.D. Estates, Lancer Road, Timarpur, Delhi in favour of the defendants.

Since no specific date for performance of the obligations by the defendants was fixed in the MoU, and in order to bring the case within the purview of the first part of Article 54 of Limitation Act, there has to be a specific date fixed for performance of the contract, I would proceed on the basis that the case is covered under the second part of the said Article. I, therefore, have to decide when, as per the averments made in the plaint, the plaintiffs had notice of refusal by the defendants to perform their obligations under the MoU dated 11.09.2001. If I take one week after 11.09.2001, i.e., 18.09.2001 as the date when the plaintiff had notice that the defendants had refused to perform obligations of defendants under the MoU dated 28.08.2001 and 11.09.2001, the present suit having been filed on 27.09.2008, is hopelessly barred by limitation to the extent the plaintiffs are seeking enforcement of the MoU dated 11.09.2001. In any case, it can hardly be disputed that when the defendants, despite execution of gift deed by the plaintiffs in respect of property No. 5, B.D. Estates, Lancer Road, Timarpur, Delhi on 11.09.2001 did not transfer their rights in property No. 116, Sector 59, Faridabad and did not pay the dues of the Bank of Rajasthan in terms of their agreement with the plaintiffs, within a reasonable time, the plaintiffs had notice that the defendants had refused to perform their obligations under the said MoU. The case of the plaintiffs is that the defendants were to transfer Faridabad property to them within one week of execution of the relinquishment deed and gift deed on 11.09.2001 and they were to pay the dues of Bank of Rajasthan immediately after the plaintiffs transferring their rights in property No. 5, B.D. Estates, Lancer Road, Timarpur, Delhi. If I take a reasonable period of say 03 months, from the date of the MoU, for its implementation on the part of the defendants, the suit would still be barred by limitation, as far as enforcement of the MoU is concerned. This is not the case of the plaintiffs that after 11.09.2001/ 18.09.2001, the defendants had been promising to perform their obligations under the MoU and, therefore, they had no notice that they had refused to perform their obligation. Rather, their case in para 15 of the previous suit was that from the very beginning the defendants had no intention to

perform their obligations.

Two reliefs have been claimed in the present suit. The first relief sought by the plaintiffs is specific performance of the MoU dated 11.09.2001 and the second relief claimed by them is damages, amounting to Rs 2,28,04,530/-. This amount comprises Rs 1 crore by damages and Rs 1,28,04,530/- as interest on that amount with effect from 11.09.2001. The claim for damages is also based upon the alleged breach of the obligations contained in the MoU since according to the plaintiffs the value of property No. 116, Sector 59, Faridabad, which has since been resumed by HSIDC and in that suit, he had sought substitution as a plaintiff in July, 2004. It has been alleged in para 24 of the plaint that in the said suit HSIDC had filed written statement on 06.12.2003, stating therein that property No. 116, Sector 59, Faridabad had been resumed by them vide order dated 18.09.2003 on account of non-implementation of the project and possession of the plot had been taken over by them on 27.110.2003. The plaintiffs are thus claiming damages on account of breach of the contract (MoU), by the defendants, by not transferring Faridabad plot, which, on account of its having been resumed by HSIDC, had become incapable of being transferred to them. The said plot, according to the plaintiffs was to be transferred to them within one week of execution of the relinquishment deed on 11.09.2011. When the plaintiffs were substituted as plaintiffs in that suit in July, 2004, they certainly came to know that the defendants were no more in a position to transfer the said plot to them. Computed from 31.7.2004, the present suit would still be barred by limitation since the period of limitation prescribed for recovery of damages commenced from 18.09.2001. The suit is, therefore, patently barred by limitation, even with respect to this relief.

13. The case of the plaintiffs is that the loan taken from Bank of Rajasthan was agreed to be paid by the defendants. This was one of the obligations to be performed by the defendants under the MoU dated 11.09.2001. It is alleged in para 12 of the plaint that since the defendants failed to pay the dues of the bank, OA No. 211/2002 was filed by it against the firm as well as the plaintiffs as guarantors. It is also alleged that a notice dated 31.12.2002 was issued by the bank to the plaintiffs as well as Sarda Solvent Extraction Pvt. Ltd under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest(SARFESI) Act. On receipt of notice of the OA and

notice dated 31.12.2002, the plaintiffs had notice that the defendants committed breach of the contract by not paying the dues of the bank. Computed from 31.12.2002, the suit is still barred by limitation. It appears that the dues of the bank have since been paid by the plaintiffs. The suit for recovery of the amount, on account of payment having been made by the plaintiffs could be within limitation, but, the suit for a direction to the defendants to pay that amount to the plaintiffs, when instituted, was barred by limitation.

14. The case of the plaintiffs is that in breach of the contract between the parties, the defendants disturbed the existing arrangement for supply of water between Sarda Solvent Extraction Pvt. Ltd. and Harsh Raghun & Co. Pvt Ltd. This averment was made in para 14 of the previous suit which was filed in September, 2004. Thus, by September, 2004, the plaintiffs had notice of breach of this part of the contract by the defendants. Computed from September, 2004, the suit is barred by limitation.

15. The plaintiffs have claimed interest on Rs.1 crore since 11.09.2001. This is yet another indicator as to when, according to the plaintiffs, the contract should have been performed by the defendants.

16. In para 15 of the previous suit, the plaintiff alleged that the defendant had no intention of performing their obligations under the MoU. This averment clearly shows that before filing the first suit in September, 2004, the plaintiffs had notice of refusal by the defendant to perform their part of the contract. As stated earlier, computed from September, 2004, the suit would be barred by limitation.

17. The learned counsel for the plaintiff has relied upon the order of this Court in Anil Rai v. Vinay Rai IA No. 4533/2006 in CS(OS) No. 294/2006, decided on 23.10.2008. In the above-referred case, the defendant had sought rejection of the plaint under Order 7 Rule 11 (d) of CPC on the ground that in the e-mail communication exchanged between the parties, the defendant had turned the family settlement in question as a mere wish list not binding upon him and, therefore, the suit based upon that family arrangement, having been filed in the year 2006 was barred by limitation. This Court took note of the averments that the defendant had taken steps to give effect to the settlement on various dates in 2001 and 2004. The Court also took note of the rule that if the

plaint contains multiple causes of action, it cannot be rejected if some of the causes of action are barred by limitation. However, in the case before this Court, the whole of the suit is based upon failure of the defendants to perform their obligations under MoU dated 11.09.2001 and this is not the case of the plaintiffs that the defendants had, at a later stage, taken steps for implementation of the MoU. Therefore, this judgment does not apply to the case before this Court.

Relying upon the decision referred in Sub para 16 of the abovereferred judgment, the learned counsel for the plaintiffs contended that the MoU, which is in the nature of a family settlement, should be given effect to. There is no quarrel with regard to the preposition of law that attempt of the Courts should be, as far as possible, to uphold the family arrangements instead of disturbing the same on technical grounds. However, it is also a dicta of law that the civil Courts cannot grant a relief which is barred by limitation. It is well known that limitation defeats equity. A relief, howsoever, equitable it may be, cannot be entertained by the Courts if it is patently barred by limitation.

18. It was next contended by the leaned senior counsel for the plaintiffs that since the defendants had, in their written statement in the previous suit, clearly stated their readiness and willingness to perform their remaining obligations under the MoU, a fresh period of limitation computed from 11.09.2001 or 18.09.2001 or three months thereafter starts from the date of filing of the written statement, in view of the provisions contained in Section 18 of Limitation Act. In my view, the contention is wholly misconceived. Section 18 of Limitation Act, to the extent it is relevant, provides that where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

The defendants, in their written statement in the previous suit, did not acknowledge any liability in respect of any property or right subject matter of this suit. Moreover, the period of limitation had already expired even before the written statement in the previous suit was filed and an acknowledgment in order to come within the purview of Section 18 of

the Limitation Act is required to be made before expiry of the prescribed period of limitation.

The written statement filed in the previous suit is dated 17th February, 2005. Even if computed from that date, the suit is barred by limitation, having been filed in August, 2008.

19. After this case was reserved for orders, the learned counsel for the plaintiffs submitted a compilation of judgments including some judgments which were not referred during the course of arguments. I am, however, unable to take those judgments into consideration since the other party had no opportunity to rebut them during the course of arguments.

20. Section 16(C) of The Specific Relief Act, to the extent it is relevant, provides that specific performance of a contract cannot be enforced in favour of a person who fails to aver and prove that he had performed or had always been ready and willing to perform the essential terms of the contract which were to be performed by him, other than terms the performance of which had been prevented or waived by the defendant.

In the case before this Court, though, it is alleged in para 29 of the plaint that the plaintiffs "are ready and willing to perform their obligations under the MoU dated 11.09.2001' there is no averment that they had always been ready and willing to do so. Though such an averment can be pleaded by way of amendment, the previous suit, repudiating the MoU and seeking its annulment leaves no doubt that at the time of filing the previous suit, they were not ready and willing to perform all their obligations under the MoU. Therefore, it cannot be said that the plaintiffs had always been ready and willing to perform the MoU. For this reason also, the plaint is liable to be rejected being barred by Section 16(C) of The Specific Relief Act, 1963.

21. For the reasons stated hereinabove, the plaint is rejected. The suit and all pending IAs stand disposed of.

ILR (2012) VI DELHI 769
EFA

RAM GOPAL & ORS. ….APPELLANTS

VERSUS

RAM CHARAN AGGARWAL ….RESPONDENT

(SANJIV KHANNA & S.P. GARG, JJ.)

EFA (OS) NO. : 23 AND 24/2010 DATE OF DECISION: 03.08.2012

Code of Civil Procedure, 1908—Intra Court appeal impugns order passed by the learned single Judge in Execution Petition, which allowed the execution and directed the appellants herein to execute a conveyance deed in favour of the Respondents in respect of property in question—Present dispute is between two brothers resulting in multifarious litigation—With the intervention of family members, both brothers agreed for arbitration—Thereafter; application for making said awards the rules of the court were pending in the High Court bearing Suit Nos. 1983-A/1995 to 1986-A/ 1995—During the pendency of suit, parties agreed to compromise and terms of compromise were recorded—It was decided, that both brothers shall bid for immovable properties in three separate lots. i.e. properties at Mumbai, Delhi and Hathras—The higher bidder will take property by paying 50% of the bid amount to the other side within three months—In case of failure to pay the bid amount, the other side would be entitled to the properties in the lot on payment of 50% of the lower bidder's bid—Present respondent was highest bidder and made payment of the bid amount for Delhi and Mumbai lots. But did not make payment for the immovable properties included in Hathras lot—Present appeal only concerned with one

of the properties at Delhi wherein the partnership firm Lalji Mal Tika Ram had tenancy rights in the property—In the two civil suits filed for partition and rendition of accounts, the disputed property was shown as one of the partnership properties but the partnership firm had interest in the property not as the owner, but as the tenant—By a sale deed dated 25th May. 1998. Prem Lata and Ram Kishan, wife and son of Ram Gopal purchased the property from the erstwhile owner-In 1999 Ram Charan had filed a civil suit for prohibitory injunction against Ram Gopal, Prem Lata and Ram Kishan praying, inter alia, that the said persons should be restrained from making additions/alterations or structural changes to the ground floor. Held—Ownership of the property was not a subject matter of dispute in any of the proceedings or the suits, which were pending before the Court. In these circumstances. In case the ownership of the property was to be transferred to Ram Charan if he was to be the highest bidder, a specific noting to this effect was required and necessary. Also the two brothers were to give bids to acquire the same right i.e. the tenancy right Family settlements are governed by special equity and are to be enforced if honestly made, though sometimes the terms agreed may have their origin in a mistake or founded on ignorance of fact as to what the rights of parties actually are—Held, the compromise decree has to be executed and implemented even if it is alleged and contended that the respondent did not fully appreciate the consequence and implication of acquiring tenancy rights and had not visualized that the Supreme Court by a judicial decision would permit and enable an owner-landlord to sue for eviction in commercial tenancies on the ground of bona fide requirement.

In **Bhavan Vaja** (supra), the Supreme Court held that the executing court cannot go behind the decree, but it is the

duty of the executing court to find out the true effect of the decree and in appropriate cases it ought to take into consideration the pleadings as well as the proceedings leading to the decree. This is precisely what we have done. We have construed the decree as well as the proceeding, i.e., orders, statement of parties, etc. In **Parayya Allayya Hittalamani** (supra), same observations have been made. It has been also held that where "a document is ambiguous" the same can be construed having regard to surrounding and attending circumstances. The said decision does not help or assist the respondent. The decree in the present case is not vague. We to satisfy ourselves, have examined the surrounding and attending circumstances. In **Manish Mohan Sharma** (supra), the Supreme Court emphasized that family settlements are governed by special equity and are to be enforced if honestly made, though sometimes the terms agreed may have their origin in a mistake or founded on ignorance of fact as to what the rights of parties actually are. The said observations have been made with the object that family settlements are to protect the family from long drawn litigation and they bring harmony and good will in the family. The courts, therefore, lean in favour of family settlements and accept the same even if the similar defects or faults may not be accepted, if the transaction was between strangers. The said decision does not support the respondent but supports the plea and contention raised by the appellants. The compromise decree has to be executed and implemented even if it is alleged and contended that the respondent did not fully appreciate the consequence and implication of acquiring tenancy rights and had not visualized that the Supreme Court by a judicial decision would permit and enable an owner-landlord to sue for eviction in commercial tenancies on the ground of bona fide requirement.

(Para 28)

Important Issue Involved: There family settlements are governed by special equity and are to be enforced if honestly made, though sometimes the terms agreed may have their origin in a mistake or founded on ignorance of fact as to what the rights of parties actually are The courts lean in favour of family settlements and accept the same, even if the similar defects or faults may not be accepted. If the transaction was between strangers.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Aly Mirza & Mr. Sindhu Sinha, Advs.

FOR THE RESPONDENT : Mr. Sudhir Nandrajog, Sr. Adv. With Mr. L.K. Singh, Adv.

CASES REFERRED TO:

1. *Satywati Sharma* vs. *Union of India* (2008) 5 SCC 287.
2. *Parayya Allayya Hittalamani* vs. *Sri Parayya Gurulingayya Poojari* 2007 (14) SCC 318.
3. *Manish Mohan Sharma* vs. *Ram Bahadur Thakur Ltd.* 2006 (4) SCC 416.
4. *State Bank of India* vs. *Mula Sahakari Sakhar Karkhana Ltd.* (2006) 6 SCC 293.
5. *Godhra Electricity Co. Ltd.* vs. *State of Gujarat* (1975) 1 SCC 199.
6. *Bhavan Vaja and Ors.* vs. *Solanki Hanuji Khodaji Mansang and Anr.* 1973 (2) SCC 40.
7. *Topanmal Chhotamal* vs. *Kundomal Gangaram* AIR 1960 SC 388.

RESULT: Appeal allowed.

SANJIV KHANNA, J.

1. The present intra court appeal impugns order dated 30th August, 2010 passed by the learned single Judge in Execution Petition No. 227/

2010. The impugned order allows the execution petition, which was filed by the respondent herein Ram Charan Aggarwal and directs the appellants herein Ram Gopal, Prem Lata and Ram Kishan to execute a conveyance deed in favour of the Respondents in respect of property bearing No.1375, Katra Lehswan, Chandni Chowk, Delhi. Some directions have also been given to ensure compliance of the said order.

2. Ram Gopal and Ram Charan Aggarwal are brothers being sons of late Ganeshi Lal and Kasturi Devi. The father and the two sons on or about in 1962 had commenced business in partnership under the name and style of Lalji Mal Tika Ram with all the three having equal share. Ganeshi Lal passed away in 1981. Disputes arose between the two sons and their families, resulting in multifarious litigation. Reference, for the purpose of decision of the present appeal, is required to be made to some of the litigations. Ram Gopal had filed a suit for dissolution of partnership and rendition of accounts being Suit No. 737/1984. Ram Charan had also filed a suit for partition and rendition of account being Suit No. 1867/1984. Ram Gopal had filed a suit for recovery of Rs.17 lacs against Shanti Devi wife of Ganeshi Lal. Prem Lata, Ram Kishan, Sangeeta and Kumud, the first being the wife and the others being the children of Ram Gopal had initiated arbitration proceedings. Interim awards were passed in their favour. Applications for making the said awards, the rule of the court were pending in the High Court in Suit Nos. 1983-A/1995 to 1986-A/1995.

3. During the pendency of the said suits, by the intervention of the Court, parties agreed to compromise. The terms of the compromise were recorded in the order dated 23rd October, 2007. The said order is relevant but we will be reproducing and examining the said order subsequently. At this stage, we note that it was decided that the immovable properties were to be divided equally between Ram Gopal and Ram Charan. It was decided that the two brothers shall bid for immovable properties in three separate lots, i.e., properties at Mumbai, Delhi and Hathras. The higher bidder will take the property by paying 50% of the bid amount to the other side within three months. In case of failure to pay the bid amount, the other side would be entitled to the properties in the lot on payment of 50% of the lower bidder's bid. 4. Pursuant to the said order, bids were given by Ram Gopal and Ram Charan Aggarwal. The order dated 14th February, 2008 records and gives details of the said bids, which are as under:-

"Lots	Ram Gopal Aggarwal's bid (Rs)	Ram Charan Aggarwal's bid (Rs)
Delhi	4 crores	7.10 crores
Mumbai	3 crores	3.25 crores
Hathras	1 crore	1.5 crores"

5. Ram Charan Aggarwal was, therefore, the highest bidder in respect of each of the three lots at Delhi, Mumbai and Hathras and his bids were accepted. Before passing the said order, the learned single Judge took care to record the statements of the Ram Bhakt Aggarwal, attorney and son of Ram Charan as well as statement of Ram Gopal and his wife Prem Lata.

6. The total bid amount payable by Ram Charan was Rs.11.85 crores. 50% of the said amount came to Rs.5.925 crores. This payment was to be made within three months. Ram Charan made payment of the bid amount for Delhi and Mumbai lots but did not make payment for the immovable properties included in Hathras lot. In respect of Hathras properties, bid given by Ram Gopal became operative and binding by default.

7. We are not concerned with the properties at Hathras or Mumbai lots in the present appeal and are only concerned with one of the properties at Delhi, namely, 1375, Lheswan Katra, Chandni Chowk, Delhi (the property, for short).

8. The partnership firm Lalji Mal Tika Ram had tenancy rights in the property. In the two civil suits filed for partition and rendition of accounts being suit Nos. 737/1984, **Ram Gopal versus Ram Charan and Another** and Suit No. 1867/1984, **Ram Charan versus Ram Gopal and others,** the property was shown as one of the partnership properties but the partnership firm had the interest in the property not as the owner but as the tenant. Neither the partnership firm nor any of two brothers in the two cross suits had claimed that the partnership firm or otherwise the two brothers were joint owners.

9. By a sale deed dated 25th May, 1998, Prem Lata and Ram Kishan, wife and son of Ram Gopal purchased the property from the erstwhile owner Shree Mahalakshmi Investment and Property Company Limited. The sale deed is duly registered and the consideration mentioned

therein is Rs.4,50,000/-. It is also stated that ground floor of the property is in occupation of Lalji Mal Tika Ram on a monthly rent of Rs.372/- and they had been accordingly advised to attorn to the new owners. Symbolic and proprietory possession was handed over/delivered to the new owners.

10. In 1999 Ram Charan had filed a civil suit for prohibitory injunction against Ram Gopal, Prem Lata and Ram Kishan praying, inter alia, that the said persons should be restrained from making additions/alterations or structural changes to the ground floor. The plea taken was that the tenancy rights in the property on the ground floor belong to Lalji Mal Tika Ram and even if Prem Lata and Ram Kishan had become owners, they had no right to make additions/alterations in connivance with Ram Gopal, partner of Lalji Mal Tika Ram.

11. Thus, the parties were aware and knew the fact that wife and one son of Ram Gopal, namely, Prem Lata and Ram Kishan had acquired ownership of the property while the tenancy was in the name of the partnership firm.

12. The question and issue raised is whether as per the compromise terms between the parties and the compromise decree passed the ownership rights in the property stand transferred to the highest bidder, i.e., the respondent herein. The learned single Judge has accepted the contention of the respondent and has directed the appellants, namely, Ram Gopal, Prem Lata and Ram Kishan to execute a conveyance deed in favour of the respondent.

13. In order to decide the said issue, we will have to examine and interpret the compromise order, statements made by the parties and the decree. For the sake of completeness, we are reproducing the relevant orders:

"23.10.2007

Present: Plaintiff-in-person.

Mr. Aly Mirza for the Defendant. **CS(OS) 737/1984, 1723/1984, 1724/1984, 1983A/1995, 1984A/1995, 1985A/1995, 1986A/1995, 1867/1984 & OMP 177/1998**

The parties have agreed that the immovable properties have to be divided half and half between Ram Gopal and Ram charan. The immovable properties are at Mumbai, Delhi and Hathras, U.P. It has been decided that the parties shall bid for the

immovable properties in three separate lots. The lots being the properties at Mumbai, the properties at Delhi and the properties at Hathras. The party having the highest bid shall take the properties and pay the other party 50% of the bid amount. The payments shall be made within three months. In case the party making the highest bid is unable to pay the entire sum in respect of any lot within the said period of three months, then the other party would be entitled to the properties in question on payment of 50% of that party's (the lower bidder's) bid. This amount shall also be paid within three months.

As regards the amounts awarded under four interim Awards made by Justice N.N. Goswami (Retd.) in 1995, Sh. Ram Charan shall despoit a sum of Rs.1.75 crores in this Court and shall await further orders from this Court with regard to its payment to the parties. In addition, a further sum of Rs.17 lacs shall also be deposited by Mr. Ram Charan in this Court to await further orders. This amount of Rs.17 lacs is in respect of Mr. Ram Gopal's claim against late Smt. Shanti Devi for Rs.99,704.97 along with 15% compound interest from 14.10.1985. Insofar as the tenancy rights in respect of 1375, Lhtswa Katra, Chandni Chowk, Delhi-6 are concerned, they are also the subject matter of the bid in respect of the Delhi properties. It is stated by the parties that the ownership of the said property belongs to the wife of Ram Gopal and his son. It is made clear that whoever succeeds to this property consequent to the bid would not be hindered in the enjoyment of the same.

The bids would be submitted by the parties in a sealed cover by the parties on or before 26.11.2007. Three separate bids would be made for the Mumbai properties, Delhi properties and Hathras properties by each party. Dasti to both the parties.

14.02.2008

Present: Mr. Dheeraj Malhotra with Mr. Mritunjay Kumar Singh for the Plaintiff.

Mr Aly Mirza for the Defendant.

CS(OS) 737/1984, 1723/1984, 1724/1984, 1983A/1995, 1984A/1995, 1985A/1995, 1986A/1995, 1867/1984 & OMP 177/1998

The statement of Shri Ram Bhakt Aggarwal who is the attorney of Shri Ram Charan as well as the Statements of Shir Ram Gopal Aggarwal and his wife Smt. Prem Lata have also been recorded. As per the agreement between the parties and the bids made pursuant to the agreement and as recorded in the order dated 23.10.2007, the sealed bids were opened in court. The bid made by Mr. Ram Charan has been marked as Exhibit C-2 and it has been signed by his son Mr. Ram Bhakt Aggarwal as his constituted attorney. The bid furnished by Mr. Ram Gopal has been marked as Exhibit C-3 and the same is signed by him. On considering the bids, the following picture emerges:

"Lots	Ram Gopal Aggarwal's bid (Rs)	Ram Charan Aggarwal's bid (Rs)
Delhi	4 crores	7.10 crores
Mumbai	3 crores	3.25 crores
Hathras	1 crore	1.5 crores"

The aforesaid table clearly indicates that Shri Ram Charan is the highest bidder in respect of each of the three lots i.e. Delhi, Mumbai and Hathras. Therefore, his bids are accepted. As per the agreement between the parties, as indicated in their statements and the order dated 23.10.2007, the highest bidder would be required to make payment of 50% of the bid amount. The total of the bid amounts comes to Rs.11.85 crores. Consequently, 50% of this amount comes to Rs.5.925 cores in respect of all the three lots. Additionally, he shall make a payment of Rs.90 lacs as per the statements recorded in court today as well as a sum of Rs.17 lacs totaling Rs.6.995 crores. The said sum of Rs.6.995 crores shall be paid within three months in terms of the order dated 23.10.2007 and as per the agreement between the parties. Simultaneously, upon making the payments, the possession of the properties comprised in the said lots will either be retained by Mr. Ram Charan or where he is not in possession would be handed over by Mr. Ram Gopal and/or his family members.

It has also been agreed between the parties, as indicated in the

order dated 23.10.2007, that, in case, the party making the highest bid is unable to pay the entire sum in respect of any lot within the said period of three months, then the other party would be entitled to the properties in the lot in question on payment of 50% of that party's (the lower bidder's bid. This amount shall also be paid within three months. In this eventuality, the stamp duty would be payable on the lower bid and not on the higher bid as per law.

The parties have arrived at a settlement of all their disputes. Essentially, the disputes were between the two brothers. Mr. Ram Gopal and Mr. Ram Charan. Their family members have also filed suits against each other. The parties have settled all the disputes not only between the said two brothers but also between the family members of the said two brothers. Even the disputes pertaining to the said two branches in respect of their individual HUFs stand settled. The present batch comprises of ten matters. However, it is clearly understood and agreed between the parties that the other matters not included in the present batch also stand settled. The matter pending before the Supreme Court has also been agreed to be withdrawn by Mr. Ram Gopal Aggarwal on a joint statement being made by mr. Ram Gopal Aggarwal and by Mr. Ram Bhakt Aggarwal before the Supreme Court. The parties agree that the matters pending before other courts also stand settled and shall be withdrawn by the respective plaintiffs/ appellants /petitioner. It has also been agreed by and between the parties that they shall cooperate with each other in effectuating the settlement and they shall execute all documents which are necessary. All the suits mentioned in this batch stand decreed accordingly. The OMP stands disposed of. The formal decree be drawn up. The statements and the Exhibits C-1, C-2 and C-3 shall form part of the decree.

The cheque of Rs.17 lacs mentioned in the order dated 13.02.2008 shall be retained in the file. Mr. Ram Bhakt states that he shall replace the said cheque by a cheque issued by him within a week. On the said cheque being submitted by Mr. Ram Bhakt Aggarwal, this cheque which has been issued by the learned counsel for Mr. Ram Bhakt, shall be returned to the learned

counsel.

All the suits, the OMP and pending applications stand disposed of.

Dasti under signatures of the Court Master.

14.02.2008

CS(OS) 737/1984, 1723/1984, 1724/1984, 1983A/1995, 1984A/1995, 1985A/1995, 1986A/1995, 1867/1984 & OMP 177/1998

Statement of MR. Ram Bhakt Aggarwal S/o Shri Ram Charan, Age 35 years, R/o Flat No. 19, Neelam, 80, Marine Drive, Bombay-400002

On oath.

My father Mr. Ram Charan Aggarwal has authorized me to represent him in these proceedings. I have brought the special power of attorney with me which is notarized at Mumbai. (The special power of attorney has been handed over to the court. The same is marked as Exhibit C-1). The figure of Rs.1.75 crores, mentioned in the order of this court on 23.10.2007, has now become Rs.1.80 crores due to accrual of interest between that date and today. I have instructions to state on behalf of my father that my father's liabilities would be to the extent of 50% of the said sum of Rs.1.80 crores which would amount to Rs.90 lacs. This is due to the fact that my father has a 50% share in the partnership firm and this is the liability of the firm. It has also been agreed between me (representing my father) and my uncle Mr. Ram Gopal Aggarwal that we shall have a half share in the firm's assets (M/s Lalji Mal Tika Ram). In order to bring about a settlement between the parties, it has been agreed between me (on behalf of my father) and my uncle Mr. Ram Gopal that despite the Will dated 05.10.1981 of Shri Ganeshi Lal bequeathing his share in the properties to my father, the said properties shall be shared between my father and Shri Ram Gopal equally i.e., 50% each.

We have agreed that the immovable properties shall be divided half and half between my father (Shri Ram Charan Aggarwal) and my uncle Shri Ram Gopal Aggarwal individually as well as

in their capacity as kartas of their respective HUFs. We shall abide by the terms of the bidding which have been set out in the order dated 23.10.2007. It has also been agreed that the sum of Rs.17 lacs which has been mentioned in the order dated 23.10.2007 shall be paid by my father and the same shall be adjusted in or added to in the amounts that may be payable to him or by him, as the case may be, after the bidding. It has also been agreed between us that the vacant, peaceful and unencumbered possession of the properties consequent upon the bidding being finalized would be handed over immediately upon the receipt of the payments. This settlement which has been arrived at between us shall entirely take care of all the claims and disputes in all the matters that are pending before this court or any other court and no further claim shall be raised in all these matters. I have the authority to make this statement on behalf of my family members and the statement that is being made by me is binding on all of us including the LRs.

14.02.2008

CS(OS) 737/1984, 1723/1984, 1724/1984, 1983A/1995, 1984A/1995, 1985A/1995, 1986A/1995, 1867/1984 & OMP 177/1998

Statement of Mr. Ram Gopal S/o Shri Ganeshi Lal, R/o 1287, Kashmeri Gate, Delhi.

On oath.

I have had discussions with my nephew Mr. Ram Bhakt Aggarwal who has been authorized by my brother Mr. Ram Charan Aggarwal to have discussions on his behalf with me. We have arrived at a settlement as has been recorded in the order dated 23.10.2007. However, with regard to the amount of Rs.1.75 crores mentioned in that order, the figure has now become Rs.1.80 crores due to accrual of interest. Insofar as that sum of money is concerned, it has been agreed between me and my brother that since the same has to come out of the partnership firm, my brother shall bear the liability to the extent of Rs.90 lacs i.e., 50% of the said amount. The said amount shall be adjusted or become payable as pr the finalization of the bids. It has also been agreed between us that the sum of Rs.17 lacs

which has been mentioned in the order dated 23.10.2007 shall be the liability of my brother towards me. I shall abide by the terms of the bid that have been set out in the order dated 23.10.2007 and I also undertake that vacant, peaceful and unencumbered possession of the properties shall be handed over/taken over simultaneously with the payment/receipt of the sums of money as per the bids. I have the authority to make this statement on behalf of my family members and the statement that is being made by me is also binding on them. We have fully and finally settled all our disputes between me and my brother as well as between my family and his family and it has also been agreed by my brother Mr. Ram Charan that despite the Will dated 05.10.1981 of late Shri Lala Ganeshi Lal, his properties, including his share in the partnership (M/s Lalji Mal Tika Ram) shall be distributed between the two brothers equally i.e., 50% each. In view of this settlement that has been arrived at between the parties, I undertake to withdraw the Special Leave Petition which has been filed before the Supreme Court and it has been agreed that both me and my nephew shall make a joint statement before the Supreme Court on the next date of hearing. No further claim shall be made by me or my family members including my LRs against my brother Shri Ram Charan and/or his family members in respect of the said partnership firm as also the properties which form the subject matter of the disputes in these matters.

14.02.2008

CS(OS) 737/1984, 1723/1984, 1724/1984, 1983A/1995, 1984A/1995, 1985A/1995, 1986A/1995, 1867/1984 & OMP 177/1998

Statement of Smt. Prem Lata w/o Mr. Ram Gopal, R/o 1287, Kashmeri Gate, Delhi.

On oath.

I have authorized my husband to make the statement on my behalf." (emphasis supplied)

14. Pursuant to the said compromise in Suit No. 737/1984 and other suits, decree sheet was prepared and the relevant portion thereof records as under:-

"These suits coming on this day for final disposal before this Court in the presence of counsel for the parties as aforesaid, upon the parties having arrived at an agreement vide order dated 23/10/2007 and upon the Court having accepted the bid made by Sh. Ram Charan in respect of properties situated at Delhi and Mumbai, marked as Ex. C-2 and the bid made by Sh. Ram Gopal in respect of Hathras properties marked as Ex. C-3, pursuant to the agreement, it is ordered that a decree of partition be and the same is hereby passed declaring that:

Sh. Ram Charan shall be exclusively entitled to:

I Suit properties in Delhi Lot:

1. Ownership of House NO. 1287, Sultansingh Estate, Kashmere Gate, Delhi 110 006.
2. Tenancy rights of 1375, Katra Lewswan, Chandni Chowk, Delhi 110006.
3. Tenancy rights of 1304, Katra Dhulia, Chandni Chowk, Delhi 110006.

II Suit properties in Mumbai Lot:

1. Ownership of flat 19, Neelam, 80 Marine Drive, Mumbai 400002.
2. Tenancy rights of 96, Mangaldas Market, Mumbai 400002
3. Tenancy rights of 329, Swadesh Market, Mumbai 400002.
4. Tenancy rights of Godown No. 2, 3368, Kalbadevi Road, Mumbai 400002.
5. Tenancy rights of Godown No. 3, Kalbadevi Road, Mumbai 400002.

and Mr. Ramgopal shall be exclusively entitled to:

III Suit properties in Hathras Lot:

1. Plot 202 Sadabad Ward, Gali Dibba, Hathras. 2. House at 203, Sadabad Ward, Gali Dibba Hathras.

It is further ordered that upon making the payments by Sh. Ram Charan to Sh. Ram Gopal the possession of the properties comprised in the said lots will either be retained by Mr. Ram

Charan or where he is not in possession shall be handed over by Mr. Ram Gopal and/or his family members to Sh. Ram Charan.

It is further ordered that the parties shall co-operate with each other effectuating the settlement and shall execute the necessary documents. It is further ordered that statements and Ex. C-1 (Special Power of Attorney), C-2 and C-3 shall form parts of the decree."

15. The contention of the appellant is that the decree sheet clearly states that Ram Gopal shall have exclusive tenancy right in the property and this was the intent of the court orders dated 23rd October, 2007, 14th February, 2008 and the statement of the parties. The language and words of the court orders accord and affirm the said contention.

16. The submission of the respondent is that the order dated 23rd October, 2007, records that the ownership of the property belongs to wife of Ram Gopal and whoever succeeds consequent to the bid would not be hindered of the enjoyment of the same. It is stated that the statement made by Ram Gopal refers to the properties which forms subject matter of the dispute in the matters and therefore, for all intents and purposes, the ownership right was to be transferred to the highest bidder.

17. We have considered the submissions made by the parties and accept the plea raised by the appellants. There are several reasons and grounds for the same. These are recorded below.

18. Ownership of the property was not a subject matter of dispute in any of the proceedings or the suits which were pending before the Court. In these circumstances, in case the ownership of the property was to be transferred to Ram Charan if he was to be the highest bidder, a specific noting to this effect was required and necessary. There is no specific noting in the order dated 23rd October, 2007. The two brothers were to give bids to acquire the same right, i.e., the tenancy right. It is not recorded or stated that the bid given by Ram Gopal would be for the tenancy right, while the bid offered by Ram Charan would be both for the tenancy and ownership rights, which would be transferred by Prem Lata and Ram Kishan, wife and son of Ram Gopal.

19. The relevant portion of the order dated 23rd October, 2007, which has been underlined for the purposes of emphasis, states, clarifies

and supports the said position. It states that wife of Ram Gopal and his son are owners of the property. It records that the tenancy rights of the property shall be the subject matter of the bid in respect of Delhi properties. In case the ownership rights of the property were also to be made subject matter of the bid, it would have been so indicated and stated. The last sentence does not cause any confusion and is not ambiguous as suggested by the respondent. It records and states that whoever succeeds and gives the highest bid would have unhindered enjoyment of the said. "Enjoyment of the same" only means right to enjoy the tenancy rights. In other words, in case Ram Gopal gives the higher bid, he would become the exclusive tenant and enjoy the tenancy rights and in case Ram Charan gives the higher bid and succeeds, he shall have unhindered right to enjoy the tenancy rights. The order also reveals that the parties were conscious about the difference between the ownership and tenancy right. What was made subject matter of the bidding process was the tenancy rights in the property.

20. Learned counsel for the respondent has submitted that there was substantial difference between the bid of Rs.4 cores and Rs.7.10 crores given by Ram Gopal and Ram Charan, respectively and, therefore, it should be accepted that Ram Charan has given a bid for the ownership rights as well as for tenancy rights. The argument cannot be accepted and is fallacious. Both the parties had and were required to give their bid and quote a figure. The bid as noted above was to acquire the same right and interest in the property. The difference in the bid amounts depends and reflects commercial wisdom and understanding. It was a matter of choice. No inference can be drawn from the bid amounts that the respondent had understood and offered bid for the ownership rights also. In respect of Hathras property, the bid of Ram Charan was Rs.1.5 crores and bid given by Ram Gopal was only Rs.1 crore. The difference was again substantial. Therefore, the difference in the bid amount for the Delhi properties does not show that Ram Charan has given bid for the ownership rights. Further, the bid paper of Ram Charan does not record the said factum. In the bid which was given by the Ram Charan, he had given a break-up of the bid amount of Rs.11.85 crores and had attributed Rs. 7.10 crores towards the Delhi properties. He did not mention that it includes the value of ownership rights.

21. We do not accept the contention of the respondent that the

respondent had understood that the bid amount included the ownership right and required transfer of the ownership right. We have quoted the decree sheet which was prepared subsequently after the passing of the order dated 14th February, 2008. The decree sheet specifically records that Ram Charan shall be exclusively entitled to tenancy right of the property. In respect of the Kashmere Gate property ownership right was transferred. Similarly ownership rights of flat at Marine Drive, Mumbai was to be transferred to Ram Charan and tenancy rights of some other properties at Mumbai were to be exclusively enjoyed by Ram Charan. In the decree sheet itself, difference is drawn between the ownership rights and the tenancy rights. This decree-sheet was prepared and Ram Charan had submitted stamp papers. Ram Charan had got the decree-sheet registered. In case there was a defect or mistake in the decree-sheet and the ownership rights were to be transferred and conveyed to Ram Charan, he would have moved an application or asked for modification or clarification. Order sheets reveal, and it is the accepted position that this has not happened and no such steps were taken. In view of dispute inter se parties, implementation of the order dated 14th February, 2008 was done through court proceedings and monitored by the Court. On 28th May, 2008, the respondent paid bank drafts towards properties in Delhi and Mumbai lots and gave up the bid/right in respect of Hathras property. Mr. P. Nagesh, Advocate was appointed as the Court Commissioner. He was asked to lock the property in question and bring the keys of the property in Court. It was also directed that the possession was to be handed over to Ram Bhakt appearing on behalf of Ram Charan. Simultaneously payments will be made in respect of Bombay and Delhi lots. Parties thereafter appeared before the Court on 14th August, 2008 and an order was passed making some adjustment in view of the fact that the Hathras properties had to go to Ram Gopal and he had to make payment to Ram Charan for the same. Ram Bhakt, son of Ram Charan, had filed IA No. 4476/2008 asking for clarification of the order dated 14th February, 2008. This application was filed on the ground that some of the properties were tenanted and, in view of the bid given by Ram Charan, they were exclusively entitled to the said tenancy rights. It was averred in the application that the order dated 14th February, 2008 did not mention identifying details of the properties of the firm and details of the properties of Ram Gopal Aggarwal HUF etc. In this application, the properties in Mumbai lot and Delhi lot were specifically stated. In respect

of the Delhi lot and the property in question, it was stated as under:-

> **"B) Delhi Lot**
>
> i) Shop at 1375, Katra Lheswan,
>
> Delhi 110 006.
>
> Direction to : Smt. Premlata Ramgopal and Ramkrishna Ramgopal regarding tenancy and rent receipt."

22. Thus contrary to what is urged before us, the respondent in April, 2008 had stated and accepted that the bid given by the parties as recorded in the order dated 14th February, 2008, was for the tenancy rights.

23. Learned counsel for the respondent submitted that till that date payment had not been made by Ram Charan and the aforesaid statement made in the application is not an admission and should be ignored. The contention is fallacious and wrong. The stand taken by the respondent is clearly an afterthought, if not dishonest. The bid given by the respondent was accepted by the court on 14th February, 2008. The question is whether the respondent had given bid for the tenancy right or for tenancy right plus the ownership rights of the wife and son of Ram Gopal. It is clear, from what was stated by the respondent in the application, that the respondent had given bid only for tenancy rights and not for the ownership rights that belonged to Prem Lata and Ram Krishna.

24. There is evidence that even after the 28th May, 2008, the respondent did not claim ownership right in the property. We would like to reproduce letter dated 9th February, 2008, written by Ram Bhakt Aggarwal and Ram Charan to Prem Lata Aggarwal. The said letter read as under:-

> "Madam,
>
> I attempted to contact you at the address A-2, Bhamashah Marg, Opp. Guru Harkishan Public School, Delhi – 110 033; to offer you rent for the premises at 1375, Katra Lheswan, Chandni Chowk, Delhi – 110 006. However, I was not able to locate your address. Kindly let me know the place, time and mode of payment desired by you to enable me to tender the rent.
>
> Kindly communicate the required information at my address mentioned above.

Yours truly,

Sd/-

(Ram Charan Agrawal)

Sd/-

(Rambhakt Agrawal)"

25. The respondent accepts and admits that the said letter was written but claims and submits that this letter states that the amounts due towards rent should be settled as rent had not been paid for a long time. The contention is again false and incorrect. The letter states that the respondent wanted to tender and pay rent for the property to Prem Lata. It states that they had offered to pay rent but they had not been able to locate the address of Prem Lata. Respondent could not have in more clear and categorical words accepted the position that the appellant Prem Lata was the owner of the property and that they enjoyed tenancy rights.

26. Learned counsel for the respondent submitted that reading of the order dated 14th February, 2008 and the statement of parties recorded on the same date show that the parties were entitled to possession and enjoy properties without any obstruction. It was highlighted by the respondent that the statement made by Ram Gopal was on behalf of his wife Prem Lata and even the arbitration proceedings to which Prem Lata and Ram Kishan were parties were to be settled. The contentions do not have any merit. The order and the statements of the parties show what was to be transferred and handed over was the possession of the properties. The tenancy rights of the property were earlier in favour of partnership firm of which both Ram Gopal and Ram Charan were partners. In view of the aforesaid orders and payment made, Ram Charan became the sole tenant and entitled to tenancy rights in the property to the exclusion of Ram Gopal. It was to this extent and reason that the possession was to be transferred. In none of the orders, it is recorded that "ownership" of the property was to be transferred.

In terms of the interim arbitration awards, payments were to be made to Prem Lata, Ram Kishan, Surjeet and Kumud, wife and children of Ram Gopal. The total amount due and payable to the said persons under the interim awards as recorded in the order dated 14th February, 2008 and the statement of Ram Bhakt of the same date, was Rs.1.80 crores. It was stated that this amount was payable by the partnership

firm and accordingly Ram Charan's 50% liability was Rs.90 lakhs. In addition, another sum of Rs.17 lakhs was to be paid. The said sums were added to the bid amount. The order and the statements also refer to the properties which were joint properties or HUF properties. This was necessary and required to be stated as what was subject matter of the suit were not only partnership properties but were also joint properties which were owned by Ram Gopal and Ram Charan. There was no dispute and it is not reflected in any of the orders quoted above or subsequent orders wherein directions were given for implementation, that the ownership rights of the property were in question. There is no averment or statement that the respondent and the appellants were joint owners. On the other hand, there are ample evidence and in fact repeated admissions by the respondent that the ownership right in the property was not treated as joint. Prem Lata and Ram Kishan had purchased the property way back vide conveyance deed dated 28th May, 1998. In the suits for partition and rendition of accounts which were filed in the year 1984, the reference was made to the tenancy right in the property. The ownership of the property was not subject matter of the compromise.

27. The problem in the present case has arisen because of the decision of the Supreme Court dated 16th April, 2008 in **Satywati Sharma vs. Union of India** (2008) 5 SCC 287. As per the said decision protected commercial tenants can be evicted on the ground of bonafide requirement of the owner-landlord. This brought about a substantial change and effectively reduced the market value of the tenancy rights. The said decision of the Supreme Court was rendered on 16th April, 2008 which is after 14th February, 2008. The question raised is whether the appellant should be allowed and can be allowed to take benefit of the said decision or the respondent can and should be made owner of the property as at the time when the bid was given, the respondent had not visualized or imagined that the landlord-owner would be able to evict a protected commercial tenant. Learned counsel for the respondent has pleaded equity and submitted that the disputes being a family matter, a holistic and broader view is required to be taken and in this regard has relied upon decisions of the Supreme Court in **Bhavan Vaja and Ors. v. Solanki Hanuji Khodaji Mansang and Anr.** 1973 (2) SCC 40, **Parayya Allayya Hittalamani v. Sri Parayya Gurulingayya Poojari** 2007 (14) SCC 318, **Manish Mohan Sharma v. Ram Bahadur Thakur Ltd.** 2006 (4) SCC 416. Learned counsel for the appellant on the other hand has relied upon

Deepa Bhargava v. Mahesh Bhargava (2009) 2 SCC 294, **Topanmal Chhotamal v. Kundomal Gangaram** AIR 1960 SC 388, **State Bank of India v. Mula Sahakari Sakhar Karkhana Ltd.** (2006) 6 SCC 293, **Godhra Electricity Co. Ltd. v. State of Gujarat** (1975) 1 SCC 199.

28. In **Bhavan Vaja** (supra), the Supreme Court held that the executing court cannot go behind the decree, but it is the duty of the executing court to find out the true effect of the decree and in appropriate cases it ought to take into consideration the pleadings as well as the proceedings leading to the decree. This is precisely what we have done. We have construed the decree as well as the proceeding, i.e., orders, statement of parties, etc. In **Parayya Allayya Hittalamani** (supra), same observations have been made. It has been also held that where "a document is ambiguous" the same can be construed having regard to surrounding and attending circumstances. The said decision does not help or assist the respondent. The decree in the present case is not vague. We to satisfy ourselves, have examined the surrounding and attending circumstances. In **Manish Mohan Sharma** (supra), the Supreme Court emphasized that family settlements are governed by special equity and are to be enforced if honestly made, though sometimes the terms agreed may have their origin in a mistake or founded on ignorance of fact as to what the rights of parties actually are. The said observations have been made with the object that family settlements are to protect the family from long drawn litigation and they bring harmony and good will in the family. The courts, therefore, lean in favour of family settlements and accept the same even if the similar defects or faults may not be accepted, if the transaction was between strangers. The said decision does not support the respondent but supports the plea and contention raised by the appellants. The compromise decree has to be executed and implemented even if it is alleged and contended that the respondent did not fully appreciate the consequence and implication of acquiring tenancy rights and had not visualized that the Supreme Court by a judicial decision would permit and enable an owner-landlord to sue for eviction in commercial tenancies on the ground of bona fide requirement.

29. We have considered the said contentions raised by the respondent but they are without merit. The respondent was aware that it was giving a bid for the tenancy right and not the ownership rights.

The judgment of the Supreme Court in **Satyawati Sharma** (supra) was decided prior to 28th May, 2008 which is when the money was paid by the respondent. The decision of the Supreme Court does not justify and cannot become the reason or ground for the executing court to modify and amend the compromise or the compromise decree. The parties are bound by the terms of the settlement and cannot wriggle out of the same. The compromise decree shows that the parties had given bid for the tenancy rights in properties in Delhi & Mumbai. When the bids were given, they also took the inherent risks involved when a person takes or requires tenancy rights, which are protected in law. In the present case the family members of Ram Gopal namely his wife and son happened to be the owners of the property of which tenancy rights have been acquired by Ram Charan. However, any other person or third person could have also been landlord or owner of the property. Similar right to seek eviction would have accrued to the benefit of the said owner/landlord. The respondent could not have asked for modification and amendment of the decree for this reason or ground. We record that the respondent has not asked for amendment or modification of the decree but had filed an execution petition stating that the decree itself postulates execution of the conveyance deed by Prem Lata and Ram Kishan. The decree, as discussed above, does not stipulate or say so and is to the contrary. It is well settled that the executing court can interpret the decree and accordingly implement or execute the same. Executing court cannot modify or amend the decree. Compromise between the parties requires consent of the parties and no amendment or change of the terms can be made except with the consent of the parties. Parties when they give bid took the risk involved. It was equally possible that the value of the tenancy rights may have gone up or increased and in that event the appellants herein would have been the loser.

30. In view of the aforesaid position, we accept the present appeal and set aside the impugned order dated 30th August, 2010. The execution petition 227/2010 is dismissed. There will be no order as to costs.

ILR (2012) VI DELHI 791
W.P. (C)

NDMC & ANR. ....PETITIONER

VERSUS

RAM PRASAD ....RESPONDENT

(MUKTA GUPTA, J.)

W.P. (C) NO. : 3858/1996 DATE OF DECISION: 15.10.2012

Labour Law—Industrial Disputes Act, 1947—Section 2(oo), 2(s), 25F—CCS (Temporary Service) Rules, 1965—Rule 5—Punjab Municipal Act, 1911—Section 45—Respondent initially appointed on adhoc basis, on consolidated salary—His services were regularised and he was placed on probation for two years—Thereafter, workman remained absent on several dated and stopped coming to office, without intimation—A show cause notice was issued to him and was also given a call back notice, pursuant to which he rejoined duties—Thereafter, service of Respondent was terminated—Workman raised a dispute—Trial Court held that termination of workman was illegal and injustified and directed reinstatement with full back wages and continuity of service—Order challenged before High Court—Plea taken, since Respondent was no probation and probation had not been confirmed, discharge simpliciter of Respondent is not illegal and award is liable to be set aside—Per contra plea taken, Respondent is a workman and even if he was on probation, provisions of Section 25F are duly attracted, if his services are terminated without following due process—Held—Sub Section (bb) of Section 2 (00) of Act permits termination simpliciter, in terms of

contract—Petitioner was on probation for a period of two years which could be terminated by school at any time by giving one month notice or payment in lieu of such notice, without furnishing any reason thereto—Respondent had not been confirmed and was repeatedly absenting and thus, vide termination order, Board of Governors terminated his services and gave him a cheque for one month's salary in lieu of notice period—This being position, it cannot be held that termination of Respondent was illegal—Impugned order set aside—Directions also given to petitioner to reconsider case of Respondent for regular appointment, if he has been found working satisfactorily.

Important Issue Involved: A workman whose services had not been confirmed and repeatedly absents, order terminating services of such a workman after giving him a cheque for one month's salary in lieu of the notice period, is not illegal.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Piyush Gaur for Mr. Arun Bhardwaj, Advocate.

FOR THE RESPONDENT : Mr. N.D. Pancholi, Mr. Hahorngam Zimik, Advocates.

CASES REFERRED TO:

1. *Devender Singh* vs. *Municipal Council, Sanaur* AIR 2011 SC 2532.
2. *Delhi Transport Corporation* vs. *Shri R.K. Tiwari & Anr.* W.P.(C) 3841/2000.
3. *Management of MCD* vs. *Prem Chand Gupta*, AIR 2000 SC 454.

4. *Union of India* vs. *The Presiding Officer, CGIT and another,* W.P. (C) No. 4870 of 1998.

5. *Rajasthan Adult Education Assn.* vs. *Ashoka Bhatacharya* (1998) 9 SCC 61 : 1998 SCC (L&S) 1114.

6. *Birla VXL Ltd.* vs. *State of Punjab* [(1998) 5 SCC 632: 1998 SCC (L&S) 1422].

7. *Adult Education Association and another* vs. *Kumari Ashoka Bhatacharya and another,* JT 1997 (9) SC 533.

8. *M. Venugopal* vs. *Divisional Manager,* AIR 1994 SC 1343.

9. *Sunilkumar S.P. Sinha* vs. *Indian Oil Corpn. Ltd.* [1983 Lab IC 1139: (1982) 3 SLR 567: (1983) 24 Guj LR 573 (Guj)].

10. *M/s. Indian Tourism Development Corporation, New Delhi* vs. *Delhi Administration,* Delhi 1982 LAB IIC 1309 FB (Delhi).

11. *L.Robort D'Souza* vs. *Executive Engineer, Southern Railway and Anr.* AIR 1982 SC 854.

12. *Oil and Natural Gas Commission and Ors.* vs. *Dr. Md. S. Iskender Ali* (1980) 3 SCC 428.

13. *Santosh Gupta* vs. *State Bank of Patiala* [(1980) 3 SCC 340: 1980 SCC (L&S) 409: AIR 1980 SC 1219].

14. *State of U.P.* vs. *Ram Chandra Trivedi* [(1976) 4 SCC 52, 64 : 1976 SCC (L&S) 542 : (1977) 1 SCR 462, 475].

15. *State Bank of India* vs. *N. Sundara Money* [(1976) 1 SCC 822: 1976 SCC (L&S) 132: AIR 1976 SC 1111].

16. *I.N. Saksena* vs. *State of M.P.* [AIR 1967 SC 1264 : (1967) 2 SCR 496 : (1967) 2 LLJ 427].

RESULT: Disposed of.

MUKTA GUPTA, J.

1. By the present petition the Petitioner impugns the award dated 25th March, 1995 whereby the learned Trial Court held that the termination

of the Respondent/ workman was illegal and unjustified, a colourable exercise of power, therefore, mala-fide and directed reinstatement with full back wages and continuity of service.

2. Learned counsel for the Petitioner contends that the Petitioner was initially appointed on 3rd October, 1980 on adhoc basis on consolidated salary. His services were regularized with effect from 24th September, 1982 and he was placed on probation for two years. Thereafter the workman remained absent on several dates and stopped coming to office with effect from 26th December, 1984 without any intimation. He was called back to join, however, he failed and neglected to join the duty till 14th February, 1985. Since the Respondent was on probation the Petitioner had two options either to simply terminate him without casting any aspersion or conduct an enquiry. The services of the Respondent were terminated on 8th July, 1985. The order was of termination simplicitor casting no aspersion on the Respondent. The Respondent was given a cheque of the salary for one month as well. The learned Trial Court erred in reading the evidence of the management witness to imply that the Respondent was confirmed. In fact, the management witness MW1 has stated that after regularization, the Respondent had become negligent in performing his duties. Further, the post which the Respondent was holding was a civil post under the Petitioner and in terms of the rules governing the Respondent, the order of termination simplicitor with one month's pay was not an illegal order. **Devender Singh Vs. Municipal Council, Sanaur** AIR 2011 SC 2532 as relied upon by the Respondent has no application to the facts of the present case, as the termination of the Respondent was as per the terms of employment. It is further contended that the Respondent has been working with the Petitioner since January 2004 in terms of the award. However, his reinstatement is subject to the outcome of the present petition. It is prayed that the impugned award be set aside.

3. Learned counsel for the Respondent on the other hand contends that the Respondent is a workman and even if he was on probation, provisions of Section 25F are duly attracted if his services are terminated without following due process. Relying upon **Devender Singh Vs. Municipal Council, Sanaur** (supra) it is contended that the source of employment, the method of recruitment, the terms and conditions of

employment/contract of service, the quantum of wages/ pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 (in short 'the ID Act'). No distinction is made between a full-time and a part-time employee, or a person employed on contract basis. Further, since the termination of the Respondent is illegal being contrary to the provision of Section 25F ID Act, there is no jurisdictional error in the Trial Court awarding reinstatement with full back wages, warranting interference by this Court as held in **Devender Singh** (supra) and **M/s. Indian Tourism Development Corporation, New Delhi Vs. Delhi Administration, Delhi** 1982 LAB IIC 1309 FB (Delhi). Reliance is also placed on **L.Robort D'Souza Vs. Executive Engineer, Southern Railway and Anr.** AIR 1982 SC 854 to contend that since the termination was on account of absence without leave constituting misconduct, the same is contrary to the principles of natural justice as no enquiry was held. Admittedly, the Respondent had completed 240 days and thus the provisions of Section 25F were clearly applicable. There being no infirmity in the impugned award, the petition be dismissed.

4. I have heard learned counsel for the parties. Briefly the facts giving rise to the filing of the present petition are that the Respondent was employed as Chowkidar with the Petitioner on 3rd October, 1980. The Respondent remained absent and thus a show cause notice was issued to him on 11th January, 1985. On 8th February, 1985 the Respondent was given a call back notice pursuant to which he rejoined the duties on 15th February, 1985. Vide order dated 8th July, 1985 the service of the Respondent was terminated. On a dispute being raised, the following terms of reference were sent for adjudication:

> "whether the termination of service of Shri Ram Parshad is illegal and/or unjustified and if so to what relief is he entitled to and what directions are necessary in this respect"?.

5. The Petitioner claimed that he was employed as a Chowkidar/ Sweeper since 7th October, 1980 and in 1985 he was refused duty by the Head Mistress of NDMC, Junior Navyug School with effect from 2nd January, 1985 without any reason but was made to rejoin on 15th February, 1985. Thereafter, he was retrenched from service on 8th July,

1985 which retrenchment is arbitrary, no reason was given, no notice pay or retrenchment compensation was offered. The claimant was victimized because of the cases pending in the office of the conciliation officer. However, the Petitioner in the reply stated that the Respondent was employed as a Sweeper/ Chowkidar with effect from 12th October, 1980 on ad-hoc basis for a short period till 23rd September, 1982 and with effect from 24th September, 1982 his services were regularized. The Respondent remained absent in the year 1984 and thus a show cause notice and a call back notice was issued to him. Though the Respondent joined duties on 15th February, 1985, however in view of his unauthorized absence, his services were terminated on 8th July, 1985. The Petitioner raised the preliminary objections that it was not an industry, the Respondent was not a workman and Delhi Administration was not competent to send the reference. These objections were decided against the Petitioner. The issue in terms of reference was also decided against the Petitioner and the termination of the Respondent was held to be illegal/ unjustified and the Respondent was directed to be reinstated with full back wages and continuity of service.

6. At the time of hearing of the present petition the only issue raised by the learned counsel for the Petitioner is that since the Respondent was on probation and the probation had not been confirmed, the discharge simplicitor of the Respondent by the order dated 8th July, 1985 is not illegal and thus the award is liable to be set aside. The thrust of the argument of the learned counsel is that since the Respondent was employed on a civil post, in terms of Rule 5 of CCS Temporary Service Rules an order of termination simplicitor which is not stigmatic cannot be said to be illegal. Further, the Respondent was paid a cheque of one month's salary. Their Lordships in **Devender Singh Vs. Municipal Council, Sanaur** (supra) while construing the definitions of "retrenchment" and "workman" under the Industrial Dispute Act held:

> "10. The definition of the term "retrenchment" is quite comprehensive. It covers every type of termination of the service of a workman by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action. The cases of voluntary retirement of the workman, retirement on reaching the age of superannuation, termination of

service as a result of non-renewal of the contract of employment or of such contract being terminated under a stipulation contained therein or termination of the service of a workman on the ground of continued ill health also do not fall within the ambit of retrenchment.

12. Section 2(s) contains an exhaustive definition of the term 'workman'. The definition takes within its ambit any person including an apprentice employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward and it is immaterial that the terms of employment are not reduced into writing. The definition also includes a person, who has been dismissed, discharged or retrenched in connection with an industrial dispute or as a consequence of such dispute or whose dismissal, discharge or retrenchment has led to that dispute. The last segment of the definition specifies certain exclusions. A person to whom the Air Force Act, 1950, or the Army Act, 1950, of the Navy Act, 1957, is applicable or who is employed in the police service as an officer or other employee of a prison or who is employed mainly in managerial or administrative capacity or who is employed in a supervisory capacity and is drawing specified wages per mensem or exercises mainly managerial functions does not fall within the definition of the term 'workman'.

13. The source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act.

14. It is apposite to observe that the definition of workman also does not make any distinction between full time and part time employee or a person appointed on contract basis. There is nothing in the plain language of Section 2(s) from which it can be inferred that only a person employed on regular basis or a person employed for doing whole time job is a workman and the one employed on temporary, part time or contract basis on fixed

wages or as a casual employee or for doing duty for fixed hours is not a workman."

7. In **M. Venugopal vs. Divisional Manager,** AIR 1994 SC 1343 it was held:

"9. Regulation 14 aforesaid has to be read as a statutory term of the contract of employment between the Corporation and the appellant. The order of appointment had fixed a target in respect of the performance of the appellant which admittedly the appellant failed to achieve within the period of probation which was extended up to two years. As such the Corporation was entitled not to confirm the appellant in terms of the order of appointment and to terminate his service during the period of probation without any notice in terms of Regulation 14(4) aforesaid. Clauses 10 and 11 of the order of appointment along with Regulation 14 shall be deemed to be stipulations of the contract of employment under which the service of the appellant has been terminated. Any such termination, even if the provisions of the Industrial Disputes Act were applicable in the case of the appellant, shall not be deemed to be "retrenchment" within the meaning of Section 2(oo), having been covered by exception (bb). Before the introduction of clause (bb) in Section 2(oo), there were only three exceptions so far as termination of the service of the workman was concerned, which had been excluded from the ambit of retrenchment ù (a) voluntary retirement; (b) retirement on reaching the age of superannuation; and (c) on ground of continued ill-health. This Court from time to time held that the definition of "retrenchment" being very wide and comprehensive in nature shall cover, within its ambit termination of service in any manner and for any reason, otherwise than as a punishment inflicted by way of disciplinary action. The result was that even discharge simpliciter was held to fall within the purview of the definition of "retrenchment". (**State Bank of India v. N. Sundara Money** [(1976) 1 SCC 822: 1976 SCC (L&S) 132: AIR 1976 SC 1111], **Santosh Gupta v. State Bank of Patiala** [(1980) 3 SCC 340: 1980 SCC (L&S) 409: AIR 1980 SC 1219].) Now with introduction of one more exception to Section 2(oo), under clause

(bb) the legislature has excluded from the purview of "retrenchment" (i) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry; (ii) such contract being terminated under a stipulation in that behalf contained in contract of employment. It need not be impressed that if in the contract of employment no such stipulation is provided or prescribed, then such contract shall not be covered by clause (bb) of Section 2(oo). In the present case, the termination of service of the appellant is as a result of the contract of employment having been terminated under the stipulations specifically provided under Regulation 14 and the order of the appointment of the appellant. In this background, the noncompliance of the requirement of Section 25-F shall not vitiate or nullify the order of termination of the appellant."

8. In Rajasthan **Adult Education Association and another vs. Kumari Ashoka Bhatacharya and another,** JT 1997 (9) SC 533 the Respondent challenged her termination as illegal being contrary to the provisions of Section 25F of the Industrial Disputes Act, 1947. Their Lordships held that the Respondent therein was employed for a particular project and at the most she was on probation during the period of her appointment. She was told to show improvement in her work when the appellant therein found that the work of the Respondent was not up to the mark and she was showing no improvement, her services were dispensed with. It was a termination simplicitor without casting any stigma. It was held that the Appellant was within its right to terminate the temporary employment of the Respondent.

9. A learned Single Judge of this Court in **Union of India vs. The Presiding Officer, CGIT and another,** W.P. (C) No. 4870 of 1998 decided on 1st July, 2010 while dealing with the applicability of Section 25F of the Industrial Disputes Act to an appointee under the rules aforesaid relying upon **Management of MCD vs. Prem Chand Gupta,** AIR 2000 SC 454 held that even in a case of a temporary employee if Section 25F is not complied with the termination is bad in law. In **Prem Chand** (supra) the Hon'ble Supreme Court was dealing with an order of termination passed on 29th April, 1966 when the amendment to the

Section 2 (oo) of the Industrial Disputes Act had not come into force. Section 2 (oo) of the Industrial Disputes Act states as under:

2 (oo) "retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not includeù

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

[(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or]

(c) termination of the service of a workman on the ground of continued ill-health;]"

10. Sub-section (bb) of Section 2(oo) ID Act permits termination simplicitor in terms of the contract. The Hon'ble Supreme Court noticed this distinction in **Prem Chand Gupta** (Supra) in para 17 which reads as under:

"17. Learned counsel for the appellant Corporation, Ms Binu Tamta in order to salvage the situation invited our attention to a decision of this Court in the case of **Birla VXL Ltd. v. State of Punjab** [(1998) 5 SCC 632: 1998 SCC (L&S) 1422] and submitted that when the appointment is given for a fixed period, on expiry of the said period the appointment would cease by the efflux of time and it could not be said to be a retrenchment. In the aforesaid case, a two-Judge Bench of this Court was concerned with an appointment order given to the third respondent before this Court on 1-1-1983 which clearly stated that it was an appointment for two years up to 31-12-1984. When the said termination by the efflux of time took place, Section 2(oo) of the

ID Act had already got amended by insertion of exception clause (bb) therein which reads as under:

"termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or"

Thus, it was a case of automatic termination of employment in the light of the stipulation contained in the appointment itself. Such termination could not be treated as retrenchment in the light of the excepted category indicated by clause (bb) inserted in Section 2(oo) by the amending Act of 1984. It has to be kept in view that the respondent workman's termination was prior to the 1984 amendment to Section 25-F. Hence, it was squarely governed by the ratio of the decision of this Court in the case of **State Bank of India v. N. Sundara Money** [(1975) 4 SCC 13: 1975 SCC (L&S) 198]. It is, therefore, not possible to agree with the contention of learned counsel for the appellant that termination of the respondent workman on 29-4-1966 would not be retrenchment. It has also to be seen that even though the earlier appointment of the respondent workman was for one year from 5-5-1964 his reappointment from 1-10-1964 was not for a fixed period and on the contrary it continued up to 18 months and it was against a clear vacancy of a permanent post caused on account of the termination of another employee. Consequently, reliance placed by learned counsel, Ms Binu Tamta for the appellant Corporation on the aforesaid decision of this Court is of no avail to her. She then invited our attention to a later decision of this Court in the case of **Rajasthan Adult Education Assn. v. Ashoka Bhatacharya** [(1998) 9 SCC 61 : 1998 SCC (L&S) 1114]. In that case this Court was concerned with the termination of a probationer temporary servant on account of unsatisfactory performance. A probationer employee was found to have not satisfactorily worked during her probation and her services were terminated w.e.f. 31-5-1989. This is also a case where after the amendment of Section 2(oo) by insertion of clause (bb) from

1984 such termination of probationers for unsatisfactory work would remain outside the sweep of Section 25-F read with Section 2(oo). In the present case, as seen earlier, the termination was years back of 29-41966 when Section 2(oo)(bb) was not on the statute-book. Reliance was then placed by learned counsel for the appellant Corporation on a decision of a learned Single Judge of the Gujarat High Court in the case of **Sunilkumar S.P. Sinha v. Indian Oil Corpn. Ltd.** [1983 Lab IC 1139: (1982) 3 SLR 567: (1983) 24 Guj LR 573 (Guj)] This decision also cannot be of any avail to her for the simple reason that the said decision proceeded on its own facts. In para 14 of the Report, it has been clearly mentioned by the learned Single Judge that the employee in that case was not a workman and again there was no evidence to show that all the requirements of Section 25-F were complied with for its applicability. It was a direct writ petition in the High Court and in the absence of relevant data the said section was held to be not applicable. The said judgment rendered on its own facts, therefore, cannot be pressed into service in the light of clear findings of fact reached by the Labour Court in the present case, which have remained well sustained on record, as seen by us earlier for applicability of Section 25-F to the impugned termination of the respondent workman's services. As a result of the aforesaid discussion, it must be held that termination of the respondent workman's service on 29-4-1966 was violative of Section 25-F of the ID Act and was, therefore, null and void. The second point for determination is answered in the affirmative against the appellant Corporation and in favour of the respondent workman, subject to our decision about appropriate relief to be given to the respondent workman as will be indicated while considering the last point for determination."

11. Since the termination in **Prem Chand Gupta** (supra) was prior to the insertion of sub-clause (bb) of Section 2 (oo) of the ID Act the same has no application to the facts of the present case. In the case at hand a perusal of terms of appointment in letter dated 23rd September, 1982 (EX. MW1) show that the Petitioner was on probation for a period of two years which could be increased at the discretion of the chairman

and his services could be terminated by the school at any time by giving one month notice or payment in lieu of such notice without furnishing any reason thereto. The Respondent had not been confirmed and was repeatedly absenting and thus vide order dated 8th July, 1985 the Board of Governors terminated his services under Section 45 of the Punjab Municipal Act and gave him a cheque for one month's salary in lieu of the notice period. This being the position it cannot be held that the termination of the Respondent was illegal.

12. Further this Court in **Delhi Transport Corporation Vs. Shri R.K. Tiwari & Anr.** W.P.(C) 3841/2000 decided on 19th July, 2012 in a similar situation in view of the law laid down in **Oil and Natural Gas Commission and Ors. Vs. Dr. Md. S. Iskender Ali** (1980) 3 SCC 428 held:

> "11. All these decisions were reviewed in the case of **State of U.P. v. Ram Chandra Trivedi** [(1976) 4 SCC 52, 64 : 1976 SCC (L&S) 542 : (1977) 1 SCR 462, 475] where this Court observed as follows: (SCC p. 64, paras 23 & 24)
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> > "Keeping in view the principles extracted above, the respondent's suit could not be decreed in his favour. He was a temporary hand and had no right to the post. It is also not denied that both under the contract of service and the service rules governing the respondent, the State had a right to terminate his services by giving him one month's notice. The order to which exception is taken is ex facie an order of termination of service simpliciter. It does not cast any stigma on the respondent nor does it visit him with evil consequences, nor is it founded on misconduct. In the circumstances, the respondent could not invite the court to go into the motive behind the order and claim the protection of Article 311(2) of the Constitution.
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> > We, therefore, agree with the submission made on behalf of the appellant that the High Court was in error in arriving at the finding that the impugned order was passed by way of punishment by probing into the departmental

> correspondence that passed between the superiors of the respondent overlooking the observations made by this Court in **I.N. Saksena v. State of M.P.** [AIR 1967 SC 1264 : (1967) 2 SCR 496 : (1967) 2 LLJ 427] that when there are no express words in the impugned order itself which throw a stigma on the government servant, the court would not delve into Secretariat files to discover whether some kind of stigma could be inferred on such research."
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> 12. The facts of the present case appear to be on all fours with those of the aforesaid decision. From the undisputed facts detailed by us in an earlier part of the judgment, it is manifest that even if misconduct, negligence, inefficiency may be the motive or the inducing factor which influences the employer to terminate the services of the employee, a power which the appellants undoubtedly possessed, even so as under the terms of appointment of the respondent such a power flowed from the contract of service it could not be termed as penalty or punishment."

13. In view of the aforesaid discussion, the impugned award is set aside. However, keeping in view that fact that termination of the Respondent wasdue to his unauthorized absence and the Respondent has been reinstated and working since 2003 with the Petitioner during the pendency of the present petition, it would be appropriate that the Petitioner reconsiders the case of the Respondent for regular appointment if he has been found working satisfactorily.

14. Petition is disposed of.