सत्यमेव जयते

INDIAN LAW REPORTS DELHI SERIES 2011

(Containing cases determined by the High Court of Delhi)

VOLUME-4, 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.) 2011
(for 6 volumes each volume consisting of 2 Parts)

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

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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—2011.

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H.D. Chakraborty v. *UOI & Ors.* *492*

— Article 16(4)—Reservations in public appointment—Reservation Policy for Other Backward Classes (OBC)—Appointment as Joint Director (Law) in Competition Commission of India (CCI)—Challenge to selection process—Petitioner applied for the posts of Joint Director (Law) and Deputy Director (Law)—Appeared in written test and was

called for interview—Petitioner did not hear from CCI—Respondent No. 3 was appointed—Petitioner claimed that reservation policy of 27% for OBC be applied against the post of Joint Director (Law)—The bench mark of 70% disclosed by the Respondent before was not laid down till the stage of interview—Incorporated to eliminate the Petitioner—10% difference was maintained in qualifying marks between the reserved and unreserved category as against 5% in benchmark laid down—Having secured higher marks as OBC candidate—Petitioner ought to have been appointed. Held—Selected candidate has no right of appointment—Merely because in the qualifying marks the difference of 10% was maintained would not compel the CCI to maintain the same difference in the benchmark for appointment also—Employer required to follow the Policy of Reservation is entitled to apply different Rules at different stages so long as framed in accordance with law—No objection raised while participating—One out of three posts be reserved for OBC candidate—Cannot be permitted to raise it now Reservation of one post out of three was in excess of 27% prescribed—No constraint in fixing higher score of marks for selection for maintaining high standards of competence.

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— Article 226—Petitioner was appointed as Senior Superintendent (Engineer-Civil) at Gaya Airport, Gaya, Bihar on ad hoc basis on 15.12.2000 for a period of six months—Competent Authority approved his appointment on 30.12.2002 until further orders—On 30.11.2004, the respondent decided to terminate the services of about 133 employees including the petitioner on the ground that these appointments were made without any advertisement, without calling candidates from the employment exchange and without following the recruitment procedure—Appointment had no legal sanctity—Various petitions filed—Same were heard by the Division Bench of Hon'ble High Court of Delhi—Some were disposed

of on the basis of the settlement reached between the petitioner and the respondent—Respondent initiated Selection process—Petitioner also received a letter informing him that he may apply for the post within 20 days after receipt of the letter—Petitioner applied for the grade of Junior Executive Engg. (Civil), appeared in the written test—He was not called for interview—He secured only 35% marks in written test—Petition seeking directions to the respondent to allow him to sit for an interview in terms of the order by the Court—The respondent contends that opportunity granted in terms of order by giving him the necessary age relaxation—Petitioner secured only 35% marks instead of requiring minimum 40%—He failed to qualify the written test and as such he was not called for interview—Held—It is open to an employer to prescribe a minimum mark which, in its own wisdom, indicates a necessary minimum understanding of the subject—There is nothing wrong with prescribing the same minimum pass or qualifying marks for the OBC as well as General categories, while at the same time, reserving separate seats for the two categories—If this is done, then provided the candidate achieves the prescribed minimum, he will then be placed in order of merit amongst other candidates of his own category exclusively, and his selection will not be effected in any way by the marks of candidates of other categories—Merely because the minimum qualifying mark for OBC and General candidates is the same, does not mean that no preference was being given in employment by the respondent's to persons belonging to the OBC category—Writ petition dismissed.

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— Article 16(4)—Reservations in public appointment—Reservation Policy for Other Backward Classes (OBC)—Appointment as Joint Director (Law) in Competition Commission of India (CCI)—Challenge to selection process—Petitioner applied for the posts of Joint Director (Law) and Deputy Director (Law)—Appeared in written test and was

called for interview—Petitioner did not hear from CCI—Respondent No. 3 was appointed—Petitioner claimed that reservation policy of 27% for OBC be applied against the post of Joint Director (Law)—The bench mark of 70% disclosed by the Respondent before was not laid down till the stage of interview—Incorporated to eliminate the Petitioner—10% difference was maintained in qualifying marks between the reserved and unreserved category as against 5% in benchmark laid down—Having secured higher marks as OBC candidate—Petitioner ought to have been appointed. Held—Selected candidate has no right of appointment—Merely because in the qualifying marks the difference of 10% was maintained would not compel the CCI to maintain the same difference in the benchmark for appointment also—Employer required to follow the Policy of Reservation is entitled to apply different Rules at different stages so long as framed in accordance with law—No objection raised while participating—One out of three posts be reserved for OBC candidate—Cannot be permitted to raise it now Reservation of one post out of three was in excess of 27% prescribed—No constraint in fixing higher score of marks for selection for maintaining high standards of competence.

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— Article 226—Border Security Force Rules, 1969—Rule 44 and 45 B—Petition challenging the verdict of guilt and the sentence imposed vide order dated 10.10.1993—Severe reprimand and reduction of seniority by 3 years—Petitioner was employed as Deputy Commandant with BSF—Attached with 8th Battalion—Stationed for duty in Kashmir Valley—On 08.04.1992, BSF Officials conducted a search operation—Apprehended two Pakistani Trained Militants—Written complaint was received against the petitioner that he demanded illegal gratification for release of the two persons—Charges were framed—Proceedings pertaining to hearing of the charge was conducted and three additional charges were also

framed—After inquiry, petitioner was acquitted for charge no. 1, but was held guilty for the charges no. 2, 3 and 4 by General Security Force Court—Petitioner submitted that Rule 45B of the BSF Rules 1969 had not been complied with—No hearing of the charge being conducted pertaining to the charge no. 2, 3 and 4—There was no evidence to sustain the verdict of guilty—Held—Law requires penal provisions, be they substantive or procedural, to be construed strictly and as regards procedural, to be complied with in letter and in spirit—Rule 45B has a salutory purport and is a procedural safeguard for an accused and dealing with the hearing of a charge is a provision enabling an accused to convince the Commandant to summarily dismiss the indictment—This is evident from a reading of sub-rule 2 of Rule 45B which States that after hearing the charge as per sub-rule 1, the officer hearing the charge may dismiss the charge or remand the accused for preparation of a record of evidence—As per clause-C of sub-rule 1 of Rule 45B, the accused has an opportunity to make a statement of his defence at the hearing of the charge—Facts noted by us herein above bring out that pertaining to charge 2, 3 and 4 no hearing of the charge was held for the obvious reason at the stage of hearing of the charge on 27.8.1992 it was only one charge which was drawn up and as highlighted by us in para 14 above, power vested under Rule 59 (2) (b) of the BSF Rules 1969 to reframe a charge would not be enough power or the source of a power to frame additional charges unrelated to the original charge—It is apparent that 2 wrongs have been committed against the petitioner—The first is by Deputy Commandant Mohinder Lal who recorded evidence beyond the scope of the charge for which record of evidence had to be prepared and secondly when Rule 45B was not followed pertaining to the 3 additional charges being charge No 2, 3 and 4—As a Deputy Commandant of a BSF Unit in an insurgency ridden State, we certainly expect the petitioner to have tried to create a network of sources in the State to receive information of movement of outsiders in the area within his jurisdiction and this perforce would require him

to make friends with a few local people and earn their confidence; we do earn each other's confidence by exchanging gifts—As long as the value of the gift does not render a gift ostentatious, we see no impropriety in the petitioner accepting a Loi, a Feron and a Karkuli from 3 persons value whereof, even on the highest side was not more than Rs. 980 (total)—Disposing of the writ petition we absolve the petitioner of the charges framed against him and quash the verdict of guilt declaring petitioner guilty of charge No. 2, 3 and 4 set aside the sentence dated 10.10.1993.

H.D. Chakraborty v. *UOI & Ors.* *492*

— Article 14, 16, 226 & 227—Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955—Regulation 4 (iii-a)—Petition challenging the legal defensibility and substantiality of the order dated 21.03.2011 passed by Central Administrative Tribunal, Principal Bench, New Delhi—The 1955 Regulations restricts the number of attempt for general category candidates upto a maximum of four whereas for OBC category candidates, the maximum number of attempt is seven and for Scheduled Castes and Scheduled Tribes candidates, the number of attempts is unlimited—The Regulations invited the frown of Articles 14 and 16 of the Constitution of India as there is a restriction on the number of attempts to be made by general category candidates whereas no restriction is made in respect of Scheduled Castes and Scheduled Tribes candidates and more number of attempts have been provided for the OBC candidates—Tribunal declined to accept the prayer—Petition—Held—It is noteworthy that clauses (1) and (2) of Article 16 of the Constitution of India guarantee 'Equality of opportunity' in the matter of an appointment to an office or any other appointment but the clauses (3) to (5) confer concession in favour of Backward Classes with certain exception to the above rule of equal opportunity—Clause 4 of the said article stipulates that nothing in the said Article shall

prevent the State from making any provision for the reservation of appointments or posts in favour of any Backward Classes of citizens which, in the opinion of the State, is not adequately represented in the services under the State—The said clauses of Article 16 confer a concession on the Backward Classes which include the Scheduled Castes and Scheduled Tribes—Article 16 (4) basically permits a reasonable classification which is the basic facet of the equality clause as enshrined under Article 14 of the Constitution of India—Applying the aforesaid test, it is quite clear that Regulation 4(iii-a) confers the power on the Union of India to issue a notification—It has so done by issuing a notification—It has limited seven attempts to the Other Backward Classes—the same is a reasonable exercise of power and a guided one—As far as the Scheduled Castes and Scheduled Tribes are concerned, number of attempts is not fixed—In the opinion of the Union of India they are to be given chances to compete to the best of their ability and come to the mainstream—That apart, though unlimited chances are given, yet the upper age limit is prescribed—Thus, it is not unreasonable—Quite apart from the above, it is noteworthy in view of the historical backdrop of the constitutional provisions—Hence, we are of the considered opinion that it meets the test of reasonable classification—Judged from these angles, we are of the considered opinion the said Regulation does not suffer from the vice of Articles 14 or 16 of the Constitution of India.

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Sh. Ghanshyam Dass Gupta & Anr. v.
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EMPLOYEES' STATE LNSURANCE ACT, 1948—Applicability to Consultancy Organisation—Appellant-a professional Architectural and Engineering Consultancy Organization contended that it was not a shop, factory or establishment; therefore not covered under the Act—The coverage impugned by the Appellant under Section 75 of the ESI Act—the challenge was negatived by order dated 15.02.2002, hence statutory appeal. Held—Issue squarely covered by *Kirloskar Consultants Ltd* Case (2001) 1SCC57 wherein similar activities were held to be commercial or economical and would amount to parting with the same at a "price" and therefore the establishment interpreted to be a "shop" and covered under the ESI Act.—Held that narrow interpretation if given to the ESI Act would defeat the very purpose of the enactment.

Consulting Engineering Services (India) Pvt. Ltd. v... *The Chairman, ESI Corporation & Ors.*..... *549*

GENERAL CAUSES ACT, 1897—Section 27—Transfer of Property Act, 1882—Section 106—Appellant Partnership firm tenant of suit property on monthly basis—Notice dated 11.05.2009 sent by respondent/landlord terminating tenancy—Appellant refused to accept notice—Second notice dated 5.6.2009 terminating tenancy also refused—Application u/Order 12 Rule 6 allowed by trial court—Contention of appellant that notice not received and service report manipulated—Also that since service denied, trial court should have recorded evidence

time from 4.3.1980 till 15.10.1985 to arrive at the conclusion that the Petition was time-barred—Assuming that Section 14 of Limitation Act applied, the period to be excluded would commence on the date on which the Petition/application under Section 33 of the 1940 Act had been filed, that is, February, 1981, ending on 15.10.1985, the day when it was allowed—Even if one were to further exclude the period which was spent in obtaining a Certified Copy of that Order, time would unquestionably commence rerunning on 25.11.1985 when the Certified Copy was received—Since the Petition under Section 20 of 1940 Act was filed on 29.5.1987, seven days already expired from the date on which the cause of action to file Section-20 Petition under 1940 Act had arisen—The cause of action does not start on the date when a claim is repudiated; it arises when the dispute actually arises—Adjudged from any standpoint, the Petition under Section 20 of 1940 Act is hopelessly barred by limitation—The dispute needs burial, even if thirty-five years too late.

Delhi State Industrial & Infrastructure Dev. Corpn. Ltd. v. *Road Master Industries India (P) Ltd.* *536*

INDIAN PENAL CODE, 1860—Sections 302/328—Case of prosecution that deceased (wife of appellant) was living with him—On date of incident, she was poisoned by the appellant and she died three days later in hospital—Trial Court convicted appellant u/s 302 and 328—Case of prosecution rested on dying declaration (DD) Ex. PW7/A recorded by IO—IO could not appear as witness as he died—Parents of deceased testified against appellant in court—FSL result indicated Aluminum Phosphide in vicera—Autopsy surgeon opined cause of death as Aluminum Phosphide poisoning—Held, DD relied upon by trial court to convict did not inspire confidence—Two DDs on record—First DD was what was stated by the deceased to doctor who recorded MLC EX. PW9/A in which deceased stated that she had consumed Diazepam tablets and some printing dye in the morning following dispute with her

husband—Second DD recorded by IO Ex. PW7/A—On MLC Ex. PW9/A, two certificates of same date, one declaring "fit for statement" and another as "un-fit"—Fitness certificate not proved making statement Ex. PW7/A doubtful—PW6 ("mother of deceased") and PW7 ("father of deceased") gave contradictory statements with regard to the statements allegedly given by the deceased—Trial Court wrongly discarded MLC Ex. PW9/A by recording that the doctor who had prepared MLC had not been examined—Trial Court failed to note that PW9, Record Clerk had proved MLC—PW2 who took deceased to hospital testified that deceased was conscious and did not say anything about appellant—This lends credibility to history recorded in MLC Ex . PW9/A which was recorded immediately upon deceased's arrival at hospital—No mention in DD Ex. PW7/A with regard to nature, odour or colour of the drink which was administered to deceased—If Aluminum Phosphide had been administered to deceased she would have immediately noticed the foul smell and odour and would have remarked about the same in her DD, as where she had given details about everything else, she would not have forgotten to mention the odour of the medicine which she was allegedly made to drink by the accused—None of the DDs mentioned fact that liquid given to her had foul smell—Aluminum Phosphide because of its distinct smell and other properties can only be administered to an un-willing person by force—No suggestion of any force having been applied by accused in administering concoction as per DD Ex. PW7/A—Not much credence can be placed on Ex. PW7/A which is not free from doubt—Conviction can be based on DD provided it is established that the DD is of the person of whom it purports to be and the statement contained therein is true—DD Ex. PW7/A does not inspire confidence, moreso because of presence of another DD in which the story is of suicide—Benefit of doubt given to accused—Accused acquitted—Appeal allowed.

Shri Nitish Yadav v. *The State* *461*

— Sections 302/323/34—Case of prosecution that deceased running Kirana shop - On day of incident appellant no. 1 after purchasing bidi from deceased claimed they were fake—Verbal altercation ensued which was put to an end by intervention of others—Appellants along with brother of appellant no, 1 reached spot—Appellant no. 2 gave a hammer blow to deceased on the back of head while third accused (before Juvenile Justice Board) inflicted blows with iron rod—However, iron rod hit the head of appellant no. 1—In the course of fight, PW4 and PW7 also sustained injuries—During fight, appellant no. 2 gave hammer blow on head of deceased and the three accused fled from the spot throwing iron rod and hammer in the drain—Deceased declared brought dead to hospital—Trial Court convicted the two appellants for the offences u/s 302/323/34—During course of appeal, appellant no. 1 died—Held, the fact that weapons not brought by appellants but were picked up from spot (appellants did not come prepared), one of the accused (juvenile) also received injuries, appellant no. 1 also received knife blow on head, goes to show the occurrence of a sudden and un-premeditated quarrel—Circumstances surrounding the act sufficient to conclude that offence u/s 304 Part I IPC and not 302 IPC made out—Appeal partly allowed.

Shankar Lal & Anr. v. *State* *480*

MOTOR VEHICLE ACT, 1988—Section 66, 177, 7, 192A, 207—Respondent/accused while driving RTV stopped to pick-up passengers in violation of permit conditions and also found not to be wearing uniform—Respondent challaned u/s 66/192A and vehicle impounded u/s 207—Trial Court held respondent guilty for offence u/s 66/192A and sentenced—Appeal—Appeal allowed, judgment of conviction and order on sentence set aside by Appellate Court—State preferred appeal before High Court—Held, not correct for accused to argue that challan issued was vague as notice to show cause specifically mentioned provisions of the Act—Unless accused is able to establish that defect in framing charges had caused real

prejudice to him and that he was not informed as to real case against him as a result of which he could not defend himself properly, no interference is required—Merely because accused challaned by an officer of the rank of sub-inspector could not be treated as a ground to set aside impugned judgment of conviction and sentence as the notice to show cause specifically mentioned the offences stated to have been committed by the accused and based on notice, he was charged and after trial held guilty of the offences—Appeal allowed and judgment of appellate Court set aside—Judgment on conviction and order on sentence of M.M. upheld.

State v. *Manoj Kumar* *472*

PREVENTION OF CORRUPTION ACT, 1998—Sections 7 & 13—Appellant challenged judgment and order on sentence, convicting him for offences punishable under Section 7 and 13(2) read with Section 13 (1) (d) of Act—As per appellant, mere recovery of money is not sufficient to raise presumption and filing of complaint by CBI cannot be taken as substantive evidence of proof of allegation of demand of illegal gratification—CBI urged, initial demand at time of trap, acceptance, recovery and motive proved by prosecution; thus appeal devoid of any merits—Held: Where receipt of illegal gratification was proved, Court was under a legal obligation to presume that such gratification was accepted as reward for doing a public duty—Prosecution proved beyond reasonable doubt the charge under the Act.

Harish Kumar v. *CBI* *642*

— Sections 7, 13 & 20—Aggrieved appellant challenged judgment and order on sentence, convicting him for offences punishable under Section 7 and 13(1)(d) of Act—As per Respondent, three essentials namely demand, acceptance of bribe and recovery of demanded money proved; thus conviction not bad in law—Appellant urged all these essentials for conviction not proved as testimony of prosecution witnesses full of doubts

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W.P. (C)

BALWANT KUMAR ....PETITIONER

VERSUS

UOI & ORS. ....RESPONDENT

(SUDERSHAN KUMAR MISRA, J.)

W.P. (C) NO. : 10847/2009 DATE OF DECISION: 04.01.2011

Constitution of India, 1950—Article 226—Petitioner was appointed as Senior Superintendent (Engineer-Civil) at Gaya Airport, Gaya, Bihar on ad hoc basis on 15.12.2000 for a period of six months—Competent Authority approved his appointment on 30.12.2002 until further orders—On 30.11.2004, the respondent decided to terminate the services of about 133 employees including the petitioner on the ground that these appointments were made without any advertisement, without calling candidates from the employment exchange and without following the recruitment procedure—Appointment had no legal sanctity—Various petitions filed—Same were heard by the Division Bench of Hon'ble High Court of Delhi—Some were disposed of on the basis of the settlement reached between the petitioner and the respondent—Respondent initiated Selection process—Petitioner also received a letter informing him that he may apply for the post within 20 days after receipt of the letter—Petitioner applied for the grade of Junior Executive Engg. (Civil), appeared in the written test—He was not called for interview—He secured only 35% marks in written test—Petition seeking directions to the respondent to allow him to sit for an interview in terms of the order by the Court—The respondent contends that opportunity granted in terms of order

by giving him the necessary age relaxation—Petitioner secured only 35% marks instead of requiring minimum 40%—He failed to qualify the written test and as such he was not called for interview—Held—It is open to an employer to prescribe a minimum mark which, in its own wisdom, indicates a necessary minimum understanding of the subject—There is nothing wrong with prescribing the same minimum pass or qualifying marks for the OBC as well as General categories, while at the same time, reserving separate seats for the two categories—If this is done, then provided the candidate achieves the prescribed minimum, he will then be placed in order of merit amongst other candidates of his own category exclusively, and his selection will not be effected in any way by the marks of candidates of other categories—Merely because the minimum qualifying mark for OBC and General candidates is the same, does not mean that no preference was being given in employment by the respondent's to persons belonging to the OBC category—Writ petition dismissed.

It is open to an employer to prescribe a minimum mark which, in its own wisdom, indicates a necessary minimum understanding of the subject. There is nothing wrong with prescribing the same minimum pass or qualifying marks for the OBC as well as General categories, while at the same time, reserving separate seats for the two categories. If this is done, then provided the candidate achieves the prescribed minimum, he will then be placed in order of merit amongst other candidates of his own category exclusively, and his selection will not be effected in any way by the marks of candidates of other categories. In this way, a candidate with less marks belonging to one category may be selected, while some other candidate with higher marks from some other category may not. This preference to specified categories is valid and within the contemplation of law.

(Para 9)

To my mind, the contention of the petitioner that directions under the aforesaid consent order of 30th April, 2007, to reserve 50% of the existing seats applied even to Group 'B' posts, to which the petitioner was an aspirant, is neither here nor there, because ultimately the petitioner failed to even secure the minimum qualifying marks. Had the petitioner secured the minimum qualifying marks, then the question whether any seats ought to have been reserved as claimed would have been relevant, but not under the present circumstances. This is because even if the seat had been reserved, the petitioner would still not have been eligible for the same due to his failure to secure even the minimum marks prescribed. Furthermore, on the facts, the respondent was under no obligation to reserve seats for the OBC category. In any case, as concluded above, merely because the minimum qualifying mark for OBC and General candidates is the same, does not mean that no preference was being given in employment by the respondent's to persons belonging to the OBC category. **(Para 12)**

Under the circumstances, the relief prayed for cannot be granted to the petitioner. The writ petition is dismissed. **(Para 13)**

Important Issue Involved: (A) Merely because the minimum qualifying mark for OBC and General candidates is the same, does not mean that no preference was being given in employment by the respondent's to persons belonging to the OBC category.

(B) The same minimum pass or qualifying marks can be prescribed for OBC as well as General Categories, reserving separate seats for the two categories.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Santosh Kumar, Advocate.

FOR THE RESPONDENTS : Ms. Anjana Gosain, Ms. Pooja Verma, Advocates for respondents Nos. 2 to 7.

CASE REFERRED TO:

1. *Chhattar Singh* vs. *State of Rajasthan* (1996) 11 SCC 742.

RESULT: Petition dismissed.

SUDERSHAN KUMAR MISRA, J. (Oral)

1. The petitioner seeks directions to the respondents to allow him to sit for an interview for the post of Junior Executive Engg. (Civil) in terms of an order passed by this court on 30th April, 2007, in WP (C) 18661-65 of 2004.

2. It is the petitione's case that he was appointed as a Senior Superintendent (Engineer-Civil) at Gaya Airport, Gaya, Bihar, on an ad hoc basis on 15th December, 2000 for a period of six months. Thereafter, on 30th December, 2002 the competent authority approved his appointment until further orders. On 30th November, 2004 the respondent decided to terminate the services of about 133 employees, including the petitioner, on the ground that these appointments were made without any advertisement; without calling candidates from the employment exchange, and without following the recruitment procedures, and therefore, the appointments including that of the petitioner, had no legal sanctity.

3. Dissatisfied with the order of termination, the petitioner and some other employees moved this Court and other High Courts. On an application of the respondent, the Supreme Court directed that all similar matters pending adjudication before any Court in India be transferred to this Court. A Division Bench of this Court then heard all the writ petitions of the terminated employees and, by a common order, dated 30th April, 2007 disposed of the matter on the basis of a settlement reached between the petitioners and the respondent, with the following directions:

> "1. Petitioner as well as other employees whose services were terminated on similar grounds would be given an opportunity for selection in the proposed recruitment of Group C and D posts.
>
> 2. For Group D posts, suitability of the candidates would be

adjudged by interview and wherever applicable, a trade test for the specific occupation. Additionally, suitability may be adjudged on the basis of familiarity with office procedures, basic knowledge of reading and writing, identification of files, notings thereon etc.

3. For Group C posts, a written objective test, which would assess the aptitude, General Knowledge, the job knowledge, proficiency in English language would be held. A typing test would also be held. However, those of the petitioners/terminated employees who have qualified the typing test of the respondents earlier would be considered for exemption. This would be applicable where the record of typing test passed earlier is available. In addition, candidates would be interviewed.

4. Respondents would make available 50% of the vacancies for the petitioners and others whose services have been terminated subject to their qualifying the objective written/trade test, 50% vacancies to be filled based on the merit amongst the petitioners and others, whose services were terminated subject to their qualifying the written objective and trade test being selected in interview.

5. Age relaxation would also be available to the petitioner and others whose services have been terminated. As regards weightage for experience and knowledge peculiar to the respondent organization, the same stands provided by provision of 50% of the vacancies being made available to them.

We also wish to note that the respondents have estimated the number of vacancies to be around 200 which should reassure the petitioners who are to take the tests in the selection process of having a fair chance, since 50% of the vacancies are proposed to be reserved for the petitioners and others whose services were similarly terminated."

4. The petitioner was interested in recruitment to a Group 'B' post while the terms of the order passed by the Division Bench of this Court on 30th April, 2007 applied to the proposed recruitment of only for the Group 'C' and 'D' posts. Admittedly, that order disposed of all the petitions, including that of the petitioner herein, by a consent order. It is

inconceivable that the petitioner, who was interested only in a Group 'B' post, could have consented to terms which apply only to Group 'C' and 'D' posts. If that were so, it would mean the dismissal of his own claim. Therefore, the said consent order of 30th April, 2007 must be taken to apply to Group B posts also. It appears that initially, even the respondent was of the view that the order would apply equally to those aspiring for Group 'B' post also, and, in fact, allowed the petitioner to sit for the written test in terms of that order; to that extent the mandate of the aforesaid consent order is satisfied.

5. The respondent then initiated the selection process in the light of the aforesaid order. The petitioner also received a letter, dated 9th April, 2008 issued by the respondent, referring to the aforesaid order of this Court of 30th April, 2007, informing him that he may apply for the post within 20 days of the issuance of the letter. Accordingly, the petitioner applied for the grade of Junior Executive Engg. (Civil). He appeared in the written test on 3rd August, 2008. He was however not called for the interview. Pursuant to an application under the RTI Act, the petitioner, inter alia, found out that he had only secured 35% marks in the written test.

6. In its reply, the respondent contends that an opportunity was granted to the petitioner, in terms of the aforesaid order dated 30th April, 2207 in WP (C) 18661-65 of 2004 by giving him the necessary age relaxation. However, the petitioner scored only 35% marks in the written test instead of the required minimum of 40%. Since he had failed to qualify in the written test, the respondent did not call the petitioner for the interview. It is contended that, therefore, the petitioner does not have any basis to impugn the process.

7. In response, the petitioner's counsel submits that the respondent was obliged to prescribe separate minimum pass marks in the written test, with respect to each category i.e. General, OBC, etc. According to him, the respondent was further obliged to prescribe lower minimum qualifying, or pass marks, for OBC candidates such as the petitioner, than what was prescribed for the General category candidates.

8. The respondent states that the fact that he belonged to the OBC category was disclosed by the petitioner for the first time in his rejoinder in this matter. In any case, the cut-off marks for General and OBC

categories were same. However, for candidates belonging to the SC/ST category the minimum passing marks were kept at 35%. In reply, the petitioner submits that there cannot be a common cut-off for candidates belonging to the General and OBC categories. According to him, the prescription of a common cut-off for the two would nullify the benefit of reservation because very idea of reservation implies selection of a less meritorious person, which redeems the constitutional promise of social justice. This contention of the petitioner cannot be accepted for two reasons. Firstly, reservation of posts for OBCs is not mandated by the Constitution. In **Chhattar Singh vs. State of Rajasthan** (1996) 11 SCC 742, the Supreme Court has held in paragraphs 18 and 19 as follows:

> "16. The Constitution has not expressly provided such benefits to the OBCs except by way of specific orders and public notifications by the appropriate Government. It would, therefore, be illogical and unrealistic to think that omission to provide same benefits to OBCs, as was provided to Scheduled Casts and Scheduled Tribes, was void under Article 16(1) and 14 of the Constitution.
>
> 17. Accordingly we are of the view that the OBCs are not entitled to 5% cut off marks in the preliminary examination as provided under proviso to Rule 13."

Secondly, the petitioner, an OBC candidate, was accorded due consideration by the respondent in terms of the orders of the Division Bench of this Court. That is why he was allowed to sit for the written examination. However, the petitioner failed to qualify.

9. It is open to an employer to prescribe a minimum mark which, in its own wisdom, indicates a necessary minimum understanding of the subject. There is nothing wrong with prescribing the same minimum pass or qualifying marks for the OBC as well as General categories, while at the same time, reserving separate seats for the two categories. If this is done, then provided the candidate achieves the prescribed minimum, he will then be placed in order of merit amongst other candidates of his own category exclusively, and his selection will not be effected in any way by the marks of candidates of other categories. In this way, a candidate with less marks belonging to one category may be selected, while some other candidate with higher marks from some other category

may not. This preference to specified categories is valid and within the contemplation of law.

10. In terms of the order dated, 30th April, 2007, 50% of the seats were to be made available to all the petitioners of that writ petition. Although the order did not say so, the respondent appears to have reserved some of those seats for SC/ST and OBC candidates also.

11. When the selection commenced, the respondents permitted the petitioner to participate in that selection by giving him relaxation in age. However, to get the benefit of appointment to a reserved seat, the petitioner had to qualify by scoring at least 40% marks. If the petitioner does not even qualify, then whether any seat is reserved or not for the petitioner's category is immaterial as far as he is concerned. Admittedly, the petitioner scored only 35%. In other words, the petitioner did not even score the minimum qualifying marks.

12. To my mind, the contention of the petitioner that directions under the aforesaid consent order of 30th April, 2007, to reserve 50% of the existing seats applied even to Group 'B' posts, to which the petitioner was an aspirant, is neither here nor there, because ultimately the petitioner failed to even secure the minimum qualifying marks. Had the petitioner secured the minimum qualifying marks, then the question whether any seats ought to have been reserved as claimed would have been relevant, but not under the present circumstances. This is because even if the seat had been reserved, the petitioner would still not have been eligible for the same due to his failure to secure even the minimum marks prescribed. Furthermore, on the facts, the respondent was under no obligation to reserve seats for the OBC category. In any case, as concluded above, merely because the minimum qualifying mark for OBC and General candidates is the same, does not mean that no preference was being given in employment by the respondent's to persons belonging to the OBC category.

13. Under the circumstances, the relief prayed for cannot be granted to the petitioner. The writ petition is dismissed.

ILR (2011) IV DELHI 461
CRL. A.

SHRI NITISH YADAV ....APPELLANT

VERSUS

THE STATE ....RESPONDENT

(BADAR DURREZ AHMED AND MANMOHAN SINGH, JJ.)

CRL A. NO. : 331/1997 DATE OF DECISION: 27.01.2011

Indian Penal Code, 1860—Sections 302/328—Case of prosecution that deceased (wife of appellant) was living with him—On date of incident, she was poisoned by the appellant and she died three days later in hospital—Trial Court convicted appellant u/s 302 and 328—Case of prosecution rested on dying declaration (DD) Ex. PW7/A recorded by IO—IO could not appear as witness as he died—Parents of deceased testified against appellant in court—FSL result indicated Aluminum Phosphide in vicera—Autopsy surgeon opined cause of death as Aluminum Phosphide poisoning—Held, DD relied upon by trial court to convict did not inspire confidence—Two DDs on record—First DD was what was stated by the deceased to doctor who recorded MLC EX. PW9/A in which deceased stated that she had consumed Diazepam tablets and some printing dye in the morning following dispute with her husband—Second DD recorded by IO Ex. PW7/A—On MLC Ex. PW9/A, two certificates of same date, one declaring "fit for statement" and another as "un-fit"—Fitness certificate not proved making statement Ex. PW7/A doubtful—PW6 ("mother of deceased") and PW7 ("father of deceased") gave contradictory statements with regard to the statements allegedly given by the deceased—Trial Court wrongly

discarded MLC Ex. PW9/A by recording that the doctor who had prepared MLC had not been examined—Trial Court failed to note that PW9, Record Clerk had proved MLC—PW2 who took deceased to hospital testified that deceased was conscious and did not say anything about appellant—This lends credibility to history recorded in MLC Ex . PW9/A which was recorded immediately upon deceased's arrival at hospital—No mention in DD Ex. PW7/A with regard to nature, odour or colour of the drink which was administered to deceased—If Aluminum Phosphide had been administered to deceased she would have immediately noticed the foul smell and odour and would have remarked about the same in her DD, as where she had given details about everything else, she would not have forgotten to mention the odour of the medicine which she was allegedly made to drink by the accused—None of the DDs mentioned fact that liquid given to her had foul smell—Aluminum Phosphide because of its distinct smell and other properties can only be administered to an un-willing person by force—No suggestion of any force having been applied by accused in administering concoction as per DD Ex. PW7/A—Not much credence can be placed on Ex. PW7/A which is not free from doubt—Conviction can be based on DD provided it is established that the DD is of the person of whom it purports to be and the statement contained therein is true—DD Ex. PW7/A does not inspire confidence, moreso because of presence of another DD in which the story is of suicide—Benefit of doubt given to accused—Accused acquitted—Appeal allowed.

In view of the foregoing discussion we find that the dying declaration Ex. PW-7/A is not free from doubt, to say the least. It is well settled that conviction can be based on a dying declaration provided it is established that the dying declaration is of the person of whom it purports to be and

that the statement contained therein is also true. In the present case, Ex. PW-7/A does not inspire such confidence. This is also because of the presence of another dying declaration in which the story is of suicide. There is enough doubt in this matter and, therefore, the benefit would have to go to the appellant. Consequently, we allow this appeal and set aside the impugned judgment and order on sentence. The appellant is already on bail. His bail bond stands cancelled and the surety stands discharged. **(Para 21)**

Important Issue Involved: Conviction can be based on DD provided it is established that the DD is of the person of whom it purports to be and the statement contained therein is true.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Vikrant Sarin, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Lao & Ms. Richa Kapoor, Addl. Standing Counsel for the State.

RESULT: Appeal allowed.

BADAR DURREZ AHMED, J (ORAL)

1. This appeal is directed against the judgment of the learned Additional Sessions Judge dated 13.05.1997 whereby the appellant was convicted under Section 302/328 IPC in connection with the death of Seema, who, it is alleged was living with the appellant at the time the incident in question took place on 01.05.1994. Seema was removed to JPN Hospital on that date and she died three days later on 04.05.1994. It is an alleged case of poisoning at the instance of the appellant.

2. The appellant, after being convicted, by virtue of the impugned judgment, was sentenced to rigorous imprisonment for life in respect of the offence under Section 302 IPC and a fine of Rs. 2,000/- was also imposed upon him and in default whereof he was to undergo rigorous

imprisonment for one month. In addition, the appellant was also sentenced to undergo rigorous imprisonment for a period of seven years in respect of the offence under Section 328 IPC and a fine of Rs. 2,000/- was also imposed and in default whereof the appellant was to undergo rigorous imprisonment for one month. All the sentences were directed to run concurrently. The order awarding the sentence was passed on 17.05.1997.

3. The entire case of the prosecution rests on the so-called dying declaration Ex. PW-7/A which was recorded by S.I. Roop Singh who was the Investigating Officer initially. However, S.I. Roop Singh could not be produced before the court, inasmuch as he had passed away on 09.01.1997, before his testimony could be recorded. Apart from the said Ex. PW-7/A, the trial court has also relied on the testimonies of PW-6 Asha (Seema's mother) and PW-7 Kailash Chand Sharma (Seema's father). Reliance was also placed by the trial court on Ex. PW-10/D which is the report of the Forensic Science Laboratory indicating that aluminum phosphide was detected in exhibit 1a (stomach and small intestine with contents) and exhibit 1b (pieces of liver, spleen and kidney). Reliance was also placed on the post-mortem report Ex. PW-10/A which, however, did not indicate any definite opinion as to the cause of death and revealed that viscera had been preserved for the purpose of sending the same to the Forensic Science Laboratory. PW-10 Dr. Lalit Kumar who conducted the post-mortem examination deposed before court, after examining the report received from the Forensic Science Laboratory, that death was caused due to aluminum phosphide poisoning.

4. There were as many as twelve prosecution witnesses and two defence witnesses. The defence witnesses essentially deposed to the effect that the appellant was not in Delhi on 01.05.1994 but was in Ferozpur, Punjab.

5. The learned counsel for the appellant has assailed the impugned judgment and order on sentence on the ground that the trial court had wrongly placed reliance on Ex. PW-7/A, considering it to be the dying declaration of the deceased Seema. He submitted that there is no witness

to the said alleged dying declaration. Furthermore, there is no certificate of fitness with regard to the fitness of Seema prior to her making the dying declaration on 03.05.1994 before the then Investigating Officer S.I. Roop Singh. It was also pointed out by the learned counsel for the appellant that the true and correct dying declaration was not PW-7/A but the MLC Ex. PW-9/A which was prepared at the time when Seema was brought to JPN Hospital on 02.05.1994. In the said MLC Ex. PW-9/A it was recorded by the doctor preparing the MLC that Seema herself had given the history of consuming 'diazepam tablets (20-25)' and of consuming printing dye in the morning following a dispute with her husband. The said MLC was prepared at 9.45 a.m. on 02.05.1994. It also records that the deceased Seema was brought to hospital by Neelam (PW-2). The learned counsel for the appellant, therefore, submitted that the true and correct dying declaration was the one given to the doctor, an independent person, who recorded the history as given by the patient herself on the MLC Ex. PW-9/A. If that were the case, then it is apparent that Seema had committed suicide, inasmuch as she had herself consumed diazepam tablets and consumed printing dye.

6. In any event the learned counsel for the appellant submitted that as there were two purported dying declarations, there was enough doubt in the matter and the benefit of which would have to be given to the appellant. The learned counsel for the appellant also placed before us some literature with regard to aluminum phosphide poisoning. Importantly he submitted that aluminum phosphide was usually used as a rodenticide and that, although it was not soluble in water, it actively reacted with water to form aluminum hydroxide and phosphine gas. The exact chemical reaction that takes place when aluminum phosphide reacts with water is as under:

ALP + 3H2 O = AL (OH)3 and PH3

(Aluminum Phosphide + Water = Aluminum Hydroxide + Phosphine)

7. From the aforesaid he submitted that once aluminum phosphide

is placed in water it immediately reacts and releases phosphine gas leaving a residue of aluminum hydroxide. He submitted that aluminum phosphide as available commercially has a very bad odour and smells like garlic or dead fish and, as such, it would have been immediately noticed by Seema if it were true that she was administered the same by the appellant as alleged in Ex. PW-7/A. But, the statement in Ex. PW-7/A does not mention anything about the odour of the medicine which was said to have been given to her. This, also, according to the learned counsel for the appellant raises serious doubts with regard to the authenticity of the alleged dying declaration Ex. PW-7/A.

8. The learned counsel for the appellant further submitted that the testimonies of PW-6 and PW-7 who are the parents of deceased Seema do not inspire much confidence, inasmuch as they are clearly interested in the sense that they were inimical towards the appellant as would be evident from what is stated in Ex. PW-7/A itself as also in their testimonies. They were, therefore, interested in seeing that the appellant, somehow or the other, is convicted, now that their daughter had lost her life. The learned counsel for the appellant also pointed out that PW-6 and PW-7 had also not stated in their statements recorded under Section 161 Cr.P.C. that the dying declaration of deceased Seema was recorded in their presence.

9. Mr Lao, appearing on behalf of the State, supported the judgment of the trial court as also the order on sentence. He stated that the trial court was correct in convicting the appellant on the basis of the dying declaration Ex. PW-7/A which was recorded by the then Investigating Officer S.I. Roop Singh and the said dying declaration had also been signed by the deceased Seema. He submitted that the said signature has subsequently been identified by her father Kailash Chand Sharma (PW-7).

10. He also submitted that the medical evidence also indicates that Seema died due to aluminum phosphide poisoning. According to him, this is in consonance with what is stated in the dying declaration Ex. PW-

7/A. He also submitted that the conduct of the appellant is also something which ought to be given due consideration, inasmuch as, after administering the said poison, the appellant disappeared from the scene and that he could only be arrested several days later, on 09.05.1994.

11. We have examined the testimonies of the witness as well as the exhibits. After hearing counsel for the parties, we are of the view that the appellant has to be given the benefit of doubt. There are several reasons for this.

12. First of all, there are two so-called dying declarations on record. The first being what was stated by Seema herself before the Doctor who recorded her history on the MLC Ex.PW-9/A. In the said document, it was stated that she consumed diazepam tablets and some printing dye in the morning following a dispute with her husband. The said MLC Ex. PW9/A (except the purported statement of fitness at mark X) has been proved by PW-9 Om Parkash who is the record clerk working at JPN Hospital. The history given in the MLC Ex.PW-9/A suggests that the deceased had herself consumed diazepam tablets and some printing dye in the morning. She, therefore, according to the said statement committed suicide. Of course, the presence of diazepam or any other printing dye toxin has not been disclosed in the FSL report, but, we must remember that Seema died three days later on 4.5.1994. Consequently, there is a doubt which has arisen as to whether the statement given by Seema to the Doctor who recorded the MLC is the true and correct statement or whether the statement allegedly given by Seema to the Investigating Officer SI Roop Singh is the one which is true and correct.

13. Secondly, on the MLC Ex.PW-9/A there are two certificates which are both dated 2.5.1994. One certificate says that Seema was unfit for making a statement. The other certificate mentions that she was "fit at the moment" and this statement is at mark X. Somebody has signed below this statement at mark X. No time has been mentioned under either of the statements. With regard to the statement at mark 'X', PW-9 Om Prakash, the record clerk, who came from JPN Hospital, stated categorically that he could not identify the handwriting and signature at portion mark 'X'. The clear implication of which is that the certificate at mark 'X' has not been established by the prosecution. This will eliminate the certificate indicating "fit at the moment". We are, therefore, left with only one certificate which says "unfit for making a statement".

This in itself would make the statement Ex.PW-7/A of a very doubtful character, to say the least.

14. Thirdly, PW-6 Asha (Seema.s mother) and PW-7 Kailash Chand Sharma (Seema.s father) made contradictory statements with regard to the statement allegedly given by Seema. PW-7 Kailash Chand Sharma stated that he had met Seema in the hospital on 2.5.1994 at about 12-12.30 noon. He further stated that no statement was made by her in the day and that police officials came in the evening and Seema gave her statement to the police at about 12 midnight in their presence. Two issues arise out of this deposition. The first being that if the statement of Seema was recorded by IO Roop Singh in the presence of PW-6 and PW-7 then why were they not shown as witnesses. The second issue that arises is that why did PW-7 not say that the statement of Seema was recorded in his presence when he gave his statement under Section 161 Cr.P.C. Both these questions remain unanswered.

15. Coming to the testimony of PW-6 Asha (Seema.s mother), it appears that when she went to the hospital on 02.05.1994, Seema was woken up but she did not say anything and she only gave her statement in the night intervening 2/3.5.1994 at about 10.00 p.m. and that, too, to the mother and father (i.e., PW-6 and PW-7). But this fact is not corroborated by PW-7 who did not mention about any statement having been given by Seema to them at 10.00 p.m. Another issue that arises is that if Seema had woken up in the afternoon and she was fit throughout the afternoon and evening as suggested by PW-6, then, why did the police not record her statement throughout the afternoon and evening and wait till midnight to record the so-called dying declaration Ex.PW-7/A?

16. Fourthly, we are not in agreement with the findings recorded by the trial court whereby the trial court discarded the MLC Ex.PW-9/A in toto by recording that the doctor who recorded the said MLC had not been examined and, therefore, no reliance should be placed on the history recorded in the MLC. The trial court failed to note that PW-9 Om Prakash, the record clerk, who had been produced by the prosecution had proved the MLC (except the portion at mark X) and had categorically stated that the MLC was recorded by Dr Rakesh Dogra whose handwriting and signature he could identify. Thus, even as per the prosecution case, the MLC Ex.PW-9/A stood proved and established (except the portion

marked X regarding which we have already indicated the same to be not proved).

17. Fifthly, we may point out that PW-2 Neelam, the person who took Seema to JPN Hospital, stated clearly that Seema, at that point of time, was conscious but she did not say anything about the appellant. She is also a witness to the fact that at the time Seema arrived at the hospital, she was conscious. This also lends credibility to the history recorded in the MLC Ex.PW-9/A which was recorded immediately upon her arrival at the hospital at 9.45 a.m. on 02.05.1994.

18. Sixthly, while the so-called dying declaration Ex. PW 7/A is fairly detailed there is no mention of the nature, odour or colour of the drink that was administered to her. The English translation of Ex.PW-7/A is set out as under:

> "I used to reside along with my parents at the aforementioned address. In the year 1990, I passed my inter school Examination and thereafter, I tried to find some employment and I found a job at 'Dear Security Service, 18-Jwala Puri. The proprietor of the said firm was Anita Yadav and the same was run by Nitish Yadav. In October 1991, Nitish Yadav employed me as a typist in the said firm where I worked for a period of eight months. Thereafter, Nitish Yadav opened an office of Screen printing at Mahavir Nagar and he made me the proprietor of the same and opened a bank account in my name. There was no money in the bank and Nitish started getting fake cheques issued from me. I was entangled by Nitish and ill acts were committed in my name. Thereafter, Nitish entangled me in his web and got himself photographed with me as his bride after making me eat some unknown substance. Afterwards I was completely trapped by him. I broke my relations with my parents on 15.09.1993 and Nitish started living with me at different places. Nitish made me eat some unknown substances and maintained illicit relations with me and tattooed the letters "NN" on the elbow of my left hand. He threatened me that in case I married anyone else, he would show my tattooed mark to those persons. He asked me to marry him although he was already married. About four months ago, he brought me to S-56, Pandav Nagar where he started ignoring me and asked me to return to Mangolpuri but I refused.

> On 01.05.1994 in the morning time I was not feeling well and I asked Nitish to bring some medicine for me. Nitish went outside the house and returned after a short while. He poured some powder in a glass and asked me to drink that and told that doctor would be coming shortly. He asked me drink that medicine and I drank the same. After a short while, I started feeling giddy and I fell on the charpoy (cot). I do not know as to what medicine was administered to me by Nitish as a result of which I developed diarrhea. I do not know as to where Nitish went thereafter. I, subsequently was taken to the hospital by my one acquaintance Neelam and I lost my senses. I do not know about the hospital where Neelam got me admitted. Nitish has committed fraud with me and has administered poison to me on the pretext of medicine. Legal action may be taken against him. I have heard the statement and it is correct.
>
> Sd/- Seema Sharma (In English)
> Attested by:
> Sd/- Roop Singh (In English)
> S.I. P.S. T. Puri
> 3.5.94"
> (underlying added)

19. On examining the said Ex. PW-7/A, it is apparent that it contains several details about the past relationship between Seema, her parents and Nitish Yadav. It is apparent that Seema.s parents and Nitish Yadav were not in the best of terms, to say the least. In fact, it is because of Nitish Yadav that Seema also broke her relations with her parents. It is also pointed out by the learned counsel for the appellant that the allegation that the letters "NN" had been tattooed on Seema.s left elbow mean nothing because the initials of the appellant were "NY" Furthermore, from Ex. PW-7/A it is apparent that the allegation is that Nitish Yadav poured some powder in a glass and asked Seema to drink the same and told her that the doctor would be coming shortly. Thereafter, she drank the same and after a short while she started feeling giddy and fell on the cot. It is stated that she did not know as to what medicine was administered to her by the appellant as a result of which she developed diarrhea and vomiting. Aluminum phosphide is usually formulated as a greenish grey tablet of 3 gm and the tablet has a typical odour of garlic or a dead fish.

It is further found that it is highly toxic and even 1/4th of a tablet is lethal in so far as the adults are concerned. It is an admitted position that aluminium phosphide is a greenish grey solid at room temperature and that phosphine gas, which is produced by the reaction of aluminum phosphide in contact with water (even at ambient humidity), has an odour similar to garlic or decaying fish (because of the presence of impurities in the comnmercially available aluminium phosphide). Aluminum phosphide is not soluble in water but is highly reactive with water, and such reaction produces phosphine gas and leaves a residue of aluminum hydroxide which is not toxic. All this suggests that if what was administered to Seema was aluminum phosphide, she would have immediately noticed the foul smell and odour and would have remarked about the same in the statement Ex. PW-7/A. We say this because where she has given details about everything else, she would not have forgotten to mention the odour of the "medicine" which she was allegedly made to drink by the appellant. In fact, neither PW-6 nor PW-7 have mentioned the fact that the liquid which was given to her had a foul smell.

20. Most cases of aluminum phosphide poisoning are either suicidal or accidental and rarely homicidal (see : "Acute aluminium phosphide poisoning : an update : A. Wahab et al; Hong Kong Journal of Emergency Medicine 2008; 15:152-155). Aluminium phosphide is available in the form of 3 gm tablets or 0.6 gm pellets and also in sachets. The tablets, pellets or powder generally contain about 56% of Aluminium Phosphide (as the active ingredient) and 44% of Aluminium Carbonate (as the inactive ingredient). The aluminium carbonate component is added to prevent self-ignition of phosphine which is released when Aluminium Phosphide comes in contact with moisture or water. Phosphine is a colourless, odourless gas. But because the commercially available form of Aluminium Phosphide contains added inactive ingredients and impurities, when phosphine is released there is a distinct and strong smell of garlic or fish. Because of this distinct odour it would not be possible to pass off aluminium phosphide as some normal medicine. It can only be administered to an unwilling person through force. There is no suggestion of any force having been applied by Nitish Yadav in administering the concoction even as per Ex. PW-7/A. It is also for this reason that we do not place much credence on Ex. PW-7/A.

21. In view of the foregoing discussion we find that the dying

declaration Ex. PW-7/A is not free from doubt, to say the least. It is well settled that conviction can be based on a dying declaration provided it is established that the dying declaration is of the person of whom it purports to be and that the statement contained therein is also true. In the present case, Ex. PW-7/A does not inspire such confidence. This is also because of the presence of another dying declaration in which the story is of suicide. There is enough doubt in this matter and, therefore, the benefit would have to go to the appellant. Consequently, we allow this appeal and set aside the impugned judgment and order on sentence. The appellant is already on bail. His bail bond stands cancelled and the surety stands discharged.

ILR (2011) IV DELHI 472
CRL. APPEAL

STATE **....PETITIONER**

VERSUS

MANOJ KUMAR **....RESPONDENT**

(HIMA KOHLI, J)

CRL. APPEAL NO. : 293/2011 DATE OF DECISION: 23.02.2011

Motor Vehicle Act, 1988—Section 66, 177, 7, 192A, 207—Respondent/accused while driving RTV stopped to pick-up passengers in violation of permit conditions and also found not to be wearing uniform—Respondent challaned u/s 66/192A and vehicle impounded u/s 207—Trial Court held respondent guilty for offence u/s 66/192A and sentenced—Appeal—Appeal allowed, judgment of conviction and order on sentence set aside by Appellate Court—State preferred appeal before High Court—Held, not correct for accused to argue that challan issued was vague as notice to

show cause specifically mentioned provisions of the Act—Unless accused is able to establish that defect in framing charges had caused real prejudice to him and that he was not informed as to real case against him as a result of which he could not defend himself properly, no interference is required—Merely because accused challaned by an officer of the rank of sub-inspector could not be treated as a ground to set aside impugned judgment of conviction and sentence as the notice to show cause specifically mentioned the offences stated to have been committed by the accused and based on notice, he was charged and after trial held guilty of the offences—Appeal allowed and judgment of appellate Court set aside—Judgment on conviction and order on sentence of M.M. upheld.

In the aforesaid facts and circumstances, this Court is inclined to agree with the submission made on behalf of the State that merely because the respondent was challaned by an officer of the rank of Sub-Inspector, could not be treated as a ground to set aside the impugned judgment of conviction and the order on sentence, as the notice to show cause specifically mentioned the offences stated to have been committed by the respondent/accused under the Act and based on the said notice to show cause, the respondent was charged and after conducting the trial, he was held guilty of the offence punishable under Sections 66/192-A of the Act, and called upon to pay a fine of Rs. 5,000/-.

(Para 11)

Important Issue Involved: Unless accused is able to establish that defect in framing charges had caused real prejudice to him and that he was not informed as to real case against him as a result of which he could not defend himself properly, no interference by appellate Court is called for.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. M.N. Dudeja, App for the State.

FOR THE RESPONDENT : Mr. S.K. Anand, Advocate.

CASES REFERRED TO:

1. *Sanichar Sahni* vs. *State of Bihar* reported as (2009) 7 SCC 198.
2. *Annareddy Sambasiva Reddy* vs. *State of A.P.* reported as (2009) 12 SCC 546.
3. *M.C. Mehta* vs. *Union of India & Ors.* reported as 69(1998) DLT 769.

RESULT: Appeal Allowed.

HIMA KOHLI, J. (Oral)

1. The present appeal arises out of the judgment and order dated 24.04.2007 passed by the learned Additional Sessions Judge, setting aside the judgment of conviction dated 03.03.2007 passed by the learned Metropolitan Magistrate in a case pertaining to an offence punishable under Sections 66(1)/192-A/7/177 of the Motor Vehicle Act, 1988 (hereinafter referred to as **'the Act'**). While passing the judgment of conviction dated 03.03.2007, the learned Metropolitan Magistrate had held that there was no evidence to show that the respondent/accused was not wearing the uniform while driving the RTV and, therefore, charges under Sections 7/177 of the Act were not proved. However, the respondent was held guilty for the offence punishable under Sections 66/192-A of the Act. By the order on sentence dated 24.03.2007, the respondent/accused was sentenced to pay a fine of Rs. 5,000/- for the offence punishable under Sections 66/192-A of the Act. Though the fine was deposited, the respondent/accused preferred an appeal under Section 374 of the Cr.PC against the aforesaid judgment of conviction and the order on sentence. The said appeal was allowed by the impugned judgment and the judgment of conviction and the order on sentence of the trial court were set aside. Aggrieved by the aforesaid judgment of the Appellate Court, the State has preferred the present appeal.

2. Briefly stated, the facts of the case, as per the State, are that on 30.06.2004 at about 12:30 PM, the respondent/accused, while driving

RTV No.DL-1VA-2858, stopped the said vehicle at Ajmeri Gate Bus Stand and started picking up passengers by calling them to be taken to Khajuri Khas and Gagan, in violation of the permit conditions as the accused had been given a C.C. permit only. He was also found to be not wearing his uniform at the time of the said incident. The respondent was challaned for violation of conditions of permit u/s 66/192A of the Act and his vehicle was impounded as per Section 207 of the CrPC. Notice to show cause was served on the respondent/accused, to which he pleaded not guilty and claimed trial. The prosecution examined two witnesses namely, PW1, SI Attar Singh, the officer who challaned the accused and PW-2, Ct.Kuldeep, who was accompanying PW-1 during all the proceedings. After completion of the evidence, statement of the accused was recorded by the learned Metropolitan Magistrate. In his statement, the respondent/accused stated that he had a C.C. permit only and that on 30.06.2004 at about 12:30 PM, he had been carrying passengers in his RTV for the destination of Khajuri Khas and Gagan by charging money from them.

3. The argument of the counsel for the respondent/accused before the learned Metropolitan Magistrate was that not only was the RTV improperly impounded, the challan issued to the respondent/accused was also improper. In this regard, he sought to rely on the judgment of the Supreme Court in the case of **M.C. Mehta vs. Union of India & Ors.** reported as 69(1998) DLT 769, to state that as per the guidelines laid down therein, flying squads made up of inter-departmental teams headed by an SDM were to be constituted and only such squads could enforce the guidelines/directions laid down by the Supreme Court and exercise powers under Section 207 as well as Section 84 of the Motor Vehicles Act. The aforesaid submission made on behalf of the respondent/accused was rejected by the learned Metropolitan Magistrate, by holding that the guidelines laid down in the aforesaid Supreme Court decision were in addition to the other responsibilities enjoined on the owner and driver of the vehicle under the Act and that the powers under Section 207 of the Act were not meant to be only exercised by the SDM or ACP. In light of these observations, it was held that the respondent/accused was not driving the vehicle as per the scheme of C.C. permit. As a result, while acquitting the respondent/accused in respect of charges against him under Sections 7/177 of the Act, for not wearing the uniform, he was held guilty for the offence punishable under Sections 66/192-A of the Act.

4. In appeal, the learned Additional Sessions Judge differed from the conclusion arrived at by the trial court and set aside the said judgment on the ground that once a notice was given to the respondent/accused under Section 251 of the Cr.PC, for violation of guidelines of the Supreme Court, it was essential that the directions given in the case of **M.C. Mehta** (supra) be followed in totality. It was held that since the respondent had been challaned by an officer below the rank of the Assistant Commissioner of Police, his conviction based on such a challan was bad in the eyes of law and hence, ordered to be set aside.

5. Learned APP for the State submits that the Appellate Court erred in reversing the findings of the learned Metropolitan Magistrate inasmuch as the said Court erred in overlooking the fact that the respondent/accused was not only issued a notice to show cause for violation of the guidelines laid down by the Supreme Court in the case of **M.C. Mehta** (supra), but was also challaned for violation of other relevant provisions under the Act and the Delhi Motor Vehicle Rules and, therefore, merely because the challan was issued by a Sub-Inspector to the respondent/accused would not make the entire proceedings bad in law, as the challan was thereafter forwarded to the court of competent jurisdiction for being tried in accordance with law.

6. This Court has perused the impugned judgment dated 24.04.2007 passed by the learned Additional Sessions Judge as also the judgment of conviction dated 03.03.2007 and the order on sentence dated 24.03.2007 passed by the learned Metropolitan Magistrate. A perusal of the notice to show cause dated 19.05.2005, issued by the learned Metropolitan Magistrate to the respondent/accused, shows that he was informed that on the relevant date, time and place, he was found picking and dropping passengers and calling upon them and while doing so, he had stopped his RTV away from the designated Bus Stop in violation of the guidelines issued by the Supreme Court of India. Secondly, he was informed that on the relevant date, time and place, he was unable to produce the original documents in respect of the vehicle and was also found to be not wearing his dress/uniform. As a result, he was issued a notice to show cause as to why he should not be tried for the offences under Sections 66(1) read with Section 192-A of the Act and Sections 7/130 of the Delhi Motor Vehicle Rules read with Section 177 of the Act. As the respondent/accused

pleaded that he was not guilty and claimed trial, the matter was taken to trial.

7. The learned APP for the State has argued that at this stage, it would not be correct for the appellant to argue that the challan issued to him was vague and he was unaware of the line of defence that he could have taken, as the notice to show cause issued to the respondent/accused, specifically mentions the provisions of the Act in respect of which, it was claimed that he had committed an offence. There is merit in the aforesaid submission. Further, it is also settled law that unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him, as a result of which he could not defend himself properly, no interference is required on mere technicalities. This view was taken by the Supreme Court in the case of **Sanichar Sahni v. State of Bihar** reported as (2009) 7 SCC 198 and reiterated in **Annareddy Sambasiva Reddy v. State of A.P.** reported as (2009) 12 SCC 546, where it was held –

> **"55.** In unmistakable terms, Section 464 specifies that a finding or sentence of a court shall not be set aside merely on the ground that a charge was not framed or that charge was defective unless it has occasioned in prejudice. Because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if the accused has not been adversely affected thereby. If the ingredients of the section are obvious or implicit, conviction in regard thereto can be sustained irrespective of the fact that the said section has not been mentioned."

In the present case, the appellant was informed of the offences against him in the notice to show cause, but even if the argument urged on his behalf is accepted that he was unaware of the offences charged against him, then also no prejudice caused to him has been shown on account of such an omission, so as to render the conviction bad.

8. In the present case, vide order dated 19.05.2005, after hearing the parties on the point of charge, the learned Metropolitan Magistrate found that prima facie charge under Section 66/192 and Section 7/130 read with Section 177 of the Act was made out against the respondent/

accused. Pertinently, the provision of Section 66 of the Act, which deals with necessity for permits falls under Chapter V of the Act which deals with control of transport vehicles and lays down that no owner of a motor vehicle would be permitted to use the vehicle as a transport vehicle in any public place, save in accordance with the permit granted, authorizing him to use the said vehicle in the manner so permitted. Section 192A falls under Chapter XIII of the Act, which pertains to offences, penalties and procedure. The aforesaid provision stipulates that whoever drives a motor vehicle or allows a motor vehicle to be used, in contravention of the provisions of Section 39, shall be punishable for the first offence with a fine which may extend to Rs. 5,000/- but shall not be less than Rs. 2,000/- and for second or subsequent offence with imprisonment which may extend to one year or with fine which may extend to Rs. 10,000/- but shall not be less than Rs. 5,000/- or both.

9. In the case of **M.C. Mehta** (supra), relied upon by the learned counsel for the respondent, the Supreme Court, while exercising its powers under Article 32 read with Article 142 of the Constitution of India, issued directions to the police and all other authorities entrusted with the administration and enforcement of the Motor Vehicles Act and generally with the control of traffic, to take certain steps to ensure that transport vehicles are used in a manner so as not to imperil public safety. One of the guidelines of the Supreme Court was as below: -

> "…….
>
> (e) Any breach of the aforesaid directions by any person, apart from entailing other legal consequences, be dealt with as contravention of the conditions of the permit, which could entail suspension/cancellation of the permit and impounding of the vehicle.
>
> …
>
> (g) To enforce these directions, flying squads made up for inter-departmental teams headed by an SDM shall be constituted and they shall exercise powers under Section 207 as well as Section 84 of the Motor Vehicle Act.
>
> The Government is directed to notify under Section 86(4) the officers of the rank of Assistant Commissioner of Police or

above so that these officers are also utilized for constituting the flying squads."

10. A perusal of the aforesaid guidelines shows that the Supreme Court was mindful of the fact that the said guidelines were laid down and were to be given effect to, over and above other legal provisions as set out in the Statute. Therefore, the learned Metropolitan Magistrate was quite justified in holding that the guidelines formulated by the Supreme Court in the case of **M.C.Mehta** (supra) did not mandate that the provisions of the Act would be set to naught or would stand substituted. Rather, the guidelines were to be in addition to the mandate of the Statute. The intent and purpose of constituting flying squads was to ensure enforcement of the directions issued by the Supreme Court and for exercise of powers under Section 207 of the Act as also Section 84 of the Act. Section 207 of the Act empowers any police officer or other person authorized in this behalf by the State Government to detain the vehicle used without certificate of registration permit. Section 84 of the Act lays down general conditions attaching to all permits. In such circumstances, it cannot be held that the guidelines laid down by the Supreme Court were in derogation of the Act. Rather, the said guidelines only supplemented the Motor Vehicle Act and were laid down to ensure that transport vehicles followed public safety norms on the roads of the NCR and NCT of Delhi by operating, within speed limit, without overtaking any other four wheeled vehicle, by confining themselves to bus lanes, and ensuring that the bus halted only at the bus stops designated for the said purpose etc.

11. In the aforesaid facts and circumstances, this Court is inclined to agree with the submission made on behalf of the State that merely because the respondent was challaned by an officer of the rank of Sub-Inspector, could not be treated as a ground to set aside the impugned judgment of conviction and the order on sentence, as the notice to show cause specifically mentioned the offences stated to have been committed by the respondent/accused under the Act and based on the said notice to show cause, the respondent was charged and after conducting the trial, he was held guilty of the offence punishable under Sections 66/192-A of the Act, and called upon to pay a fine of Rs. 5,000/-.

12. For the aforesaid reasons, the appeal is allowed and the impugned judgment dated 24.04.2007 passed by the appellate Court is set aside,

while upholding the judgment of conviction dated 03.03.2007 and the order on sentence dated 24.03.2007 passed by the learned MM.

13. As it is stated by the learned APP for the State that the respondent/accused has withdrawn the fine of Rs. 5,000/- deposited by him earlier, he is permitted to deposit the fine of Rs. 5,000/- in the concerned court, within four weeks, or in the alternate, show proof of deposit made earlier, to the said court.

14. The appeal is disposed of. There shall however be no order as to costs.

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CRL. A.

SHANKAR LAL & ANR. ....APPELLANTS

VERSUS

STATE ....RESPONDENT

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

CRL. A. NO. : 27/1998 DATE OF DECISION : 14.03.2011

Indian Penal Code, 1860—Sections 302/323/34—Case of prosecution that deceased running Kirana shop - On day of incident appellant no. 1 after purchasing bidi from deceased claimed they were fake—Verbal altercation ensued which was put to an end by intervention of others—Appellants along with brother of appellant no, 1 reached spot—Appellant no. 2 gave a hammer blow to deceased on the back of head while third accused (before Juvenile Justice Board) inflicted blows with iron rod—However, iron rod hit the head of appellant no. 1—In the course of fight, PW4 and PW7 also sustained injuries—During fight, appellant no. 2

gave hammer blow on head of deceased and the three accused fled from the spot throwing iron rod and hammer in the drain—Deceased declared brought dead to hospital—Trial Court convicted the two appellants for the offences u/s 302/323/34—During course of appeal, appellant no. 1 died—Held, the fact that weapons not brought by appellants but were picked up from spot (appellants did not come prepared), one of the accused (juvenile) also received injuries, appellant no. 1 also received knife blow on head, goes to show the occurrence of a sudden and un-premeditated quarrel—Circumstances surrounding the act sufficient to conclude that offence u/s 304 Part I IPC and not 302 IPC made out—Appeal partly allowed.

The decision relied on by the Appellant also fortifies the conclusions of this Court because in those cases too in the course of sudden quarrel a house hold article lying in the premises was used to inflict injuries on the person of the deceased. The court held that circumstances surrounding the attack were sufficient to conclude that the offence under Section 304 Part I IPC had been committed. In the Division Bench decision leading in **Sukhdev Singh** (supra) where no less than twelve injuries were inflicted on the person of the deceased, the Court concluded that the offence of Section 304 Part I IPC was made and substituted with the one recorded by the trial court under Section 302 IPC. **(Para 16)**

[Ad Ch]

APPEARANCES.

FOR THE APPELLANT : Ms. Jyoti Singh, Sr. Adv. With Mr. Amandeep Joshi, Advocate

FOR THE RESPONDENT : Mr. Jaideep Malik, APP for the State with SI Kamal Kohli, PS Moti Nagar.

CASES REFERRED TO:

1. *Smt. Sandhya Jadhav* vs. *State of Maharashtra,* (2006) 4 SCC 653.
2. *Jeet Singh* vs. *State of Haryana,* (2005) 11 SCC 597.
3. *Sridhar Bhuyan* vs. *State of Orissa,* 2004 Cri LJ 3875.
4. *Parkash Chand* vs. *State of H.P.* (2004)11SCC381.
5. *Sachchey Lal Tiwari* vs. *State of Uttar Pradesh* 2004 Cri LJ 4660.
6. *Sukhdev Singh* vs. *State,* 2002 (97) DLT 969.
7. *Om Parkash* vs. *State* 1996 (64) DLT 689.
8. *Balbir Singh* vs. *State of Punjab,* 1995 Supp (3) SCC 472.
9. *Gurdeep Singh* vs. *State* 1994 (31) DRJ (DB).

RESULT: Appeal partly allowed.

S. RAVINDRA BHAT, J (ORAL)

1. The status report in respect of appellant No.1-Shankar Lal has been placed on record along with a copy of the death certificate. It is evident that the appellant No.1-Shankar Lal died on 17.10.2008. The appeal therefore stands abated as regards appellant No.1 is concerned.

2. This appeal is directed against the judgment and order of the learned Additional District Judge dated 16.12.1997 whereby the two appellants Shankar Lal and Ajay (son of Shankar Lal) were convicted for the offence punishable under Sections 302/323/34 IPC. By the order dated 20.12.1997, they were sentenced to undergo life imprisonment and directed to pay a fine of Rs.500 and in default of which to undergo simple imprisonment for one month each. The appellants were already sentenced to RI of three months in respect of offence punishable under Sections 323/34 IPC. Both substantive sentences were ordered to run concurrently.

3. During the pendency of the appeal, Appellant No.1 Shankar Lal died on 17.10.2008. The court has noted this development and appeal so far as he is concerned, stands abated.

4. The prosecution case was that the deceased Kishan Kumar was resident of B-476 Sudarshan Park, Moti Nagar. He also used to run a Kirana Shop in the same premises. The appellants Ajay and Shankar Lal

were residing in his neighbourhood in premises bearing No.B-467, Sudarshan Park. The further allegation was that on 23.6.1994 at about 11:30 AM. Shankar Lal went to purchase a bundle of biri from the deceased. After purchasing the bidi bundle he (Shankar Lal) allegedly took out one or two of them from the bundle and said that the biris were fake. The deceased (Kishan Kumar) allegedly protested at this and told Shankar Lal that since a new bundle had been opened, he could take any other bundle from other bundles placed before him. The prosecution further alleged that a verbal altercation ensued in which Shankar Lal used harsh words by saying **"tum hame nakli biri pilate ho aur khud asli biri pete ho"**. Shankar Lal threatened Kishan Kumar that he would teach him a lesson. Thereafter Shankar Lal caught hold of Kishan Kumar by his hand and forcibly pulled him out of his shop and simultaneously shouted that **"Aaj tumhe nakli biri pilane ka maja chakate hain."**

5. The prosecution further alleged that Shankar Lal caught hold of Kishan Kumar upon which Ram Kumar brother of Kishan and Chet Ram father of Kishan who were apparently present at the site intervened and saved the deceased from the clutches of Shankar Lal. It is further alleged that the Appellants, i.e. Shankar Lal and Ajay, along with Shankar Lal's younger son Dhananjay, reached the spot; Ajay allegedly picked up a hammer lying in the premises; Dhananjay (who was a minor at that stage and was arrested as accused in the case and was later sent up for trial before the Juvenile Court) allegedly took a fan rod which was also lying in the premises. The prosecution case was that Ram Kumar was a trained electrician and therefore instruments were lying there to repair the house fan. It was alleged that appellant Ajay gave a hammer blow to Kishan Kumar on the back of the head and the third accused Dhananjay inflicted blows with the iron rod. The prosecution further stated that Dhananjay's blows did not hit Kishan Kumar and it struck on the head of Shankar Lal (his own father). Thereupon an attempt to assault Kishan Kumar was made; at that stage the deceased father Chet Ram pushed Dhananjay as a result of which the latter's head struck the cement floor near the spot. Dhananjay started bleeding from the injury on his head. Ram Kumar in the meanwhile received an iron rod blow on his head just above his left eye brow. Kishan Kumar also received blows from the iron rod. Chet Ram received rod blows on his left knee and started bleeding. The prosecution stated that thereafter accused Ajay and Dhananjay started pulling Kishan Kumar towards their house and on the way accused Ajay

again gave a hammer blow on Kishan Kumar's head as a result of which he (Kishan Kumar) fell down in front of House No.B-545. At that stage, the accused i.e. Ajay, Dhananjay and Shankar Lal noticing the serious condition of Kishan Kumar fled from the spot, throwing the iron rod and hammer in the drain. Ram Kumar and Chet Ram removed injured Kishan Kumar to RSI hospital where Kishan Kumar was declared brought dead by the doctor concerned.

6. In order to prove its case the prosecution relied upon the testimony of 20 witnesses. The defence examined 2 witnesses. After considering the evidence and material brought on the record, the trial court recorded the conviction and handed down the sentences noticed in the preceding part of this judgment. During the pendency of the appeal, the court had suspended the sentences of the Appellants after noticing that they had undergone a substantial portion of it.

7. Ms. Jyoti Singh learned senior counsel for the Appellant stated that before the trial court Ajay (the sole surviving Appellant) had disputed his presence, no attempt would be made to pursue that line and instead her endeavour would be to satisfy the court that the facts and circumstances do not warrant conviction under Section 302 and the same ought to be substituted with conviction under Section 304 Part I of the Indian Penal Code. It was pointed out that the trial court had primarily rested its conclusion on the testimony of the eye witness Ram Kumar PW-4 who had received some injuries, as well as of Chet Ram PW-7 his father (as well as father of the deceased) who too had received injuries on his knee. Learned counsel emphasized that both these witnesses clearly mentioned the nature of the fight i.e. Shankar Lal having purchased bidis from the deceased, his taking out a couple of them and alleging them to be fake; the ensuing verbal altercation leading to Shankar Lal allegedly pulling out the deceased from there and other members of the rival parties reaching the spot escalating into the physical fight. Great emphasis was placed on the circumstances that weapon of offence i.e. the iron rod and the hammer rod were lying in the deceased premises where Ram Kumar was expected to repair the ceiling fan. It was also submitted that the trial court appears to have overlooked two crucial circumstances i.e. the injury that one of the accused party (Dhananjay) received upon being pulled onto the floor and his head striking on the cement floor. The other point submitted by the Appellant's learned counsel

was that the injury received by Shankar Lal was made the subject matter of a criminal complaint. Learned counsel for the Appellant also relied on a portion of the cross-examination of PW-4 and PW-7 in which this line of inquiry was pursued. It was contended that this clearly mentioned about the knife blow received by Shankar Lal, by Ex.16/B.

8. Learned counsel relied upon the decision reported as **Sukhdev Singh v. State,** 2002 (97) DLT 969, a Division Bench ruling. In that case the court had converted the conviction recorded by the learned trial court from Section 304 Part I to 308 IPC. The facts were that the appellant was provoked by a three wheeler scooter driver with whom he had no previous animosity. The altercation ensued as the three wheeler driver was not even ready to take the appellant to the police station which provided provocation which was grave and sudden to the appellant leading to infliction of the fatal injuries. The appellant had taken out his pistol and fired at the driver. The bullet hit the thigh of someone else standing nearby. The Court held that injuries were not caused intentionally. The second decision was relied upon in the case titled as **Gurdeep Singh v. State** 1994 (31) DRJ (DB). In this case a quarrel which appears to have been in progress when the appellant along with someone else reached the spot. The other party made effort to pacify those involved in quarrelling. The appellant rival party continued to quarrel and the appellant in the course of the quarrel was caught hold by the deceased who started abusing him asking as to who he was to intervene and help in getting the deceased released. The appellant in this case landed eleven blows on different parts of the body of the deceased. The trial court had convicted the appellant for the offence punishable under Section 302 IPC. On appreciation of the evidence, this court was of the opinion that the facts of the case justified the conclusion that Exception 2 to Section 300 of the Indian Penal Code was attracted and accordingly converted the conviction to one under Section 304 Part I IPC. The last decision cited was in the case of **Om Parkash v. State** 1996 (64) DLT 689 where the incident occurred in the course of a sudden quarrel without pre-mediation where the appellant interestingly picked up the knife and stabbed the deceased. The Court held as under:

> "About the alleged recovery of the weapon of offence, the learned counsel for the appellant has submitted two things. First he submits that the personal search of the appellant vide memo

> Ex.Public Witness-18-H showed he had in his possession one small knife. The argument proceeds that the appellant had taken to Sikhism and was working as a sewadar in Gurudwara. The small knife is the kirpan which he used to carry as a Sikh. On this basis it is submitted that the appellant did not have to pick up a kitchen knife to commit the crime. Secondly, it is submitted that the alleged disclosure statement of the appellant Ex.Public Witness-18/J and alleged recovery memo regarding recovery of knife Ex.Public Witness-18/L do not have any independent witness supporting the same. The disclosure memo is witnessed only by the police officials and Pradeep Kumar son of the appellant who had appeard as a prosecution witness to support the prosecution case against the appellant, his own father. Similarly recovery memo is witnesses only by the police officials and Pradeep Kumar, the son of the appellant. The recovery memo is not even signed by the appellant. Janakpur is a busy area and non-association of any public witness casts a doubt on the prosecution case about the recovery of the alleged knife at the instance of the appellant. The doubt gets stronger in the background of the fact that the appellant is shown to be already possessing a knife as pointed out hereinbefore. In the peculiar facts of the case have strong doubts about the alleged recovery of the weapon of offence at the instance of the appellant."

9. Mr. Jaideep Malik, the learned Additional Public Prosecutor for the State strongly opposes the submissions made on behalf of the appellant and contended that the trial court findings should not be disturbed and ought to be affirmed. He argues that this is not a case of single blow that the deceased received. Several injuries on a vital part of his body i.e. the head, had led to his demise. It is also submitted that use of an iron rod and hammer, with the kind of force deployed by the appellant Ajay, clearly demonstrated the intention to cause such an injury as would result in death or at the least could have caused injuries which in the natural course of nature would result in the death of the deceased, which in fact happened. He relied upon the post mortem report for this purpose and stated that whether the weapon was found in the premises of the deceased or was brought to the site is immaterial; what is necessary for the court is to gauge the mental intention and to look at the intensity of the injury inflicted.

10. The essential facts of the prosecution case are not in dispute. There are various elements to it i.e. (i) Shankar Lal purchasing bundle of bidis from the deceased who used to run a Kirana shop; (ii) his opening the bidi bundle and alleging that it contained fake bidies; (iii) protest by deceased about the fact that such allegations were untrue and would result in loss of confidence of his; (iv) Shankar Lal's customers ensuing verbal altercation leading to his (Shankar Lal) pulling out Kishan Kumar threatening him with dire consequences and giving blows and (v) intervention of deceased's relatives i.e. brother and father Ram Kumar and Chet Ram respectively. The appellant Ajay and his younger brother Dhananjay reached the spot.

11. Dhanajay had allegedly inflicted a blow at Kishan Kumar which unintentionally landed on his father Shankar Lal; Ajay hit the deceased with a hammer; both the hammer and the rod used by the appellant Ajay and Dhananjay were picked up from the premises of the deceased; Dhananjay was pushed on to the floor and received head injuries; this was done by Chet Ram PW-7 (this has been spoken to by both the prosecution witnesses PW-4 and PW-7); the deceased was dragged out of the premises and the accused inflicted injuries, on the deceased.

12. The trial court noticed that injuries were received by Dhananjay the youngest brother of the accused Ajay and younger son of deceased Shankar Lal. It also noticed that a complaint had been filed by Shankar Lal as regards the injury received by him by the knife blow inflicted by Chet Ram PW 7, yet, while analyzing the entirety of the circumstances no importance was given to it. Perhaps trial court did not find that necessary or overlooked this aspect since Ajay at that stage disputed his presence from the spot. The trial court of course correctly concluded that the injuries were of a such nature as would be resulted and did cause death of Kishan. Therefore, it proceeded to convict the accused for the offence punishable under Section 302/323 read with Section 34 IPC.

13. While agreeing with the decision of the trial court, this court is of the opinion that facts of this case as noticed previously do not warrant the affirmation as regards the conviction of the appellant under Section 302 IPC. The two vital circumstances which have emerged during submissions- and not disputed by the prosecution are that the weapons were not brought by the members of the accused party i.e.

appellant; crucially Dhananjay one of the accused too had received on injury on being pushed down to the floor. Likewise Shankar Lal also received a knife blow on the head. The prosecution did not make an attempt to turn its investigation towards this aspect. However, this emerges on a fair reading of the evidence. Particularly Ex.PW 16/A Ajay categorically records that Shankar Lal had received a knife blow. Furthermore PW-4 and PW-7 admitted that Dhananjay had been pushed by Chet Ram. All these, in the opinion of this court clearly points out to the occurrence of a sudden and unpremeditated incriminated quarrel. The further element that injuries were inflicted with an iron weapon which was facilitated by the hammer and iron rod lying in the deceased premises itself is a significant factor. Learned APP for the State had argued that use of such weapon would indication intention to kill. Having regard to the ferocity of the blow as it is manifest from the post mortem report- we are not in agreement with the submission. This is because the appellant did not come prepared of such quarrel; the same appears to have escalated and snow balled into a physical fight from a verbal quarrel in which both parties inflicted injuries upon each other. It is a matter on record that appellant-accused parties also received two fairly serious injuries; however the intensity of these injuries is unknown because there is no medical record on this aspect. In the case titled as **Smt. Sandhya Jadhav v. State of Maharashtra,** (2006) 4 SCC 653 the Court held as under:

> "9. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by the First Exception, after which its place would have been more appropriate. The Exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reasons and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them

in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300 IPC is not defined in the IPC. It takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

14. The aforesaid aspects have been highlighted in **Sridhar Bhuyan v. State of Orissa,** 2004 Cri LJ 3875; **Parkash Chand v. State of H.P.** (2004)11SCC381 , and **Sachchey Lal Tiwari v. State of Uttar Pradesh** 2004 Cri LJ 4660; In **Balbir Singh v. State of Punjab,** 1995 Supp (3) SCC 472, the Court held that:

"6. It was next contended that in any case it was not proper to convict the appellant under Section 302 IPC. The contention deserves to be accepted. This was not a case of premeditation as the accused and the deceased met by chance and the appellant had given only one blow. The evidence regarding raising of a lalkara by the other accused has not been believed by the trial court. On the basis of the evidence led in this case it is not possible to say with certainty under which circumstances the appellant gave a kirpan blow to Amrik Singh. No attempt was made by him to give another blow. The injury caused on the head of Amrik Singh does not appear to have been caused intentionally. Therefore, in view of the facts and circumstances of this case we are of the opinion that the lower court committed an error in convicting the appellant under Section 302. He should have been convicted under Section 304 Part I. Therefore, we alter the conviction of the appellant from Section 302 IPC to Section 304 Part I I.P.C. The sentence of RI for life is set aside and instead he is ordered to suffer RI for 10 years. This appeal is allowed to the aforesaid extent. As the appellant has been released on bail he is ordered to surrender to his bail bond, so as to serve out the sentence imposed upon him."

15. In the case titled as **Jeet Singh v. State of Haryana,** (2005) 11 SCC 597 the Court held as under:

It is pointed out that there was no previous quarrel or enmity between the appellant and the deceased and the quarrel had suddenly taken place due to the fact that the deceased Bawa Singh drove the tractor through his field and the sudden quarrel ensued because of the conduct of the deceased. It is also pointed out that the appellant was having a weapon with him and he gave only one blow which unfortunately had resulted in the death of the deceased. It is contended by the appellant's counsel that the offence would come within the ambit of Section 304 Part I IPC. It is true that there is only one fatal injury on the head of the deceased. The appellant must have inflicted a blow on the head of the deceased because of the quarrel between the two. The appellant certainly would have knowledge that his act would result in the death of the deceased. Hence, the offence comes

under the purview of Section 304 Part I of the Indian Penal Code and hence we set aside the conviction of the appellant for the offence under Section 302 IPC and hold him guilty of the offence under Section 304 Part I IPC and sentence him to undergo imprisonment for a period of 8 years. The appeal is disposed of as above.

16. The decision relied on by the Appellant also fortifies the conclusions of this Court because in those cases too in the course of sudden quarrel a house hold article lying in the premises was used to inflict injuries on the person of the deceased. The court held that circumstances surrounding the attack were sufficient to conclude that the offence under Section 304 Part I IPC had been committed. In the Division Bench decision leading in **Sukhdev Singh** (supra) where no less than twelve injuries were inflicted on the person of the deceased, the Court concluded that the offence of Section 304 Part I IPC was made and substituted with the one recorded by the trial court under Section 302 IPC.

17. In view of the above discussion, this court is of the opinion that the appeal has to succeed partly. The findings and order of the trial court as regards the conviction of the surviving appellant Ajay are substituted, instead of offence under Section 302 IPC, it is held that the Appellant-Ajay was guilty of the offence punishable under Section 304 Part I IPC. The record indicates that by order dated 17.8.2001 it was noted that the appellant had undergone the sentence to the extent of six years nine months and three days. This is a little less than seven years. Having regard to these circumstances, this Court directs that the sentence of the appellant-Ajay to be reduced to the period undergone.

18. The appeal is accordingly allowed in terms indicated above. Bail bonds and surety bonds are ordered to be discharged.

ILR (2011) IV DELHI 492
W.P. (C)

H.D. CHAKRABORTY ....PETITIONER

VERSUS

UOI & ORS. ....RESPONDENTS

(PRADEEP NANDRAJOG & SURESH KAIT, JJ.)

W.P. (C) NO. : 4904/1994 DATE OF DECISION. 21.03.2011

Constitution of India, 1950—Article 226—Border Security Force Rules, 1969—Rule 44 and 45 B—Petition challenging the verdict of guilt and the sentence imposed vide order dated 10.10.1993—Severe reprimand and reduction of seniority by 3 years—Petitioner was employed as Deputy Commandant with BSF—Attached with 8th Battalion—Stationed for duty in Kashmir Valley—On 08.04.1992, BSF Officials conducted a search operation—Apprehended two Pakistani Trained Militants—Written complaint was received against the petitioner that he demanded illegal gratification for release of the two persons—Charges were framed—Proceedings pertaining to hearing of the charge was conducted and three additional charges were also framed—After inquiry, petitioner was acquitted for charge no. 1, but was held guilty for the charges no. 2, 3 and 4 by General Security Force Court—Petitioner submitted that Rule 45B of the BSF Rules 1969 had not been complied with—No hearing of the charge being conducted pertaining to the charge no. 2, 3 and 4—There was no evidence to sustain the verdict of guilty—Held—Law requires penal provisions, be they substantive or procedural, to be construed strictly and as regards procedural, to be complied with in letter and in spirit—Rule 45B has a salutory purport and is a procedural safeguard for an accused

and dealing with the hearing of a charge is a provision enabling an accused to convince the Commandant to summarily dismiss the indictment—This is evident from a reading of sub-rule 2 of Rule 45B which States that after hearing the charge as per sub-rule 1, the officer hearing the charge may dismiss the charge or remand the accused for preparation of a record of evidence—As per clause-C of sub-rule 1 of Rule 45B, the accused has an opportunity to make a statement of his defence at the hearing of the charge—Facts noted by us herein above bring out that pertaining to charge 2, 3 and 4 no hearing of the charge was held for the obvious reason at the stage of hearing of the charge on 27.8.1992 it was only one charge which was drawn up and as highlighted by us in para 14 above, power vested under Rule 59 (2) (b) of the BSF Rules 1969 to reframe a charge would not be enough power or the source of a power to frame additional charges unrelated to the original charge—It is apparent that 2 wrongs have been committed against the petitioner—The first is by Deputy Commandant Mohinder Lal who recorded evidence beyond the scope of the charge for which record of evidence had to be prepared and secondly when Rule 45B was not followed pertaining to the 3 additional charges being charge No 2, 3 and 4—As a Deputy Commandant of a BSF Unit in an insurgency ridden State, we certainly expect the petitioner to have tried to create a network of sources in the State to receive information of movement of outsiders in the area within his jurisdiction and this perforce would require him to make friends with a few local people and earn their confidence; we do earn each other's confidence by exchanging gifts—As long as the value of the gift does not render a gift ostentatious, we see no impropriety in the petitioner accepting a Loi, a Feron and a Karkuli from 3 persons value whereof, even on the highest side was not more than Rs. 980 (total)—Disposing of the writ petition

we absolve the petitioner of the charges framed against him and quash the verdict of guilt declaring petitioner guilty of charge No. 2, 3 and 4 set aside the sentence dated 10.10.1993.

Law requires penal provisions, be they substantive or procedural, to be construed strictly and as regards procedural, to be complied with in letter and in spirit. Rule 45B has a salutary purport and is a procedural safeguard for an accused and dealing with the hearing of a charge is a provision enabling an accused to convince the Commandant to summarily dismiss the indictment. This is evident from a reading of sub-rule 2 of Rule 45B which states that after hearing the charge as per sub-rule 1, the officer hearing the charge may dismiss the charge or remand the accused for preparation of a record of evidence. As per clause-C of sub-rule 1 of Rule 45B, the accused has an opportunity to make a statement of his defence at the hearing of the charge.

(Para 28)

Facts noted by us herein above bring out that pertaining to charge 2, 3 and 4 no hearing of the charge was held for the obvious reason at the stage of hearing of the charge on 27.8.1992 it was only one charge which was drawn up and as highlighted by us in para 14 above, power vested under Rule 59(2)(b) of the BSF Rules 1969 to reframe a charge would not be enough power or the source of a power to frame additional charges unrelated to the original charge. It is thus apparent that when statements were permitted to be recorded during record of evidence pertaining to the gifting of a Loi, Feron and a Karkuli, which were beyond the scope of the record of evidence, which perforce had to be restricted to the charge of having demanded and received illegal gratification in sum of `20,000/- to release Gulam Hasan Lone and Mohd.Akram Lone, if additional charges had to be framed, hearing of the charge proceedings envisaged as per Rule 45B had to be conducted. Indeed, the General Security Force Court found merit in the said plea when raised as a plea of jurisdictional bar and vide order dated

19.8.1993 adjourned the proceedings and reported the matter to the Convening Officer, obviously with the intention that hearing of the charge proceedings would be conducted as per Rule 45B pertaining to charge 2, 3 and 4.

(Para 29)

It is apparent that 2 wrongs have been committed against the petitioner. The first is by Deputy Commandant Mohinder Lal who recorded evidence beyond the scope of the charge for which record of evidence had to be prepared and secondly when Rule 45B was not followed pertaining to the 3 additional charges being charge No.2, 3 and 4.

(Para 31)

As a Deputy Commandant of a BSF Unit in a.n insurgency ridden State, we certainly expect the petitioner to have tried to create a network of sources in the State to receive information of movement of outsiders in the area within his jurisdiction and this perforce would require him to make friends with a few local people and earn their confidence; we do earn each other.s confidence by exchanging gifts. As long as the value of the gift does not render a gift ostentatious, we see no impropriety in the petitioner accepting a Loi, a Feron and a Karkuli from 3 persons value whereof, even on the highest side was not more than Rs. 980 (total).

(Para 36)

Disposing of the writ petition we absolve the petitioner of the charges framed against him and quash the verdict of guilt declaring petitioner guilty of charge No.2, 3 and 4 and set aside the sentence dated 10.10.1993. We also set aside the order dated 12.8.1994 rejecting the Statutory Petition filed by the petitioner and allow the Statutory Petition.**(Para 37)**

Important Issue Involved: lf additional charges had to be framed, hearing of the charge proceedings envisaged as per Rule 45B had to be conducted.

[Vi Ba]

APPEARANCES .

FOR THE PETITIONER : Mr. Tamali Wad, Advocate.

FOR THE RESPONDENT : Mr. Neeraj Chaudhari, CGSC with Mr. Khalid Arshad and Mr. Mohit Auluck, Advocates and Mr. Bhupinder Sharma, Law Officer, BSF.

RESULT: Petition disposed.

PRADEEP NANDRAJOG, J.

1. In the year 1992 the petitioner was employed as a Deputy Commandant with BSF and was attached with the 8th Bn. which was stationed for duties in Kashmir Valley. BSF officials conducted a search operation on 8.4.1992 and apprehended 2 Pakistan trained militants. The local people raised an issue on the said two persons being apprehended. A written complaint was received on 25.5.1992 against the petitioner alleging that he had demanded illegal gratification in sum of Rs. 20,000/- from the complainants Jabar Khan and Mohd.Ali Ganai to release the 2 persons who were detained. As per the department the Commandant of the 8th Bn. made discreet inquiry pertaining to the complaint and found substance therein. Since by then the petitioner stood attached to the 67th Bn. the complaint along with the discreet inquiry report was sent to the Commandant of the said battalion for necessary action.

2. As claimed by the department the Commandant complied with Rule 44 of the BSF Rules 1969 and reduced in writing the allegation as set out in Appendix VI i.e. framed the charge dated 27.8.1992, which reads as under:-

"CHARGE SHEET

IRLA No.2829 Rank Dy.Commandant name Sh.H.D.

Chakraborty of 67 BN BSF is charged with:-

BSF ACT

SEC 46 Committing a civil offence, that is to say, being public servant, accepting from any person, for himself, any gratification whatever, other than legal remuneration as a

motive for showing in exercise of his official functions, favour to any person, punishable under Section 7 of the Prevention of Corruption Act 1988.

In that he, on 7th May, 1992, while posted at Damal Hanzipur as E-Coy Comdr. 08 BN BSF, accepted Rs.20,000/- as an illegal gratification from Mohd.Jabar Khan for release of their relatives namely Gulam Hasan Lone & Mohd.Akram Lone from the Custody of BSF."

3. As per the department the Commandant, in compliance with Rule 45B of the BSF Rules 1969, conducted proceedings pertaining to hearing of the charge and finding a case made out to prepare a Record of Evidence detailed Mohinder Lal, Deputy Commandant of the 67th Bn. BSF as the Recording Officer to prepare the Record of Evidence.

4. At the Record of Evidence, statements of 13 persons were recorded on behalf of the department and of 2 persons in defence. Relevant would it be to note that 10 out of 13 persons examined by the department talked of the petitioner either demanding or receiving illegal gratification in sum of Rs. 20,000/- from Jabar Khan and Mohd.Ali Ganai and notwithstanding the Record of Evidence proceedings relating to only the charge of accepting illegal gratification in sum of Rs. 20,000/-, Sh. Mohinder Lal permitted 3 persons to depose facts beyond the charge and we note that Gulam Mohidin Sheikh PW-6 stated that as a token of his love and friendship towards the petitioner he had gifted a 'Feron' (Kashmiri Apparel) to the petitioner, Manzoor Ahmad PW-8 stated that as a token of his love and friendship towards the petitioner he had gifted a 'Loi' (Kashmiri Shawl) to the petitioner and Gulam Hassan Bhat PW-9 stated that as a token of his love and friendship towards the petitioner he had gifted a 'Karkuli' (Kashmiri Cap) to the petitioner.

5. Considering the Record of Evidence, on 24.5.1993, the Commandant framed 3 additional charges and drew out a charge sheet consisting of 4 charges as under:-

"CHARGE SHEET

The accused IRLA No.2829 Shri H.D.Chakraborty, Dy.Commandant 67 Bn. BSF is charged with.

Ist Charge

BSF ACT

Sec 46 COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, BEING A PUBLIC SERVANT, ACCEPTING GRATIFICATION, OTHER THAN LEGAL REMUNERATION, FOR SHOWING, IN THE EXERCISE OF HIS OFFICIAL FUNCTIONS, FAVOUR TO ANY PERSON, PUNISHABLE U/S 161 RBC (RPC)

In that he,

at TAC HQ 08 Bn. BSF Qaziguad, on 07 May 1992, while performing the duties of Adjutant in 08 Bn BSF, accepted a sum of Rs.20,000/- (Rupees twenty thousand) only, from Mohd.Jabar Khan S/o Gulam Ahmad Khan, for himself, a gratification other than legal remuneration, as a motive for showing, in the exercise of his official functions, favour to any person, to wit, release of two detenues namely Gulam Hassan Lone and Mohd.Akram Lone of Vill Salam Kain Naugam from the BSF custody.

2nd Charge

BSF ACT

Sec 40 AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE

In that he,

at BSF Camp Khur Batpora, during December 1991, while being the Officer Incharge at the said BSF Camp, improperly accepted one ,,LOI. (Woollen Shawl) from Shri Manzoor Ahmad S/o Mohd.Sikander Malik of Vill Khur Batpora.

3rd Charge

BSF ACT

Sec 40 AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE.

In that he,

At BSF Camp Khur Batpora, during January 1992, while

being the Officer Incharge at the said BSF Camp, improperly accepted one 'Feron' from Shri Gulam Mohi-ud-din Sheikh S/O Abdul Sheikh of village Khur Batpora.

4th Charge

BSF Act

Sec 40 AN ACT PREJUDICIAL TO GOOD ORDER AND DISCIPLINE OF THE FORCE

In that he,

at BSF Camp Khur Batpora, during 1991-92, while being the Officer Incharge at the said BSF Camp, improperly accepted one 'Karakuli Cap' from Shri Gulam Hassan Bhatt S/O Gulam Rasool Bhatt of Vill Khur Batpora."

6. On Nil.6.1993 the Inspector General BSF Kashmir Frontier Range i.e. the range under whose administrative control petitioner's battalion was stationed directed petitioner's trial by a General Security Force Court in respect of the four charges, i.e. ordered a General Security Force Court to be convened.

7. When the Court convened on 19.8.1993, the petitioner raised a preliminary objection pertaining to the lack of jurisdiction of the Court alleging that no hearing was conducted pertaining to the hearing of the charge as envisaged by Rule 45B of the BSF Rules 1969. He alleged that nothing was read out to him pertaining to the sole charge which was framed then. He alleged no hearing of the charge qua charge No.2, 3 and 4. This necessitated the examination of the Commandant Sh.D.Kaushal who appeared as Court Witness No.1.

8. Sh.D.Kaushal deposed that on 21.8.1992 he received a signal requiring him to collect a file pertaining to the petitioner and he did the needful. The file contained a discreet inquiry conducted by Sh.G.S.Bhomia Commandant 8th Bn. BSF pertaining to some allegation levelled by civilians against the petitioner while petitioner was posted with 8th Bn. BSF and some documents including a complaint of one Jabar Khan. He called the petitioner on 27.8.1992 and conducted the hearing as contemplated by Rule 45B and at the hearing read over the discreet inquiry report as also the complaint made by Mohd.Jabar Khan. He clarified that he did not examine any witnesses and that he filled up the requisite performa in

which he made the endorsement of having framed the charge sheet and read over the charge to the petitioner and decided to order Record of Evidence to be prepared.

9. The witness produced for perusal of the Court the necessary certificate which was marked Ex.'N' and it was observed by the Court that Annexures I and II mentioned in the certificate Ex.'N' were not attached. It was noted by the Court that as per the certificate, Annexure II was the stated statement made by the petitioner during hearing of the charge proceedings. When confronted with the deficiencies by the Court, the witness stated that the fact was that when given an opportunity to make a statement, the petitioner had made none and that he i.e. the witness had inadvertently failed to record in the certificate that the petitioner had declined to make a statement as also that he inadvertently did not score off the inapplicable portions of the statutory performa to be filled up by him while recording the reading of the charge. He deposed that after the Record of Evidence was completed and he submitted the same to the Frontier Headquarters, the file was returned to him with the observation that the nature of documents examined at the time of hearing the charge was not specified in the certificate and therefore he had prepared a fresh certificate which he tendered as Ex.'O'. It was noted by the Court that Ex.'O' bore the date 27.8.1992 and thus called upon the Court witness to explain, to which he stated that though he drew up the certificate Ex.'O' much later, but since it was issued on the basis of the hearing done on 27.8.1992, he ante-dated the same by recording the date 27.8.1992.

10. As noted above the petitioner had raised another issue before the Court, of Rule 45B being not complied with i.e. no hearing of the charge being conducted pertaining to charge 2, 3 and 4. To put it pithily, the petitioner raised an issue pertaining to no hearing of the charge being conducted properly pertaining to charge No.1 and no proceeding whatsoever being conducted pertaining to charge No.2, 3 and 4.

11. It is but obvious that whereas there may be a dispute as to what happened on 27.8.1992 pertaining to charge No.1, it was obvious that pertaining to charge No.2, 3 and 4, no hearing of charge whatsoever took place inasmuch as these charges were obviously framed after the Record of Evidence proceedings were over and the material pertaining to said 3 charges surfaced for the first time during Record of Evidence

proceedings and as per Court Witness No.1 he never deposed of conducting any hearing of the charge pertaining to the said 3 charges.

12. The Court pronounced decision against the petitioner qua the first objection raised by him and accepted the version of the Court witness of not properly drawing up the proceedings on 27.8.1992 but found prima facie merit in the second submission. The Court passed an order that it was adjourning further proceedings and reported the matter to the Convening Officer i.e. the Inspector General, Kashmir Frontier, obviously with the intent that the Convening Authority would look into the matter.

13. The Convening Officer, vide order dated 24.9.1993, taken on record when the Court re-assembled as Ex.'R', missed the point in issue on which the Court had deferred further consideration, evidenced by the fact that the Convening Authority recorded that pertaining to the sole charge on which the hearing of the charge was held was not found to be with any taint and ignoring that pertaining to the other 3 charges, no hearing of the charge was held, opined that it was always available for the Competent Authority i.e. the Convening Authority to re-frame the charge sheet, a power which we find vested under Rule 59(2)(b) of the BSF Rules 1969.

14. It be highlighted that re-framing of a charge is an issue entirely different than framing additional charges. We may explain. Hearing of a charge pertains to an allegation made by 'A' that an officer extorted money under threat of false implication by threatening that he would ensure by manipulating record that 'A' has sold sub-standard goods to the Unit. During Record of Evidence the evidence is recorded and which shows that 'A' extorted money by delaying settlement of the bill. This would be an instance where a charge can be re-framed. It is a situation akin to a major or a minor offence with which Courts are familiar with respect to criminal trials, though strictly not the same. Re-framing of a charge would be, where the core remains the same but in view of the variation from where the journey commences and till it ends, the exact contours of the stated offence require a different boundary to be drawn.

15. Be that as it may, the Court was helpless and thus proceeded to commence the trial and record the testimony of the witnesses of the prosecution.

16. We eschew even recording a brief summary of the testimony of Assistant Commandant Hemant Kumar PW-1, Commandant G.S.Bhomia PW-2, Mohd.Jabar Khan PW-3, Bashir Ahmad Padder PW-4, Gulam Ahmed Lone PW-5, Mohd.Yakub Khan PW-6, Gulam Mohd.Sheikh PW-7, Ali Mohd.Gahai PW-10 and Const.Shyam Sunder Negi PW-12 for the reason the testimony of these witnesses relate to the first charge i.e. the charge of petitioner demanding and accepting illegal gratification in sum of Rs. 20,000/- from Mohd.Jabar Khan for release of two detenues i.e. Gulam Hassan Lone and Mohd.Akram Lone. The reason we are not so recording is the fact that at the end of the trial, petitioner was declared not guilty of Charge No.1. The reason for the verdict is the mutually contradictory and conflicting versions stated by the witnesses during evidence pertaining to the manner in which the illegal gratification amount was settled; the manner in which the amount was raised and the manner in which it was paid. The versions were so mutually contradictory and conflicting that none could be reconciled.

17. We have noted hereinabove that during Record of Evidence proceedings, Gulam Mohidin Sheikh PW-6, Manzoor Ahmad PW-8 and Gulam Hassan Bhat PW-9 had stated that they had, as a token of their love and affection towards the petitioner, gifted a Feron, Loi and Karkuli respectively to the petitioner. At the trial Gulam Mohidin Sheikh appeared as PW-9. Manzoor Ahmad appeared as PW-8 and Gulam Hassan Bhat appeared as PW-11. Whereas Gulam Mohidin Sheikh and Gulam Hassan Bhat deposed once again that as a token of their love and affection and friendship they had gifted a Feron and Karkuli respectively to the petitioner, Manzoor Ahmad, who during Record of Evidence stated that he had gifted a Loi to the petitioner as a token of his love and affection, changed his version during trial and said that the petitioner had demanded a Loi from him as a consideration to release a relative of his from BSF custody and therefore he gave the Loi to the petitioner.

18. Relevant would it be to note that in his testimony Manzoor Ahmad gave no name of his relative who was arrested by BSF officers and was released. When cross-examined with respect to what he had stated during Record of Evidence, he said that he does not know as to how his statement was not recorded correctly during Record of Evidence. We may only highlight that a statement recorded during Record of Evidence has been signed by him and it stands recorded therein that the statement

has been read over by him. We note that the statement is recorded in English and Manzoor Ahmad has signed the same in English. Name of two independent witnesses in whose presence the statement was recorded, with their signatures exists beneath the statement and one of them is Gulzar Ganai Sheikh who has also signed in English. The other witness is L/Nk. B.G.Jonawane.

19. We may note that Gulam Hassan Bhat accepted that when he gifted the cap to the petitioner he i.e. the petitioner offered to pay the price, but since it was a gift out of love and affection, he has refused to accept the money.

20. We need not note the defence evidence led at the trial inasmuch as it relates to charge No.1, of which the petitioner has been absorbed.

21. The Court returned a verdict of not guilty qua charge No.1 and a verdict of guilt pertaining to charge No.2, 3 and 4.

22. The sentence imposed upon the petitioner vide order dated 10.10.1993 was of 'severe reprimand and reduction of seniority by 3 years' i.e. by directing that the rank and precedent of promotion of the petitioner to the rank of Deputy Commandant shall bear the date 14.9.1990; it be noted that the petitioner had been promoted as a Deputy Commandant on 14.9.1987.

23. Against the verdict of guilt pertaining to 3 charges and the sentence imposed, petitioner preferred a statutory petition on 1.1.1994 which was rejected vide order dated 12.8.1994.

24. We note that the petitioner had raised the issues pertaining to no hearing of charge being conducted on 27.8.1992 as required by law pertaining to charge No.1, which plea we find became useless in view of the petitioner being acquitted of the said charge. Pertaining to charge No.2, 3 and 4, petitioner raised the same plea which he has raised before the Court and in respect whereof the Court remitted the matter before the Convening Authority for a reconsideration, which was declined. Since we have noted the issue raised in para 10 above, for sake of brevity we need not re-pen the same. Qua the verdict of guilt on charge No.2, 3 and 4, petitioner additionally raised the issue that pertaining to charge No.3 and 4 there was no evidence of his having improperly accepted the Feron and the Karkuli and highlighted that the testimony of Gulam Mohidin

Sheikh and Gulam Hassan Bhat clearly brought out that the two had gifted the Feron and Karkuli respectively to him out of love and affection. Qua the Loi, petitioner highlighted that Manzoor Ahmad had changed his version vis-a-vis what he stated during Record of Evidence and at the trial.

25. We note that the order rejecting the statutory petition filed by the petitioner is a non-speaking order and simply records that the authority concerned found no merit in the statutory petition and hence was pleased to reject the same.

26. It would be apparent to a reader of our decision as to what are the points which would have been argued before us during arguments in the writ petition. Obviously, the first argument was that pertaining to charge No.2, 3 and 4 for which the petitioner faced a trial before the General Security Force Court, no hearing of the charge was held as contemplated by Rule 45B of the BSF Rules 1969. The second submission was that pertaining to charge No.3 and 4, there was no evidence to sustain the verdict of guilt and pertaining to charge No.2, the evidence of the sole witness Manzoor Ahmad was so highly tainted that even within the confines of evaluation of evidence at a domestic trial, the same merited a rejection.

27. Let us note Rule 45B of the BSF Rules 1969. The same reads as under:-

> "45B. Hearing of charge against an officer and a subordinate officer.–
>
> (1)(a) The charge against an officer or subordinate officer shall be heard by his Commandant:
>
> Provided that charge against a Commandant, a Deputy Inspector-General or an Inspector-General may be heard either by an officer commanding a Unit or Headquarters to which the accused may be posted or attached or by his Deputy Inspector-General, or his Inspector-General or, as the case may be, the Director-General.
>
> (b) The charge sheet and statement of witnesses if recorded and relevant documents, if any, shall be read over to the accused if he has not absconded or deserted:

Provided that where written statement of witnesses, are not available the officer hearing the charge shall hear as many witnesses as he may consider essential to enable him to know about the case.

(c) The accused if he has not absconded or deserted, shall be given an opportunity to make a statement in his defence.

(2) After hearing the charge under sub-rule (1), the officer who heard the charge may –

(i) dismiss the charge; or

(ii) remand the accused, for preparation of a record of evidence or preparation of abstract of evidence against the accused:

Provided that he shall dismiss the charge if in his opinion the charge is not proved or may dismiss it if he considers that because of the previous character of the accused and the nature of the charge against him, it is not advisable to proceed further with it:

Provided further that in case of all offences punishable with death, a record of evidence shall be prepared:

Provided also that in case of offence under sections 14, 15, 17, 18 and offence of 'murder' punishable under section 46 of the Act, if the accused has absconded or deserted, the Commandant shall hear the charge in his absence and remand the case for preparation of record of evidence."

28. Law requires penal provisions, be they substantive or procedural, to be construed strictly and as regards procedural, to be complied with in letter and in spirit. Rule 45B has a salutary purport and is a procedural safeguard for an accused and dealing with the hearing of a charge is a provision enabling an accused to convince the Commandant to summarily dismiss the indictment. This is evident from a reading of sub-rule 2 of Rule 45B which states that after hearing the charge as per sub-rule 1, the officer hearing the charge may dismiss the charge or remand the accused for preparation of a record of evidence. As per clause-C of sub-rule 1 of Rule 45B, the accused has an opportunity to make a statement of his defence at the hearing of the charge.

29. Facts noted by us herein above bring out that pertaining to charge 2, 3 and 4 no hearing of the charge was held for the obvious reason at the stage of hearing of the charge on 27.8.1992 it was only one charge which was drawn up and as highlighted by us in para 14 above, power vested under Rule 59(2)(b) of the BSF Rules 1969 to reframe a charge would not be enough power or the source of a power to frame additional charges unrelated to the original charge. It is thus apparent that when statements were permitted to be recorded during record of evidence pertaining to the gifting of a Loi, Feron and a Karkuli, which were beyond the scope of the record of evidence, which perforce had to be restricted to the charge of having demanded and received illegal gratification in sum of Rs. 20,000/- to release Gulam Hasan Lone and Mohd.Akram Lone, if additional charges had to be framed, hearing of the charge proceedings envisaged as per Rule 45B had to be conducted. Indeed, the General Security Force Court found merit in the said plea when raised as a plea of jurisdictional bar and vide order dated 19.8.1993 adjourned the proceedings and reported the matter to the Convening Officer, obviously with the intention that hearing of the charge proceedings would be conducted as per Rule 45B pertaining to charge 2, 3 and 4.

30. A vital right of the petitioner to convince the Commandant that said charges could not be framed not only on account of the officer who conducted the record of evidence proceedings permitted statements to be recorded beyond his mandate but additionally for the reason Gulam Mohidin Sheikh, Manzoor Ahmed and Gulam Hasan Bhat, who stated that they gifted a Feron, Loi and Karkuli respectively did so as a token of their love and friendship towards the petitioner.

31. It is apparent that 2 wrongs have been committed against the petitioner. The first is by Deputy Commandant Mohinder Lal who recorded evidence beyond the scope of the charge for which record of evidence had to be prepared and secondly when Rule 45B was not followed pertaining to the 3 additional charges being charge No.2, 3 and 4.

32. Pertaining to the second plea urged, it assumes importance to note that the entire writ petition has been drafted and so was the statutory petition drafted, and indeed arguments were advanced, as if the 3 charges pertain to demanding and receiving bribe. The charges were of improper acceptance of a Loi, Feron and Karkuli. The two are different and distinct.

33. We concur with the plea urged by learned counsel for the petitioner that pertaining to the Feron and the Karkuli being accepted as gifts by the petitioner there is no evidence to establish that he demanded the same. On the contrary the evidence is that Gulam Mohiddin Sheikh gifted a Feron and Gulam Hasan Bhat gifted a Karkuli to the petitioner as a token of their friendship towards the petitioner. Qua the petitioner receiving a Loi from Manzoor Ahmed, we agree with her submission that Manzoor Ahmed has under pressure of the local community falsely deposed at the trial that the petitioner demanded the Loi in return of release of his relative, a fact not so stated during record of evidence. More so, in view of the admission made by Ct.Shyam Sunder Negi PW-12 that before he came to the Court to depose, the prosecutor had tried to influence him. We thus concur with the submission that as per the evidence on record it is apparent that the petitioner accepted a Loi from Manzoor Ahmed when the same was offered to him as a token of friendship.

34. But the issue would be, ought the petitioner to have received a Loi, a Feron and a Karkuli as gifts. As per Manzoor Ahmed the Loi costed between Rs. 500 – 700. As per Gulam Hasan Bhat the Karkuli cap costed `80 and as per Gulam Mohiddin Sheikh the Feron costed between Rs. 150 – 200. Taking the upper value of the 3 items would be Rs. 700 + Rs. 80 + Rs. 200= Rs. 980. The year when the gifts were received was December 1991 and January 1992.

35. With passage of time, memory fades, but we certainly recollect the prices of apparels in the year 1991 and 1992 and do remember buying a good quality sweater or a coat for a price ranging between Rs.2000 to Rs.4000. Thus, the value of the gifts received is fairly petty.

36. As a Deputy Commandant of a BSF Unit in an insurgency ridden State, we certainly expect the petitioner to have tried to create a network of sources in the State to receive information of movement of outsiders in the area within his jurisdiction and this perforce would require him to make friends with a few local people and earn their confidence; we do earn each other.s confidence by exchanging gifts. As long as the value of the gift does not render a gift ostentatious, we see no impropriety in the petitioner accepting a Loi, a Feron and a Karkuli from 3 persons value whereof, even on the highest side was not more than Rs. 980 (total).

37. Disposing of the writ petition we absolve the petitioner of the charges framed against him and quash the verdict of guilt declaring petitioner guilty of charge No.2, 3 and 4 and set aside the sentence dated 10.10.1993. We also set aside the order dated 12.8.1994 rejecting the Statutory Petition filed by the petitioner and allow the Statutory Petition.

38. Noting that as a result of the penalty imposed, petitioner could not earn promotions, we direct Review DPC to be held and consider petitioner's candidature for promotion by considering the ACRs of the petitioner as of the date when DPCmet and in which persons junior to the petitioner were promoted. The petitioner would be entitled to all consequential benefits, if held entitled to be promoted, except back-wages. Noting that the petitioner has since retired, we clarify that his pension would be fixed accordingly with reference to the higher post and would be paid as per scale of pay applicable with effect from the date pension became payable.

39. No costs.

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LPA

ARUN TYAGI ....APPELLANTS

VERSUS

ELECTION COMMISSION OF INDIA & ANR. ....RESPONDENTS

(DIPAK MISRA CJ. & SANJIV KHANNA, J.)

LPA NO. : 2/2011 DATE OF DECISION: 04.04.2011

Representation of Peoples Act, 1950—Section 22—Rule of *audi alteram partem* and post-decisional hearing—Appellant's name was deleted from the electoral roll on the basis of a joint inspection by revenue officials Ghaziabad and North-East Delhi in

the presence of Assistant Electoral Registration Officer, concluding that the residence of the Appellant was situated beyond the boundary of Delhi and in Ghaziabad-Single Judge holding that issue could not be agitated in writ jurisdiction and it can only be agitated in a civil suit -Instant appeal Appellant contended -proviso to Section 22 mandates conducting a prior enquiry and affording an opportunity of hearing—Respondent contended that mandate was substantially complied with by way of hearing at appellate stage and joint inspection.

Held—Section 22 (correction of entries in electoral rolls) takes away a substantial right of a voter—Strict compliance of the provision—Competent authority cannot be granted leverage to proceed in an arbitrary manner without complying with the proviso to Section 22(c) which clearly postulates hearing in respect of action proposed to be taken—Doctrine of post decision hearing would not meet statutory requirement.

In the said case, their Lordships referred to the decision in **Hari Prasad Mulshanker Trivedi v. V.B. Raju,** (1974) 3 SCC 415 wherein it has been stated that the 1950 Act is a complete code in the manner of preparation and maintenance of electoral rolls. The relief of enrolment or striking out of the name of a person enrolled therein on the ground of his lacking in qualifications conferring a right to be enrolled must be adjudicated in the manner prescribed by the 1950 Act invoking the jurisdiction of the authorities contemplated therein. We may hasten to add that in the said case, the inclusion of a person or persons in the electoral roll by the authority empowered in law to prepare the electoral roll, though they are not qualified to be so enrolled, cannot be a ground for setting aside the election of a returned candidate but the fact remains that emphasis has been laid on the issue of enrolment and preparation of electoral roll of any constituency and the obligations of an authority. If these

aspects are appreciated in a cumulative manner, we are of the considered opinion that there has to be strict compliance of Section 22 of the 1950 Act as the same takes away the substantial right of a voter. The deletion or inclusion may not be a ground to set aside the election but the competent authority under the Act cannot be granted leverage to proceed in an arbitrary manner without complying with the proviso to Section 22(c). It has a statutory function to carry out and must understand the purity of such a procedural aspect. Thus, adherence to the same, we are inclined to think, is a must. The provision clearly lays a postulate that the person concerned has to be afforded reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him by the electoral registration officer. Therefore, the doctrine of post-decisional hearing or hearing at the stage of appeal would not meet the statutory requirement. Judged from both the angles, the order is unsustainable. The deletion is unsustainable because of procedural non-compliance. As has been held by the Lordships in the authorities which we have referred hereinbefore, the principles of natural justice may not be put in a straitjacket formula and it may vary from statute to statute, situation to situation and case to case. In our view, when there is a deletion under Section 22 in the context of the statutory provision, considering the extent of repercussion it can have in a democratic setup and its effect on the right of a citizen to vote, pre-decisional hearing is imperative.

(Para 30)

Important Issue Involved: Doctrine of post decisional hearing does not meet the requirement of hearing postulated in proviso to Section 22 of the Representation of Peoples Act, 1950.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Ch. Rabindra Singh, Advocate.

FOR THE RESPONDENTS : Mr. P.R. Chopra, Advocate.

CASES REFERRED TO:

1. *City Montessori School* vs. *State of Uttar Pradesh & Ors.,* (2009) 14 SCC 253.
2. *People's Union for Civil Liberties & Anr.* vs. *Union of India & Anr.,* (2009) 3 SCC 200.
3. *Haryana Financial Corporation & Anr.* vs. *Kailash Chandra Ahuja,* (2008) 9 SCC 31.
4. *Bidhannagar (Salt Lake) Welfare Assn.* vs. *Central Valuation Board and others,* (2007) 6 SCC 668.
5. *AM (Serbia)* vs. *Secy. of State for the Home Deptt.,* 2007 EWCA Civ 16 (CA).
6. *Rajesh Kumar* vs. *Dy. CIT,* (2007) 2 SCC 181.
7. *State of Maharashtra* vs. *Public Concern for Governance Trust and others,* (2007) 3 SCC 587.
8. *P.D. Agrawal* vs. *SBI,* (2006) 8 SCC 776.
9. *Reliance Industries Ltd.* vs. *Designated Authority,* (2006) 10 SCC 368.
10. *Ajit Kumar Nag* vs. *General Manager (PJ), Indian Oil Corporation Ltd., (Haldia) and others,* (2005) 7 SCC 764.
11. *Canara Bank & Ors.* vs. *Debasis Das & Ors.,* (2003) 4 SCC 557.
12. *Shyamdeo Pd. Singh* vs. *Nawal Kishore Yadav,* (2000) 8 SCC 46.
13. *P.V. Narasimha Rao* vs. *State (CBI/SPE),* (1998) 4 SCC 626.
14. *Union Bank of India* vs. *Vishwa Mohan,* (1998) 4 SCC 310.
15. *Managing Director, ECIL* vs. *B. Karunakar,* (1993) 4 SCC 727.
16. *Lily Thomas* vs. *Speaker, Lok Sabha* (1993) 4 SCC 234.
17. *Kihoto Hollohan* vs. *Zachillhu & Ors.,* 1992 Supp. (2) SCC 651.
18. *Charan Lal Sahu* vs. *Union of India,* AIR 1990 SC 1480.
19. *K.I. Shephard and others, etc. etc.* vs. *Union of India and others,* AIR 1988 SC 686.
20. *R.S. Dass* vs. *Union of India,* 1986 Supp SCC 617.
21. *Liberty Oil Mills & Ors.* vs. *Union of India & Ors.,* (1984) 3 SCC 465.
22. *A.C. Jose* vs. *Sivan Pillai* (1984) 2 SCC 656.
23. *Board of Trustees of the Port of Bombay* vs. *Dilip Kumar Raghavendranath Nadkarni* (1983) 1 SCC 124.
24. *Swadeshi Cotton Mills* vs. *UOI,* (1981) 1 SCC 664.
25. *M.S. Gill* vs. *Chief Election Commissioner* (1978) 1 SCC 405.
26. *Hari Prasad Mulshanker Trivedi* vs. *V.B. Raju,* (1974) 3 SCC 415.
27. *A.K. Kraipak* vs. *Union of India,* AIR 1970 SC 150.
28. *State of Orissa* vs. *Dr. (Miss) Binapani Dei,* AIR 1967 SC 1269.
29. *D.F. Marion* vs. *Minnie Davis,* 1955 American LR 171.

RESULT: Appeal allowed.

O R D E R

% 04.04.2011

1. Questioning the correctness of the order dated 26.10.2010 passed by the learned Single Judge in W.P.(C) No.13779/2009, the present intra-Court appeal has been preferred.

2. The factual matrix giving rise to the present appeal is that the appellant was registered as a voter and he was issued an EPIC No. CZF1248509 by the Electoral Registration Officer for 68 Gokul Pur (SC) Assembly Constituency within the territory of Delhi. In the first week of March 2009, prior to the parliamentary elections, he came to know that his name had been deleted from the Electoral Roll 2009 by the respondents.

3. Being dissatisfied with such deletion, he preferred WP(C) No.7967/2009 seeking inclusion of his name in the electoral roll. The writ petition was disposed of on 1.4.2009 granting liberty to the appellant to prefer an appeal under Section 24 of the Representation of Peoples Act, 1950 (for brevity 'the 1950 Act'). The appellant filed an appeal which was dismissed by the Chief Electoral Officer by the order dated 25.9.2009.

4. Being aggrieved by the order of the appellate authority, the appellant preferred W.P.(C) No.13779/2009. It was contended before the writ court that the appellate authority had not taken into consideration the fact that he had produced the electricity bills, house tax receipts and a copy of the ration card which showed his mother's address to be in Gokul Pur, Delhi. The learned Single Judge perused the impugned order wherein the CEO had recorded that there was a joint inspection on 17.6.2009 which revealed that the house of the appellant is situated in Uttar Pradesh and not in the National Capital Territory of Delhi. The learned Single Judge, by order dated 25.1.2010, required the respondent No.2 to produce the said joint inspection report. On a scrutiny of the said report, the learned Single Judge found that the revenue officials of district Ghaziabad, Uttar Pradesh as well as the revenue staff of the district North-East, Delhi undertook a joint inspection of the house of the appellant at A-1/67, Gali No.2, Harijan Basti Colony, Gokul Puri in the presence of the Assistant Electoral Registration Officer and came to the conclusion that the house is situated beyond the boundary of Delhi in Uttar Pradesh and, in particular, in village Behta Hajipur, district Ghaziabad (Uttar Pradesh) in khasra No.1031. The learned Single Judge came to the conclusion that the same being in the realm of fact, the writ court in exercise of extraordinary jurisdiction cannot re-appreciate the same and it can only be agitated in a civil suit and accordingly granted liberty to the petitioner therein to seek other appropriate remedies available to the appellant.

5. We have heard Mr. Rabindra Singh, learned counsel for the appellant, and Mr.P.R. Chopra, learned counsel for the respondent nos. 1 and 2.

6. It is submitted by Mr. Singh that before deleting the name of the appellant, it was incumbent on the part of the concerned authorities to follow the principles of natural justice but the same was not followed. It is his further stand that the finding recorded by the appellate authority

that there was a joint inspection and the committee had gone to the house of the appellant and, therefore, the principles of natural justice stood substantially complied with is not factually correct.

7. Mr. P.R. Chopra, learned counsel for the respondents, would contend that the order passed by the appellate authority is totally defensible inasmuch as the appellate authority had granted opportunity to the appellant to explain his case in detail which he did by presenting himself through his counsel on 8.6.2009. The learned counsel would further submit that the joint inspection report speaks eloquently about the situation of the house of the appellant and, therefore, there is no warrant for interference by this Court and the observation made by the learned Single Judge that it is a disputed question of fact and should not be gone into in the writ petition cannot be found fault with.

8. To appreciate the submissions raised at the Bar, it is apposite to refer to Section 22 of the Act. It reads as follows:

> "22. **Correction of entries in electoral rolls.** - If the electoral registration officer for a constituency, on application made to him or on his own motion, is satisfied after such inquiry as he thinks fit, that any entry in the electoral roll of the constituency –
>
> (a) is erroneous or defective in any particular,
>
> (b) should be transposed to another place in the roll on the ground that the person concerned has changed his place of ordinary residence within the constituency, or
>
> (c) should be deleted on the ground that the person concerned is dead or has ceased to be ordinarily resident in the constituency or is otherwise not entitled to be registered in that roll, the electoral registration officer shall, subject to such general or special directions, if any, as may be given by the Election Commission in this behalf, amend, transpose or delete the entry:
>
> Provided that before taking any action on any ground under clause (a) or clause (b) or any action under clause (c) on the ground that the person concerned has ceased to be ordinarily resident in the constituency or that he is otherwise not entitled

to be registered in the electoral roll of that constituency, the electoral registration officer shall give the person concerned a reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him."

9. On a plain reading of the aforesaid provision, it is clear as crystal that the Electoral Registration Officer can act on the basis of an application made to him or suo motu after causing an enquiry that any entry in the electoral roll of the constituency should be deleted on the ground that the person concerned is dead or ceased to be ordinarily resident in the constituency or is otherwise not entitled to be registered in that roll but before taking any action, it is obligatory on the part of the electoral registration officer to give the person concerned reasonable opportunity of being heard in respect of the action to be taken in relation to him. Thus, the provision mandates conducting a prior enquiry and affording an opportunity of hearing to the aggrieved person.

10. The question that emanates for consideration is whether in a case of this nature, hearing by the appellate authority would subserve the mandate of the statute. The learned counsel for the respondents would submit that when a hearing is given at the appellate stage and a joint inspection has been conducted, the mandate of Section 22 is substantially complied with. The learned counsel for the appellant would urge that in a democracy, correction of entries in electoral roll has its own sanctity and when the statute clearly commands that before taking any action the electoral registration officer shall give the person concerned a reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him, it cannot be viewed like a case or a lis in other sphere. That apart, it is canvassed by him that the joint inspection was conducted behind the back of the appellant and, therefore, it has no meaning in law.

11. At this juncture, we think it appropriate to refer to certain authorities which deal with the concept of basic rule of audi alteram partem and its effect and impact and also the invocation of the principle of post decisional hearing. In **State of Orissa v. Dr. (Miss) Binapani Dei,** AIR 1967 SC 1269, the Apex Court has observed thus:

"It is true that the order is administrative in character but even an administrative order which involves civil consequences as already stated, must be made consistently with the rules of natural

justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken; the High Court was, in our judgment, right in setting aside the order of the State."

12. In **A.K. Kraipak v. Union of India,** AIR 1970 SC 150, the Constitution Bench has ruled thus:

"Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the Courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often-times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry."

13. In this regard, we may profitably quote a passage from **K.I. Shephard and others, etc. etc. v. Union of India and others,** AIR 1988 SC 686 wherein the Apex Court has held thus:

"15. Fair play is a part of the public policy and is a guarantee for justice to citizens. In our system of Rule of Law every social agency conferred with power is required to act fairly so that social action would be just and there would be furtherance of the well-being of citizens. The rules of natural justice have developed with the growth of civilization and the content thereof is often

considered as a proper measure of the level of civilization and Rule of Law prevailing in the community. Man within the social frame has struggled for centuries to bring into the community the concept of fairness and it has taken scores of years for the rules of natural justice to conceptually enter into the field of social activities. …"

14. In **Swadeshi Cotton Mills v. UOI,** (1981) 1 SCC 664, the issue that emerged for consideration was whether prior hearing was imperative to be given to the persons affected before an order under Section 18-AA of Industries (Development and Regulation) Act, 1951 was passed. The majority, after scanning the anatomy of Section 18-AA while analyzing the said question, held as follows:

"42. "The necessity for speed", writes Paul Jackson: "may justify immediate action, it will, however, normally allow for a hearing at a later stage." The possibility of such a hearing – and the adequacy of any later remedy should the initial action prove to have been unjustified-are considerations to be borne in mind when deciding whether the need for urgent action excludes a right to rely on natural justice. Moreover, however, the need to act swiftly may modify or limit what natural justice requires, it must not be thought "that because rough, swift or imperfect justice only is available that there ought to be no justice": *Pratt v. Wanganui Education Board.*

43. Prof. de Smith, the renowned author of JUDICIAL REVIEW (3rd Edn.) has at page 170, expressed his views on this aspect of the subject, thus: "Can the absence of a hearing before a decision is made be adequately compensated for by a hearing ex post facto? A prior hearing may be better than a subsequent hearing, but asubsequent hearing is better than no hearing at all; and in some cases the courts have held that statutory provision for an administrative appeal or even full judicial review on the merits are sufficient to negative the existence of any implied duty to hear before the original decision is made. The approach may be acceptable where the original decision does not cause serious detriment to the person affected, or where there is also a paramount need for prompt action, or where it is impracticable to afford antecedent hearings."

44. In short, the general principle – as distinguished from an absolute rule of uniform application – seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative progress or frustrate the need for utmost promptitude. In short, this rule of fairplay "must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands". The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, to recall the words of Bhagwati, J., the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

After stating the said principles, their Lordships opined thus:

"77. The second reason – which is more or less a facet of the first – for holding that the mere use of the word "immediate" in the phrase "immediate action is necessary", does not necessarily and absolutely exclude the prior application of the audi alteram partem rule, is that immediacy or urgency requiring swift action is a situational fact having a direct nexus with the likelihood of adverse effect on fall in production. And, such likelihood and the urgency of action to prevent it, may vary greatly in degree. The words "likely to affect… production" used in Section 18-AA(1)(a) are flexible enough to comprehend a wide spectrum of situations ranging from the one where the likelihood of the happening of

the apprehended event is imminent to that where it may be reasonably anticipated to happen sometime in the near future. Cases of extreme urgency where action under Section 18-AA(1)(a) to prevent fall in production and consequent injury to public interest, brooks absolutely no delay, would be rare. In most cases, where the urgency is not so extreme, it is practicable to adjust and strike a balance between the competing claims of hurry and hearing.

78. The audi alteram partem rule, as already pointed out, is a very flexible, malleable and adaptable concept of natural justice. To adjust and harmonise the need for speed and obligation to act fairly, it can be modified and the measure of its application cut short in reasonable proportion to the exigencies of the situation. Thus, in the ultimate analysis, the question (as to what extent and in what measure), this rule of fair hearing will apply at the pre-decisional stage will depend upon the degree of urgency, if any, evident from the facts and circumstances of the particular case.

Their Lordships further came to hold as follows:

"94. …In the facts and circumstances of the instant case, there has been a non-compliance with such implied requirement of the audi alteram partem rule of natural justice at the pre-decisional stage. The impugned order therefore, could be struck down as invalid on that score alone. But we refrain from doing so, because the learned Solicitor-General in all fairness, has both orally and in his written submissions dated August 28, 1979, committed himself to the position that under Section 18-F, the Central Government in exercise of its curial functions, is bound to give the affected owner of the undertaking taken over, a "full and effective hearing on all aspects touching the validity and/or correctness of the order and/or action/of take-over", within a reasonable time after the take-over. The learned Solicitor-General has assured the Court that such a hearing will be afforded to the appellant-Company if it approaches the Central Government for cancellation of the impugned order. It is pointed out that this was the conceded position in the High Court that the aggrieved owner of the undertaking had a right to such a hearing."

[Emphasis added]

15. In **Liberty Oil Mills & Ors. v. Union of India & Ors.,** (1984) 3 SCC 465, the Apex Court while dealing with the application of principles of natural justice adverted to the concept of pre-decisional hearing and post-decisional hearing and stated thus:

"15. …Procedural fairness embodying natural justice is to be implied whenever action is taken affecting the rights of parties. It may be that the opportunity to be heard may not be pre-decisional; it may necessarily have to be post-decisional where the danger to be averted or the act to be prevented is imminent or where the action to be taken can brook no delay. If an area is devastated by flood, one cannot wait to issue show-cause notices for requisitioning vehicles to evacuate population. If there is an outbreak of an epidemic, we presume one does not have to issue show-cause notices to requisition beds in hospitals, public or private. In such situations, it may be enough to issue post-decisional notices providing for an opportunity. It may not even be necessary in some situations to issue such notices, but it would be sufficient but obligatory to consider any representation that may be made by the aggrieved person and that would satisfy the requirements of procedural fairness and natural justice. There can be no tape-measure of the extent of natural justice. It may and indeed it must vary from statute to statute, situation to situation and case to case..."

[Emphasis supplied]

16. In **Canara Bank & Ors. v. Debasis Das & Ors.,** (2003) 4 SCC 557, the Apex Court was dealing with the scope and ambit of Regulations 6(18) and 6(21) of the Canara Bank Officer Employees. (Conduct) Regulations, 1976. In the said case, their Lordships posed the question whether the principles of natural justice have been avoided and if so, to what extent and whether any prejudice has been caused and eventually held as follows:

"19. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to

be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the frame work of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

Thereafter, their Lordships referred to the decisions in **Charan Lal Sahu v. Union of India,** AIR 1990 SC 1480, **Managing Director, ECIL v. B. Karunakar,** (1993) 4 SCC 727 and **Union Bank of India v. Vishwa Mohan,** (1998) 4 SCC 310 and came to hold that though in all cases, post-decisional hearing cannot be a substitute for pre-decisional hearing, yet it would depend upon the facts of the case.

17. In **Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Ltd., (Haldia) and others,** (2005) 7 SCC 764, while dealing with the concept of applicability of natural justice, the Apex Court has held thus:

"The principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket. They must yield to and change with exigencies of situations. They must be confined within their limits and cannot be allowed to run wild. While interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life. The approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than "precedential". In certain circumstances, application of the principles of natural justice can be modified and even excluded. Both in England and in India, it is well established that where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct in the taking of prompt action, such a right can be excluded. It

can also be excluded where the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion. The maxim audi alteram partem cannot be invoked if import of such maxim would have the effect of paralysing the administrative process or where the need for promptitude or the urgency so demands. The principles of natural justice have no application when the authority is of the opinion that it would be inexpedient to hold an enquiry and it would be against the interest of security of the Corporation to continue in employment the offender workman when serious acts were likely to affect the foundation of the institution."

[Emphasis supplied]

18. In **Haryana Financial Corporation & Anr. v. Kailash Chandra Ahuja,** (2008) 9 SCC 31, a two-Judge Bench of the Apex Court after referring to the decisions in **R.S. Dass v. Union of India,** 1986 Supp SCC 617 and **Managing Director, ECIL v. B. Karunakar,** (1993) 4 SCC 727 has ruled thus:

"36. The recent trend, however, is of "prejudice". Even in those cases where procedural requirements have not been complied with, the action has not been ipso facto illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant."

Thereafter, their Lordships referred to the decision in **P.D. Agrawal v. SBI,** (2006) 8 SCC 776 and opined as under:

"42. Recently, in **P.D. Agrawal** (supra) this Court restated the principles of natural justice and indicated that they are flexible and in the recent times, they had undergone a "sea change". If there is no prejudice to the employee, an action cannot be set aside merely on the ground that no hearing was afforded before taking a decision by the authority."

19. In **State of Maharashtra v. Public Concern for Governance Trust and others,** (2007) 3 SCC 587, while dealing with the non-affording of an opportunity of hearing to a person who is visited with civil consequences and his reputation is affected, their Lordships have opined thus:

"39. …In our opinion, when an authority takes a decision which may have civil consequences and affects the rights of a person, the principles of natural justice would at once come into play. Reputation of an individual is an important part of one's life. It is observed in **D.F. Marion v. Minnie Davis,** 1955 American LR 171 and reads as follows:

> "The right to enjoyment of a private reputation, unassailed by malicious slander is of an ancient origin, and is necessary to human society. A good reputation is an element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property."

40. This Court also in **Board of Trustees of the Port of Bombay v. Dilip Kumar Raghavendranath Nadkarni** (1983) 1 SCC 124 has observed that right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution.

41. It is thus amply clear that one is entitled to have and preserve one.s reputation and one also has a right to protect it. In case any authority in discharge of its duties fastened upon it under the law, travels into the realm of personal reputation adversely affecting him, it must provide a chance to him to have his say in the matter. In such circumstances, right of an individual to have the safeguard of the principles of natural justice before being adversely commented upon is statutorily recognized and violation of the same will have to bear the scrutiny of judicial review."

20. In **Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board and others,** (2007) 6 SCC 668, the Apex Court, while testing the constitutional validity of certain provisions of the West Bengal Central Valuation Board (Amendment) Act, 1994, has expressed thus:

> "28. The proviso appended to Section 14 of the 1978 Act makes the situation worse inasmuch as before taking recourse to the review provision a pre-deposit is to be made in terms thereof. A statute which provides for civil or evil consequences must conform to the test of reasonableness, fairness and non-arbitrariness.

29. Ordinarily an order entailing civil consequences should be preceded by an opportunity of being heard. [(See **Rajesh Kumar v. Dy. CIT,** (2007) 2 SCC 181]. The impugned Act, however, has taken away such a provision which existed in the earlier one.

30. It may be that the legislature thought that while preparing the general valuation, it may not be possible to give an opportunity of hearing as such and, an opportunity of hearing may be given at a later stage. It is true that an order of assessment under the Act is conclusive subject to Sections 14 and 15 of the Act but keeping in view the limited power conferred upon the Revenue Committee thereunder in terms whereof a part of demand is beyond the pale thereof, it is possible that in a given case the entire exercise of review may end in futility. What, thus, was necessary was to provide for an independent and impartial body constituted for the general redressal of the grievance of the taxpayers."

After so holding, their Lordships referred to the decisions in **Reliance Industries Ltd. v. Designated Authority,** (2006) 10 SCC 368 and **AM (Serbia) v. Secy. of State for the Home Deptt.,** 2007 EWCA Civ 16 (CA) and ultimately expressed the view thus:

> "45. We, therefore, for the aforementioned reasons have no other option but to hold that the provisions for review conferred in terms of the statute for all intent and purport are illusory ones and do not satisfy the test of Article 14 of the Constitution of India. No statute which takes away sombody's right and/ or imposes duties, can be upheld where for all intent and purport, there does not exist any provision for effective hearing."

21. In **City Montessori School v. State of Uttar Pradesh & Ors.,** (2009) 14 SCC 253, the Apex Court has stated thus:

> "28. … It is now a well-settled principle of law that it cannot be put in a straitjacket formula. The Court despite opining that the principle of natural justice was required to be followed may, however, decline grant of a relief, inter alia, on the premise that the same would lead to a useless formality or that the person concerned in fact did not suffer any prejudice…"

22. From the aforesaid enunciation of law, the principles that are culled out are that non-compliance of the principles of natural justice vitiates the decision; that it is a common experience that once a decision has been taken there is a tendency to uphold it; that unless the statute or a rule excludes the application of natural justice the same should be adhered to; that a person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing; that the doctrine of audi alteram partem is not founded on a straitjacket formula and it can be modified in the exigencies of the situation; that the doctrine of post-decisional hearing can be invoked if a danger or a different situation is required to be avoided; that a higher forum in certain circumstances can afford adequate opportunity of hearing though in all cases post-decisional hearing cannot be substituted for pre-decisional hearing; that the hard realities of life are to be borne in mind and it would depend upon the facts of the case; that the factum of prejudice that has been caused is a factor to be taken note of; that there has to be a pragmatic approach; and that sometimes the court may not interfere and direct for a post-decisional hearing.

23. Regard being had to the aforesaid principles that have been laid down by the Apex Court, it is necessitous to see whether a pre-decisional hearing could have been done away with despite the statutory mandate engrafted in Section 22 of the Act. It is to be borne in mind that the said provision basically pertains to the rights of a voter registered in the electoral roll. There is no trace of doubt that the right to vote is a statutory right and it can only be curbed within the statutory parameters. Parliamentary democracy has its sacrosanct features. In this context, we think it apt to refer to certain citations in the field.

24. In **Kihoto Hollohan v. Zachillhu & Ors.,** 1992 Supp. (2) SCC 651, the Apex Court, while discussing about the concept of democracy, in the majority opinion, has stated thus:

> "42. Democracy is a basic feature of the Constitution. Whether any particular brand or system of government by itself, has this attribute of a basic feature, as long as the essential characteristics that entitle a system of government to be called democratic are otherwise satisfied is not necessary to be gone into. Election conducted at regular, prescribed intervals is essential to be democratic system envisaged in the Constitution. So is the need

> to protect and sustain the purity of the electoral process. That may take within it the quality, efficacy and adequacy of the machinery for resolution of electoral disputes…."

25. In **P.V. Narasimha Rao v. State (CBI/SPE),** (1998) 4 SCC 626, it has been held that parliamentary democracy is a part of the basic structure of the Constitution.

26. In **Gujarat Assembly Election Matter, In Re,** (2002) 8 SCC 237, the Apex Court has opined thus:

> "…It is no doubt true that democracy is a part of the basic structure of the Constitution and periodical, free and fair election is the substratum of democracy. If there is no free and fair periodic election, it is the end of democracy and the same was recognized in **M.S. Gill v. Chief Election Commissioner** - (1978) 1 SCC 405 thus: (SCC p.419, para 12)
>
> > "12. A free and fair election based on universal adult franchise is the basic, the regulatory procedures vis-a-vis the repositories of functions and the distribution of legislative, executive and judicative roles in the total scheme, directed towards the holding of free elections, are the specifics…. The super authority is the Election Commission, the Kingpin is the Returning Officer, the minions are the presiding officers in the polling stations and the electoral engineering is in conformity with the elaborate legislative provision."
>
> 78. Similar concern was raised in the case of **A.C. Jose v. Sivan Pillai** (1984) 2 SCC 656. In that case, it was argued that if the Commission is armed with unlimited arbitrary powers and if it happens that the persons manning the Commission shares or is wedded to a particular ideology, he could by giving odd directions cause a political havoc or bring about a Constitutional crisis, setting at naught the integrity and independence of the electoral process, so important and indispensable to the democratic system. Similar apprehension was also voiced in **M.S. Gill v. Chief Election Commissioner** (supra). The aforesaid concern was met by this Court by observing that in case such a situation ever arises, the Judiciary which is a watchdog to see that

Constitutional provisions are upheld would step in and that is enough safeguard for preserving democracy in the country."

27. In **People's Union for Civil Liberties & Anr. v. Union of India & Anr.,** (2003) 4 SCC 399, their Lordships have stated thus:

"62. It has to be stated that in an election petition challenging the validity of election, rights of the parties are governed by the statutory provisions for setting aside the election but this would not mean that a citizen who has right to be a voter and elect his representative in the Lok Sabha or Legislative Assembly has no fundamental right. Such a voter who is otherwise eligible to cast vote to elect his representative has statutory right under the Act to be a voter and has also a fundamental right as enshrined in Chapter III. Merely because a citizen is a voter or has a right to elect his representative as per the Act, his fundamental rights could not be abridged, controlled or restricted by statutory provisions except as permissible under the Constitution. If any statutory provision abridges fundamental right, that statutory provision would be void. It also requires to be well understood that democracy based on adult franchise is part of the basic structure of the Constitution. The right of an adult to take part in election process either as a ˇvoter or a candidate could be restricted by a valid law which does not offend constitutional provisions…."

[Underlining is ours]

28. In **People's Union for Civil Liberties & Anr. v. Union of India & Anr.,** (2009) 3 SCC 200, their Lordships have held thus:

"4. In **Lily Thomas v. Speaker, Lok Sabha** (1993) 4 SCC 234, the Court elucidated the meaning of the term "voting" in the following words: (SCC pp.236-37, para 2)

"2 ….Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue in question. ….Right to vote means right to exercise the right in favour of or against the motion or resolution. Such a right implies right to remain neutral as well."

5. The scope of the citizen.s right to express his/her opinion through the medium of the franchise was further developed in **Union of India v. Association for Democratic Reforms,** (2002) 5 SCC 294……"

29. From the aforesaid pronouncement of law, it is clear as noon day that democracy is an essential feature of our Constitution – the fountainhead of all laws. It basically refers to the 'people's power'. The collective governance is founded on the principle that the people have the potentiality and ability to choose as well as discard a government. Every citizen has a right of political participation within legal parameters. A voter in a democratic setup has the right to exercise his right of voting in favour of or against a particular political philosophy or an individual. The said right under the Act flows from the entry in the electoral roll. In this context, we may refer with profit to the decision in **Shyamdeo Pd. Singh v. Nawal Kishore Yadav,** (2000) 8 SCC 46 wherein their Lordships, after reproducing Section 62 of the Act which deals with the right to vote, proceeded to state as follows:

"11. Section 62 can clearly be divided into two parts. One part is sub-section (1), which is couched partly in positive form and partly in the negative. A person who is not entered in the electoral roll of any constituency is not entitled to vote in that constituency though he may be qualified under the Constitution and the law to exercise the right to franchise. To be entitled to cast a ballot the person should be entered in the electoral roll. Once a person is so entered he is entitled to vote in that constituency. The phrase "for the time being" has been significantly and strategically cast into the framing of the provision and qualifies the expression "entered in the electoral roll of any constituency". It gives the factum of entry in the electoral roll of any constituency a decisive role to play for finding out whether he is or is not entitled to vote in that constituency. The other part of Section 62 consists of sub-sections (2) to (5). In spite of a person having been entered into an electoral roll and by virtue of such entry having been conferred with a right to vote, such right may yet be defeated by existence of any of the ˇdisqualifications or ineligibilities enacted by sub-sections (2) to (5).

30. In the said case, their Lordships referred to the decision in **Hari Prasad Mulshanker Trivedi v. V.B. Raju,** (1974) 3 SCC 415 wherein it has been stated that the 1950 Act is a complete code in the manner of preparation and maintenance of electoral rolls. The relief of enrolment or striking out of the name of a person enrolled therein on the ground of his lacking in qualifications conferring a right to be enrolled must be adjudicated in the manner prescribed by the 1950 Act invoking the jurisdiction of the authorities contemplated therein. We may hasten to add that in the said case, the inclusion of a person or persons in the electoral roll by the authority empowered in law to prepare the electoral roll, though they are not qualified to be so enrolled, cannot be a ground for setting aside the election of a returned candidate but the fact remains that emphasis has been laid on the issue of enrolment and preparation of electoral roll of any constituency and the obligations of an authority. If these aspects are appreciated in a cumulative manner, we are of the considered opinion that there has to be strict compliance of Section 22 of the 1950 Act as the same takes away the substantial right of a voter. The deletion or inclusion may not be a ground to set aside the election but the competent authority under the Act cannot be granted leverage to proceed in an arbitrary manner without complying with the proviso to Section 22(c). It has a statutory function to carry out and must understand the purity of such a procedural aspect. Thus, adherence to the same, we are inclined to think, is a must. The provision clearly lays a postulate that the person concerned has to be afforded reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him by the electoral registration officer. Therefore, the doctrine of post-decisional hearing or hearing at the stage of appeal would not meet the statutory requirement. Judged from both the angles, the order is unsustainable. The deletion is unsustainable because of procedural non-compliance. As has been held by the Lordships in the authorities which we have referred hereinbefore, the principles of natural justice may not be put in a straitjacket formula and it may vary from statute to statute, situation to situation and case to case. In our view, when there is a deletion under Section 22 in the context of the statutory provision, considering the extent of repercussion it can have in a democratic setup and its effect on the right of a citizen to vote, pre-decisional hearing is imperative.

31. In view of our aforesaid premised reasons, we allow the appeal, set aside the order passed by the learned Single Judge as well as all the orders passed by the authorities and direct the electoral registration officer to proceed afresh under Section 22 of the Act. In the facts and circumstances of the case, there shall be no order as to costs.

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ARB. P.

TARUN KR. JAIN, SOLE PROPRIETOR ....PETITIONER

VERSUS

M.C.D. ....RESPONDENT

(VIPIN SANGHI, J.)

ARB. P. NOS. : 202/2005 & 203/2005 DATE OF DECISION: 18.04.2011

Arbitration and Conciliation Act, 1996—Sections 14 & 15—Application seeking appointment of substitute arbitrator in place of originally appointed arbitrator—Two petitions u/s 11 of the Act preferred—Both the petitions were allowed vide order dated 08.12.2005 and sole arbitrator was appointed—In the month of July 2010, counsel of petitioner inquired about the status of these cases and it was reported that learned Arbitrator refused to conduct arbitration proceedings as he was suffering from ill health—Arbitrator, in the proceedings held on 18.10.2006 in the presence of the parties, withdrew from the office of arbitrator—Present Applications filed Held—The period within which a party must approach the competent court to seek the appointment of an arbitrator is three years in terms of Entry no. 137 of the Schedule to the Limitation Act—The right to apply to the court to seek the appointment of substitute arbitrator accrued upon the

passing of the order dated 8th October,. 2006—Therefore, petitioner should have approached the Court for appointment of substitute arbitrator by 17th October 2009—Reliance placed by Mr. Singla on Section 15 (2) of the Act is misplaced—All that the said provision provides is that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced—However, this does not mean that the process for appointment of substituted arbitrator can be delayed by a party indefinitely—The said process has to be initiated within the period of limitation prescribed by law.

The period within which a party must approach the competent court to seek the appointment of an arbitrator is three years in terms of entry No.137 of the schedule to the Limitation Act. The right to apply to the court to seek the appointment of substitute arbitrator accrued upon the passing of the order dated 8th October, 2006. Therefore the petitioner should have approached the court for appointment of substitute arbitrator by 17th October, 2009. **(Para 13)**

Reliance placed by Mr. Singla on Section 15(2) of the Act is again misplaced. All that the said provision provides is that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. However, this does not mean that the process for appointment of substituted arbitrator can be delayed by a party indefinitely. The said process has to be initiated within the period of limitation prescribed by law. **(Para 14)**

Important Issue Involved: Limitation for moving application for appointment of substitute arbitrator is three years from the date of termination of arbitrator.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. A.K. Singla, Sr. Advocate with Mr. Vivek Kishore & Mr. Anurag Jain, Advocates.

FOR THE RESPONDENT : Ms. Mini Pushkarna, Standing Counsel with Mr. Rajesh Singh Advocate.

CASES REFERRED TO:

1. *Satender Kumar* vs. *Municipal Corporation of Delhi and Anr.,* MANU/DE/0385/2010.
2. *J.C. Budhiraja* vs. *Chairman, Orissa Mining Corporation Ltd.,* (2008) 2 SCC 444.

RESULT: Application dismissed.

VIPIN SANGHI, J. (Oral)

I.A. No. 6885/2010 in ARB.P.No.202/2005

I.A. No. 6887/2010 in ARB.P.No.203/2005

1. These are the two applications preferred by the petitioner under Sections 14 & 15 of the Arbitration and Conciliation Act to seek appointment of a substitute arbitrator in place of the originally appointed arbitrator Mr. M.L. Jain, Advocate.

2. The petitioner preferred the aforesaid two petitions under Section 11 of the Act. Both these petitions were allowed by the Court vide order dated 8th December, 2005 and in both these cases Mr.M.L. Jain, Advocate was appointed as the sole arbitrator.

3. The present applications have been preferred by the petitioner on 13th May, 2010. In the applications, it is averred in para 16 that in the month of April, 2010, counsel for the petitioner enquired about the status of these cases. It is stated that the learned arbitrator refused to conduct the arbitration proceedings as he has been suffering from ill health.

4. Upon issuance of notice, the respondent has filed its reply. The respondent has raised an issue of limitation, by urging that the claims now sought to be raised are barred by time. It is stated in para 10 that

if the petitioner is now permitted to file its statement of claim, the same would be barred by limitation.

5. Vide order dated 20th October, 2010, the Court had requested the learned arbitrator to file the proceedings undertaken by him in a sealed cover. They have been filed.

6. The proceedings were started before him on 20th January, 2006. It appears that for some time the proceedings were adjourned as the petitioner stated that he would move an application to get the fee of the arbitrator fixed by the Court. The order sheet shows that the fees of the arbitrator was fixed at Rs.60,000/- vide order dated 4th September, 2006 passed in I.A. No. 6037/2006 in Arb P.No.202/2005. However, it appears that no similar application was moved in Arb.P.no.203/2005.

7. The learned arbitrator in the proceedings held on 18th October, 2006 in the presence of the parties, withdrew from the office of the arbitrator by observing:

> "I am down with fever for a few days and confined to bed. I regret, I will not be able to entertain or take up the cited matters. Parties/their learned Counsels may kindly note and take appropriate steps to arrange for their re-reference."

8. However, he continued to conduct proceedings in yet another reference pending before him arising out of Arb. Petition No. 193/2005. The learned Arbitrator rendered the award in that case on 25.09.2007.

9. Learned Senior Counsel for the petitioner Mr. Singla submits that the proceedings before the arbitrator continued from January, 2006 and were adjourned from time to time as the fixation of fees by the Court was awaited. He submits that the learned arbitrator did not require the petitioner to file his statement of claim at any stage of the proceedings till the date that he passed the order on 18th October, 2006.

10. Though the objection of the respondent is that the claims would be barred by limitation as of now, that may not be an accurate statement. The arbitration proceedings stood commenced when the agreement was invoked. The Court while allowing the applications under Section 11 of the Act did not go into the aspect of limitation vis-à-vis the claims of the petitioner. In my view, that is not the issue. The issue of limitation is

with regard to the filing of the present applications after the termination of the mandate by the arbitrator upon his withdrawing from arbitration. As the aspect of limitation can be examined by the court suo moto, I proceed to examine the same.

11. Mr. Singla submits that even after the passing of the order dated 18th October, 2006, the mandate of the arbitration did not stand terminated, as it would be for this Court to make an order declaring that the mandate stands terminated.

12. I cannot agree with this submissions in the light of the plain reading of the Section 14(1)(b) of the Act. It provides that the mandate of the arbitrator shall terminate if he withdraws from his office. The order dated 18th October, 2006 is a clear withdrawal from his office by the learned arbitrator. It is only when a controversy remain between the parties, concerning any of the grounds referred to in clause (a) of sub-section (1) of Section 14 (which deals with the de jure and de facto inability to perform his functions by the arbitrator, or where the arbitrator is alleged to have failed to act without undue delay) that the parties can approach the court to decide whether or not the termination of mandate has taken place. The parties are not expected to approach the court to seek an order for termination of the mandate of the arbitrator, even in cases where arbitrator has withdrawn from his office. Section 14(2) has no application to a case falling under Section 14(1)(b).

13. The period within which a party must approach the competent court to seek the appointment of an arbitrator is three years in terms of entry No.137 of the schedule to the Limitation Act. The right to apply to the court to seek the appointment of substitute arbitrator accrued upon the passing of the order dated 8th October, 2006. Therefore the petitioner should have approached the court for appointment of substitute arbitrator by 17th October, 2009.

14. Reliance placed by Mr. Singla on Section 15(2) of the Act is again misplaced. All that the said provision provides is that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. However, this does not mean that the process for appointment of substituted arbitrator can be delayed by a party indefinitely. The said process has to be initiated within the period of

limitation prescribed by law.

15. The Supreme Court in **J.C. Budhiraja vs. Chairman, Orissa Mining Corporation Ltd.,** (2008) 2 SCC 444, has dealt with the aforesaid aspect. Para 25 of the said decision reads as follows:-

> "25. The learned Counsel for the appellant submitted that the limitation would begun to run from the date on which a difference arose between the parties, and in this case the difference arose only when OMC refused to comply with the notice dated 4.6.1980 seeking reference to arbitration. We are afraid, the contention is without merit. The appellant is obviously confusing the limitation for a petition under Section 8(2) of the Arbitration Act, 1940 with the limitation for the claim itself. The limitation for a suit is calculated as on the date of filing of the suit. In the case of arbitration, limitation for the claim is to be calculated on the date on which the arbitration is deemed to have commenced."

16. Reliance placed by Mr. Singla on the decision of this Court in **Satender Kumar vs. Municipal Corporation of Delhi and Anr.,** MANU/DE/0385/2010, is of no way applicable, as the said case deals with the aspect, whether or not, the claims were barred by limitation. That is not the issue arising before me.

17. In my view, the present applications are clearly barred by limitation, and the same are accordingly dismissed.

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FAO

DELHI STATE INDUSTRIAL & INFRASTRUCTURE DEV. CORPN. LTD. ....APPELLANT

VERSUS

ROAD MASTER INDUSTRIES INDIA (P) LTD. ....RESPONDENT

(VIKRAMAJIT SEN & SIDDHARTH MRIDUL, JJ.)

FAO (OS) NO. : 676/2006 & CM NO. : 11747/2008 **DATE OF DECISION : 19.04.2011**

Arbitration Act, 1940—Section 20 and 33—Indian Limitation Act, 1963—Section 14 and Section 137—Petition seeking reference to Arbitrator of dispute between the parties arising out of the agreement dated 07.10.1976—Petition filed in 1988—Petitioner raised a demand vide letter dated 28.07.1979, which was refuted by the defendant vide letter dated 11.08.1979—Defendant opposed the petition that it is barred by limitation—Held—Since the cause of action must be deemed to have arisen on 28.07.1979, if not earlier in normal circumstances, the Section 20 Petition would be required to be filed before 27.07.1981—The exact date on which the Respondent filed the Section 33 Petition cannot be ascertained—We shall extend all benefit to the Appellant by assuming that this petition was filed on 01.02.1981—Since, it was allowed on 15.10.1985, a period of one year five months and twenty seven days was available from the date on which Section 33 Petition was allowed—The time to file an application under Section 20, therefore expired on 22.5.1987—The learned Single Judge has excluded time from 4.3.1980 till 15.10.1985 to arrive at the conclusion that the Petition was time-barred—Assuming

that Section 14 of Limitation Act applied, the period to be excluded would commence on the date on which the Petition/application under Section 33 of the 1940 Act had been filed, that is, February, 1981, ending on 15.10.1985, the day when it was allowed—Even if one were to further exclude the period which was spent in obtaining a Certified Copy of that Order, time would unquestionably commence rerunning on 25.11.1985 when the Certified Copy was received—Since the Petition under Section 20 of 1940 Act was filed on 29.5.1987, seven days already expired from the date on which the cause of action to file Section-20 Petition under 1940 Act had arisen—The cause of action does not start on the date when a claim is repudiated; it arises when the dispute actually arises—Adjudged from any standpoint, the Petition under Section 20 of 1940 Act is hopelessly barred by limitation—The dispute needs burial, even if thirty-five years too late.

The above narration discloses the recalcitrance and obduracy of the Appellant in not approaching the Court under Section 20 of the 1940 Act for the appointment of an Arbitrator in the way of the Respondent's stand that the Appellant was not competent to appoint the Arbitrator. Had the Appellant resorted to Section 20, the damages that it had allegedly incurred as a result of bringing the entire subject consignment back to Nigeria, could have been adjudicated upon. Instead, it went to the extent of disputing the Respondent's action under Section 33 of the 1940 Act. Having been ill advice to pursue obdurate stand, assuming that the advantage of Section 14 of the Limitation Act was available to him, it was essential to move the Court within three years of 28.07.1979 after excluding the period in which the Section 33 Petition remained pending. Since the cause of action must be deemed to have arisen on 28.07.1979, if not earlier in normal circumstances, the Section 20 Petition would be required to be filed before 27.07.1981. The exact date on which the Respondent filed the Section 33 Petition cannot

be ascertained. We shall extend all benefit to the Appellant by assuming that this petition was filed on 01.02.1981. Since it was allowed on 15.10.1985, a period of one year five months and twenty seven days was available from the date on which Section 33 Petition was allowed. The time to file an application under Section 20, therefore expired on 22.5.1987. **(Para 12)**

The learned Single Judge has excluded time from 4.3.1980 till 15.10.1985 to arrive at the conclusion that the Petition was time-barred. Assuming that Section 14 of Limitation Act applies, the period to be excluded would commence on the date on which the Petition/application under Section 33 of the 1940 Act had been filed, that is, February, 1981, ending on 15.10.1985, the day when it was allowed. Even if one were to further exclude the period which spent in obtaining a Certified Copy of that Order, time would unquestionably commence rerunning on 25.11.1985 when the Certified Copy was received. Since the Petition under Section 20 of 1940 Act was filed on 29.5.1987, seven days already expired from the date on which the cause of action to file Section 20 Petition under 1940 Act had arisen. We must clarify that the cause of action does not start on the date when a claim is repudiated; it arises when the dispute actually arises. Adjudged from any standpoint, therefore, the Petition under Section 20 of 1940 Act is hopelessly barred by limitation. The dispute needs burial, even if thirty-five years too late. **(Para 14)**

Important Issue Involved: Limitation for filing of a petition u/s 20 Arbitration Act 1940 is three years from the date of notice.

[Vi Ba]

APPEARANCES:

FOR THE APPELLANT : Ms. Anusuya Salwan & Ms. Renuka Arora, Advocates.

FOR THE RESPONDENT : Mr. H.L. Tiku, Sr. Adv, with Mr. Sanjay Goel & Ms. Naina Kejriwal, Advocates.

CASES REFERRED TO:

1. *Competent Placement Services (Regd.)* vs. *Delhi Transport Corporation,* 2010 (120) DRJ 3232(DB)
2. *Bharat Sanchar Nigam Ltd.* vs. *Haryana Telecom Ltd.,* 2010(7) AD (Delhi) 331.
3. *The Executive Engineer (Irrigation & Flood Control)* vs. *Shree Ram Construction Co.,* 2010 (10) AD (Delhi) 180.
4. *Gulbarg University* vs. *Mallikarjun Kodagali,* (2008) 13 SCC 539.
5. *Punjab State* vs. *Dina Nath,* AIR 2007 SC 2157.
6. *State of Goa* vs. *Western Builders,* (2006) 6 SCC 239.
7. *Hari Shankar Singhania* vs. *Gaur Hari Singhania,* AIR 2006 SC 2488.
8. *Union of India* vs. *Popular Construction Company,* (2001) 8 SCC 470.
9. *State of Orissa* vs. *Sri Damodar Das,* AIR 1996 SC 942.
10. *Shah Construction Company Ltd., Bombay* vs. *Municipal Corporation of Delhi,* AIR 1985 Delhi 358
11. *Oriental Building & Furnishing Co.* vs. *Union of India,* AIR 1981 Delhi 293
12. *Union of India* vs. *M/s. Vijay Construction Co., Meerut,* AIR 1981 Delhi 193
13. *Pridhadinomal Methumal* vs. *Mt. Chuti,* AIR 1933 Sind 379
14. *Somshikharswami Shidlingswami* vs. *Shivappa Mallappa Hosmani,* AIR 1924 Bom 39.

RESULT: Appeal is dismissed.

VIKRAMAJIT SEN, J.

1. This Appeal assails the Order of the learned Single Judge, which we shall reproduce below for facility of reference:-

> 1. Petition under Section 20 of the Arbitration Act 1940 seeks reference to an arbitrator of the disputes between the petitioner and the respondent arising out of the agreement dated 7.10.1976.
>
> 2. Petition has been filed in the year 1988.
>
> 3. It is stated in para 16 of the petition that vide letter dated 28.7.1979, petitioner raised a demand against the respondent arising out of the contract and that vide letter dated 11.8.1979 defendant refuted the demand.
>
> 4. A principal issue arises whether present petition is within limitation, for the reason, law is well settled. A party must move under Section 20 of the Arbitration Act 1940 within a period of 3 years when dispute surfaces.
>
> 5. A perusal of the petition shows that the chairman of the petitioner has appointed an arbitrator on 4.3.1980 which appointment was challenged by the respondent vide OMP No.91/1981. Vide decision dated 15.10.1985, appointment of arbitrator was set aside holding that the chairman of the petitioner could not appoint an arbitrator.
>
> 6. The present petition has been filed on 30.5.1987. It was returned under objections and was thereafter refiled in May 1988.
>
> 7. From a perusal of the petition it is to be noted that dispute arose when the consignment shipped abroad reached a wrong destination. This took place in the year 1977.
>
> 8. Thus, ex facie appointment of the arbitrator by the chairman of the petitioner in the year 1981 was at a point of time when claim had become barred by limitation.
>
> 9. Excluding time from 4.3.1980 till OMP No.91/1981 was decided on 15.10.1985 present petition would be hopelessly barred by limitation for the reason cause of action accrued in 1977.

10. Assuming that cause of action accrued on 11.8.1979, still, excluding time from 26.2.1980 till 15.10.1985, the petition would be barred by limitation.

11. Suit No.1056-A/1988 is accordingly dismissed as barred by limitation.

12. All pending IAs are disposed of as infructuous.

13. No costs.

August 31, 2006 PRADEEP NANDRAJOG, J.

2. What falls for a decision before us is whether the Petition under Section 20 of the Arbitration Act, 1940 (1940 Act for short) was barred from consideration by the principles of prescription. The 1940 Act did not specifically prescribe any period of limitation with regard to the preferment of a petition under Section 20 thereof for reference of disputes to an arbitrator. In these circumstances, it has been held that the residuary clause in the Limitation Act, 1963 (Limitation Act for short) would come into force. Accordingly, a petition under Section 20 of 1940 Act would require to be filed within three years of the arising out of the cause of action.

3. Learned counsel for the Appellant has sought to rely on **State of Goa –vs- Western Builders,** (2006) 6 SCC 239 as well as **Gulbarg University –vs- Mallikarjun Kodagali,** (2008) 13 SCC 539. Both the precedents relate to the manner in which the period of limitation has to be calculated with regard to Section 34 of the Arbitration & Conciliation Act, 1996 (1996 Act for short). **Gulbarg University** refers to **Western Builders** which, in turn, refers to **Union of India –vs- Popular Construction Company,** (2001) 8 SCC 470. The applicability of Section 5 of the Limitation Act to disputes under the Arbitration Act was neither doubted nor interfered with. However, in the context of Section 34 of the 1996 Act, it has been definitively held that if objections came to be filed beyond three months and thirty days of the date on which the Award was served on the Objector, it would stand barred from consideration. It was held that Section 5 of the Limitation Act could be pressed into use so far as delay in the hiatus beyond three months but before thirty days thereafter is concerned. So far as **Western Builders** is concerned, it has not interfered or modified the **Popular Construction**

dictum. The question that had arisen before the Court in the later case was that the Plaintiff/Petitioner had been bona fide prosecuting a remedy albeit in the wrong Court. Their Lordships held that the benefit bestowed by Section 14 of the Limitation Act had not been excluded even by the preemptory language contained in Section 34(3) of the 1996 Act. Since Section 14 had not been applied to the dispute in **Gulbarg University**, the Supreme Court had remanded the matter back to the trial Court for a fresh determination of facts.

4. Section 14 of the Limitation Act reads thus:-

> 14. Exclusion of time of proceeding bonafide in court without jurisdiction.
>
> (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub- section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.
>
> Explanation.- For the purposes of this section,-

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

5. It is manifestly clear from a bare reading of this Section that the period during which the Plaintiff has bona fide prosecuted another civil proceedings in a Court not possessing jurisdiction would be excludable while computing the period of limitation. However, sub-section(2) of Section 14 extends those benefits to an applicant, in contradistinction to a plaintiff alone. In other words, the alleviation is available both to the plaintiff and to the applicant. So far as the present case is concerned, the Appellant had appointed an Arbitrator on 26.2.1980. The Respondent disputed this appointment within six days, that is, on 4.3.1980. The Arbitrator, however, entered upon the Reference after the expiry of almost one year, on 23.2.1981. Immediately thereupon, it is the Respondent who, in February, 1981, invoked Section 33 of the 1940 Act, that is, to determine the existence of an Arbitration Agreement and/or the effect of the Arbitration Clause. On 15.10.1985, the Petition came to be allowed, the consequence of which was that the appointment of the Arbitrator and all proceedings pursuant thereto, stood completely nullified. This narration manifests that it was not the Appellant before us who had filed any suit or application; on the contrary, it was the Respondent who had done so, and in the event, successfully. Had the Appellant assailed the Order allowing the application under Section 33 of the 1940 Act, it would have been a moot or arguable question whether the benefit of this provision would have enured to it. Section 14 of the Limitation Act, therefore, cannot be invoked by the Appellant who was neither the Plaintiff nor the Appellant in the Section 33 proceedings. The definition of the word "prosecute" in Black's Law Dictionary, Eighth Edition is – (1) "To commence and carry out a legal action; …. (2) To institute and pursue a criminal action against a person. (3) To engage in; carry on". In Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edition 2005, with regard to the meaning of the term "prosecute" reference is made to **Somshikharswami Shidlingswami –vs- Shivappa Mallappa Hosmani,**

AIR 1924 Bom 39 and **Pridhadinomal Methumal –vs- Mt. Chuti,** AIR 1933 Sind 379 in order to formulate its definition viz. – "The expression 'prosecuting' is generally applicable to proceedings by a person as a plaintiff or an applicant, and not to proceedings in which such person is merely resisting, as a defendant or respondent, the claim of another". In our opinion, Section 14 of the Limitation Act cannot be availed or even invoked by the Appellant.

6. Even if one were to assume that Section 14 of the Limitation Act comes to the succor of the Appellant, it must be borne in mind that the provision excludes time but does not extend time. This interesting question of law came to be analysed by one of us the Division Bench, in **Bharat Sanchar Nigam Ltd. –vs- Haryana Telecom Ltd.,** 2010(7) AD (Delhi) 331 as well as in **The Executive Engineer (Irrigation & Flood Control) –vs- Shree Ram Construction Co.,** 2010 (10) AD (Delhi) 180.

7. Proceedings on the presumption that the advantage of Section 14 is available to the Appellant, the relevant period of exclusion would be from February 1981 to 15.10.1985. During this period, time stood still as if in suspended animation in the legendary Bermuda Triangle. It is contended by Mr. H.L. Tiku, learned Senior Counsel for the Respondent that the cause of action must be taken to have arisen on 2.3.1978 when the last consignment was shipped in terms of the Agreement dated 7.10.1976 between the parties. The admitted position is that the Claim of the Appellant was made in writing on 28.7.1979.

8. It is possible that some doubt may be entertained as to whether Limitation for the purposes of Section 20 commences differently to that regarding ordinary civil suits. The Limitation Act prescribes, in the context of civil disputes, that the computation of limitation must commence from the date on which the cause of action first arises. So far as Section 20 is concerned, it arises "when the period to apply accrues". **Oriental Building & Furnishing Co. –vs- Union of India,** AIR 1981 Delhi 293 is a Single Bench decision of this Court which appears to laid down that it is only when parleys have come to a futile end that Limitation for the purposes of Section 20 commences to run. Same observations can be found in the decision of the Division Bench in **Shah Construction Company Ltd., Bombay –vs- Municipal Corporation of Delhi,** AIR 1985 Delhi 358 on a concession made by the parties (See paragraph 16).

9. We are in entire and respectful agreement with the Division Bench ruling in **Union of India –vs- M/s. Vijay Construction Co.,** Meerut, AIR 1981 Delhi 193 where it was observed that the "right to apply under Section 20 accrues to a party to the contract containing arbitration clause on the date when the contract was rescinded by the other party thereto and the limitation thereof has to be counted from that date and not from the date of service of notice when that party to arbitration agreement serves a notice on the other party thereto requiring the appointment of an arbitrator". The later Division Bench Judgment follows **Vijay Construction**. In AIR 1990 SC 1918, their Lordships held that the period started to run from the date of the issuance of the notice of demand and that the date on which one of the parties had applied to the government to refer disputes between them to arbitration was irrelevant. In **State of Orissa –vs- Sri Damodar Das,** AIR 1996 SC 942, their Lordships observed as follows:-

> 5. Russell on Arbitration by Anthony Walton (19th Edn.) at pp. 4-5 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued:
>
> "Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued."
>
> Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause.

10. Our research would not be complete without reference to **Hari**

Shankar Singhania –vs- Gaur Hari Singhania, AIR 2006 SC 2488 since it makes a reference to the Single Bench decision in Oriental Building & Furnishing Co., with which respectfully we are unable to concur. A holistic reading of the Judgment will show that only a passing reference had been made by their Lordships to this Judgment. The gravamen and ratio of **Hari Shankar Singhania** case is that where family disputes are concerned, if efforts to reconcile differences are underway, the cause of action should not be seen as having arisen. It is only when these differences are finally found to be irreconcilable that the cause of action arises. The conclusive is to be found in **Punjab State –vs- Dina Nath,** AIR 2007 SC 2157 as will be evident from a reading of the following paragraphs therefrom:

> 24. Accepting the principles laid down in S. Rajan this Court in **Hari Shankar Singhania v. Gaur Hari Singhania** again reiterated the principle that an application under Section 20 of the Act for filing the arbitration agreement in court and for reference of the dispute to arbitration in accordance therewith is required to be filed within a period of three years when the right to apply accrues and that the said right accrues when difference or dispute arises between the parties to the arbitration agreement. Keeping the principles in mind, let us now examine as to when difference or dispute arises between the parties to the arbitration agreement, when the right to apply accrues. As noted herein earlier, demand notice was served on the appellants by the respondent on 16-4-1990 and the application under Section 20 of the Act was filed on 13-11-1990 which is admittedly within the period of limitation as contemplated under Article 137 of the Limitation Act.
>
> 25. The Additional District Judge, Roopnagar, Punjab, held on the question of limitation in filing the application under Section 20 of the Act that the cause of action did not arise when notice of demand was served but arose when the respondent first acquired either the right of action or the right to require that arbitration takes place upon the dispute concerned.
>
> 26. Keeping the decisions of this Court in **S. Rajan** and **Hari Shankar Singhania** in mind, in our opinion, the view of the Additional District Judge was totally erroneous. In the aforesaid two decisions, it was held that the right to apply accrued for the

difference arising between the parties only when service of demand notice was effective, which should be the date for holding that the difference had already arisen between the parties. Such being the settled law, we are of the view that the application under Section 20 of the Act was clearly filed within the period of limitation.

11. The pleadings in the Petition under Section 20 of 1940 Act as well as the Appeal are unhappily vague. A reading of paragraphs 9 and 10 of the Section 20 Petition under the 1940 Act filed by the Appellant indicates that two consignments exported by the Respondents were 'over-shipped'. In order to salvage or mitigate damages, expenses were allegedly incurred by the Appellant owing to its officials have to travel to Nigeria. Details of this event are not forthcoming from a reading of the Petition, and even more regretfully from any of the pleadings or arguments of the Respondents. However, this much is certain that the cause of action for the present claim had already arisen on 28.7.1979 when the Appellant had made a written demand on the Respondent. Three years period within which the Appellant could have preferred an application under Section 20 of the 1940 Act would have expired on 27.7.1982. The Petition under Section 33 was filed in February, 1981 and, therefore, one year six months and three days had already elapsed, on that date one year five months and twenty seven days remained. Operation of Section 14, assuming it to be available to the Appellant, would enable it to have filed the Section 20 Petition under 1940 Act by 22.5.1987 days. The Petition came to be filed on 29.5.1987, by which date it was barred by limitation, even applying Section 14 of the Limitation Act.

12. The above narration discloses the recalcitrance and obduracy of the Appellant in not approaching the Court under Section 20 of the 1940 Act for the appointment of an Arbitrator in the way of the Respondent.s stand that the Appellant was not competent to appoint the Arbitrator. Had the Appellant resorted to Section 20, the damages that it had allegedly incurred as a result of bringing the entire subject consignment back to Nigeria, could have been adjudicated upon. Instead, it went to the extent of disputing the Respondent.s action under Section 33 of the 1940 Act. Having been ill advice to pursue obdurate stand, assuming that the advantage of Section 14 of the Limitation Act was available to him, it was essential to move the Court within three years of 28.07.1979 after

excluding the period in which the Section 33 Petition remained pending. Since the cause of action must be deemed to have arisen on 28.07.1979, if not earlier in normal circumstances, the Section 20 Petition would be required to be filed before 27.07.1981. The exact date on which the Respondent filed the Section 33 Petition cannot be ascertained. We shall extend all benefit to the Appellant by assuming that this petition was filed on 01.02.1981. Since it was allowed on 15.10.1985, a period of one year five months and twenty seven days was available from the date on which Section 33 Petition was allowed. The time to file an application under Section 20, therefore expired on 22.5.1987.

13. It will bear repetition that the Claim which is now sought to be resurrected is already over thirty-five years old or stale. The pleadings made available to us are awfully vague, indicating that if arbitration were to commence, nothing substantial would be proved. Mr. Tiku, learned Senior Counsel for the Respondent, relies on **Competent Placement Services (Regd.) –vs- Delhi Transport Corporation,** 2010 (120) DRJ 3232(DB) in support of his argument that the refiling of the Petition after the efflux of almost one year should not be condoned. Ms. Anusuya Salwan, learned counsel for the Appellant, however, rightly submits that the provisions pertaining to the period within which refiling must be carried out were not in vogue in 1988 and, therefore, the rigours of Competent Placement Services (Regd.) would no obtain. Mr. Tiku's objection that the Appellant had not even bothered to file an application under Section 5 of the Limitation Act for condoning the delay in refiling, therefore, also loses all substance. It will indeed be a dismal day when a Court is compelled to order commencement of proceeding of a dispute which had arisen as far back as in circa 1978. Our decision, however, does not rest only on these pragmatic considerations.

14. The learned Single Judge has excluded time from 4.3.1980 till 15.10.1985 to arrive at the conclusion that the Petition was time-barred. Assuming that Section 14 of Limitation Act applies, the period to be excluded would commence on the date on which the Petition/application under Section 33 of the 1940 Act had been filed, that is, February, 1981, ending on 15.10.1985, the day when it was allowed. Even if one were to further exclude the period which spent in obtaining a Certified Copy of that Order, time would unquestionably commence rerunning on 25.11.1985 when the Certified Copy was received. Since the Petition

under Section 20 of 1940 Act was filed on 29.5.1987, seven days already expired from the date on which the cause of action to file Section 20 Petition under 1940 Act had arisen. We must clarify that the cause of action does not start on the date when a claim is repudiated; it arises when the dispute actually arises. Adjudged from any standpoint, therefore, the Petition under Section 20 of 1940 Act is hopelessly barred by limitation. The dispute needs burial, even if thirty-five years too late.

15. Appeal is dismissed with no order as to costs. CM No.11747/2008 is also dismissed.

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FAO

CONSULTING ENGINEERING SERVICES (INDIA) PVT. LTD. **....APPELLANT**

VERSUS

THE CHAIRMAN, ESI CORPORATION & ORS. **....RESPONDENTS**

(REVA KHETRAPAL, J.)

FAO NO. : 124/2002 AND CM NO. : 291/2002 (STAY) **DATE OF DECISION: 03.05.2011**

Employees' State Insurance Act, 1948 ("ESI Act")—Applicability to Consultancy Organisation—Appellant-a professional Architectural and Engineering Consultancy Organization contended that it was not a shop, factory or establishment; therefore not covered under the Act—The coverage impugned by the Appellant under Section 75 of the ESI Act—the challenge was negatived by order dated 15.02.2002, hence statutory appeal. Held—Issue squarely covered by *Kirloskar Consultants Ltd* Case (2001) 1SCC57

wherein similar activities were held to be commercial or economical and would amount to parting with the same at a "price" and therefore the establishment interpreted to be a "shop" and covered under the ESI Act.—Held that narrow interpretation if given to the ESI Act would defeat the very purpose of the enactment.

The irresistible conclusion, in my view, therefore, is that whenever an establishment carries on activities in the nature of trade or commerce, it must be held that the premises being used therefor is a "shop" by giving an expanded meaning to the word "shop". The giving of the expanded meaning is entirely justified in view of the fact that the Preamble to the Act explicitly states:-

> **"An Act to provide for certain benefits to employees in case of sickness, maternity and 'employment injury' and to make provision for certain other matters in relation thereto."**

The aforesaid object, being a beneficent one, it stands to reason that a narrow or restricted meaning assigned to the coverage of the Act would defeat the very purpose of the enactment itself. **(Para 16)**

The Senior Civil Judge, in my view, has, therefore, rightly held that it is not necessarily only a place where "goods" are sold which comes within the meaning of the word "shop". A place where "services" are sold has also been legally interpreted to be a "shop". The appellant–Company, by its own admission, is carrying on consultancy services, for which it charges its clients. The services are not being rendered as gratuitous or for charity, but admittedly for remuneration. As such, the interpretation required to be given to the provisions of Section 1(4) read with Section 2(12)(b) of the Act read with the Notification No.F.28(2)/88/IMP/LC/Lab/2625-32 dated 30th September, 1988 (effective from the 2nd day of October, 1988) must, in my opinion,

necessarily encompass services of the nature being rendered by the appellant. **(Para 17)**

Important Issue Involved : A professional Architectural and Engineering Consultancy Organization was a "shop" and therefore covered under the Employees' State Insurance Act 1948. A narrow interpretation to such a welfare statute would defeat its very purpose.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Rakesh Kumar Khanna, Sr. Advocate with Mr. Anurag and Ms. Neha Garg, Advocates.

FOR THE RESPONDENT : Mr. K.P. Mavi, Advocate.

CASES REFERRED TO:

1. *Dharmarth Trust, Jammu and Kashmir, Jammu and Ors.* vs. *Dinesh Chander Nanda* (2010) 10 SCC 331.
2. *Kirloskar Consultants Ltd.* vs. *Employees. State Insurance Corpn.* reported in (2001) 1 SCC 57.
3. *Indian Medical Association* vs. *V.P. Shantha and Ors.,* (1995) 6 SCC 651.
4. *M/s. Cochin Shipping Co.* vs. *ESI Corporation,* (1992) 4 SCC 245.
5. *Hindu Jea Band* vs. *Regional Director, Employees. State Insurance Corporation, Jaipur,* AIR 1987 SC 1166.
6. *M/s. International Ore & Fertilisers (India) Pvt. Ltd.* vs. *Employees. State Insurance Corporation,* (1987) 4 SCC 203.
7. *Sasidharan* vs. *M/s. Peter and Karunakar and Ors.,* (1984) 4 SCC 230.
8. *V. Sasidharan* vs. *M/s. Peter and Karunakar and Ors.,* (1984) 4 SCC 230.

9. *Regional Provident Fund Commissioner* vs. *Shibu Metal Works,* (1965) 2 SCR 72.

RESULT: Appeal dismissed.

REVA KHETRAPAL, J.

1. The present appeal filed under Section 82 of the Employees. State Insurance Act, 1948 is directed against the judgment and order ˇdated 15.02.2002 passed by the learned Senior Civil Judge, ESI Court, Delhi in ESI Petition No.19/99, whereby it was held that the appellant is covered by the Employees State Insurance Act, 1948 (hereinafter referred to as "the Act") and is not entitled to the relief claimed by it in the petition filed under Section 75 of the Act.

2. The facts leading to the filing of the petition under the aforesaid Act are that the appellant–Company is a private limited company incorporated under the provisions of the Companies Act, 1956 with its registered office at 57, Nehru Place, Manjusha building, 5th Floor, New Delhi-110019. It was established in May, 1969 as a professional Architectural/Engineering Consultancy Organisation having no association with any contractor/manufacturer/supplier and renders comprehensive consultancy services starting from initial fact finding surveys, formulation and concept planning, right upto project management and supervision of various kinds of Engineering and Architectural services. It does not carry out any manufacturing activity nor it produces any goods for marketing and supply to any of its clients and customers nor it produces or supplies any goods to the public in general. It is claimed that the appellant–Company is neither a "factory" nor an "establishment" nor a "shop" within the meaning of the ESI Act. The dominant feature of the application of the ESI Act for the purpose of definition of such application is relateable only to factories and establishments where either manufacturing process goes on or where the business of selling and purchase takes place as a commercial activity. In the case of the appellant, the said features are claimed to be conspicuously absent and as such the employees of the appellant are not employees within the meaning of the said Act. It is further claimed that the appellant–Company is providing medical facilities to its employees which are far superior to those provided by the respondents, and as such the provisions of the Act are not attracted to the appellant–Company. It is asserted that the appellant–Company being

not aware of the existing position of the ESI Act, and the implications thereof, had allowed itself to be registered under the said Act. This was done under mistake, and on account of the said mistake it had also deposited an amount of ` 10,51,681/- to the ESI Corporation. The appellant claims to be entitled to the refund of the said sum of Rs. 10,51,681/- and to be de-registered from the operation of the Act. The respondents having refused to accede to the said prayer and having claimed a further contribution to the tune of Rs. 15,50,703/- for various periods, the appellant was compelled to file a writ petition before this Court, being Civil Writ Petition 153/98, which was disposed of on 28.01.2000 by passing the following order:-

"28.1.2000

Present: Ms. Deepty Chowdhary for the petitioner.

Mr. Harpreet Singh for the respondent-4.

CW.153/98 & CM No.2553/98 & CM 216/98

Rule.

With the consent of parties, the matter is taken up for final disposal at this stage today.

The petitioner received show cause notice from respondent No.1/Employees State Insurance Corporation calling upon it to show cause as to why the petitioner as one of the principal employers be not prosecuted for offence under section 406 of Indian Penal Code for non-payment of contribution under section 39 and 40 of E.S.I. Act. Petitioner replied stating that it was not the liability of the petitioner to pay any such contribution. However the contention of the petitioner was not accepted by E.S.I. authorities and demand notice was issued dated 4.11.1996 demanding a sum of Rs. 7,14,656.25 p for the period from 17.1.1995 to 31.1.1995 and 1.2.1995 to 30.6.1996. Subsequently further a sum of Rs. 3,37,025/- was also demanded. Petitioner made the payment of Rs. 10,51,681/- pursuant to the aforesaid demand notices. Thereafter on 5.9.1997 another sum of Rs. 15,50,703/- was demanded. Petitioner challenged the validity of this demand and requested the respondent Corporation to exempt its company from the ESI coverage under the provisions of

Section 87, 88, 89 and 91A of the ESI Act. Thereafter petitioner filed CW No.5374/97 in this Court in which order dated 10.12.1997 was passed directing the respondent to give hearing to the petitioner. It is the case of the petitioner that without giving hearing Deputy Director, the respondent No.3 passed an ex-parte order directing the petitioner to pay a sum of Rs. 15,50,703/-. At this stage, petitioner filed this writ petition challenging the aforesaid order dated 19.12.1997 as well as coverage of the petitioner establishment under the provisions of ESI Act.

On 11.5.1999 an order in this writ petition was passed in the following terms:

> "Learned counsel for the respondent No.1 & 2 submitted that the petitioner.s plea that he is not covered by the provision of the Employees. State Insurance Corporation Act, 1948, hereinafter referred as ESI Act, can be raised before ESI Court under Section 75 of the ESI Act. Learned counsel for the petitioner is, therefore, permitted to raise this plea before the ESI Court within a period of two weeks from today. The ESI Court will decide this issue raised by the petitioner within a period of six weeks thereafter."

After the aforesaid order, the petitioner raised the dispute before the ESI Court by filing this petition which is pending before the said Court. Counsel for the petitioner states the next date is 16.3.2000 for filing of reply by respondents 5 & 6/ Central Government.

In view of the aforesaid position, when the matter is seized of by ESI Court and which is also the efficacious alternative remedy provided to the petitioner in such cases, no useful purpose would be served in keeping this petition pending. If the petitioner is aggrieved against the order that would be ultimately passed by the ESI Court, petitioner has remedy provided under ESI Act which provides for complete machinery for adjudication for such disputes. The counsel for the petitioner accepts this position and is willing to withdraw this petition. However she contends that

in the meantime, the stay order granted by this Court should continue till the matter is decided by the ESI Court. This stay order was passed after hearing both the parties at length and the respondents agreeing to the same. Mr. Harpreet Singh, learned counsel for the respondent however points out that it was on the understanding that ESI Court would decide the matter within a period of six weeks as mentioned in order dated 11.5.1999 also.

Keeping in view the entirety of circumstances stated above, it would be appropriate to continue the stay order and at the same time it is necessary to issue directions to ESI Court to decide the matter as expeditiously as possible. Accordingly direction is issued to ESI Court to decide the matter by 31.5.2000 and interim order passed in this Court would continue till the decision of the case by ESI Court.

The Writ Petition and CM dismissed as withdrawn.

Dasti to counsel for both the parties."

3. In view of the aforesaid order, the appellant, as already stated above, filed a petition under Section 75 of the ESI Act, which was dismissed vide the impugned order dated February 15, 2002.

4. Aggrieved by the aforesaid dismissal, the appellant has preferred the present appeal praying for quashing the impugned order and judgment dated 15.02.2002, on which I have heard Mr. Rakesh Kumar Khanna, the learned senior counsel for the appellant and Mr. K.P. Mavi, the learned counsel for the respondents.

5. Mr. Khanna, the learned senior counsel for the appellant contended that the provisions of the Act are applicable only to ˇfactories and establishments where either the manufacturing process goes on or where business of selling and purchase takes place as a commercial activity. It is the case of the appellant–Company that it is neither a factory nor an establishment nor a shop and, as such, is not liable to be covered under the Act. It is providing consultancy services only, and an organization providing consultancy services only is not covered under the Act. In this context, Mr. Khanna relied upon the meaning of the words "Shop" and "Establishment" as per the New Lexicon, Webster's Dictionary of the English language (Deluxe Encyclopedic Edition), and the Oxford Dictionary

as given below. In the former, the words "Shop" and "retail" are described as under:

"SHOP" A Store (Building where retail trade is carried on).

A workshop or establishment where machines or goods are made or repaired.

'RETAIL' Selling of goods, which are for sale, in small quantities to the General Public, outlet (i.e. shops) for the retail of leather goods, retail business traders, manufacturers, etc.

The meaning of word "Shop" as per Oxford Dictionary is as under:

"Building or room where goods or services are sold to the public."

The meaning of the word "Commercial Establishments" as per Delhi Shops and Establishments Act, 1954 was also adverted to as given below:

"COMMERCIAL ESTABLISHMENTS

'Shop' means any premises where goods are sold, either by retail or wholesale or when services are rendered to customers, and includes an office, a store-room, godown, warehouse or workhouses or work place, whether in the same premises or otherwise, used in or in connection with such trade or business but does not include a factory or 'Commercial Establishment'."

6. Mr. Khanna, the learned senior counsel for the appellant also relied upon the definition of "Professional Activity" as set out in the Master Plan, the relevant portion of which reads as under:-

"15.8. PROFESSIONAL ACTIVITY

Subject to the general terms and conditions specified in para 15.4, professional activity is permissible in plotted development and group housing under the following specific conditions:

i. Professional activities shall mean those activities involving services based on professional skills namely Doctor, Lawyer, **Architect,** and Chartered Accountant, Company secretary, Cost and Works Accountant, **Engineer,** Town Planner, Media professionals and Documentary Film maker;

ii. ……

iii. ……

iv. ……"

7. The learned senior counsel for the appellant further contended that the expression "Shop" means a premises which is used in connection with trade or business, but does not include an establishment where professional service is rendered or professional activity is carried on. Relying upon the judgment of the Hon'ble Supreme Court in **V. Sasidharan vs. M/s. Peter and Karunakar and Ors.,** (1984) 4 SCC 230, he contended that on the analogy that a lawyers office where advice is given by a lawyer is not a "Shop" or "Commercial Establishment" for the purposes of the Kerala Shops and Commercial Establishments Act, 1960, as held by the Hon'ble Supreme Court, the appellant's place of work cannot be regarded as a shop.

8. Reliance was also placed by him on the decision of the Hon'ble Supreme Court in **Dharmarth Trust, Jammu and Kashmir, Jammu and Ors. vs. Dinesh Chander Nanda** (2010) 10 SCC 331. The question which arose for consideration before the Supreme Court in the said case was whether the suit filed by the respondent, who was an Architect, was covered under Article 56 of the Jammu and Kashmir Limitation Act, 1995 or whether the said suit was covered under Article 119 of the said Act. For the aforesaid purpose, the Supreme Court interpreted the expressions "price" and "work done" as appearing in Article 56 and held that the term "price" does not cover the services provided by professionals such as an architect, lawyer, doctor, etc. as professionals charge a "fee". Also, the term "work done" in Article 56 will not be applicable to professionals such as architect, lawyer, doctor, etc. as these professionals render "services" to their clients. The remuneration of a professional is in the form of a "fee" and, therefore, it cannot be said that the professional earns a "price". In common usage, the term "price" refers to goods sold. In paragraph 18, the Court observed as follows:-

> "18. As rightly pointed out by Mr. Giri, learned Senior Counsel for the respondent that the specific treatment of attorneys/vakils who provide professional services is a reflection of the intention of the legislature to treat the services provided by professionals differently from work done by others. The word "price" was never intended to be used synonymously with the word "fee" and, therefore, the fee charged by an architect for services rendered by him would not be covered under Article 56 of the Act. In the case on hand, the trial court as well as the High Court have made a clear distinction between the terms "work done" and "services". The "work done" would refer to work done by masons such as landfilling or engineering projects, etc."

9. The learned senior counsel for the appellant also placed reliance upon a three-Judge Bench decision of the Supreme Court rendered in the case of **Indian Medical Association vs. V.P. Shantha and Ors.,** (1995) 6 SCC 651 to contend that while a person engaged in an occupation renders service which falls within the scope and ambit of Section 2(1)(o) of the Consumer Protection Act, 1986, the service rendered by a person belonging to a profession does not fall within the ambit of the said Section. He contended that whereas hitherto, the word "profession" used to be confined to three learned professions, viz. the Church, Medicine and Law, by and large professional status has now been conferred on seven specific occupations, namely, (i) architects, engineers and quantity surveyors, (ii) surveyors, (iii) accountants, (iv) solicitors, (v) barristers, (vi) medical practitioners, and (vii) insurance brokers (See: **Jackson & Powell on Professional Negligence,** 3rd Edition). It has now a wider connotation. As enunciated by Scrutton L.J., the profession in the present use of language involves "the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting or sculpture, or surgery, by intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangement for the production or sale of commodities". [See: **IRC vs. Maxse,** (1919) 1 KB 647 at page 657].

10. Rebutting the aforesaid contentions of the learned senior counsel for the appellant, Mr. K.P. Mavi, the learned counsel for the respondents contended that the present appeal was not maintainable in view of the fact that it raised no substantial question of law as envisaged by the provisions of Section 82 of the Act. Relying upon the Notification No.F.28(2)/88/IMP/LC/Lab/2625-32 dated 30th September, 1988, Mr. Mavi, on merits, contended that the provisions of the Act had been extended to classes of establishments specified in Column I of the Schedule given in the Notification with effect from the 2nd day of

October, 1988. The said Schedule reads as under:-

"SCHEDULE

Description of establishments Area in which the establishments are

_____ situated

The following establishments wherein twenty or more persons are employed or were employed for wages on any day of the preceding twelve months namely: In the Union "SHOPS" Territory of Delhi.

By order and in the name of the
Lt. Governor of the Union
Territory of Delhi.
Sd/-

(MRS. M. BASSI)

DEPUTY SECRETARY (LABOUR)

DELHI ADMINISTRATION: DELHI"

11. Mr. Mavi also referred to and relied upon the decision of the Supreme Court rendered in the case of **Employees State Insurance Corporation vs. R.K. Swamy & Ors. etc.,** JT 1993 (6) SC ˇ176, wherein the question which had arisen was whether advertising agencies are shops for the purposes of the application of the Act? Answering the aforesaid question in the affirmative, the Supreme Court, taking into account the expanded meaning now given to the word "shop" in various cases before it, held that the advertising agencies were "shops" "where systematic economic or commercial activity was carried on". In arriving at the aforesaid conclusion, the Supreme Court referred to and relied upon the following judgments already rendered by it:-

(i) **M/s. Cochin Shipping Co. vs. ESI Corporation,** (1992) 4 SCC 245.

In this case, the Supreme Court noted that the appellant was carrying on stevedoring, clearing and forwarding operations and held that it could

not be gainsaid that the appellant was rendering a service to cater to the needs of exporters and importers and others who wanted to carry goods. Therefore, the appellant's premises were held to be a "shop" carrying on a systematic economic or commercial activity.

(ii) **M/s. International Ore & Fertilisers (India) Pvt. Ltd. vs. Employees. State Insurance Corporation,** (1987) 4 SCC 203. In this case, the petitioner carried on commercial activities facilitating the sale of goods by its foreign principals to the State Trading Corporation or the Minerals and Metals Trading Corporation. It arranged for the unloading of such goods and their survey. Upon delivery, it collected the price payable and remitted it to its foreign principals. These were trading activities and although the goods imported were never actually brought to the petitioner.s premises, the premises were nevertheless held by the Supreme Court to be a "shop", because the trading activities "related to the sale of goods".

(iii) **Hindu Jea Band vs. Regional Director, Employees. State Insurance Corporation, Jaipur,** AIR 1987 SC 1166. The Supreme Court in this case held a shop to be "a place where services are sold on retail basis". It was, therefore, held that making available on payment of a stipulated price the service of musicians employed by the petitioner on wages made the petitioner.s establishment a "shop".

(iv) **Regional Provident Fund Commissioner vs. Shibu Metal Works,** (1965) 2 SCR 72.

It was held that in construing the provisions of the Employees Provident Fund Act, which had a beneficent purpose, if two views were reasonably possible, the Court should prefer the view which helped the achievement of the object. The object, which the Act purported to achieve, was to require that appropriate provision should be made for employees employed in establishments to which the Act applied and thus, a broad construction of the Act was to be preferred.

12. Mr. Mavi next sought support from the judgment of the Supreme Court rendered in **Kirloskar Consultants Ltd. vs. Employees. State Insurance Corpn.** reported in (2001) 1 SCC 57. In the said case, the appellant before the Supreme Court provided under a roof, the services of several different professionals like Engineers, Architects, Financial Consultants and Management Consultants, guidance and advice to other

companies, corporations, boards and even local authorities on how best to manage their business for optimum utilization of plant, machinery and other infrastructure. It was the contention of the respondent that the appellant was engaged in the consultancy services in technical and marketing fields for a price and it was a "shop". Applying the analogy of **R.K. Swamy's** case (supra), the Supreme Court in the Kirloskar case held as follows:-

> "9. What we are concerned in the present case is what this Court was concerned in **R.K. Swamy** case. An advertising agency organises campaigns by conducting the same in different media and would give advice in this behalf and also in regard to possible expenses. It is also engaged in preparing and presenting alternate campaigns and for such a purpose it prepares artwork and appropriate slogans to go with it. By engaging the service of experts in different fields the advertising agency would prepare the campaign for customers and sell the campaign by receiving the price thereof. As the advertising agency sells its expert services to a client to enable him to launch an advertising campaign to advertise his product, the same being offered for at a price, the premises of an advertising agency could reasonably be said to be a shop. Adopting the same logic, we may say that the business carried on by the appellant is of consultancy services to its customers in respect of industrial, technical, marketing and management activities and preparation of project reports by engaging the services of architects, engineers and other experts. In substance, the nature of activities carried on by the appellant is commercial or economical and would amount to parting with the same at a price. Hence reliance on **Sasidharan** case is misplaced. Thus, we do not find any good reason to differ from the view expressed by the High Court."

13. Placing strong reliance on the aforesaid observations, the learned counsel for the respondents contended that the judgments of the Supreme Court relied upon by the learned senior counsel for the appellant, rendered in the cases of **V. Sasidharan, Dharmarth Trust** and **Indian Medical Association** (supra), were clearly distinguishable on facts. The first case related to the question as to whether a firm of lawyers is a "commercial establishment" within the meaning of the Kerala Shops and Commercial

Establishments Act, 1960. In the second case, viz., **Dharmarth Trust**, the question which arose for consideration was that whether the term "price" used in Articles 52 to 55 of the Jammu and Kashmir Limitation Act, 1995 in co-relation to goods sold and delivered would take a similar meaning when used in Article 56 of the said Act, and it was in this context that the Court held that the term "price of work done" in Article 56 of the Limitation Act cannot be made applicable to professions where the professional merely provides services for a "fee", and the Supreme Court accordingly accepted the claim of the respondent that the profession of an Architect is one such service, hence Article 56 is not applicable thereto. In **Indian Medical Association,** the point in controversy related to the Consumer Protection Act, 1986 and the common question raised in all the appeals, special leave petitions and writ petition was whether and, if so, in what circumstances, a medical practitioner can be regarded as rendering 'service' under Section 2(1)(o) of the said Act.

14. Rebutting the aforesaid contentions of the learned counsel for the respondents, Mr. R.K. Khanna, the learned senior counsel for the appellant, pointed out that the question of law, as formulated in the Rejoinder-Affidavit filed by the appellant, is whether the ESI Act was applicable to the appellant–Company as it does not fall within the scope and definition of shop/factory/establishment as defined in the said Act? Reference was also made by Mr. Khanna to the Regulations framed by the Council of Architecture, and in particular to the Preamble thereof, to reinforce his submission that the work being carried on by the appellant–Company was professional activity, and to highlight the distinction drawn by him between trading activities for which "price" is paid and professional activity for which "fee" is received.

15. After hearing the learned counsel for the parties and going through the precedents cited by them at the Bar, I am of the view that the present case stands squarely covered by the decision of the Supreme Court rendered in the case of **Kirloskar Consultants Ltd.** (supra). In the said case, as in this case, the business carried on by the appellant was of consultancy services to its customers in respect of industrial, technical, marketing and management activities and preparation of project reports by engaging the services of architects, engineers and other experts. The Supreme Court in the said case after reviewing the entire gamut of case law held that the nature of activities carried on by the appellant was

commercial or economical and would amount to parting with the same at a "price". Reliance in such circumstances on **Sasidharan's** case (supra) was held to be misplaced as in the said case the Court was not concerned with the meaning attributed to the word "shop" arising under the ESI Act, and was concerned only with the interpretation thereof for the purposes of the Kerala Shops and Commercial Establishments Act, 1960, wherein Section 2(4) defines "commercial establishment" and Section 2(15) defines "shop". In the cases **Hindu Jea Band, M/s. Cochin Shipping Co. and International Ore & Fertilizers (India) Pvt. Ltd.**(supra), the premises were held to be "shop" even though activities relating to sale of goods were not taking place and in the first case the premises were being used for rendering service of musicians, in the second case the steamship Company was not carrying on any stevedoring operations at its office, and in the third case the survey of goods imported was being done.

16. The irresistible conclusion, in my view, therefore, is that whenever an establishment carries on activities in the nature of trade or commerce, it must be held that the premises being used therefor is a "shop" by giving an expanded meaning to the word "shop". The giving of the expanded meaning is entirely justified in view of the fact that the Preamble to the Act explicitly states:-

> **"An Act to provide for certain benefits to employees in case of sickness, maternity and 'employment injury' and to make provision for certain other matters in relation thereto."**

The aforesaid object, being a beneficent one, it stands to reason that a narrow or restricted meaning assigned to the coverage of the Act would defeat the very purpose of the enactment itself.

17. The Senior Civil Judge, in my view, has, therefore, rightly held that it is not necessarily only a place where "goods" are sold which comes within the meaning of the word "shop". A place where "services" are sold has also been legally interpreted to be a "shop". The appellant–Company, by its own admission, is carrying on consultancy services, for which it charges its clients. The services are not being rendered as gratuitous or for charity, but admittedly for remuneration. As such, the interpretation required to be given to the provisions of Section 1(4) read with Section 2(12)(b) of the Act read with the Notification No.F.28(2)/

88/IMP/LC/Lab/2625-32 dated 30th September, 1988 (effective from the 2nd day of October, 1988) must, in my opinion, necessarily encompass services of the nature being rendered by the appellant.

18. I am fortified in coming to the aforesaid conclusion from the fact that the appellant–Company of its own accord obtained its registration under the Act, but on second thoughts and presumably on advice subsequently received by it, is trying to have itself de-registered without any valid justification for the same. The last ditch attempt of the appellant to bring itself within the proviso to Section 1(4) of the Act, which provides that nothing contained therein shall apply to a factory or establishment belonging to or under the control of the Government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act, also cannot be countenanced. The reason is not far to seek, for the appellant is neither a Government company nor it claims to be exempted from the provisions of the Act on the ground that it is providing superior medical services than provided by the respondent, unless it has been specifically so exempted under the provisions of the Act.

19. In view of the aforesaid discussion, the judgment of the learned Senior Civil Judge is affirmed and it is held that the appellant–Company, which is a Company covered under the Act, is not entitled to the relief claimed by it in its petition under Section 75 of the Act.

20. The appeal is without merit and is dismissed. CM No.291/2002 also stands disposed of accordingly.

ILR (2011) IV DELHI 565
LPA

UNIVERSITY OF DELHI ....PETITIONER

VERSUS

VARUN KAPUR ....RESPONDENT

(PRADEEP NANDRAJOG & SURESH KAIT, JJ.)

LPA NO. : 400/2011 & 401/2011 DATE OF DECISION: 04.05.2011

Confirmation of Provisional Admission-Cut-off date for Eligibility-student was given provisional admission in LLB course subject to securing 50% marks at Graduate/ Post-Graduate level—Failed in one subject and had to take supplementary examination—Could not submit the requisite documents pertaining to eligibility before the date prescribed—Debarred from taking first semester LLB examination—Student contended that having cleared the supplementary examination, the result would relate back to the date of main examination—Writ petition allowed by Ld Single Judge directing the confirmation of the provisional admission—Appeal by the University.

Held—Respondent did not clarify that eligibility must be acquired at main examination and not supplementary—Therefore Respondent to continue as student—Petitioner directed to clearly stipulate in the bulletin cut-off date—Those placed in compartment be treated as ineligible.

In our opinion the University not having clarified, as observed by the learned Single Judge, that eligibility must be acquired at the main examination and not the supplementary, the alternative reasoning of the learned Single Judge merits acceptance. **(Para 8)**

If the University has any issue on the second reasoning, it is easily capable of being rectified inasmuch as the University can, in future, clearly stipulate in the bulletin information that eligibility, de-jure as also de-facto, has to be obtained by the cut-off date and that those who are placed in compartment would be treated as ineligible. Further, we see no reason why the University should not scrutinize the cases of provisional admissions by the cut-off date and bring an end to the issue the day next. **(Para 9)**

Why should we not be situationalist Judges and not rationalist Judges? We think we should. It is not a case where wholly ineligible persons or persons who have obtained admission by dubious means would continue as students of the University of Delhi in the Faculty of Law. If we hold against the respondents, two seats would go abegging, and this in our opinion would be contrary to public interest and thus the compulsion of the situation compels us to be situationalist Judges and uphold the view taken by the learned Single Judge. **(Para 11)**

Important Issue Involved: University to clearly stipulate in the bulletin information that eligibility, de-jure as also de-facto, has to be obtained by the cut-off date and that those who are placed in compartment would be treated as ineligible. Failure to expressly clarify in the admission bulletin would entitle the candidate to confirmation of the provisonal admission.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. M.J.S. Rupal, Advocate with Mr. Aravind Varma, Advocate.

FOR THE RESPONDENTS : Mr. J.P. Sengh, Sr. Advocate with Mr. Manish Kumar and Mr. Dheeraj Sachdeva, Mr. S.C. Pathak Advocate with Mr. R.R. Jangu, Advocate.

CASES REFERRED TO:

1. *Ankur Wahi* vs. *UOI* 2004 (72) DRJ 428.
2. *Prashant Srivastava* vs. *CBSE,* AIR 2001 Delhi 28.
3. *Neha Kattyar* vs. *CBSE* LPA No.385/1999.

RESULT: Appeals dismissed.

PRADEEP NANDRAJOG, J.(Oral)

1. Vide impugned judgment and order dated 10.3.2001 writ petitions filed by the respondents have been allowed and a declaration has been granted that the respondents are entitled to a confirmation of their provisional admission and thereby permit them to take the ensuing semester end term examination as per rules.

2. Issue pertains to the admission to the Bachelor of Law (LLB) course in the University of Delhi for the academic year 2010-11, eligibility whereof as per bulletin information issued by the appellant mandated that the candidate must have either a Graduate or a Post-Graduate degree of any recognized University or equivalent degree with at least 50% marks. Admission was as per merit obtained at an Entrance Test. Since by the date the results of the entrance exam were declared and admissions effected it was known to the University that quite a few final year results pertaining to Graduate or Post-Graduate courses are not declared, those who successfully cleared the entrance examination were given provisional admission subject to they securing the requisite 50% marks at the Graudate/ Post-Graduate level.

3. Whereas respondent Sanwal Ram was pursuing a BBA course with a University at Rajasthan and was to secure a degree in the year 2010, respondent Varun Kapoor was pursuing a Graduate degree course from a College affiliated to the University of Delhi. Both cleared the Entrance Test and since the final result pertaining to the Graduate course which the two were undertaking had not been declared the University gave provisional admission and unfortunately for the two when their results were declared, having failed in one subject each, both of them were placed in compartment and were permitted to take a supplementary examination pertaining to the paper in question, which they took and successfully cleared, but by that time a date of significance had lapsed. The date was 31st August 2010 by which they had to submit the requisite documents pertaining to their eligibility and which meant that the two had

to produce a final or a provisional degree issued by their respective University along with the mark-sheet evidencing that the two had acquired Graduate degree with at least 50% marks.

4. The University permitted both to continue attending classes and raised the issue somewhere in the month of December when the first semester end term examination was to be conducted and denied a right to both of them to sit at the examination. The University threatened to cancel their admission and the two were compelled to file the two writ petitions which have been allowed in their favour.

5. Whereas the respondents would urge before the learned Single Judge that having cleared the supplementary examination the result thereof would relate back to the date when the main result was declared as held by a Division Bench of this Court in the judgment reported as AIR 2001 Delhi 28 **Prashant Srivastava vs. CBSE,** which decision followed and earlier decision dated 7.9.1999 in LPA No.385/1999 **Neha Kattyar vs. CBSE** and thus submitted that they would have to be deemed to be treated as eligible by the requisite date i.e. 31.8.2010 by which date the result of the main examination held had been declared. Per contra, the University would urge that as per the decision reported as 2004 (72) DRJ 428 **Ankur Wahi vs. UOI** held to the contrary.

6. The learned Single Judge has noted that the decision in **Ankur Wahi's** case is by a Single Judge and whereas the two decisions relied upon by the respondents were by a Division Bench. The learned Single Judge has given a further reason, being that, the bulletin information issued by the University did not clearly state that those who were awaiting results were required to clear the qualifying examination at the first instance.

7. There is merit in the plea sought to be urged by learned counsel for the University that if a cut-off date is prescribed by which eligibility has to be secured, an eligibility secured at a later date would be inconsequential, but the argument ignores the fact that where law requires something deemed to have come into existence, one cannot boggle down the consequence thereof and whatever logically flows from the deemed existence of a thing having come into being, the same has to be treated as having come into being.

8. In our opinion the University not having clarified, as observed by the learned Single Judge, that eligibility must be acquired at the main

examination and not the supplementary, the alternative reasoning of the learned Single Judge merits acceptance.

9. If the University has any issue on the second reasoning, it is easily capable of being rectified inasmuch as the University can, in future, clearly stipulate in the bulletin information that eligibility, de-jure as also de-facto, has to be obtained by the cut-off date and that those who are placed in compartment would be treated as ineligible. Further, we see no reason why the University should not scrutinize the cases of provisional admissions by the cut-off date and bring an end to the issue the day next.

10. Learned counsel for the appellants concedes that it is too late in the day for the University to fill up the two vacant seats if respondents are held ineligible candidates on the ground as urged by the University, notwithstanding that both of them have cleared the supplementary examination and are deemed to be candidates having obtained Graduate degree at par with the rest.

11. Why should we not be situationalist Judges and not rationalist Judges? We think we should. It is not a case where wholly ineligible persons or persons who have obtained admission by dubious means would continue as students of the University of Delhi in the Faculty of Law. If we hold against the respondents, two seats would go abegging, and this in our opinion would be contrary to public interest and thus the compulsion of the situation compels us to be situationalist Judges and uphold the view taken by the learned Single Judge.

12. For the future years, the University of Delhi can certainly incorporate a clause in the bulletin information as observed by us in para 9 above.

13. Both appeals are dismissed but without orders as to costs.

14. CM No.8394/2011 and CM No.8395/2011 in LPA No.401/2011 and CM No.8390/2011 and CM No.8391/2011 in LPA No.400/2011 which exemption as prayed are allowed. CM No.8392/2011 in LPA No.400/2011 and CM No.8396/2011 in LPA No.401/2011 which seek stay of the operation of the impugned judgment are dismissed as infructuous.

ILR (2011) IV DELHI 570
W.P.

DEVI DARSHAN SETH ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P.(C) NO. : 8272/2010 DATE OF DECISION: 05.05.2011

Constitution of India, 1950—Article 16(4)—Reservations in public appointment—Reservation Policy for Other Backward Classes (OBC)—Appointment as Joint Director (Law) in Competition Commission of India (CCI)—Challenge to selection process—Petitioner applied for the posts of Joint Director (Law) and Deputy Director (Law)—Appeared in written test and was called for interview—Petitioner did not hear from CCI—Respondent No. 3 was appointed—Petitioner claimed that reservation policy of 27% for OBC be applied against the post of Joint Director (Law)—The bench mark of 70% disclosed by the Respondent before was not laid down till the stage of interview—Incorporated to eliminate the Petitioner—10% difference was maintained in qualifying marks between the reserved and unreserved category as against 5% in benchmark laid down—Having secured higher marks as OBC candidate—Petitioner ought to have been appointed. Held—Selected candidate has no right of appointment—Merely because in the qualifying marks the difference of 10% was maintained would not compel the CCI to maintain the same difference in the benchmark for appointment also—Employer required to follow the Policy of Reservation is entitled to apply different Rules at different stages so long as framed in accordance with law—No objection raised while

participating—One out of three posts be reserved for OBC candidate—Cannot be permitted to raise it now Reservation of one post out of three was in excess of 27% prescribed—No constraint in fixing higher score of marks for selection for maintaining high standards of competence.

The petitioner, merely for the reason of having participated in the selection process and having been found eligible as per the parameters laid down, cannot claim any right of appointment. It is the settled position in law that even a selected candidate has no right of appointment. Reference in this regard can be made to **Punjab SEB v. Malkiat Singh** (2005) 9 SCC 22, **State of U.P. v. Rajkumar Sharma** (2006) 3 SCC 330 & **S.S. Balu v. State of Kerala** (2009) 2 SCC 479. **(Para 13)**

The next question for consideration is whether any illegality can be imputed to the difference of 5% only in the benchmark for the Unreserved and the Reserved Category candidates. The counsel for the petitioner has neither been able to plead nor urge that the difference has to be necessarily of 10%. The Constitution Bench of the Apex Court in para 358 (i.e. the opinion of Pasayat and Thakker, JJ.) of **Ashoka Kumar Thakur v. UOI** (2008) 6 SCC 1, even in relation to educational Institutions suggested that five (5) grace marks below the minimum eligibility marks fixed for General Category can be given to the OBCs. The opinions of other Judges also suggest a difference of not more than 10 marks out of 100, below that of General Category for OBCs. The Supreme Court in **Andhra Pradesh Public Service Commission v. Baloji Badhavath** (2009) 5 SCC 1 also appears to suggest a difference of 5% between the Unreserved and the Reserved category. Merely because in the qualifying marks the difference of 10% was maintained, would not compel the CCI to maintain the same difference in the benchmark for appointment also. There is no identity between qualifying marks in the written test for being eligible to be invited for interview and the benchmark for appointment. An employer

required to follow the Policy of Reservation, is entitled to apply different Rules at different stages so far as framed in accordance with law. **(Para 16)**

The last question for consideration is whether the reservation policy has been breached in the matter of the CCI not reserving one out of three posts of Joint Director (Law) for the OBC category. In this regard again, I find that the invitation for applications itself had clubbed the posts of Joint Director in the streams of Law, Economics and Financial Analysis and prescribed reservation of only one post out of seven for OBC without specifying whether it could be in the stream of Law or Economics or Financial Analysis. The petitioner at that time did not raise any objection; he did not contend that since there were three posts of Joint Director (Law), one should be reserved for OBC. The petitioner after having been unsuccessful cannot be permitted to raise the said challenge. The law in this regard is also well settled. Reference may be made to the recent Apex Court decision in **Manish Kumar Shahi v. State of Bihar** (2010) 12 SCC 576. **(Para 17)**

Even otherwise, I have wondered as to how, when the reservation prescribed for OBCs is of 27% only, could CCI have reserved one out of three posts of Joint Director (Law) for OBC; if that were to be the position then similarly one out of three posts of Joint Director (Economics) also would have been required to be reserved for OBC and which would have led to reservation for OBCs in excess of the prescribed 27%. It is for this reason only that the Office Memorandum dated 2nd July, 1997 of the Ministry of Personnel prescribes for grouping of posts in small cadres of up to thirteen posts. The CCI was thus within its right to reserve the post for OBC in any of the three streams of Joint Director which were clubbed together in accordance with the said directive and which also passes the test of logic as aforesaid.**(Para 18)**

I am even otherwise of the opinion that an employer, especially a specialist Body as CCI is, is entitled to appoint/

employ the best talent available as long as not contravening law and no restrictions can be placed on their choice. The respondent no.3 admittedly secured more marks in the written test and the interview than the petitioner and no error can be found in the decision of CCI to make appointments to all the three posts of Joint Director in the stream of Law and leaving the post reserved for OBC to be filled up in the stream of Economics. **(Para 19)**

The settled legal position is that there is no constraint on the Government in respect of the number of appointments to be made or in fixing higher score of marks for the purpose of selection and it is open to the Government to, with a view to maintain high standards of competence, fix a score which is much higher than the one required for mere eligibility. (see **State of Haryana v. Subash Chander Marwaha** (1974) 3 SCC 220) **(Para 20)**

Important Issue Involved: There is no constraint on the Government in respect of the number of appointments to be made or in fixing higher score of marks for the purpose of selection and it is open to the Government to, with a view to maintain high standards of competence, fix a score which is much higher than the one required for mere eligibility.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Harish Pandey, Advocate.

FOR THE RESPONDENTS : Mr. Neeraj Chaudhary, Mr. Ritesh Kumar & Mr. Mohit Auluck, Advocates for R-1. Mr. Parag P. Tripathi, ASG with Mr. Rajiv Saxena, Ms. Mahima Gupta & Mr. D.K. Pradhan, Advocates for R-2 CCI. Mr. Chirag Jamwal & Mr. Ajay K. Upadhyay, Advocates for R-3.

CASES REFERRED TO:

1. *Manish Kumar Shahi* vs. *State of Bihar* (2010) 12 SCC 576.
2. *S.S. Balu* vs. *State of Kerala* (2009) 2 SCC 479.
3. *Andhra Pradesh Public Service Commission* vs. *Baloji Badhavath* (2009) 5 SCC 1.
4. *Hemani Malhotra* vs. *High Court of Delhi* (2008) 7 SCC 11.
5. *Ranbir Singh* vs. *GGSIP University* MANU/DE/1003/2008.
6. *Ashoka Kumar Thakur* vs. *UOI* (2008) 6 SCC 1.
7. *K.H. Siraj* vs. *High Court of Kerala* AIR 2006 SC 2339.
8. *State of U.P.* vs. *Rajkumar Sharma* (2006) 3 SCC 330.
9. *Punjab SEB* vs. *Malkiat Singh* (2005) 9 SCC 22.
10. *UOI* vs. *T. Sundararaman* (1997) 4 SCC 664.
11. *M.P. Public Service Commission* vs. *Navnit Kumar Potdar* (1994) 6 SCC 293.
12. *Govt. of A.P.* vs. *P. Dilip Kumar* (1993) 2 SCC 310.
13. *State of Haryana* vs. *Subash Chander Marwaha* (1974) 3 SCC 220.

RESULT: Writ Petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. The petitioner claiming to be belonging to the Other Backward Classes (OBC) category, in response to the invitation by the respondent no.2 Competition Commission of India (CCI), of applications for direct recruitment to various posts therein, applied for the posts of Joint Director (Law) and Deputy Director (Law). The "mode of selection" prescribed was as under:

"7. All the applications received by the due date will be screened with reference to the minimum qualification criteria. From amongst the eligible candidates, suitable candidates will be short listed through a transparent mechanism and the short listed candidates will be called for interview before final selection. Mere fulfilling

of minimum qualifications by itself would not entitle any applicant for being called for interview."

2. It is the case of the respondent no. 2 CCI and not controverted by the petitioner that due to the overwhelming response received from candidates, CCI decided to undertake the selection to all the posts based on a written test followed by an interview with the written test being of 80 marks and interview of 20 marks.

3. The petitioner appeared in the written test for both the aforesaid posts, was called for interview for the post of Joint Director (Law) on 15th March, 2010 and for the post of Deputy Director (Law) on 19th March, 2010. It is the case of the petitioner that the CCI without publishing the result of the written examination had merely issued call letters to the successful candidates calling them for interview and thus the inter se merit of candidates who appeared in the written test remained unknown to all. The petitioner, pursuant to the interview did not hear from CCI and after gathering information through the medium of "Right to Information Act. (RTI) filed this writ petition averring that appointments had been made in a non-transparent manner and in disregard to the criteria for reservation for OBCs. The petitioner has claimed the relief of directing the respondent no.2 CCI to apply the reservation policy of 27% for OBCs in the matter of appointments to the various posts and has sought direction for his appointment against the vacancy of Joint Director (Law) with retrospective date i.e. from the date on which the respondent no.3, selected as Joint Director (Law) in CCI in pursuance to the invitation aforesaid, was offered appointment.

4. The petitioner having confined his relief to the post of Joint Director (Law) only, hereinafter facts concerning the said post alone shall be discussed.

5. Notice of the writ petition and of the application for interim relief seeking to restrain CCI from making any further appointment for the post of Joint Director (Law) was issued. Counter affidavit has been field by CCI. The respondent no.3 has adopted the counter affidavit of CCI. The petitioner has filed rejoinder to the said counter affidavit. The counsel for the petitioner and the learned ASG appearing for the respondent no.2 CCI have been heard.

6. CCI in its counter affidavit has pleaded that in exercise of powers under Section 17 r/w Section 63 of the Competition Act, 2002, recruitment rules were framed by the Central Government, prescribing the eligibility, educational qualifications, age limit and other conditions for posts in CCI; that the task of conducting the written test for the post was assigned to the National Law School of India University, Bangalore and the results of the written test were maintained in sealed cover and not handed over to the Interview Board even, so to maintain absolute impartiality in selection process; that candidates in the Unreserved Category securing minimum 50% marks and candidates in the Reserved Category securing minimum of 40% marks in the written test were called for interview in proportion of five times the number of vacancies where the vacancies to the particular post were ten or less and three times the number of vacancies where the total number of vacancies were more than ten; that the issue regarding drawing of consolidated list of candidates with composite marks of written test and interview was considered by CCI in its special meeting held on 31st March, 2010 when it was decided that the candidates securing 70% or more marks in the Unreserved Category and 65% or more marks in the Reserved Category would be selected and appointed; it was so decided desiring that the vacancies be filled up on the basis of merit and selection of candidates below the said marks, may not be suitable for discharging the functions of the post; that the petitioner secured only 61 marks out of 100 for the post of Joint Director (Law) and having not secured the benchmark of 65 marks as laid down for appointment under the Reserved Category, was not appointed.

7. CCI in its counter affidavit qua the reservation policy has pleaded that it has adhered to the guidelines contained in the Notification dated 2nd July, 1997 issued by the Department of Personnel & Training of the Government of India. It is pleaded and again is not in dispute that there were seven posts of Joint Director, three (3) in the stream of Law, three (3) in the stream of Economics and one (1) in the stream of Financial Analysis; of the said seven posts, one was reserved for OBC and one for Scheduled Castes (SC) category. It is further pleaded that the posts of Joint Director (Law), Joint Director (Economics) and Joint Director (Financial Analysis) were grouped together for the purposes of reservation in accordance with the guidelines in the Office Memorandum dated 2nd July, 1997 (supra) i.e. out of the seven posts of Joint Director, any one in any of the three streams could be left for OBCs and any one in any

of the three streams for SC/ST and that CCI was not required to necessarily fill up the reserved seat for OBC from the stream of Law only.

8. It is further the plea of CCI that the petitioner having participated in the selection process which did not require reservation for OBCs in the stream of Law only, cannot now be allowed to challenge the same after being unsuccessful. Reliance in this regard is placed on **Ranbir Singh Vs. GGSIP University** MANU/DE/1003/2008 and **K.H. Siraj Vs. High Court of Kerala** AIR 2006 SC 2339.

9. CCI has further pleaded that since only six candidates were able to achieve the benchmark decided in the meeting of 31st March, 2010, three posts in the stream of Law were filled up from the candidates in the Unreserved Category and two posts in the stream of Economics were filled up with one each from the Unreserved and from the SC category and one post in the stream of Financial Analysis was filled up from the Unreserved Category and one post in the stream of Economics has been kept vacant against the OBC category.

10. The petitioner in his rejoinder has inter alia pleaded that it is borne out from the counter affidavit of CCI that it had not laid down the benchmark of 70% for Unreserved Category and 65% marks for Reserved Category till the stage of interview and contends that the same was incorporated in the selection process only to eliminate the petitioner; it is also averred that no such information as to the decision averred of 31st March, 2010 was disclosed in the reply dated 21st October, 2010 to the RTI query and was taken for the first time by way of Corrigendum thereto dated 10th November, 2010, even though the appointments were made on 21st April, 2010. Reliance is placed on **Hemani Malhotra Vs. High Court of Delhi** (2008) 7 SCC 11 to contend that the rules of the game which means the eligibility criteria, benchmark etc. were required to be laid down before the start of the selection process and could not have been added/changed amidst the selection process.

11. It is also pleaded in the rejoinder that while in the qualifying marks, a difference of 10% was maintained between the Unreserved and the Reserved Category, in the benchmark purportedly laid down for the first time on 31st March, 2010, difference of only 5% marks was maintained between the Reserved and the Unreserved Category. It is

contended that there was no reason for the said variation and had the difference of 10% in the benchmark been maintained i.e. of 70% for the Unreserved Category and 60% for the Reserved Category, the petitioner having secured 61%, would have been entitled to the appointment, having obtained the highest marks amongst OBC candidates in all the three streams. It is averred that the difference was reduced from 10% in qualifying marks to 5% in the benchmark only to ensure the appointment of respondent no.3.

12. With respect to the reservation policy applied by the CCI, the petitioner in the rejoinder has pleaded that the OBC candidate i.e. the petitioner himself, who secured the highest marks in all the three streams ought to have been appointed.

13. The petitioner, merely for the reason of having participated in the selection process and having been found eligible as per the parameters laid down, cannot claim any right of appointment. It is the settled position in law that even a selected candidate has no right of appointment. Reference in this regard can be made to **Punjab SEB v. Malkiat Singh** (2005) 9 SCC 22, **State of U.P. v. Rajkumar Sharma** (2006) 3 SCC 330 & **S.S. Balu v. State of Kerala** (2009) 2 SCC 479.

14. The invitation of applications in fact even did not lay down that written test of 80 marks and interview of 20 marks would be held and/or with qualifying marks of 50% for Unreserved and 40% for Reserved Category candidates. Clause 7 of the said invitation set out hereinabove merely provided for screening of the candidates with reference to the minimum qualification criteria. It was further declared that "mere fulfilling of minimum qualifications by itself would not entitle any applicant for being called for interview". The procedure of written test and interview was designed only because of the large number of applications received. The petitioner at that time did not object that the selection process being adopted by CCI was not disclosed in the invitation of applications and took his chance by appearing in the written test and the interview. Reliance on **Hemani Malhotra** (supra) is misconceived. The Supreme Court in that case was concerned with variation of the criteria laid down after the selection process had begun. In the present case as aforesaid, no criteria was laid down and the criteria was being evolved during the process of selection. It cannot be lost sight of that CCI though created under the Act of 2002 but has become functional only in the year 2009

and the appointments were being made for the first time. There were thus no precedent of such appointments. No mala fide can be imputed to CCI in evolving the process along the way to selection.

15. The Supreme Court in **M.P. Public Service Commission v. Navnit Kumar Potdar** (1994) 6 SCC 293 held that once applications are received and the Selection Board applies its mind to evolve any rational and reasonable basis on which the list of applicants should be shortlisted, the process of selection commences. Similarly, in **Govt. of A.P. v. P. Dilip Kumar** (1993) 2 SCC 310 it was held that it is open to the recruiting agency to screen candidates due for consideration at the threshold of the process of selection by prescribing higher eligibility qualification so that the field of selection can be narrowed down with the ultimate objective of promoting candidates with higher education to enter the zone of consideration. Similarly, in **UOI v. T. Sundararaman** (1997) 4 SCC 664 it was held that where the number of applications received in response to an advertisement is large, and it will not be convenient or possible to interview all the candidates, the number can be restricted to a reasonable limit on the basis of qualification and experience higher than the minimum prescribed in the ˇadvertisement, provided that the criteria is reasonable and not arbitrary having regard to the post for which selection is to be made.

16. The next question for consideration is whether any illegality can be imputed to the difference of 5% only in the benchmark for the Unreserved and the Reserved Category candidates. The counsel for the petitioner has neither been able to plead nor urge that the difference has to be necessarily of 10%. The Constitution Bench of the Apex Court in para 358 (i.e. the opinion of Pasayat and Thakker, JJ.) of **Ashoka Kumar Thakur v. UOI** (2008) 6 SCC 1, even in relation to educational Institutions suggested that five (5) grace marks below the minimum eligibility marks fixed for General Category can be given to the OBCs. The opinions of other Judges also suggest a difference of not more than 10 marks out of 100, below that of General Category for OBCs. The Supreme Court in **Andhra Pradesh Public Service Commission v. Baloji Badhavath** (2009) 5 SCC 1 also appears to suggest a difference of 5% between the Unreserved and the Reserved category. Merely because in the qualifying marks the difference of 10% was maintained, would not compel the CCI to maintain the same difference in the benchmark for

appointment also. There is no identity between qualifying marks in the written test for being eligible to be invited for interview and the benchmark for appointment. An employer required to follow the Policy of Reservation, is entitled to apply different Rules at different stages so far as framed in accordance with law.

17. The last question for consideration is whether the reservation policy has been breached in the matter of the CCI not reserving one out of three posts of Joint Director (Law) for the OBC category. In this regard again, I find that the invitation for applications itself had clubbed the posts of Joint Director in the streams of Law, Economics and Financial Analysis and prescribed reservation of only one post out of seven for OBC without specifying whether it could be in the stream of Law or Economics or Financial Analysis. The petitioner at that time did not raise any objection; he did not contend that since there were three posts of Joint Director (Law), one should be reserved for OBC. The petitioner after having been unsuccessful cannot be permitted to raise the said challenge. The law in this regard is also well settled. Reference may be made to the recent Apex Court decision in **Manish Kumar Shahi v. State of Bihar** (2010) 12 SCC 576.

18. Even otherwise, I have wondered as to how, when the reservation prescribed for OBCs is of 27% only, could CCI have reserved one out of three posts of Joint Director (Law) for OBC; if that were to be the position then similarly one out of three posts of Joint Director (Economics) also would have been required to be reserved for OBC and which would have led to reservation for OBCs in excess of the prescribed 27%. It is for this reason only that the Office Memorandum dated 2nd July, 1997 of the Ministry of Personnel prescribes for grouping of posts in small cadres of up to thirteen posts. The CCI was thus within its right to reserve the post for OBC in any of the three streams of Joint Director which were clubbed together in accordance with the said directive and which also passes the test of logic as aforesaid.

19. I am even otherwise of the opinion that an employer, especially a specialist Body as CCI is, is entitled to appoint/employ the best talent available as long as not contravening law and no restrictions can be placed on their choice. The respondent no.3 admittedly secured more marks in the written test and the interview than the petitioner and no error can be found in the decision of CCI to make appointments to all

the three posts of Joint Director in the stream of Law and leaving the post reserved for OBC to be filled up in the stream of Economics.

20. The settled legal position is that there is no constraint on the Government in respect of the number of appointments to be made or in fixing higher score of marks for the purpose of selection and it is open to the Government to, with a view to maintain high standards of competence, fix a score which is much higher than the one required for mere eligibility. (see **State of Haryana v. Subash Chander Marwaha** (1974) 3 SCC 220).

21. The counsel for the petitioner has also contended that even if the petitioner did not meet the benchmark criteria laid down, the post for OBC should have been carried forward. The argument is misconceived. The post reserved for OBC candidates has not been filled up and the learned ASG has stated that fresh invitations therefor will be invited in due course. The petitioner is wrong in contending that the post was for the stream of Law only. It was neither so shown in the invitation applying applications nor was required to be so, as aforesaid.

22. The petitioner is thus not found entitled to the relief claimed. The writ petition is dismissed. No order as to costs.

ILR (2011) IV DELHI 582
CRL. MISC. (C)

RADHA .....PETITIONER

VERSUS

STATE .....RESPONDENT

(KAILASH GAMBHIR, J.)

CRL. MISC. (C) NO. : 3494/2008 DATE OF DECISION: 18.05.2011

Code of Criminal Procedure, 1973—Sections 154, 156 and 482—Petitioner filed petition under Section 482 of Cr.P.C. to seek directions against police to register FIR and investigate case expeditiously—Petitioner urged, her young brother went missing from home, mother of petitioner approached local police to report about missing of her son but police did not oblige—Next day some one informed police about a deadbody which, petitioner and her family members were shocked to find was that of petitioner's missing brother—They requested police to register case as they noticed some injuries on head and other parts of dead body but police refused—Finally, petitioner filed writ petition before High Court of Delhi and petitioner was directed to approach court of Metropolitan Magistrate under Section 156(3) of Cr.P.C. instead of invoking writ jurisdiction of Court—Accordingly, complaint case was filed before Metropolitan Magistrate, but even after a lapse of more than one year, directions not given to police to investigate said crime nor concerned police officials took any steps in this direction—Feeling aggrieved petitioner again approached High Court of Delhi to seek directions for registration of FIR—Held: The officer incharge of a police station has no option or discretion not to register an FIR once the information relating to the

commission of cognizable offence is laid before him—The intendment of legislature in using expression "shall" in Section 154 of Code of Criminal procedure cannot be whittled down so as to read the same as "may" and such an interpretation if taken, would defeat very legislative intent behind the spirit of said Section. Section 154 thus clearly postulates that once any information even if given orally to an officer incharge of police station relates to commission of a cognizable offence, then said officer has no choice or alternative left with him but to register FIR—Investigation transferred to CBI with directions to complete investigation as early as possible but not later than a period of three months from the date of order.

It is thus not the prerogative, free will or privilege of the police officer to whimsically decide that in what cases to register an FIR or not. The provision of Section 154 of the Code is thus mandatory and the concerned police officer is duty bound to register the case on the basis of information disclosing commission of a cognizable offence and police officer cannot refuse to register the FIR simply because he does not like the face of the complainant or the complainant approaching him is a commoner or he is not in a good mood to register the same. There cannot be seen to be any temperamental twists in the approach of the police officer not to register an FIR once information relating to the commission of cognizable office is laid before him. However, the question of pre-registration inquiry or preliminary inquiry no doubt can arise in certain cases such as where the concerned I.O. based on the information laid before him seriously doubts the commission of any cognizable offence on its bare perusal or where the complaint lodged is a vague, uncertain or unspecific or ex facie absurd or the complaint appears to be false on the very face of it or the same appears to have been lodged with some apparent ulterior motives; but otherwise the concerned police officer is not supposed to transgress the mandate of law as envisaged under Section 154(1) Cr.P.C. **(Para 14)**

Important Issue Involved: The officer incharge of a police station has no option or discretion not to register an FIR once the information relating to the commission of cognizable offence is laid before him—The intendment of legislature in using expression "shall" in Section 154 of Code of Criminal procedure cannot be whittled down so as to read the same as "may" and such an interpretation if taken would defeat very legislative intent behind the spirit of said Section.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Anil Soni, Advocate.

FOR THE RESPONDENT : Mr. Pawan Sharma, Advocate.

CASES REFERRED TO:

1. *Siddharam Satlingappa Mhetre* vs. *Maharashtra* (2011) 1 SCC 694.
2. *Ashok Kumar Todi* vs. *Kishwar Jahan & Ors.* 2011(3) SCALE 94.
3. *Sandeep Rammilan Shukla* vs. *The State of Maharashtra through the Secretary, Home Department and Ors.* 2009(1) MhLj 97.
4. *Lalita Kumari* vs. *Government of U.P.& Ors.*(2008) 7 SCC 164.
5. *Parkash Singh Badal* vs. *State of Punjab* (2007)1 SCC 1.
6. *Rajinder Singh Katoch* vs. *Chandigarh Administration & Anr.* 2007(10) SCC 69.
7. *Ramesh Kumari* vs. *Stateof NCT of Delhi. :* 2006CriLJ1622.
8. *Mohammed Yousuf* vs. *Afaq Jahan* 2006(1) SCC 627).
9. *Ramesh Kumari* vs. *State (NCT Of Delhi) and Ors. ;* AIR 2006 SC 1322.

10. *Lallan Chaudhary & Ors.* vs. *State of Bihar & Anr.* (2006)12 SCC 229
11. *Ramesh Kumari* vs. *State of NCT of Delhi,*(2006) 2 SCC 677.
12. *Laxminarayan Gupta* vs. *Commissioner of Police* 130(2006) DLT 490.
13. *Ramesh Kumari* vs. *State of NCT of Delhi* 2006 AIR (SC) 1322.
14. *Ravi Kumar* vs. *State of Punjab* (2005)9 SCC 315.
15. *CBI and Ors.* vs. *Tapan Kumar Singh* (2003) 6 SCC 175.
16. *Satish Kumar Goel* vs. *State & Ors* 84(2000) DLT 199.
17. *Satish Kumar Goel* vs. *State & Ors.* 84(2000) DLT 199(DB).
18. *Gurudath Prabhu & Ors.* vs. *Ms. Krishna Bhat & Ors.* 1999 Crl. L. J. 3909.
19. *Guruduth Prabhu* vs. *Ms. Krishna,* 1999 CRI.L.J 3909.
20. *Madhu Bala* vs. *Suresh Kumar & Ors* 1997(8) SCC 476.).
21. *Binay Kumar Singh* vs. *State of Bihar,* (1997)1 SCC 283.
22. *State of Haryana* vs. *Bhajan Lal* AIR 1992 SC 604.
23. *Indra Carat Pvt. Ltd.* vs. *State of Karnataka & Ors.* 1989 AIR (SC) 885.
24. *Raghubir Singh* vs. *State of Bihar* AIR 1987 SC 149.
25. *Madheshwardhari Singh & Anr.* vs. *State of Bihar* AIR 1986 Pat 324.
26. *Bhagwant Singh* vs. *Commissioner of Police* 1985 (2) SCC 537.
27. *Amrik Singh* vs. *The State of Punjab* 1983 CRI.L.J 1405.
28. *Mahabir Singh* vs. *State* 1979 Cri LJ 1159.
29. *Thulia Kali* vs. *The State of Tamil Nadu* AIR 1973 SC 501.
30. *Hasib* vs. *State of Bihar* AIR 1972 SC 283.
31. *Tapinder Singh* vs. *State of Punjab & Anr.* 1970(2) SCC 113.
32. *Abhinandan Jha & Anr* vs. *Dinesh Mishra* 1968 AIR (SC) 117.

RESULT: Petition disposed of.

KAILASH GAMBHIR, J.

1. By this petition filed under Section 482 of the Code of Criminal Procedure, 1973, the petitioner has approached this Court to seek directions to direct the police to register an FIR and investigate the case expeditiously.

2. The present petition was filed by the petitioner on 3.11.2008 and the same was taken up by this Court on 5.11.2008 in the presence of the State Prosecutor. The case in hand depicts the sordid, despotic and nepotic functioning of the Delhi Police who in a most brazen, blatant and contemptuous manner have flouted and defied not only the mandate of the law as envisaged under Section 154 of Cr.P.C., but also various directions given by the Hon'ble Apex Court and the High Court pronouncing that once any information disclosing the commission of a cognizable offence is brought before the police officer of a police station, then the concerned police officer is bound to register an FIR.

3. Before I proceed to discuss the legal position and the approach of the concerned police officials including that of the rank of not less than the Additional Commissioner of Police and the Commissioner of Police, it would be apt to give a sequence of facts which compelled the petitioner to approach this court by invoking the inherent powers of this Court under Section 482 of the Code of Criminal Procedure. The petitioner happens to be an unfortunate sister of a 22 year old young boy namely Brijesh Kumar @ Birju who had gone out from his house i.e. House No. B-9/427, Sector-3, Rohini, Delhi on the evening of 05.08.2007 for some work and did not return until midnight. When Brijesh did not return till midnight, his mother went out in search of him and later on approached the local police so as to report missing of her son. The police, however, did not oblige her and the mother came back with the hope that her son Brijesh may come back home soon. On 6.8.2007, someone informed the police that the dead body of a person is lying in the park of B-9, Sector-3, Rohini. The petitioner and her family members after having come to know about the said information reached the spot and were shocked to

find the dead body of Brijesh. As per the petitioner, she and the other family members had noticed some injuries on the head and other parts of the body of the deceased. The deceased was removed by the police to Baba Saheb Ambedkar Hospital by PCR Van bearing No. C-43 and thereafter the body was referred to the mortuary of Sanjay Gandhi Memorial Hospital for postmortem. The petitioner and her mother visited the police station for the registration of the case but the police refused to register any case. The petitioner then sent telegrams to various higher authorities requesting them to give directions to the concerned SHO of P.S. Rohini to register an FIR and for thorough investigation of the case. The petitioner had also apprised the police that on 3.8.2007 a quarrel between the deceased and one Vaibhav Gautam @ Michael had taken place over some girl and the deceased was threatened by the said Michael that he would be killed. Since the police did not register any FIR, therefore, the petitioner filed a writ petition before this court vide W.P.(C) No. 1096/2007 to seek directions for the registration of an FIR. The High Court did not entertain the said writ petition filed by the petitioner in view of the judgment of the Apex Court in the case of **Aleque Padamsee & Ors. Union of India & Ors.** (2007)6 SCC 171 and directed the petitioner to approach the court of the Metropolitan Magistrate under Section 156(3) of Cr.P.C., instead of invoking the writ jurisdiction of this court. Pursuant to the said direction of the High Court, the petitioner filed a complaint case before the concerned Metropolitan Magistrate, Delhi on 29.8.2007, but even after the lapse of more than one year, neither the Magistrate give any direction to the police to investigate the said crime nor did the concerned police officials take any steps in this direction. It is also the case of the petitioner that the learned Magistrate allowed the police a free hand for over a period of one year without directing registration of a case involving such a heinous and grave crime of the nature of murder and also that the police started conducting a preliminary inquiry first at the level of the local police and then by the Crime Branch but did not choose to register an FIR.

4. Feeling aggrieved with the lackadaisical approach of the police as well as that of the concerned Magistrate, the petitioner approached this court to seek directions for the registration of an FIR and for investigation of the case. Taking a serious note of the conduct of the police in the present case, this court vide order dated 5.11.2008 expressed its displeasure not only on the inaction of the police but also on the casual

approach of the concerned Magistrate. In the said order dated 5.11.2008 this court observed as under:

> "It is most shocking that the police has not registered the FIR for such a heinous crime which had taken place on the intervening night of 5th/6th 2007. Time and again the Apex Court as well as various High Courts have clearly mentioned that on the filing of the complaint disclosing commission of cognizable offence, the police should register an FIR. In the present matter even after a lapse of more than one year the police brazenly remained blindfolded in not registering an FIR and even the learned M.M. has not discharged his judicial functions in the right earnest as no directions till date have been given by the Magistrate for the registration of an FIR. The Joint Commissioner of Local Police Station as well as Joint Commissioner, Crime Branch shall explain the reasons for such serious dereliction on the part of the concerned police officers of local police and of Crime Branch for their deviant conduct in not registering an FIR in a murder case by way of affidavit. The officers will also explain as to what action has been initiated against the delinquent officers for their such despicable conduct. The affidavits be filed within a period of one week."

Pursuant to the said directions given by this court, two of the senior officers of the Delhi Police of the rank of Joint Commissioner of Police and Additional Commissioner of Police had filed their respective affidavits. Since both the said affidavits filed by the said senior officers were on the same lines, it would be relevant to refer to the stand taken by the Delhi Police in the affidavit filed by the Additional Commissioner of Police, Crime Branch as under:

> "I, Satyendra Garg, Additional Commissioner of Police, Crime, Delhi Police, Police Headquarters, Indraprastha Estate, New Delhi do hereby solemnly affirm and declare as under:
>
> 1. That on 6/8/07 at 6:20 AM information was received vide DD No.6A from the PCR that a male dead body was lying in the park of Pkt.B/9, Sector 3, Rohini, Delhi. The call was marked to SI Jagdish Chander of PS Rohini. SI Jagdish Chander reached the spot and found that the dead

body was removed by PCR to Baba Saheb Ambedkar Hospital, Rohini, Delhi. After reaching hospital SI Jagdish Chander collected MLC No.4045/07 of Brijesh Singh s/o Dharampal Singh r/o B-9/427, Sec.3, Rohini, Delhi who was declared as brought dead in the hospital with alleged history of being found lying in the park in water as told by police personnel. At the time of preparation of MLC mother of deceased Smt. Shanti Devi was also present in the hospital and her name was mentioned in the MLC itself by the doctor present on duty. (Photograph and copy of MLC annexed as A & B).

2. That on 6/8/07 the post mortem was conducted on the dead body of deceased Brijesh Singh at Sanjay Gandhi Memorial Hospital, Delhi. The autopsy surgeon described "no external injury mark seen on deady body". Viscera of deceased was preserved by the autopsy surgeon to rule out any common poisoning. Inquest proceeding u/s 174 Cr.P.C. was conducted by the local police. The cause of death was kept pending till report of chemical analysis of the viscera was received. During inquest proceeding, various persons were examined by local police. On 28.8.07 the viscera of the deceased was sent to Forensic Science Laboratory, Rohini, Delhi for chemical examination. (PM report annexed as C)

3. That on 11.1.08 Smt. Radha made complaint before Commissioner of Police that her brother Brijesh Singh had been murdered. The complaint of Smt. Radha was marked to Crime Branch for enquiry on 19/1/08. Accordingly enquiry was initiated by Crime Branch.

4. That during enquiry, Smt. Radha, sister of deceased was examined on 22/1/08. In her statement she stated that on 4/8/07 her brother Brijesh Singh told her that he had an altercation with Vaibhav Gautam @ Michael over a girl who was studying a computer course in Rohini and Vaibhav Gaurtam wanted to make friendship with that girl. She also stated that one year ago Manish Gandhi had an altercation with Brijesh Singh, and Manish Gandhi had

made a complaint to police against Brijesh Singh. In the police station, the father of Manish Gandhi had threatened Brijesh Singh with dire consequences. On 5/8/07 when her brother did not return to home, her mother called Smt. Radha and told her about the incident. She further stated that when her mother reached PS Rohini, police officials advised them to look for Brijesh Singh for some more time. They searched for their brother but due to rain they were not able to find their brother. On 6/8/07 at about 6.00 am someone from the locality came to their house and informed them that the body of her brother was lying inside the park in a water logged tree pit. She stated that she along with her mother saw the dead body of her brother in a water logged tree pit inside park in front of their home. Police removed the dead body to Baba Saheb Ambedkar Hospital, Delhi. Postmortem was conducted at hospital and after postmortem the dead body of Brijesh Singh was handed over to them and they cremated the dead body.

5. That during enquiry at Crime Branch, Vaibhav Gautam @ Michael and Manish Gandhi, suspected by Smt. Radha were interrogated at length. The following persons were also examined:

(i) SI Jagdish Chander, Initial I.O. of PS Rohini, who conducted Inquest Proceedings.

(ii) Neelam Sharma s/o Dinesh Chand Sharma r/o 47, Pkt B-9 Sec.3, Rohini Delhi-friend of the deceased.

(iii) Jitender Dahiya s/o Randhir Singh r/o WZ-3158, Mahindera Park, Rani Bagh, Delhi-friend of the deceased.

(iv) Smt. Parmila w/o Ramgopal r/o F-36, Sector 4, Vijay Vihar, Delhi-Cellphone of deceased was recovered from her.

(v) Raju s/o Tika Ram r/o Vill. Dairy, PO Bayana, PS Bhavnoli, Distt. Sagar, MP-he found the cell phone on the road and sold it to Parmila.

6. That during enquiry SI Jagdish Dahiya of PS Rohini,

Outer District was examined. He had been conducting the Inquest Proceeding of deceased Brijesh Singh. During enquiry he stated that initially the family members of deceased did not give any statement regarding death of Brijesh Singh. During enquiry he stated that initially the family members of deceased did not give any statement regarding death of Brijesh Singh. Subsequently, they began suspecting Vaibhav Gautam as Brijesh Singh had a scuffle with Michael over a girl a few days prior to his death.

7. That during enquiry Vaibhav Gautam stated that on the day of incident he was not in Delhi. He had gone to fetch "Kanwad" from Hardwar. He returned back to Delhi on 10/8/08. He produced a ticket of Rs.10/-issued to vehicle No DL3CW 9350 as Marg Sudharan Shulk, Rajaji Rashtriya Park, Dehradun (Uttaranchal). Vehicle No. DL3CW 9350 is the registration number of Indica car which belongs to his father. He had gone to Hardwar by his car and returned back carrying the "Kanwad" on foot.

8. That Manish Gandhi stated that at the time of incident he was not in India. He had been in Atlanta, USA. He came back to Delhi on 8/8/07. He produced the photocopy of passport and visa to prove his point.

9. That during the enquiry Neelam Sharma was also interrogated. He was the last person to see Brijesh Singh alive. He stated that on the night of 5/8/07 Brijesh Singh had consumed alcohol with his friends in Jheel Wala Park situated near Rani Bagh. At about 12.30 am on 6.8.07 Neelam Sharma left him alone in the park of Pkt B/9, Sector 3, Rohini, Delhi which is right in front of Brijesh Singh's house. Brijesh Singh told Neelam Sharma that his family members would scold him if he reached home late in drunken position.

10. That the mobile phone of the deceased had been missing since the day of the incident. Call details of his telephone number 9818546606 were analysed. It was found that the last call was an outgoing call on 5/8/07 at 10.30 pm to telephone 9313877834. This telephone number belongs to

Jitenra Dahiya s/o Randhir Singh Dahiya r/o WZ-3158, Rani Bagh Delhi. The conversation lasted for 12 seconds. Jitender Dahiya is a friend of Neelam Sharma.

11. That during enquiry Jitender Dahiya stated that on 5/8/07 he along with his friend took drinks on roof of his house. From about 7 to 7.30 P.M. Neelam Sharma made several calls to him. Neelam Sharma told him that he had some altercation with his girl friend and he wanted to have drinks. Jitender Dahiya received Neelam Sharma along with one frined who was already in drunken position near a barber's shop near his house. The person was introduced to Jitender Dahiya by Neelam Sharma as his friend Brijesh Singh. Jitender Dahiya bought one bottle of McDowell whisky from a wine shop. After that, the friends of Jitender Dahiya and Neelam Sharma and Brijesh Singh went to Jheel Wala Park, Rani Bagh, Delhi and all of them consumed alcohol in a picnic hut at Jheel Wala Park. At that time, according to Jitender Dahiya, due to heavy consumption of alcohol, Brijesh Singh started staggering. Jitender Dahiya asked Neelam Sharma to take Brijesh Singh home. Then all of them rode on two bikes to leave Brijesh Singh at his home. When they reached near the house of Brijesh Singh, Neelam Sharma told Jitender Dahiya that whenever Brijesh Singh consumed so much liquor, he usually slept outside the park in front of his home instead of going home. Then Jitender Dahiya along with friends left Neelam Sharma and Brijesh Singh inside the park and left for their homes.

12. That in the enquiry conducted so far nothing was found to suggest that Vaibhav Gautam and Manish Gandhi were involved in the death of Brijesh Singh. Both of them were not in Delhi on the day of incident.

13. That the IMEI no. 357948000653750 of the missing phone was sent to all mobile phone service providers in India. The IMEI number of the missing mobile phone was traced in Delhi circle on mobile number 9999698068. On the analysis of call details of the mobile phone, it was found

that the missing mobile phone was used by Smt. Parmila, w/o Ram Gopal r/o F-36, Sector-4, Vijay Vihar, Delhi. She was examined on 9/9/08 and she stated that she had bought the mobile phone from one Raju s/o Tika Ram R/o Vill. Dairy, PO & PS Minoli, Distt. Sagar, M.P. who was a tenant in the same house. She further stated that Raju had not paid his rent and he needed money, so he sold the mobile phone to her for Rs.900/-.

14. That Raju s/o Tika Ram was interrogated and he stated that he had found the mobile phone near the petrol pump in Sec.3 Rohini about 10/12 months ago. He needed money to pay his rent and he sold the mobile phone to Smt. Parmila. The mobile phone was recovered and seized through a memo and deposited in malkhana of PS Rohini.

15. That the result of chemical analysis of the viscera of deceased Brijesh Singh was received from Forensic Science Laboratory, Delhi. Ethyl alcohol 150.1 mg/100ml of blood was found in the viscera. On 9/9/08 the Forensic Science Laboratory report along with post mortem report of deceased Brijesh Singh was submitted before the autopsy surgeon Sanjay Gandhi Memorial Hospital, Delhi for giving the cause of death. The autopsy surgeon reported that **" after going through P.M. report and examination of FSL report. I am of the opinion that person had a fall in drunken state and had a head injury as written in PM report and that injury is sufficient to cause death."** (FSL report along with subsequent PM report annexed as D and E)

16. That on 08.07.08 a detailed status report listing out the steps taken was submitted in the Hon'ble Court of Sh. M.C. Gupta, ACMM, Rohini during the hearing of complaint of Smt. Radha u/s 156 (3) Cr. P.C. Thereafter, progress reports were duly filed on 4.8.08 and 10.9.08 in the Hon'ble Court. After hearing arguments the Hon'ble Court had adjourned the matter for 12/11/08. On 12/11/08, the matter was fixed for 17.11.08.

In view of the facts and circumstances it is most

respectfully submitted from the enquiry conducted so far, the report of Forensic Science Laboratory and the final opinion given by the autopsy surgeon regarding cause of death, there is nothing to suggest that the deceased Brijesh Singh died due to any criminal act. However, the respondent is willing to abide by any direction issued by the Hon'ble Court in the matter."

Unsatiated by the explanation given by the said two senior officers of Delhi Police in their respective affidavits, this court vide order dated 18.11.2008 gave directions to the Commissioner of Police to explain by way of an affidavit as to what prevented the police from registering an FIR on the complaint filed by the sister of the deceased suspecting murder of her brother. The Commissioner of Police was also directed to explain as to why the police had failed to follow the mandate of law envisaged under Section 154 Cr.P.C. and the law laid down by the Apex Court in **Ramesh Kumari Vs. State (NCT of Delhi) & Ors** AIR 2006 SC 1322. The gist of the order dated 18.11.2008 is reproduced as under:

"The case in hand reflects total mal-functioning, insensitivity, apathy and inaction of the police as they sat on the complaint of the sister of the deceased for over more than one year but did not register an FIR. The sister of the deceased had earlier filed a writ petition when she was directed to approach the lower court to seek remedy. The lower court also did not give any directions till yesterday and as per the affidavits filed by these two police officers, the inquiry was being conducted into the incident but without the registration of any FIR. In both the affidavits filed by the police officers no reasons have been given as to what prevented the police to first register an FIR and then proceed with the necessary investigation or inquiry. Indisputably, in this case a young person of 22 years of age lost his life and his sister had approached the police authorities to register an FIR but failing in her endeavour the petitioner approached this court by way of filing the writ petition and then on the direction of the court she approached the Ld. M.M. by filing an application under Section 156 (3) Cr.P.C. as no steps were taken by the police to register an FIR. The contention of the counsel for the State is far from convincing that since the police did not suspect any

foul play, therefore, no FIR was registered. Once the real sister had suspected of a foul play in the matter and had been approaching the police to register an FIR, there could not have been any ground for not registering an FIR and that too in a case where a person has died in mysterious circumstances. No doubt, in a given case the police can carry out a preliminary inquiry but the settled legal position is to first register an FIR and then to carry out investigation. The police could not have straight away relied upon the conclusions given in the postmortem report and in the FSL report to reach to its own decision, more particularly, when the sister of the deceased suspected a foul play and had gone to the extent of raising finger at some person behind the said murder. Both these officers of the rank of Joint Commissioner of Police and Additional Commissioner of police have given justification for not registering an FIR and if such kind of explanation can be given by such high ranking officers, then nothing better can be expected from the lower hierarchy of Delhi Police. It is thus evident that in the present case police has virtually violated the directions given by the Apex Court in **Ramesh Kumari Vs. State (NCT Of Delhi) and Ors.** ; AIR 2006 SC 1322. Relevant para of the said judgment is reproduced as under:

> 4. That the Police Officer mandatorily registers a case on a complaint of a cognizable offence by the citizen under Section 154 of the Code are no more res integra. The point of law has been set at rest by this Court in the case of State of Haryana and Ors. v. Bhajan Lal and Ors. 1922 Supp (1) SCC 335. This Court after examining the whole gamut and intricacies of the mandatory nature of Section 154 of the Code has arrived at the finding in paras 31 & 32 of the judgment as under:
>
> 31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned police officer cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in

charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub-section (3) of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, "reasonable complaint" and "credible information" are used. Evidently, the non-qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the

earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that 'every complaint or information' preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 189(c) of the present Code of 1973 (Act 2 of 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence.

Finally, this Court in para 33 said:

33. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154(1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information.

5. The views expressed by this Court in paragraphs 31, 32 and 33 as quoted above leave no manners of doubt that the provision of Section 154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of such an information disclosing cognizable offence.

It would be thus evident that the two Senior Police Officers in their affidavits have failed to give any justifiable reason for non-registration of a case despite untiring efforts made by the

petitioner.

Let the Commissioner of Police by way of an affidavit explain as to what prevented the police from registering an FIR on the complaint of the sister of the deceased who suspected murder of her brother and secondly, why the police failed to follow the mandate of law envisaged under Section 154 Cr.P.C. and the law laid down by the Apex Court in **Ramesh Kumari Vs. State (NCT Of Delhi) and Ors.** ; AIR 2006 SC 1322 regarding registration of an FIR after receiving the information of commission of a cognizable offence.

Let the affidavit be filed within a period of two weeks."

5. Pursuant to the said directions, Mr. Yudhvir Singh Dadwal, the then Commissioner of Delhi Police had filed his affidavit dated 1.12.2008. On facts, the Commissioner of Police reiterated the same sequence of events as narrated by the Additional Commissioner of Police in his affidavit. The Commissioner of Police in his affidavit, however, tried to defend the conduct of the police officers in not registering an FIR by taking shelter under the provision of Section 174 of Cr.P.C. and also in view of the observations of the Hon'ble Apex Court in **Rajinder Sinigh Katoch Vs. Chandigarh Administration & Ors.** (2007)10 SCC 69, wherein the Hon'ble Apex Court observed that in a given case the preliminary enquiry can also be conducted by the concerned police officers in order to find out as to whether the FIR sought to be lodged has any substance or not. The Commissioner of Police in para 7(i) of his affidavit admitted the fact that between 7.8.2007 to 29.5.2008 the petitioner made several complaints to the police and other authorities requesting for registration of an FIR in the said case. In para 9 of the affidavit the Commissioner of Police took a stand that in view of the observations made in the inquest report, post mortem report and initial findings, the concerned I.O. did not think it appropriate to register a case of murder. In para 10, however, the Commissioner of Police stated that pursuant to the direction dated 17.11.2008 given by the learned ACMM under Section 156(3) Cr.P.C., an FIR bearing No. 26/08 was registered by the police u/s 302/392/120-B/34 IPC. The relevant paras of the said affidavit of the Commissioner of Police are also reproduced as under:

"……..

5. It is the submission of the deponent that whenever information of a cognizable offence is made out an FIR is registered and the matter is investigated. However, the Hon'ble Supreme Court of India in Rajinder Singh Katoch Vs. Chandigarh Administration and others have laid down that although the officer In charge of a police station is legally bound to register a first information report in terms of Section 154 of the Code of Criminal Procedure, if the allegations made by them gives rise to an offence which can be investigated without obtaining any permission from the magistrate concerned; the same, by itself, however, does not take away the right of the competent officer to make a preliminary enquiry, in a given case, in order to find out as to whether the first information sought to be lodged had any substance or not. This coupled with provision of Section 174 Cr.P.C. guides police as regards unnatural deaths and other cases, reported to police. This was also followed in the complaint of Smt. Radha and the death of Brijesh Singh.

6. It is respectfully submitted that the very purpose of conducting inquest proceeding is to find out the cause of death. While conducting inquest if at any stage a cognizable offence is made out an FIR is registered and investigation taken thereon and a final report in terms of Section 173 Cr.P.C. is filed. In a case where, however, commission of cognizable offence is not made out the inquest proceedings are only conducted wherein the cause of death is ascertained by getting the post mortem conducted and also recording of statements of the relevant witnesses. After the conclusion of inquest, unlike a report u/s 173 Cr.P.C. to the Magistrate, a report is sent to the concerned SDM, who takes a final decision on the same in terms of Section 174 Cr.P.C.

7……..

(i) That from 7.8.07 to 29.5.08 Mrs. Radha made several complaints to the police and other authorities upon which the factual report was submitted to the concerned authorities by the SHO and subsequently by the DCP Outer District and DCP Vigilance. The DCP Vigilance also sent a report to NHRC in response to the complaint of petitioner. It was also reported that action would be taken after receiving the final report regarding

the cause of death. Copy of the complaint dated 9.8.2007 sent by the petitioner to the deponent is annexed as Annexure R-3.

……..

8. (a) Smt. Radha had made a complaint before the deponent that her brother Brijesh Singh had been murdered. In her complaint she alleged that her brother Brijesh Singh @ Birju went on 5/8/07 at about 6.P.M. On next date 6/8/07 the dead body of her brother was found in a park. She suspected that her brother Brijesh Singh was murdered. She further made allegations that her brother had some quarrel on 3.8.08 with Vaibhav Gautam @ Michael who was known to her brother Brijesh Singh and he had threatened to kill Brijesh. She had requested for registration of a case. The complaint of Smt. Radha was marked to Crime Branch for enquiry on 19/1/08. Accordingly an enquiry was initiated by the Crime Branch.

(b) The enquiry was marked to Inspector R.K. Meena, Anti-Homicide Section of Crime Branch. During the course of enquiry Smt. Radha, sister of deceased was examined on 22/1/08. In her statement she stated that on 4/8/07 her brother Brijesh Singh had told her that he had an altercation with Vaibhav Gautam @ Michael over a girl who was studying in a computer course in Rohini and Vaibhav Gautam wanted to make friendship with that girl. She also stated that one year ago Manish Gandhi had an altercation with Brijesh Singh, and Manish Gandhi had made a complaint to police against Brijesh Singh. In the police station, the father of Manish Gandhi had threatened Brijesh Singh with dire consequences. On 5.8.07 when her brother did not return home, her mother called her daughter Ms. Radha and told her about the incident. She further stated that when her mother reached PS Rohini, police officials advised them to look for Brijesh Singh for some more time. They searched for their brother but due to rain they were not able to find Brijesh Singh. On 6.8.07 at about 6.00 A.M. someone from the locality came to their house and informed them that the body of Brijesh Singh was lying inside the water logged park near a tree pit. Smt. Radha stated that she along with her mother saw the dead body of her brother in the water logged park near a tree pit in front

of their home. Police removed the dead body to Baba Saheb Ambedkar Hospital, Delhi. Post mortem was conducted at the hospital and after post mortem the dead body of Brijesh Singh was handed over to them and they cremated the dead body.

…

(k) That during enquiry Jitender Dahiya stated that on 5.8.07 he along with his friends took drinks on roof of his house. From about 7 to 7.30 P.M. Neelam Sharma made several calls to him. Neelam Sharma told him that he had some altercation with his girl friend and he wanted to have drinks. Jitender Dahiya received Neelam Sharma along with his friend who was already in drunk position near a barber's shop near his house. The person was later introduced to Jitender Dahiya by Neelam Sharma as his friend Brijesh Singh. Jitender Dahiya bought one bottle of McDowell whisky from a wine shop. After that, the friends of Jitender Dahiya and Neelam Sharma and Brijesh Singh went to Jheel Wala Park, Rani Bagh, Delhi and all of them consumed alcohol in a picnic hut at Jheel Wala Park. At that time, according to Jitender Dahiya, due to heavy consumption of alcohol Brijesh Singh started staggering. Jitender Dahiya asked Neelam Sharma to take Brijesh Singh to his home. When they reached near the house of Brijesh Singh, Neelam Sharma told Jitender Dahiya that whenever Brijesh Singh consumed so much liquor, he usually slept inside the park in front of his home instead of going home. After that Jitender Dahiya along with friends left Neelam Sharma and Brijesh Singh inside the park and left for their homes.

…

(o) The result of chemical analysis of the viscera of deceased Brijesh Singh was received on 4.9.2008 from Forensic Science Laboratory, Delhi. According to FSL report Ethyl alcohol 150.1 mg/100ml of blood was found in the viscera. On 9.9.08 the Forensic Science Laboratory report along with post mortem report of deceased Brijesh Singh was submitted before the autopsy surgeon Sanjay Gandhi Memorial Hospital, Delhi for giving the cause of death. The autopsy surgeon reported that "after going through P.M. report and examination of FSL report I am of the

opinion that person had a fall in drunken state and had a head injury as written in PM report and that injury is sufficient to cause death."

……

9. It is submitted that from the time the body of deceased Brijesh Singh was discovered on 6.8.07, through the process of inquest and post mortem which was conducted on the same day, no external injury had been discovered on the body. During postmortem the viscera of the deceased was preserved and sent to Forensic Science Laboratory. In view of observations in inquest, post mortem and initial findings, the I.O did not think it appropriate to register a case of murder. The statement of witnesses who saw Brijesh Singh drinking heavily on the night of incident was corroborated by FSL report which showed heavy presence of alcohol content in his blood being 150.1 mg/100 ml. This also indicated that no offence had been committed against Brijesh and led to the action of the I.O. in continuing with the inquest.

10. That on 17.11.2008 the Ld. ACMM, Rohini, Sh. Amit Bansal, was pleased to give directions u/s 156(3) Cr.P.C. and pursuant thereto FIR no. 26/08 u/s 302/392/120-B/34 IPC PS Crime Branch, was registered on 17.11.2008."

6. After the registration of the said FIR, as per the status report filed by the Delhi Police, investigation of the said case was entrusted to Inspector Dharambir Singh, Anti Homicide, Crime Branch. During the investigation the I.O. had interrogated various persons who were named by the petitioner in her complaint and also those who were found with the deceased on the night of 5.8.2007. As per the status report, the mobile phone of the deceased was recovered by the police on 9.9.2008 during the course of inquest proceedings but no cue after interrogating the person from whom the mobile phone was recovered could be found by the concerned I.O. Polygraph test of Neelam Sharma, Vaibhav Gautam and Promod Sharma was also got conducted by the Crime Branch during investigation from Central Forensic Science Laboratory, CBI, Lodhi Road but all these persons were found to be truthful in their answers. As per the status report filed by Inspector Dharambir Singh on 5.8.2010 and the

latest status report filed on 7.5.11 by Inspector Bhaskar Sharma, the investigation of the case was still in progress.

7. Besides addressing oral arguments, both the parties have filed their written synopsis in support of their arguments. In the written synopsis filed by the petitioner , her stand is that the petitioner and her mother had reached the spot where the dead body of Brijesh was lying and it was found by them that mobile phone, wrist watch, currency notes and papers contained in the purse were found missing. They also found that one notebook which did not belong to the deceased along with one iron rod was found lying near the dead body. As per the petitioner, she and her mother told the S.I. Jagdish Chander that they suspect foul play as mobile phone, wrist watch and money from the purse was missing but S.I. Jagdish Chander without paying any heed to such vital information handed over the notebook and purse to the mother of the deceased. The petitioner also pointed out that the clothes of the deceased were not preserved by the police but the same were thrown away in a great hurry. The petitioner also raised a grievance that the statements of various material witnesses were recorded by the police during the course of preliminary enquiry but they were of no consequence as the police ought to have recorded their statements under Section 161 Cr.P.C. after registration of an FIR. The petitioner also submitted that the callous attitude of the police in unnecessarily carrying out the preliminary enquiry for a period of over one year was merely to help the accused to eliminate evidence. The petitioner also submitted that the learned ACMM also failed to give any direction to the police to register an immediate FIR for proper investigation of the case, but instead kept on asking for the status report from the police. In support of her case, the petitioner relied upon the following judgments:

1. **Bhagwant Singh Vs. Commissioner of Police** 1985 (2) SCC 537
2. **Abhinandan Jha & Anr Vs. Dinesh Mishra** 1968 AIR (SC) 117
3. **Indra Carat Pvt. Ltd. Vs. State of Karnataka & Ors.** 1989 AIR (SC) 885
4. **Ramesh Kumari vs. State of NCT of Delhi** 2006 AIR (SC) 1322

8. On the other hand, in the brief submissions filed by the respondent-State, the stand taken is that a call was received by the PCR, Head Quarter at about 6.07 A.M. reporting that a person was lying dead inside the B-9 park, Sector-3, Rohini. At 6.20 A.M. the call from the PCR through District Net reached P.S. Rohini wherein it was lodged in daily diary of P.S. Rohini vide D.D. No. 6A dated 6.8.2007 and the copy of the same was sent to the S.I. Jagdish Chander for necessary action. It has also been stated that one Beat Constable Beg Raj helped the PCR officials in removing the dead body and before picking up the dead body the constable had taken the photograph of the place of occurrence from his mobile phone camera. S.I. Jagdish Chander reached the spot along with one Constable Harinder but by that time the body was already removed to Baba Saheb Ambedkar Hospital by the said PCR Van. S.I. Jagdish Chander then went to the hospital and had obtained MLC No. 4045/07 and thereafter the dead body was referred to the mortuary of Sanjay Gandhi Memorial Hospital for forensic examination. It is further stated that no article belonging to the deceased or any foreign material was found by the I.O. Jagdish Chander. It is further stated that since no apparent injury was noticed by the I.O. and due to non availability of any eye witness who could give any first hand account of the circumstances leading to the death of the deceased, the I.O. initiated the inquest proceedings under Section 174 Cr.P.C. for ascertainment of the exact cause of death. After getting the post mortem conducted, the body was handed over by the I.O. to Shri Raj Singh, brother of the deceased. It has also been denied that any missing article of the deceased was reported by the family members to the I.O. It is further stated that even in the telegram dated 6.8.2007 sent by the petitioner to various authorities there was no mention of any foreign article found near the body or any article belonging to the deceased found missing. It is only in the subsequent complaints dated 9.8.2007 onwards that the petitioner started making such allegations regarding missing of purse and presence of iron road and note book. The respondent also took a stand that no external injury on the body of the deceased was found and the facts at the spot did not make out a case of commission of a cognizable offence and hence inquest proceedings under Section 174 Cr.P.C. were conducted by the I.O. so as to ascertain the cause of death. It has also been stated that the enquiry on the complaint of the petitioner was marked to the Crime Branch on 19.1.2008 and during this enquiry several persons were examined

by the Crime Branch. On the legal issue, the stand taken by the respondent is that no cognizable offence seemed to have been committed after taking into consideration the allegations and the facts as were available. In the status report it is also stated that at no stage during the inquest proceedings it could be found that the death was due to any act or injury caused by someone. The State in their submissions also came in defence of the learned Magistrate for not directing registration of an FIR. The State placed reliance on the following judgments in support of their case:

1. **Gurudath Prabhu & Ors. vs. Ms. Krishna Bhat & Ors.** 1999 Crl. L. J. 3909
2. **Tapinder Singh vs. State Of Punjab** 1970(2) SCC 113
3. **Satish Kumar Goel vs. State & Ors.** 84(2000) DLT 199(DB)
4. **Rajinder Singh Katoch vs. Chandigarh Administration & Anr.** 2007(10) SCC 69
5. **Binay Kumar Singh vs. State of Bihar** 1997(1) SCC 283

9. I have heard learned counsel for the petitioner Mr. Anil Soni and Mr. Pawan Sharma, learned Standing Counsel for State and carefully gone through the stand taken by both the parties in their oral arguments as well as written submissions. Before furthering the discussion on the controversy in hand, it would be appropriate to reproduce the relevant provisions of the Code of Criminal Procedure pertinent to the facts of the present case as under:

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

(c)"cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

…."

154.Information in cognizable cases.

(1) Every information relating to the commission of a cognizable

offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

156.Police officers power to investigate cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

174.Police to enquire and report on suicide, etc.

(1) When the officer in charge of a police station or some other police officer specially empowered by the State Government in

that behalf receives information that a person has committed suicide, or has been killed by another or by an animal or by machinery or by an accident, or has died under circumstances raising a reasonable suspicion that some other person has committed an offence, he shall immediately give intimation thereof to the nearest Executive Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises, and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any); such marks appear to have been inflicted.

(2) The report shall be signed by such police officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.

(3) When there is any doubt regarding the cause of death, or when for any other reason the police officer considers it expedient so to do, he shall, subject to such rules as the State Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the State Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) The following Magistrates are empowered to hold inquests, namely, any District Magistrate or Sub-divisional Magistrate and any other Executive Magistrate specially empowered in this behalf by the State Government or the District Magistrate.

10. The 'First Information Report' sets into motion the process of criminal machinery. The Hon'ble Apex Court and various High Courts of the country through various authoritative legal pronouncements have time

and again taken an unequivocal view that where a complaint is made to the police officer which discloses commission of a cognizable offence, it is the statutory duty of the police to register an FIR and then proceed to hold investigation in the complained offence, but unfortunately the voice of various High Courts and even the Highest Court of the land has fallen on deaf ears of not only the lower officials but also of the rank of Joint Commissioner of Police, Additional Commissioner of Police and the top Cop of the Delhi Police as well. To give a reminder of the same to the Delhi police once again, it has become imperative to reiterate the dicta of law laid down by the Hon'ble Supreme Court through various pronouncements. Mandate of Section 154(1)

11. In the celebrated pronouncement of the Apex Court in the case of **State of Haryana Vs. Bhajan Lal** AIR 1992 SC 604, the court has held that:

> "30. The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" (as defined Under Section 2(c) of the Code) if given orally (in which case it is to be reduced into writing) or in writing to "an officer incharge of a police station" (within the meaning of Section 2(o) of the Code) and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "First Information Report" and which act of entering the information in the said form is known as registration of a crime or a case.31. At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code, the concerned police officer cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer incharge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered Under Section 156 of the Code to investigate, subject to the proviso to Section 157. (As we have proposed to make a detailed discussion about the power of a police officer

in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in-extensor in the present context). In case, an officer incharge of a police station refuses to exercise the jurisdiction vested on him and to register a case on the information of a cognizable offence, reported and thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by Sub-section 3 of Section 154 of the Code.

32. Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression "information" without qualifying the same as in Section 41(1)(a) or (g) of the Code wherein the expressions, "reasonable complaint" and "credible information" are used. Evidently, the non-qualification of the word "information" in Section 154(1) unlike in Section 41(1)(a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. In other words, 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the CrPC of 1861 (Act XXV of 1861) passed by the Legislative Council of India read that 'every complaint or information' preferred to an officer incharge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act X of 1872) which thereafter read that 'every complaint' preferred to an officer incharge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two

Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 ˇwhich word is now used in Sections 154, 155, 157 and 190(c) of the present Code of 1973(Act II of 1974). An overall reading of all the Codes makes it clear that the condition which is sine-qua-non for recording a First Information Report is that there must be an information and that information must disclose a cognizable offence.

33. It is, therefore, manifestly clear that if any information disclosing a organizable offence is laid before an officer incharge of a police action satisfying the requirements of Section 154(1) of the Code, the void police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."

The above said legal position has been reiterated by the Apex Court in the case of **Parkash Singh Badal Vs. State of Punjab** (2007)1 SCC 1. The Hon'ble Apex Court in **Lallan Chaudhary & Ors. Vs. State of Bihar & Anr.** (2006)12 SCC 229 held as under:

"Section 154 of the Code thus casts a statutory duty upon police officer to register the case, as disclosed in the complaint, and then to proceed with the investigation. The mandate of Section 154 is manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station, such police officer has no other option except to register the case on the basis of such information.

5. In the case of Ramesh Kumari v. State (NCT of Delhi) and Ors. : 2006CriLJ1622 this Court has held that the provision of Section 154 is mandatory. Hence, the police officer concerned is duty-bound to register the case on receiving information disclosing cognizable offence. Genuineness or credibility of the information is not a condition precedent for registration of a case. That can only be considered after registration of the case. The mandate of Section 154 of the Code is that at the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence, the police officer concerned cannot embark upon an enquiry as to whether the information,

laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not relevant or credible. In other words, reliability, genuineness and credibility of the information are not the conditions precedent for registering a case under Section 154 of the Code."

The Full Bench decision of the Bombay High Court presided over by Hon'ble Justice Swatanter Kumar (the then Chief Justice of the Bombay High Court) in **Sandeep Rammilan Shukla vs. The State Of Maharashtra through the Secretary, Home Department and Ors.** 2009(1) MhLj 97 is in fact a treatise on the subject of FIR and it would be quite useful to refer the following paras of the same as under:

"27. In the light of above enunciated principles, now let us revert back to the language of Section 154 and the other provision which would have a bearing on its true construction. The provisions of Section 154 use a clear language and hardly leave any scope for doubt. The moment information relating to the commission of cognizable offence is given to the officer in charge of a Police Station, he "shall reduce the same in writing or cause it to be written under his direction and shall be signed by the person giving information and entered in such book which may be prescribed by the State Government in that behalf." Thus, this provision casts an absolute obligation upon an officer in charge of a Police Station that wherever information about cognizable offence is brought to his notice, he shall follow the procedure prescribed under Section 154(1). In the event of default, Section 154(3) provides a remedy to the aggrieved party. In other words, the Legislature did contemplate the possibility of a refusal to record information of a cognizable offence by officer in charge of a Police Station, and therefore, found a need of spelling out a remedy under Section 154(3).

28. A cognizable offence by its very definition would be a serious offence and in fact, an assault on the freedom and liberty of another individual as protected under the basic rule of law. A cognizable offence would be one where the Investigating Officer can arrest without warrant. Section 41 specifies when, without order from the Magistrate and without warrant, a person could be arrested who is concerned in any cognizable offence. Section

157 is another important provision, which throws some light on the matters in issue. Section 157 of course is preceded by Sections 154 to 156 but its language does not indicate that the procedure of investigation indicated in it can be followed only after registration of a case.

29. In the case of Emperor v. Khwaja Nazir , it is held that receipt and recording of FIR is not a condition precedent to criminal investigation and police have statutory right under Section 154 to investigate. Section 157 requires that if from the information received which may even refer to Section 154 or otherwise, an officer in charge of a Police Station has reason to suspect commission of an offence which he is empowered under Section 156 to investigate after sending report to Magistrate would proceed to investigate personally or appoint his subordinate to investigate. Here the expression `reason to suspect the commission of an offence. Indicates arriving at some kind of satisfaction on the part of the Investigating Officer in regard to commission of an offence, which he is empowered to investigate in terms of Section 156 i.e. a cognizable offence. Proviso (b) to Section 157(1) further grants some kind of leverage to the Investigating Officer that he may not enter upon the investigation where there is 'no sufficient ground for investigation'. Besides submitting the report, he is under obligation to notify the informant as well. The report is to be submitted in terms of Section 158 where the Magistrate can even direct investigation in terms of powers conferred upon the Magistrate under Section 159. This provision gives some element of discretion to the Investigating Officer, which he could exercise as per the prescribed procedure, in accordance with the law and to have fair play into the investigation. Abuse of this discretion can lead to drastic consequences on the entire criminal law.

30. The opening words of Section 157 are also of some significance. The expression `If" used in "If' from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate", is considered it suggests that the power to investigate under Section 157 is

dependent upon some satisfaction as indicated the word `if.. The expression `if. has to be given some meaning and reference in the language of Section. This expression will have to be examined in light of the language of Section 154(1) of the Code.

31. In the scheme of the Code of Criminal Procedure, the provisions of Section 154 is a significant provision and has considerable impact on administration of criminal justice as well as have substantial effect on the society. The question, which requires serious consideration, is whether any kind of discretion is available to the officer in charge of a Police Station in terms of Section 154 or he is left with no choice whatever as per the circumstances of the case. The advantages and disadvantages per se may not be a relevant consideration in interpretation of provisions of criminal law but this exemption in the light of object of the statute and provision and its purpose can be of definite help in such situation. Experience has shown and even it is not disputed at the bar during the course of arguments that the abuse of this power either way is not only possible but has actually been seen in practice. Fear of manipulation per se cannot be the basis for enactment of a law and for that matter its interpretation. The Court essentially must believe that all the things would be done fairly and as required under the law unless contrary is shown. Sometimes, cases relating to cognizable offence are registered even if they are patently false, absurd and the credibility and reliability of which is prima facie questionable. They are filed just to harass the party complained against at the behest of some influential persons. On the other hand, a genuine complainant who is the real victim of commission of a cognizable offence committed by another is neither attended to nor heard at various police stations and the officer in charge of a Police Station refuses to record any entry of such information, thus leading to consequences which result in not bringing the influential people to the command of law.

32. The word `shall' appearing in Section 154 has to be given its plain and simple meaning as its plain interpretation is neither hit by any rule of great hardship, inconvenience or ambiguity. The expression `shall' therefore is a mandatory provision and in

no uncertain terms places an absolute duty upon the officer in charge of a Police Station to record information of a cognizable offence in the appropriate book/books. No doubt, the words "shall" and `may' are interchangeable but in the present case, mandatory interpretation of the word 'shall' can hardly be avoided. Corollary to the question that follows is whether this absolute duty arising from the word `shall' specifically or by definite implication puts an absolute prohibition on the police officer in charge of a Police Station to do any other act ancillary thereto or otherwise under the Scheme of the Act.

33. The provisions of Section 154 are capable of being interpreted and given a meaning on its plain interpretation without harming either doctrine of fair investigation, avoiding adverse effect on the society and ensuring expeditious commencement and disposal of the trials without exposing the complainant to the possible disadvantage for non registration of his complaint. Once the matter falls within the realm of investigation, it is controlled by the Investigating Agency, normally, without interference of the Court. The only condition precedent to put the machinery of investigation in motion is information of a cognizable offence and/or registration of offence alleged to have been committed which is cognizible. The investigation includes all proceedings under the Code for collection of evidence conducted by a police officer. There is no specific provision or legislative command where preinvestigative inquiry is either specifically permitted or prohibited. There appears to be nothing in the language of Section 154 of the Code, which debars recourse to preregistration inquiry howsoever formal it might be, that necessarily may not mean that it specifically permit such an inquiry. This aspect of the matter, we shall revert back for a detail discussion after noticing the judgments on the subject."

Thus it would be luculent from the above that there can be no departure from the fact that there is an inviolable duty cast upon the police officer incharge of a police station to register an FIR.

First Information Report: Object & Importance

12. In the case of **Ravi Kumar Vs. State of Punjab** (2005)9 SCC

315, the Hon'ble Supreme Court has defined the First Information Report in the following words:

> "15. The First Information Report is a report giving information of the commission of a cognizable crime which may be made by the complainant or by any other person knowing about the commission of such an offence. It is intended to set the criminal law in motion. Any information relating to the commission of a cognizable offence is required to be reduced to writing by the officer-in-charge of the Police Station which has to be signed by the person giving it and the substance thereof is required to be entered in a book to be kept by such officer in such form as the State Government may prescribe in that behalf. The registration of the FIR empowers the officer-in-charge of the Police Station to commence investigation with respect to the crime reported to him. A copy of the FIR is required to be sent forthwith to the Magistrate empowered to take cognizance of such offence. After recording the FIR, the officer-in-charge of the Police Station is obliged to proceed in person or depute one of his subordinate officers not below such rank as the State Government may, by general or special order, prescribe in that behalf to proceed to the spot to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. It has been held time and again that the FIR is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under Section 161 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') or to contradict him under Section 145 of that Act. It can neither be used as evidence against the maker at the trial if he himself becomes an accused nor to corroborate or contradict other witnesses. It is not the requirement of law that the minutest details be recorded in the FIR lodged immediately after the occurrence. The fact of the state of mental agony of the person making the FIR who generally is the victim himself, if not dead, or the relations or associates of the deceased victim apparently under the shock of the occurrence reported has always to be kept in mind. The object of insisting upon lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed."

The Apex court further in the case of **Thulia Kali vs. The State of Tamil Nadu** AIR 1973 SC 501 emphasized the importance of FIR in the following manner:

> "First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused: The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story As a result of deliberation and consultation."

The Apex Court in the case of **Hasib vs. State of Bihar** AIR 1972 SC 283 put forth the essence of FIR as under:

> The legal position as to the object, value and use of first information report is well settled. The principal object of the first information report from the point of view of the informant is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bringing to book the guilty party.

It would also be useful here to refer to some of the important observations made by the Apex Court in the case of **Ramesh Kumari Vs. State of NCT of Delhi,**(2006) 2 SCC 677 and in the case of **CBI and Ors. Vs. Tapan Kumar Singh** (2003) 6 SCC 175 which are respectively reproduced as under:

> "3. Mr. Vikas Singh, learned Additional Solicitor General, at the outset, invites our attention to the counter-affidavit filed by the respondent and submits that pursuant to the aforesaid observation of the High Court the complaint/representation has been

subsequently examined by the respondent and found no genuine case was established. We are not convinced by this submission because the sole grievance of the appellant is that no case has been registered in terms of the mandatory provisions of Section 154(1) of the Criminal Procedure Code. Genuineness or otherwise of the information can only be considered after registration of the case. Genuineness or credibility of the information is not a condition precedent for registration of a case. Me are also clearly of the view that the High Court erred in law in dismissing the petition solely on the ground that the contempt petition was pending and the appellant had an alternative remedy. The ground of alternative remedy nor pending of the contempt petition would be no substitute in law not to register a case when a citizen makes a complaint of a cognizable offence against the Police Officer.

4. That the Police Officer mandatorily registers a case on a complaint of a cognizable offence by the citizen under Section 154 of the Code are no more res integra. The point of law has been set at rest by this Court in the case of State of Haryana and Ors. v. Bhajan Lal and Ors. : 1992CriLJ527 . This Court after examining the whole gamut and intricacies of the mandatory nature of Section 154 of the Code has arrived at the finding in paras 31 & 32 of the judgment as under:

…….

5. The views expressed by this Court in paragraphs 31, 32 and 33 as quoted above leave no manners of doubt that the provision of Section 154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of such an information disclosing cognizable offence."

……..

"22. It is well settled that a First Information Report is not an encyclopedia, which must disclose all facts and details relating to the offence reported. An informant may lodge a report about the commission of an offence though he may not know the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily

be an eye witness so as to be able to disclose in great details all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself abut the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even if the information does not furnish all the details, he must find out those details in the course of investigation and collect all the necessary evidence. The information given disclosing the commission of a cognizable offence only sets in motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law. The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the concerned police officer is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can."

It would also be useful here to refer to the judgment of the Division Bench of this court in the case of **Shanti Devi & Anr.** State

97(2002)DLT410 (DB) where the court very eloquently put the legal position as under:

> "5. It is a beaten track that if an information is laid before an officer or a police station, he is saddled with duty to enter it in the prescribed form and register a case and then to conduct an investigation into the allegations made. Though he can make some inquiry as to the commission of a cognizable offence but he can't examine the credibility, correctness or reliability of the accusations made in the complaint' so long as the complaint is not uncertain and it is not entertaining any doubt on the commission of any cognizable offence he has no option but to register the FIR on the complaint where the facts narrated laid a foundation for making out a cognizable offence.
>
> 6. In this conspectus it remained to be seen how petitioners' complaint was handled and treated. There is no dispute that it had charged ASI Dharam Pal of being instrumental for the fall of two motor cycle riders resulting in death of one of them and grievous hurt to the other. It could not, Therefore, be said that the information put up before the concerned SHO made the commission of a cognizable offence doubtful or that it was vague or uncertain as to warrant no action in the matter. Respondents' stand that petitioners' complaint was examined by Public Grievance Cell and was found devoid of any substance is wholly misconceived and irrelevant.
>
> 7. It is not understandable how the inquiry by that Cell would justify the non-registration of a case on the petitioners' complaint which otherwise indicated commission of a cognizable offence irrespective of the correctness of the accusations. Such an inquiry by any forum of police, it must be under-scored, had no such sanctity in the eyes of law. It indeed fell outside the scope and scheme of Chapters XII and XIV of Cr.P.C.
>
> 8. It requires to be made clear at this stage that a police officer was not competent to conduct any investigation of sorts on the complaint or to refer it to any forum for testing its veracity or correctness or substance before entering it in prescribed form and registering a case. Or else, it would tantamount to putting

> the cart before the horse, because the registration of FIR had to precede the investigation and not the vice versa."

(emphasis supplied)

I may also refer to some of the other important extracts from the judgment of the Bombay High Court in **Sandeep Rammilan Shukla**(Supra) which are reproduced as under:

> "60. It is evident from the analysis of the above judgments of the Supreme Court as well as this Court that there are some what divergent points of view taken by the different Benches of the Court. Of course, they cannot be termed as diametrically divergent views. They can be easily reconciled if looked from appropriate perspective in the backdrop of respective facts. The judgments which have taken the view that there is permissibility within the scope of Section 154 for an officer in charge of a police station to conduct some kind of an inquiry preregistration of the FIR have stated so to be an exception and not the rule. In other words, it has to be one of those rare cases where recourse to such a procedure may be adopted. As a rule and as requirement of law, the police officer in charge of a police station is stated to have hardly any discretion in registering the case once the information given to such an officer discloses a cognizable offence. The essence appears to be that the information should disclose commission of a cognizable offence which alone would vest power and jurisdiction in the officer in charge to put into motion the investigation machinery. It needs to be noticed with some emphasis that it is not necessary that FIR should be registered for the purposes of setting the mechanism of investigation into motion. It is sufficient that a cognizable offence is disclosed by the information given. This is the true implication of the provisions of Section 154 read with Section 157 of the Code. The Supreme Court and Privy Council have consistently taken the view that for investigation to commence, registration of a FIR is not a sine qua non (**Emperor v. Khwaja Nazir , and Apren Joseph @ Current Kunjukunju and Ors. v. State of Kerala** : 1973CriLJ185).
>
> 61. One of the arguments raised before us on behalf of the

Petitioners was that the judgments relied upon by the State are judgments on their own facts and cannot be constituted as precedent of law settling or answering proposition involved in the present case. Somewhat similar is the contention on behalf of the State. It can hardly be disputed that the dictum of the Supreme Court and even this Court are judgments on facts and circumstances of those cases. In each case, whether for and against the proposition of law, there were peculiar circumstances. Despite ingredient of the Section being satisfied, the police had intentionally not registered or delayed the registration of information disclosing the cognizable offence. While in other cases, there was an overzeal on the part of the police and while even conducting the preregistration inquiry they acted unfairly. Still, a third class of cases is where despite an offence having been made out the investigating agency or the police officer in charge, neither entered upon a preliminary inquiry preregistration nor even registered the case thus compelling the aggrieved party to approach the High Court under Article 226 of the Constitution of India. There are also cases where the investigation was so unfair and opposed to the rule of law that parties had come for quashing of an FIR or for transfer of investigation to CBI. Whichever view is accepted as correct exposition of law, the basic principle therein is necessity of bona fide exercise of power and unbiased and fair investigation of an alleged offence by the police. Rule of criminal jurisprudence make no exception to the principle that a fair investigation is the soul of proper administration of criminal justice system. Criminal justice system has two components. The role of the State and role of the judiciary. Exercise of power or authority by any of these components has to ensure due protection with dignity to the rights of a complainant as well as suspect and the society at large, while ensuring that there is no adverse impact on the social fabric of the society.

62. It is required to be noticed with some emphasis that the judgment in the case of **Bhagwant Kishore Joshi** (supra) is a judgment delivered by a Bench of three Judges, while all the other judgments relied on by either parties are judgments by two Judge Bench. In that case, the Supreme Court had clearly taken the view while explaining the word "investigation" that merely

making some preliminary inquiry upon receipt of the information from an anonymous source or a source of doubtful reliability for checking up the correctness of the information does not amount to collection of evidence and so cannot be regarded as investigation. The Court further clarified that in absence of any prohibition in the Code, express or implied, it was open to the police officer to make such preliminary inquiry.

63. The judgment of **Ramesh Kumari vs Stateof NCT of Delhi.** : 2006CriLJ1622 , was duly noticed by the Supreme Court in the case of **Rajinder Singh Katoch** (supra). The judgment in **Rajinder Singh Katoch** (supra) had been pronounced after the judgment of the Supreme Court in **Badal's** case (supra). In other words, the view taken in **Rajinder Singh Katoch's** case (supra) is in the latest judgment where the subject in controversy has been discussed in some detail.

64. In other words, the judgments of the Courts have permitted and accepted the practice of preregistration inquiry, of course with a limited compass and with utmost caution. It is obvious that such limited inquiry is not specifically and/or by necessary implication prohibited under the provisions of Section 154 of the Code. It is expected of the officer in charge of the police station to examine whether the information received is disclosing a cognizable offence or not. In absence of such disclosure, he attains no jurisdiction to look into the matter or authority to investigate without leave of the Court if the offence is non cognizable. Even during this limited process of examining and conducting some kind of an inquiry to establish those ingredients, the officer concerned is to do nothing which is unjust or unfair. He essentially must examine the complaint/information as it comes to him.

.....

68. Even in the case of **Tapan Kumar** (supra), the Supreme Court culled out a very fine distinction stating that on the information given to the police officer, even if he suspects the commission of a cognizable offence or not, he must be convinced or satisfied that cognizable offence has been disclosed in the

information. If he has reasons to suspect on the basis of information received that a cognizable offence may have been committed, he is bound to record information and conduct an investigation. The emphasis is that the police officer has reasons to suspect commission of a cognizable offence. Of course, it is not the requirement of law that a police officer has to verify the truthfulness of the allegations preregistration, if taken on its face value, the information discloses a cognizable offence. In the case of **Lallan Chaudhary** (supra) also the Supreme Court held that reliability, genuineness and credibility of information are not the conditions precedent for registering a case under Section 154 of the Code.

69. There is hardly any judgment, which in express terms has taken the view that any kind of inquiry by the officer in charge of a Police Station is forbidden and prohibited under the law. It is one thing to say that it is mandatory duty or obligation of the Police Officer to register the FIR when the information provided to him is in relation to the commission of a cognizable offence but still another thing to say that after noting the information brought to his notice and before recording the substance thereof in the notified book (i.e. FIR Register) the law prohibits in express terms to make any inquiry in relation to the commission of that offence. The paramount condition attached to exercise of duty under Section 154 is that it should be performed bona fidely, fairly and without any undue delay.

70. The provisions of Section 154 of the Code impose an absolute obligation and duty upon the officer in charge of a police station to record information in the prescribed book of a cognizable offence (FIR register), but it is difficult for the Court to construe in absence of any express language that this provision forbids any kind even preliminary inquiry prior to registration of the FIR. We are unable to notice anything in the language of the section which by necessary implication debars in law such an inquiry. The Supreme Court in the case of **Bhagwant Kishore Joshi** (supra), a judgment which was delivered by a three Judge Bench, took the view that such an inquiry, of course for a very limited purpose and bona fide object, was not debarred under the

provisions of Section 154. Again, a three Judge Bench of the Supreme Court in the case of **Jacob Mathew** (supra), in unambiguous terms declared that preregistration inquiry would be permissible, but again for a class of persons i.e. Medical Practitioners. The investigating agency was cautioned in that case not to cause harassment to the Doctors in furtherance to a private complaint unless some prima facie evidence of rash and negligent act on the part of the accused Doctor was brought on record before the investigating officer. The principle enunciated in both these judgments, particularly in the case of **Bhagwant Kishore Joshi** (supra), is not subject matter of a detailed discussion by any of the subsequent Benches of the Supreme Court, except in the case of **Rajinder Singh Katoch** (supra), a judgment pronounced by a two Judge Bench of the Supreme Court after declaration of law in **Prakash Singh Badal's** case (supra) which also specifically noticed **Ramesh Kumari's** case (supra) and declared the principle that some kind of preliminary inquiry would be permissible prior to registration of the case. It needs to be noticed at the cost of repetition that judgments of the Supreme Court delivered by two Judges Bench have taken the view that there is no option with the police officer in charge of a police station but to register the FIR. The view is obviously relateable to the facts of those cases and in all those cases the conduct of the investigating agency had been deprecated and the Court took the view that reliability, genuineness and credibility of information are not the condition precedent for registration of a case under Section 154 and provisions of Section 154 are mandatory and officer in charge of police station is duty bound to register the case on receiving the information disclosing a cognizable offence. (See **Lallan Chaudhary** (supra) and **Ramesh Kumari** (supra)). However, in the case of **Mohindro** (supra), the Court observed on facts of that case that for no reason whatsoever the police had not registered the case and proceeded to pass the appropriate direction.

71. Thus it is evident that information must relate to `commission of a cognizable offence'. If the information given exfacie is so absurd or lacks essential ingredients of the allegedly committed cognizable offence, the investigating officer after making a due

entry in the prescribed books like daily diary, general diary or station diary or daily roznamachar, could step into the limited preliminary inquiry and then within a very short time and most expeditiously register the FIR unless the information does not disclose commission of a cognizable offence. Such exercise has to be bona fide, fair and must stand to the test of judicious exercise of power. Such cases would be by and large very few and rare cases where the police officer has to conduct preliminary inquiry preregistration of a FIR for a very limited period. Taking an example of such rare and exceptional cases, an informant by a telephone makes a call that there has been a blast at a railway station causing injury and death of number of persons and names the persons who has alleged to have effected the bomb blast. A police officer is obliged to make an entry in the daily diary register and at least would verify the same by ringing up the nearest police station or the railway authority in charge of the railway station where such an incident is informed to have been occurred. If no incident has occurred at the railway station, the question of registering the FIR would hardly arise and he could proceed in accordance with law on the basis of the entry made in the daily diary register/station diary/roznamachar. In the case of **Tapan Kumar Singh** (supra), the Supreme Court has even held that an entry in the daily diary/station diary or roznamachar itself can be a FIR.

72. Another aspect which the Court may have to examine is avoiding absurd results while ensuring compliance to the provisions of Section 154 of the Code. In a given case, where a person of public importance or a public figure is stated to be abroad by print and press media, thus information is given to everybody and the informant goes to the police station and lodges a report that he was assaulted or legally confined by that person (public figure) in Mumbai. Such information may not demand instant registration of the FIR and after making due entry in the daily dairy register, the police officer may be within his rights at least to verify that fact reflected in the media before actually registering a first information report in the prescribed book which ultimately then must lead to entire investigation process, collection of evidence and presenting a report in terms of Section 173(2) of

the Code. Still further, there might be cases where information given by the informant may not indicate or suspect commission of a cognizable offence but some verification or some further information may bring those cases within the ambit of commission of a cognizable offence thus instantaneously registerable in accordance with the provisions of Section 154 of the Code. We have already said that such cases would be exceptional and rare. As a normal course the police officer in charge of a police station is bound to register the information in relation to commission of a cognizable offence and this is an absolute duty on the part of such officer.

73. One of the arguments is that whosoever furnishes false or incorrect information to the police or a public servant commits an offence punishable under Sections 177 and 180 of the Indian Penal Code. Thus no matter how absurd incorrect or false information might have been furnished to the police officer, the FIR should be registered forthwith. We are unable to find much merit in this submission for the reason that this will only generate more and more litigation which is not the object of any law much less a procedural law. The scheme of the Code does give element of very limited discretion to the investigating/police officer and a concept of preliminary inquiry within the very limited scope afore-indicated is not forbidden in law. Thus, it will achieve a greater object if in those exceptional and rare cases the investigating officer makes an entry in the daily diary register/ station diary or roznamachar and upon a very limited criminal inquiry registers the FIR within two days or even otherwise proceeds in accordance with the provisions of the Code.

74. The scheme of the Criminal Procedure Code examined in conjunction with the provisions of the Indian Penal Code also provides an inbuilt safeguard against non registration or undue delay in registering the FIR. Firstly, in terms of Section 154(3) of the Code, an informant or complainant has a right to approach the higher authorities in the case of non registration praying not only for registration but even investigation by a higher authority. In addition to this, a public servant who disobeys law or direction of law is liable to be proceeded against and punished in terms of

Sections 166 and 217 of the Indian Penal Code. This approach will draw equibalance between the triangular protection projected under the scheme of the Code i.e. protection to victim/complainant, accused and the society at large. On the one hand, non registration of a FIR instantaneously results in harassment to the victim, avoidance of obedience of law as well and adversely affects the society as it ultimately results in deterioration in law and order. On the other hand, registration of a cognizable offence can lead to instant arrest of the suspect and various other consequences which are contemplated in law. Some times they can even become irreversible and jeopardize the interest and protection of the suspect and also result in social resentment which adversely affects the administration of criminal justice."

Here it would also be useful to refer to the recent ruling of the Apex Court in the case of **Ashok Kumar Todi vs. Kishwar Jahan & Ors.** 2011(3) SCALE 94 where the Court while dealing with the unnatural death of a person re emphasized the steps involved in investigation and accentuated the importance of registration of FIR in the following paras:

"23. Section 2(h) of the Code defines investigation which reads as under:

(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf Under the scheme of the Code, investigation commences with lodgment of information relating to the commission of an offence. If it is a cognizable offence, the officer-in-charge of the police station, to whom the information is supplied orally has a statutory duty to reduce it to writing and get the signature of the informant. He shall enter the substance of the information, whether given in writing or reduced to writing as aforesaid, in a book prescribed by the State in that behalf. The officer-in-charge has no escape from doing so if the offence mentioned therein is a cognizable offence and whether or not such offence was committed within the limits of that police station. But when the offence is non-cognizable, the officer-in-charge of the police station has no obligation to record it if the offence was not committed within the limits of his police station.

Investigation thereafter would commence and the investigating officer has to go step by step. The Code contemplates the following steps to be carried out during such investigation:

(1) Proceeding to the spot; (2) ascertainment of the facts and circumstances of the case; (3) discovery and arrest of the suspected offender; (4) collection of evidence relating to the commission of the offence which may consist of -(a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial; and (5) formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and, if so, to take necessary steps for the same by the filing of a charge-sheet under Section 173. [Vide **H.N. Rishbud and Anr. v. State of Delhi: AIR 1955 SC 196, State of M.P. v. Mubarak Ali : AIR 1959 SC 707** and **Navinchandra N. Majithia v. State of Meghalaya and Ors. : (2000) 8 SCC 323]**

24. When the final report is laid after conclusion of the investigation, the Court has the power to consider the same and issue notice to the complainant to be heard in case the conclusions in the final report are not in concurrence with the allegations made by them. Though the investigation was conducted by the CBI, the provisions under Chapter XII of the Code would apply to such investigation. The police referred to in the Chapter, for the purpose of investigation, would apply to the officer/officers of the Delhi Police Establishment Act. On completion of the investigation, the report has to be filed by the CBI in the manner provided in Section 173(2) of the Code. [Vide Hemant Dhasmana v. Central Bureau of Investigation and Anr. : (2001) 7 SCC 536]

25. In view of the same, the Division Bench failed to appreciate the order dated 16.10.2007 passed by the learned single Judge directing the CBI to investigate into cause of unnatural death of Rizwanur Rehman. We have already noted that as per Section 2(h) of the Code investigation includes all the proceedings under this Code for collection of evidence conducted by a police officer. The direction to conduct investigation requires registration of an

FIR preceding investigation and, therefore had to be treated as casting an obligation on the CBI to first register an FIR and thereafter proceed to find out the cause of death, whether suicidal or homicidal. In order to find out whether the death of Rizwanur Rahman was suicidal or homicidal, investigation could have been done only after registration of an FIR. Therefore, CBI was justified in recording FIR on 19.10.2007 in terms of the order dated 16.10.2007 passed by the learned Single Judge."

13. The Apex Court in **Lalita Kumari Vs. Government of U.P.& Ors.**(2008) 7 SCC 164 expressed its utmost displeasure on the failure of the police authorities of the country in not registering FIR's unless directions are given by the Chief Judicial Magistrate or the High Courts or the Supreme Court. The case before the Apex Court concerned the kidnapping of a minor child for which the police did not register an FIR till the matter was reported to the senior officials of the police and then sat over the investigation. Recommending initiation of contempt proceedings against the delinquent officials and to punish them for violation of the orders if no sufficient cause is shown the Hon'ble Apex Court held that:

"6. In view of the above, we feel that it is high time to give directions to the Governments of all the States and Union Territories besides their Director Generals of Police/Commissioners of Police as the case may be to the effect that if steps are not taken for registration of FIRs immediately and copies thereof are not made over to the complainants, they may move the Magistrates concerned by filing complaint petitions to give direction to the police to register case immediately upon receipt/production of copy of the orders and make over copy of the FIRs to the complainants, within twenty-four hours of receipt/production of copy of such orders. It may further give direction to take immediate steps for apprehending the accused persons and recovery of kidnapped/abducted persons and properties which were the subject-matter of theft or dacoity. In case FIRs are not registered within the aforementioned time, and/or aforementioned steps are not taken by the police, the Magistrate concerned would be justified in initiating contempt proceeding against such delinquent officers and punish them for violation of its orders if no sufficient cause is shown and awarding stringent punishment

like sentence of imprisonment against them inasmuch as the disciplinary authority would be quite justified in initiating departmental proceeding and suspending them in contemplation of the same."

After the decision the Hon'ble Apex Court by a subsequent order reported as **Lalita Kumari vs. Government of Uttar Pradesh (2008)14 SCC 337** has referred the issue to a Larger Bench to ascertain as to whether upon receipt of information by the officer in charge of the police station disclosing cognizable offence, it is imperative for him/her to register a case under Section 154 of Cr.P.C., 1973 or there lies a discretion with him/her to make some sort of preliminary inquiry before registering the FIR. However, while referring the same to the Larger Bench, the Hon'ble Apex Court did not grant any stay to the earlier directions given by the Apex Court in the said case, the Apex observed as under:

"5. In view of the conflicting decisions of this Court, referred to above, we feel that it is necessary to refer the matter to a larger Bench.

6. Let this petition be placed before the Hon'ble Chief Justice of India for passing appropriate orders to list the case before a larger Bench.

7. In view of the interim order passed by this Court, we feel that it would be expedient to hear this petition at an early date." However, as of date, the matter is still pending before a three Judge Bench.

14. From an analysis of the aforesaid judgments the clear legal position which emerges is that the officer incharge of a police station has no option or discretion not to register an FIR once the information relating to the commission of cognizable offence is laid before him. The intendment of the legislature in using the expression "shall" in Section 154 of the Code of Criminal Procedure cannot be whittled down so as to read the same as "may" and such an interpretation if taken would defeat the very legislative intent behind the spirit of the said Section. Section 154 thus clearly postulates that once any information even if given orally to an officer incharge of the police station relates to the commission of a cognizable offence, then the said officer has no choice or alternative left with him but to register the FIR. The word "relating"

in the said Section also denotes that the said expression is a of very wide connotation and had the intention of the Legislature been different then in place of the word "relating" the word "disclosing" could have been used in the said Section. This Court has not come across any judgment where it has been held that even if an information clearly discloses commission of a cognizable offence, then also the police can refuse to register an FIR. The Courts have rather gone to the extent of saying that even if the police officer has reason to suspect, on the basis of the information received that a cognizable offence may have been committed, then he is bound to record the information and conduct an investigation. It is thus not the prerogative, free will or privilege of the police officer to whimsically decide that in what cases to register an FIR or not. The provision of Section 154 of the Code is thus mandatory and the concerned police officer is duty bound to register the case on the basis of information disclosing commission of a cognizable offence and police officer cannot refuse to register the FIR simply because he does not like the face of the complainant or the complainant approaching him is a commoner or he is not in a good mood to register the same. There cannot be seen to be any temperamental twists in the approach of the police officer not to register an FIR once information relating to the commission of cognizable office is laid before him. However, the question of pre-registration inquiry or preliminary inquiry no doubt can arise in certain cases such as where the concerned I.O. based on the information laid before him seriously doubts the commission of any cognizable offence on its bare perusal or where the complaint lodged is a vague, uncertain or unspecific or ex facie absurd or the complaint appears to be false on the very face of it or the same appears to have been lodged with some apparent ulterior motives; but otherwise the concerned police officer is not supposed to transgress the mandate of law as envisaged under Section 154(1) Cr.P.C.

15. Reliance was placed by the respondent State on the judgment of the Apex Court in the case of **Rajinder Singh Katoch Vs. Chandigarh Administration & Ors**(2007)10 SCC 69, where the Honble Apex Court clearly took a view that the officer in charge of the police station is legally bound to register a First Information Report in terms of Section 154 Cr.P.C. if the allegations made in the complaint give rise to commission of a cognizable offence. The Apex Court, however, held that in a given case the competent officer can make a preliminary enquiry in order to ascertain whether the first information sought to be lodged has any

substance or not. It cannot be lost sight of the fact that in this case the dispute was between two brothers and both of them were claiming possession in respect of the property which was in their joint possession and hence an observation in the peculiar facts of the case. Reliance was also placed on **Binay Kumar Singh Vs. State of Bihar,** (1997)1 SCC 283 where the Hon'ble Apex Court took a view that in a case of nebulous information which is hardly sufficient for discerning the commission of any cognizable offence it is open to the officer in charge to collect some more information by holding preliminary enquiry. Similarly, the case of **Tapinder Singh Vs. State of Punjab & Anr.** 1970(2) SCC 113 on which reliance was placed relates to a cryptic and anonymous telephone message which did not in any terms specify a cognizable offence. In the said case the Apex Court took a view that such a message cannot be treated as First Information Report merely because this information was first in time. Another judgment cited by the State was **Satish Kumar Goel Vs. State & Ors** 84(2000) DLT 199, in which case the Division Bench of this Court took a view that where the information recorded in the complaint is uncertain, indistinct and not clearly expressed which creates a doubt as to whether the information laid before the incharge of the police station discloses commission of a cognizable offence therefrom and therefore some inquiry should proceed before the registration of an FIR. In **Guruduth Prabhu vs. Ms. Krishna,** 1999 CRI.L.J 3909, a judgment of the Karnataka High Court relied upon by the respondent would not be applicable to the facts of the present case as there the court took a view that the Magistrate cannot order an investigation under section 156(3) without applying his mind, where the allegations in the compliant did not disclose any cognizable offence.

16. As would be thus seen that in all the aforesaid judgments, which were relied upon by the State, where the court felt that a preliminary inquiry or pre-registration inquiry can take place were those cases where the information was cryptic, without any substance, uncertain or vague which could create a doubt in the mind of the I.O. that the information laid before him does not clearly disclose commission of a cognizable offence and there is a need to conduct a further inquiry before registration of an FIR. Mostly in cases where such preliminary inquiry seems to be required are those which are akin to civil disputes relating to movable or immoveable properties, benami transactions or the cases where economic offences are involved or the same relate to fraud and

cheating or the cases which require close scrutiny of some documentary evidence etc and hence would not be of any help to the case set up by of respondent State. But it is pertinent to note that in all the above cases the court nowhere held that the I.O. should not register an FIR even in a case where the information provided by the complainant at least prima facie discloses commission of a cognizable offence, which is in fact the position in the case at hand. It is a settled legal position that the reliability, genuineness and creditability of the information is not to be tested by the I.O. at the stage of lodging of a complaint. The concerned police officer cannot embark upon an inquiry so as to ascertain whether the information laid before him is truthful, reliable, genuine or credible. **Any officer who refuses to register an FIR even in a case where the information laid before him prima facie discloses commission of a cognizable offence undoubtedly violates the statutory duty cast upon him and deserves suitable punishment as held by the Apex Court in Lalita Kumari's** case (Supra).

17. Turning to the facts of the present case and applying the aforesaid principles of law enunciated by the Hon'ble Apex Court and various High Courts, this court is of the considered view that there was no perceptible or genuine reason for the concerned I.O. to hold a preliminary inquiry into the alleged offence of murder before registering an FIR in the present case. A brief recapitulation of facts is that a young boy of 22 years with no history of previous bodily ailment was found dead on the morning of 6.8.2007 under mysterious circumstances; his body was found lying in a water logged park with his face downwards; the sister of the boy and his mother had reached the spot and they themselves had seen the dead body lying in the park. It is an admitted case of the State that the I.O. had not reached the spot and the body was removed by the PCR officials with the help of one Constable Beg Raj; the said Constable had taken the photographs of the deceased with the help of his mobile phone camera, but no proper steps were taken by the police to examine the site or the surroundings of the site before lifting the body from the spot. The State also admitted that from 7.8.2007 to 29.5.2008 the petitioner made several complaints to the police and the higher authorities; even copy of one such complaints dated 9.8.2007, which has been placed on record by the State, clearly states that the family had witnessed injury marks on the head and back of the deceased. In the complaint it was stated that they had told the police on the spot

itself that the wrist watch and mobile phone 9818546606 of the deceased which he had when he was leaving home were missing from the spot. The complainant further attributed the hand of one Mr. Michael behind the said murder who wanted to befriend a girl who was a friend of the deceased. The complainant also stated that the said Michael had physical scuffle with the deceased and he had also threatened to kill him.

18. In the face of the aforesaid clear and explicit allegations leveled by the complainant what more was required to register an FIR by the concerned police officials is beyond the comprehension and understanding of this court. The dead body lying in mysterious circumstances is there; the complaint with precise facts is there; the complainant has even named a person who could be the culprit ; and in the background of these apparent facts if the police takes a stand that there was a need to conduct a preliminary enquiry then nothing else can be inferred by this court but to believe that the police right from the inception had the intention to scuttle the investigation instead of apprehending the culprit of the crime after conducting a proper investigation. I find the justification given by the Delhi Police through the affidavits filed by its senior officers and their written submissions that the allegations as were available did not disclose the commission of a cognizable offence for the registration of an FIR is opposed to even commonsensical logic, what to talk about being opposed to the law. The Delhi Police has utterly failed in carrying out a proper investigation as it even failed to follow the proper norms of investigation when it visited the spot where the dead body of the victim was lying. The police during the investigation did not find that the deceased was carrying any item or article in his pocket or any money as it would be inconceivable that the deceased would not have been carrying anything with him or had empty pockets. The polygraph test of some other suspects was conducted by the police between 24th March to 30th March, 2009 i.e. almost after a period of 1 ½ years. The mobile phone of the deceased could be recovered by the police on 09.08.2008; again after a gap of about one year. The presence of alcohol of 150.1 mg in 100 ml blood of the deceased as per the postmortem report could not have proved fatal to result in complete disorientation of the brain of the deceased due to which he could lose his senses that he himself fell down resulting in his death. As per the status report filed by the Delhi Police, the deceased had first taken beer with Neelam Sharma and thereafter at

least 6-7 persons had shared whisky from one bottle. This again would show that the deceased had not consumed so much of alcohol to render him totally disoriented and in any case there appears to be a wide gap between the time when he had consumed the liquor and when he was left at the spot of death by Neelam Sharma. There are so many questions which remain unanswered and without commenting upon them, this court is of the opinion that it is quite apparent that the concerned officials of the Delhi Police have conducted themselves in a most irresponsible manner and in fact have clearly acted in flagrant and blatant violation of the law of the land envisaged under Section 154 Cr.P.C. and various authoritative legal pronouncements of the Apex Court and other High Courts, some of which have been referred above. In the case of **Laxminarayan Gupta vs. Commissioner of Police** 130(2006) DLT 490 , this court in the circumstances where an FIR was not being registered by the police brought to record the practicality of the functioning of the police forces in the right earnest , and the relevant excerpt of the same is reproduced as under :

> "Bearing in mind the legal position which emerges from the above decisions this court must hold that a statutory duty is cast upon the police to register and investigate the case on receipt of an information relating to the commission of a cognizable offence and it cannot be left to the sweet will or the so called discretion of the police officer to register or not to register a case or to undertake a preliminary inquiry even before registration of the case. The Police Officer cannot embark upon an enquiry in regard to the correctness or veracity of the facts/allegations disclosed from the information. It would be hazardous to give such sweeping power or discretion to the police in the matter of registration of FIR which would go contra to the very scheme of the Code of Criminal Procedure and Criminal Justice delivery system in the country. Such a situation may play havoc more particularly so when the matter is left in the hands of unscrupulous police officer(s) who are not acting bona fide or who fail to approach the matter with the desired objectivity and sensitivity as may be required in the matter.
>
> 14. This court can take judicial notice of the factual scenario as to how the provision of Section 154 is being worked out by the

> police officers in practice at the ground. Filing of a large number of petitions under Article 226 of the Constitution complaining inaction on the part of the police authorities to register the crime despite information given/complaint made to the concerned police authorities is a clear indication that the concerned police officers are generally loath to register a crime more particularly so in disclosing certain trivial cognizable offences and economic offences. The reasons for doing so are not very difficult to understand. One reason may be to keep the crime graph low in the Metropolis of Delhi and the other could be to save itself from the botheration of investigation in a large number of cases. None of these reasons can be said to afford justifiable ground for not registering the crime. The very object of having a strong and large police force in any State is to register, detect and investigate the crimes and prosecute the violators of law besides of course maintaining the law and order etc.. Law and order can only be maintained if the commission of crime is prevented and when the crime is committed, the same is thoroughly and properly investigated and criminals brought to the book. For these reasons also it is incumbent upon the police officer to make strict compliance of the provisions of Section 154 Cr.P.C. rather than to embark upon a kind of preliminary enquiry in order to ascertain the correctness and veracity of the allegations made in the complaint."

Delhi is no doubt progressing but so is its crime rate making it the crime capital of the country. The police cannot contain the crime rate by not registering the crimes being reported to them. The crime graph of the city can be kept low only if the police act fast in apprehending criminals and not by manipulating the data or by avoiding registration of cases wherever required. The number game is thus no viable justification for the loutish behaviour of the police which is resulting in the complainants giving up on the police. It cannot be forgotten that the police force has a predominant duty to follow the mandate of law, but it is distressing to note the reality that despite the stringent directions from the portals of law, there is a mammoth difference in the theory and praxis in the functioning of the Police which has undoubtedly bedeviled the common man.

19. The police in the present case has consumed a miserably long time in the inquest proceedings. The purpose of holding the inquest as per section 174 C.r.P.C is very limited; it is to ascertain whether the person has committed suicide or has been killed by an animal or by accident or murdered or has died by some other reason raising reasonable suspicion that some other person has committed the offence. The inquest proceedings under the scheme of Code of Criminal Procedure cannot take place of an investigation. This court in the case of **Mahabir Singh Vs. State** 1979 Cri LJ 1159 has clearly held that if the inquest report is unreasonably delayed then begins the scope for questioning the genuineness of the FIR both qua its contents and the time of its recording. The Delhi Police thus cannot take refuge of the said inquest report to say that based on the observations of the inquest, postmortem and the initial findings, the Investigating Officer did not think it appropriate to register a case of murder. The case in hand clearly depicts the insensitivity of the Delhi Police and its pachydermatous indifference to the suffering of a common man. This court is constrained to observe that had this case been not of a an ordinary citizen then the state of affairs would certainly have been different, as for the rich and mighty the police makes room and invariably registers an instant FIR even where the case may not clearly disclose the commission of any cognizable offence. The Police have bedaubed itself with the dubious distinction of being partisans of the power yielding somebodies and has on the way belittled the value of human life. The trust quotient of the police therefore definitely has come to naught as the ordinary citizen is made to feel like a worthless entity, a part of a faceless citizenry whenever they approach their so called protectors.

20. Another unfortunate wounding fact is that even the concerned Magistrates also showed their soulless approach in not taking prompt steps to direct the police to register an FIR, once an application was moved by the petitioner under Section 156(3) Cr.P.C. and kept on calling for one status report after the other. The Apex Court has categorically held that the Magistrate while ordering an investigation under section 156(3) should order the registration of FIR to set the investigation by the police in motion (**Madhu Bala vs. Suresh Kumar & Ors** 1997(8) SCC 476.). It is also has also been held that even if the Magistrate orders investigation under section 156(3) for investigation and does not in so many words order the registration of an FIR, it is the duty of the police

officer in charge to register an FIR, after all it sets in motion the investigative machinery (**Mohammed Yousuf vs. Afaq Jahan** 2006(1) SCC 627). However, this would not culminate to mean that the Magistrate would not make any effective order once an application under section 156(3) is filed before him. He has to either direct the police to start investigation or proceed to examine the complainant on oath. There is not contemplated in the Code any middle path to shirk from the duty; he has to set the ball rolling for the case to proceed and cannot leave the complainant high and dry in a case where there is sufficient material at least to direct the police to register an FIR. Hence, in a case like this where prima facie material was laid by the complainant disclosing commission of a cognizable offence, that too an offence of such a heinous nature which does not involve probing any document or some kind of rival claims of the parties, the Magistrates are equally expected to act with all promptitude to pass the necessary directions under Section 156(3) Cr.P.C. instead of granting long adjournments in the matter. One cannot lose sight of the fact that right to speedy investigation and right to speedy trial are not only mandated by provisions of Cr.P.C. but are the fundamental rights guaranteed to every person under Article 21 of the Constitution of India, as held by the Hon'ble Supreme Court in the case of **Raghubir Singh Vs. State of Bihar** AIR 1987 SC 149. It would also be pertinent to refer, while on the issue, the judgment of the Full Bench of the Patna High Court in the case of **Madheshwardhari Singh & Anr. Vs. State of Bihar** AIR 1986 Pat 324 which is to the same effect and where it was held that the right to speedy trial is applicable not only to actual proceedings in court but includes within its sweep the preceding police investigation in a criminal prosecution as well. It was also held that a speedy investigation and trial are equally mandated both by the letter and spirit of the Code of Criminal Procedure. The right to a speedy trial is the polestar of the justice dispensation system of our country and we cannot let any malfunctioning of any aegis of the forces be an impediment for securing it.

21. It is a misconception that the registration of an FIR must necessarily lead to an arrest of the suspect of the crime as it entirely depends on each case as there may be cases where the arrest of the accused maybe essential and others where the police may require more incriminating evidence for apprehending the accused. It is thus a settled law that mere registration of an FIR in every case may not result into

arrest of a person accused of the offence. It would be useful to refer here to the recent pronouncement of the Apex Court in **Siddharam Satlingappa Mhetre vs. Maharashtra** (2011) 1 SCC 694 where while laying down parameters for anticipatory bail the court regarding arrest held that:

> "129. In case the arrest is imperative, according to the facts of the case, in that event, the arresting officer must clearly record the reasons for the arrest of the accused before the arrest in the case diary, but in exceptional cases where it becomes imperative to arrest the accused immediately, the reasons be recorded in the case diary immediately after the arrest is made without loss of any time so that the court has an opportunity to properly consider the case for grant or refusal of bail in the light of reasons recorded by the arresting officer."

Hence, in the given facts of the case, the police can always postpone the arrest of the person accused unless it is prima facie satisfied that the accused named in the complaint or the accused/suspect of a crime under the given circumstances cannot at all be involved in the commission of the crime or in a case where prompt action to arrest if not taken will result in jeopardizing or sabotaging the course of investigation. But certainly the police cannot postpone the registration of an FIR where the information laid by the complainant before it clearly discloses commission of a cognizable offence. The police is expected to take fair, impartial and sincere steps whenever any crime is committed as the prime function of the police is to protect the lives of the people and also to maintain the law and order situation to ensure a crime-free society. It would be useful here to refer to the observations of the Hon'ble High Court of Punjab & Haryana in the case of **Amrik Singh vs. The State of Punjab** 1983 CRI.L.J 1405 where it was held as under:

> "17. The duty of the police is to prevent and detect crime and to bring the accused to justice. Lord Denning, Master of the Rolls in his book titled "The Due Process of Law", 1980 Edn., in Chap. I of Part Three, has observed about the role of the police as follows: "In safeguarding our freedoms, the police play a vital role. Society for its defence needs a well-led, well-trained and well-disciplined force of police whom it can trust; and enough

> of them to be able to prevent crime before it happens, or if it does happen, to detect it and bring the accused to justice. The police of course, must act properly. They must obey the rules of right conduct. They must not extort confessions by threats or promises. They must not search a main's house without authority. They must not use more force than the occasion warrants,"
>
> The investigation in the present case had been tainted and aimed at to save the appellant and not to bring him to justice. Under the law the investigator is enjoined upon to unearth the crime and as soon as he receives the information about the crime, he is to proceed to the spot, ascertain the facts and circumstances of the case and arrest the suspected offender, collect the evidence relating to the commission of the offence, examine various persons including the accused, reduce their statements into writing, to search the places and take into possession the things considered necessary for the investigation and to be produced at the trial and then to form his opinion as to whether on the material collected any accused is to be placed before a Magistrate for commitment and to file a charge-sheet under. Section 173, Cri. P.C. In the nature of things, an investigator has to have and is clothed with many powers by the Jaw for the purpose of conducting investigation and where a murder has taken place, it is the duty of the investigator to send the special report to the illaqa Magistrate at once."

Thus, the conduct of the concerned officials of the Delhi Police in the present case is highly deplorable and an astonishing spectacle was the action of the senior officers upto the rank of the Commissioner of Police who came out in defence of the shoddy inquiry instead of coming forward to rectify their reprehensive conduct of not registering an FIR in such a case involving murder of a young boy of 22 years. It is a harsh reality that despite numerous police reforms yet the common man shirks and hesitates to freely walk into the police station to lodge a complaint as he is still afraid and fearful that he will not be treated well and perhaps would be subjected to harassment for reporting any crime, which otherwise is his legitimate right. It is the notion that the police procedures are veiled, slow paced and uncertain in outcome which has further plummeted the public trust in the police. The Delhi police motto states **"Citizens**

First" and a part of its Mission statement reads as:

"The objective of Delhi Police is to Uphold the law fairly and firmly; To prevent crime; to pursue and bring to justice Those who break the law; To keep the peace in partnership with the community; To protect, help and reassure the people;……"

But these promising words seem to have no verisimilitude. They seem so hollow especially in the present case, where they have whittled down to become nothing but a teasing mirage.

22. In the light of the above discussion, where the petitioner has borne the harrowing brunt of a tardy investigation, this court is of the considered view that this is a fit and deserving case where the investigation needs to be transferred to the CBI. No doubt the CBI, which is considered to be a premier investigating agency of this country is already burdened with many important investigations involving huge scams, but keeping in view the fact that the death of a young boy of 22 years and the slack investigation conducted by the Delhi Police and also the shamble justifications given by the senior officers of Delhi Police in not registering an FIR, the CBI is the only other agency which can be looked upto to carry on the investigation in this case. The CBI is therefore directed to complete the investigation as early as possible but not later than a period of three months from the date of this order.

23. Since in the present case the petitioner and the entire family of the deceased are the hapless victims who not only had to pass through the galling and traumatic period due to the sudden death of their beloved but they were further forced to file one case after the other just for seeking the registration of a simple FIR into the alleged murder case, therefore, the cost of Rs.2 lac is imposed upon the Delhi Police for their illegal, contemptuous and defiant approach in not following the law of the land. The said amount shall be paid by the Delhi Police to the petitioner within a period of one month from the date of this order.

24. With the above directions, the present petition stands disposed of.

ILR (2011) IV DELHI 642
CRL. APPEAL

HARISH KUMAR **....APPELLANT**

VERSUS

CBI **.....RESPONDENTS**

(MUKTA GUPTA, J.)

CRL. APPEAL NO. : 740/2010 DATE OF DECISION: 19.05.2011

Prevention of Corruption Act, 1998—Sections 7 & 13—Appellant challenged judgment and order on sentence, convicting him for offences punishable under Section 7 and 13(2) read with Section 13 (1) (d) of Act—As per appellant, mere recovery of money is not sufficient to raise presumption and filing of complaint by CBI cannot be taken as substantive evidence of proof of allegation of demand of illegal gratification—CBI urged, initial demand at time of trap, acceptance, recovery and motive proved by prosecution; thus appeal devoid of any merits—Held: Where receipt of illegal gratification was proved, Court was under a legal obligation to presume that such gratification was accepted as reward for doing a public duty—Prosecution proved beyond reasonable doubt the charge under the Act.

Before proceeding further, we may point out that the expressions "may presume" and "shall presume" are defined in Section 4 of the Evidence Act. The presumptions falling under the former category are compendiously known as "factual presumptions" or "discretionary presumptions" and those falling under the latter as "legal presumptions" or "compulsory presumptions". When the expression "shall be presumed" is employed in Section 20(1) of the Act it must have the same import of compulsion. **(Para 14)**

Important Issue Involved: Where receipt of illegal gratification was proved, Court was under a legal obligation to presume that such gratification was accepted as reward for doing a public duty.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANTS : Mr. R.N. Mittal, Sr. Advocate with Mr. Manoj Kumar and Mr. Mohit Garg, Advocates.

FOR THE RESPONDENT : Dr. A.K. Gautam, Standing Counsel with Mr. Puneet Yadav, Advocate.

CASES REFERRED TO:

1. *Bhagwan Singh* vs. *CBI,* 2010 (4) LRC 73 DEL.
2. *Roshan Lal Saini* vs. *CBI* 2010 (4) LRC 138(DEL).
3. *Sunil Kumar Sharma* vs. *State (CBI),* 2007 139 DLT 407.
4. *M. Narsinga Rao* vs. *State of Andhra Pradesh,* 2001 (1) SCC 691.
5. *Suresh Budharmal Kalani* vs. *State of Maharashtra* 1998CriLJ4592.
6. *Inder Singh & Ors.* vs. *State* 61 (1996) DLT 566.
7. *Khujji alias Surendra Tiwari* vs. *State of Madhya Pradesh,* 1991 (3) SCC 627.
8. *Som Nath* vs. *State,* 1990 (42) DLT 38 (SN).
9. *Gopal Krishan* vs. *State,* 1980 (18) DLT 11 (2) SN.
10. *Banamali Samal* vs. *State of Orissa,* AIR 1979 1414.
11. *Sita Ram* vs. *State of Rajasthan,* AIR 1975 SC 1432.
12. *Jaswant Singh* vs. *State of Punjab,* AIR 1973 SC 707.
13. *Hawkins* vs. *Powells Tillery Steam Coal Company, Ltd.* 1911 (1) K.B. 988.

RESULT: Appeal dismissed.

MUKTA GUPTA, J.

1. In the present appeal, a challenge is laid to the judgment dated 31st May, 2010 convicting the Appellant for offences punishable under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1998(in short the P.C. Act) and the order on sentence dated 2nd June, 2010 whereby the Appellant has been awarded a sentence of Rigorous Imprisonment for a period of three years and a fine of Rs.10,000/- and in default of payment of fine, to further undergo simple imprisonment for three months on both the counts i.e. Section 7 and Section 13 (2) read with Section 13 (1) (d) of the P.C. Act.

2. The brief facts leading to the filing of the present appeal are that on a written complaint dated 4th February, 1993 Ex. PW5/A by PW5 Sh. Yogesh Kumar Agarwal to the CBI that the Appellant was demanding Rs. 500/- as illegal gratification for installing a PCO connection at the shop of the PW5 situated at 9/51, Durga Market, Khichripur, Delhi 110091, a case was registered and a trap was laid by PW 10 Inspector D.M. Sharma. The trap team consisted of other CBI officials besides PW10 and trap witnesses PW6 Sh. Surinder Kumar and PW7 Jaganath both Assistant Grade-II. PW 5 produced 10 G.C. notes of Rs. 50/- denomination, the numbers whereof were noted vide Ex. PW 5/B and the same were treated with the solution. After completing the pre-trap formalities wherein PW 7 was asked to act as shadow witness, the trap party along with PW 5 reached the office of SDO (P), Mayur Vihar. PW 5 along with PW 7 went to the office of the Appellant and at about 4:00 P.M. when PW5 went inside the office room of Harish Kumar where co-accused Gurudev was also present, Harish Kumar asked PW5 that whether he had brought the money. PW5 replied that he had brought the money but the same was little less than the demanded money. PW5 gave money to the Appellant who kept it in his pocket. On this PW 7 gave the pre-appointed signal and the other members of the CBI team rushed inside the office of the Appellant and caught hold of the Appellant and co-accused Gurdev Singh. On the trap officer challenging them, both the accused were perplexed PW 5 has stated that when PW 7 went outside to give the signal, he asked Appellant Harish Kumar to reduce the amount and on his request Rs. 100/- were returned. On the search being conducted Rs. 350/- were recovered from the Appellant and Rs. 50/- from the register and Rs. 100/- were recovered from PW 5. The right hand wash

and the left hand wash and the pocket wash of the Appellant gave pink colour solution and were kept in two separate clean bottles on which paper slips were pasted and given the marking of LHW and RHW. The bottles were wrapped in cloth wrapper and sealed. The left hand wash of co-accused Gurudev Singh turned pink. After completing all the formalities, the Appellant and co-accused Gurdev Singh were arrested. Thereafter departmental proceedings were initiated against the Appellant wherein statements of the witnesses were recorded and as the witnesses did not support the prosecution case on material aspects in the departmental inquiry, the CBI filed a closure report on 31st August, 2001. Vide order dated 4th January, 2003, the learned Special Judge did not accept the closure report and directed further investigation of the matter. After further investigation, the CBI filed a charge-sheet against the Appellant and co-accused Gurdev Singh on 2nd January, 2004. After recording of the prosecution witnesses, statements of the accused and defence witnesses, the learned trial Court acquitted the co-accused Gurudev Singh extending the benefit of doubt and convicted the Appellant as mentioned above resulting in filing of the present appeal.

3. Learned counsel for the Appellant contends that the prosecution witnesses have not supported the prosecution case on material aspects either in the disciplinary proceedings or in the trial and thus it is a case of no evidence against the Appellant. The learned Trial Court vide its order dated 21st November, 2007 in view of the statement of PW 5 made in his examination in chief, cross-examination and re-examination and further cross-examination being contradictory in nature directed holding of an enquiry against PW5 for giving false evidence before the court and issued notice under Section 340 Cr. P.C. to him. The enquiry proceeding under Section 340 Cr.P.C. was separated however till date no action has been taken thereon. Thus, the leaned trial court was also of the opinion that there are material contradictions in the testimony of PW 5 and thus no reliance should be placed on such a witness. The alleged motive has not been proved because as per the testimony of PW 5 and PW3 the connection had already been installed on 4th January, 1993 and thus, there was no reason for the Appellant to demand the bribe on the said date. The prosecution has also not proved the initial demand because though PW5 in his examination in chief has stated that on 3rd January, 1993 the appellant came to his shop and demanded Rs. 500/- as bribe, however, in his cross-examination he has stated that bribe was demanded

from his brother in law Arvind Kumar in whose name the PCO was being installed. Thus, the initial demand has also not been proved by the prosecution in the absence of examination of Arvind Kumar as a witness. Though, PW 5 in his examination in chief has stated that the Appellant asked if he had brought the money to which he said that he had brought and asked if his work would be done on which the Appellant stated that if the lineman is available it would be done that day otherwise it would be done definitely the next day. Thereafter, the Appellant asked him to pay the money. Further in his cross-examination, he has stated that when he went to the cabin of the Appellant and stated that he had brought the money demanded by him from Arvind Kumar, he refused to accept the money and told him that the PCO will be installed and he did not need the money and he would talk to Arvind Kumar at the shop. Even PW 7, the shadow witness in the departmental enquiry has stated that he did not exactly hear the amount of bribe and also the demand/acceptance of bribe nor seen the Appellant accepting of the bribe. The prosecution has also failed to prove the acceptance of bribe amount as PW 7 has stated that he did not hear or see anything between the two persons in the departmental enquiry and even in the Court he has stated that PW5 replied that he had brought the money but the same was little less, therefore the demand of bribe amount be reduced. Since this witness did not hear anything so he could not have even heard the reduction of the bribe amount. Even PW5 has failed to prove the acceptance of money as he has stated that the Appellant refused to accept the money and told him that PCO will be installed and he did not need the money and he told the Appellant to take Rs. 500/- by saying this he put the money in his pocket. The prosecution has also failed to prove the recovery of money from the Appellant as PW 5 in his cross examination has stated that after the CBI officers came in, he went out of the cabin of the Appellant and he did not know what happened thereafter. The story of PW5 of giving the bribe amount is unbelievable. PW 6 Sh. Surender Kumar has stated that he took search of the person of the Appellant and from his pant pocket 3-4 G.C. notes of Rs. 100 each were recovered and then subsequently it is stated that he was asked to take search of the Appellant and he recovered Rs. 350/- from the left side pant pocket and further he has stated that the CBI officer took out the money from the Appellant. Even though PW 7 had stated that CBI team officials recovered bribe amount from the Appellant but he did not remember exactly from where

the money was recovered. PW 5 in his cross examination has not supported the signing of the handing over memo, recovery memo and the production memo Ex. PW 5/B, PW5/C and PW 5/D respectively. He stated that he cannot read English and he signed those documents on the directions of the CBI officials. Reliance is placed on **Sita Ram vs. State of Rajasthan,** AIR 1975 SC 1432, **Jaswant Singh v. State of Punjab,** AIR 1973 SC 707; **Banamali Samal v. State of Orissa,** AIR 1979 1414, **Gopal Krishan vs. State,** 1980 (18) DLT 11 (2) SN, **Som Nath vs. State,** 1990 (42) DLT 38 (SN), **Sunil Kumar Sharma v. State** (CBI), 2007 139 DLT 407 to contend that mere recovery of money is not sufficient to raise presumption. Relying on **Bhagwan Singh vs. CBI,** 2010 (4) LRC 73 DEL it is contended that though recovery of money raises some doubt, but doubt itself cannot replace the proof. Relying on **Roshan Lal Saini vs. CBI** 2010 (4) LRC 138(DEL) it is contended that filing of complaint with CBI cannot be taken as substantive evidence of proof of allegations of demand of illegal gratification. It is thus prayed that the Appellant be acquitted of the charges framed.

4. Learned Standing Counsel for the CBI on the other hand contends that the prosecution has proved beyond reasonable doubt the initial demand at the time of trap, acceptance, recovery and motive. The initial demand is proved by the testimony of PW 5 which is corroborated by his complaint Ex. PW5/A and the testimony of PW6 and PW7 who have also corroborated the complaint Ex. PW5/A. The subsequent demand and the acceptance have been proved by the testimony of PW5 Complainant, PW7 the shadow witnesses and the members of the trap team. The recovery is proved by the hand wash and the pocket wash of the Appellant and once the recovery is proved under Section 20 of the P.C. Act, this court is duty bound to raise presumption and the onus thereafter shifts on the Appellant to discharge the same and prove his innocence and thus the appeal be dismissed being devoid of any merit.

5. I have heard learned counsel for the parties and perused the records. While appreciating the evidence, it is the bounden duty of the Court to separate the grain from the chaff. It is well-settled that even if the witnesses have turned hostile, the part testimony of such witnesses which inspires confidence can be read in evidence. The entire evidence of hostile witnesses does not get effaced. Undoubtedly, in the present case, PW 5 the complainant has taken a turn-around on some points in

his cross-examination, however in his re-examination he has again affirmed his statements made in the examination-in-chief. It would, thus, be relevant to reproduce the part of the cross-examination of the complainant:

> I have given my statement in this matter before the Enquiry Officer in the departmental Enquiry against accused Harish Kumar. Copy of my statement signed by me (containing five pages) is Ex.PW5/DA. Harish Kumar had met my brother-in-law (Sala), who also sits at my shop. The accused Harish Kumar had demanded bribe from my brother in law Arvind Kumar initially. When I went to give the bribe money, the ˇaccused Harish Kumar told me that my work will be done on that day and he would come to my shop to collect the money, I told Harish Kumar that since he had to take money, he should take there and then. It is correct that when I was giving him the money, he once told me that he will come to my shop but then he accepted the money.
>
> It is correct that when I went to the cabin of accused Harish Kumar and told him that I had brought the money demanded by him from Arvind Kumar, he refused to accept the money and told me that PCO will be installed and he did not need the money, he will talk to Arvind Kumar at the shop. It is incorrect to suggest that I again tried to push the money in his pocket, he resisted and in the meanwhile, CBI persons came and caught hold of accused Harish Kumar. I do not remember if I had stated so in my statement before the Enquiry Officer. Confronted with portion A to A in statement Ex.PW5/DA where it is so recorded.
>
> It is incorrect to suggest that infact the PCO instrument was installed and the line was also laid on the noon of the same day on which the CBI has raided Cabin of accused Harish Kumar i.e. 04.01.93. I did not state so before the Enquiry Officer. Confronted with portion B to B of statement Ex.PW5/DA where it is so recorded.
>
> I do not remember if I had stated before the Enquiry Officer that one Gurdev Singh was sitting there but nothing was paid to Gurdev Singh in my presence and no money was returned to me. Confronted with portion C to C in statement Ex.PW5/DA

where it is so recorded.

6. From a perusal of the above deposition of the complainant in the cross-examination the only thing which can be adduced is that the complainant was confronted with his statement made before the Enquiry Officer which he partly admitted and partly denied, however, in his re-examination he has reiterated his statement given in the examination-in-chief before the Court to be correct & has affirmed the prosecution version. Another opportunity was granted to cross-examine the witness & nothing material could be elucidated from him. In his cross-examination this witness has denied that he tried to push the money in the pocket of the Appellant. Hon'ble Supreme Court in **Khujji alias Surendra Tiwari v. State of Madhya Pradesh,** 1991 (3) SCC 627 has held that the evidence of a hostile witness cannot be treated as effaced or washed of the record altogether and the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof. This Court in **Inder Singh & Ors.Vs. State** 61 (1996) DLT 566 has held that where cross-examination of the witness was conducted after a gap of almost one year it might be possible that the witness was won over by the defense. In the case at hand after the departmental enquiry, a closure report was filed by the investigating agency which was not accepted by the court. Subsequently the charge-sheet was filed. Only because PW5 has not supported the prosecution case on some points in his cross-examination, his entire testimony cannot be thrown away. Rather this witness was re-examined and there he reaffirmed the prosecution version. Also what has been stated by PW 5 in his cross-examination is only that he does not remember partly as to what he stated before the enquiry officer. The same does not amount to supporting the case of the defence. The statement of the witness along with the shadow witness gives the entire sequence of events.

7. The contention of the learned counsel that there was no motive for the Appellant to have received the bribe amount since the PCO had already been installed by the time bribe amount was allegedly demanded and paid is meritless. The orders of installation of PCO were issued on the 10th September, 1992 and the connection was to be installed by the end of December. However, the same was not done. PW4 Sh. R.P. Gupta the then Junior Telecom Officer at Mayur Vihar Telephone Exchange, Phase-I has stated that on 4th January, 1993 before lunch he

had prepared the store requisition slip Ex.PW4/A. In the cross-examination he has stated that after preparing the requisition slip Ex. PW4/A he gave the same to lineman Yogender Singh and thereafter the concerned JTO had to issue jumper letter for opening of the new connection and it was possible that the same day new connection could open. PW9 Yogender Singh has stated that on 4th January, 1993 he was working as lineman and he had installed the telephone connection at the address given in Ex. 6/C-1 which is a copy of receipt of jumper letter book having name & address of Arvind Kumar R/o 9/51 Durga Market, Kichripur, Delhi in the evening hours, that is, after the raid was conducted at 4:00 P.M. The testimony of PW 4 and PW 9 corroborates the version of PW5 the Complainant who has in his cross-examination denied the suggestion that the connection had been installed and the line was also laid in the noon of the same day on which the CBI raid was conducted. Thus, when the money was accepted by the Appellant from PW5 the connection had not been installed and the procedural formalities thereof were being fulfilled.

8. As regards the previous version, PW5 in his testimony has stated that the Appellant had come to his shop at 9/51 at Durga Market, Khichripur on 3rd January, 1993 in the afternoon and the Appellant told him that his number had come and the telephone can be installed but he would have to pay him Rs. 500/- as bribe. This testimony of PW 5 is corroborated by the contemporaneous document. Ex.PW5/A the complaint given by PW5 to the SP, CBI wherein the factum of demand made by the Appellant on 3rd January, 1993 when he came to his shop is clearly mentioned. It is also mentioned that the money was to be paid on 4th January, 1993 at 4:00 P.M. Much emphasis has been laid by the learned counsel for the Appellant that in his cross-examination PW5 has stated that the demand on 3rd January, 1993 was made to the brother-in-law of the Petitioner and thus, no initial demand was made from the Petitioner. In cross-examination of PW5 it has been stated that the Appellant had demanded bribe from his brother-in-law Arvind Kumar initially. The cross-examination does not suggest that the demand made on 3rd January, 1993 which was alleged in the complaint and deposed in the Court was not made to PW5. Moreover, this statement in the cross-examination of PW5 is not corroborated by any contemporaneous or independent evidence nor does this statement indicate that no demand was made to the Petitioner. Thus, this Court is inclined to rely upon the statement of PW 5 in his examination-in-chief wherein he has stated that the initial demand of Rs.

5,00/- was made to him at his shop by the Appellant when he came on the 3rd January, 1993.

9. Coming to the demand made by the Appellant at the time of trap. PW 5 has stated that he along with the CBI team and independent witnesses reached near the office of the Appellant at about 4:00 P.M. Thereafter, he and PW7 Jaganath went to the office of the Appellant situated at the first floor of the MTNL building. After reaching the first floor of the office of Appellant PW5, the complainant entered into the room while PW7 Jagannath stood on the gate of the room which was partly opened. When he entered the room, he found Appellant sitting on the chair and co-accused Gurdev was also sitting across the table. On his saying 'namaste' to the Appellant he asked him why he was late. On which the Complainant replied that his cycle had developed some snag and therefore he was late. Thereafter, the Appellant asked if he had brought any money; to which he replied that he had brought the money and asked if his work would be done today. Thereafter, Appellant Harish Kumar stated if the lineman was available it will be done that day otherwise it will be definitely done the next day. Thereafter, the Appellant asked him to pay the money. On this he took the bribe money from his shirt pocket by his right hand and extended towards the Appellant who accepted/ received the money from his left hand and kept it in the left side of his pant after counting the same with both his hands. PW7 Jagannath who was standing at the gate of the room gave the signal to CBI team. On Jagannath giving the signal, the CBI team entered. Further, though, PW 5 in his cross-examination has stated that when he was giving the money, the Appellant once told him that he will come to his shop but he then accepted the money. PW5 in his cross-examination accepted the suggestion that when he went to the cabin of the Appellant and told him that he had brought the money demanded by him from Arvind Kumar, he refused to accept the money and told him that PCO will be installed and he did not need the money, he will talk to Arvind Kumar at the shop. Merely because this witness in his cross-examination has partly supported the case of the Appellant, the same would not wash off his testimony in the examination-in-chief. In his re-examination this witness has reiterated that the Appellant asked him if he had brought the money and he replied that he had brought the same and asked if his work would be done that day which was replied by the Appellant stating that if the lineman would be available it would be done that day otherwise it would be done the

next day. Thus, the prosecution has proved the demand made by the Appellant at the time of trap.

10. PW5 in his examination-in-chief has stated that on the Appellant asking him to pay the money he took the bribe amount from his shirt pocket by his right hand and extended towards the Appellant who accepted the same with his left hand and kept the same in his left side of his pant after counting the same with both his hands. During the said transaction witness PW7 Jagannath was standing on the gate of the room. While Jagannath was giving signal to CBI team he asked the Appellant to reduce the bribe amount on which the Appellant returned two notes of Rs. 50/- back to him and one note of Rs. 50/- out of the bribe amount was given by the accused to Gurdev Singh which he kept in a file cover on the table. In the meantime, CBI team arrived and two officers caught hold of the wrist of the Appellant. PW 7 informed D.M. Sharma what had transpired. PW 6 searched the pocket of the Appellant and `350/- were recovered from the left pocket of his pant. The numbers of the 7 G.C. Notes were compared. Inspector D.M. Sharma asked him about the three remaining notes on which PW 5 told him that the Appellant had returned those two notes on his request to reduce the amount and one note was given to the co-accused Gurdev Singh. The two hand washes and the pocket wash of the Appellant turned pink which were kept in separate bottles and sealed. No cross-examination of this witness on the point of hand wash has not been done except putting him a suggestion that he did not note what was written on the handing over memo Ex.PW5/B, recovery memo Ex.PW5/C and production memo Ex.PW5/D. In his re-examination this witness has reiterated his version in his examination-in-chief. This testimony of PW 5 is duly corroborated by PW 7. Also PW 7 has not been cross-examined on this aspect and thus his testimony has gone unchallenged on this count.

11. PW 7 Jagannath who was the shadow witness and accompanying the Complainant PW5 has stated that when PW5 reached inside the room of the Appellant, he took position at the door of office room. The Appellant and Gurdev Singh were present inside the office room. He asked him as to how he had come here on which PW 5 replied that he came on a bicycle. The Appellant asked whether he had brought the money to which PW5 replied that he had brought the money but the same was little less therefore demand of bribe money be reduced. PW

5 gave the money to the Appellant who accepted the same and kept it in his pocket. On his indication, the CBI officers entered the office and conducted the raid. This witness has not been cross-examined on this aspect except a suggestion put to him that he had appeared in the departmental enquiry against the Appellant which PW 7 affirmed and stated that Ex.PW7/(D1) was his statement before the departmental enquiry. This witness has not been confronted with the relevant portions of his previous statement Ex PW7/D1. Hence, the testimony of PW 7 has gone unchallenged. Thus, the prosecution has proved beyond reasonable doubt the demand and acceptance of bribe made by the Appellant at the time of the trap.

12. I also find no merit in the contention of the learned counsel for the Petitioner that since these witnesses, particularly PW5 had appeared in the departmental enquiry and not supported the prosecution case, his testimony cannot be relied upon. The statement before any enquiry officer is only like a previous statement. The witness has been duly confronted and even in his cross-examination, during confrontation he has denied certain portions of the statements made during the enquiry.

13. Learned counsel has laid emphasis on the fact elicited from PW 5 during his cross-examination that on the apprehension, the Appellant was beaten by the CBI officers. It may be noted that the Appellant has not been able to substantiate this aspect from any other evidence on record like an application to the learned trial court immediately on production for remand or from any MLC.

14. In the present case, since acceptance and demand has been proved in terms of Section 7 of the POC Act, this Court is duty bound to raise presumption for offence under Section 20 of the POC Act. In **M. Narsinga Rao vs. State of Andhra Pradesh,** 2001 (1) SCC 691 it was held that where receipt of illegal gratification was proved, the Court was under a legal obligation to presume that such gratification was accepted as reward for doing a public duty. In the report, it was held:

> "13. Before proceeding further, we may point out that the expressions "may presume" and "shall presume" are defined in Section 4 of the Evidence Act. The presumptions falling under the former category are compendiously known as "factual presumptions" or "discretionary presumptions" and those falling

under the latter as "legal presumptions" or "compulsory presumptions". When the expression "shall be presumed" is employed in Section 20(1) of the Act it must have the same import of compulsion.

14. When the sub-section deals with legal presumption it is to be understood as in terrarium i.e. in tone of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act etc., if the condition envisaged in the former part of the section is satisfied. The only condition for drawing such a legal presumption under Section 20 is that during trial it should be proved that the accused has accepted or agreed to accept any gratification. The section does not say that the said condition should be satisfied through direct evidence. Its only requirement is that it must be proved that the accused has accepted or agreed to accept gratification. Direct evidence is one of the modes through which a fact can be proved. But that is not the only mode envisaged in the Evidence Act.

15. The word "proof need be understood in the sense in which it is defined in the Evidence Act because proof depends upon the admissibility of evidence. A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or consider its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This is the definition given for the word "proved" in the Evidence Act. What is required is production of such materials on which the court can reasonably act to reach the supposition that a fact exists. Proof of the fact depends upon the degree of probability of its having existed. The standard required for reaching the supposition is that of a prudent man acting in any important matter concerning him. Fletcher Moulton L.J. in **Hawkins v. Powells Tillery Steam Coal Company, Ltd.** 1911 (1) K.B. 988 observed like this:

> "Proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to a particular conclusion."

16. The said observation has stood the test of time and can now be followed as the standard of proof. In reaching the conclusion the court can use the process of inferences to be drawn from facts produced or proved. Such inferences are akin to presumptions in law. Law gives absolute discretion to the court to presume the existence of any fact which it thinks likely to have happened. In that process the court may have regard to common course of natural events, human conduct, public or private business vis-a-viz the facts of the particular case. The discretion is clearly envisaged in Section 114 of the Evidence Act.

17. Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in Law of Evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the court can draw an inference and that would remain until such inference is either disproved or dispelled.

18. For the purpose of reaching one conclusion the court can rely on a factual presumption. Unless the presumption is disproved or dispelled or rebutted, the court can treat the presumption as tantamounting to proof. However, as a caution of prudence we have to observe that it may be unsafe to use that presumption to draw yet another discretionary presumption unless there is a statutory compulsion. This Court has indicated so in **Suresh Budharmal Kalani v. State of Maharashtra** 1998CriLJ4592. "A presumption can be drawn only from facts - and not from other presumptions - by a process of probable and logical reasoning."

19. Illustration (a) to Section 114 of the Evidence Act says that the court may presume that "a man who is in the possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession." That illustration can profitably be used in the

present context as well when prosecution brought reliable materials that appellant's pocket contained phenolphthalein smeared currency notes for Rs. 500/- when he was searched by PW-7 DSP of the Anti Corruption Bureau. That by itself may not or need not necessarily lead to a presumption that he accepted that amount from somebody else because there is a possibility of somebody else either stuffing those currency notes into his pocket or stealthily inserting the same therein. But the other circumstances which have been proved in this case and those preceding and succeeding the searching out of the tainted currency notes, are relevant and useful to help the court to draw a factual presumption that appellant had willingly received the currency notes."

15. Since the prosecution has proved beyond reasonable doubt the charge under Section 7 and 13(2) read with Section 13(1)(d) of the PC Act, the conviction and order of sentence of the Appellant is upheld for the said offences. The appeal is dismissed. The Appellant is on bail; his bail bond and surety bond are cancelled. The Appellant be taken into custody to undergo the remaining sentence.

ILR (2011) IV DELHI 656
CRL. APPEAL

MEHKAR SINGH ....APPELLANT

VERSUS

CENTRAL BUREAU OF INVESTIGATION .....RESPONDENT

(M.L. MEHTA, J.)

CRL. APPEAL NO. : 746/2002 DATE OF DECISION: 23.05.2011

Prevention of Corruption Act, 1988—Sections 7, 13 & 20—Aggrieved appellant challenged judgment and order on sentence, convicting him for offences

punishable under Section 7 and 13(1)(d) of Act—As per Respondent, three essentials namely demand, acceptance of bribe and recovery of demanded money proved; thus conviction not bad in law—Appellant urged all these essentials for conviction not proved as testimony of prosecution witnesses full of doubts and did not inspire any confidence—Held:- Mere recovery of bribe money from the accused was not sufficient to prove offence and no presumption of guilt should be raised under the Act in absence of proof of demand and acceptance of money by accused as a motive of reward—Ample evidence on record to corroborate statement of complainant on essentials of demand, acceptance and recovery—Conviction upheld.

In fact PW3, PW4, PW7 and PW8 have corroborated each other with regard to the pre-raid and post-raid proceedings and they have stood lengthy cross-examinations by the defence. Nothing could be elicited in their cross-examinations to doubt their testimonies. They have deposed on the lines of the prosecution case as narrated in the handing over memo PW3/B. **(Para 20)**

Important Issue Involved: Mere recovery of bribe money from the accused was not sufficient to prove offence and no presumption of guilt should be raised under Act in absence of proof of demand and acceptance of money by accused as a motive of reward.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. R.N. Mittal, Sr. Advocate with Mr. Manoj Kumar Advocate.

FOR THE RESPONDENT : Mr. Narender Mann, Special Public Prosecutor for CBI.

CASES REFERRED TO:

1. *Banarasi Dass* vs. *State,* 2010 Crl.LJ 2419.
2. *C.M. Girish Babu* vs. *CBI, Cochin, High Court of Kerala* (2009) 3 SCC 779.
3. *Sunil Kumar Sharma* vs. *State,* 139 (2007) DLT 407.
4. *Pyare Lal* vs. *State,* 149 (2008) DLT 425.
5. *State of A.P.* vs. *V. Vasudeva Rao,* (2004) 9 SCC 319.
6. *M. Narsinga Rao* vs. *State of A.P.,* 2001 (1) SCC 691.
7. *Satbir Singh* vs. *State of Haryana,* 2000 (1) C.C. Cases HC 195.
8. *Madhukar Bhaskarrao Joshi* vs. *State of Maharashtra* (2000) 8 SCC p. 571.
9. *State* vs. *Zakaullah,* 1998 SCC (Cr.) 456.
10. *Ved Prakash* vs. *State of H.P.,* II (1998) CCR 317.
11. *Ramni* vs. *State,* 1999 (6) SC 247.
12. *Som Parkash* vs. *State of Punjab,* 1992 CRl. L.J. 490.
13. *G.V. Nanjundiah* vs. *State (Delhi Administration),* 1988 Crl.L.J. 152.
14. *State of UP* vs. *Dr. G.K. Ghosh,* AIR 1984 SC 1453.
15. *Bharwada Bhoginbhai Hirjibhai* vs. *State of Gujarat,* AIR 1983 SC 753.
16. *Rajender Kumar Sood* vs. *State of Punjab* 1983 Crl. LJ 1338.
17. *Gulam Mahmood A. Malek* vs. *The State of Gujarat,* AIR 1982 SC 1558.
18. *Gopal Krishan* vs. *State,* 18 (1980) DLT 11 (SN).
19. *Narottam Singh* vs. *State,* 1978 Crl.L. J. 1612 (SC).
20. *Boya Ganganna and Anr.* vs. *The State of Andhra Pradesh* AIR 1976 SC 1541
21. *Jaswant Singh* vs. *State of Punjab,* AIR 1973 SC 707.
22. *State of Madras* vs. *A. Vidyanatha Iyer,* AIR 1958 SC 61.

23. *Rao Shiv Bahadur* vs. *State of Vindhya Pradesh,* AIR 1954 SC 322.

RESULT: Appeal dismissed.

M.L. MEHTA, J.

1. This appeal is directed against the Judgment dated 20.09.2001 and Order of Sentence dated 24.09.2001, whereby, the appellant/accused was convicted by learned Special Judge under section 7 and 13(1)(d) of Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act') and was sentenced to undergo rigorous imprisonment for 4 years with a fine of Rs. 500/- on each count. In case of default in payment of fine he was to undergo rigorous imprisonment for 3 months each.

2. The prosecution case as set up in the complaint(Ex. PW3/A) against the appellant/ accused in brief is that, Rakesh Kumar, s/o Jugal Kishore, r/o Bapa Nagar, Karol Bagh, New Delhi (PW-3) was accused vide FIR No. 304/93 and 435/94 P.S. Nizammuddin lodged at the instance of his wife. The said cases were pending before Ms.Sunita Gupta, the then MM New Delhi. The appellant/accused ASI Mehkar Singh was posted in PS Nizammuddin and was the Investigation Officer (IO) of FIR No. 304/93, whereas HC Padam Singh was the IO of FIR No.435/94. The complainant got bail in FIR 304/93, but was allegedly put in custody by the accused. He had even filed a contempt petition against accused in that case, but the same was later dismissed by the court after the compromise was arrived at between the complainant and his wife.

3. On 20.10.1996 the complainant had gone to attend the case of FIR 435/93 at Patiala House Court where he met HC Padam Singh and also the accused. He was told by them to meet two days before 28.10.96, the next date of hearing in the case when they would tell him the weaknesses of case against him so that he could be saved. On 25.10.1996, he went to meet accused at PS Sriniwas Puri and not finding him there went to PCR Sarai Rohilla, where he met HC Padam Singh and after some time accused also reached there. Accused demanded `500 as bribe for each hearing if he wanted to save himself from the case against him. The complainant was also assured that the accused would get the evidence weakened. The accused asked him to come to Patiala House Courts on 28th October, 1996 and bring Rs. 500/-. Based on this complaint, FIR (PW8/B) was registered. The necessary arrangements for laying trap

were done. Two independent witnesses, namely, S.P. Gulati (PW-4) and Jai ram (PW-7) were arranged to attend the trap party. The complainant arranged Rs. 500/- in the currency notes of denomination of `100/-, the numbers of which were noted down. PW-4 was to act as a shadow witness, whereas PW-7 was to remain nearby to watch the proceedings. Pre-trap proceedings were conducted by (PW-8) the I.O., who was also the Trap Laying Officer (TLO). The currency notes were given phenolphthalein powder treatment. With the help of Inspector B.K. Pradhan and PW4, the demonstration of the manner in which said power will react when brought in contact with the solution of sodium carbonate was ˇgiven to the members of the raiding party including the complainant and the independent witnesses. All this was recorded in handing over memo (PW-3/B). The treated notes were given to the complainant with the instruction to handover to the accused on specific demand. The trap party left for Patiala House Courts at about 10am. Both the complainant and the shadow witness PW4 were sent to the court. Other members of the party took positions in the area. At about 10:15am, the complainant contacted the accused whereafter both of them went into court room No. 2 and PW4 followed them. The complainant and the accused were seen moving towards the lawyers chambers. The accused allegedly asked the complainant to give the money which he had asked for. The money was given to the accused, who accepted the same with his right hand. At this, PW4 gave the pre appointed signal to the trap party whereupon the members of the team rushed to the spot. The accused was apprehended by his wrists. The complainant as well as the shadow witness confirmed about accused having received the tainted money from the complainant with his right hand. The tainted Government Currency notes were recovered by PW-7 and he also compared the numbers of notes with the numbers already noted down in the handing over memo and found the same tallying. The washes of both the hands of the accused were ˇtaken separately which turned the solution pink. After the completion of the formalities, the accused was arrested. On completion of investigation the accused was challaned under section 7 and 13(1)(d) read with 13(2) of the Act. The accused denied the charges and pleaded not guilty. At the trial the prosecution examined as many as 9 witnesses. The accused was also examined under Section 313 Cr.P.C, wherein he denied all incriminating evidence. He did not lead any evidence in defense.

4. At the outset, the learned defence counsel submitted that the accused had arrested the complainant during the existence of anticipatory bail which led to the filing of a contempt petition against the accused by the complainant. He submitted that though the contempt petition was ultimately dismissed by the High Court and complaint against the complainant was also dismissed on account of compromise with his wife in the said case, but the complainant carried out a grudge and animosity against the accused. The facts that complainant was arrested during the subsistence of bail and his having filed contempt and same getting subsequently disposed by High Court, are not in dispute. These facts alone would not be enough to conclude outrightly that the complainant was carrying any grudge or he got planted the present case against the accused. It would be seen subsequently after discussion of the case in entirety that this reasoning of the learned counsel is not well founded and is misconceived. It was submitted by the learned senior counsel for the accused that the accused has been falsely implicated at the instance of PW9, S.K. Peshin, in conspiracy with the complainant. He submitted that the accused was a parokar in the inquiry relating to death of a person in police lockup against PW9, S.K. Peshin, and it was at his instance that the present case was planted against the accused. With regard to the accused being the parokar in the inquiry against PW9, S.K. Peshin, it may be stated that though it was admitted by the PW8 to be correct that he was aware of such an inquiry, but PW8 denied the suggestion put to him that the present complaint was at the instance of PW9, S.K. Peshin. Interestingly, nothing of this sort was put to PW9, S.K. Peshin in his cross-examination. He was not confronted with any question on this subject relating to inquiry, nor he was put any suggestion. In fact, he was not subjected to any cross-examination by the defence.

5. Learned senior counsel for the defence Mr. R.N. Mittal assailed the impugned Judgment and Order as bad in law and wrong on facts. Learned Counsel submitted that the learned Trial Court failed to appreciate that the complainant was carrying grudge against accused as he was aggrieved of his arrest, during subsistence of bail by him, and so was not reliable. He submitted that learned Judge also failed to appreciate that the prosecution witnesses do not inspire any confidence as their testimonies are full of doubts. He submitted that the learned Trial Court failed to appreciate the fact that not only because PW7 was a stock witness of CBI having appeared already in 4-5 cases, but both PW4 & PW7 were

declared hostile and there were inconsistencies and discrepancies in their statements and other witnesses. The learned counsel further submitted that no public witness was associated when the appellant/accused was apprehended. He also submitted that the complainant PW-3 admitted in his cross-examination that an application was moved by the Investigation Officer of case i.e. FIR No.435/94 in the court of learned MM against the complainant for cancellation of his bail, alleging that the complainant had threatened them to involve in a false case of bribery.

6. As against this, Shri Narendra Mann learned counsel for CBI submitted that all the essentials, namely, demand, acceptance of the bribe and recovery of the demanded money have been proved by the testimonies of by PW-3, PW-5, PW-7 and PW-8. It was submitted by the learned counsel that all the witnesses mentioned herein have specifically stated in their examination in the court that the bribe money was recovered from the right hand fist of the Appellant/accused. There may be some contradictions in their examinations, but these are minor and do not go to the root of the case and minor contradictions are natural and ought to appear where the witnesses are examined after a long period of time. Learned Counsel relied on **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat,** AIR 1983 SC 753 and **State vs. Zakaullah,** 1998 SCC (Cr.) 456.

7. Before proceeding to embark upon the fact whether the learned Special Judge erred in appreciating the evidence of the prosecution, it must be kept in mind that while appreciating the evidence of a witness one may come across certain discrepancies in his deposition. These discrepancies are really of no consequence as long as they don.t go into the root of and demolish the veracity of the case. These discrepancies can be due to normal errors of observation, or loss of memory due to lapse of time or due to mental disposition such as shock and horror at the time of the occurrence and the like. It must be remembered that the evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnessed by another though both are present at the scene of occurrence [vide **Boya Ganganna and Anr. v. The State of Andhra Pradesh** AIR 1976 SC 1541]. In the case of **Bharwarda Bhoginbhai Hirjibhai** (supra), it was held by the Supreme Court that much importance cannot be given to minor

discrepancies which did not go to the root of the matter and shake the basic version of the witnesses, therefore cannot be annexed with undue importance. It has been held time and again by catena of judgments of Apex Court that discrepancies do not necessarily demolish the testimony. The proof of guilt can be sustained despite some infirmities [**Narottam Singh v. State,** 1978 Crl.L. J. 1612 (SC)]. In the case of **Ramni v. State,** 1999 (6) SC 247, it was held that all the discrepancies are not capable of affecting the credibility of the witnesses and similarly all the inconsistent statements are not sufficient to impair the credit of a witness. I would like to advert to the discrepancies pointed out by the learned defence counsel a little later.

8. The learned counsel submitted that the complainant is an interested person because of his carrying grudge and was not reliable unless his testimony finds corroboration. In this regard, reliance was placed on the cases **Pyare Lal v. State,** 149 (2008) DLT 425; **Jaswant Singh v. State of Punjab,** AIR 1973 SC 707 and **Sunil Kumar Sharma v. State,** 139 (2007) DLT 407. In the case of **Pyare Lal** (supra), appellant was the investigating officer in the case registered against the complainant. The court found that complainant wanted the appellant to hush up the case against him and his family members and on his refusal to oblige him, slapped false corruption case against the accused. This was the case based on its own facts and circumstances which led the court to record such a finding. In both the cases **Jaswant Singh** (supra) and **Sunil Kumar Sharma** (supra), it was held that in a bribery cases where complainant is an interested witness, his evidence must be considered with great caution. I am conscious of this fact that the testimony of such a witness would require scrutiny with great caution. While noting so, it is also relevant to note that the mere fact that complainant was facing prosecution and was arrested at one point of time despite bail by the accused, would itself may not be enough to throw away the prosecution case or to discard the testimony of the complainant. It is also not that in every case the court would see independent corroboration of such a witness. It would all depend upon the facts and circumstances of each case and the nature of deposition made by such a complainant.

9. With regard to the testimony of complainant the Apex Court in the case of **State of UP v. Dr. G.K. Ghosh,** AIR 1984 SC 1453 observed as under:-

> "**24.** …In the case of an offence of demanding and accepting illegal gratification, depending on the circumstances of the case, the Court may feel safe in accepting the prosecution version on the basis of the oral evidence of the complainant and the official witnesses even if the trap witnesses turn hostile or are found not to be independent. When besides such evidence, there is circumstantial evidence which is consistent with the guilt of the accused and not consistent with his innocence, there should be no difficulty in upholding the conviction."

10. In the case of **Rajender Kumar Sood v. State of Punjab** 1983 Crl. LJ 1338 the Division Bench of Punjab and Haryana High Court while dealing with the proposition whether testimony of complainant required independent corroboration observed as under:-

> "We are of the opinion that there is no question of the Court insisting upon any such independent corroboration of the complainant in regard to the circumstances of the kind. When a given complainant first visits a public servant for doing or not doing some task for him he does not go to him as a trap witness. He goes there in a natural way for a given task. To require a witness to take a witness with him at that stage would amount to attributing to the complainant a thought and foreknowledge of the fact that the accused would demand bribe."

11. In the case of **State vs. Zakaullah** (supra), it was held by the Supreme Court that evidence of the bribe giver cannot be rejected merely because he is aggrieved by the conduct of the accused. It was further held that nobody over-heard the demand made by the accused for bribe or the amount was found in the left pocket of the accused and not in the right pocket, are flippant grounds which should never have merited consideration.

12. The learned senior counsel, Mr.Mittal, took me through some of the facts in support of his submission that there was no allegation of demand of any money by the accused from the complainant in the meeting which allegedly took place on 22nd October, 1996. In this regard, he submitted that in fact there was no occasion or reason for the accused to have demanded any money from the complainant inasmuch that the case in which the complainant appeared before the court on 22nd

October, 1996 was FIR No.435/94 in which accused was not the Investigating Officer. Since he was not the IO in the said case, he was not required to appear in the case before the Metropolitan Magistrate, Sunita Gupta, on this date. He submitted that in fact the accused had gone to Tis Hazari Courts on 22nd October, 1996 and from there he came back to the Police Station and so there was no question of his meeting with the complainant in the Patiala House Court on 22.10.1996 at 11.30 AM.

13. Learned counsel relied upon the decision of **Banarasi Dass v. State,** 2010 Crl.LJ 2419; **Gopal Krishan v. State,** 18 (1980) DLT 11 (SN) in support of his submissions that the mere recovery of bribe money from the accused was not sufficient to prove offence and that no presumption of guilt should be raised under the Act in the absence of proof of demand and acceptance of money by the accused as a motive or reward. There is no dispute with regard to the proposition of law as laid down in these judgments that mere recovery of money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantial evidence in the case is not reliable. Reliance in this regard is placed on the decision of the Hon.ble Supreme Court in the case of **M. Narsinga Rao v. State of A.P.,** 2001 (1) SCC 691, which has been followed in catena of judgments. However, in the present case, it would be seen that there is ample evidence on record to corroborate the statement of the complainant on the essentials of demand, acceptance and recovery.

14. It is a fact that the accused was not the I.O. of the case FIR 435/94 and so was not required to be present in the Patiala House Courts on 22.10.1996. However, it stands proved from the statement of PW-5, Additional S.H.O., Sriniwas Puri, that the accused went out of the Police Station to attend the date of hearing at Tis Hazari along with SI Bansidhar. It is also proved from the statements of PW3 and PW6 that PW3 complainant attended the hearing of case FIR 435/94 at Patiala House court on 22.10.1996 and this case was adjourned to 28.10.1996. PW3 also said that he had met the accused and HC Padam Singh on this date in the Patiala House Courts and was asked by them to meet two days before the next date of hearing, i.e., 28.10.1996. As per DD (Ex.PW5/B) the accused and SI Bansidhar left the police station at about 8.15 AM for Tis Hazari Courts and Patiala House Courts respectively. DD (PW5/C) shows the return of accused back to the police station at 3.31 PM. The fact that he was not to appear in the Patiala House Courts on 22.10.1996 but was to go to Tis Hazari Courts would not be sufficient enough to record that he in fact did not go to Patiala House Court on that date. Notice can be taken of the fact that Patiala House Court is on the way to Tis Hazari Courts and while going to Tis Hazari Courts one can easily stop at Patiala House Court for onward move to Tis Hazari. SI Bansidhar and the record of the case of Tis Hazari court where the accused was supposed to appear on 22nd October, 1996, could have thrown some light, but, however, the accused did not choose to make any effort to lead evidence in this regard.

15. Learned defence counsel also submitted that the visit of the PW3 complainant to PCR Sarai Rohilla was doubtful inasmuch firstly because there was no occasion for him to visit PCR Sarai Rohilla and secondly, it was not possible to reach Sarai Rohilla from Police Station Sriniwas Puri. In this regard, PW3 stated that on 25.10.1996, he had gone to PS Sriniwas Puri to meet the accused, but as he did not find him there, he within 15 minutes reached PCR Sarai Rohilla. The learned Special Judge recorded in this regard that the complainant seems to be making general statement about time taken in the journey which involved the distance of about 20 kilometers. It appears that the complainant made such a casual statement and tried to exaggerate in this regard. But, that may not be enough to conclude that he did not visit PCR Sarai Rohilla. The complainant was very categorical in his visit to PCR Sarai Rohilla. While observing that one may not reach in 15 minutes from PS Sriniwas Puri to PCR Sarai Rohilla as claimed by complainant, it can also be observed that during noon period the traffic is comparatively less and such distance could be covered by two wheeler in about 20-30 minutes.

16. At PCR Sarai Rohilla, complainant remained for about 1½ hours and met the accused and HC Padam Singh. If it was not so, why would he introduce this as a story. He stated that the money was demanded in the presence of HC Padam Singh. In such fact situation, some light could have been thrown on this subject by HC Padam Singh, who has not been chosen to be examined by the accused, though, at one point of time, he so desired to examine him as a witness. In fact, this part of statement of the complainant that the conversation with Mehkar Singh took place in presence of HC Padam Singh has not been assailed. The complainant

categorically stated and maintained that the accused demanded Rs. 500 for each date of hearing to ensure that the evidence gets weakened.

17. The testimony of PW3 on demand by the accused become reliable when we analyse the entire evidence including the conduct of the accused to be discussed hereafter. PW3 categorically stated and maintained that on 25.10.1996 at PS Sarai Rohilla, Mehkar Singh during conversation told him that he will tell about the loopholes and for that he would have to pay Rs. 500/- for each date of hearing and that he would also ensure that the evidence in the court gets weakened. Thereafter, he directed him to meet him in Patiala House Courts on 28.10.1996 so that he can introduce him to the witnesses. He also directed him to bring the money of Rs. 500/-. On 28.10.1996, when he reached the court of Ms.Sunita Gupta, MM, the accused Mehkar Singh came there. The testimony of the witness in this regard is worth noting and is reproduced as under:-

> "When we reached at the door of the court of Smt.Sunita Gupta, M.M. accused Mehkar Singh came there, and following conversation took place between us:-
>
> Mehkar Singh:- HA BHAI RAKESH, PAISE LAYA HAIN.
>
> Myself:- HA JI JO AAPNE BATAYE THE UTNE PAISE LAYA HU.
>
> Thereafter accused went into the court room and signaled me to accompany him. He took me to the seat of the naib court, where police files are kept.
>
> We both sat on the bench and accused read the police file of my case sometime. SP Gulati also came inside the court and sat at a distance of 4-5 paces from us. Shri BK Pradhan also came into the court and sat at some distance. After reading the file for sometime, accused said "CHAL AA BAHAR CHALE". Thereafter, we both came out of the court room. SP Gulati also followed us at some distance. While walking accused said "MAIN TUMHE CASE KI KHAMIYO KE BARE MEIN BATAOONGA, JO PAISE LAYA HAIN, MUJHE DE". On this I took out aforesaid treated GC notes of Rs.500/- from my pocket and passed on to the accused. Accused accepted said money in his right hand."

18. PW4 S.P. Gulati though turned hostile, also deposed to the

effect that though he could not hear the conversation which took place with the accused in front of the court room, but he heard the accused asking complainant if he had brought the money and the complainant confirming that he had brought Rs. 500/- as desired. He corroborated the complainant that the accused took him in the court room where the accused took the police file from Naib Court and started reading it. He also testified that he (PW4) had also gone into the court room and sat at a distance of 4-5 feets and after sometime accused asked the complainant to come out and further that he followed the complainant and the accused. He said that while walking accused asked for the money and thereupon the complainant took out the tainted money and gave to him, who accepted the same in his right hand and at this stage he gave pre-determined signal whereupon CBI officials came and apprehended the accused. He further stated that when the accused was confronted by Inspector Ved Prakash, the accused threw the tainted money on the floor which was later recovered by PW-7 Jai Ram from the fist of the accused. He also stated that he along with PW7 Jai Ram compared the tainted money with the numbers of notes already noted in the handing over memo and found the numbers tallying.

19. Both PW-4 and PW-7 were also cross-examined by the learned prosecutor. They both have supported the case of the prosecution in entirety and have identified the accused present in the court. They are also witnesses to the handing over memo (Ex.PW3/B) detailing pre-raid proceedings. PW8 also corroborated the witnesses of recovery stating that he also followed the complainant, accused and others and noticed that the complainant took out the tainted money from the pocket of his shirt and gave to accused Mehkar Singh who accepted the same in his right fist. He also stated that he challenged the accused after he had taken the bribe money from the complainant to which the accused kept mum and thereafter he directed PW7 Jai Ram to recover the money from his right fist and that after counting, the numbers of the tainted money were compared with the numbers mentioned in the handing over memo. This witness denied the suggestion that the accused neither demanded nor accepted the money nor did he see the accused taking money from the complainant. When the accused was apprehended, he remained mum and became nervous. The conduct of the accused is also one of the relevant and admissible piece of evidence, the aid of which is available in corroboration of the testimony of a witness. In fact remaining mum or

getting perplexed or throwing the money when caught are significant factors pointing towards the guilt of the accused. In the normal circumstances, no one behaves in such a manner. In the case of **Rao Shiv Bahadur v. State of Vindhya Pradesh,** AIR 1954 SC 322 and **State of Madras v. A. Vidyanatha Iyer,** AIR 1958 SC 61, the Apex Court relied on the evidence relating to the conduct of the accused when confronted by the police officials with the allegation that he had received bribe. In the case of **Rao Shiv Bahadur** (supra) the evidence relating to conduct on which reliance was placed was to the effect that the accused was confused and could not furnish any explanation when questioned by the officer. Likewise, in the case of **Vidyanatha** (supra) also evidence to the effect that the accused was seen trembling and that he silently produced the notes was acted upon for recording conviction.

20. In the present case, there is ample evidence on record to prove the factum of demand, acceptance and recovery of the bribe money from the accused. In fact PW3, PW4, PW7 and PW8 have corroborated each other with regard to the pre-raid and post-raid proceedings and they have stood lengthy cross-examinations by the defence. Nothing could be elicited in their cross-examinations to doubt their testimonies. They have deposed on the lines of the prosecution case as narrated in the handing over memo PW3/B.

21. Having gone through the testimony of PW3 cautiously, I could not see anything coming on the record to substantiate the plea of the accused that it was because of any grievance of the complainant that the present complaint was made by him against the accused. Here it is also noted that a plea was also taken by the learned counsel that an application was also filed by HC Hukum Singh, IO in FIR No.435/94 before the MM against the complainant alleging threats to involve them in a false case. In this regard also, nothing could be brought on record to substantiate this plea. During the course of arguments, when it was put to the learned defence counsel as to the time of making of such an application to see as to whether it was before or after the trap, the learned defence counsel expressed ignorance and stated that in any case the timing of such an application would have no relevance. I am afraid, the timing of making such an application before the MM was all the more relevant and it appears that the application came to be filed by HC Hukum Singh after the trap of the accused. If it was before, the same could have been so

conveniently brought on record by the accused. The same having not been done, the logical inference would be that it was got filed after the trap to create defence of the trap and recovery from accused.

22. Now coming back to the discrepancies as pointed out by the learned counsel that PW3 stated that money was passed on to the accused at a distance of about 20-25 yards and PW4 Mr.S.P. Gulati heard the conversation and saw the whole incident, whereas Mr.Gulati stated that he could not hear the conversation. In his cross-examination, he also stated that the accused threw the money on the floor. It is true that there is some variance in the testimony of PW4 as pointed out by learned counsel, but it is noted that this witnesses immediately after his so stating, stated that PW7 Jai Ram recovered money from the right fist of the accused and that they both [he and Jai Ram (PW7)] compared the numbers of the tainted money with the numbers noted on the handing over memo and found the same to be correct. So this would hardly be discrepancy of any value.

23. It was next pointed out by the learned counsel that as per PW4, accused was arrested in the verandah of the court at his signal, whereas PW8 (TLO) stated about the apprehension of the accused at the distance of 75 yards from the court room and PW3 stated about 25 yards. In this regard, he also submitted that as per the site plan from the position of some members of the raiding party team they could not have seen and heard anything between the complainant and the accused except PW4. I have considered the submissions in this regard very seriously and do not find any of these to be amounting to a glaring discrepancy or infirmity. This was natural course of observation of different persons of different situations in different ways and particularly when they depose in the court after lapse of long period of three to five years.

24. It was submitted by the learned counsel that PW7 being a stock witness of CBI and also hostile was not reliable. I have noted above that the testimony of PW7 is trustworthy and reliable though he was not able to identify the accused and was allowed to be cross-examined by the prosecution. He, however, in his further statement identified the accused as appearing to be the same person who was arrested at the spot for taking bribe. May be that he had appeared as a witness in 4/5 other cases investigated by the CBI, but that alone would not be enough to discard him. It is not clear as to in how many years he appeared in 4/5 earlier

cases. Having cautiously scrutinized his evidence, I do not see any reason to discard him on this ground alone.

25. It was lastly submitted by the learned counsel that no independent witness was joined by CBI whereas there were several available in the office of the accused and also in the hall where the appellant was allegedly caught receiving the money. Learned counsel in this regard relied upon the judgments of **Som Parkash v. State of Punjab,** 1992 CRl. L.J. 490; **Ved Prakash v. State of H.P.,** II (1998) CCR 317; **G.V. Nanjundiah v. State (Delhi Administration),** 1988 Crl.L.J. 152; **Gulam Mahmood A. Malek v. The State of Gujarat,** AIR 1982 SC 1558 and **Satbir Singh v. State of Haryana,** 2000 (1) C.C. Cases HC 195.

26. There is no dispute with regard to the proposition regarding desirability of association of independent witnesses by the police so as to lend more credence and authenticity to the case, but there is also no dispute that non-association of the independent witnesses per se for any reason whatsoever was in itself not enough to discard the prosecution witnesses or throw away the case as a whole. In the present case, CBI associated two independent witnesses on the written requisition made in this regard. Since the prosecution/CBI already had two independent witnesses, who had been informed and apprised about the technicalities involved in the procedure during the trap proceedings, it was not necessary for the IO to have joined other public witnesses at the time of apprehension.

27. In the case of **Som Prakash** (supra), there was no independent witnesses associated and so that case was entirely distinguishable from the present case. Similarly, the case of **Ved Prakash** (supra) is also distinguishable. In that case the independent witness who was associated was the one who was brought by the complainant and was already in contact with him and therefore, was not regarded as independent. In the case of **Gulam Mahmood A. Malek** (supra), the testimony of the complainant was not reliable inasmuch as he himself was an accused in four cases and though the independent witness was available, none was joined. The case of **G.V. Nanjudiah** (supra) was also on its peculiar facts where the testimony of the complainant contractor was also found to be not trustworthy and there was no evidence establishing the factum of acceptance of bribe. Similarly, in the case of **Satbir Singh** (supra) also there was no proof of initial demand of illegal gratification beyond reasonable shadow of doubt and there was no other evidence to corroborate

the statement of the complainant, that the failure to join the independent witnesses was held to be an infirmity in the prosecution case.

28. Learned counsel also challenged the validity of the sanction of the prosecution of the accused stating that there was no valid sanction by the competent authority. In this regard, it is seen that the sanction for the prosecution of the accused was accorded by PW2, Dharmender Kumar, DCP, vide order Ex.PW2/A. He affirmed on oath that he had perused the relevant documents including the statement of witnesses etc. before according the sanction. Though he did not remember some of the details of the prosecution file, but he denied that the sanction was accorded mechanically without going through the record. The mere fact that he did not remember some of the details could not create any doubt. The sanction order speaks for itself and shows that the requisite material had been gone into before according sanction. There is no reason to disagree with the finding of the learned Special Judge in this regard.

29. Section 20 of the Act provides that where at the trial it is proved that an accused has accepted or obtained or agreed to accept or attempted to obtain any gratification (other than legal remuneration), it shall be presumed unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain such gratification as a motive or reward as mentioned in Section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate. The requirement of this Section is only that it must be proved that the accused has accepted or obtained or agreed to accept or attempted to obtain gratification. It may be proved by direct evidence as in the present case it has been proved from the direct evidence of testimonies of PW-3 and PW-4 that the gratification was accepted as a motive or reward for helping the complainant in the criminal case pending against him and other co-accused persons. In the case of **Madhukar Bhaskarrao Joshi v. State of Maharashtra** (2000) 8 SCC p. 571, the Apex Court held as under:-

> "**12.** The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act. So the

word 'gratification' need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like "gratification or any valuable thing." If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word 'gratification' must be treated in the context to mean any payment for giving satisfaction to the public servant who received it."

30. In the case of **C.M. Girish Babu v. CBI, Cochin, High Court of Kerala** (2009) 3 SCC 779, it was held as under:-

"21. It is well settled that the presumption to be drawn under Section 20 is not an inviolable one. The accused charged with the offence could rebut it either through the cross-examination of the witnesses cited against him or by adducing reliable evidence. If the accused fails to disprove the presumption the same would stick and then it can be held by the Court that the prosecution has proved that the accused received the amount towards gratification."

31. Though, the burden of proof on the accused to rebut the presumption under Section 20 is not akin to that of the burden placed on the prosecution to prove the case beyond reasonable doubt, but the same, in any case, was required to be discharged at least by preponderance of probability. The accused did not lead any evidence in defence and also could not elicit anything from the cross-examination of prosecution witnesses and thus could not rebut the presumption of guilt under Section 7 against him. Insofar as Section 13(1)(d) is concerned, it stand proved that accused demanded and accepted bribe money for doing of favour in the exercise of his official function.

32. From the above discussion, the case of the prosecution stands proved beyond any reasonable doubt. Nothing could be pointed out by the defence to interfere or find fault with the impugned judgment or the order of the Special Judge. I have noted at different places in the preceding discussion that in certain areas some light on the subject as discussed

would have been thrown by leading some evidence by the accused, but nothing of the sort was even tried to be done by him. This would lead to draw an inference that there was nothing in store in defence of the accused to cause any dent in the prosecution case. There was no denial of the fact that the corruption by the public servants and particularly the law enforcers like the accused is an alarming menace to the society and which is spreading its tentacles in all walks of life. With regard to the quantum of sentence, nothing specific was pointed out by the learned defence counsel except for praying for leniency in view of the protracted pendency of the case. This was no ground to mitigate the gravity of the offence as per the catena of judgments of the Hon.ble Supreme Court and reference here can be made only to the case of **State of A.P. v. V. Vasudeva Rao,** (2004) 9 SCC 319.

33. In the given factual matrix, I am not persuaded to impose the minimum sentence as prayed by the learned defence counsel. In the overall circumstances, while maintaining the conviction as awarded by the learned Special Judge, I am of the view that ends of justice would be met by sentencing the accused to two years of rigorous imprisonment on each count. Consequently, the order of sentence stands modified in the sense that the accused shall stand sentenced for two years rigorous imprisonment each under Section 7 and also under Section 13(2). The rest of the order shall remain unchanged. Both sentences shall run concurrently. The period of imprisonment already undergone shall be set off. The accused shall be taken into custody to undergo the imprisonment as awarded. The appeal stands dismissed.

ILR (2011) IV DELHI 675
W.P.

BIJENDER SINGH RATHORE ....PETITIONER

VERSUS

UOI AND ORS. ....RESPONDENTS

(DIPAK MISRA, CJ. & SANJIV KHANNA, J.)

W.P. (C) NO. 3450/2011 DATE OF DECISION: 23.05.2011

Constitution of India, 1950—Article 14, 16, 226 & 227—Indian Administrative Service (Appointment by Competitive Examination) Regulations, 1955—Regulation 4 (iii-a)—Petition challenging the legal defensibility and substantiality of the order dated 21.03.2011 passed by Central Administrative Tribunal, Principal Bench, New Delhi—The 1955 Regulations restricts the number of attempt for general category candidates upto a maximum of four whereas for OBC category candidates, the maximum number of attempt is seven and for Scheduled Castes and Scheduled Tribes candidates, the number of attempts is unlimited—The Regulations invited the frown of Articles 14 and 16 of the Constitution of India as there is a restriction on the number of attempts to be made by general category candidates whereas no restriction is made in respect of Scheduled Castes and Scheduled Tribes candidates and more number of attempts have been provided for the OBC candidates—Tribunal declined to accept the prayer— Petition—Held—It is noteworthy that clauses (1) and (2) of Article 16 of the Constitution of India guarantee 'Equality of opportunity' in the matter of an appointment to an office or any other appointment but the clauses (3) to (5) confer concession in favour of Backward Classes with certain

exception to the above rule of equal opportunity—Clause 4 of the said article stipulates that nothing in the said Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any Backward Classes of citizens which, in the opinion of the State, is not adequately represented in the services under the State—The said clauses of Article 16 confer a concession on the Backward Classes which include the Scheduled Castes and Scheduled Tribes—Article 16 (4) basically permits a reasonable classification which is the basic facet of the equality clause as enshrined under Article 14 of the Constitution of India—Applying the aforesaid test, it is quite clear that Regulation 4(iii-a) confers the power on the Union of India to issue a notification—It has so done by issuing a notification—It has limited seven attempts to the Other Backward Classes—the same is a reasonable exercise of power and a guided one—As far as the Scheduled Castes and Scheduled Tribes are concerned, number of attempts is not fixed—In the opinion of the Union of India they are to be given chances to compete to the best of their ability and come to the mainstream—That apart, though unlimited chances are given, yet the upper age limit is prescribed—Thus, it is not unreasonable—Quite apart from the above, it is noteworthy in view of the historical backdrop of the constitutional provisions—Hence, we are of the considered opinion that it meets the test of reasonable classification—Judged from these angles, we are of the considered opinion the said Regulation does not suffer from the vice of Articles 14 or 16 of the Constitution of India.

The other limb of submission of the learned counsel for the petitioner is that by providing for four attempts to the general category candidates and unlimited attempts to Scheduled Castes and Scheduled Tribes category candidates and seven attempts to Other Backward Classes category

candidates, the respondents have violated the equality clause and treated the petitioner in a discriminatory manner. It is noteworthy that clauses (1) and (2) of Article 16 of the Constitution of India guarantee „Equality of opportunity, in the matter of an appointment to an office or any other appointment but the clauses (3) to (5) confer concession in favour of Backward Classes with certain exceptions to the above rule of equal opportunity. Clause 4 of the said article stipulates that nothing in the said Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any Backward Classes of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The said clauses of Article 16 confer a concession on the Backward Classes which include the Scheduled Castes and Scheduled Tribes. Article 16(4) basically permits a reasonable classification which is the basic facet of the equality clause as enshrined under Article 14 of the Constitution of India. The principle of classification with all its contours is attracted to clause (4) of Article 16. **(Para 11)**

Applying the aforesaid test, it is quite clear that Regulation 4(iii-a) confers the power on the Union of India to issue a notification. It has so done by issuing a notification. It has limited seven attempts to the Other Backward Classes. The same is a reasonable exercise of power and a guided one. As far as the Scheduled Castes and Scheduled Tribes are concerned, number of attempts is not fixed. In the opinion of the Union of India they are to be given chances to compete to the best of their ability and come to the mainstream. That apart, though unlimited chances are given, yet the upper age limit is prescribed. Thus, it is not unreasonable. Quite apart from the above, it is noteworthy in view of the historical backdrop of the constitutional provisions. Hence, we are of the considered opinion that it meets the test of reasonable classification. Judged from these angles, we are of the considered opinion the said Regulation does not suffer from the vice of Articles 14 or 16 of the Constitution of India. **(Para 16)**

Important Issue Involved: Regulation Limiting the attempts to general candidates to 4 and no restriction for Scheduled Castes & Scheduled Tribes candidate and limited seven attempts to the Other Backward Classes does not suffer from vice of Article 14 or 16 of the Constitution of India.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Karan Singh Bhati, with Mr. Prikshayat Singh, Advocate.

FOR THE RESPONDENTS : Mr. Ravinder Aggarwal, Advocate For Respondent No. 1/UOI Mr. Naresh Kaushik, Advocate for Respondent Nos. 2 & 3/UPSC.

CASES REFERRED TO:

1. *M. Nagaraj* vs. *Union of India,* (2006) 8 SCC 212.
2. *Union of India* vs. *S.C. Bagari,* AIR 1999 SC 1412.
3. *State of M.P.* vs. *Ram Kishna Balothia,* AIR 1995 SC 1198.
4. *Indra Sawhney* vs. *Union of India,* AIR 1993 SC 477.
5. *Indian Railway SAS Staff Association* vs. *Union of India,* (1988) 2 SCC 651: (1998 AIR SCW 524).
6. *State of Mysore* vs. *P. Narasinga Rao,* AIR 1968 SC 349: ((1968) 1 SCR 407).

RESULT: Petition dismissed.

DIPAK MISRA, CJ.

1. Invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, the petitioner has called in question the legal defensibility and substantiality of the order dated 21.3.2011 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (for short 'the tribunal') in OA No. 1079/2011 whereby the tribunal has declined to accept the prayer of the petitioner which was made to declare Regulation 4(iii-a) of the Indian Administrative Service (Appointment by

Competitive Examination) Regulations, 1955 (for short „the 1955 Regulations.) as ultra vires the Constitution of India.

2. The facts which are necessitous to be adumbrated are that the Union Public Services Commission (UPSC), vide notification dated 2.1.2010, invited applications for approximately 965 vacancies in different streams of Civil Services. The petitioner submitted his form for selection for the post in the stream of Indian Administrative Service on 27.1.2010. It is not disputed that he was aged about 28 years and had already appeared in the examination four times and the present one was the fifth attempt by him. He appeared in the examination conducted by the UPSC on 23.5.2010 but was denied the result on the ground that he could not have been allowed to sit for the fifth time in the competitive examination as he belonged to the general category. Being dissatisfied with the aforesaid, the petitioner ˇapproached the tribunal challenging the said regulation which prohibits a general category candidate to take a fifth attempt to qualify.

3. It was contended before the tribunal that the 1955 Regulations restricts the number of attempts for general category candidates upto a maximum of four whereas for OBC category candidates, the maximum number of attempts allowed is seven and for Scheduled Castes and Scheduled Tribes candidates, the number of attempts is unlimited. Be it noted, the 1955 Regulations also grant age relaxation to the Scheduled Castes and Scheduled Tribes categories but the petitioner clearly expressed before the tribunal that he had no grievance with regard to the age relaxation and his grievance was only with regard to the difference in chances offered to the general category candidates vis-à-vis other category candidates. It was urged that the 1955 Regulations invited the frown of Articles 14 and 16 of the Constitution of India as there is a restriction on the number of attempts to be made by general category candidates whereas no restriction is made in respect of Scheduled Castes and Scheduled Tribes candidates and more number of attempts have been provided for the OBC candidates. It was also urged before the tribunal that in other examinations conducted by the UPSC, there is no such restriction in respect of the number of attempts as seen in the Civil Services Examination but the said restriction is only with regard to the Indian Administrative Service and, hence, the equality clause enshrined under Article 14 of the Constitution is flagrantly violated.

4. The tribunal, upon hearing the learned counsel for the parties, came to hold that it is not a discrimination but a classification which is permissible regard being had to the provisions contained in Article 16(4) of the Constitution of India. Being of this view, the tribunal dismissed the Original Application.

5. We have heard Mr. Karan Singh Bhati along with Mr.Prikshayat Singh, learned counsel for the petitioner, and Mr. Ravinder Aggarwal and Mr. Naresh Kaushik, learned counsel for the Union of India and UPSC respectively.

6. The 1955 Regulations have been framed in pursuance of Rule 7 of the India Administrative Service (Recruitment) Rules, 1954. Regulation 4 deals with the conditions of eligibility. It reads as follows:

> "4. **Conditions of Eligibility:**-In order to be eligible to compete at the examination, a candidate must satisfy the following conditions, namely:-
>
> (i) Nationality:- (a) He must be a citizen of India,
>
> Or,
>
> (b) He must belong to such categories of persons as may, from time to time, be notified in this behalf by the Central Government.
>
> (ii) Age:- He must have attained the age of 21 and not attained the age of 30 on the first day of August of the year in which the examination is held:
>
> Provided that the upper age limit may be relaxed in respect of such categories of persons as may from time to time, be notified in this behalf by the Central Government, to the extent and subject to the conditions notified in respect of each category:
>
> Provided further that the upper age limit shall be raised to 31 years for the candidates appearing at the examination to be conducted by the Commission in 1990.
>
> (iii) Educational Qualifications:- He must hold a degree of any University incorporated by an Act of the Central or State Legislature in India or other educational institutions established by an Act of Parliament or declared to be deemed as Universities

under Section 3 of the University Grants Commission Act, 1956, or a foreign University approved by the Central Government from time to time, or possess a qualification which has been recognized by the Central Government [for the purpose of admission to the examination]

Provided that-

(a) in exceptional cases the Commission may, [ ] treat as qualified a candidate who though not possessing the qualification prescribed in this clause, has passed examinations conducted by other institutions of a standard which, in the opinion of the Commission, justifies the admission of the candidate to the examination; and

(b) candidates who are otherwise qualified but have taken degree from foreign Universities, which are not approved by the Central Government, may also be admitted to the examination at the discretion of the Commission.

Provided further that a candidate may be permitted to take the preliminary examination while studying for his degree so long as by a date to be notified by the Commission, the candidate produces proof of pass in the degree course for being eligible to take the final examination during that year.

(iii-a) Attempts at the examination:- Unless covered by any of the exceptions that may from time to time be notified by the Central Government in this behalf, every candidate appearing for the examination after 1st January 1990, who is otherwise eligible, shall be permitted four attempts at the examination; and the appearance of a candidate at the examination will be deemed to be an attempt at the examination irrespective of his disqualification or cancellation, as the case may be, of his candidature.

Explanation- An attempt at a preliminary examination shall be deemed to be an attempt at the examination, within the meaning of this rule.

(iv) Fees :- He must pay the fees prescribed by the Commission."

7. On a reading of the aforesaid Regulation, it is quite clear that every candidate shall be permitted four attempts at the examination; and

the appearance of a candidate at the examination will be deemed to be an attempt at the examination irrespective of his disqualification or cancellation, as the case may be, of his candidature.

8. The Central Government in the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) issued a notification on 2.1.2010 dealing with competitive examinations. It included The Indian Administrative Service; The Indian Foreign Service; The Indian Police Service; The Indian P&T Accounts and Finance Service, Group 'A'; The Indian Audit and Accounts Service, Group 'A'; Indian Revenue Service (Customs & Central Excise) Gr. 'A'; The Indian Defence Accounts Service, Group 'A'; The Indian Revenue Service, (I.T.) Group 'A'; The Indian Ordnance Factories Service, Group 'A' (Asst. Works Manager – Administration); The Indian Postal Service, Group 'A'; The Indian Civil Accounts Service, Group 'A'; The Indian Railway Traffic Service, Group 'A'; The Indian Railway Accounts Service, Group 'A'; The Indian Railway Personnel Service, Group 'A'; Post of Assistant Security Officer, Group 'A' in Railway Protection Force; The Indian Defence Estates Service, Group 'A'; The Indian Information Service, Junior Grade Group 'A'; Indian Trade Service, Group 'A' (Gr.III); Indian Corporate Law Service, Group 'A'; Armed Forces Headquarters Civil Service, Group 'B' (Section Officer's Grade); Delhi, Andaman and Nicobar Islands, Lakshadweep, Daman & Diu and Dadra & Nagar Haveli Civil Service, Group 'B'; Delhi, Andaman and Nicobar Islands, Lakshadweep, Daman & Diu and Dadra & Nagar Haveli Police Service, Group 'B'; Pondicherry Civil Service, Group 'B'; and Pondicherry Police Service, Group 'B'. The examinations to the above services are to be conducted by the Union Public Service Commission in the manner prescribed in Appendix I to the said rules.

9. Rule 4 of the Examination Rules reads as follows:

"4. Every candidate appearing at the examination who is otherwise eligible, shall be permitted four attempts at the examination:

Provided that this restriction on the number of attempts will not apply in the case of Scheduled Castes and Scheduled Tribes candidates who are otherwise eligible:

Provided further that the number of attempts permissible to candidates belonging to Other Backdward Classes, who are

otherwise eligible, shall be seven. The relaxation will be available to the candidates who are eligible to avail of reservation applicable to such candidates:

Provided further that a physically handicapped will get as many attempts as are available to other non-physically handicapped candidates of his or her community, subject to the condition that a physically handicapped candidate belonging to the General Category shall be eligible for seven attempts. The relaxation will be available to the physically handicapped candidates who are eligible to avail of reservation applicable to such candidates.

Note:-

(I) An attempt at a Preliminary Examination shall be deemed to be an attempt at the Examination.

(II) If a candidate actually appears in any one paper in the Preliminary Examination, he / she shall be deemed to have made an attempt at the Examination.

(III) Notwithstanding the disqualification / cancellation of candidature, the fact of appearance of the candidate at the examination will count as an attempt."

10. On a perusal of the aforesaid Rule, it is quite clear that the restriction on the number of attempts will not apply to the candidates who belong to Scheduled Castes and Scheduled Tribes and as far as the other Backward Classes are concerned, the attempts are restricted to seven. The said examination Rule has been framed in consonance with Regulation 4(iii-a) on the foundation of the power conferred on the Central Government. On a reading of the said examination Rule, it is vivid that the number of attempts is applicable to all categories of examinations. Thus, the submission of the learned counsel for the petitioner that the number of attempts is confined to The Indian Administrative Service alone is not correct and, therefore, the same need not be dealt with.

11. The other limb of submission of the learned counsel for the petitioner is that by providing for four attempts to the general category candidates and unlimited attempts to Scheduled Castes and Scheduled Tribes category candidates and seven attempts to Other Backward Classes

category candidates, the respondents have violated the equality clause and treated the petitioner in a discriminatory manner. It is noteworthy that clauses (1) and (2) of Article 16 of the Constitution of India guarantee "Equality of opportunity" in the matter of an appointment to an office or any other appointment but the clauses (3) to (5) confer concession in favour of Backward Classes with certain exceptions to the above rule of equal opportunity. Clause 4 of the said article stipulates that nothing in the said Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any Backward Classes of citizens which, in the opinion of the State, is not adequately represented in the services under the State. The said clauses of Article 16 confer a concession on the Backward Classes which include the Scheduled Castes and Scheduled Tribes. Article 16(4) basically permits a reasonable classification which is the basic facet of the equality clause as enshrined under Article 14 of the Constitution of India. The principle of classification with all its contours is attracted to clause (4) of Article 16.

12. In this regard, we may profitably reproduce a passage from **Indra Sawhney v. Union of India,** AIR 1993 SC 477 which states as follows:

> "It needs no emphasis to say that the principle aim of Articles 14 and 16 is equality and equality of opportunity and that clause (4) of Article 16 is but a means of achieving the very same objective. Clause (4) is a special provision - though not an exception to clause (1). Both the provisions have to be harmonised keeping in mind the fact that both are but the restatements of the principle of equality enshrined in Article 14. The provision under Article 16(4) - conceived in the interest of certain sections of society - should be balanced against the guarantee of equality enshrined in clause (1) of Article 16 which is a guarantee held out to every citizen and to the entire society.

We may also refer with profit to the majority view expressed in **Indra Sawhney** (supra) wherein it has been laid down as follows:

> "121.(1)(a) It is not necessary that the "provision" under Art. 16(4) should necessarily be made by the Parliament/Legislature. Such a provision can be made by the Executive also. Local bodies, Statutory Corporations and other instrumentalities of the

State falling under Art. 12 of the Constitution are themselves competent to make such a provision, if so advised. (Para 55)

(b) An executive order making a provision under Art. 16(4) is enforceable the moment it is made and issued. (Para 56)

(2)(a) Clause (4) of Art. 16 is not an exception to clause (1). It is an instance and an illustration of the classification inherent in clause (i). (Para 57)

(b) Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens, as explained in this judgment. (Para 58)

(c) Reservations can also be provided under clause (1) of Art. 16. It is not confined to extending of preferences, concessions or exemptions alone. These reservations, if any, made under clause (1) have to be so adjusted and implemented as not to exceed the level of representation prescribed for 'backward class of citizens' - as explained in this judgment. (Para 60)"

In paragraph 122, their Lordships have further clarified as follows:

"(1) Article 16(4) is not an exception to Art. 16(1). It is an instance of classification inherent in Art. 16(1). Art. 16(4) is exhaustive of the subject of reservation in favour of backward classes, though it may not be exhaustive of the very concept of reservation. Reservations for other classes can be provided under clause (1) of Art. 16.

(2) The expression "backward class" in Art. 16(4) takes in 'Other Backward Classes', S.Cs., S.Ts. and may be some other backward classes as well. The accent in Art. 16(4) is upon social backwardness. Social backwardness leads to educational backwardness and economic backwardness. They are mutually contributory to each other and are intertwined with low occupations in the Indian society. A caste can be and quite often is a social class in India. Economic criterion cannot be the sole basis for determining the backward class of citizens contemplated by Art. 16(4). The weaker sections referred to Art. 46 do include S.E.B.Cs. referred to in Art. 340 and covered by Art. 16(4)."

13. In this regard, it will not be out of place to refer to the decision in **State of M.P. v. Ram Kishna Balothia,** AIR 1995 SC 1198 wherein the Apex Court, while upholding the constitutional validity of Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, referred to the Statement of Objects and Reasons of the Act and expressed the view as follows:

> "The above statement graphically describes the social conditions which motivated the said legislation. It is pointed out in the above Statement of Objects and Reasons that when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interests try to cow them down and terrorise them. In these circumstances, if anticipatory bail is not made available to persons who commit such offences, such a denial cannot be considered as unreasonable or violative of Article 14, as these offences form distinct class by themselves and cannot be compared with other offences."

True it is, the said decision was rendered in the context of non-availability of the benefit of Section 438 of the Code of Criminal Procedure but we have referred to the same only to highlight the social conditions of the Scheduled Castes and Scheduled Tribes people.

14. In this regard, we may profitably refer to certain paragraphs from **Union of India v. S.C. Bagari,** AIR 1999 SC 1412 wherein the Apex Court has held thus:

> "13. In **State of Mysore v. P. Narasinga Rao,** AIR 1968 SC 349: ((1968) 1 SCR 407), this Court considered the validity of the Rules and it was inter alia held that it is well-settled that though Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation and when any impugned rule or statutory provision is assailed on the ground that it contravenes Article 14, its validity can be sustained if two tests are satisfied namely classification on which it is founded must be based on an intelligible differentia which distinguishes persons or things grouped together from others left out of the group, and the second test is that the differentia in question must have a reasonable relation to the object sought to be achieved and in other words there must be some rational nexus between

the basis of classification and the object intended to be achieved. It was also held that Articles 14 and 16 form part of the same constitutional code of guarantees and supplement each other and in other words Article 16 is only an instance of the application of the general rule of equality laid down in Article 14 and it should be construed as such and, therefore, there is no denial of equality of opportunity unless the person who complains of discrimination is equally situated with the person or persons who are alleged to have been favoured.

14. In the decision of this Court in **Indian Railway SAS Staff Association v. Union of India,** (1988) 2 SCC 651: (1998 AIR SCW 524), it was held that there can be many criteria for classification of posts such as administrative procedure and others which have to be taken into consideration by the authorities concerned before deciding on the classification.

15. Situated thus, broadly speaking, concept of equality has an inherent limitation arising from very nature of the guarantee under the Constitution and those who are similarly circumstanced are entitled to equal treatment. If there is a rational classification consistent with the purpose for which such classification was made, equality is not violated. Article 16 of the Constitution does not bar a reasonable classification of employees or reasonable tests for selection. Equality of opportunity of employment means equality as between members of the same class of employees and not equality between members of separate independent classes."

15. In this regard, we may fruitfully refer to the Constitution Bench decision in **M. Nagaraj v. Union of India,** (2006) 8 SCC 212 wherein it has been stated thus:

"102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" rule and "consequential seniority" are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are

not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from Clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is - whether the impugned amendments discard the original constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicate that the impugned amendments have been promulgated by Parliament to overrule the decision of this Court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in Virpal Singh, Ajit Singh (I), Ajit Singh (II) and

Indra Sawhney were judgments delivered by this Court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well settled that Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this Court will certainly set aside and strike down such legislation. Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism, etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets – "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the rule of law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

106. The gravamen of Article 14 is equality of treatment. Article 14 confers a personal right by enacting a prohibition which is absolute. By judicial decisions, the doctrine of classification is read into Article 14. Equality of treatment under Article 14 is an objective test. It is not the test of intention. Therefore, the basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances. [Emphasis added]. Every discretionary power is not necessarily discriminatory. According to the Constitutional Law of India, by H.M. Seervai, 4th Edn. 546, equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred. This is the theory of "guided power". This theory is based on the assumption that in the event of arbitrary exercise by those on whom the power is conferred, would be corrected

by the Courts. This is the basic principle behind the enabling provisions which are incorporated in Articles 16(4-A) and 16(4-B). Enabling provisions are permissive in nature. They are enacted to balance equality with positive discrimination. The constitutional law is the law of evolving concepts. Some of them are generic, others have to be identified and valued. The enabling provisions deal with the concept, which has to be identified and valued as in the case of access vis-à-vis efficiency which depends on the fact situation only and not abstract principle of equality in Article 14 as spelt out in detail in Articles 15 and 16. Equality before the law, guaranteed by the first part of Article 14, is a negative concept while the second part is a positive concept which is enough to validate equalizing measures depending upon the fact situation.

107. It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for Backward Classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making ˇreservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between "equality in law" and "equality in fact" (See: Affirmative Action by William Darity).

If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred."

16. Applying the aforesaid test, it is quite clear that Regulation 4(iii-a) confers the power on the Union of India to issue a notification. It has so done by issuing a notification. It has limited seven attempts to the Other Backward Classes. The same is a reasonable exercise of power and a guided one. As far as the Scheduled Castes and Scheduled Tribes are concerned, number of attempts is not fixed. In the opinion of the Union of India they are to be given chances to compete to the best of their ability and come to the mainstream. That apart, though unlimited chances are given, yet the upper age limit is prescribed. Thus, it is not unreasonable. Quite apart from the above, it is noteworthy in view of the historical backdrop of the constitutional provisions. Hence, we are of the considered opinion that it meets the test of reasonable classification. Judged from these angles, we are of the considered opinion the said Regulation does not suffer from the vice of Articles 14 or 16 of the Constitution of India.

17. Consequently, the writ petition, being devoid of merit, stands dismissed without any order as to costs.

ILR (2011) IV DELHI 692
R.S.A.

SH. GHANSHYAM DASS GUPTA & ANR. ....APPELLANTS

VERSUS

SH. PREM CHAND ....RESPONDENT

(INDERMEET KAUR, J.)

R.S.A. NO. : 61/2009 DATE OF DECISION: 24.05.2011

Delhi Rent Control Act, 1958—Section 2(1), 50: Whether protection of S. 50 is available to the son of the original tenant when after the death of the original tenant the tenancy was inherited by his widow, in whose lifetime the tenancy was terminated—Held—After the death of original tenant, the tenancy would devolve first upon the spouse and then upon the children i.e. son or daughter—Where legal heir not financially dependent on the deceased, the tenancy would be inheritable only for 1 year—Successor of each category shall not pass on his inheritance to the next lower category—Right of every successor to continue in possession will be personal to him and shall not on his death devolve upon any other heir—Held—Bar of S. 50 not available to the son of the original tenant and the landlord. Appeal Allowed.

The category of succession has been detailed. After the death of original tenant, the tenancy would devolve first upon the spouse and then upon the children i.e. son or daughter; as in this case first upon the widow & then upon his son and daughter; explanation II states that where the legal heir was not financially dependent upon the deceased, the tenancy would be inheritable for 1 year only; explanation III clause (a) & (b) explains that the successor of each category shall not pass on this inheritance to the next lower

category; thus right of every successor to continue in possession will be personal to him and shall not on his death devolve upon any other heir. Khazani Devi was the spouse of the original tenant i.e. Ram Sharan. In the plaint, it has been specifically averred that Khazani Devi was the only person financially dependent upon Ram Sharan and her tenancy had been terminated vide a legal notice during her own lifetime. This had been adverted to while dealing with issue no. 2; the trial Judge had returned a fact finding that the tenancy of Khazani Devi had been validly terminated vide Ex.PW-1/3. The impugned judgment had rejected this finding on the legal proposition that the tenancy had devolved upon all the legal heirs i.e. upon the spouse and the children together. This was incorrect. The impugned judgment had upheld the finding of trial Judge on issue No. 1 holding that tenancy of Ram Sharan had not been validly terminated but had gone on to proceed that all the legal heirs of Ram Sharan had become tenants after the death of Ram Sharan by operation of law; the notice dated 18.11.1996 (Ex.PW-1/3) issued to Khazani Devi had no sanctity in the eyes of law as all children were also tenants along with Khazani Devi. **(Para 11)**

After the termination of the tenancy of Khazani Devi during her lifetime and her right to inherit the tenancy being personal; after her the other legal heirs did not get a right to inherit the tenancy; it was also not the case of the defendant that he was financially dependent upon his deceased father and was entitled to the tenancy on that count. This was never his defence (as is evident from the written statement) that he was living in the premises with his father or was financially dependent upon him. The defendant had thus become an unauthorized occupant. His unauthorized occupation had also been terminated vide legal notice dated 03.10.2006 (Ex.PW-1/7). There is no dispute about this fact. The defendant having become an unauthorized occupant, he was liable to be evicted. **(Para 13)**

The bar of Section 50 of the DRCA was thus not applicable;

there was no relationship of landlord and tenant between the parties. The period of one year available after the death of statutory tenant to heirs who are not financially dependent upon the deceased was long since over. The defendant being an unauthorized tenant was rightly ordered to be evicted. The finding in the impugned judgment is perverse. **(Para 15)**

[An Ba]

APPEARANCES:

FOR THE APPELLANTS : Mr. Yogesh Chhabra, Advocate.

FOR THE RESPONDENT : Mr. Faiz Ahmad, Advocate.

CASE REFERRED TO:

1. *Krishna Prakash & Ors.* vs. *shanta Sinha Chinoy & Anr.)* ILR (1980) II Delhi 854.

RESULT: Appeal allowed.

INDERMEET KAUR, J.

1. This appeal has impugned the judgment and decree dated 05.03.2009 which has reversed the finding of the trial Judge dated 03.07.2008. Vide judgment and decree dated 03.07.2008 the suit filed by the plaintiffs Ghanshyam Dass Gupta & Anr seeking possession of the suit property (i.e. two rooms with common latrine and open and covered verandah on the ground floor of property bearing No. 2918, Aryapura Subzi Mandi, Delhi-110007) had been decreed. The impugned judgment had reversed this finding; suit of the plaintiffs stood dismissed.

2. The case of the plaintiff is that his father Baishakhi Ram Gupta was the owner of the aforenoted suit property. He had tenanted the suit premises to Ram Sharan. After the death of Ram Sharan his widow Khazani Devi had inherited the tenancy which tenancy was terminated during her lifetime. Defendant who is her son is an unauthorized occupant. Rent has also not been paid. Legal notice dated 03.10.2006 (Ex.PW-1/7) had been served upon the defendant terminating his tenancy but to no avail. Present suit was thereafter filed seeking possession of the suit property as also damages.

3. The defendant refuted the claim of the plaintiff. His case was that all the legal heirs of Ram Sharan were dependent upon him; they had inherited the tenancy; the defendant being the son of Ram Sharan is a tenant in his own right; rate of rent being below Rs.3,500/- per month, protection under Section 50 of the Delhi Rent Control Act (DRCA) is available to the defendant; he could not be evicted.

4. On the pleadings of the parties, the following seven issues were framed:-

1. Whether the tenancy of Sh. Ram Sharan was duly and validly terminated. If so, its effect? OPP
2. Whether the tenancy of Smt. Khazani Devi was duly and validly terminated. If so, its effect? OPP
3. Whether the suit has been properly valued for the purpose of court fees and jurisdiction? OPP
4. Whether the suit of the plaintiff is barred by section 50 of DRC Act 1958? OPD
5. Whether the suit is without cause of action? OPD
6. Whether the plaintiff is entitled to recover arrears of rent and damages as prayed for in para B of the Relief? OPP
7. To what relief(s) the plaintiff is entitled to?

5. Oral and documentary evidence was led. Issue no. 1 was decided against the plaintiff. It was held that the tenancy of Ram Sharan had not been validly terminated. Issue No. 2 was decided in favour of the plaintiff. The trial Judge was of the view that the tenancy of Khazani Devi has been validly terminated vide notice Ex. PW-1/3 dated 18.11.1996 terminating her tenancy w.e.f. 31.12.1996; the postal receipt Ex. PW-1/4 and certificate of posting Ex. PW-1/5 had been adverted to; the original A.D. Card bearing her thumb impression Ex.PW-1/6 was also noted. This issue was decided in favour of the plaintiff. The trial Judge while dealing with issue No. 4 had noted that the bar of Section 50 of the DRCA is not applicable; the provisions of Section 2 (l) of DRCA had been expounded; the Court had held that the averment of the plaintiff was specific to the effect that Khazani Devi was the only legal heir of Ram Sharan who was financially dependent upon her; her tenancy had also been validly terminated during her lifetime; no other legal heir inherited

the tenancy; the defendant was an unauthorized occupant; suit of the plaintiff was accordingly decreed.

6. This finding was reversed in appeal. The appellate court was of the view that the notice dated 18.11.1996 sent to Khazani Devi has no sanctity in law as all the legal heirs of the Ram Sharan were protected under the DRCA; jurisdiction of the civil court was barred. Civil suit was not maintainable.

7. This is a second appeal. It has been admitted and on 15.11.2010, the following substantial question of law was formulated:-

> "Whether the impugned judgment dated 05.03.2009 holding that the provision of Section 50 of the Delhi Rent Control Act, 1958 is attracted is not a perverse finding and if so its effect?"

8. On behalf of the appellant, it has been urged that the impugned judgment dismissing the suit is a perversity. The trial court had failed to appreciate Section 2(l) of the DRCA which had been incorporated by the amendment of 1975. It is pointed out that Khazani Devi was in the first category of inherited tenant; her tenancy was also validly terminated during her lifetime; this finding of the trial Judge has in fact not been upset in the impugned judgment. The impugned judgment had proceeded on the wrong assumption that all the legal heirs were liable for protection under the DRCA. The judgment suffering from a perversity is liable to be interfered with.

9. Arguments have been rebutted. It is pointed out that the impugned judgment calls for no interference.

10. The Delhi Rent Control Act, 1958 is a statute which had been promulgated for providing for the control of rents and evictions. Section 2 (l) of the DRCA is relevant and it reads as under:-

> 2. In this Act, unless the context otherwise requires,-
>
> (l) 'tenant' means any person by whom or onwhose account or behalf the rent of any premises is, or, but for a special contract, would be, payable, and includes-
>
> (i) ……
>
> (ii)……

(iii) in the event of the death of the person continuing in possession after the termination of his tenancy, subject to the order of succession and conditions specified, respectively, in Explanation I and Explanation II to this clause, such of the aforesaid person's-

(a) spouse,

(b) son or daughter, or, where there are both son and daughter, both of them,

(c) parents,

(d) daughter-in-law, being the widow of his pre-deceased son, as had been ordinarily living in the premises with such person as a member or members of his family up to the date of his death, but does not include,-

(A) any person against whom an order or decree for eviction has been made, except where such decree or order for eviction is liable to be re-opened under the proviso to section 3 of the Delhi Rent Control (Amendment) Act, 1976. 18 of 1976.

(B) XXXXXXXX

Explanation 1.-The order of succession in the event of the death of the person continuing in possession after the termination of his tenancy shall be as follows;-

Explanation II-If the person, who acquires, by succession, the right to continue in possession after the, termination of the tenancy, was not financially dependent on the deceased person on the date of his death, such successor shall acquire such right for a limited period of one year; and, on the expiry of that period, or on his death, whichever is earlier, the right of such successor to continue in possession after the termination of the tenancy shall become extinguished.

Explanation III.-For the removal of doubts, it is hereby declared that,-

(a) where, by reason of Explanation II,. the right of any successor to continue in possession after the termination of the tenancy becomes extinguished, such extinguishment shall not affect the

right of any other successor of the same category to continue in possession after the termination of the tenancy; but if there is no other successor of the same category, the right to continue in possession after the termination of the tenancy shall not, on such extinguishment, pass on to any other successor specified in any lower category or categories, as the case may be;

(b) the right of every successor, referred to in Explanation L to continue in possession after the termination of the tenancy, shall be personal to him and shall not, on the death of such successor, devolve on any of his heirs;]

11. The category of succession has been detailed. After the death of original tenant, the tenancy would devolve first upon the spouse and then upon the children i.e. son or daughter; as in this case first upon the widow & then upon his son and daughter; explanation II states that where the legal heir was not financially dependent upon the deceased, the tenancy would be inheritable for 1 year only; explanation III clause (a) & (b) explains that the successor of each category shall not pass on this inheritance to the next lower category; thus right of every successor to continue in possession will be personal to him and shall not on his death devolve upon any other heir. Khazani Devi was the spouse of the original tenant i.e. Ram Sharan. In the plaint, it has been specifically averred that Khazani Devi was the only person financially dependent upon Ram Sharan and her tenancy had been terminated vide a legal notice during her own lifetime. This had been adverted to while dealing with issue no. 2; the trial Judge had returned a fact finding that the tenancy of Khazani Devi had been validly terminated vide Ex.PW-1/3. The impugned judgment had rejected this finding on the legal proposition that the tenancy had devolved upon all the legal heirs i.e. upon the spouse and the children together. This was incorrect. The impugned judgment had upheld the finding of trial Judge on issue No. 1 holding that tenancy of Ram Sharan had not been validly terminated but had gone on to proceed that all the legal heirs of Ram Sharan had become tenants after the death of Ram Sharan by operation of law; the notice dated 18.11.1996 (Ex.PW-1/3) issued to Khazani Devi had no sanctity in the eyes of law as all children were also tenants along with Khazani Devi.

12. This was a wrong legal proposition and against the purport of section 2 (l) of the DRCA which has categorized the manner in which

the tenancy has to devolve after the death of statutory tenant. It first has to devolve upon the widow of the statutory tenant who in this case was Khazani Devi; she was the only heir financially dependent and living with the deceased at the time of his death. The impugned judgment had not set aside the fact finding that Ex.PW-1/3 had terminated the tenancy of Khazani Devi; it had proceeded on the assumption that since all the legal heirs of Ram Sharan had become tenants, termination of tenancy of Khazani Devi by itself was not sufficient; other legal heirs had also become tenants. This as already noted was an incorrect proposition.

13. After the termination of the tenancy of Khazani Devi during her lifetime and her right to inherit the tenancy being personal; after her the other legal heirs did not get a right to inherit the tenancy; it was also not the case of the defendant that he was financially dependent upon his deceased father and was entitled to the tenancy on that count. This was never his defence (as is evident from the written statement) that he was living in the premises with his father or was financially dependent upon him. The defendant had thus become an unauthorized occupant. His unauthorized occupation had also been terminated vide legal notice dated 03.10.2006 (Ex.PW-1/7). There is no dispute about this fact. The defendant having become an unauthorized occupant, he was liable to be evicted.

14. In the judgment of ILR (1980) II Delhi 854 **Krishna Prakash & Ors. Vs. shanta Sinha Chinoy & Anr.)** the Division Bench of this Court had noted as follows:-

> "…….The amended section 2(1) has been reproduced above. Briefly, the relief given is that the most preferable legal representative who was living with the family of the tenant at the time of his death and who was financially dependent on his death would be regarded as the successor of the tenant enjoying the statutory protection which had been enjoyed by the tenant prior to the death of the tenant. On the contrary, if such, a heir was not financially dependent on the tenant on the death of the tenant, than such a successor would acquire the right to continue in possession of the leased premises only for a period of one year and on the expiry of that period this right to continue in possession would come to an end.
>
> XXXXXXXXXXXXXXXXX

> ……..Broadly speaking, there are two-fold remedies which are available to the landlord against the legal representatives of the tenant. If the legal representative who continues in occupation of the premises was living with the landlord at the time of his death and was also financially dependent on the date of his death; then such a legal representative would inherit the tenancy or the statutory protection of the tenant and would be a tenant for the purpose of the Act. The proceeding for eviction against such a person can be filed by the landlord only under the Act, and, therefore, before the Controller. During the relationship between the landlord and the tenant the landlord would have to take recourse to the proceeding under the Act and would have to prove one of the causes of action which would entitle him to evict the tenant under the Act. If is the order of the Controller upholding the contention of the landlord which would secure the eviction of the. tenant in favor of the landlord. On the contrary, if the landlord fails to prove the facts Constituting the cause of action, the eviction petition would stand dismissed and the leased premises would continue to be held by the legal representatives of the tenant who are in the same position as the deceased tenant was. Such a successor of the deceased tenant can be evicted by the landlord .precisely in the same way as the deceased tenant would be evicted and no other manner and in no other forum. On the other hand, if the landlord avers that the particular heir of the deceased tenant who is continuing in possession after the death of the tenant was not ordinarily living in the premises with the tenant, as a member of his family up to the time of the death of the tenant and/or was not financially dependent on the deceased tenant on the date of the death of the tenant then such a successor under Explanation II to section 2(1) acquired a right to continue in possession of the demised premises only fora period of one year and on the expiry of that period or on his death whichever is earlier the right of such a successor to continue in possession becomes extinguished. On the averment of such facts, there would be no relationship of landlord and tenant between the owner of the premises and a person Who is in unlawful possession of the premises because he has not inherited the tenancy or the statutory protection of the deceased tenant. The proceeding for

the eviction of such a person would be a proceeding for the eviction of a trespasser. The forum for eviction would, therefore, be-a civil court and a suit for possession on the ground of title against a trespasser would have to be filed by the landlord on these facts. Such a proceeding would not be under the Act but would be outside it. It is true that for success of such a suit the landlord would have to prove the facts showing that the person in possession is not entitled to the tenancy or the statutory protection which could be inherited from the tenant in terms of the amended definition of tenant in section 2(1) of the Act. But the decision of the averments made by the landlord would have to be by the civil court because the averments amounted to saying that the person to be evicted is not a tenant at all."

15. The bar of Section 50 of the DRCA was thus not applicable; there was no relationship of landlord and tenant between the parties. The period of one year available after the death of statutory tenant to heirs who are not financially dependent upon the deceased was long since over. The defendant being an unauthorized tenant was rightly ordered to be evicted. The finding in the impugned judgment is perverse.

16. Substantial question of law is answered in favour of the appellants and against the respondent. Appeal is allowed. Suit of the plaintiffs stands decreed.

ILR (2011) IV DELHI 702
RFA

DEEPSONS DEPARTMENTAL STORE ....PETITIONER

VERSUS

Y.N. GUPTA ....RESPONDENT

(G.S. SISTANI, J.)

RFA NO. : 758/2010 DATE OF DECISION: 24.05.0211

Code of Civil Procedure, 1908—Order 12 Rule 6—Indian Evidence Act, 1872—Section 114—General Causes Act, 1897—Section 27—Transfer of Property Act, 1882—Section 106—Appellant Partnership firm tenant of suit property on monthly basis—Notice dated 11.05.2009 sent by respondent/landlord terminating tenancy—Appellant refused to accept notice—Second notice dated 5.6.2009 terminating tenancy also refused—Application u/Order 12 Rule 6 allowed by trial court—Contention of appellant that notice not received and service report manipulated—Also that since service denied, trial court should have recorded evidence of service instead of allowing application u/ Order 12 Rule 6—Held, it cannot be said as a universal rule that the moment receipt of a notice is denied the sender can only prove the same by leading evidence—The conduct of the appellant and fact that no document was placed on record to show that notices were not served upon the appellant and applying the settled position of law there is enough material on record to raise presumption u/s 27 General Clauses Act that the notices were served—Denial by appellant far outweighed by the documents placed on record by respondent—Mere denial of service of notice is not rebuttable of the presumption u/s 27—Legal notice terminating tenancy of the appellant firm deemed to

be duly served upon the appellant by virtue of presumption u/s 27 of the General Causes Act as sufficient evidence in the form of postal receipts, registered AD card and certificate of posting that had been placed on record by the respondent—Even presuming that notice not served, tenancy would stand terminated under general law on filing of suit for eviction—Respondent rightly entitled to decree—Appeal dismissed with costs of Rs. 20,000/-.

Important Issue Involved: It cannot be said as a universal rule that the moment receipt of a notice u/s 106 TPA sent through post/regd AD is denied the sender can only prove the same by leading evidence. Mere denial of service of notice is not rebuttable to the presumption u/s 27. The conduct of the appellant and view of the fact that no document was placed on record to show that the notices were not served upon the appellant would be sufficient to raise a presumption u/s 27 General Clauses Act that notice terminating tenancy were served.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Vikas Dhawan and Mr. S.P. Das, Advocates.

FOR THE RESPONDENT : Mr. Sandeep Sethi,. Sr. Advocate With Mr. Rajesh Gupta and Mr. Harpreet Singh, Advocates.

CASES REFERRED TO:

1. *Hill Elliot and Company Ltd.* vs. *Bhupinder Singh* reported at 2011(121) DRJ 438 (DB).
2. *M/s Jeevan Diesels & Electronics Ltd.* vs. *M/s Jasbir Singh Chadha (HUF) & Anthr* reported at 2010 (6) SCC 601.
3. *Jindal Dyechem Industries Pvt. Ltd.* vs. *Pahwa*

International Pvt. Ltd, (2009)113 DRJ 214.

4. *Ms. Rohini* vs. *RB Singh* reported at 155(2008) DLT 440.
5. *V.N. Bharat* vs. *Delhi Development Authority And Another,* reported at (2008) 17 Supreme Court Cases 321.
6. *Nopany Investments (Pvt.) Ltd.* vs. *Santokh Singh (HUF)* reported at (2008)2 SCC 728.
7. *C.C. Alavi Haji* vs. *Palapetty Muhammed and another* reported at (2007)6 SCC 555.
8. *D. Vinod Shivappa* vs. *Nanda Belliappa,*(2006) 6 SCC 456: 2006(89) DRT 129 (SC).
9. *Rajiv Sharma And Another* vs. *Rajiv Gupta,* reported at (2004) 72 DRJ 540.
10. *Tele Tube Electronics Ltd.* vs. *Delhi Sales Tax Appellate Tribunal and Ors.,* 101 (2002) DLT 337 (DB): 2003(67) DRJ 68(DB).
11. *Ms. Rama Ghai* vs. *State Handloom Corporation* 91 (2001) DLT 386.
12. *Atma Ram Property Ltd.* vs. *Pal Property Pvt. Ltd.* 91 (2001) DLT 438.
13. *M. Nar Singh Rao* vs. *State of Andhra Pradesh* AIR 2001 SC 318.
14. *Uttam Singh Duggal & Co. Ltd.* vs. *United Bank of India* reported at (2000) 7 SCC 120.
15. *Rail India Technical & Economic Service Ltd.* vs. *I.M.Puri and Ors.* 2000(52) DRJ 538.
16. *K. Bhaskaran* vs. *Sankaran Viadhyan Balan* reported at AIR 1999 SC 3762.
17. *Shimla Development Authority and Ors.* vs. *Smt. Santosh Sharma and Anr.* JT 1996(11) SC 254.
18. *M/s. Green View Radio Service* vs. *Laxmibai Ramji and Anr.,* AIR 1990 SC 2156.
19. *Green View Radio Service* vs. *Laxmibai Ramji And*

Another, reported at (1990) 4 SCC 497.

20. *M/s Madan and Co.* vs. *Wazir Jaivir Chand* reported at AIR 1989 SC 630.

21. *Sodhi Transport Co. And Others* vs. *State of U.P. And Others,* reported at (1986) 2 SCC 486.

22. *Harcharan Singh* vs. *Shivrani* reported at (1981)2 SCC 535.

23. *Puwada Venkateswara Rao* vs. *Chidamana Venkataramana,* reported at AIR 1976 SC 869.

24. *Mangilal* vs. *Sugan Chand Rathi (deceased)* AIR 1965 SC 101.

25. *Janakiram Narhari Sahane* vs. *Damodar Ramachandra Joshi* reported at AIR 1956 Nagpur 266.

26. *Harihar Banerji* vs. *Ramshashi Roy* AIR 1918 PC 102.

RESULT: Appeal dismissed.

G.S. SISTANI, J. (ORAL)

1. Present appeal has been filed by the appellant, assailing the judgment and decree dated 30.9.2010 passed by learned Additional District Judge, Delhi, on an application filed under Order XII Rule 6 Code of Civil Procedure (hereinafter referred to as "CPC") with respect to property bearing no.E-17, Connaught Place, New Delhi, (hereinafter referred to as "the suit property").

2. The brief facts of the case, as noticed by the learned Additional District Judge, are that the appellant is a partnership firm and was a month-to-month tenant of the suit property at a monthly rent of Rs. 3,543/-. The tenancy was terminated by the respondent by a notice dated 11.5.2009. The appellant had refused to accept the notice on 12.5.2009. Thus, according to the respondent, the appellant was deemed to have been served with the notice. It is also the case of the respondent before the trial court that the suit property has been sub-let by the appellant to M/s Reebok India Company and the respondent landlord without prejudice to the service of earlier notice dated 11.5.2009 had sent another notice dated 5.6.2009, which notice was again refused by the appellant. The trial court has also noticed that the appellant has not denied the execution

of lease deed dated 13.8.1970 as this document has been filed by the defendant i.e. appellant herein. There is also no denial of the rate of rent.

3. The basic thrust of the argument of learned counsel for the appellant is that respondents have failed to satisfy the mandatory condition, as laid down in Section 106 of Transfer of Property Act of the service of a fifteen days' notice to the tenant terminating the tenancy.

4. It is contended by learned counsel for the appellant that appellant did not receive the legal notices dated 11.5.2009 and 5.6.2009. It is further contended that service report of refusal is manipulated and, thus, the judgment and decree passed by learned trial court is against the facts and law. It is next contended that learned trial court has grossly erred in not appreciating that evidence regarding refusal of the notice must be clear and convincing. Counsel further contends that it is neither unusual nor unknown that endorsement of refusal can be got made through postman either without proper care or sometimes deliberately.

5. Learned counsel for the appellant submits that trial court has failed to appreciate the drastic consequences and the ease with which an endorsement of refusal may be available. Counsel further submits that it was the duty of the trial court to ensure that very clear and convincing evidence of the service of demand notice was available on record.

6. Learned counsel for the appellant has laboured hard in support of his contention that presumption under Section 27 of the General Clauses Act and Section 114 of the Indian Evidence Act are rebuttable presumptions. Mr. Dhawan submits that once the appellant had denied receipt of notice no decree could have been passed without recording the evidence in the case as to whether the alleged notices of termination of tenancy were tendered and, if tendered, to whom and who has refused to accept the same. Counsel further submits that the report made by the concerned postman is manipulated/procured and in the absence of service of notice of termination of tenancy under Section 106 of the Transfer of Property Act, no suit for possession was maintainable and secondly, no decree under Order XII Rule 6 CPC could have been passed.

7. While relying on **Janakiram Narhari Sahane v. Damodar Ramachandra Joshi** reported at AIR 1956 Nagpur 266, learned counsel for the appellant contends that when there is no evidence before the Court as to how the registered cover containing notice to quit under

Section 106 of the Transfer of Property Act was tendered, to whom the same was tendered and who made the endorsement, the suit cannot be decreed.

8. The learned counsel for the appellant further submits that notices in question were neither tendered to the partners of the firm nor have they ever refused to accept the said notices. Counsel further submits that in view of the above situation and a clear cut denial, it was a fit case in which evidence was required to be adduced and no decree for possession under Order XII Rule 6 CPC could have been passed. Counsel also submits that the trial court has also failed to appreciate the law laid down in 1976 PCR 151, more particularly head note "C", which is reproduced below:

> "C. Evidence Act – Section 114 – General Clauses Act – Section 27 – Transfer of Property Act – Section 106 of TP Act notice determining the tenancy sent through a registered cover-notice received back with endorsement "refused" – presumption of service under section 27 of General Clauses Act and Section 114 of the Evidence Act are not conclusive but rebuttable – Bare statement on oath denying tender is sufficient to rebut the presumption, if party making statement inspires confidence….
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> Held, a bare statement on oath by the tenant denying the tender and refusal to accept the delivery was sufficient to rebut the presumption because by making such a statement on oath the tenant has really produced the best possible evidence he could. The presumption raised there with regard to the tender to him of a postal cover and refusal by him of its delivery. The best he could do is to make a statement on oath that no such tender was even made to him and there was, therefore, no question to refuse the delivery. What other evidence could be possibly given in such a case? Such evidence would be sufficient to shift the onus to the landlord to establish actual tender and refusal to accept the delivery inter alia by producing the postman concerned."

9. Learned counsel for the appellant submits that in the present case the trial court did not offer any opportunity to the parties to lead evidence and in the absence thereof no decree could have been passed. Counsel for the appellant has also drawn the attention of the Court to the copy

of the written statement placed on record, wherein in paragraphs 4 and 5 the appellant has categorically denied receipt of legal notices dated 11.05.2009 and 05.06.2009.

10. Learned counsel for the appellant has relied upon **V.N. Bharat v. Delhi Development Authority And Another,** reported at (2008) 17 Supreme Court Cases 321, more particularly paragraphs 24 to 28, in support of his contention that once the service of notice has been denied, the onus of proving notice shifts back on the person issuing the notice. Paragraphs 24 to 28 read as under:

> "**24.** Ms Tripathy urged that since the notice of demand in respect of fifth and final instalment had been duly sent to the appellant by registered post with acknowledgment due at the address given by him, there would be a statutory presumption under Section 114 Illustration (f) of the Evidence Act that the demand notice had been duly served on the appellant. Ms Tripathy urged that the Commission rightly dealt with the matter and no ground had been made out on behalf of the appellant for interference with the same.
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> **25.** As will be evident from what has been mentioned hereinbefore, the real controversy in this appeal appears to be whether the demand letter dated 11-9-1996, for payment of the fifth and final instalment had, in fact, been received by the appellant and as to whether non-compliance with the same resulted in termination of the appellant's allotment and whether the restoration of such allotment on a representation made by the appellant would amount to a fresh or new allotment.
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> **26.** As submitted by Ms Tripathy, except for the statutory presumption under Section 114 Ill. (f) of the Evidence Act, there is no other material to suggest that the demand notice had actually been received by the appellant.
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> **27.** The assertion of service of notice on account of such presumption has been denied by the appellant as a result whereof onus of proving service shifted back to the respondent. The respondent DDA has not led any other evidence in support of the presumption of service. In such circumstances, it has to be held that such service had not been effected. Therefore, when on the

appellant's application for restoration of the allotment, the allotment was restored, the only conclusion that can be arrived at is that the earlier allotment continued as no cancellation and/or termination had, in fact, taken place in terms of Clause 4 of the Scheme in question.

28. As far as the MRTP Commission is concerned, there is no definite finding on the question of service of the demand notice. On the other hand, the Commission presumed that the appellant must have had knowledge of the allotment which had been widely publicised in leading newspapers. According to the Commission, it was for the appellant to have made inquiries relating to completion of the construction and it should have waited for a demand notice to have been sent to him. In our view, the Commission also erred in placing the onus of proof of service of the demand notice on the appellant, since except for denial there is nothing else that the appellant could have produced to prove a negative fact. As we have indicated hereinbefore, the presumption under Section 114 Ill. (f) of the Evidence Act is a rebuttable presumption and on denial of receipt of the registered letter from DDA the appellant discharged his onus and the onus reverted back to the respondent to prove such service by either examining the postal authorities or obtaining a certificate from them showing that the registered article had been delivered to and had been received by the appellant. It is on a mistaken understanding of the provisions of Section 114 Ill. (f) of the Evidence Act that the Commission came to the erroneous conclusion that the allegation of unfair trade practice on the part of the respondent Authority had not been proved. In our view, from the material on record it is quite clear that the respondent Authority was unable to prove that service of the demand notice for the fifth and final instalment had been effected on the appellant."

11. Learned counsel for the appellant has also relied upon **Puwada Venkateswara Rao v. Chidamana Venkataramana,** reported at AIR 1976 SC 869, more particularly para 6, which is reproduced below:

"6. It is true that, in **Mangilal v. Sugan Chand Rathi (deceased)** AIR 1965 SC 101,, this Court has held that the provisions of

Section 4 of the Madhya Pradesh Accommodation Control Act of 1955 do not dispense with the requirement to comply with the provisions of Section 106 of the Transfer of Property Act. In that case, however, Section 4 of the Madhya Pradesh Act merely operated as a bar to an ordinary civil suit so that service of a notice under Section 106 of the Transfer of Property Act became relevant in considering whether an ordinary civil suit filed on a ground which constituted an exception to the bar contained in Section 4 had to be preceded by a notice under Section 106 of the Transfer of Property Act. In the context of the remedy of ejectment by an ordinary civil suit, it was held that the usual notice of termination of tenancy under Section 106 of the Transfer of Property Act was necessary to terminate a tenancy as a condition precedent to the maintainability of such a suit."

12. It is contended by learned counsel for the appellant that the case of the appellant is also covered by a recent decision of the Apex Court in **M/s Jeevan Diesels & Electronics Ltd. V. M/s Jasbir Singh Chadha (HUF) & Anthr** reported at 2010 (6) SCC 601 where it has been held that whether or not there is clear unambiguous admission is essentially a question of fact and depends on the facts of each case. It is further contended that learned trial court has incorrectly relied upon the judgments cited by the respondent-landlord and has failed to appreciate that in those cases the presumption was drawn only after the cases were put to trial and statement of parties were recorded.

13. Learned counsel for the appellant has relied upon **Jeevan Diesels And Electricals Limited v. Jasbir Singh Chadha (HUF) And Another,** (supra) more particularly at paras 6 to 9, which are reproduced below:

"6. In the written statement, which was filed by the appellant, Paras 5 and 6 of the plaint have been dealt with in Paras 5 and 6 of the written statement respectively. Those two paragraphs are set out below:

"5. That the contents of Para 5 of the plaint are a matter of record. It is submitted that tenancy has neither expired by efflux of time nor has it been terminated.

6. That in reply to the contents of Para 6 of the plaint, it is submitted that the defendant is in possession of the

premises. There has been no determination of tenancy."

It is clear from a perusal of the aforesaid averments in the written statement that the appellant has disputed (a) the fact of expiry of tenancy by efflux of time; and (b) the appellant has also disputed that there has been a determination of tenancy. So far as receipt of the notice referred to in Para 5 of the plaint is concerned, there has been no denial by the appellant.

7. The learned counsel for the appellant also argued before us that the lease deed cannot be terminated in view of certain clauses contained in the lease. The said argument was opposed by the learned counsel for the respondent-plaintiffs. But in the facts of this case and in view of the nature of the judgment we propose to pass we need not decide those contentions at all.

8. It may be noted herein that to the written statement filed by the appellant, the respondent-plaintiffs did not file any rejoinder. They filed an application under Order 12 Rule 6 of the Code of Civil Procedure for passing a judgment on admission. In the said petition in Para 4, the respondent-plaintiffs also averred as follows:

> "4. That in view of the admission (i) on existence of relationship of landlord and tenant and thereafter (ii) service of the termination notice, the only question left for adjudication for the purpose of possession is whether the termination of the tenancy has been validly terminated?"

9. To that application the appellant had given a reply. In Para 2 of the reply it was again denied by the appellant that there was any admission by them about termination or determination of tenancy. In the said reply it has been stated that in the suit issues are still to be framed and the case be tried in accordance with the Civil Procedure Code as there is no admission by the appellant and the respondent-plaintiffs have to prove its case with legally admissible evidence. As such prayer was made to dismiss the application of the respondent-plaintiffs under Order 12 Rule 6."

14. The counsel for appellant contends that a statement on oath of a party denying the receipt of notice is sufficient to rebut the presumption under section 27 of the General Clauses Act and the burden then shifts

back to the respondent landlord to prove that the service was actually effected. Learned counsel for the appellant has relied upon **Green View Radio Service v. Laxmibai Ramji And Another,** reported at (1990) 4 SCC 497, paragraphs, 3, 4 and 7, which are reproduced below:

> "3. In this connection, we may also point out that the provisions of Section 106 of the Transfer of Property Act require that notice to quit has to be sent either by post to the party or be tendered or delivered personally to such party or to one of his family members or servants at his residence or if such tender or delivery is not practicable, affixed to a conspicuous part of the property. The service is complete when the notice is sent by post. In the present case, as pointed out earlier, the notice was sent by the plaintiff's advocate by registered post acknowledgement due. The acknowledgement signed by the party was received by the advocate of the plaintiff. Thus in our view the presumption of service of a letter sent by registered post can be rebutted by the addressee by appearing as witness and stating that he never received such letter. If the acknowledgement due receipt contains the signatures of the addressee himself and the addressee as a witness states that he never received such letter and the acknowledgement due does not bear his signature and such statement of the addressee is believed then it would be a sufficient rebuttal of the presumption drawn against him. The burden would then shift on the plaintiff who wants to rely on such presumption to satisfy the court by leading oral or documentary evidence to prove the service of such letter on the addressee. This rebuttal by the defendant of the presumption drawn against him would of course depend on the veracity of his statement. The court in the facts and circumstances of a case may not consider such denial by the defendant as truthful and in that case such denial alone would not be sufficient. But if there is nothing to disbelieve the statement of the defendant then it would be sufficient rebuttal of the presumption of service of such letter or notice sent to him by registered post.
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> 4. In the present case it is an admitted position that the notice by registered post had been sent at the proper address. Similar address appeared in the earlier notice given to the defendant and

the same is admitted to have been received by the defendant. It has come on record that the defendant proprietor Amarjeet Singh signs his name differently at different times. This is borne out from his signatures on the receipt of summons in the suit, vakalatnama of his former advocate Mr Mattai and the written statement in the suit which have been signed by him in English in three different ways. It may be further noted that Amarjeet Singh had deposed that he had paid rent for April 1963 to the Gurkha employee of the plaintiffs but no rent receipt was brought to him. He also produced a copy of letter dated June 5, 1963 addressed by him to plaintiffs together with a certificate of posting as Ex.7 (Col. 1). The plaintiffs in this regard did not admit the receipt of this letter and their case was that the copy of letter and certificate of posting Ex.7 (Col. 1) have been fabricated by the defendant of the original written statement. The trial court while dealing with this matter arrived at the conclusion that the copy of the letter dated June 5, 1963 and the certificate of posting were not genuine documents and no reliance could be placed upon them. The above matter was also examined by the High Court in detail and it recorded the finding that the appellant (defendant) had made an unsuccessful attempt by inserting on record a suspicious document in order to make out a case of payment of rent for the month of March 1963. The High Court observed that the learned trial Judge had rightly disbelieved this evidence and it found no reason to differ from him on this point. The above conduct of the defendant goes to show that no reliance can at all be placed on the bald denial of Amarjeet Singh that he did not receive the notice dated September 3, 1963 sent to him by registered post. He was capable of introducing certificate of posting (Ex.7) in support of his case which was found to be not genuine. As already mentioned above, Amarjeet Singh was signing in different manner and his above conduct of relying on a fabricated document clearly goes to show that no credence can be given to his statement that he had not received the notice in question.

7. However, in the facts and circumstances of the case and particularly in view of the fact that the appellant has been carrying on the business at the suit premises for the last about 40 years,

we are of the view that a sufficient time should be given to find out alternative premises. We, therefore, direct that the eviction decree shall not be executed for a period of three years from today subject to the appellant giving the usual undertaking within four weeks from today."

15. Learned counsel for the appellant has relied upon **Sodhi Transport Co. And Others v. State of U.P. And Others,** reported at (1986) 2 SCC 486, more particularly at para 14, which is reproduced below:

"14. A presumption is not in itself evidence but only makes a prima facie case for party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules of presumption are deduced from enlightened human knowledge and experience and are drawn from the connection, relation and coincidence of facts, and circumstances.

16. Per contra, it is contended by counsel for respondent that there is no infirmity in the impugned judgment and decree in view of the facts of the case and the provisions of law. It is submitted by the counsel for respondent that the appellant has clearly admitted the existence of landlord-tenant relationship and the rate of rent has also not been disputed. As regards the service of notice terminating the tenancy of the appellant is concerned, the counsel submits that by virtue of section 27 of the General Clauses Act, there is deemed service of notice and therefore, the respondent is entitled to a decree under Order 12 Rule 6 CPC.

17. Mr. Sandeep Sethi, counsel for respondent has vehemently argued that in view of the fact that the envelopes containing the said notices were sent at the correct address and were returned by the postal authorities with the remarks .not claimed. and .refused. and that the

defendant (appellant herein) has refused to accept the said envelopes, the notices are deemed to have been duly served upon him by implication of law as per the provision of section 27 of the General Clauses Act. Reliance is placed on **K. Bhaskaran v. Sankaran Vaidhyan Balan** reported at AIR 1999 SC 3762 at paras 22 to 25:

> **22.** It is well settled that a notice refused to be accepted by the addressee can be presumed to have been served on him (vide **Harcharan Singh v. Shivrani**[1] **and Jagdish Singh v. Natthu Singh**[2]).
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> **23.** Here the notice is returned as unclaimed and not as refused. Will there be any significant difference between the two so far as the presumption of service is concerned? In this connection a reference to Section 27 of the General Clauses Act will be useful. The section reads thus:
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> > "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 expressions "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."
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> **24.** No doubt Section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in Section 27 (quoted above) can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Any other interpretation can lead to a very tenuous position as the drawer of the cheque who is liable to pay the

1. (1981) 2 SCC 535

2. (1992) 1 SCC 647

> amount would resort to the strategy of subterfuge by successfully avoiding the notice.
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> **25.** Thus, when a notice is returned by the sendee as unclaimed such date would be the commencing date in reckoning the period of 15 days contemplated in clause (d) to the proviso of Section 138 of the Act. Of course such reckoning would be without prejudice to the right of the drawer of the cheque to show that he had no knowledge that the notice was brought to his address. In the present case the accused did not even attempt to discharge the burden to rebut the aforesaid presumption."

18. Further substantiating the above contention, counsel submits that not only the notices, but even the summons sent to the appellant by all modes have also been refused by the appellant. Summons sent through ordinary process were refused by the servant of the appellant stating that the appellant is away from Delhi. Summons sent through speed post and courier receipts have been delivered to the appellant as per the tracking report; and summons sent through registered cover have been received back with the report of refusal. As the appellant had refused to accept the summon. The court proceeded ex-parte against the appellant on 17.12.2009 and the appellant appeared only on 17.04.2010 by which time ex-parte evidence had already been recorded and the matter was kept for final arguments. An application was preferred under Order IX Rule 7 which was allowed by the learned trial court and the appellant filed his written statement. In his written statement, the appellant has not questioned the issuance of notices nor has he questioned the stamps nor the fact that notices were sent at the correct address but has merely denied the receipt of the said notices. The appellant has not placed any document in support of its contention that the postal receipts, refusal report and certificate of posting are false. To support his contention, the counsel has placed reliance on **C.C. Alavi Haji v. Palapetty Muhammed and another** reported at (2007)6 SCC 555 and more particularly at para 8 which reads as under:

> "8. Since in Bhaskaran case[3] the notice issued in terms of Clause (b) had been returned unclaimed and not as refused, the Court posed the question: "Will there be any significant difference

3. (1999) 7 SCC 510 : 1999 SCC (Cri) 1284

between the two so far as the presumption of service is concerned?. It was observed that though Section 138 of the Act does not require that the notice should be given only by "post", yet in a case where the sender has dispatched the notice by post with correct address written on it, the principle incorporated in Section 27 of the General Clauses Act, 1897 (for short .the GC Act.) could profitably be imported in such a case. It was held that in this situation service of notice is deemed to have been effected on the sendee unless he proves that it was not really served and that he was not responsible for such non-service."

19. Reliance is also placed on **M/s Madan and Co. v. Wazir Jaivir Chand** reported at AIR 1989 SC 630 and more particularly at para 6 :

"**6.** We are of opinion that the conclusion arrived at by the courts below is correct and should be upheld. It is true that the proviso to clause (i) of Section 11(1) and the proviso to Section 12(3) are intended for the protection of the tenant. Nevertheless it will be easy to see that too strict and literal a compliance of their language would be impractical and unworkable. The proviso insist that before any amount of rent can be said to be in arrears, a notice has to be served through post. All that a landlord can do to comply with this provision is to post a prepaid registered letter (acknowledgement due or otherwise) containing the tenant's correct address. Once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee under Section 27 of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee or a person authorised by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribe any detailed procedure regarding the delivery of such registered letters. When the postman is unable to deliver it on his first visit, the general practice is for the postman to attempt to

deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the assessee's absence. His responsibilities cannot, therefore, be equated to those of a process server entrusted with the responsibilities of serving the summons of a court under Order V of the CPC. The statutory provision has to be interpreted in the context of this difficulty and in the light of the very limited role that the post office can play in such a task. If we interpret provision as requiring that the letter must have been actually delivered to the addressee, we would be virtually rendering it a dead letter. The letter cannot be served where, as in this case, the tenant is away from the premises for some considerable time. Also, an addressee can easily avoid receiving the letter addressed to him without specifically refusing to receive it. He can so manipulate matters that it gets returned to the sender with vague endorsements such as .not found., .not in station., .addressee has left. and so on. It is suggested that a landlord, knowing that the tenant is away from station for some reasons, could go through the motions of posting a letter to him which he knows will not be served. Such a possibility cannot be excluded. But, as against this, if a registered letter addressed to a person at his residential address does not get served in the normal course and is returned, it can only be attributed to the addressee's own conduct. If he is staying in the premises, there is no reason why it should not be served on him. If he is compelled to be away for some time, all that he has to do is to leave necessary instructions with the postal authorities either to detain the letters addressed to him for some time until he returns or to forward them to the address where he has gone or to deliver them to some other person authorised by him. In this situation, we have to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word 'served' as 'sent by post', correctly and properly addressed to the tenant, and the word 'receipt' as the tender of the letter by the postal peon at the address mentioned in the

letter. No other interpretation, we think, will fit the situation as it is simply not possible for a landlord to ensure that a registered letter sent by him gets served on, or is received by, the tenant."

20. Reliance is also placed on **Hill Elliot and Company Ltd. v. Bhupinder Singh** reported at 2011(121) DRJ 438 (DB) and more particularly at para 15 which reads as under:

"15. Coming to the presumption of service of notice dated 09.08.2008, the notice was sent to Hill Elliott by registered AD post, speed AD post, UPC and by courier service. It was specifically pleaded that the Hill Elliott had refused to accept the notice sent by the courier service whereas a confirmation was given by the Postal Authorities regarding delivery of the notice (article through postal receipt No. 4527 and 4528 dated 9.8.2008) on 12.08.2008. It has been submitted by Shri G.L. Rawal, learned senior counsel for the Appellant that presumption under Section 27 of the General Clauses Act is a rebuttable presumption and since Hill Elliott has denied service of notice dated 9.8.2008 it became a triable issue and the learned Single Judge committed a grave error in presuming service of the notice upon Hill Elliott. In support of his contention, the learned senior counsel has referred to **"Tele Tube Electronics Ltd. v. Delhi Sales Tax Appellate Tribunal and Ors.,** 101 (2002) DLT 337 (DB): 2003(67) DRJ 68(DB) **"D. Vinod Shivappa v. Nanda Belliappa,** (2006) 6 SCC 456: 2006(89) DRT 129 (SC); **"M/s. Green View Radio Service v. Laxmibai Ramji and Anr.,** AIR 1990 SC 2156. There is no dispute about the proposition of law that the presumption of service of notice under Section 27 of the General Clauses Act is a rebuttable presumption. However, the facts of each case have to be seen to reach the conclusion whether any rebuttal is forthcoming from the party who is deemed to have been served. We have already referred to hereinbefore as to how the notice terminating the tenancy was sent to Hill Elliott. A perusal of the relevant paragraphs of the written statement filed by Hill Elliott would show that it had simply denied the receipt/ service of notice. The circumstances under which the notice dated 9.08.2008 was not received by Hill Elliott were not stated either in para 7 of the Preliminary Objections of the written

statement or in reply to Para 5 of the Plaint. Hill Elliott has not stated that the premises during the period the notice is purported to have been served were lying locked; that no responsible person of Hill Elliott was present in the premises during this time or there was any other reason by which the normal course of business of service of notice was prevented. Thus, the denial of service of notice shall be treated as a vague denial and thus deemed to have been admitted."

21. Counsel next submits that the appellant does not dispute the issue of notice nor the appellant pleaded that the address is wrong but has only disputed the receipt of the said notices. Relying upon the case of **Jindal Dyechem Industries Pvt. Ltd. v. Pahwa International Pvt. Ltd,** (2009)113 DRJ 214; counsel for respondent submits that where the notice is dispatched at correct address, then there is a presumption of service under section 27 of the General Clauses Act. The relevant portion of the judgment is reproduced below: "12. In view of the record placed by the plaintiff and in light of the fact that the notice was dispatched to the defendant's correct address through registered post and the AD card was also received back from the defendant, the denial in respect of the said notice by the defendant has no value. The rebuttal in this case, does not go beyond a bald and interested denial of service of the notice by the defendant, which does not displace the onus to rebut the presumption of service. I am unable to accept the arguments advanced by the defendant before this Court that by merely saying the AD card bears somebody else's signature, they have discharged the initial burden to rebut the presumption.

13. In my considered view all the requirement of Order XII Rule VI C.P.C are satisfied, as far as the factum of landlord and the tenant relationship; and the factum of amount of rent is above Rs. 3,500/- both is undisputedly admitted by the defendant and in view of the documents placed on record by the plaintiff, the denial of service of termination of notice is sham and false denial, it was observed by this Court that such kind of bald denial should be ignored in such kind of circumstances. This was so observed in the case of **Ms. Rama Ghai v. State Handloom Corporation** 91 (2001) DLT 386 Para 16 and similar view is reiterated by this Court in the case of **Rajiv Saluja v.**

Bhartia Industries Ltd. and Anr. AIR 2003 Del 142, which reads as under:

> "16. Though in the instant case the service of notice under Section 106 of the Act was not at all necessary because the tenancy had expired by efflux of time by virtue of Section 111A of the T.P. Act but to be on the safer side the plaintiff served notice under Section 106. Mere denial of receipt of such notice cannot come to the rescue of defendant No. 2. Denial is far outweighed by not only postal receipts proving the dispatch at all the addresses of the defendant but also through a certificate from the postal authorities as to the receipt of the notice by the defendants at the suit premises.
>
> 17. I have taken a view in **Rama Ghai v. UP State Handloom Corporation 2001 4 AD (DEL) 471** that in order to invoke the provisions of Order 12 Rule 6 CPC the Court has to scrutinise the pleadings in their totality and ignore the evasive and unspecific denials either as to the relationship or as to the service of notice or as to the nature of tenancy.
>
> 18. If the landlord either under the legal advice or by way of abundant precaution sends notice for termination of tenancy under Section 106 of the T.P. Act after the expiry of tenancy by way of efflux of time his intention is not to terminate the tenancy but to insist and impress upon the tenant to hand over the possession after the expiry of agreed period of tenancy."

14. In any case, the documentary evidence assembled by the plaintiff is sufficient to raise a strong presumption of Section 27 of General Clauses Act that notice had been properly served by the applicant. It would be appropriate to reproduce the language of Section 27 General Clauses Act, 1897, as under:

> **"27-Meaning of service by post.**-Where any (Central Act) or Regulation made after the commencement of this Act authorizes of requires any document to be served by post, where the expression "serve" or either of the expressions

> "give" or "send" or any other expression in 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.
>
> 15. It is apparent from the reading of the section that service shall be deemed to be effectuated by properly addressing, pre paying and posting by registered post, a letter containing the notice. This presumption is no doubt rebuttable but unless it is disproved, dispelled or rebutted, the court can treat the presumption as tantamounting to proof.

16. In **Green View Radio Service v. Laxmibai** AIR 1990 SC 2156, the Supreme Court observed as under:

> There is a legal presumption that the communication sent by post properly addressed to the addressee is received by him in due course of business and that the acknowledgment was received back from the post office duly signed with the recipient's signature and that acknowledgment is on record. The notice was sent by the respondent-landlord's advocate and the acknowledgment was received at his office. The court further held that Amarjeet Singh, the proprietor of the premises was in the habit of changing his signature from time to time and had signed different documents in different styles. The appellant further did not lead sufficient evidence to rebut the presumption of service. It was admitted by Amarjeet Singh that either he himself or his brother or his employee would always be present in the suit premises. Although he came out with an alibi that he was not present in the premises on the date on which the postal acknowledgment is signed, he has not stated that nobody else was present in the shop on that day and hence nobody could have received the said notice on behalf of the appellant. The courts, therefore, held that the service of the notice on the appellant was

proved. Since the rent was admittedly not paid within thirty days of the receipt of the said notice, according to the mandatory provisions of the Act, the appellant was liable to be evicted.

17. Reference may also be made to **Rail India Technical & Economic Service Ltd. v. I.M.Puri and Ors.** 2000(52) DRJ 538, and **M. Nar Singh Rao v. State of Andhra Pradesh** AIR 2001 SC 318.

18. It would be appropriate to appreciate locus classicus on the issue in **Harihar Banerji v. Ramshashi Roy** AIR 1918 PC 102 wherein it was observed by Lord Atkinson:

> A letter sent under Registered post was held to be giving rise to a stronger presumption especially when a receipt for the letter is produced, even when signed on behalf of addressee by some person other than the addressee himself.

19. Similarly, in **Atma Ram Property Ltd. v. Pal Property Pvt. Ltd.** 91 (2001) DLT 438, this Court has observed:

> 13. Coming to the service of the notice, the plaintiff has placed on record the copy of the notice sent to the defendants under Section 106 of the Transfer of Property Act. The plaintiff has also placed on record the postal receipt in original by which notice was sent by registered post to the defendants. The plaintiff has also produced on record the original acknowledgement received back which is addressed to Pal Properties India Pvt. Ltd. Address is rightly mentioned as H-72, Connaught Circus, New Delhi. It bears stamp and is signed by some person acknowledging the receipt of the letter.
>
> 14. In view of these documents on record it cannot be said that the defendants did not receive the notice. Bare denial would not serve any purpose. [Ref.: **Shimla Development Authority and Ors. v. Smt. Santosh Sharma and Anr.** JT 1996(11) SC 254; **Madan and Co. v. Wazir Jaivir Chand** AIR 1989 SC 630."

22. Without prejudice to the contention that the notices were duly

served upon the appellant, the counsel for respondent further submits that in view of the various decisions by the Apex Court and this Court, there is no requirement of service of notice to quit and filing of the suit itself by the landlord can be taken as a notice to quit communicating the intention of the landlord to terminate the tenancy of the tenant. Further substantiating his arguments, the counsel submits that filing of the suit pursuant to issuance of notices dated 11.05.2009 and 05.06.2009 is itself an act in furtherance of the respondent's intention to obtain possession of the suit premises from the appellant. A strong reliance has been placed on **Nopany Investments (Pvt.) Ltd. v. Santokh Singh (HUF)** reported at (2008)2 SCC 728 and more particularly at para 22 which reads as under:

> **"22.** In the present case, after serving a notice under Section 6-A read with Section 8 of the Act, the protection of the tenant under the Act automatically ceased to exist as the rent of the tenanted premises exceeded Rs. 3500/-and the bar of Section 3(c) came into play. At the risk of repetition, since, in the present case, the increase of rent by 10% on the rent agreed upon between the appellant and the respondent brought the suit premises out of the purview of the Act in view of Section 3(c) of the Act, it was not necessary to take leave of the Rent Controller and the suit, as noted hereinabove, could be filed by the landlord under the general law. The landlord was only required to serve a notice on the tenant expressing his intention to make such increase. When the eviction petition was pending before the Additional Rent Controller and the order passed by him under Section 15 of the Act directing the appellant to deposit rent at the rate of Rs 3500 was also subsisting, the notice dated 9-1-1992 was sent by the respondent to the appellant intimating him that he wished to increase the rent by 10 per cent. Subsequent to this notice, another notice dated 31-3-1992 was sent by the respondent intimating the appellant that by virtue of the notice dated 9-1-1992 and in view of Section 6-A of the Act, the rent stood enhanced by 10 per cent i.e. from Rs 3500 to Rs 3850. It is an admitted position that the tenancy of the appellant was terminated by a further notice dated 16-7-1992/17-71992. Subsequent to this, Eviction Petition No. 432 of 1984 was withdrawn by the respondent on 20-8-1992 and the suit for eviction, out of which

the present appeal has arisen, was filed on 6-2-1993. That being the factual position, it cannot at all be said that the suit could not be filed without the leave of the Additional Rent Controller when, admittedly, at the time of filing of the said suit, the eviction petition before the Additional Rent Controller had already been withdrawn nor can it be said that the notice of increase of rent and termination of tenancy could not be given simultaneously, when, in fact, the notice dated 16-71992/17-7-1992 was also a notice to quit and the notice intending increase of rent in terms of Section 6-A of the Act was earlier in date than the notice dated 16-71992/17-7-1992. In any view of the matter, it is well settled that filing of an eviction suit under the general law itself is a notice to quit on the tenant. Therefore, we have no hesitation to hold that no notice to quit was necessary under Section 106 of the Transfer of Property Act in order to enable the respondent to get a decree of eviction against the appellant. This view has also been expressed in the decision of this Court in **V. Dhanapal Chettiar v. Yesodai Ammal**[4]."

23. During the course of arguments, the counsel for respondent submits that even otherwise assuming without admitting that the notices sent were not received by the appellant the appellant was put to notice when he received a complete paper book i.e. plaint documents filed by the respondent including copy of the notices. Mr. Sethi submits that at best the date of termination of tenancy be treated as the date of receipt of plaint by the appellant along with all the documents including the notice terminating the tenancy of the appellant and that statutory period of fifteen days be calculated therefrom.

24. It is strongly contended by counsel for respondent that a bald denial in the written statement filed by the appellant is not sufficient to rebut the presumption under section 27 of the General Clauses Act. He further contends that the said denial is evasive and sham since a perusal of the postal receipts and acknowledgment cards, originals of which have been placed on record, would show that the notices were issued to the appellant at the correct address. No documents have been filed by the appellant to prove that the notices were not duly served and a mere plain

4. (1979) 4 SCC 214 : AIR 1979 SC 1745

denial by the appellant is not sufficient to rebut the presumption raised by section 27 of the General Clauses Act.

25. I have heard the counsel for the parties and have also perused the record and given my thoughtful consideration to the matter. The contentions of the counsel for appellant may be summarised as under:

- The impugned judgement is bad in law and facts
- No notice has ever been served upon the appellants nor has any notice been refused
- Presumption under section 27 of the General Clauses Act is a rebuttable presumption and denial of notice by the appellant raises a triable issue which requires leading of evidence. Therefore, a decree under Order XII Rule 6 CPC cannot be passed.
- The presumption stands rebutted by a denial of the receipt of notice and the onus shifts back on the respondent-landlord to prove that the notices were duly served upon the appellant.
- For a decree under Order XII Rule 6, the admissions must be unambiguous, absolute and unequivocal.

26. The contentions of counsel of respondent may be summarised as under:

- There is no infirmity in the impugned judgement as the appellant has admitted the landlord-tenant relationship and the rate of rent has not been disputed. The notices are deemed to be duly served as there is enough material placed on record to raise presumption under section 27 of the General Clauses Act.
- Though presumption under section 27 of the said Act is a rebuttable presumption, but a mere bald denial is not sufficient to rebut the aforesaid presumption.
- The appellant has deliberately avoided/refused the receipt of notices and refusal to accept notice is deemed service.

27. The law with regard to section 27 of the General Clauses Act is well settled. It inter alia lays down that where a document is required

to be served by post then, unless contrary is proved, the service shall be deemed to be effected by properly addressing, prepaying and posting it by registered post 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. The section thus raises a presumption of due service or proper service if the document sought to be served is sent by properly addressing, prepaying and posting by registered post to the addressee and such presumption is raised irrespective of whether any acknowledgment due is received from the addressee or not. It has been consistently held by the Apex Court that the principle incorporated in section 27 of the General Clauses Act would apply to a notice sent by registered post at the correct address, and it would be for the party against whom the presumption of service is drawn to prove that it was really not served and that he was not responsible for such non-service.

28. In **Harcharan Singh v. Shivrani** reported at (1981)2 SCC 535, the Hon'ble Apex Court categorically laid down that presumption of deemed service would also mean that the person to whom the communication has been sent would be deemed to know the contents of the communication so deemed to be served upon by him. The relevant portion of the judgment is reproduced as under:

> "7. Section 27 of the General Clauses Act, 1897 deals with the topic— .Meaning of service by post. and says that where any Central Act or Regulation authorises or requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting it 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. The section thus raises a presumption of due service or proper service if the document sought to be served is sent by properly addressing, prepaying and posting by registered post to the addressee and such presumption is raised irrespective of whether any acknowledgment due is received from the addressee or not. It is obvious that when the section raises the presumption that the service shall be deemed to have been effected it means the addressee to whom the communication is sent must be taken to have known the contents of the document

sought to be served upon him without anything more. Similar presumption is raised under illustration (f) to Section 114 of the Indian Evidence Act whereunder it is stated that the court may presume that the common course of business has been followed in a particular case, that is to say, when a letter is sent by post by prepaying and properly addressing it the same has been received by the addressee. Undoubtedly, the presumptions both under Section 27 of the General Clauses Act as well as under Section 114 of the Evidence Act are rebuttable but in the absence of proof to the contrary the presumption of proper service or effective service on the addressee would arise. In the instant case, additionally, there was positive evidence of the postman to the effect that the registered envelope was actually tendered by him to the appellant on November 10, 1966 but the appellant refused to accept. In other words, there was due service effected upon the appellant by refusal. In such circumstances, we are clearly of the view, that the High Court was right in coming to the conclusion that the appellant must be imputed with the knowledge of the contents of the notice which he refused to accept. It is impossible to accept the contention that when factually there was refusal to accept the notice on the part of the appellant he could not be visited with the knowledge of the contents of the registered notice because, in our view, the presumption raised under Section 27 of the General Clauses Act as well as under Section 114 of the Indian Evidence Act is one of proper or effective service which must mean service of everything that is contained in the notice. It is impossible to countenance the suggestion that before knowledge of the contents of the notice could be imputed the sealed envelope must be opened and read by the addressee or when the addressee happens to be an illiterate person the contents should be read over to him by the postman or someone else. Such things do not occur when the addressee is determined to decline to accept the sealed envelope. It would, therefore, be reasonable to hold that when service is effected by refusal of a postal communication the addressee must be imputed with the knowledge of the contents thereof and, in our view, this follows upon the presumptions that are raised under Section 27 of the General Clauses Act, 1897 and Section 114 of the Indian

Evidence Act."

29. The counsel for appellant has cited various judgements to the effect that mere denial of receipt of notice is sufficient to rebut the presumption under section 27 of the General Clauses Act as a denial in a statement on oath is the best possible evidence that can be rendered for a negative fact. A perusal of the judgments cited would show that the settled position of law is that the courts have discretion to rely upon the statement of the party denying the service of the notice and that this rebuttal would depend upon the veracity of the statement of the defendant. To determine the veracity of the statement, the conduct of the defendant becomes an important factor. The counsel for appellant has sought reliance upon **V N Bharat n DDA** (supra) to the effect that once the receipt of notice is denied by a party, the onus of proving due service shifts back upon the sender. The above case is not applicable to the case of the appellant as in that case, DDA has failed to place on record any positive evidence to prove that the notice was duly sent by registered post and was received by the appellant. The court was primarily influenced by the fact that the appellant VN Bharat has already made the payment towards the final instalment before the issue of a fresh notice thereby showing his willingness to make the said payment and an inference that there was no reason for the appellant to avoid or refuse the service of demand letter issued by DDA.

30. Even the case of **Green View Radio Service** (supra) relied upon by the counsel for appellant does not come to his rescue since in this case, the court refused to rely upon the statement of one Amarjeet Singh denying the receipt of notice taking into account his past conduct of putting different signatures on different documents. The case of **Puwada Venkateswara Rao** (supra) also does not help the case of the appellant as it has been categorically held by the Apex Court in para 10 of the judgement that .the denial of service by a party may be found to be incorrect from its own admissions or conduct."

31. It is an admitted position that the notices sent by registered post had been sent to the correct address. Similar addresses appear on both the notices and it is not the case of the appellant that the addresses mentioned are wrong. Both the said notices have been returned unserved with the report of refusal. The counsel for appellant contends that the said notices were neither tendered nor were they ever refused by the

appellant. The counsel further submits that the postal receipts, reports of refusal and certificate of posting produced by the respondent-landlord are false, manipulated and fabricated. Apart from a bald assertion, nothing has been placed on record by the appellant in support of his contention. It is the also the case of the respondent landlord that not only has the appellant refused to accept the said notices, but it had even refused to accept the court process on three occasions. A perusal of the order dated 05.11.2009 of the learned trial court would show that summons were sent to the appellant –defendant by ordinary process in which it is reported that the servant of the appellant refused to take the summons stating that his employers are away from Delhi. The tracking report placed on record by the counsel for respondent before the trial court state that the 13th summons were delivered to the defendant-appellant on and 14th October, 2009 through speed post and courier respectively. The summons sent through registered cover was received back with the report of refusal. Since the appellant did not appear, they proceeded ex parte. After conclusion of the evidence by the respondent-plaintiff, the matter was fixed for final arguments on 06.04.2010 when counsel for appellant-defendant entered appearance and filed an application under Order IX Rule 7 CPC which was allowed in the interest of justice.

32. In the application under Order IX Rule 7 CPC, the appellant has conceded that a process server had come to the said shop in first week of November, 2009 and since the partners of the appellant firm were not available, the process server duly informed the staff of the appellant that one Mr. Gupta has filed a suit against them in respect of the said shop. The application also states that the staff of the appellant duly informed the partners when they came to the shop. It has also been stated in the application that that the partners through whom the notice was effected used to come to the said shop only in the evenings atleast once a week and that the shop is managed by Mr. Ajay Haryani, who is the son of one of these partners. Taking note of the fact that suit premises is a shop from where the appellant is running its business, it is hard to believe that when the process server had visited in November, 2009; the partners were informed about the visit of the process server only in March 2010.

33. I have carefully gone through the trial court record. There is enough material on record to raise a presumption under section 27 of the General Clauses Act. The counsel for respondent has placed on record

the original certificate of posting (Ex. PW1/9), registered AD card (Ex. PW1/8 and Ex. PW1/7) and also the envelope with the endorsement .not claimed. (Ex. PW1/10) with respect to notice dated 11.05.09. Original registered Ad card (Ex. PW1/13 and Ex. PW1/14) and envelope with endorsement .refused. (Ex. PW1/17) have also been placed on record with regard to notice dated 05.06.2009 terminating the tenancy of the appellant. No document has been placed on record by the appellant along with the written statement to prove that the said documents are false, manipulated and fabricated. It is also not the case of the appellant that the premises are permanently locked or that the partners are away from the country and thus no notice was served or that there was any other reason which would have prevented the notices from being served in the ordinary course of past.

34. The argument raised by counsel for the appellant that the report of refusal of notices is false and manipulated is completely without any force for the reason that it would be in the interest of the landlord to serve the legal notice as it is well known that in case where the rent is more than Rs.3500/-, per month, and landlord-tenant relationship is not denied the only other defence available is non-receipt of legal notice. This seems to be the precise reason for the appellant to deny the receipt of notices.

35. Having regard to the settled position of law and based on the judgments relied upon by counsel for the appellant as also the respondent, it cannot be said that as a universal rule the moment receipt of a notice is denied the sender can only prove the same by leading evidence.

36. Considering the conduct of the appellant and in view of the fact that no document has been placed on record to show that the notices were not served upon the appellant and applying the settled position of law, I am of the view that there is enough material on record to raise a presumption under section 27 of the General Clauses Act and that the notices were duly served. The denial by the appellant has been far outweighed by the documents placed on record by the respondent-landlord. The appellant who has overstayed in the suit premises cannot be permitted to delay the matter to his benefit. Accordingly, I concur with the view of the trial court that mere denial of service of notice is not rebuttal to the presumption under section 27 of the said Act.

37. The Supreme Court in the case of **Nopany Investments (Pvt.) Ltd.** (supra) has held that tenancy would stand terminated under general law on filing of a suit for eviction. Accordingly, in view of the law laid down by the Apex Court, I hold that even assuming that the notice of tenancy was not served upon the appellant the tenancy would stand terminated on the filing of the present suit against the appellant. I also hold that assuming the notice was not served upon the appellant, the appellant was put to notice on receipt of the plaint and documents and based on the statement made by counsel for the respondent the date of termination would be fifteen days from receipt of the plaint and documents. Although in the facts of the present case, this Court has come to the conclusion that appellant was duly served with the notice of termination.

38. The law with regard to Order XII Rule 6 CPC is fairly Well Settled. The principle behind Order 12 Rule 6 is to give the plaintiff a right to speedy judgement as regard so much of the rival claim about which there is no controversy. In **Uttam Singh Duggal & Co. Ltd. v. United Bank of India** reported at (2000) 7 SCC 120, the Apex Court observed as under:

> **"12.** As to the object of Order 12 Rule 6, we need not say anything more than what the legislature itself has said when the said provision came to be amended. In the Objects and Reasons set out while amending the said Rule, it is stated that .where a claim is admitted, the court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the plaintiff is entitled.. We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where the other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed."

39. It was observed in the case of **Rajiv Sharma And Another v. Rajiv Gupta,** reported at (2004) 72 DRJ 540, that the purpose of Order XII Rule 6 of CPC is to enable the party to obtain speedy justice to the extent of relevant admission, which according to the admission.

If the other party is entitled for. Admission on which judgment can be claimed must be clear and unequivocal. In the case of **Ms. Rohini v. RB Singh** reported at 155(2008) DLT 440 it has been held as under: "it is trite to say that in order to obtain judgment on admission, the admissions must be clear and unequivocal. In the matter of landlord and tenant there are only three aspects which are required to be examined – (i) relationship of landlord and tenant; (ii) expiry of tenancy by a flux of time or determination of valid notice to quit; and (iii) the rent of the premises being more than Rs. 3500/-per month , in view of the Act."

40. In the present case, the appellant have admitted the landlord-tenant relationship and the rate of rent has also not been disputed. Legal notice terminating the tenancy of the appellant firm is deemed to be duly served upon the appellant by virtue of presumption under section 27 of the General Clauses Act as sufficient evidence, in form of postal receipts, registered AD card and certificate of posting, has been placed on record by the respondent-landlord. Thus, the respondent landlord was entitled to a decree under Order XII Rule 6 CPC.

41. A faint argument has also been made by counsel for appellant that the suit is bad for non-joinder of all the partners of the appellant company. As regards the aforementioned contention, I concur with the view of the trial court that since the premises were let out to the firm, the tenancy was validly terminated by addressing the notice to the appellant firm and that the suit is not bad for nonjoinder of the partners of the appellant firm.

42. In view of the observations made above, I find no infirmity in the judgment of the trial court.

43. Accordingly, the appeal is dismissed with costs of Rs.20,000/-.

ILR (2011) IV DELHI 734
CS (OS)

IG BUILDERS & PROMOTERS PVT. LTD. ....PLAINTIFF

VERSUS

DR. AJIT SINGH AND ORS. ....DEFENDANTS

(J.R. MIDHA, J.)

CS (OS) NO. : 83/2011 DATE OF DECISION: 27.05.2011

Specific Relief Act, 1963—Specific performance of agreement to sell—Code of Civil Procedure, 1908—Order XXXIX Rule 1 and 2—Interim application filed for directing defendants to maintain status quo—Defendant no. 1 and 2 owners of property—Defendant no. 3 mother of defendants no. 1 and 2 given part payment for the purchase of the property—No formal agreement executed between the parties for selling the property—No power of attorney or authority executed by defendants no. 1 and 2 in favour of defendant no. 3—Defendants denied having entered into any agreement to sell with the plaintiff—Defendant no. 3 stated to have accepted money and executed the receipt under mis-representation and undue influence of the Counsel for the defendants engaged in one other case—Held, no written agreement between defendant no. 1 and 2 and the plaintiff—Defendant no. 3 holding no power of attorney or written authorization on behalf of defendant no. 1 and 2 to sell property—Payment made to defendant no. 3 to only to pursuade defendant no. 1 and 2 to agree to sell property—Thus, primafacie no case in favour of plaintiff to seek temporary injunction—Application under Order XXXIX Rule 1 and 2 dismissed.

The principles laid down by the Courts in the aforesaid judgments are summarized hereunder:-

15.1 The four ingredients necessary to make an agreement to sell are: (i) particulars of consideration; (ii) certainty as to party i.e. the vendor and the vendee; (iii) certainty as to the property to be sold; and (iv) certainty as to other terms relating to probable cost of conveyance to be borne by the parties, time, etc.

15.2 The first fundamental, which must be proved beyond all reasonable doubt is the existence of a valid and enforceable contract.

15.3 It is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence.

15.4 The uncertain and undefinite receipts prima facie indicate that the parties were still to negotiate to arrive at the agreed terms and conditions for sale of the suit property. If after the issuance of alleged receipts till the filing of the suit, there were no negotiations/communications between the parties, it prima facie indicates that there was no consensus between the parties to formally execute an agreement to sell.

15.5 If the two minds were not ad-idem in respect of the property to be sold, the court cannot order specific performance.

15.6 The stipulations and terms of the contract have to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for

there was no contract at all. Where there are negotiations, the court has to determine at what point, if at all, the parties have reached agreement.

15.7 Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable.

15.8 The Court has to consider the conduct of the plaintiff and circumstances outside the contract and the Court will not order specific performance if the defendant can show any circumstances dehors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance.

15.9 If the so-called repudiation or cancellation takes place within few days, no damage by way of loss of profit because of escalation in prices would result to the plaintiff.

15.10 If under the terms of the contract, the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. So also specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff.

15.11 The party who seeks specific performance being equitable relief, must come to the Court with clean hands. In other words, the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.

15.12 The Court has considered whether it would be fair, just and equitable. The Court is guided by the principles of justice, equity and good conscience.

15.13 While exercising the discretion, the Court would take into consideration the circumstances of the case, the conduct

of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee.

15.14 The specific performance is an equitable relief. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion. The Court is not bound to grant specific relief merely because it is lawful to do so. The motive behind the litigation is to be examined. The Court while granting or refusing the relief has to consider whether it would be fair, just and equitable. In case, where any circumstances under Section 20(2) are established, the relief is to be declined. The relief sought under Section 20 is not automatic as the Court is required to see the totality of the circumstances which are to be assessed by the Court in the light of facts and circumstances of each case. The conduct of the parties and their interest under the contract is also to be examined.

15.15 The principle underlying Section 52 of TP Act is based on justice and equity. The operation of the bar under Section 52 is however subject to the power of the court to exempt the suit property from the operation of section 52 subject to such conditions it may impose. That means that the court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any part to the suit, by imposing such terms as it deems fit. **(Para 15)**

[La Ga]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Abhijat and Ms. Manmeet Arora, Advocates.

FOR THE DEFENDANTS : Dr. A.M. Singhvi, Sr. Advocates with Mr. Somesh Arora, Mr. Gulshan Sharma and Ms. Neelam Agarwal, Advocates for D-1 and 2. Mr. S.K. Puri, Sr. Advocate. with Mr. Manish Miglani, Advocate for D-3.

CASES REFERRED TO:

1. *Iqbal Properties Pvt. Ltd.* vs. *Atar Singh,* 2011 I AD (Delhi) 269.
2. *Kiran Chhabra* vs. *Pawan Kumar Jain,* 178 (2011) DLT 462.
3. *Sanjay Puri* vs. *Radhey Lal and Ors.,* 2011 I AD (Delhi) 413.
4. *Vinod Seth* vs. *Devinder Bajaj and Anr.,* JT 2010 (8) SC 66.
5. *Dalip Singh* vs. *State of U.P.,* (2010) 2 SCC 114.
6. *Arun Batra* vs. *Bimla Devi,* 2010 (117) DRJ 699.
7. *Padmawati and Ors.* vs. *Harijan Sewak Sangh,* 154 (2008) DLT 411.
8. *Sanjeev Narang* vs. *Prism Buildcon Pvt. Ltd.,* 154 (2008) DLT 508 (DB).
9. *Bal Krishna* vs. *Bhagwan Das,* AIR 2008 SC 1786.
10. *M/s Pelikan Estates Pvt. Ltd.* vs. *Kamal Pal Singh and Ors.* 2004 (VI) AD 185: 2004 (76) DRJ 353.
11. *Mirahul Enterprises* vs. *Mrs. Vijaya Sirivastava and Mr. R.R. Sood,* AIR 2003 Delhi 15.
12. *Narendra and Nirmala Anand* vs. *Advent Corporation Pvt. Ltd.,* 2002 V AD (S.C.) 239 = (2002) 5 SCC 481.
13. *A.C. Arulappan* vs. *Ahalya Naik,* 2001 VI AD (S.C.) 585 = (2001) 6 SCC 600.
14. *A.C. Arulappan* vs. *Smt. Ahalya Naik,* AIR 2001 SC 2783.

15. *Gobind Ram* vs. *Gian Chand,* 2000 VII AD (S.C.) 389 = (2000) 7 SCC 548.
16. *Gobind Ram* vs. *Gian Chand,* AIR 2000 SC 3106.
17. *K. Narendra* vs. *Riviera Apartments (P) Ltd.* 1999 VI AD (S.C.) 256 = (1999) 5 SCC 77.
18. *Ganesh Shet* vs. *Dr. C.S.G.K. Shetty,* AIR 1998 SC 2216).
19. *Rickmers Verwaltung GMB H* vs. *The Indian Oil Corporation Ltd.,* 1998 VIII AD (SC) 481.
20. *K.L.Bhatia* vs. *Gurmit Singh,* 1996 (37) DRJ 542.
21. *Lourdu Mari David* vs. *Louis Chinnaya Arogiaswamy,* AIR 1996 SC 2814.
22. *Lourdu Mari David* vs. *Louis Chinnaya Arogiaswamy,* (1996) 5 SCC 589.
23. *N.P. Thirugnanam* vs. *Dr. R. Jagan Mohan Rao,* 1995(5) SCC 115.
24. *M/s. Gujarat Bottling Co. Ltd.* vs. *Coca Cola Company* AIR 1995 SC 2372.
25. *Sardar Singh* vs. *Krishna Devi,* (1994) 4 SCC 18.
26. *Shiv Kumar Chadha* vs. *Municipal Corporation of Delhi,* (1993) 3 SCC 161.
27. *Mayawanti* vs. *Kaushalya Devi,* JT 1990 (3) SC 205.
28. *Mayawanti* vs. *Kaushalya Devi* (1990) 3 SCC 1.
29. *D. Anjaneyulu* vs. *Damacherla Venkata Seshaiah,* AIR 1987 SC 1641.
30. *Parakunnan Veetill Joseph's Son Mathew* vs. *Nedumbara Kuruvila's Son,* AIR 1987 SC 2328.
31. *T. Arivandandam* vs. *T.V. Satyapal,* AIR 1977 SC 2421.
32. *Bellamy* vs. *Sabine* 1857 (1) De G & J566.

JUDGMENT

I.A.Nos.489/2011 and 3228/2011

1. The plaintiff has filed this suit seeking specific performance of the Agreement to Sell dated 10th November, 2010 and 18th November,

2010 in respect of the property bearing No.D-87, Defence Colony, New Delhi-110024.

2. The plaintiff has filed I.A.No.489/2011 under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure in which ex-parte interim order dated 18th January, 2011 was passed directing the defendants to maintain status quo with respect to the title and possession of the suit property till the next date of hearing. Defendants No.1 and 2 have filed I.A.No.3228/2011 under Order XXXIX Rule 4 of the Code of Civil Procedure for vacation of the ex-parte interim order dated 18th January, 2011. Both these applications have been heard together.

3. Plaintiff's Case

3.1. Defendants No.1 and 2 are the joint owners of suit property bearing No.D-87, Defence Colony, New Delhi-110024. Defendants No.1 and 2 are real brothers. Defendant No.1 is the constituted attorney of defendant No.2 who is residing in Canada. Defendant No.3 is the mother of defendants No.1 and 2.

3.2. Defendant No.1 acting for himself and as constituted ˇattorney of defendant No.2, negotiated for sale of the suit property with the plaintiff and showed all relevant documents of ownership of the suit property as well as the power of attorney of defendant No.2 in his favour to the plaintiff whereupon the plaintiff agreed to purchase the suit property for a sale consideration of Rs. 20,50,00,000/-. It was agreed by defendants No.1 and 2 to have the suit property converted from leasehold to freehold and to execute the sale deed within 45 days of conversion. The ground floor of the suit property was in possession of a tenant and defendant No.1 urged the plaintiff to negotiate and obtain vacant possession from the tenant at his own cost (No dates and particulars of negotiation and agreement are given in paras 4, 5 and 6 of the plaint).

3.3. On 10th November, 2010, a meeting was fixed in the office of defendant No.1's lawyer at Delhi for payment of the earnest money. Defendant No.1 expressed his inability to attend the meeting and conveyed to the plaintiff that defendant No.3 would attend the meeting and was duly authorised by defendant No.1 to receive the payment of earnest money. The meeting was attended by the plaintiff and defendant No.3 on behalf of defendants No.1 and 2. The plaintiff made the payment of

Rs.15,00,000/- to defendant No.3, by means of cheque No.697591 dated 10th November, 2010 for Rs. 10,00,000/- and cash of Rs.5,00,000/- whereupon defendant No.3 signed the receipt acknowledging the payment. The aforesaid cheque was drawn in favour of defendant No.1.

3.4. Defendants No.1 and 2 requested the plaintiff for additional payment of Rs.35,00,000/- whereupon the plaintiff made further payment of Rs.35,00,000/- by means of demand draft No.006897 dated 18th November, 2010 to defendant No.3 who executed the receipt dated 18th November, 2010 (No date and particulars of the request of defendant No. 1 and 2 for Rs. 35 Lacs are given the para 9 of the plaint).

3.5. Defendants No.1 and 2 represented and assured the plaintiff that they have taken steps to have the suit property converted from leasehold to freehold. The plaintiff negotiated with the tenant occupying the ground floor of the suit property and arrived at an agreement with the said tenant for vacation. (No date and particulars of the representation and assurance of defendants No.1 and 2 and the alleged agreement with the tenant have been given in paras 11 and 12 of the plaint.)

3.6. On 3rd January, 2011, the plaintiff's Director received an envelope addressed by defendant No.3 containing a blank sheet of paper whereupon the plaintiff sent letter dated 3rd January, 2011 to defendant No.3 which was received back undelivered on 10th January, 2011.

3.7. On 8th January, 2011, the plaintiff was informed by its bankers that a sum of Rs. 45,00,000/- have been transferred to the plaintiff's account from the account of defendant No.1 with State Bank of Patiala, Chandigarh without the consent of the plaintiff. The plaintiff further discovered that defendant No.1 closed the said account after effecting the transfer. The plaintiff, therefore, wrote letter dated 8th January, 2011 to the defendants.

3.8. The plaintiff tried to contact defendants No.1 and 3 who were not traceable. (No date and mode of contacting defendants No.1 and 3 are given in para 16 of the plaint.)

3.9. The plaintiff had always been ready and willing to perform their part of the contract. The plaintiff also published a notice in the newspaper on 10th January, 2011.

4. Defence of defendants No.1 and 2

4.1. Defendants No.1 and 2 have filed the joint written statement which is signed by defendant No.1 for himself and as attorney of defendant No.2 appointed vide General Power of Attorney dated 13th May, 1999.

4.2. The ground floor of the suit property is in possession of a tenant, V.K. Jain whereas first floor is in possession of the answering defendants. Defendant No.2 is residing in Canada whereas defendant No.1 is a resident of Chandigarh. Defendant No.1 has renounced the practical world and is involved in yoga and spiritual practices. Defendant No.3 also resides at Chandigarh but frequently visits Delhi to look after the suit property.

4.3. The defendants have filed an eviction petition against the ground floor tenant of the suit property through Mr. Arun Vohra, Advocate who gained immense trust amongst the defendants and became part and parcel of their family.

4.4. Gireesh Chaudhary, Director of the plaintiff company is a friend and client of Mr. Arun Vohra, Advocate and he hatched a conspiracy to grab the suit property with active participation of the lawyer and got the documents signed from defendant No.3 knowing well that the defendants No.1 and 2 were not interested to sell the suit property and defendant No.3 was not authorised to deal with the sale of the suit property.

4.5 The cheque for Rs.10,00,000/- was deposited in the account of defendant No.1 without the knowledge of defendants. Defendant No.3 lodged a complaint vide DDR No.19 dated 8th January, 2011 with the Police Station, Sector-8, Chandigarh and thereafter, also published a public notice dated 19th February, 2011 to the effect that the defendants never entered into any agreement to sell with the plaintiff. Defendants No.1 and 2 also issued a notice dated 24th February, 2011 to Mr. Arun Vohra, Advocate.

4.6 The Director of the plaintiff and their counsel misrepresented defendant No.3 as well as to the witness, Bhupinder Jarial to the effect that defendants No.1 and 2 had agreed to sell the suit property to the plaintiff and induced them to sign the receipt dated 10th November,

2010. Defendants No.1 and 2 neither entered into any agreement with the plaintiff nor authorised or consented defendant No.3 to enter into any agreement on their behalf.

4.7 Defendants No.1 and 2 transferred a sum of Rs.45 lakhs by RTGS transfer in the account of plaintiff on 24th December, 2010. Defendants No.1 and 2 deposited a further sum of Rs.5 lakhs in the account of the plaintiff on 12th January, 2011 by means of a demand draft bearing No.209434 dated 10th January, 2011.

4.8 There is no agreement whatsoever between the plaintiff and defendants No.1 and 2.

4.9 Defendants No.1 and 2 never authorised defendant No.3 to enter any agreement on their behalf.

4.10 The receipts executed by defendant No.3 without the consent/ authorisation of defendants No.1 and 2 are not binding on the defendants No.1 and 2.

4.11 There was no privity of contract between plaintiff and defendants No.1 and 2.

4.12 The alleged receipts dated 10th November and 18th November, 2010 executed by defendant No.3 have been executed by defendant No.3 under misrepresentation, undue influence and fraud. The alleged receipts dated 10th November and 18th November, 2010 are not valid, legally enforceable and do not constitute a concluded contract.

5. Defence of Defendants No.3

5.1 Defendants No.1 and 2 are the joint owners of the suit property. Defendant No.3 did not act on the instructions of defendants No.1 and 2, much less on their explicit instructions.

5.2 Defendant No.3 attended the office of her lawyer on his request to come over and afford opportunity to the plaintiff to convey their interest in the suit property and to request defendant No.3 to use her personal good offices as mother to defendant No.1. The plaintiff unilaterally urged being permitted to demonstrate their earnestness by presenting some amounts of money to be shown to defendant No.1 who was patently disinterested.

5.3 The plaintiff paid the amount to defendant No.3 to demonstrate his eagerness to purchase the suit property and agreed to take back the money upon disagreement of defendant No.1. On the insistence of the lawyer, defendant No.3 agreed to take the money to her son to explore the possibility of her son agreeing to come to the negotiating table with the plaintiff. However, no transaction was negotiated between the parties.

5.4. Defendant No.3 signed the receipts prepared by her counsel on the trust of the counsel who told her that the receipts have no binding effect and would remain in the custody of the counsel and would only be used in case of successful negotiation between the parties.

5.5. There was no legal, valid and binding agreement whatsoever between the plaintiff and the defendants. The amount paid by the plaintiff was not a part of the sale transaction but a result of collusion between the plaintiff and the counsel.

6. Relevant Documents

6.1 **Receipt dated 10th November, 2010 executed by defendant No.3**

The original receipt dated 10th November, 2010 for Rs.15 lakhs has been placed on record by the plaintiff which is reproduced hereunder:-

"R E C E I P T

Received with thanks from M/s. I.G. Builders & Promoters Pvt. Ltd., having its office at C-581 Defence Colony, New Delhi – 110024, through its duly authorized Director Shri Gireesh Chaudhary, a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs Only) as per details below:-

i. Rs.10,00,000/- (Rupees Ten Lakhs Only) vide cheque No.697591 dated 10th November, 2010 drawn on HDFC Bank South Extension-II, New Delhi, in favour of Dr. Ajit Singh;

ii. Rs.5,00,0000/- (Rupees Five Lakhs) in cash currency notes.

towards the sale of property bearing No.D-87, Defence Colony, New Delhi. The total sale consideration has been agreed at

Rs.20,50,00,000/= (Ruees Twenty Crores Fifty Lakhs Only), which shall be paid within forty five days (45 days) of the conversion of the said property from Lease-hold to Free-hold from L&DO. The undersigned owner shall extend full co-operation to the buyer in getting the Ground Floor vacated from the tenant Shri V.K. Jain. This receipt is executed at New Delhi on this 10th day of November 2010 in the presence of following witnesses:-

Sd/-

(GAJINDER KAUR)

SELLER

Wife of Shri Brijnandan Singh

Mother and authorized representative of

Dr. Ajit Singh and Mr. Savraj Singh

Sd/

1. (Arun Vohra)
   S/o Late Sh. D.L. Vohra
   B-222, G.K.-I
   New Delhi - 110048
2. Sd/-
   (Bhupinder Jarial)
   S/o Late Sh. B.S. Jarial
   5513/2, MHC, Manimajra
   CHD-160101"

6.2 **Receipt dated 18th November, 2010 executed by defendant No.3**

The original receipt dated 18th November, 2010 for Rs.35 Lakhs has been placed on record by the plaintiff which is reproduced hereunder:-

"R E C E I P T

Received with thanks from M/s. I.G. Builders & Promoters Pvt. Ltd., having its office at C-581 Defence Colony, New Delhi – 110024, through its duly authorized Director Shri Gireesh Chaudhary, a sum of Rs.35,00,000/- (Rupees Thirty Five Lakhs Only) as per details below:

i. Rs.35,00,000/- (Rupees Thirty Five Lakhs Only) vide Draft/Pay Order No.006897 dated 18th November, 2010 drawn on HDFC Bank South Extension-II, New Delhi, in favour of Dr.Ajit Singh;

as further part payment/consideration amount towards the sale of property bearing No.D-87, Defence Colony, New Delhi. The total sale consideration has been agreed at Rs.20,50,00,000/- (Rupees Twenty Crores Fifty Lakhs Only), which shall be paid within forty five days (45 days) of the conversion of the said property from Lease-hold to Free-hold from L&DO.

This receipt is executed at New Delhi on this 18th day of November 2010 in the presence of following witnesses:-

Sd/-

18.11.2010

(GAJINDER KAUR)

SELLER

Wife of Shri Brijnandan Singh

Mother and authorized representative of

Dr. Ajit Singh and Mr. Savraj

Singh

Sd/

1. (Arun Vohra)
   S/o Late Sh. D.L. Vohra
   B-222, G.K.-I
   New Delhi - 110048"

6.3 **Draft agreement to sell.**

The plaintiff has placed on record the agreement to sell drafted by Mr. Arun Vohra, Advocate. The draft agreement does not contain the names of the seller as well purchaser and the sale consideration and all relevant paragraphs contain blanks to be filled-up.

6.4 **Second Draft agreement to sell sent by Mr. Arun Vohra, Advocate to Mr. Bhupinder Jarial on 11th December, 2010.**

The plaintiff has placed on record the second draft agreement to sell sent by Mr. Arun Vohra, Advocate to Mr.Bhupinder Jarial. The draft agreement depicts defendants No.1 and 2 as the sellers and plaintiff as the purchaser. There is no reference of defendant No.3 in the said agreement. The draft agreement contains detailed terms and conditions.

6.5 **The legal notice dated 24th February, 2011 issued by defendants No.1 and 2 to Mr. Arun Vohra, Advocate**

Defendants No.1 and 2 have placed on record the legal notice dated 24th February, 2011 issued by them to Mr. Arun Vohra, Advocate.

6.6 **Reply dated 17th March, 2011 by Mr. Arun Vohra, Advocate to the legal notice dated 24th February, 2011 issued by defendants No.1 and 2.**

Mr. Arun Vohra has stated in the reply that the draft agreement to sell along with the draft of the Special Power of Attorney was sent to Mr. Bhupinder Jarial who modified and sent back by e-mail to Mr. Arun Vohra for approval of the plaintiff. The issue of possession of ground floor was not agreed to and defendant No.1 requested him to visit Chandigarh whereupon Mr. Arun Vohra visited Chandigarh on 2nd December, 2010 and a meeting was held there. Thereafter, a final draft agreement to sell was prepared and sent by Mr. Arun Vohra to Mr. Bhupinder Jarial which was received back with slight modifications. However, on 24th December, 2010, defendant No.3 told Mr. Arun Vohra that defendants were no longer interested in the deal and they had

returned advance of Rs.45 lakhs to the plaintiff. The relevant portion of the said reply is reproduced hereunder:-

> "9. That thereafter the undersigned was requested by Dr. Ajit Singh to prepare a Draft Agreement to Sell and to send the same on the e-mail address of Shri Bhupinder Jharial. Accordingly, a Draft Agreement to Sell was drafted along with the Draft of Special Power of Attorney and both were mailed to Shri Bhupinder Jharial, Chartered Accountant. on his e-mail address. It was thereafter apprised that the said Draft Agreement to Sell was modified by Dr. Ajit Singh and sent back by e-mail to the undersigned for approval with Shri Gireesh Chaudhary. The only point desired to be discussed was with regard to the possession of the Ground Floor Premises on getting the said premises vacated from the tenant. To discuss and finalise the said issue, Dr. Ajit Singh requested the undersigned to visit Chandigarh alone without Mr. Gireesh Chaudhary, so that the said issue could also be resolved to the satisfaction of both the Seller and the Buyer. Likewise the undersigned traveled to Chandigarh on 02nd December, 2010 and a meeting in the office of one Shri Sethi who is a close associate of Dr. Ajit Singh was held and it was apprised to Dr. Ajit Singh that since he was selling the property together with the litigation of the tenant, hence the possession of the vacated Ground Floor after eviction of the tenant would automatically have to be handed over to Shri Gireesh Chaudhary. In the said meeting, besides the undersigned, Dr. Ajit Singh, his mother Mrs. Gajinder Kaur, Shri Bhupinder Jharial, Chartered Accountant, and also Shri Amarjit Singh Sethi were present.
>
> 10. That thereafter it was desired that a Final Agreement to Sell be prepared and the same be sent to Dr. Ajit Singh through e-mail address of Shri Bhupinder Jharial, Chartered Accountant and the same would be finalized and executed. Accordingly, the undersigned thereafter made and sent by e-mail the Final Draft Agreement to Sell for approval to Dr. Ajit Singh through Shri Bhupinder Jharial, Chartered Accountant, which was received back with slight

modifications. However, on 24th December, 2010 when the undersigned called up Mrs. Gajinder Kaur, Mother of Dr. Ajit Singh to fix up the date for execution of the Agreement to Sell, she stated that they were no longer interested in the deal and they had returned the Advance Amount of Rs.45 Lakhs into the account of Shri Gireesh Chaudhary by means of RTGS..."

7. Admitted Facts

7.1 Defendants No.1 and 2 are the joint owners of suit property bearing No.D-87, Defence Colony, New Delhi – 110024.

7.2 There is no written agreement between the plaintiff and defendants No.1 and 2.

7.3 There is no power of attorney or written authorisation by defendants No.1 and 2 in favour of defendant No.3.

7.4 The plaintiff paid a sum of Rs.50 lakhs to defendant No.3 out of which Rs.15 lakhs was paid on 10th November, 2010 and Rs.35 lakhs was paid on 18th November, 2010.

7.5 Defendants No.1 and 2 have refunded the aforesaid sum of Rs.50 lakhs to the plaintiff out of which Rs.45 lakhs was transferred in the account of the plaintiff on 24th December, 2010 and the balance amount of Rs.5 lakhs was deposited in the account of the plaintiff on 12th January, 2011.

7.6 The draft agreement to sell has not been signed by any of the parties.

8. Disputed Facts

8.1 The plaintiff orally negotiated for sale of the suit property with defendant No.1, as alleged in paras 4 and 5 of the plaint. However, the plaintiff is not seeking specific performance of the alleged oral agreement. The plaintiff is seeking specific performance of the agreement to sell rendered in the receipts dated 10th November and 18th November, 2010. The plaintiff has not even disclosed the material particulars such as date, time and place of oral agreement.

8.2 Defendant No.3 was authorised and competent to enter into the agreement with the plaintiff on behalf of defendants No.1 and 2. However, the plaintiff is not seeking any declaration that defendant No.3 was authorised/competent to act on behalf of defendants No.1 and 2. Admittedly there is no power of attorney or written authorisation by defendants No.1 and 2 in favour of defendant No.3. The plaintiff also never insisted for the power of attorney or written authorisation of defendants No.1 and 2 at any point of time.

8.3 According to the plaintiff, the terms of the draft agreement to sell sent by Mr. Arun Vohra, Advocate to Mr.Bhupinder Jarial on 11th December, 2010 were agreed to by the plaintiff as well as by defendant No.1.

9. Un-explained facts:-

The plaintiff could not give any explanation to the following material aspects of the case:-

9.1 Why the receipts were not signed by defendant No.1? Admittedly defendant No.3 was not holding any power of attorney of defendants No.1 and 2. If defendant No.1 had agreed to sell the suit property, the receipts should have been signed by him or receipts should have been given to defendant No.3 to get the same signed from defendant No.1 or alternatively a power of attorney should have been prepared and given to defendant No.3.

9.2 Why payment was not made directly to defendant No.1 If defendant No.1 could not come on 10th November, 2010, a fresh date could have been fixed or a representative of the plaintiff could have visited Chandigarh for payment to defendant No.1.

9.3 Why the plaintiff never insisted on the signatures of defendants No.1 and 2 on the receipts or for their power of attorney in favour of defendant No.3 or for ratification of the receipts dated 10th and 18th November, 2010 by defendants No.1 and 2?

9.4 Why sufficient time was not given to defendant No.3 before the execution of the receipts to enable her to exercise free consent and to also consult defendants No.1 and 2.

9.5 Why undue haste was exercised by the plaintiff for getting the receipts signed from defendant No.3 knowing well that she was not holding any Power of Attorney or written authorisation from defendants No.1 and 2?

10. Judgments referred to and relied by the plaintiff

The learned counsel for the plaintiff has referred to and relied upon the following judgments:-

10.1 **M/s Nanak Builders and Investors Pvt. Ltd v. Vinod Kumar Alag, AIR 1991 Delhi 315 -** This Court held that a receipt containing all the essential ingredients of a contract can be specifically enforced.

10.2 **Sanjeev Narang v. Prism Buildcon Pvt. Ltd.,** 154 (2008) DLT 508 (DB) - The Division Bench of this Court while dismissing the appeal against the order vacating interim injunction by the learned Single Judge directed the respondent to inform the purchaser about the litigation pending between the parties in case the respondent wishes to dispose of the suit property during the pendency of the suit in view of Section 52 of the Transfer of the Property Act, 1882.

10.3 **K.L.Bhatia v. Gurmit Singh,** 1996 (37) DRJ 542 - This Court while dismissing the injunction application directed the defendants to disclose the factum of the suit in case of any agreement or transaction to be entered into for the sale/transfer of the suit property in favour of the third party or prior to parting of the possession to any third party.

11. Judgments referred to and relied upon by the defendants

The learned counsel for the defendants refer to and rely upon the following judgments:-

11.1 **Arun Batra v. Bimla Devi,** 2010 (117) DRJ 699 - The ex-parte interim order granted to the plaintiff was vacated by this Court on the ground that the receipts of payment was not signed by all the co-owners of the suit property, the receipts signed by some of the co-owners were

undated, no time frame was fixed for concluding the sale transaction and full particulars were not mentioned on the receipts. This Court held that the receipts were uncertain and indefinite which prima facie indicate that the parties were still to negotiate to arrive at the agreed terms and conditions for sale of the suit property. This Court held that prima facie there was no consensus between the parties to formally execute the agreement and the defendant who had not signed the receipts, cannot be held to be bound by the receipts signed by the other defendants. The relevant findings of this Court are as under:-

"41. In the present case, admittedly the defendants No. 1, 3, 4, 6 & 7, the co-owners of the property, have not signed the documents produced by the plaintiff. The present case is not a case of written agreement. The base of the claim of the plaintiff is two receipts which according to the plaintiff were signed by the defendants No. 2, 5 & 8 and on behalf of other defendants i.e. 1,3,4,6 & 7. The basic question which requires consideration in the present matter is that whether prima facie there was a concluded agreement for sale of the respective shares of the defendants in the property is made out by the plaintiff or not. **The four ingredients necessary to make an agreement to sell are: (i) particulars of consideration; (ii) certainty as to party i.e. the vendor and the vendee; (iii) certainty as to the property to be sold; and (iv) certainty as to other terms relating to probable cost of conveyance to be borne by the parties, time, etc.**

42. In view of the said ingredients, as referred above, perusal of the receipts shows that the receipts are undated, no timeframe was stipulated for concluding the sale transaction, full particulars and detail of respective authority are also not mentioned in the receipts. These relevant details are missing in the receipts/oral agreement. **In view of the above, it appears that receipts are uncertain and undefinite which prima facie indicate**

that the parties were still to negotiate to arrive at the agreed terms and conditions for sale of the suit property. Admittedly after the issuance of alleged receipts till the filing of the present suit there were no negotiations/communications between the parties. At this stage, prima facie it does not appear that there was any consensus between the parties to formally execute an agreement to sell and defendants No. 1,3,4,6 & 7 cannot be held to be bound by the said agreement alleged to have been entered into (even after assuming) by way of two receipts signed by the defendants No. 2,5 & 8. There is no doubt that the Court can grant the relief to the extent of joint owners who had become party to the contract and it can be enforced against part of the co-owner. But fact remains that is not the case of plaintiff nor has the relief been claimed in that manner. In the present case, the plaintiff wants to enforce the agreement between the plaintiff and defendants No. 1 to 8 for the entire property in dispute."

(Emphasis added)

11.2 **Mayawanti v. Kaushalya Devi,** JT 1990 (3) SC 205 - In this case, the agreement was signed by one of the two co-owners. The suit for specific performance was decreed by the trial Court and the first appeal was dismissed by the Additional District Judge. The second appeal was, however, allowed by the High Court against which the special leave petition was filed before the Apex Court. It was contended before the Apex Court that the signatures of one of the two co-owners was of no avail as there was no evidence to show that he had authority to execute the document on behalf of the other co-owner. The Hon'ble Supreme Court held as under:-

"8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the

existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. **Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable.** The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation."

"11. If the above correspondence were true, it would appear that the contract was in the alternative of either whole or half of the property and that the offer and acceptance did not correspond. It is settled law that if a contract is to be made, the intention of the offeree to accept the offer must be expressed without leaving room for doubt as to the fact of acceptance or to the coincidence of the terms of acceptance with those of the offer. The rule is that the acceptance must be absolute, and must correspond with the terms of the offer. If the two minds were not ad idem in respect of the property to be sold, there cannot be said to have been a contract for specific performance. **If the parties themselves were not ad idem as to the subject matter of the contract the court cannot order specific performance..."**

"19. The specific performance of a contract is the actual execution of the contract according to its stipulations and terms, and the courts direct the party in default to

do the very thing which he contracted to do. The stipulations and terms of the contract have, therefore, to be certain and the parties must have been consensus ad idem. The burden of showing the stipulations and terms of the contract and that the minds were ad idem is, of course, on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. Where there are negotiations, the court has to determine at what point, if at all, the parties have reached agreement. Negotiations thereafter would also be material if the agreement is rescinded.

20. The jurisdiction of the court in specific performance is discretionary. Fry in his Specific Performance, 6th Edn. P. 19, said:

> "There is an observation often made with regard to the jurisdiction in specific performance which remains to be noticed. It is said to be in the discretion of the Court The meaning of this proposition is not that the Court may arbitrarily or capriciously perform one contract and refuse to perform another, **but that the Court has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiffs favour. 'If the defendant', said Plumer V.C.,' can show any circumstances dehors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a Court of Equity, having satisfactory information upon that subject, will not interpose."**

21. As Chitty observes the "prophecy has not been wholly fulfilled, for the scope of the remedy remains subject to many limitations." But the author observes a welcome move towards the more liberal view as to the extent of jurisdiction which was favoured by Lord Justice Fry. But

where no contract has been entered into at all, there is no room for any liberal view.

22. Section 9 of the Specific Relief Act says that except as otherwise provided in that Act where any relief is claimed under Chapter II of the Act in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground which is available to him under any law relating to contracts. It the instant case **the defence of there having not been a contract for lack of consensus ad idem was available to the defendant."**

(Emphasis added)

11.3 **Shiv Kumar Chadha v. Municipal Corporation of Delhi,** (1993) 3 SCC 161 -

"TEMPORARY INJUNCTION

30. It need not be said that primary object of filing a suit challenging the validity of the order of demolition is to restrain such demolition with the intervention of the Court. In such a suit the plaintiff is more interested in getting an order of interim injunction. It has been pointed out repeatedly that a party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is within the discretion of the Court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the Court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. The purpose of temporary injunction is, thus, to maintain the status quo. The Court grants such relief according to the legal principles - ex debited justitiae,. Before any such order is passed the Court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him.

31. Under the changed circumstance with so many cases pending in Courts, once an interim order of injunction is passed, in many cases, such interim orders continue for months; if not for years. At final hearing while vacating such interim orders of injunction in many cases, it has been discovered that while protecting the plaintiffs from suffering the alleged injury, more serious injury has been caused to the defendants due to continuance of interim orders of injuction without final hearing. It is a matter of common knowledge that on many occasions even public interest also suffers in view of such interim orders of injunction, because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The Court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the Court.

32. Power to grant injunction is an extra -ordinary power vested in the Court to be exercised taking into consideration the facts and circumstances of a particular case. The Courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. That is why Rule 3 of Order 39 of the Code requires that in all cases the Court shall, before grant of an injunction, direct notice of the application to be given to the opposite partttty, except where it appears that object of granting injunction itself would be defeated by delay. By the Civil Procedure Code (Amendment) Act, 1976, a proviso has been added to the said rule saying that "where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay..."

11.4 **Sanjay Puri v. Radhey Lal and Ors.,** 2011 I AD (Delhi) 413 - This Court held that a document styled as receipt can operate and be enforceable as a contract. However, the absence of the signatures of the owner on the receipt can justifiably lead to the conclusion that a contract had not emerged. This Court held that an enforceable contract had not come into being. This Court held as under:

"7. ...In **K. Narendra v. Riviera Apartments (P) Ltd.**1999 VI AD (S.C.) 256 = (1999) 5 SCC 77, the Court observed thus:

29. Section 20 of the Specific Relief Act, 1963 provides that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Performance of the contract involving some hardship on the Defendant which he did not foresee while non-performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance. The doctrine of comparative hardship has been thus statutorily recognized in India. However, mere inadequacy of consideration or the mere fact that the contract is onerous to the Defendant or improvident in its nature, shall not constitute an unfair advantage to the plaintiff over the Defendant or unforeseeable hardship on the Defendant. The principle underlying Section 20 has been summed up by this Court in **Lourdu Mari David v. Louis Chinnaya Arogiaswamy,** (1996) 5 SCC 589 by stating that the decree for specific performance is in the discretion of the Court but the discretion should not be used arbitrarily; the discretion should be exercised on sound principles of law capable of correction by an appellate court.

30. Chitty on Contracts (27th Edn., 1994 1 1296) states:

Severe hardship may be a ground for refusing specific performance even though it results from circumstances which arise after the conclusion of the contract, which affect the person of the Defendant rather than the subject-matter of the contract, and for which the plaintiff is in no way responsible.

8. In **Gobind Ram v. Gian Chand,** 2000 VII AD (S.C.) 389 = (2000) 7 SCC 548, the Court observed thus:

7. It is the settled position of law that grant of a decree for specific performance of contract is not automatic and is one of the discretions of the court and the court has to consider whether it will be fair, just and equitable. The court is guided by principle of justice, equity and good conscience.

9. **A.C. Arulappan v. Ahalya Naik,** 2001 VI AD (S.C.) 585 = (2001) 6 SCC 600 The Court observed thus:-

7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. **If under the terms of the contract the plaintiff gets an unfair advantage over the Defendant, the court may not exercise its discretion in favour of the plaintiff.** So also, specific relief may not be granted if the Defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff."

"11. Even in these circumstances, the learned Single Judge had declined to pass a decree for Specific Performance. The decisions in **Sardar Singh v. Krishna Devi,** (1994) 4 SCC 18 as well as **K. Narendra and Nirmala Anand v. Advent Corporation Pvt. Ltd.,** 2002 V AD (S.C.) 239 = (2002) 5 SCC 481 were noted.

These decisions emphasize the discretionary nature of the relief of Specific Performance. The learned Single Judge has kept in perspective the conduct of the Respondent/Owner in that he had endeavoured to return the "Token Advance" of Rs. 50,000/- within ten days of the event. The learned Single Judge has further noted that **since the so-called repudiation or cancellation, or as best put - refutation, had taken place within ten days, no damage by way of loss of profit because of escalation in prices would have resulted to the plaintiff/Appellant.** He accordingly directed the plaintiff to revalidate the draft of Rs. 50,000/- sent to the plaintiff as a return of the "Token Advance" along with Rs. 1,00,000/- as damages. Mindful of the decision in **N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao,** 1995(5) SCC 115, the learned Single Judge has also found it relevant that the plaintiff was dealing in real estate."

(Emphasis added)

11.5 **A.C. Arulappan v. Smt. Ahalya Naik,** AIR 2001 SC 2783 - The Hon'ble Supreme Court held as under:-

"7. The jurisdiction to decree specific relief is discretionary and the court can consider various circumstances to decide whether such relief is to be granted. Merely because it is lawful to grant specific relief, the court need not grant the order for specific relief; but this discretion shall not be exercised in an arbitrary or unreasonable manner. Certain circumstances have been mentioned in Section 20(2) of the Specific Relief Act, 1963 as to under what circumstances the court shall exercise such discretion. **If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff.**

8. In **D. Anjaneyulu vs. Damacherla Venkata**

Seshaiah, AIR 1987 SC 1641, the High Court declined to grant a decree for specific performance in favour of the plaintiff, even though the defendant was guilty of breach of agreement. That was a case where the defendant had constructed costly structures and if a decree for specific performance was granted, the defendant would have been put to special hardship. This Court directed the defendant to pay compensation to the plaintiff.

9. In **Parakunnan Veetill Joseph's Son Mathew vs. Nedumbara Kuruvila's Son,** AIR 1987 SC 2328, this Court cautioned and observed as under:

"Section 20 of the Specific Relief Act, 1963 preserves judicial discretion to Courts as to decreeing specific performance. The Court should meticulously consider all facts and circumstances of the case. The Court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter in the judicial verdict. The Court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff".

10. In **Lourdu Mari David vs. Louis Chinnaya Arogiaswamy,** AIR 1996 SC 2814, the plaintiff, who sought for specific performance of an agreement to purchase immovable property, filed a suit with incorrect and false facts. In the plaint, it was alleged that the plaintiff was already given possession of Door No.2/53 as a lessee and he was given possession of Door No. 1/53 on the date of the agreement itself. But he did not give any evidence that he had got possession of Door No.1/53 on the date of agreement. It was found that his case as regards Door No.1/53 was false. He also alleged that he had paid Rs.400/- in addition to the sum of Rs.4,000/- paid as advance, but this was proved to be an incorrect statement. He alleged that the third defendant had inspected the house during the course of negotiations, but this also was found to be false. This Court held that it is settled law that **the party who seeks to avail of the jurisdiction**

of a Court and specific performance being equitable relief, must come to the Court with clean hands. In other words, the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.

11. In **Gobind Ram vs . Gian Chand,** AIR 2000 SC 3106, it was observed in paragraph 7 of the judgment that grant of a decree for specific performance of contract is not automatic and is one of the discretions of the court and **the court has consider whether it would be fair, just and equitable. The court is guided by the principles of justice, equity and good conscience."**

(Emphasis added)

11.6 **Bal Krishna v. Bhagwan Das,** AIR 2008 SC 1786 The Hon.ble Supreme Court held as under:-

"8……It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not bound to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void."

(Emphasis added)

11.7 **Mirahul Enterprises v. Mrs. Vijaya Sirivastava and Mr. R.R. Sood,** AIR 2003 Delhi 15 This Court held as under:-

"24. Before we proceed to analyses the evidence in this case and to appreciate the submissions made at the bar, it will be put necessary to take into consideration the provisions of Specific Relief Act and the requirements of law before a decree for specific performance be granted. Grant of decree for specific performance under Section 20 of the Specific Relief Act, 1963 rest in the discretion of the Court and cannot be claimed as of right. Parties seeking performance of contract must satisfy all the requirements necessary for seeking relief in equity. In exercising discretion, Court is obliged to take into consideration circumstances of the case, conduct of the parties and the respective interests under the contract. At the same time, it should not be lost sight of that the discretion has to be exercised by the Court not arbitrarily but based on sound judicial principles. **The first fundamental, which must be proved beyond all reasonable doubts is the existence of a valid and enforceable contract.** Where a valid and enforceable contract has not been made, Court will not make a contract for the parties. Specific performance will not be ordered it the contract itself suffers from some defect, makes the contract invalid or unenforceable. Reference at this stage be made to a decision of the Supreme Court in **Mayawanti v. Kaushalya Devi** (1990) 3 SCC 1.

25. Section 10 of the Contract Act defines as to what agreements are contracts. All agreements are contracts, it they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void. A true contract thus requires the agreement of the parties freely made with full knowledge and without any feeling of restraint. Parties must be ad-idem on the essential terms of the contract In case, it is an agreement to sell of

immovable property, the law requires that it must with certainty identify the property agreed to be sold and the price fixed as consideration paid or agreed to paid. Price has not been defined in Transfer of Property Act but that expression has to be understood in the same sense as is understood in the Sales of Goods Act. Every sale implies a contract of sale and like any other contract, the contract for sale of immovable property must be based on mutuality."

(Emphasis added)

11.8 **Iqbal Properties Pvt. Ltd. v. Atar Singh,** 2011 I AD (Delhi) 269 - This Court dismissed the suit for specific performance on the ground that all the co-owners were not party to the agreement.

12. It is a settled law that in a suit for specific performance of contract, the evidence and proof of agreement must be absolutely clear and certain. (**Ganesh Shet v. Dr. C.S.G.K. Shetty,** AIR 1998 SC 2216). In **Rickmers Verwaltung GMB H v. The Indian Oil Corporation Ltd.,** 1998 VIII AD (SC) 481, the Hon'ble Supreme Court held that there was a vast difference between negotiating a bargain and entering into a binding contract. It was held that the Court should ascertain whether there was any meeting of minds between the parties to create a binding contract. It was further held that the Court is not empowered to create a contract for the parties by going outside the language used by the parties. The relevant findings of the Court are as under:-

"In this connection the cardinal principle to remember is that **it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence,** except insofar as there are some appropriate implications of law to be drawn. Unless from the correspondence it can unequivocally and clearly emerge that the parties were ad idem to the terms, it cannot be said that an agreement had come into existence between them through

correspondence. The Court is required what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows that there had been meeting of mind between the parties and they had actually reached an agreement, upon all material terms, then and then alone can it be said that a binding contract was capable of being spelt out from the correspondence."

(Emphasis added)

13. In **M/s Pelikan Estates Pvt. Ltd. v. Kamal Pal Singh and Ors.** 2004 (VI) AD 185: 2004 (76) DRJ 353, specific performance was sought on the basis of oral agreement and interim injunction was sought during the pendency of the suit. Vikramajit Sen, J. declined the injunction with the observation that **"where immovable property is in question I would always be reluctant if not loathe to accept the evolution of a transaction which is not evidenced in writing."** Learned Judge further observed that **"where emergence of an oral agreement is being set up, there must be no possibility of doubt in essential concomitants of the contract"**.

14. In **Vinod Seth v. Devinder Bajaj and Anr.,** JT 2010 (8) SC 66, the Hon'ble Supreme Court held that:

"20. ...Section 52 of TP Act provides that during the pendency in any court of any suit in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the court and on such terms as it may impose. The said section incorporates the well-known principle of lis pendens which was enunciated in **Bellamy v. Sabine** 1857 (1) De G & J566: It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation - that it would plainly be impossible that any action or suit could be brought to a successful termination, if

alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating efore the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding.

It is well-settled that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section 52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest, during the pendency of the suit will be subject to the decision in the suit.

21. **The principle underlying Section 52 of TP Act is based on justice and equity. The operation of the bar under Section 52 is however subject to the power of the court to exempt the suit property from the operation of section 52 subject to such conditions it may impose. That means that the court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any part to the suit, by imposing such terms as it deems fit.** Having regard to the facts and circumstances, we are of the view that this is a fit case where the suit property should be exempted from the operation of Section 52 of the TP Act, subject to a condition relating to reasonable security, so that the defendants will have the liberty to deal with the property in any manner they may deem fit, inspite of the pendency of the suit. The appellant-plaintiff has alleged that he is a builder and real estate dealer. It is admitted by him that he has entered into the transaction as a commercial collaboration agreement for business benefits. The appellant has further stated in the plaint, that under the collaboration agreement, he is required to invest Rs. 20 lakhs in all, made up of Rs. 16,29,000/- for construction and Rs. 3,71,000/- as cash consideration and that in lieu of it he will be

entitled to ground floor of the new building to be constructed by him at his own cost. Treating it as a business venture, a reasonable profit from such a venture can be taken as 15% of the investment proposed, which works out to Rs. 3 lakhs. Therefore it would be sufficient to direct the respondents to furnish security for a sum of Rs. 3 lakhs to the satisfaction of the court (learned Single Judge) as a condition for permitting the defendants to deal with the property during the pendency of the suit, under Section 52 of the TP Act."

(Emphasis added)

15. The principles laid down by the Courts in the aforesaid judgments are summarized hereunder:-

15.1 The four ingredients necessary to make an agreement to sell are: (i) particulars of consideration; (ii) certainty as to party i.e. the vendor and the vendee; (iii) certainty as to the property to be sold; and (iv) certainty as to other terms relating to probable cost of conveyance to be borne by the parties, time, etc.

15.2 The first fundamental, which must be proved beyond all reasonable doubt is the existence of a valid and enforceable contract.

15.3 It is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the Court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence.

15.4 The uncertain and undefinite receipts prima facie indicate that the parties were still to negotiate to arrive at the agreed terms and conditions for sale of the suit property. If after the issuance of alleged receipts till the filing of the suit, there were no negotiations/communications between the parties, it prima facie indicates that there was no consensus between the parties to formally execute an agreement to sell.

15.5 If the two minds were not ad-idem in respect of the property to be sold, the court cannot order specific performance.

15.6 The stipulations and terms of the contract have to be certain and the parties must have been consensus ad idem. The burden of

showing the stipulations and terms of the contract and that the minds were ad idem is on the plaintiff. If the stipulations and terms are uncertain, and the parties are not ad idem, there can be no specific performance, for there was no contract at all. Where there are negotiations, the court has to determine at what point, if at all, the parties have reached agreement.

15.7 Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable.

15.8 The Court has to consider the conduct of the plaintiff and circumstances outside the contract and the Court will not order specific performance if the defendant can show any circumstances dehors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance.

15.9 If the so-called repudiation or cancellation takes place within few days, no damage by way of loss of profit because of escalation in prices would result to the plaintiff.

15.10 If under the terms of the contract, the plaintiff gets an unfair advantage over the defendant, the Court may not exercise its discretion in favour of the plaintiff. So also specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the Court would desist from granting a decree to the plaintiff.

15.11 The party who seeks specific performance being equitable relief, must come to the Court with clean hands. In other words, the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.

15.12 The Court has considered whether it would be fair, just and equitable. The Court is guided by the principles of justice, equity and good conscience.

15.13 While exercising the discretion, the Court would take into consideration the circumstances of the case, the conduct of parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the

performance of the contract would involve some hardship on the defendant, which he did not foresee.

15.14 The specific performance is an equitable relief. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion. The Court is not bound to grant specific relief merely because it is lawful to do so. The motive behind the litigation is to be examined. The Court while granting or refusing the relief has to consider whether it would be fair, just and equitable. In case, where any circumstances under Section 20(2) are established, the relief is to be declined. The relief sought under Section 20 is not automatic as the Court is required to see the totality of the circumstances which are to be assessed by the Court in the light of facts and circumstances of each case. The conduct of the parties and their interest under the contract is also to be examined.

15.15 The principle underlying Section 52 of TP Act is based on justice and equity. The operation of the bar under Section 52 is however subject to the power of the court to exempt the suit property from the operation of section 52 subject to such conditions it may impose. That means that the court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any part to the suit, by imposing such terms as it deems fit.

16. Applying the aforesaid principles of law to the facts of the present case, this Court is of the prima facie opinion that:-

16.1 There is no written agreement whatsoever between the plaintiff and defendant Nos.1 and 2, who are the joint owners of the suit property.

16.2 There is no privity of contract between plaintiff and defendants No.1 and 2.

16.3 There is no power of attorney or written authorisation by defendants No.1 and 2 in favour of defendant No.3 authorising her to sell the suit property on their behalf. The receipts dated 10th and 18th November, 2010 executed by defendant No.3 in favour of the plaintiff are, therefore, not binding on the defendants No.1 and 2.

16.4 The Plaintiff made the payment of Rs.50,00,000/- to defendant No.3 with the knowledge that defendant No.3 had no power of attorney

or written authorisation on behalf of defendants No.1 and 2 to sell the suit property.

16.5 The plaintiff never insisted for the signatures of defendants No.1 and 2 on the receipts, the ratification of receipts by defendants No.1 and 2 or power of attorney of defendants No.1 and 2 because the plaintiff knew that the defendants were not ready to sell the suit property.

16.6 It appears that there was no consensus ad idem between the plaintiff and defendants No.1 and 2 at all or between the plaintiff and defendant No.3.

16.7 There is no concluded contract as the draft agreement to sell was not signed by any of the two parties. The unsigned draft agreement to sell placed on record by the plaintiff is un-enforceable.

16.8 It appears that the plaintiff made the payment of Rs.50,00,000/- to the defendant No.3 to persuade defendants No.1 and 2 to agree to sell the suit property to the plaintiffs but there was no concluded contract even between the plaintiff and defendant No.3.

16.9 Since the defendants have refunded Rs.50,00,000/- to the plaintiff, no damage by way of loss of profit because of escalation of prices has resulted to the plaintiff as held by the Hon'ble Supreme Court in **A.C. Arulappan v. Ahalya Naik** (Supra).

16.10 The receipts dated 10th and 18th November, 2010 give an unfair advantage to the plaintiff over the defendants considering that the plaintiff took advantage of the trust of defendant No.3 in her lawyer to get the receipts signed from defendant No.3 to somehow bind her to sell the suit property and to entangle the suit property in a litigation.

16.11 The conduct of the plaintiff at the time of execution of the receipts dated 10th and 18th November, 2010 show that the same have been executed in undue haste to somehow bind defendant No.3 whatever worth it was, knowing fully well that she was not holding a power of attorney or written authorisation on behalf of defendants No.1 and 2 to sell the suit property.

17. Conduct of the plaintiff

17.1 In **M/s. Gujarat Bottling Co. Ltd. v. Coca Cola Company**

AIR 1995 SC 2372, the Hon'ble Supreme Court held that the Conduct of the parties invoking the jurisdiction of the Court under Order XXXIX of the Code of Civil Procedure must be fair and honest. The relevant finding of the Court is reproduced hereunder:-

> "50. In this context, it would be relevant to mention that in the instant case GBC had approached the High Court for the injunction order, granted earlier, to be vacated. Under Order 39 of the Code of Civil procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the court, and may refuse to interfere unless his conduct was free from blame. **Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest."**
>
> (Emphasis added)

17.2. In **Dalip Singh v. State of U.P.,** (2010) 2 SCC 114, the Hon'ble Supreme Court noted as under:-

> "1. For many centuries, Indian society cherished two basic values of life i.e. 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any

> respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

17.3. In **Padmawati and Ors. v. Harijan Sewak Sangh,** 154 (2008) DLT 411, this Court noted as under:

> "6. The case at hand shows that frivolous defences and frivolous litigation is a calculated venture involving no risks situation. You have only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of illegalities. I consider that in such cases where Court finds that using the Courts as a tool, a litigant has perpetuated illegalities or has perpetuated an illegal possession, the Court must impose costs on such litigants which should be equal to the benefits derived by the litigant and harm and deprivation suffered by the rightful person so as to check the frivolous litigation and prevent the people from reaping a rich harvest of illegal acts through the Courts. One of the aim of every judicial system has to be to discourage unjust enrichment using Courts as a tool. The costs imposed by the Courts must in all cases should be the real costs equal to deprivation suffered by the rightful person."
>
> xxxxxx
>
> **"9. Before parting with this case, I consider it necessary to pen down that one of the reasons for over-flowing of court dockets is the frivolous litigation in which the Courts are engaged by the litigants and which is dragged as long as possible. Even if these litigants ultimately loose the lis, they become the real victors and have the last laugh. This class of people who perpetuate illegal acts by obtaining stays and injunctions from the Courts must be made to pay the sufferer not only the entire illegal gains made by them as costs to the person deprived of his right and also must be**

burdened with exemplary costs. Faith of people in judiciary can only be sustained if the persons on the right side of the law do not feel that even if they keep fighting for justice in the Court and ultimately win, they would turn out to be a fool since winning a case after 20 or 30 years would make wrong doer as real gainer, who had reaped the benefits for all those years. Thus, it becomes the duty of the Courts to see that such wrong doers are discouraged at every ˇstep and even if they succeed in prolonging the litigation due to their money power, ultimately they must suffer the costs of all these years long litigation. Despite settled legal positions, the obvious wrong doers, use one after another tier of judicial review mechanism as a gamble, knowing fully well that dice is always loaded in their favour, since even if they lose, the time gained is the real gain. This situation must be redeemed by the Courts."

(Emphasis added)

This Court imposed costs of Rs.15.1 lakhs in the above case against which Special Leave to Appeal (Civil) No 29197/2008 was preferred to the Supreme Court. On 19th March, 2010, the Hon'ble Supreme Court passed the following order:

> "We have heard learned Counsel appearing for the parties. We find no ground to interfere with the well-considered judgment passed by the High Court. The Special Leave Petition is, accordingly, dismissed."

17.4 I agree with the findings by the learned Judge in **Padmawati's** case (supra) and wish to add a few words. There is another feature which has been observed and it is of unscrupulous persons filing false claims or defences with a view that the other person would get tired and would then agree to compromise with him by giving up some right or paying some money. If the other party is not able to continue contesting the case or the Court by reason of falsehood falls into an error, the wrong succeeds. Many times, the other party compromises, or at other times, he may continue to fight it out. But as far as the party in the wrong is concerned, as this Court noted in **Padmawati's** case (supra), even if these litigants ultimately lose the lis, they become the real victors

and have the last laugh.

17.5 In the present case, the conduct of the plaintiff does not appear to be honest. There is no written agreement between plaintiff and defendants No.1 and 2 who are the owners of the suit property. Instead the plaintiff somehow got the receipts signed from defendant No.3, that too in undue haste and under suspicious circumstances with a view to entangle the property of defendants No.1 and 2 in the hope that the plaintiff can, with the court delays, drag the case for years and the other side would succumb to buy peace. If the other side does not so settle in the end, they are hardly compensated and remains a loser.

17.6 The plaintiff has deliberately concealed the draft agreement to sell drafted by Mr. Arun Vohra, Advocate. This Court heard the arguments on 31st March, 2011 and reserved the order. This Court, thereafter, noticed the reference to the draft agreement to sell in the reply dated 17th March, 2011 of Mr. Arun Vohra, Advocate, whereupon the case was taken up on 18th May, 2011 and upon direction of this Court, the plaintiff placed on record the two draft agreements drafted by Mr. Arun Vohra, Advocate. Admittedly, none of the defendants have signed the said draft agreement to sell and, therefore, the plaintiff has no cause of action to file this suit.

17.7 The plaintiff has made false statements on oath in the plaint by concealing the draft agreement to sell with the dishonest intention of obtaining ex-parte injunction from this Court. In fact, the plaintiff succeeded in obtaining ex-parte injunction from this Court by misleading this Court.

18. <u>Conclusion</u>

In the facts and circumstances of this case, this Court is of the view that there is no prima facie case in favour of the plaintiff and against the defendants as there is no written agreement whatsoever between the plaintiff and defendants No.1 and 2, who are the joint owners of the suit property and there is no written authorisation or power of attorney in favour of defendant No.3 who has executed the receipts dated 10th and 18th November, 2010 which are not binding on defendants No.1 and 2. There is no concluded contract between the parties as the draft agreement to sell placed on record by the plaintiff has not been signed by any of the parties. The balance of convenience is in

favour of the defendants who would suffer irreparably in the event of an injunction being granted in this matter. The suit is prima facie vexatious and frivolous. The Plaintiff is, therefore, not entitled to any injunction. I.A. No.489/2011 under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure is, therefore, dismissed with cost of Rupees One Lakh. I.A. No.3228/2011 under Order XXXIX Rule 4 of the Code of Civil Procedure is allowed. The ex-parte interim order dated 18th January, 2011 stands vacated.

19. Having regard to the facts and circumstances of this case and following the judgment of the Hon'ble Supreme Court in the case of **Vinod Seth v. Devinder Bajaj** (Supra), this Court is of the view that this is a fit case where suit property should be exempted from operation of Section 52 of the Transfer of Property Act subject to the defendants furnishing security of Rs. 5 lakhs. Defendants No.1 and 2 are hereby exempted from the operation of Section 52 of Transfer of Property Act subject to their informing the purchaser about this litigation and furnishing security of Rs.5 lakhs to the satisfaction of the Registrar General of this Court within 30 days.

20. The observations made hereinabove are prima facie and shall not constitute any expression of final opinion on the issues involved and shall have no bearing on the merits of the case.

CS(OS)No.83/2011

1. In **T. Arivandandam v. T.V. Satyapal,** AIR 1977 SC 2421, the Hon'ble Supreme Court held that if on a meaningful reading of the plaint, the suit appears to be manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, the Court should nip it in the bud by rejecting the plaint under Order VII Rule 11 of the Code of Civil Procedure.

2. List for consideration as to whether the suit is liable to be rejected under Order VII Rule 11 of the Code of Civil Procedure on 1st June, 2011.

3. Both the parties are directed to file brief note of submissions not exceeding three pages in terms of the order dated 14th February, 2011 in the case of **Kiran Chhabra v. Pawan Kumar Jain,** 178 (2011) DLT

462, along with the relevant judgments before the next date of hearing.

4. Both the parties shall remain present in the Court along with all documents relating to this case within their power and possession for being examined under Order X Rule 2 of the Code of Civil Procedure read with Section 165 of the Indian Evidence Act, if deemed necessary.

HIGH COURT OF DELHI : NEW DELHI
NOTIFICATION

Delhi, the 14th March, 2011

No. 127/Rules/DHC.—In exercise of powers conferred by Section 7 of the Delhi High Court Act, 1966 (Act 26 of 1966) and read with Article 227 of the Constitution of India and all other powers enabling it in this behalf, the High Court of Delhi, with the prior approval of the Lt. Governor of the Government of National Capital Territory of Delhi, hereby makes the following amendment in Part A of Chapter 8 of the High Court Rules and Orders, Volume III, namely:—

THE FOLLOWING SHALL BE SUBSTITUTED FOR THE EXISTING RULE 3:—

> **"3. Expediency and interests of justice—the main consideration.**—The main point which the Court has to consider in initiating proceedings under Section 340 of the Code is whether it is expedient in the interests of justice that an enquiry should be made and a complaint filed. The mere fact that there is reason to believe that an offence has been committed is by itself not sufficient to justify a prosecution. The objective is to prevent abuse of process of Court by use of perjury. The Court is empowered to hold a preliminary inquiry but it is not peremptory. Even without a preliminary inquiry the Court can form an opinion when it appears that an offence has been committed in relation to a proceeding in that Court. Sub-section (1) of Section 340 does not contemplate that the Court should give a finding whether any particular person is guilty or not. In fact no expression on the guilt or innocence of person should be made by the Court while passing the order under Section 340 of the Code. The purpose of inquiry, even if the Court ought to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed. It is not mandatory that person concerned should be called upon to give any explanation before ordering his prosecution. [Ref. : (1) **M.S. Shriff and Anr. V. State of Madras and Ors.** AIR 1954 SC 397 and (2) **Pritish V. State of Maharashtra,** AIR 2002 SC 236]"

Note : This amendment shall come into force from the date of its publication in the Gazette.

By Order of the Court,

V.P. VAISH, Registrar General

DEPARTMENT OF URBAN DEVELOPMENT
NOTIFICATION
Delhi, the 14th March, 2011

F. No. 16(1)/Pf. II/UD/W/2008/171.—In exercise of powers conferred by Section 3 of the Delhi Water Board Act, 1998 (Delhi Act 4 of 1998), the Lt. Governor of National Capital Territory of Delhi, hereby appoints the following as Vice Chairperson and Members in the Delhi Jal Board, Delhi constituted *vide* this Government's Notification No. F. 16(1)/UD/DWB/98-99/4199, dated 6th April, 1998, with effect from the date they assume charge of their respective offices, namely:—

SI. No.	Name	Designation	Provision of Section
(1)	(2)	(3)	(4)
1.	Ch. Mateen Ahmad	Vice Chairperson	3(2)(i)
2.	Shri Balram Tanwar	Member	3(2)(iii)
3.	Shri Asif Mohammad Khan	Member	3(2)(iii)

By Order and in the Name of the Lt. Governor of the National Capital Territory of Delhi,
S.S. RATHOR, Addl. Secy. (Water)

HIGH COURT OF DELHI
NOTIFICATION

Delhi, the 9th February, 2011

No. 70/Rules/DHC.—In exercise of powers under Part X of the Code of Civil Procedure, 1908 (5 of 1908) and Order V, Rule 9 of the Code of Civil Procedure, 1908 and all other powers enabling it in this behalf, the High Court of Delhi, hereby makes the following Rules:—

'Delhi Courts Service of Processes by Courier, Fax and Electronic Mail Service (Civil Proceedings) Rules, 2010'

CHAPTER I
GENERAL

1. Title :

These Rules may be called the Delhi Courts Service of Processes by Courier, Fax and Electronic Mail Service (Civil Proceedings) Rules, 2010.

2. Commencement :

These Rules shall come into force with effect from the date of their notification.

3. Application :

These Rules shall apply to, all civil proceedings including Suits, Writ Petitions, Applications, Appeals, Revisions or Reviews pending before the High Court of Delhi or any Subordinate Court or Tribunal in Delhi.

4. Definitions :

(a) "Code' means Code of Civil Procedure, 1908.

(b) "Courier" means a proprietorship concern, a firm, a company or a body corporate engaged in the business of delivering postal articles.

(c) "Recommendation Committee" means the committee constituted by the Chief Justice of the High Court, consisting of Registrar General, one officer of the High Court not below the rank of Joint Registrar and one officer of the Delhi Higher Judicial Service, for preparing a panel of proposed Approved Couriers.

(d) "High Court" means the High Court of Delhi.

(e) "Chief Justice" means the Chief Justice or the Acting Chief Justice of the High Court of Delhi.

(f) "District Judge" means the District and Sessions Judge of Delhi.

(g) "Registrar General" means the Registrar General of the High Court of Delhi.

(h) "Approved Courier" means the courier on the panel of Approved Couriers.

(i) "Proof of Delivery" means the report submitted by the Approved Courier, in the format prescribed by these Rules of the service of summons/notices or any other communication of the Court and includes the reasons of non-delivery.

(j) "Postal Article" includes the envelopes, packets, parcels containing summons, notices, documents or other communications of the Court handed over for service to the Approved Courier with the label "COURT SUMMONS SERVICE".

(k) "FAX" (a short form of facsimile) is the telephone transmission of scanned-in printed material (text or images) to a telephone number with a printer or any other output device.

(l) "Electronic Mail" is a store and forward method of composing, sending, storing and receiving message in electronic form via a computer based communication mechanism.

(m) "Electronic Mail Service" means the summons sent in pre-designed template form by electronic mail, digitally signed by the presiding officer of the Court or any other person authorized in this behalf by the High Court or the District Judge, as the case may be.

CHAPTER 2

Selection of Courier and Service by Courier

5. Procedure for selecting an Approved Courier:

(a) The High Court will invite tenders from the Courier who desire to be selected as Approved Couriers, on the terms and conditions laid down in these rules and other directions and instructions issued by the High Court from time to time, within a specified period as given in the notification. The tender will be issued as far as possible in Form 'A'

appended with these rules.

(b) The Chief Justice will constitute a 'Reccommendation Committee' consisting of:—

(i) Registrar General, who will head the Committee;

(ii) One officer not below the rank of a Joint Registrar; and

(iii) One officer of Delhi Higher Judicial Service.

(c) The Recommendation Committee will prepare a panel of all the proposed Approved Couriers taking into consideration:—

(i) reputation of the Courier;

(ii) past record of the Courier;

(iii) structure of the organization of the Courier and its network including the financial capacity and standing;

(iv) the experience and capacity of the Courier to provide the desired service;

(v) willingness to abide by the terms and conditions as laid down in these rules; and

(vi) readiness to fulfill the criterion laid down by the High Court.

(d) (i) The Recommendation Committee, after preparing the proposed panel will place it before the Chief Justice for consideration and approval of the panel of Approved Couriers. The Chief Justice will examine the entire list of the applicants as well as the proposed panel of Approved Couriers and after examining the same, issue appropriate directions notifying the final panel of selected Approved Couriers.

(ii) The Registrar General will intimate all the Approved Couriers of their being empanelled.

6. Agreement and Undertaking by a Courier:

The Approved Courier shall enter into an agreement, with such variations, and modifications as may be found necessary in Form 'B' and

shall also file an undertaking before the Registrar General, stating therein:—

(a) That the Approved Courier is not a party to any litigation pending before any of the Courts in Delhi and if it is, make a full and complete disclosure of the same.

(b) That the Approved Courier will be solely responsible for the safety and security of the documents/goods to be delivered by it.

(c) That the postal article handed over to the Approved Courier will be handled only by its regular employees having reasonable knowledge of English language.

(d) That the Approved Courier would design its 'proof of delivery' in the format approved by the Registrar General.

(e) That the Approved Courier would necessarily furnish proof of delivery in case of served processes with legible signatures of the recipient or return envelope with a proper report in legible handwriting in case of unserved process within a period of 30 days, under acknowledgement from the Registry. In case of refusal by addressee, the name and designation of the person refusing the article or his relationship with the addressee, shall be clearly mentioned on the unserved article.

(f) A proof of delivery shall be supported by an affidavit of the person delivering the post.

7. Procedure for removing the Courier from the panel of Approved Courier:

(a) Name of the Courier will be liable to be removed from the panel if:

(i) the Court, which has issued the summons or on whose behalf summons has been issued, finds prima facie the person employed by the Courier to deliver the postal article entrusted to the courier to have filed a false affidavit or given a false report, as the case may be.

(ii) it is found that the Courier is not providing the

service up to the expectation of the litigants or advocates or the Court.

(iii) it is found that the Courier has been rendering deficient service.

(iv) it is found that the Courier has made false statement in the application.

(v) it is found that the Courier has done something which may be considered as the sufficient ground to remove the Courier from the panel.

(b) As soon as it comes to the knowledge of the Registrar General that the Courier has acted in violation of Rule 7(a) or it has been brought to his knowledge that it has done something which makes the Courier liable to be removed under this Rule, he will make an inquiry in this respect himself or depute anyone to make inquiry in this respect. If the Registrar General comes to the conclusion that the Courier has done something which makes it liable to be removed from the panel, he will call for an explanation of the Courier as to why it should not be removed. The Registrar General shall place the reply, if any, received from the Courier proposed to be removed along with his recommendation before the Chief Justice.

(c) The Chief Justice, after going through the recommendations of the Registrar General, reply, if any, submitted by the Courier and on making such further inquiries as the Chief Justice may consider appropriate, may approve the recommendations of the Registrar General for the removal of the Courier from the panel of Approved Couriers or pass such orders or give such directions as the Chief Justice may consider appropriate.

(d) In case of recommendation of removal of the Courier being approved by the Chief Justice, name of the Courier shall be removed from the panel of Approved Couriers and the Registrar General shall inform the said Courier accordingly.

CHAPTER 3
SERVICE BY FAX

8. Parties to provide Fax number, if desire to serve the other party by Fax :

A party desirous of sending the process by Fax shall provide the Number of the other party whom it would like to serve by Fax.

9. Process by Fax to bear the number of pages faxed with process :

The process being sent by Fax will bear the note that the same is being sent by Fax with or without documents. In case the documents are also being sent by Fax, the number of pages being sent shall also be mentioned on the process.

10. Party to bear cost of process to be sent by Fax :

In case a party is permitted to send the process by Fax, such party shall bear the cost of sending the process and the documents, if any, sent along with it. The party sending the process shall submit the receipt of having sent the Fax to the Court without any delay along with an affidavit in support of having sent the process by Fax.

11. Fee for sending process/documents by Fax using Court facility :

Where the process is to be sent with or without the documents by a facility provided by the High Court, the party shall be asked to deposit fee at such rate as may be determined by the High Court for itself and the District Courts.

CHAPTER 4

Service by 'Electronic Mail Service'

12. Parties to provide electronic mail address, if desire to serve the other party by electronic mail :

A party desirous of sending the process to the other party by Electronic Mail Service shall provide electronic mail address of the other party or a party whom it would like to serve by Electronic Mail Service. Party shall file an affidavit in Court stating that the electronic mail address of the other party given by him is correct to the best of his knowledge.

13. Digitally signed process to be sent at the given electronic mail address by using pre-designed templates :

The process digitally signed by the Presiding Officer of the Court or any other officer authorized by the High Court or the District Judge in this behalf, as the case may be, will be sent at the given electronic mail address of the other party by using the pre-designed templates, designed in accordance with the formats provided in Appendix B of the Code of Civil Procedure, 1908 or in the form as directed by the Court, with the scanned images of the documents. The bouncing of mail shall not constitute valid service.

14. Fee for sending process/document by Electronic Mail Service to be deposited :

The process would be sent by Electronic Mail Service after the party has deposited the fee at such rate as may be determined by the High Court for itself and the District Court.

CHAPTER 5
Miscellaneous

15. Summons to witnesses :

The provisions of these rules shall apply to summons to give evidence or to produce documents or other material objects.

16. Notices or other communication during the proceedings :

The court may direct that a notice or any other communication to any of the parties to the suit or any interlocutory proceeding, before it, may be sent by Courier, Fax or Electronic Mail Service in the manner and in the format it may consider appropriate. Such notices or communications sent by the Electronic Mail Service shall be digitally signed by the Court or by any Officer authorized in his behalf.

17. Parties may voluntarily apply to be served by Fax or Electronic Mail Service :

During the trial of the case, any of the party to the suit or interlocutory proceedings, may file an application in writing giving its Fax number or the electronic mail address or both, with the request that it may be served

with the notices of the Court or any other communication under the Code at the given Fax number or the designate electronic mail address. Any notice or communication sent at the said number or address will constitute a valid service of such notice or the communication on such party.

18. Saving of the powers of the Court :

Nothing in these rules shall be deemed to limit or otherwise affect the power of the Court relating to service of summons or notices or other communications as given in the Code or any other law for the time being in force.

****

HIGH COURT OF DELHI
GENERAL BRANCH

LAST DATE OF TENDER:—

No :

Dated :

NOTICE INVITING TENDERS FOR COURIER SERVICES

Sealed tenders are invited, as per proforma enclosed herewith, from reputed firms, companies or other Body Corporate in the field of courier services for awarding of contract for Courier Services for delivery of letters, notices/summons, parcels etc. dispatched from High Court of Delhi to every nook and corner of the country and outside India.

Preference will be given to the Courier having features such as security, speed, tracking, specialized and individualized service committed delivery time and large network throughout the country, including remote areas as well as adequate arrangement for service outside India.

TERMS AND CONDITIONS

1. The tenderer shall be required to furnish details about his present business, permanent address, complete networking in the country and outside India, audited accounts for the past three years, experience in the field of courier services and list of valued/important clients and litigation, if any,

pending before any of the Courts in Delhi in which it is a party, compulsorily as per Annexure 'A'.

2. Two separate sealed envelopes should be used for submitting (i) tender and (ii) earnest money, on each envelope superscribing (a) Tender for Courier Services, and (b) Earnest Money for Courier Services.

3. The tenderers are required to quote their lowest competitive rates for courier services to be provided throughout India and outside India, Separate rates may be quoted for local delivery, NCR, inland delivery outside Delhi/NCR and delivery in other countries.

4. The rates quote by the tenderer for courier services should be valid for a period of one years from the date or acceptance.

5. The tenderers are required to send their tender along with a demand draft of Rs. 20,000 (Rupees twenty thousand only) drawn in favour of the "Registrar General, High Court of Delhi" as earnest money, which will be refunded to the unsuccessful tenderers on their written request with respect thereto. Name of the firm, telephone number and 'Courier Services' may be written on the reverse side of the demand draft.

6. The successful tenderer shall have to deposit Rs. 40,000 (Rupees forty thousand only) as Performance Security Deposit within one week from the date of receipt of acceptance letter after adjusting Rs. 20,000 already deposited with the tender as Earnest Money, which will be refunded on completion of the contractual period successfully and after two months from the payment of last bill.

7. The number of letters, notice/summons, parcels may decrease/increase depending upon the exigency/ requirement and all the letters, notice/summons/parcels may not necessarily be sent through courier.

8. The Courier will be solely responsible for the safety and security of the document/goods to be delivered by them.

9. Payment of the work done shall be made on monthly bill basis after presentation of the bill subject to submitting proof of delivery or returned envelope to this Court.

10. The service provider will have to the necessarily furnish proof delivery in case of served processes with legible signatures of the recipient or return envelope with a proper report in legible handwriting in case of unserved process within a period of 30 days, under acknowledgement from the Registry. In case of refusal by addressee, the name and designation of the person refusing the article or his relationship with the addresses, shall be clearly mentioned on the unserved article.

11. The proof of delivery would be signed by the person who had delivered the post and also counter signed by the responsible officer of the Courier posted at the counter located in the Court's complex.

12. With every proof of delivery returned after the service of postal article, the responsible office, appointed to manage its counter in the Court's complex, will file his own affidavit in support of the service of the postal article or its non-delivery, as the case may be, in the format approved by the Registrar General.

13. No charges shall be paid to the service provider if neither proof of delivery nor unserved letter, notice/summon or parcel is returned back to this Court under acknowledgement within stipulated period and/or the delivery was not effected without valid reason within stipulated period.

14. There shall be a penalty of Rs. 25 upon the courier for each consignment for which neither satisfactory proof of delivery nor returned envelope is provided back to this Court within 30 days from the date of dispatch and the same will be deducted from the bill of current or coming month/security deposit.

15. The courier shall have to collect envelopes from and provide proof of delivery/unserved envelopes to Dispatch

/Establishment Section of this Court under acknowledgement.

16. The service provider shall necessarily have to accept, for delivery, all the envelopes/letters/parcels etc. which, in the opinion of the concerned Registrar, High Court of Delhi, bear adequate address of the consignee. The Registry will deal with the tenderers directly and no middlemen/agents/ commission agents etc. should be asked by the tenderers to represent their cause and they will not be entertained by the Registry.

17. The Registry reserves the right to reject or accept any or all the tenders, wholly or partly, without assigning any reason therefor.

18. Over-writing, over-typing or erasing of the figures are not allowed and shall render the tender invalid if it appears to be doubtful or ambiguous.

19. Even after awarding the said contract, the High Court reserves the right to terminate the same, if the services of the contractor are not found satisfactory, or that instances covered by clause 14 are exceptionally high during any given period, or in case of deficiency of service, and to entrust the work to another contractor, and to recover the entire expenses for render from the contractor who committed default.

20. The High Court also reserves the right to terminate the contract if it considers so necessary for any administrative reasons.

Interested parties may send their sealed tender in two separate sealed envelopes, one for submitting the tender and another containing Earnest Money, on each envelope superscribing **(i) Tender for Courier Services and (ii) Earnest Money for Courier Services** addressed by name to the undersigned so as to reach on or before..... upto.....p.m. which will be opened at.....p.m. on the same day in Room No.....by the Recommendation Committee constituted for the purpose before the tenderers or their aurthorized representatives who may wish to remain present. The tenders received after due date

and/or time and/or without Earnest Money shall not be entertained.

ANNEXURE 'A'

HIGH COURT OF DELHI
GENERAL BRANCH

No :

Dated :

PROFORMA

TO BE SUBMITTED BY THE TENDERERS WITH REFERENCE TO NOTICE INVITING TENDER FOR COURIER SERVICES

1. Name of the Courier Service :
2. Postal Address :
3. Mobile/Phone number with the name of the contract person:
4. Permanent Address:
5. Details of litigation, if any, pending before any of the Courts in Delhi in which it is a party :
6. Name and addresses of all your establishments/offices in the country and outside India along with telephone numbers, name of contract persons and total number of staff members at each establishment/office :
7. Period from which you have been running Courier Services:
8. Whether capable to deliver letters, notices/summons, parcels etc. in far flung/remote areas in the country and outside India :
9. Minimum and maximum time required for delivery of letters, notices/summons, parcels, etc. :
10. Quote your competitive rates compulsorily as per below format (excluding services tax and education cess) :

S. No.	Destination	Upto 250 gms.	Upto 500 gms	Above 500 gms
1.	Local			
2.	National Capital Region (NCR)			
3.	Punjab			
4.	Haryana			
5.	Rajasthan			
6.	Chandigarh			
7.	Rest of India			
8.	Outside India			

11. Are you having On-line Tracking Facility and large network throughout the country, as well as adequate arrangements for service outside India, if so, give details :

12. List of your valued/important clients along with telephone numbers and names of contract persons :

13. Turnover of past three years :

SIGNATURE.....

(with date).....

Name.....

Designation.....

(Rubber stamp of the Company)

FORM 'B'

AGREEMENT

This agreement is entered into at Delhi on this the.....day of.....2010, between M/s. .....(hereinafter called "The Courier") which expression shall unless excluded by or repugnant to the context, include its successors and assigness of the one part and the Registrar General, High Court of Delhi, Shershah Road, New Delhi (hereinafter called the High Court) which expression shall unless excluded by or repugnant to the context, include its successors and assignees of

the other part.

AND WHEREAS pursuant to the abridged publication of a Tender Notice in.....newspaper on.....and on receipt of copy of detailed Tender Notice dated.....by the tenderers inviting tenders for awarding of Contract for Courier Services for delivery of letters, notices/summons, packets, etc. to be dispatched from the High Court of Delhi to various parts of the country, including remote areas and outside India, the Courier submitted its tender dated.....for providing Courier Services in the High Court. The Courier also submitted duly answered and signed prescribed proforma and rate list of their Courier Services, which shall form part and parcel of this agreement (Annexure-1) (hereinafter collectively referred as "Tender") and shall remain binding on the Courier, in so far as terms and conditions in the tender do not conflict with the terms and conditions set out in his Agreement.

AND WHEREAS the Courier, having been found to be suitable for the job and their rates having been approved is being awarded the contract for Courier Services for delivery of letters, notices/summons, parcels, etc. dispatched from the High Court to various parts of the country, including remote areas and outside India.

AND WHEREAS parties hereto have agreed to enter into this agreement for the said job in the manner hereinafter appearing.

NOW THIS AGREEMENT WITNESSES AS FOLLOWS:

THAT the Courier shall truly and faithfully undertake and complete the job of courier services for delivery of letters, notice/summons, parcels, etc. dispatched from the High Court to various parts of the country including remote areas and outside India.

THAT the work shall have to be carried out as per tender and directions of the Registrar General, High Court or any other authorized officer from time to time and more particularly described as per :

1. The Courier shall have to deposit Rs. 40,000 (Rupees forty thousand only) as Performance Security Deposit within one week from the date of receipt of acceptance letter after adjusting Rs. 20,000 already deposited with the tender as Earnest Money, which will be refunded on completion of the contractual period successfully and after

two months from the payment of last bill.

2. The number of letters, notice/summons, parcels may decrease/increase depending upon the exigency/ requirement and all the letters, notices/summons/parcels may not necessarily be sent through courier.

3. The service provider will be solely responsible for the safety and security of the documents/goods to be delivered by them.

4. Payment of the work done shall be made on monthly bill basis after presentation of the bill subject to submitting proof of delivery or returned envelope to the High Court at the following rates and duly certified by the Assistant Registrar/Deputy Registrar (General).

S. No.	Destination	Upto 250 gms.	Upto 500 gms	Above 500 gms
1.	Local			
2.	National Capital Region (NCR)			
3.	Punjab			
4.	Haryana			
5.	Rajasthan			
6.	Chandigarh			
7.	Rest of India			
8.	Outside India			

5. The Courier will have to neccessarily furnish proof of delivery in case of served processes with legible signatures of the recipient or return envelope with a proper report in legible handwriting in case of unserved process within a period of 30 days, under acknowledgement from the High Court. In case of refusal by addressee, the name and designation of the person refusing the article or his relationship with the addressee, shall be clearly mentioned on the unserved article.

6. Proof of delivery shall be supported by an affidavit of the

person delivering the post.

7. No charges shall be paid to the Courier if neither proof of delivery nor unserved letter, notice/summons or parcel is returned back to the High Court under acknowledgement within stipulated period and/or the delivery was not effected without valid reason within stipulated period.

8. There shall be a penalty of Rs.25 upon the Courier for each consignment for which neither satisfactory proof of delivery nor returned envelope is provided back to the High Court within 30 days from the date of dispatch and the same will be deducted from the bill of current or coming month/security deposit.

9. The courier shall collect envelopes from and provide proof of delivery/unserved envelopes to Dispatch/Establishment Section of the High Court under acknowledgement.

10. The Courier shall necessarily have to accept for delivery, all the envelopes/letters/parcels etc. which, in the opinion of the concerned Registrar, High Court of Delhi, bear adequate address of the consignee. The Registry will deal with this Courier directly and no middlemen/agents/ commission agents etc. shall be asked by the Courier to represent its cause and they will not be entertained by the Registry.

11. The High Court reserves the right to terminate the contract, if the services of the Courier are not found satisfactory, or that instances covered by clause 8 are exceptionally high during any given period, or in case of deficiency of service, and to entrust the work to another contractor, and to recover the entire expenses for tender from the contractor who committed default.

12. The High Court also reserves the right to terminate the contract if it considers so necessary for any administrative reasons.

13. The terms and conditions mentioned in the tender notice and the rules framed by the High Court in this regard shall form part and parcel of this agreement.

IN WITNESS WHEREASOF the parties have executed this agreement on the date above written.

WITNESSES :

1. (Signature of first party)

2. (Signature of second party)

****

BY ORDER OF THE COURT

V.P. VAISH, Registrar General

HIGH COURT OF DELHI : NEW DELHI
NOTIFICATION

New Delhi, The 7th July, 2011

No. 315/Rules/DHC.—In exercise of powers conferred under Article 235 of the Constitution of India, Section 47 of the Punjab Courts Act, 1918 and all other powers enabling it in this behalf, the High Court of Delhi hereby makes the following Rules, in respect of Leave of Members of Delhi Higher Judicial Service:—

Delhi Higher Judicial Service (Leave) Rules, 2010
PRELIMINARYC

CHAPTER I

1. Short Title : These rules may be called Delhi Higher Judicial Service (Leave) Rules, 2010.

2. Commencement : These Rules will come into force from the date they are notified by the High Court of Delhi,

3. Extent of application : These rules shall apply to officers appointed to Delhi Higher Judicial service.

4. Definitions : Unless the context other wise requires:—

(a) *"Accounts officer"* means the officer, whatever his official designation, in whose District the office of the Member of the Service is situated;

(b) *"Administrator"* means the Administrator appointed under Article 239 of the Constitution of India for the Union Territory of Delhi.

(c) *"Authority competent to grant leave"* means the authority specified in Column (3) of the First Schedule to these rules, competent to grant the Kind of leave specified in the corresponding entries in Column (2) of the said Schedule;

(d) *"Date of retirement"* or *"date of his retirement"* in relation to a Member of Service, means the afternoon of the last

day of the month in which a Member of Service, Service attains the age prescribed for retirement under the terms and conditions governing his services.

(e) *"District Judge"* means the District Judge of the concerned district in which the Member of the Service is posted.

(f) *"Duty"* means duty as a Member of the Service and includes:—

(i) service as probationer,

(ii) such other periods as the High Court may, by general or special order, declare as 'duty';

(g) *"Form"* means a Form appended to the Second Schedule to these rules

(h) *"Government"* means Government of National Capital Territory of Delhi

(i) *"High Court"* means "High Court of Delhi"

(j) *"Leave"* means and includes earned leave, half pay leave, commuted leave, leave not due, extraordinary leave, study leave, special disability leave, maternity leave, paternity leave, special causal leaves, special sick leaves, child care leave or any other authorized leave of absence.

(k) *"Leave Salary"* means the monthly amount admissible to a Member of Service who has been granted leave under these rules.

(i) *"Member of the Service"* means a person appointed to the service under the provisions of Delhi Higher Judicial Service Rules, 1970

(m) *"Month"* means a calendar month.

(n) *" Service"* means the Delhi Higher Judicial Service constituted under Section 3 of the Delhi Higher Judicial Service Rules, 1970.

(o) Words and expressions used herein and not defined but defined in the Fundamental Rules and Supplementary Rules shall have the meanings respectively assigned to them in the Fundamental Rules and Supplementary Rules.

CHAPTER II

General Conditions

5. Right to leave : (1) Leave cannot be claimed as of right.

(2) When the exigencies of service so require, leave of any kind may be refused or revoked by the authority competent to grant it, but it shall not be open to that authority to alter the kind of leave due and applied for except at the written request of the Member of Service.

6. Regulation of claim to leave : A Member of the Service's claim to leave is regulated by the rules in force at the time the leave is applied for and granted.

7. Effect of dismissal, removal or resignation on leave at credit: (1) Except as provided in Rule 56 and this rule, any claim to leave to the credit of a Member of Service, who is dismissed or removed or who resigns from Government service, ceases from the date of such dismissal or removal or resignation.

(2) Where a Member of Service applies for another post under the Government of India or under Government of NCT of Delhi but outside his parent department and if such application is forwarded through proper channel and the applicant is required to resign his post before taking up the new one, such resignation shall not result in the lapse of the leave to his credit.

(3) A Member of Service, who is dismissed or removed from service and is reinstated on appeal or revision, shall be entitled to count for leave his service prior to dismissal or removal, as the case may be.

(4) A Member of Service, who having retired on compensation or invalid pension or gratuity is re-employed and allowed to count his past service for pension, shall be entitled to count his former service towards leave.

8. Commutation of one kind of leave into another : (1) At the

request of a Member of Service, the authority which granted him leave may commute it retrospectively into leave of a different kind which was due and admissible to him at the time the leave was granted, but the Member of Service cannot claim such commutation as a matter of right:

Provided that no such request shall be considered unless received by such authority, or any other authority designated in this behalf, within a period of 30 days of the concerned Member of Service joining his duty on the expiry of the relevant spell of leave availed of by him.

(2) The commutation of one kind of leave into another shall be subject to adjustment of leave salary on the basis of leave finally granted to the Member of service, that is to say, any amount paid to him in excess shall be recovered or any arrears due to him shall be paid.

NOTE.—Extraordinary leave granted on medical certificate or otherwise may be commuted retrospectively into leave not due subject to the provisions of Rule 27.

9. Combination of different kinds of leave : Except as otherwise provided in these rules, any kind of leave under these rules may be granted in combination with or in continuation of any other kind of leave.

Explanation.—Casual leave, which is not recognized as leave under these rules shall not be combined with any other kind of leave admissible under these rules except with special casual leave.

However it may be possible, in some cases, that an officer has only half a day's casual leave to his credit and he avails of said casual leave in the afternoon and is unable to resume duty on next working day, because of unexpected illness, or on some other compelling grounds and is thus constrained to take leave for that day. In such a circumstance he may be permitted by the competent authority to combine half a day's casual leave with regular leave if his absence on the next working day was due to sickness or on other compelling grounds. The officers who have to ever already applied for leave of the kind due and admissible to cover their absence for the subsequent working day and thereafter should not be allowed the last half a day's casual leave for the afternoon.

10. Maximum amount of continuous leave: (a) No. Member of the Service shall be granted leave of any kind for a continuous period

exceeding five years.

(b) Unless the High Court in view of the special circumstances of the case, determines otherwise, a Member of the Service who remains absent from duty for a continuous period exceeding five years whether with or without leave, shall be deemed to have resigned from the service.

Note.—Provided that a reasonable opportunity to explain the reason for such absence shall be given to the Member of the Service before the provisions of sub-rule (b) are invoked.

11. Acceptance of service or employment while on leave. (1) A Member of Service while on leave, including leave preparatory to retirement shall not take up any service or employment elsewhere, including the setting up of a private professional practice as an Advocate, without obtaining the previous sanction of—

(a) the President, if the proposed services or employment lies elsewhere than in India; or

(b) the authority empowered to appoint him, if the proposed service or employment lies in India.

(2) (a) No Member of Service while on leave, other than leave preparatory to retirement shall ordinarily be permitted to take up any other service or employment.

(b) If grant of such permission is considered desirable in any exceptional case, the Member of Service may have his services transferred temporarily from his parent office to the office in which he is permitted to take up service or employment or may be required to resign his appointment before taking up any other service or employment.

(c) A Member of Service while on leave preparatory to retirement shall not be permitted to take up private employment. He may, however, be permitted to take up employment with a Public Sector Undertaking or a body controlled or financed by the Government and in that event also leave salary payable for leave preparatory to retirement shall be the same as admissible under Rule 55.

(3) (a) In case a Member of Service who has proceeded on leave preparatory to retirement is required, before the date of retirement for

employment during such leave in any post under the Central Government in or outside. India or with Government of NCT of Delhi and is agreeable to return to duty, the unexpired portion of the leave from the date of rejoining shall be cancelled.

(b) The leave so cancelled under Clause (a) shall be allowed to be encashed in the manner provided in sub-rule (2) of Rule 56.

CHAPTER III

Grant of and Return from Leave

12. Application for leave.—Any application for leave or for extension of leave shall be made in Form 1 or Form 2, as applicable, to the authority competent to grant leave.

13. Leave Account.—A leave account shall be maintained in Form 3 by the Accounts Officer in the office of the District Judge in respect of every Member of the Service.

NOTE.—The District Judge shall send a monthly statement of leave account of every Member of Service to the High Court by the 10th day of every succeeding month.

14. Verification of title to leave.—(1) No leave shall be granted to a Member of Service until a report regarding its admissibility has been obtained from the authority maintaining the leave account.

NOTE.—The order sanctioning leave shall indicate the balance of earned leave/half pay leave at the credit of the Member of Service.

(2) (a) Where there is reason to believe that the obtaining of admissibility report will be unduly delayed, the authority competent to grant leave may calculate, on the basis of available information, the amount of leave admissible to the Member of Service and issue provisional sanction of leave for a period not exceeding sixty days,

(b) The grant of leave under this sub-rule shall be subject to verification by the authority maintaining the leave account and a modified sanction for the period of leave may be issued, where necessary.

15. Leave not to be granted in certain circumstances.—Leave shall not be granted to a Member of Service whom a competent punishing

authority has decided to dismiss, remove or compulsorily retire from government service.

16. Grant of leave on medical certificate.—(1) An Application for leave on medical certificate made by any Member of the Service shall be accompanied by a medical certificate as per Form 4 given by an Authorised Medical practitioner.

Explanation.—Authorized Medical Practitioner shall mean a person who is authorised to practice medicine under any government approved system of medicine,

(2) An Authorised Medical Practitioner shall not recommend the grant of leave in any case in which there appears to be no reasonable prospect that the Member of Service concerned will ever be fit to resume his duties and in such case, the opinion that the Member of Service is permanently unfit for government service shall be recorded in the medical certificate.

(3) The authority competent to grant leave may, at its discretion, secure a second medical opinion by requesting a Government Medical Officer not below the rank of a Civil Surgeon or Staff Surgeon, to have the applicant medically examined on the earliest possible.

(4) It shall be the duty of the Government Medical Officer referred to in sub-rule (3) to express an opinion both as regards the facts of the illness and as regards the necessity for the amount of leave recommended and for that purpose may either require the applicant to appear before himself or before a Medical Officer nominated by himself.

(5) The grant of medical certificate under this rule does not in itself confer upon the Member of Service concerned any right to leave; the medical certificate shall be forwarded to the authority competent to grant leave and orders of that authority awaited.

(6) The authority competent to grant leave may, in its discretion, waive the production of a medical certificate in case of an application for leave for a period not exceeding three days at a time. Such leave shall not, however, be treated as leave on medical certificate and shall be debited against leave other than leave on medical grounds.

17. Leave to a Member of service who is unlikely to be fit to

return to duty.—(1)(a) When a Medical Authority has reported that there is no reasonable prospect that the Member of Service will ever be fit to return to duty, leave shall not necessarily be refused to such a Member of Service.

(b) The leave may be granted, if due, by the authority competent to grant leave on the following conditions:—

(i) if the Medical Authority is unable to say with certainty that the Member of Service will never again be fit for service, not exceeding twelve months in all may be granted and such leave shall not be extended without further reference to a Medical Authority,

(ii) if a Member of Service is declared by a Medical Authority to be completely and permanently incapacitated for further service, leave or an extension of leave may be granted to him after the report of the Medical Authority has been received, provided the amount of leave as debited to the leave account to gether with any period of duty beyond the date of the report of the Medical Authority does not exceed six months.

(2) A Member of Service who is declared by a Medical Authority to be completely and permanently incapacitated for further service shall—

(a) if he is on duty, not be invalidated from service during his service period,

(b) if he is already on leave, not be invalidated from service on the expiry of that leave or extension of leave, if any, granted to him under sub/rule (1)

18. Commencement and termination of leave.—Except as provided in Rule 19, leave ordinarily begins on the day on which the transfer of charge is effected and ends on the day preceding that on which the charge is resumed.

19. Combination of holidays with leave.—(1)(i) When the day, immediately preceding the day on which a Member of Service's leave (other than leave on medical certificate) begins or immediately following the day on which his leave expires, is a holiday or one of series of holidays, the Member of Service shall be deemed to have been permitted

(except in cases where for administrative reasons permission for prefixing suffixing holidays to leave is specifically withheld) to leave his station at the close of the day before, or return to it on the day following such holiday or series of holidays.

(ii) In the case of leave on medical certificate—

(a) When a Member of Service is certified medically unwell to attend office, holiday(s), if any, immediately preceding the day he is so certified shall be allowed automatically to be prefixed to leave and the holiday(s) if any, immediately succeeding the day he is so certified (including that day) shall automatically be allowed to be suffixed to the leave, and

(b) When a Member of Service is certified medically fit for joining duty, holiday(s), if any, succeeding the day he is so certified (including that day) shall automatically be allowed to be suffixed the leave.

(2) Unless the authority competent to grant leave in any case otherwise directs—

(a) if holidays are prefixed to leave, the leave and any consequent rearrangement of pay and allowances take effect from the day after the holidays, and

(b) if holidays are suffixed to leave, the leave is treated as having terminated and any consequent rearrangement of pay and allowances takes effect from the day on which the leave would have ended if holidays had not been suffixed.

20. Grant of leave beyond the date of retirement appointment as the Judge of the High Court.—No. leave shall be granted to a Member of the Service beyond the date on which he retires from service under Rule 16 of the All India Services (Death-cum-Retirement Benefits) Rules, 1958 or appointed as the Judge of the High Court.

21. Recall to duty before expiry of leave.—(1) In case a Member of Service is recalled to duty before the expiry of his leave, such recall to duty shall be treated as compulsory in all cases and the Member of Service shall be entitled —

(a) if the leave from which he is recalled is in India, to be treated as on duty from the date on which he starts for the station to which is ordered, and to draw—

(i) travelling allowance under rules made in this behalf for the journey, and

(ii) leave salary, until he joins his post at the same rate at which he would have drawn it but for recall to duty;

(b) if the leave from which he is recalled is out of India, to count the time spent on the voyage to India as duty for purposes of calculating leave, and to receive—

(i) leave salary, during the voyage to India and for the period from the date of landing in India to the date of joining his post, at the same rate at which he would have drawn it but for recall to duty;

(ii) a free passage to India;

(iii) refund of his passage from India if he has not completed half the period of his leave by the date of leaving for India on recall or three months, whichever is shorter;

(iv) travelling allowance, under the rules for the time being in force, for travel from the place of landing in India to the place of duty.

22. Return from leave.—(1) A Member of Service on leave shall not return to duty before the expiry of the period of leave granted to him unless he is permitted to do so by the authority which granted him leave.

(2) Notwithstanding anything contained in sub-rule (1), a Member of Service on leave preparatory to retirement shall be precluded from returning to duty, save with the consent of the authority competent to appoint him to the post from which he proceeded on leave preparatory to retirement.

(3) A Member of Service who has taken leave on medical certificate may not return to duty until he has produced a medical certificate of fitness in Form 5.

(4) (a) A Member of Service returning from leave is not entitled,

in the absence of specific orders to that effect, to resume as a matter of course the post which he held before going on leave.

(b) Such Member of Service shall report his return to duty to the authority which granted him leave or to the authority, if any, specified in the order granting him the leave.

NOTE.—A Member of Service who had been suffering from Tuberculosis may be allowed to resume duty on the basis of fitness certificate which recommends light work for him.

23. Absence after expiry of leave.—(1) Unless the authority competent to grant leave extends the leave, a Member of Service who remains absent after the end of leave is entitled to no leave salary for the period of such absence and that period shall be debited against his leave account as though it were half pay leave, to the extent such leave is due, the period on excess of such leave due being treat as extraordinary leave.

(2) Willful absence from duty after the expiry of leave renders a Member of Service liable to disciplinary action.

CHAPTER IV

Kinds of Leaves due and admissible

24. Earned Leave: (a) The leave account of every Member of Service shall be credited with earned leave, in advance, in two instalments of 15 days each on the first day of January and July of every calendar year.

(b) If a Member of the Service is appointed after the 1st of January for a Year, earned leave shall be credited to his leave account at the of 2/12 days for each completed month of service which he is likely to render in a half-year of the calendar year in which he is appointed.

Explanation—If lst January or lst July is holiday and a member joins the service on the next working day, he shall be entitled to the full credit of leave.

(c) The credit for the half-year in which a Member of the Service is due to retire or resign from service shall be afforded only at the rate of 2½ days per completed month in the half-year upto the date of retirement or resignation. If the leave already availed of is more than the

credit, so due to him, necessary adjustment shall be made in respect of leave salary overdrawn, if any.

(d) The earned leave at the credit of a Member of the Service at the close of a half-year shall be carried forward to the next half-year subject to the condition that earned leave so carried forward plus the credit for that half-year shall not exceed 300 days for which encashment has been allowed along with leave travel concession while in service or under Rule 56.

Explanation—In cases where the earned leave at credit on 1st January/1st July is 300 days or less but more than 285 days then an advance credit of 15 days earned leave will be made in the leave account. However, the resultant total will be shown as 300 + the number of days exceeding the ceiling of 300 days in brackets. The leave taken thereafter during the current half-year will be first adjusted against the figure shown in the brackets in the leave account and at the end of the half-year the balance will be shown as 300 + the number of days exceeding 300 days, if any, after adjudging the leave taken. Thus, while arriving at the total named leave to be again credited at the beginning of the next half-year the number of days shown in bracket shall be delucted from the total number of 15 says earned leave sought to be credited.

(e) When a Member of the Service is removed or dismissed from the service or dies while in service, credit of earned leave shall be allowed at the rate of 2½ days per completed month upto the end of the month preceding the month in which he is removed or dismissed from service or dies in service Where the quantum of earned leave availed is in excess of the leave, the overpayment of leave salary shall be recovered in such cases.

(f) While affording credit under these rules, fraction of the say shall be rounded off to the nearest day.

(g) The maximum earned leave granted to a Member of the Service at a time shall be 180 days.

Provided that earned leave granted as preparatory to retirement shall be subject to a maximum of 300 days.

(h) Formal application of leave in Form A or Form B appended with these rules must always be submittted fifteen days in advance,

unless prevented by exigencies completely unanticipated.

(i) If a Member of the Service has availed of extraordinary leave and/or some period of absence has been treated as *dies non* in a half-year, the credit to be afforded to his leave account at the commencement of the next half-year shall be reduced by 1/10th of the period of such leave and/or *dies non* subject to maximum of 15 days.

25. Half Pay Leave: (a) The half pay leave account of every Member of Service shall be credited with half pay leave in advance, in two installments of ten days each on the first day of January and July of every calendar year.

(b) The leave shall be credited to the said leave account at the rate of 5/3 days fir each completed month of service which he is likely to render in the half-year of the calendar year in which he is appointed.

(c) The credit for the half-year in which a Member of Service is due to retire or resign from the service shall be allowed at the rate of 5/3 days per completed month up to the date of retirement or resignation.

(d) When a Member of the Service is removed or dismissed from service or dies while in service, credit of half pay leave shall be allowed at the rate of 5/3 days per completed month upto the end of the month preceding the month in which he is removed or dismissed from service or dies in service.

(e) Where a period of absence or suspension of a Member of Service has been treated as *dies non* in half-year, the credit to be afforded to his half pay leave account at the commencement of next half-year, be reduced by one-eighteenth of the period of dies non subject to a maximum of ten days.

(i) The leave under this rule may be granted on medical certificate or on private affairs.

(g) While affording credit of half pay leave, fraction of day shall be rounded off to the nearest day.

26. Commuted Leave: (a) Commuted Leave not exceeding half the amount of half pay leave due may be granted on medical certificate to a Member of Service subject to the condition that twice the amount of such leave shall be debitable to the half pay leave due.

(b) No commented leave may be granted under this rule unless the Competent Authority has reason to believe that the Member of the Service will return to duty on its expiry.

Where a Member of the service who has been granted commuted leave resigns from service or, at his request, is permitted to retire voluntarily without returning to duty, the commuted leave shall be treated as half pay leave and the difference between leave salary in respect of commuted leave and half pay leave shall be recovered:

Provided that no such recovery shall be made if the retirement is by reason of ill-health incapacitating the Member of the Service for further service or in the event of his death. (c) Half pay leave upto a maximum of 180 days may be allowed to be commutted during the entire service where such leave is utilized for approved course of study, certified to be in the interest of the Judiciary as an Institution, by the High Court.

Explanation—(1) Commuted leave may be granted at the request of the Member of Service even when earned leave is due to him.

(2) Commuted leave shall be however granted only on production of medical/fitness certificate from an Authorized Medical practitioner.

27. Leave Not Due (a) Save in case of leave preparatory to retirement, Leave Not Due may be granted to a Member of Service limited to a maximum of 360 days during the entire service on medical certificate. However, in case of a female member, the leave may be granted without medical certificate provided leave should be in continuation of child care leave, maternity leave and adoption leave subject to the following conditions:

(i) Competent Authority is satisfied that there is reasonable prospect of the Member of Service returning to duty on its expiry,

(ii) Leave Not Due shall be limited to the half pay leave he or she is likely to earn thereafter,

(iii) Leave No Due shall be debited against the half pay leaves the Member of the Service may earn subsequently.

(b)(i) Where a Member of Service who has been granted Leave Not Due resigns from service or at his request is permitted

to retire voluntarily without returning to duty, the Leave No Due shall be cancelled from the date of his resignation or retirement takes effect on which such leave had commenced, and leave salary shall be recovered.

(ii) Where a Member of Service who having availed himself of Leave Not Due returns to duty but resigns or retires from service before he has earned such leave, he shall be liable to refund the leave salary to the extent the leave has not been earned subsequently:

Provided the no leave salary shall be recovered under sub-rule (a) or sub-rule (b) if the retirement is by reason of ill-health incapacitating the Member of Service for further service or in the event of his death.

(iii) Where a Member of Service is incapacitated during the continuation of the Leave Not Due or at the end of the period of Leave Not Due, he or she shall be considered to have retired from the date of the expiry of such Leave Not Due.

28. Extraordinary Leave: (a) Subject to the maximum periods of leaves which can be granted under Rule 10, extraordinary leave may be granted to a Member of the Service in the following circumstances, that is to say—

(i) when no other kind of leave is admissible, or

(ii) when any other kind of leave is admissible but the Member of the Service applies in writing for the grant of extraordinary leave.

(b) Competent Authority may retrospectively convert period of absence without leave into extraordinary leave even when any other kind of leave was admissible at the time when absence without leave commenced:

(c) Extraordinary Leave shall not be debited to the leave account:

(d) Two spells of extraordinary leave, if intervened by any other kind of leave, shall be treated as one continuous spell of extraordinary leave for the purpose of sub-rule (a)

29. Special Disability Leave for injury intentionally inflicted: (1) The authority competent to grant leave may grant special disability leave to a Member of Service (whether permanent or temporary) who is disabled by injury intentionally inflicted or caused in, or in consequence of the due performance of his official duties or in consequence of his official position.

(2) Such leave shall not be granted unless the disability manifested itself within three months of the occurrence to which it is attributed and the person disabled acted with due promptitude in bringing it to notice:

Provided that the authority competent to grant leave may, if it is satisfied as to the cause of the disability, permit leave to be granted in cases where the disability manifested itself more than three months after the occurrence of its cause.

(3) The period of leave granted shall be such as is certified by an Authorized Medical Practitioner and shall in no case exceed 24 months.

(4) Special disability leave may be combined with leave of any other kind.

(5) Special disability leave may be granted more than once if the disability is aggravated or reproduced in similar circumstances at later date, but not more than 24 months of such leave shall be granted in consequence of any on disability.

(6) Special disability leave shall be counted as duty in calculating service for pension and shall not, except the leave granted under the proviso to Clause (b) of sub-rule (7), be debited against the leave account.

(7) Leave salary during such leave shall:—

(a) for the first 120 days of any period of such leave, including a period of such leave granted under sub-rule (5), be equal for leave salary while on earned leave,

(b) for the remaining period of any such leave be equal to leave salary during half pay leave:

Provided that a Member of Service may, at his option, be allowed leave salary as in sub-rule (a) for a period not exceeding another 120 days, and in the event the period of such leave shall be

debited to his half pay leave account.

30. Special disability leave for accidental injury: (1) The provisions of Rule 29 shall apply also to a Member of Service who is disabled by injury accidentally incurred in, or in consequence of, the due performance of his official duties or in consequence of his official position, or by illness incurred in the performance of any particular duty, which has the effect of increasing his liability to illness or injury beyond the ordinary risk attaching to the civil post which he holds.

(2) The grant of special disability leave in such case shall be subject to the further conditions:

(i) That the disability, if due to disease, must be certified by an Authorized Medical Practitioner to be directly due to the performance of the particular duty,

(ii) that the period of absence recommended by an Authorized Medical Practitioner may be covered in part, by leave under this rule and in part by any other kind of leave, and that the amount of special disability leave granted on leave salary equal to that admissible on earned leave shall not exceed 120 days.

31. Maternity Leave: (a) Maternity leave may be granted to a woman Member of the Service, with less than two surviving children, on full pay up to a period of 180 days from the date of its commencement During such period, she shall be paid leave salary equal to the pay draw immediately before proceeding on leave.

(b) A female Member of the Service (irrespective of the number of surviving children) may be granted maternity leave in cases of miscarriage, including abortion induced under Medical Termination of Pregnancy Act, 1971 or otherwise, to a maximum period not exceeding 45 days on production of a medical certificate as laid down in Rule 16.

(c) Maternity leave may be combined with the leave of any kind. Notwithstanding the requirement of production of medical certificate contained in Rule 26 and Rule 27, leave of any kind due and admissible (including commuted leave for a period of not exceeding 60 days and Leave Not Due) up to a maximum of two year may. If applied, be granted in continuation of maternity leave granted under sub-rule (a).

(d) Maternity leave shall not be debited against the leave account.

32. Paternity Leave: (a) A male Member of the Service with less than two surviving children may be granted paternity leave by Competent Authority for a period of 15 days during the confinement of his wife for child birth i.e., up to 15 days before, or up to six months from the date of delivery of the child,

(b) During such period of 15 days he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave,

(c) The paternity leave may be combined with leave of any other kind;

(d) The paternity leave shall not be debited against the leave account;

(e) If paternity leave is not availed of within the period specific sub-rule (a) such leave shall be treated as lapsed.

33. Child Adoption Leave: (1) A female Member of the Service with less than two surviving children on valid adoption of a child below the age of one year may be granted child adoption leave, by the competent authority for a period of 180 days after the date of valid adoption,

(2) During the period of child adoption leave she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave;

(3) (a) Child adoption leave may be combined with leave of any other kind;

(b) In continuation of the child adoption leave granted under sub-rule (1), a female Member of the Service on valid adoption of a child may also be granted, if applied for, leave of the kind due and admissible (including leave not due and commuted leave not exceeding 60 days without production of medical certificate) for a period up to one year reduced by the age of the adopted child on the date of valid adoption, without taking into account child adoption leave:

Provided that this facility shall not be admissible in case she is already having two surviving children at the time of adoption.

(4) Child adoption leave shall not be debited against the leave account.

(5) A male Member of Service with less than two surviving children,

on valid adoption of a child below the age of one year, may be sanctioned paternity leave for a period of 15 days within a period of six months from the date of valid adoption.

34. Child Care Leave: A female Member of the Service may be granted Child Care Leave having minor children below the age of 18 years for a maximum period of two years (i.e. 730 days) during her entire tenure of service with the following conditions:—

(a) Child Care Leave shall be admissible for two eldest surviving children only.

(b) Child Care Leave may not be granted in more than 3 spells in a calendar year.

(c) Child Care Leave may not be granted for less than 15 days.

(d) Child care Leave should not ordinarily be granted during the probation period except in case of certain extreme situations where the leave sanctioning authority is fully satisfied about the need of Child Care Leave to the probationer. It may also be ensured that the period for which this leave is sanctioned during probation is minimal.

(e) Child Care Leave cannot be demanded as a matter of right. Under no circumstances a Member of the Service can proceed on Child Care Leave without prior approval of the Competent Authority.

Explanation :

(1) The Child Care Leave is to be treated like earned leave and sanctioned as such. Consequently. Saturdays Sundays, Gazetted holidays, etc. falling during the period of leave would also count as Child Care Leave as in the case of earned leave.

(2) Clause (d) above shall have no application to the case of a Member of the Service who has joined upon promotion from Delhi Judicial Service.

35. Special Casual Leave: (a) The High Court may grant special casual leaves to Members of the Service for a period not exceeding three weeks in the month of June and not exceeding one week in the month of December every year without prejudice to their right to claim earned leaves under these rules.

(b) Special Casual Leaves shall not be debited to the leave account of the Member of the Service.

36. Special Sick Leave: (a) Members of the Service may be granted four Special Sick Leaves. In a year. Without the production of a medical certificate.

(b) Special Sick Leave shall not be debited to leave account of the Member of the Service.

37. Compensatory Leave: (a) Compensatory leave may be given to the Members of Service where compulsory attendance on Sundays or other public holidays or during vacations justifies the grant of compensatory leave for the number of days a Member of Service is directed to attend the office/court.

(b) No compensatory leave, however, will be admissible to a Member of Service who has been paid honoraium or suitably compensated in terns of money for the days of such compulsory attendance on Sundays or other public holidays or has been on duty leave on such days.

(c) Compensatory leave may be availed within a period of 1 year from the date of its falling due, otherwise the same shall be treated to have lapsed.

38. Leave to probationer, a person on probation: (1)(a) A probationer shall be entitled to leave under these rules if he had held his post substantively otherwise than on probation.

(b) If, for any reason, it is proposed to terminate the services of a probationer, any leave which may be granted to him shall not extend—

(i) beyond the date on which the probationary period as already sanctioned or extended expires. or

(ii) beyond any earlier date on which his services are terminated by the orders of an authority competent to appoint him.

(2) A person appointed to a post on probation shall be entitle to leave under these rules as a temporary or a permanent Member of Service according as his appointment is against a temporary or a permanent post:

Provided that where such person already holds a lien on a permanent post before such appointment he shall be entitled to leave under these rules as a permanent Member of Service.

39. Persons re-employed after retirement:

In the case of a person re-employed after retirement, the provisions of these rules shall apply if he had entered government service for the first time on the date of his re-employment.

40. Leave Preparatory to retirement:

(1) A Member of Service may be permitted by the authority competent to grant leave to take leave preparatory to retirement to the extent of earned leave due, not exceeding 300 days together with half pay leave due, subject to the condition that such leave extends up to and includes the date of retirement.

NOTE.—The leave granted as leave preparatory to retirement shall not include extraordinary leave.

CHAPTER V

Study Leave

41. Conditions for grant of study leave : (1) Study leave may be granted to a Member of the Service with due regard to the exigencies of judicial service to enable him to undergo in or out of India, a special course of study consisting of higher studies or specialized training in a professional or a technical subject having a direct and close connection with the sphere of his duty,

(2) Study leave may also be granted for a course of training or study tour in which a Member of the service may not attend a regular academic or semi-academic course if the course of training or the study tour is certified to be of definite advantage to government from the point of view of public interest and is related to sphere of duties of the Member of Service subject to the conditions that:—

(a) the particular study or study tour should be approved by the authority competent to grant leave; and

(b) the Member of Service should be required to submit, on his return, a full report on the work done by him while on study

leave;

(3) Study leave may also be granted for the studies which may not be closely or directly connected with the work of a Member of the Service, but which are capable of widening his mind on a manner likely to improve his abilities as a Judicial Officer;

(4) Study leave out of India shall not be granted for the prosecution of studies in subjects for which adequate facilities exist in India;

(5) Study leave may be granted to a Member of the Service—

(i) who has satisfactorily completed period of probation and has rendered not less than five years' regular continuous service including the period of probation under the government,

(ii) who is not due to reach the age of superannuation from the government service within three years from the date on which he is expected to return to duty after the expiry of the leave; and

(iii) who executes a Bond as laid down in Rule 44(4) undertaking to serve the government for a period of three years after the expiry of the leave;

(6) Study leave shall not be granted to a Member of Service with such frequency as to remove him from contact with his regular work or to cause cadre difficulties owing to his absence on leave,

(7) The High Court shall be the authority competent to grant study leave.

42. Maximum amount of study leave : (1) The maximum amount of study leave, which may be granted to a Member of the Service shall be—

(a) ordinarily twelve months at anyone time, and

(b) during his entire service, twenty-four months in all (inclusive of similar blind of leave for study or training granted under any other rules).

43. Applications for study leave:

(1)(a) Every application for study leave shall be submitted through

proper channel to the authority competent to grant leave.

(b) The course or courses of study contemplated by the Member of the Service and any examination which he proposes to undergo shall be clearly specified in application.

(2) Where it is not possible for the Member of Service to give full details in his application, or if, after leaving India, he is to make any change in the programme which has been approved in India, he shall submit the particulars as soon as possible to the Head of Mission or the authority competent to grant leave, as the case may be, and shall not, unless prepared to do so at his own risk, commence the course of study or incur any expenses in connection therewith until he receives the approval of the authority competent to grant the study leave for the course.

44. Sanction of study leave:

(1) A report regarding the admissibility of the study leave shall be obtained from the Accounts Officer:

Provided that the study leave, if any, already availed of by the Member of Service shall be included in the report.

(2) Where a of Service borne permanently on the cadre of Delhi Higher Judicial Service is serving temporarily in another department or establishment, the grant of study leave to him shall be subject to the condition that the concurrence of the High Court is obtained before the leave is granted.

(3) Where the study leave is granted for prosecution of studies abroad, Head of the Mission concerned shall be informed of the fact by the authority granting the leave, provided that where such leave has been granted by the Administrator, the intimation shall be sent through the Ministry concerned.

NOTE.—The Head of the Mission shall be contacted by the Member of Service for issue of any letters of introduction or for other similar facilities that may be required.

(4) (a) Every Member of Service who has been granted study leave or extension of such study leave shall be required to execute a Bond in Form 6 or Form7, as the case may be,

before the study leave or extension of such study leave granted to him commences.

(b) The Authority competent to grant leave shall send to the Accounts Officer a certificate to the effect that the Member of Service referred to in Clause (a) has executed the requisite bond.

(5) (a) On completion of the course of study, the Member of Service shall submit to the authority which granted him the study leave, the certificates of examinations passed or special courses of study undertaken, indicating the date of commencement and termination of the course with the remarks, if any, of the authority in charge of the course of study.

(b) If the study is undertaken in a country outside India where there is an Indian Mission, the certificates shall be submitted through the Head of the Mission concerned.

45. Accounting of study leave and combination with leave of other kinds:

(1) Study leave shall not be debited against the leave account of the Member of Service.

(2) Study leave may be combined with other kinds of leave, but in no case shall be grant of this leave in combination with leave, other than extraordinary leave involve a total absence of more than twenty eight months generally and thirty-six months for the courses leading to PhD. degree from the regular duties of the Member of Service.

Explanation:—the limit of twenty eight months/thirty six months of absence prescribed in this sub-rule includes the period of vacation.

(3) A Member of Service granted study leave in combination with any other kind of leave may, If he so desires, undertake or commence a course of study during any other kind of leave and subject to the other conditions laid down in Rule 48 being satisfied, draw study allowance in respect thereof:

Provided that the period of such leave coinciding with the course of study shall not count as study leave.

46. Regulation of study leave extending beyond course of study:

When the course of study fall short of study leave granted to a Member of Service, he shall resume duty on the conclusion of the course of study, unless the previous sanction of the authority competent to grant leave has been obtained to treat the period of shortfall as ordinary leave.

47. Leave Salary during study leave:

(1) Except as provided in sub-rule (6), during Study Leave availed of outside India, a Member of Service shall draw Leave Salary equal to the pay that the Member of Service drew while on duty with government immediately before proceeding on such leave and in addition the Dearness Allowance, House Rent Allowance and Study Allowance as admissible in accordance with the provisions of Rules 48 to 51.

(2) Except as provided in sub-rule (6), during Study Leave availed of on India a government servant shall draw Leave Salary equal to the pay that the Member of Service drew while on duty the government immediately before proceeding on such leave and in addition the Dearness Allowance and House Rent Allowance as admissible in accordance with the provisions of Rule 51

(3) Payment of leave salary at full rate under Clause (2) shall be subject to furnishing of a certificate by the Member of Service to the effect that he is not in receipt of any scholarship, stipend or remuneration in respect of any part-time employment.

(4) The amount, if any, received by a Member of Service during the period of Study leave as scholarship or remuneration in respect any part-time employment as envisaged in sub-rule (2) of Rule 48, shall be adjusted against the Leave Salary payable under this sub-rule subject to the condition that the Leave Salary shall not be reduced to an amount less than that payable as Leave Salary during

half-pay leave.

(5) No study allowance shall be paid during Study Leave for courses of study in India.

(6) During the currency of Study Leave within or outside India, a Member of Service shall draw benefits of Revised pay from the date such revision takes place.

48. Conditions for grant of study allowance.— (1) A study allowance shall be granted to a Member of Service who has been granted study leave for studies outside India for the period spent in prosecuting a definite course of study at a recognized institution or in any definite tour of inspection of any special class of work, as well as for the period covered by any examination at the end of the course of study.

(2) Where a Member of Service has been permitted and retain, in addition to his leave salary, any scholarship or stipend that may be awarded to him from government or non-government sources, or any other remuneration in respect of any part-time employment—

(a) no study allowance shall be admissible in case the net amount of such scholarship or stipend or remuneration (arrived at by deducting the cost of fees, if any, paid by the Member of Service from the value of the scholarship or stipend or remuneration) exceeds the amount of study allowance otherwise admissible.

(b) In case the net amount of scholarship or stipend or remuneration is less than the study allowance otherwise admissible, the difference between the value of the net scholarship or stipend or any other remuneration in respect of any part-time employment and the study allowance may be granted by the authority competent to grant leave.

(3) Study allowance shall not be granted for any period during which a Member of Service interrupts his course of study to suit own convenience:

Provided that the authority competent to grant leave or the Head of Mission may authorize the grant of Study Allowance for a period not exceeding 14 days at a time during such interruption if was due to sickness.

(4) Study Allowance shall also be allowed for the entire period of vacation during the course of study subject to the conditions that—

(a) The Member of Service attends during vacation any special course of study or practical training under the direction of the government or the authority competent to grant leave, as the case may be, or

(b) In the absence of any such direction, he produces satisfactory evidence before the Head of the Mission or the authority competent to grant leave, as the case may be, that he has continued his studies during the vacation:

Provided that in respect of vacation falling at the end of the course of study, it shall be allowed for a maximum period of 14 days.

(5) The period for which Study Allowance may be granted shall not exceed 24 months in all.

49. Rates of Study Allowance.—The rates of Study Allowance admissible to a Member of Service shall be such as may be especially determined by the High Court in each case.

NOTE.—The rates of Study Allowance shall in no case be lower than the one prescribed by the government in respect of officers of Indian Administrative Service.

50. Procedure for payment of study allowance.—(1) Payment of Study Allowance shall be subject to the furnishing of a certificate by the Member of Service to the effect that he not in receipt of any scholarship, stipend or any other remuneration in respect of any part-time employment.

(2) Study Allowance shall be paid at the end of every month provisionally to an undertaking in writing being obtained from the Member of Service that he would refund to the government any overpayment consequent on his failure to produce the required certificate attendance or on his failure to satisfy the authority competent to grant leave about the proper utilization of the time spent for which Study Allowance is claimed.

(3) (a) In the case of a definite course of study at a recognized institution, the Study Allowance shall be the authority

competent to grant leave, if the study leave availed of is in a country where there is no Indian Mission, and by the Head of the Mission in other cases, on claims submitted by the member of Service from time, supported by proper certificates of attendance.

(b) The certificate of attendance required to be submitted in support of the claims for Study Allowance shall be forwarded at the end of the terms, if the Member of Service is undergoing study in an educational institution, or at intervals not exceeding three months if he is undergoing study at any other institution.

(4) (a) When the programme of study approved does not include, or does not consist entirely of, such a course of study, the Member of Service shall submit to the authority competent to grant leave direct or through the Head of the Mission a diary showing how his time has been spent and a report indicating fully the nature of the methods and operations which have been studied and including suggestions as to the possibility of adapting such methods or operations to conditions obtaining in India.

(b) The authority competent to grant leave shall decide whether the diary and report show that the time of the Member of Service was properly utilized and shall determine accordingly for what periods Study Allowance may be granted.

51. Admissibility of allowances in addition to Study Allowance: (1) For the first (180) days of the Study Leave, House Rent Allowance shall be paid at the rates admissible to the Member of Service from time to time at the station from where he proceeded on duty leave. The continuance of payment of House Rent Allowance beyond (180) days shall be subject to the production of a certificate as prescribed in Para. 8 (b) of Ministry of Finance, O.M. No. 2 (37)-E.II/(B)/64, dated 27-11-1965, as amended from time to time.

(2) Except for House Rent Allowance as admissible under sub-rule (1) and the Dearness Allowance, City Compensatory Allowance and the Study Allowance, where admissible, no other allowance shall be paid to

a Member of Service in respect of the period of study leave granted to him.

52. Travelling Allowance during study leave.—A Member of Service to whom study leave has been granted shall not ordinarily be paid Travelling Allowance but the President may in exceptional circumstances sanction the payment of such allowance.

53. Cost of fees for study.—A Member of Service to whom study leave has been granted shall ordinarily be required to meet the cost of fees paid for the study but in exceptional cases, the High Court may sanction the grant of such fees:

Provided that in no case shall the cost of fees be paid to a Member of Service who is in receipt of scholarship or stipend from whatever source or who is permitted to receive or retain, in addition to his leave salary, any remuneration in respect of part-time employment.

54. Resignation or retirement after study leave or non-completion of the course of study.—(1) If a Member of Service resigns or retires from service is otherwise quits service without returning to duty after a period of study leave or within a period of three years after such return to duty or fails to complete the course of study and is thus unable to furnish the certificates as required under sub-rule (5) of Rule 44 he shall be required to refund—

(i) the actual amount of leave salary, Study Allowance, cost of fees, travelling and other expenses, if any, incurred by the Government of India; and

(ii) the actual amount, if any, of the cost incurred by other agencies such as foreign Government, Foundations and Trusts in connection with the course of study, together with interest thereon at rates for the time being in force on government loans from the date of demand, before his resignation is accepted or permission to retire is granted or his quitting service otherwise:

Provided that except in the case of a Member of Service who fail to complete the course of study nothing in this rule shall apply—

(a) to a Member of Service who, after return to duty from study leave, is permitted to retire from service on medical grounds; or

(b) to a Member of Service who, after return to duty from study leave, is deputed to serve in any Statutory to Autonomous Body or Institution under the control of the government and is subsequently permitted to resign from service under the government with a view to his permanent absorption in the said Statutory or Autonomous body or Institution in the public interest.

(2) (a) The study leave availed of by such Member of Service shall be converted into regular leave standing at his credit on the date on which the study leave commenced, any regular leave taken in continuation of study leave being suitably adjusted for the purpose and the balance of the period of study leave, if any, which cannot be so converted, treated as extraordinary leave.

(b) In addition to the amount to be refunded by the Member of Service under sub-rule (1), he shall be required to refund any excess of leave salary actually drawn over the leave salary admissible on conversion of the study leave.

(3) notwithstanding anything contained in this rule, the President may, if it is necessary or expedient to do so, either in public interest or having regard to the peculiar circumstances of the case or class of cases, by order, waive or reduce the amount required to be refunded under sub-rule (1) by the Member of Service concerned or class if Member of Service.

Chapter VI

Leave Salary and encashment of leave

55. Leave Salary.—(a) A Member of the Service on earned leave is entitled to leave salary equal to the pay drawn immediately before proceeding on earned leave,

(b) A Member of the Service on half pay leave or leave not due is entitled to leave salary equal half the amount specified in sub-rule (a)

(c) A Member of the Service on commuted leave is entitled to leave salary equal to the amount admissible under sub-rule (a)

(d) A Member of the Service on extraordinary leave is not entitled to any leave salary.

(e) A Member of the Service on special disability leave shall be entitled , in respect of the initial period of 120 days, to leave salary in accordance with sub-rule (a).

(f) In respect of special disability leave beyond the initial period of 120 days leave salary equal to the amount specified in sub-rule (a), may be granted at the option of the Member of the Service for a further period limited to the number of days of earned leave due to him in which case the earned leave account shall be debited with half the number of days for which leave salary is granted under this sub-rule.

(g) The leave salary during special disability leave in respect of any period not covered by sub-rules (e) and (f) shall be at the rate specified in sub-rule (b).

(h) in the case of a Member of Service who is granted leave earned by him during the period of re-employment, the leave salary shall be based on the pay drawn by him exclusive of pension and pension equivalent of other retirement benefits.

(i) The leave salary payable under these rules shall be drawn in rupees in India.

56. Leave/Cash payment in lieu of leave beyond the date of retirement, compulsory retirement or quitting of service.—(1) No leave shall be granted to a Member of Service beyond—

(a) the date of his retirement, or

(b) the date of his final cessation of duties, or

(c) the date on which he retires by giving notice to government or he is retired by government by giving him notice or pay and allowances in lieu of such notice, in accordance with the terms and conditions of his service, or

(d) the date of his resignation from service.

(2) (a) Where a Member of Service retires on attaining the

age of superannuation under Rule 26-B of Delhi Higher Judicial Services Rules, the authority competent to grant leave shall *suo motu* issue an order granting cash equivalent of leave salary for earned leave, if any, at the credit of the Member of Service on the date of his retirement, subject to a maximum of 300 days.

(b) The cash equivalent under Clause (a) shall be calculated as follows and shall be payable in one lump sum as a one-time settlement.

No House Rent Allowance or Compensatory (City) allowance shall be payable—

$$\text{Cash equivalent} = \frac{\text{pay admissible on the date of retirement plus dearness allowance admissible on the date}}{30} \times \text{Number of days of unutilized earned leave at credit on the date of retirement subject to the maximum of 300 days}$$

(3) The authority competent to grant leave may withhold whole or part of cash equivalent of earned leave the case of a Member of Service who retires from service attaining the age of retirement while under suspension while disciplinary or criminal proceedings are pending him, if in the view of such authority there is a of some money becoming recoverable from him conclusion of the proceedings against him. On conclusion of the proceedings, he will become eligible to amount so withheld after adjustment of government if any.

(4) (a) Where the service of a Member of Service has been extended, in the interest of public service beyond the date of his retirement, he may be granted—

(i) during the period of extension, any earned leave due in respect of the period of such extension plus the earned leave which was at his credit on the date of his retirement subject on the date of his retirement subject to a maximum of 300 days.

(ii) after expiry of the period of extension, cash equivalent in

the manner provided on sub-rule (2) in respect of earned leave at credit on the date of retirement, plus the earned leave earned during the period of extension, reduced by the earned leave availed of during such period, subject to a maximum of 300 days.

(b) The cash equivalent payable under sub-clause (ii) of Clause (a) of this sub-rule shall be calculated in the manner indicated in Clause (b) of sub-rule (2) above.

(5) A Member of the Service who retires or is retired from service in the manner mentioned in Clause (c) of sub-rule (1), may be granted *suo motu,* by the authority competent to grant leave, cash equivalent of the leave salary in respect of earned leave at his credit subject to a maximum of 300 days and also in respect of all the half pay leave at his credit, provided this period does not exceed the period between the date on which he so retires or is retired from service and the date on which he would have retired the normal course after attaining the age prescribed for retirement under the terms and conditions governing his service. The cash equivalent shall be equal to the leave salary as admissible for earned leave and/or equal to the leave salary as admissible for half pay leave plus dearness allowance admissible on the leave salary for the first 300 days at the rates on force on the date the Member of Service so retires is retired from service. The pension and pension equivalent of other retirement benefits and *ad hoc* relief/graded relief on pension shall be deducted from the leave salary paid for the period of half pay leave, if any, for which the cash equivalent is payable. The amount so calculated shall be paid in one lumpsum as a one-time settlement. No House Rent Allowance or Compensatory (City) Allowance shall be payable:

Provided that of leave salary for the half pay leave component falls short of pension and other pensionary benefits, cash equivalent of half pay leave shall not be granted.

(6)(a)(i) Where the services of a Member of Service are terminated by notice or by payment of pay and allowances in lieu of notice, or otherwise in accordance with the terns and conditions of his appointment, he may be granted, suo motu, by the authority competent to grant leave, cash equivalent in respect of earned leave at his credit on the

date own which he ceases to be in service subject to a maximum of 300 days.

(ii) If a Member of Service resigns or quits service, he may be granted, suo motu, by the authority competent to grant leave, cash equivalent in respect of earned leave at his credit on the date of cessation of service, to te extent of half of such leave at his credit, subject to a maximum of 150 days.

(iii) A Member of Service, who is re-employed after retirement may, on termination of his re-employment, be granted, *suo motu* by the authority competent to grant leave, cash equivalent in respect of earned leave at his credit on the date of termination of re-employment subject to a maximum of 300 days including the period for which encashment was allowed at the time of retirement.

(b) The cash equivalent payable under Clause (a) shall be calculated in the manner indicated in Clause (b) of sub-rule (2) and for the purpose of computation of cash equivalent under sub-clause (iii) of Clause (a), the pay on the date of the termination of re-employment shall be the pay fixed in the scale of post of re-employment before adjustment of pension and pension equivalent of other retirement benefits, and the Dearness Allowance appropriate to that pay.

57. Cash equivalent of leave Salary in case of death in service

In case a Member of Service dies while in service, the cash equivalent of the leave salary that the deceased employee would have got had he gone on earned leave that would have been due and admissible to him but for the death on the date immediately following the death and in any case, not exceeding leave salary for 300 days, shall be paid to his family in the manner specified in Rule 59 without any reduction on account of pension equivalent of death-cum-retirement gratuity.

58. Cash equivalent of leave salary in case of invalidation from service:

A Member of Service who is declared by a Medical Authority to be

completely and permanently incapacitated for further service may be granted, *suo motu,* by the authority competent to grant leave, cash equivalent of leave salary in respect of leave due and admissible, on the date of his invalidation from service, provided that the period of leave for which he is granted cash equivalent does not extend beyond the date on which he would have retired in the normal course after attaining the age prescribed for retirement under the terns and conditions governing his service. The cash equivalent thus payable shall be equal to the leave salary as calculated under sub-rule (5) of Rule 56.

59. Payment of cash equivalent of leave salary in case of death, etc., of Member of Service

In the event of the death of a Member of Service while in service or after retirement or after final cessation of duties but before actual receipt of its cash equivalent of leave salary payable under Rules 56, 57 and 58, such amount shall be payable—

(i) to the widow, and if there are more widows than one, the eldest surviving widow if the deceased was a male Member of Service, or to the husband, if the deceased was a female Member of Service;

Explanation—The expression "eldest surviving widow" shall be construed with reference to the seniority according to the date of the marriage of the surviving widows and not with reference to their ages,

(ii) failing a widow or husband, as the case may be, to the eldest surviving son, or an adopted son;

(iii) failing (i) and (ii) above, to the eldest surviving unmarried daughter;

(iv) failing (i) to (iii) above, to the eldest surviving widowed daughter;

(v) failing (i) to (iv) above, to the father;

(vi) failing (i) to (v) above, to the mother;

(vii) failing (i) to (vi) above, to the eldest surviving brother below the age of eighteen years;

(viii) failing (i) to (vii) above, to the eldest surviving unmarried sister;

(ix) failing (i) to (viii) above, to the eldest surviving widowed sister;

(x) failing (i) to (ix) above, to the eldest surviving married daughter; and

(xi) failing (i) to (x) above, to the eldest child of the eldest predeceased son.

60. Cash equivalent of leave salary in case of permanent absorption in Public Sector Undertaking/Autonomous Body wholly or substantially owned or controlled by the Central/State Government.—A Member of Service who has been permitted to be absorbed in a service or post in or under a Corporation or Company wholly or substantially owned or controlled by the Central Government or State Government or in or under a body controlled by one or more than one such Government shall be granted *suo motu* by the authority competent to grant leave cash equivalent of leave salary in respect of earned leave at his credit on the date of absorption subject to a maximum of 300 days. This will be calculated in the same manner as indicated in Clause (b) of sub-rule (2) of Rule 56.

61. Advance of leave salary.—A Member of the Service, proceeding on leave for a Period not less than thirty days, may be allowed an advance in lieu of leave salary up to a month's pay and allowances admissible on that leave salary subject to deductions on account of Income Tax, Provident Fund, House Rent, Recovery of Advances, etc.

62. Cash equivalent of leave salary at the time of appointment of the Judge of the High Court.—Where a Member of the Service is appointed as the Judge of the High Court, the government shall *suo moto* sanction to him cash equivalent of the salary in accordance with rule 20, as if he had retired from the service a day prior to such appointment.

63. Encashment of earned leaves at the time of availing Leave Travel Concession.—(a) A Member of the Service may be sanctioned encashment of ten days of named leave out of the total earned leave at his credit while availing leave travel concession if -

(i) The total earned leave encashed under this rule during the entire service such member does not exceed sixty days,

Explanation:—Equal number of encashment of leaves can also be availed by the spouse, if working.

(ii) A balance of at last thirty days earned leave remains at the credit of the Member of the Service after availing of the earned leave during leave travel concession.

(b) The amount admissible in case of encashment of earned leave under sub-rule (a) shall be equal to the corresponding leave salary.

Explanation:—The encashment of earned leave up to 10 days at the time of availing LTC shall be without any linkage to the number of days and the nature of leave availed while proceeding on LTC.

64. Encashment of Leave During Service

(a) A Member of Service shall be entitled to encash salary equivalent to one month after every two years of his or near service;

(b) The amount payable shall be the leave salary equal to the amount payable for the last month of the two year block period;

(c) The earned leave encashed under this rule shall not be deducted from the total earned leave encashable by a Member of the Service at the time of superannuation, resignation or death, as the case may be

Chapter-VII

Miscellaneous

65. Relaxation of the provisions of the rules in individual cases.—Where the High Court is satisfied that the operation of any of these rules causes or is likely to cause undue hardship to a Member of the Service, it may, after recording its reasons for so doing and notwithstanding anything contained in any of these rules, deal with the case of such member in such manner as may appear to it to be just equitable:

Provided that the case shall not be dealt with in any manner less favourable to such member than that prescribed in these rules.

66. Interpretation.—If any question arises as to the interpretation of these rules, the High Court shall decide the same.

67. Residuary matters.—In respect of all such matters regarding

leaves for which no provision or insufficient provision has been made in these rules, the All India Service (Leave) Rules, 1955, as amended from to time or orders or directions issued and applicable to the officers of comparable status in the Indian Administrative Service serving in connection with the affairs of Union of India shall apply.

FIRST SCHEDULE

[*See* Rule 4(c)]

AUTHORITIES COMPETENT TO GRANT LEAVE

SI. No.	Kind of leave	Authority compete to grant leave
(1)	(2)	(3)
1.	Earned Leave, Half Pay Leave, Commuted Leave, Leave not Due, Materity Leave, Paternity Leave, Child Adoption Leave, Child Care Leave, Casual Leave, Special Casual Leave, Special Sick Leave, Compensatory Leave.	District Judge of the concerned District
2.	Special Disability Leave, Study Leave and Extraordinary Leave	High Court

SECOND SCHEDULE

[*See* Rule 4(g)]

FORM 1

[*See* Rule 12]

APPLICATION FOR LEAVE OR FOR

EXTENSION OF LEAVE

1. Name of applicant.....
2. Post held.....
3. Place of posting.....

4. Nature and Period of leave applied for and date from which required.....
5. Sundays and holidays, if any, proposed to be prefixed/ suffixed to leave.....
6. Grounds on which leave is applied for .....
7. Address during leave period.....

Signature of Applicant

(with date)

8. Remarks and/or recommendation of the Controlling Officer

Signature (with date)

Designation

CERTIFICATE REGARDING ADMISSIBILITY OF LEAVE

9. Certified that.....(*nature of leave*) for.....(*Period*).....from to.....is admissible under Rule.....of the Delhi Higher Judicial Services Rules (Leave).

Signature (with date)

Designation

10. Orders of the authority competent to grant leave.....

Signature (with date)

Designation

FORM 2

[*See* Rule 12]

APPLICATION FOR LEAVE OR FOR EXTENSION

OF LEAVE WHILE AVAILING LTC

1. Name of applicant.....
2. Post held.....
3. Place of Posting.....

4. Pay.....

5. Nature and period of leave applied for and date from which required.....

6. Sundays and holidays, if any, proposed to be prefixed/ suffixed to leave.....

7. Grounds on which leave is applied for.....

8. I propose to avail myself of leave travel concession for the block years.....during the ensuing leave.....

9. Address during leave period.....

Signature of Applicant

(with date)

10. Remarks and/or recommendation of the Controlling Officer

Signature (with date)

Designation

CERTIFICATE REGARDING ADMISSIBILITY OF LEAVE

11. Certified that.....(nature of leave) for .....(period)from.....to.....is admissible under Rule .....of the Central Civil Services (Leave) Rules, 1972.

Signature (with date)

Designation

12. Orders of the authority competent to grant leave

Signature (with date)

Designation

FORM 4

[*See* Rule 16]

MEDICAL CERTIFICATE FOR MEMBER OF SERVICE RECOMMENDED LEAVE OR EXTENSION OF LEAVE OR COMMUTATION OF LEAVE

Signature of the Member of Service.....

I,.....after careful personal examination of the case hereby certify that Shri/Shrimati/Kumari .....whose signature is given above, is suffering from.....and I consider that a period of absence from duty of.....with effect from.....is absolutely necessary for the restoration of his/her health.

Dated.....

Authorized Medical Practitioner

FORM 5

[*See* Rule 22(3)]

MEDICAL CERTIFICATE OF FITNESS TO

RETURN TO DUTY

Signature of Member of Service.....

I,....., Registered Medical Practitioner do hereby certify that I have carefully examined Shri Shrimati/Kumari.....whose signature is given above, and find that he/she has recorded from his/he illness and is now fit to resume duties in government service. I also certify that before arriving at these decision, I have examined the original medical certificate(s) and [statement(s) of the case (or certified copies thereof) (if any)] on which leave was granted or extended and have taken these into consideration in arriving at my decision.

Dated.....

Authorized Medical Practitioner

NOTE—The original medical certificate(s) and statement(s) of the case on which the leave was originally granted is extended shall be produced before the authority required to issue the above certificate. For this purpose, the original certificate(s) and statement(s) of the case should be prepared in duplicate, one copy being retained by the Member of Service concerned.

FORM 6

[*See* Rule 44]

BOND TO BE EXECUTED BY A MEMBER

OF SERVICE WHEN

PROCEEDING ON STUDY LEAVE

KNOW ALL MEN BY THESE PRESENTS THATI,.....resident of.....in the District of.....at present employed as.....in Delhi Higher Judicial Service do hereby bind myself and my Heirs, executors and administrators to pay to the president of India (hereinafter called the 'Government') on demand the sum of Rs.....(Rs.....only) together with interest thereon from the date of demand at government rates for the time being in force in government loans or, if payment is made in a country other than India, the equivalent of the said amount in the currency of that country converted at the official rate of exchange between that country and India AND TOGETHER with all costs between attorney and client and all charges and expenses that shall or may have been incurred by the government.

WHEREAS I,.....am granted study leave by government.

AND WHEREAS for the better protection of the government I have agreed to execute this Bond with such condition as hereunder is written:

NOW THE CONDITION OF THE ABOVE WRITTEN OBLIGATION IS THAT in the event of my failing to resume duty, or resignation or retiring from service or otherwise quitting service without returning to duty after the expiry or termination of the period of study leave or failing to complete the course of study or at any tome within a period of three years after my return to duty, I shall forthwith pay to the government or as may be directed by the government, on demand the said sum of Rs. .....(Rupees.....only) together with interest thereon from the date of demand at government rates for the time being in force on government loans.

AND upon my making such payment, the above written obligations shall be void and of no effect, otherwise in shall be and remain in full force and virtue.

The Bond shall in all respects be governed by the laws of India for the time being in force and the rights and liabilities hereunder shall, where necessary be accordingly determined by the appropriate Courts in India.

Signed and dated this.....day of .....two thousand and.....Signed and delivered by.....in the presence of.....

Witnesses:1. .....

2. .....

ACCEPTED

For and on behalf of the

President of India

FORM 7

[*See* Rule 44]

BOND TO BE EXECUTED BY A MEMBER OF SERVICE WHEN GRANTED EXTENSION OF STUDY LEAVE

KNOW ALL MEN BY THESE PRESENTS THAT I, ...resident of.....in the District of.....at present employed as .....in the Delhi Higher Judicial Service do hereby bind myself and my heirs, executors and administrators to pay to the President of India (Hereinafter called "the Government") on demand the sum of Rs. .....(Rupees.....only) together with interest thereon from the date of demand at Government rates for the time being in force on Government loans or, if payment is made in a country other than India, the equivalent of the said amount in the currency of that country converted at the official rate of exchange between that country and India AND TOGETHER with all costs between attorney and client and all charges and expenses that shall or may have been incurred by the Government.

WHEREAS I, ...was granted study leave by Government for the period from..... to .....in consideration of which I executed a Bond, dated.....,for Rs. .....(Rupees.....only) in favour of the President of India.

AND WHEREAS the extension of study leave has been granted to me at my request until.....

AND WHEREAS for the better protection of the Government I have agreed to execute this Bond with such conditions as hereunder are written.

NOW THE CONDITION OF THE ABOVE WRITTEN OBLIGATION IS THAT in the event of my failing to resume duty, or resigning or retiring from service or otherwise quitting service without returning to duty after the expiry or termination of the period of study leave so extended or failing to complete the course of Study or any time within a period of three years after my return to duty, I shall forthwith pay to the Government or as may be directed by the Government, on demand the said sum of Rs. .....(Rupees.....only) together with interest thereon from the date of demand at Government rates for the time being in force on Government loans.

AND upon my making such payment the above written obligation shall be void and of no effect, otherwise it shall be and remain in full force and virtue.

The Bond shall in all respects be governed by the laws of India for the time being in force and the rights and liabilities hereunder shall, where necessary, be accordingly determined by the appropriate Courts in India.

Signed and dated these .....day of .....two thousand and.....Signed and delivered by .....in the presence of.....

Witnesses: 1. .....

2. .....

ACCEPTED

for and on behalf of the

President of India

APPENDIX-1

RULES REGARDING GRANT OF CASUAL LEAVE

Casual leave is not a recognized form of leave and is not subject to any rules made by the Member of Service. An official on casual leave is not treated as absent from duty and his pay is not intermitted.

1. Casual leave can be combined with Special Casual Leave but not with any other kind of leave.

2. It cannot be combined with joining time.

3. Sundays and Holidays falling during a period of casual leave are not counted as part of casual leave.

4. Sundays/public holidays/restricted holidays/ weekly offs can be prefixed/suffixed to casual leave.

5. Casual leave can be taken while on tour, but no daily allowance will be admissible for the period.

6. Casual leave can be taken for half-day also.

7. Essentially intended for short periods. It should not normally be granted for more than 5 days at anyone time.

8. LTC can be availed during Casual Leave.

9. A Member of the Service shall be entitled to 12 Casual Leaves during the calendar year.

10. Officials Joining during the middle of a year may avail casual leave proportionately or the full period at the discretion of the competent authority.

NOTE—The account of casual leave of all the employees shall be maintained in the Annexed pro forma.

ANNEXURE

Casual Leave account for the year.....district .....

SI. No.	Name	Casual Leave taken on (dates)	Remarks
1	2	3 4 5 6 7 8 9 10 11 12	

Half-day Casual Leave:

(i) A half-day casual leave either for the forenoon session or for the afternoon session may be granted to a Member of the Service on account of some urgent private work.

(ii) The lunch interval shall be the dividing line i.e. a person who takes half day's casual leave for forenoon session is required to come to office at 2:00 p.m. Similarly if a person takes leave for afternoon session he can be allowed to leave office at 1:30 p.m. (1:30 p.m. to 2:00 p.m. being the lunch time).

(iii) A half-day's leave may be granted in conjunction with full day's casual leave subject to the maximum number of casual leaves that can normally be granted at a time.

Half-day's casual leave to be debited for late attendance—In order to enforce punctuality and ensure prompt and efficient transaction of work half a day's casual leave should be debited to the casual leave account of a Member of Service for each late attendance but late attendance up to an hour, on not more than two occasions in a month, may be condoned by the Competent Authority.

NOTE: THESE AMENDMENTS SHALL COME INTO FORCE FROM THE DATE OF THEIR PUBLICATION IN THE GAZETTE.

BY ORDER OF THE COURT

V.P. VAISH, Registrar General

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