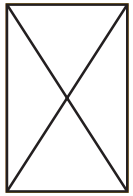
I.L.R. (2014) I DELHI

Part-I (January, 2014)
(Pages 1-442)

P.S.D. 25.1.2014
600



INDIAN LAW REPORTS
DELHI SERIES
2014

(Containing cases determined by the High Court of Delhi)

VOLUME-1, PART-I

(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.) 2014
(for 6 volumes each volume consisting of 2 Parts)

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

for Subscription Please Contact :

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

PRINTED BY : **J.R. COMPUTERS, 477/7, MOONGA NAGAR,
KARAWAL NAGAR ROAD DELHI-110094.
AND PUBLISHED UNDER THE AUTHORITY OF HIGH COURT OF DELHI,
BY THE CONTROLLER OF PUBLICATIONS, DELHI-110054—2014.**

CONTENTS

VOLUME-I, PART-I

JANUARY, 2014

Pages

COMPARATIVE TABLE

ILR (DS) 2014 (I) = OTHER JOURNAL

JANUARY, PART-I

Page No.	Journal	Page No.	Journal Name	Page No.
1	2013 (10) AD (D) 165			
1	2014 (1) AD (D) 40			
12	No Equivalent			
22	2013 (138) DRJ 579			
35	2013 (9) AD (D) 169			
35	2013 (138) DRJ 570			
44	No Equivalent			
51	No Equivalent			
58	2013 (10) AD (D) 179			
70	No Equivalent			
75	No Equivalent			
84	No Equivalent			
119	No Equivalent			
126	No Equivalent			
130	2013 (9) AD (D) 569			
130	2013 (4) JCC 620			
138	No Equivalent			
141	No Equivalent			
144	No Equivalent			
149	No Equivalent			
153	2014 (1) RAJ 490			
153	2013 (139) DRJ 133			
171	No Equivalent			
187	No Equivalent			
201	2014 (140) DRJ 56			
212	No Equivalent			

222	2014 (206) DLT 87			
222	2014 (2) AD (D) 632			
222	2014 (57) PTC 179			
237	No Equivalent			
242	No Equivalent			
248	2014 (1) JCC 51			
259	No Equivalent			
270	2014 (206) DLT 188			
270	2013 (139) DRJ 379			
270	2014 (2) AD (D) 762			
290	2014 (1) AD (D) 334			
290	2014 (1) JCC 145			
301	No Equivalent			
321	No Equivalent			
327	No Equivalent			
334	No Equivalent			
340	2014 (140) DRJ 540			
356	2014 (207) DLT 10			
356	2014 (2) AD (D) 641			
364	2014 (2) AD (D) 171			
364	2014 (1) JCC 503			
374	No Equivalent			
380	No Equivalent			
387	No Equivalent			
394	No Equivalent			
404	2014 (305) ELT 305			
416	No Equivalent			

COMPARATIVE TABLE

OTHER JOURNAL = ILR (DS) 2014 (I)

JANUARY, PART-I

Journal Name Page No.	**=**	**ILR (DS) 2014 (I)**	**Page No.**
2013 (10) AD (D) 165	=	ILR (DS) 2014 (I)	1
2014 (1) AD (D) 40	=	ILR (DS) 2014 (I)	1
2013 (9) AD (D) 169	=	ILR (DS) 2014 (I)	35
2013 (10) AD (D) 179	=	ILR (DS) 2014 (I)	58
2013 (9) AD (D) 569	=	ILR (DS) 2014 (I)	130
2014 (2) AD (D) 632	=	ILR (DS) 2014 (I)	222
2014 (2) AD (D) 762	=	ILR (DS) 2014 (I)	270
2014 (1) AD (D) 334	=	ILR (DS) 2014 (I)	290
2014 (2) AD (D) 641	=	ILR (DS) 2014 (I)	356
2014 (2) AD (D) 171	=	ILR (DS) 2014 (I)	364
2014 (206) DLT 87	=	ILR (DS) 2014 (I)	222
2014 (206) DLT 188	=	ILR (DS) 2014 (I)	270
2014 (207) DLT 10	=	ILR (DS) 2014 (I)	356
2013 (138) DRJ 579	=	ILR (DS) 2014 (I)	22
2013 (138) DRJ 570	=	ILR (DS) 2014 (I)	35
2013 (139) DRJ 133	=	ILR (DS) 2014 (I)	153
2014 (140) DRJ 56	=	ILR (DS) 2014 (I)	201
2013 (139) DRJ 379	=	ILR (DS) 2014 (I)	270

2014 (140) DRJ 540	=	ILR (DS) 2014 (I)	340
2014 (305) ELT 305	=	ILR (DS) 2014 (I)	404
2014 (1) JCC 503	=	ILR (DS) 2014 (I)	364
2013 (4) JCC 620	=	ILR (DS) 2014 (I)	130
2014 (1) JCC 51	=	ILR (DS) 2014 (I)	248
2014 (1) JCC 145	=	ILR (DS) 2014 (I)	290
2014 (57) PTC 179	=	ILR (DS) 2014 (I)	222
2014 (1) RAJ 490	=	ILR (DS) 2014 (I)	153

PRACTICE DIRECTIONS FOR ISSUANCE OF SUMMONS/ NOTICES THROUGH SPEED POST/REGISTERED POST WITH PROOF OF DELIVERY (POD) IN THE HIGH COURT OF DELHI

1. These practice directions will apply in all cases where the Hon'ble Court has ordered issuance of summons/notices through Speed Post or Registered Post. These Practice Directions will come into force immediately.

2. In all cases where summons/notices have been ordered by Hon'ble Court to be served through Speed Post or Registered Post the following procedure will be followed.

a) The advocate/Party-in-Person will file Process Fee at the filing Counter, Delhi High Court, clearly mentioning therein his contact number and address along with copies of the petition/application to be sent with the summons/notices and adequate numbers of the envelopes specially designed, containing proof of delivery (PoD) bearing the address of the respondent/addressee. These envelopes are available at the Extension Counter set up by the Department of Posts in the Receipt and Despatch Branch, Main Building, 'A' Block, Delhi High Court.

b) The Process Fee From along with envelope(s) and the copies of petition/application so filed will be sent by the Filing Counter to the concerned Branch for preparation of summons/notices.

c) The concerned branch will prepare the summons/notices within a period of three working days of receiving the process fee form from the filing counter. The branch will immediately thereafter send the copies of summons/notices, envelope(s) and copy of the petition/application to the Receipt & Despatch Branch, which will seal the process in the envelope(s).

d) The Advocate/Party-in-Person will collect sealed envelope(s) from the Receipt and Despatch Branch and submit them directly at the extension counter set up by the Department

of Posts.

e) The Advocates will pay the following charges directly at the Counter set up by the Department of Posts.

i) Speed Post charges for the article as determined by the Department of Posts.

ii) Speed Post charges for the PoD as determined by the Department of Posts.

iii) Handing charges @ Rs.5/- per acknowledgment (PoD) at the time of booking of the article.

iv) Scanning charges for the PoD @ Rs. 10/- at the time of booking of the article.

3. The Speed Post charges paid once will not be refunded even if the article is not delivered or is received back unserved.

4. The concerned Advocate/Party-in-Person will file an affidavit of service along with the receipt of summons/ notices sent in the specially designed envelope(s) through Speed Post and the tracking report as available on the net.

5. The Department of Posts will send the scanned copy of the PoD electronically to the e-mail ID of the nominated officer of the Delhi High Court immediately on receipt of the same in the concerned Post Office.

6. The undelivered/refused articles or the duly signed PoD (or its scanned copy) received in the Receipt & Despatch Branch will be sent to the concerned Branches for further necessary action.

7. If the advocate/party concerned desires to have a scanned copy of the POD then he may furnish his e-mail ID at the time of filing of Process Fee form and should send a request to the Assistant Registrar (Appellate) (Email arappellate.dhc@nic.in) through email in this regard, who shall forward the scanned copy of the POD received electronically from the Department of Posts.

NOMINAL-INDEX
VOLUME-1, PART-I
JANUARY, 2014

SUBJECT-INDEX
VOLUME-1, PART-I
JANUARY, 2014

ARBITRATION & CONCILIATION ACT, 1996—S. 34-Objections-refiling-condonation of delay-166 days—S. 151 CPC—Inherent powers—Delhi High Court Rule—Volume 5 Chapter 1-A—Rule 5-an Application for condonation of delay of 166 days in refiling the objection moved under S. 151 CPC before single judge-dismissed—FAO preferred—Respondent contended-no jurisdiction to condone the delay beyond the period of 3 months and 30 days-not permitted in the first instance to file objection-cannot be permitted at the second instance-consequently a refiling done after prescribed statutory period-no jurisdiction to condone the delay beyond the period of 30 days—Held—The Court has jurisdiction to condone delay in refiling even if the period extends beyond the time specified under the Act-however-object of arbitration and conciliation act is to ensure that the arbitration proceedings are concluded expeditiously-jurisdiction not be exercised-delay in filing frustrate the object of the Act-the applicant to satisfy-pursued the matter diligently and delays beyond control and unavoidable-inordinate delay of 166 days-appellant not able to offer satisfactory explanation-liberal approach not called for-appeal dismissed.

DDA v. *Durga Construction Co.* *153*

ARMS ACT, 1950—Section 25 and 27—Possession and use of arms—Criminal Procedure Code, 1973—Section 357—Compensation to victim—Appellant/accused fired at the complainant PW6—Missed—Hit another person and caused injuries—Shot fired again—Hit PW6 and caused injuries—Appellants fled the spot—Injured removed to Hospital—DD No. 36 dated 08.06.1995 recorded—MLCs collected—Injuries to complainant opined to be dangerous and described as gunshot injuries—Injured opined to be grievous—On the Statement of complainant FIR No. 339/95 PS Janakpuri registered—Accused persons named therein—Appellant/

accused arrested—Made disclosure statements—Country made pistols recovered—Sent for expert examination to FSL—Appellant/accused person alongwith Ashwani and Sanjiv Sethi arrested and charge Sheeted—Accused persons Ashwani and Sanjiv Sethi discharged—Charges against the appellants/accused persons framed—prosecution examined 22 witnesses—Statement of appellants u/s. 313 Cr. P.C. recorded—Denied complicity in crime and pleaded false implication—Appellants convicted for offences u/s. 307/34 IPC and u/s. 25/27 Arms Act—Sentenced to undergo imprisonment and fine—Aggrieved appellants preferred appeals—Contended—Witnesses PW7 and PW19 not present the spot and falsely introduced as eye witnesses—Lacked creditability being interested witnesses—Complainant is B.C. of the area—Involved in a number for criminal cases—Recoveries are doubtful—Pistols recovered not connected/linked with the crime—Nature of injuries suffered by PW6 not proved—Other injured withheld and not produced—Investigation is tainted and unfair—Ld. APP contended—Conviction based upon fair appraisal of evidence—The other injured could not be traced and examined—Held—Conduct of PW7 and PW19 unnatural and unreasonable—presence at the spot highly suspicious—Complainant PW6 proved the version given to police at first instance without major variations—Other injured not traceable—No adverse inference can be drawn against the prosecution—Country made pistols recovered from the appellants— Shot fired from one of the pistols—Appellants arrived at the scene having made preparation, participated by firing and facilitated commission of crime—shared common intention—injury to PW6 caused on a vital organ—Injuries dangerous in nature—Injuries not self inflicted or accidental in nature—No variance and conflict between ocular and medical evidence—Involvement in the incident established beyond reasonable doubt—Conviction sustained—Substantive sentences modified—Compensation awarded—Appeal disposed of.

Joginder Singh @ Mor v. *State of Delhi* *248*

pursued the matter diligently and delays beyond control and unavoidable-inordinate delay of 166 days-appellant not able to offer satisfactory explanation-liberal approach not called for-appeal dismissed.

— Section 24 Scope—Consolidation of suits—Substantial & sufficient similarity of issues arising in two different suits—Eligible for consolidation—Probate petition and suit involve common issues and witnesses—Interest of parties is a factor to be considered for consolidation of two suit—Deposition of common witnesses is a factor in considering consolidation—No legal bar in trying both of them together.

— Order XXXIX Rule 1 & 2—Injunction order sought—Balance of convenience is also not in favour of the plaintiff—Plaintiff failed to make out prima facie case—Injunction, if granted would tantamount to decreeing of suit—Hence denied.

— Suit-S.9—Order XXXIX Rule 1 and 2—ad-interim injunction-trade mark Act, 1999—Trade mark-infringment of-identical-deceptively similar- Passing of—Intellectual property Appellate Board (IPAB)—Plaintiff having registered trade mark '4T PREMIUM'—India's first in growing lubricant market and producer of quality branded automotive/industrial product—Product available at more than 50,000 retail counters across India—Product imported under various famous trade marks-4T PREMIUM used extensively and continuously—uninterruptedly, since year 2003—Defendant adopted trade mark with mala fide intention—liable to be injuncted from using 4T PREMIUM—Defendant contended—plaintiff could not claim exclusive right either in the word '4T' OR '4T PREMIUM'—word '4T' denoted 4 strokes engine—word

PREMIUM a laudatory word—no one can claim right to use the word exclusively—defendant its trademark 'AGIP' WITH 4T PREMIUM—packing totally different from the plaintiffs—no infringement or passing of. The passing of the defendant's goods as that of plaintiff—defendant never used 4T PRIMIUM separately- used the same with their trade name AGIP 4T PREMIUM—defendant already filed an application for cancellation of plaintiff trade mark before IPAB—Held—when the two marks not identical the plaintiff have to establish- mark used by the defendant so nearly resemble the plaintiff's trademark as it likely to mislead to a false conclusion in relation to good in respect to which it is registered—the defendant using word AGIP and its logo alongwith 4T PREMIUM and not simplicitor 4T PREMIUM—Even the plaintiff using the word 'VOLVOLINE' with 4T PREMIUM—application dismissed.

— S, 9—Suit—Specific Relief Act, 1963—Suit for declaration and mandatory injunction—Order 1 Rule X CPC—Impleadment—proper party-Necessary party—First Appeal—S. 100 A—No further appeal in certain cases—Delhi High Court Act, 1966—S. 10—Appeal to Division Bench—Delhi High Court Rules—Chapter II of OS Rules—Rule 4—Letter Patent Appeal—preliminary objection—Maintainability—Appellant filed a suit seeking decree of declaration-possession and mandatory injunction in favour of plaintiff-Defendant no. R1 filed an application under order 1 Rule 10 (2) of CPC for impleadment—Application not opposed by R2 DDA—Plaintiff opposed the application R1 neither necessary party nor proper party to the proceedings-Contended-R1 claiming title to the half share of the suit property—Dispute could not be made to the subject matter of the suit—Appellant also resisted the application on the ground that the appellant was *dominous litus*—Registrar accepted the contention of the appellant and rejected the application filed by R1 by order dated

properties of petitioner—The Single Judge granted leave under Order XXI Rule 50(2), leading to the present appeal. Held: Court which passed the decree, i.e. the Court which made the arbitral award in question a rule of Court under Section 17 of the Arbitration Act, 1940—Execution proceedings the matter was transferred under Section 39, CPC—Assets sought to be utilized in the execution of the decree situated in the jurisdiction of the Calcutta High Court—Appellant made three fold suggestions first, appellant was neither provided notice of the underlying suit or of the execution proceedings, until proceedings reached the Calcutta High Court-second, words referred to in clause (b) or clause (c) of sub-rule (1) of Rule 50 of Order XXI are to be read in contradistinction to the persons, i.e. partners, referred to in clauses (b) and (c)-third, after transferring the decree, the transferor court, i.e. this Court, has no jurisdiction in respect of the proceedings Sub-rule (2), if read as against sub-rule 1 does not refer to partners of the firm but to third persons unappealing—Clauses (b) and (c) of sub-rule 1 do not exhaust all categories of partners that may be proceeded against—Such that sub-rule (2) only deals with thirds persons—Core of Rule 50-individual partners not involved in the proceedings-in which case they would be covered under clauses (b) or (c) of sub-rule 1-their assets may still be utilized in the execution proceedings Court which passed the decree grants leave after hearing the individual on the question of his liability vis-a-vis his relationship with firm finally, Court which passed the decree in this was this Court which made the arbitral award into a rule of Court—No distinction can be read into Rule 50(2) between the bench seized of the execution proceedings and that which heard the matter on the original side—Transferring the decree, the transferor Court does not retain the power to grant leave, is contrary to the express terms of Section 42 transferee Court does not obtain the power to grant leave to execute such decree against any person other than such a person as is referred to in clause (b), or clause (c), of sub-rule (1) of rule 50 of Order XXI retiring partner discharged from any liability to a third

party for acts of the firm done before his retirement by an agreement made by him with third party and the partners of the reconstituted firm—Such agreement may also be implied by a course of dealing after he had knowledge of the retirement.

Shri Satish Kumar Jhunjhunwala v. *Union of India & Ors.* *58*

CODE OF CRIMINAL PROCEDURE, 1973—S. 482—Inherent Power-Quashing of FIR—Indian Penal Code—S. 376—Rape-compromise-living as husband and wife-charge sheet already filed—Petitioner and prosecutrix R2-working in the same branch of a private company—Started conversing on the telephone—Prosecutrix visiting petitioner at his residence-staying with him occasionally had developed physical relation refused to marry her—Prosecutrix made complaint—Petitioner forced himself upon her and raped her—FIR under S. 376 IPC registered—Petitioner arrested-reached at understanding-married prosecutrix—Petition under S. 482 filed for quashing of FIR-compromised-petitioner and R2 living happily as husband and wife-marriage certificate photographs-placed on record-prosecutrix not to pursue complaint-prosecution opposed the quashing-offence not compoundable—Held—While considering quashing of FIR under S. 482 Cr. PC High Court must have due regard to the nature and gravity of crime-heinous and serious offences of mental depravity or offences like murder-rape-dacoity etc.-not fittingly quashed-even though the victim and victim family and offenders have settled the dispute-such offences not private in nature and have serious impact on society—Petition dismissed.

Mayank Pandey v. *State & Ors.* *374*

— Section 357—Compensation to victim—Appellant/accused fired at the complainant PW6—Missed—Hit another person and caused injuries—Shot fired again—Hit PW6 and caused injuries—Appellants fled the spot—Injured removed to

Hospital—DD No. 36 dated 08.06.1995 recorded—MLCs collected—Injuries to complainant opined to be dangerous and described as gunshot injuries—Injured opined to be grievous—On the Statement of complainant FIR No. 339/95 PS Janakpuri registered—Accused persons named therein—Appellant/accused arrested—Made disclosure statements—Country made pistols recovered—Sent for expert examination to FSL—Appellant/accused person alongwith Ashwani and Sanjiv Sethi arrested and charge Sheeted—Accused persons Ashwani and Sanjiv Sethi discharged—Charges against the appellants/accused persons framed—prosecution examined 22 witnesses—Statement of appellants u/s. 313 Cr. P.C. recorded—Denied complicity in crime and pleaded false implication—Appellants convicted for offences u/s. 307/34 IPC and u/s. 25/27 Arms Act—Sentenced to undergo imprisonment and fine—Aggrieved appellants preferred appeals—Contended—Witnesses PW7 and PW19 not present the spot and falsely introduced as eye witnesses—Lacked creditability being interested witnesses—Complainant is B.C. of the area—Involved in a number for criminal cases—Recoveries are doubtful—Pistols recovered not connected/linked with the crime—Nature of injuries suffered by PW6 not proved—Other injured withheld and not produced—Investigation is tainted and unfair—Ld. APP contended—Conviction based upon fair appraisal of evidence—The other injured could not be traced and examined—Held—Conduct of PW7 and PW19 unnatural and unreasonable—presence at the spot highly suspicious—Complainant PW6 proved the version given to police at first instance without major variations—Other injured not traceable—No adverse inference can be drawn against the prosecution—Country made pistols recovered from the appellants— Shot fired from one of the pistols—Appellants arrived at the scene having made preparation, participated by firing and facilitated commission of crime—shared common intention—injury to PW6 caused on a vital organ—Injuries dangerous in nature—Injuries not self inflicted or accidental in nature—No variance and conflict between ocular and

medical evidence—Involvement in the incident established beyond reasonable doubt—Conviction sustained—Substantive sentences modified—Compensation awarded—Appeal disposed of.

Joginder Singh @ Mor v. *State of Delhi* *248*

CONSTITUTION OF INDIA, 1950—Article 226—Petitioners seek quashing of Signals whereby benefit to Petitioners under ACP scheme has been denied on the grounds that if they have qualified SUOCC Course after completion of 24 years of service then the benefit can be given only from the date of completion of the course and not from completion of 24 years of regular service. Impugned Signals in contravention to the letter issued by the Directorate General in consultation with Ministry of Home Affairs. Respondent cannot be allowed to take advantage of their own wrong. Petitioners did not undertake said course since the Respondents did not detail the Petitioners to undergo the same. Held- It is the responsibility of the respondent to detail the individual for the pre promotional cadre course. Having not done so, the respondents cannot be allowed to withhold the benefits entitled to an individual for their own faults. Petitioners granted financial upgradation from date of completion of 24 years of service, and granted arrears. Writ allowed.

Jaipal Singh and Ors. v. *UOI and Ors.* *12*

— Article 226—Rule 9—Research & Analysis wing (Recruitment, Cadre & Service) Rules, 1975 ("Rules")—Respondent was Class I Executive cadre officer in the Cabinet Secretariat [also known as the R&AW]—Respondent alleged sexual harassment at workplace sometime in 2007—Constitution of two Committees reports of the Committee (dated 19.05.2008 and 30.09.2008), although not direct subject matter of these proceedings-allegations of sexual harassment could not be substantiated—The Union Government under Rule 135(1)(a) of the Rules, compulsorily retired the respondent on the ground of her being exposed as

the Petitioner was closed since relevant documents weren't furnished despite communications —Petitioner didn't receive communication, alleged malafides on the part of the Respondent—Hence, present writ petition. Respondent contends despite repeated requests Petitioner didn't furnish required information—Petitioner's case therefore closed in 1992 and the same communicated to the Petitioner—Policy doesn't allow reopening of closed cases. Held: Petitioner does not specifically deny receiving communications from the Respondent—Petitioner approached Respondent after 20 years of closure of his case—While Limitation Act normally doesn't apply to proceedings u/Article 226, settled law that WP filed beyond period of limitation prescribed for civil suits be dismissed on delay and laches.

Babu Ram v. *Land & Building Department & Anr.* *327*

— Article 226—Petitioner, ex service man applied in SC category and participated in selection process for post of SI/AI in CPO—Petitioner successfully participated—However, no appointment letter issued—Hence, present writ petition. Respondents contended Petitioner was overage despite age relaxation, and thus not offered appointment. In response, Petitioner urged that he may be considered for a Group C posting, incase he was overage for a Group B posting. Held: Petitioner overage by 2 years for Group B posting—No representation made for Group C posting. Even in the writ petition Petitioner seeks appointment to Group B post—Petitioner not entitled to Group C appointment as prayed for. Petition dismissed.

Babu Ram v. *Union of India and Anr.* *387*

— Article 226—Customs Act, 1962—Section 2(2), 110(1), (2) and (3) and 124—Petitioner filed writ petition for de-freezing its account frozen by Respondent No. 2 (Directorate of Revenue Intelligence)—Plea taken, Petitioner has neither been indicted nor arraigned as a Notice in show cause notice

purported to haver been issued in pursuance of investigation—As per Provisions of Section 110(1) of Act if any goods liable for confiscation under Act are seized and a show cause notice under Section 124 of Act is not Given within six months, then goods are liable to be restored to person from whom goods have been seized—Per contra plea taken, although notice Section 110 (2) to be served within a period of six months is mandatory, yet no such time limit is laid down under Section 124 and thus of goods can continue under Section 124 of Act—Seizure of bank account was under Section 110(3) and there is no provision to serve any notice upon person from whose possession any documents or things are seized—Held—Section 110 (3) of Act deals with seizure of documents or things which in opinion of proper person would be relevant to any proceedings under Act—Freezing of bank account will not be seizure of any document or thing useful or relevant to any proceedings under Act—Bank account is frozen with a view to recover evaded customs Duty, penalty *etc. etc.,* freezing of bank account may not amount to seizure of any document, but at same time it cannot also amount to seizure of any goods liable for confiscation as well—Since freezing of bank account was not seizure of 'goods' as envisaged under Section 110 of Act, Petitioner is not entitled to de-freezing of bank account unconditionally—Amount deposited in bank Account shall be released, Subject to furnishing of a Bank guarantee to Respondent No. 2 in respect of amount credited in account from date of freezing of amount.

Ravi Crop Science v. *UOI & Ors.* *404*

— Articles 32 & 226—University grant Commission Act, 1956—Section 3 and 26(1)—UGC—(Minimum Qualifications Required for the Appointment and Career Advancement of Teachers in Universities and Colleges) Regulations, 2000—Clause 1.3.1—Petitioner filed petition seeking writ of quo warranto for declaring that fourth respondent Dr. S. Sivakumar is not entitled to hold his position as Research Professor at Indian Law Institute (ILI)—Plea taken, Sivakumar

fraudulently obtained post by making false statements and fraudulent misrepresentation before selection committee—Sivakumar's appointment was contrary to statutory rules as he did not have requisite qualifications in terms of advertisement issued by ILI inviting applications for post of Research Professor and in terms of UGC Regulations for appointment—Per contra plea taken, present proceedings are motivated—Writ Petition of quo warranto is not maintainable as Sivakumar's selection and appointment was not to a statutory post—Petitioner does not have any locus standi to claim quashing of appointment since he was not a candidate—RTI responses received by petitioner from Kerala Law Academy were manipulated and are therefore, to be ignored—Selection of Sivakumar was not only within terms of advertisement issued and bye-laws of ILI, but merited—Held—Points for consideration in this case are whether petitioner has locus standi to agitate this matter—If so, do facts warrant issuance of writ of quo warranto—Petitioner, in opinion of this Court, despite being outsider, possesses necessary locus standi to question appointment in violation of UGC Regulations, which have force of statute—A particular institution may, based upon its internal peculiarities, choose to lay a different emphasis on particular requirements inter se candidates, fact remains that all minimum qualifications prescribed in 2000 UGC Regulations must necessarily be complied with—Limited inquiry to be conducted by this Court while considering a writ of quo warranto is not whether Sivakumar was more qualified candidate for post but rather whether his credential fell below minimum statutory bar imposed by UGC Regulations—If documentary proof provided by petitioner is to be believed, Dr. Sivakumar did not have cumulative ten years teaching or research experience required under 2000 Regulations, whilst if Dr. Sivakumar's documentary proof is considered, that requirement is clearly satisfied—Comprehensive details disclosed in "Academic Profile" render Sivakumar eligible for post of Research Professor under Second alternate criterion i.e. outstanding scholar with established reputation who has

made significant contribution to knowledge and that being case, his further selection lies at discretion of Selection Committee—There is no infirmity in appointment of Dr. Sivakumar as Research Professor at ILI—Writ petition dismissed with cost of Rs. 50,000/-.

— Article 226—Petitioner got himself registered for allotment of MIG flat under Ambedkar Awas Yojna—At time of registration, he gave his current and permanent address—Petitioner was allotted a government accommodation—Petitioner requested DDA for incorporating his changed address in record of DDA—DDA asked him to submit attested copy of ration card or election card so that his address could be changed in office record—Said documents were not submitted by Petitioner as he did not possess same—In spite of representations of Petitioner to DDA to allot a flat, he did not receive any response—In a public meeting in 2012, Petitioner came to know about allotment of a flat in Dwarka to him in year, 2001 and that Demand-cum-Allotment letter (DAL) of same had been returned back undelivered and that allotment of flat made to him had been cancelled on account of non payment of cost of flat within stipulated period—Petitioner approached HC by way of instant petition seeking allotment of a similar flat as allotted to earlier—Plea taken by DDA, DAL was sent to Petitioner at his correspondence/postal address as mentioned in application form with advice to deposit demanded amount as per schedule given in letter—Since Petitioner failed to deposit amount as required, allotment automatically stood cancelled—Held—Even if DAL was initially sent at old address and received back with report of 'left', DDA was under obligation to send same at current address of Petitioner which was duly provided in year, 2001—Not only this admittedly, information about allotment of flat was also not sent at Petitioner's occupational/office address—It is very unfortunate that in spite of residential address of Petitioner of Government flat allotted to him being available, in respect of government

employees also, DDA wants to take a plea that it was not under obligation to send allotment letter at current residential which was duly informed—Writ of Mandamus issued directing DDA to allot a flat of equivalent size preferably in same area, that is Dwarka at price prevalent on date of this order, within period of 12 weeks.

Nanak Chand v. *DDA* *380*

CUSTOMS ACT, 1962—Section 2(2), 110(1), (2) and (3) and 124—Petitioner filed writ petition for de-freezing its account frozen by Respondent No. 2 (Directorate of Revenue Intelligence)—Plea taken, Petitioner has neither been indicted nor arraigned as a Notice in show cause notice purported to haver been issued in pursuance of investigation—As per Provisions of Section 110(1) of Act if any goods liable for confiscation under Act are seized and a show cause notice under Section 124 of Act is not Given within six months, then goods are liable to be restored to person from whom goods have been seized—Per contra plea taken, although notice Section 110 (2) to be served within a period of six months is mandatory, yet no such time limit is laid down under Section 124 and thus of goods can continue under Section 124 of Act—Seizure of bank account was under Section 110(3) and there is no provision to serve any notice upon person from whose possession any documents or things are seized—Held—Section 110 (3) of Act deals with seizure of documents or things which in opinion of proper person would be relevant to any proceedings under Act—Freezing of bank account will not be seizure of any document or thing useful or relevant to any proceedings under Act—Bank account is frozen with a view to recover evaded customs Duty, penalty *etc. etc.,* freezing of bank account may not amount to seizure of any document, but at same time it cannot also amount to seizure of any goods liable for confiscation as well—Since freezing of bank account was not seizure of 'goods' as envisaged under

Section 110 of Act, Petitioner is not entitled to de-freezing of bank account unconditionally—Amount deposited in bank Account shall be released, Subject to furnishing of a Bank guarantee to Respondent No. 2 in respect of amount credited in account from date of freezing of amount.

Ravi Crop Science v. *UOI & Ors.* *404*

DELHI CO-OPERATIVE SOCIETIES ACT, 2003—S. 70—Delhi Co-operative Housing Finance Corporation Ltd. (DCHFC)-Housing Loan-Default-Recovery certificate—Loan of Rs.51.52 lacs taken from the DCHFC to complete the construction of flats of Neelkamal CO-operative group Housing Society for its members-Society defaulted in making timely payment of installment—Loan secured by way of mortgage deed—DCHFC proceeded with recovery suit in 2010-recovery certificate issued for 1,20,06,7.1/- with interest @ 15.9% execution proceedings filed—R4 Assistant Collector/ Recovery Officers—Issued a public dated 4.3.2013 for sale of assets of society including the flats occupied by different members—During the proceedings of execution-order dtd. 14 August, 2013 passed-directing members/GPF holders/ residents to apportion amounts payable by Society in terms of recovery certificate—Further informed-no objection certificate (NOC) could be issued against the members who clear full and final payment-Some members filed objections disputing liability-objections pending-Petitioners No. 3 to 7 deposited the amount in compliance of the order by way of cheque and sought NOC-R4 returned the cheques-appears that the society claiming amount against several members in proceedings under S. 70 of Delhi Co-operative Societies Act, 2003—Preferred writ petition—Contended-depite *bona fide* as well as sincere efforts to comply with the order, non acceptance of tender would be foisting-unwarranted interest liability and would be highly prejudicial—Held-directed R4 to accept payment from such members of the Society who are willing to pay as apportioned by R4 subject to subsequent

adjustment on the finalization of proceedings before different forums—Writ petition disposed of.

R.K. Anand and Ors. v. *Delhi Co-Operative Housing Finance Corporation Ltd. & Ors.* *242*

DELHI DEVELOPMENT AUTHORITY—Allotment of Flats—Constitution of India, 1950—Article 226—Petitioner got himself registered for allotment of MIG flat under Ambedkar Awas Yojna—At time of registration, he gave his current and permanent address—Petitioner was allotted a government accommodation—Petitioner requested DDA for incorporating his changed address in record of DDA—DDA asked him to submit attested copy of ration card or election card so that his address could be changed in office record—Said documents were not submitted by Petitioner as he did not possess same—In spite of representations of Petitioner to DDA to allot a flat, he did not receive any response—In a public meeting in 2012, Petitioner came to know about allotment of a flat in Dwarka to him in year, 2001 and that Demand-cum-Allotment letter (DAL) of same had been returned back undelivered and that allotment of flat made to him had been cancelled on account of non payment of cost of flat within stipulated period—Petitioner approached HC by way of instant petition seeking allotment of a similar flat as allotted to earlier—Plea taken by DDA, DAL was sent to Petitioner at his correspondence/postal address as mentioned in application form with advice to deposit demanded amount as per schedule given in letter—Since Petitioner failed to deposit amount as required, allotment automatically stood cancelled—Held—Even if DAL was initially sent at old address and received back with report of 'left', DDA was under obligation to send same at current address of Petitioner which was duly provided in year, 2001—Not only this admittedly, information about allotment of flat was also not sent at Petitioner's occupational/office address—It is very unfortunate that in spite of residential address of Petitioner of Government flat allotted to him being available, in respect of government

employees also, DDA wants to take a plea that it was not under obligation to send allotment letter at current residential which was duly informed—Writ of Mandamus issued directing DDA to allot a flat of equivalent size preferably in same area, that is Dwarka at price prevalent on date of this order, within period of 12 weeks.

Nanak Chand v. *DDA* *380*

INDIAN PENAL CODE, 1860—Sections 342, 304, 34—Appellant was convicted U/s 342/304 /34 of Code—He challenged conviction urging FIR was not lodged promptly and is fatal to prosecution case. Held:—The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.

Raj Kumar v. *State of Delhi* *51*

— Section 307—Attempt to murder—Quarrel between appellant and victim on slapping a boy aged 8 or 10 years—Appellant brought knife from his house and inflicted injuries on left cheek—Attempt to strike knife blow on stomach foiled Blow on neck taken on left arm, assaulted on left leg, palm and fingers—Injured became unconscious appellant fled the spot taken to hospital—DD No. 43 B recorded on the victim's statement FIR No. 22/1999 under section 307 IPC P.S. Sarita Vihar registered—Injuries opined to be grievous appellant/ accused arrested-chargesheeted Convicted for offence u/s. 307 IPC-aggrieved appellant preferred appeal- contended-crime weapon not recovered- injuries were not dangerous in nature- Ingredients of section 307 missing- APP urged-multiple injuries inflicted on various body parts- judgement requires no interference- Held- No animosity between the appellant and victim- no ulterior motive assigned to victim-material facts deposed by injured remained unchallenged in

800/- FIR was registered and on completion of investigation Appellant was chargesheeted and brought to trial—Appellant claimed false implication—Addl. Sessions Court—Convicted—Contended that testimony of PW1 who turned hostile during cross examination and thus could not be relied upon—That conviction u/s 397 IPC was unsustainable due to non recovery of crime weapon—Further,. that Appellant wasn't charged u/s 392, IPC, therefore conviction under the same was unsustainable Held: Prosecution has established case beyond reasonable doubt—Simply because witness turned hostile in the cross examination, version given under oath during examination in chief cannot be disbelieved—Law to the effect that merely when the witness turns hostile, whole of his evidence is not liable to be thrown away, is well settled.

- The prosecution was not able to prove that the appellant had intention and knowledge to cause death. The conviction u/s 307 require alternation to offence u/s 326 IPC.

- No force in the contention that conviction with the aid of S. 397 is not permissible in the absence of non recovery of knife.

Deepak v. *State* *290*

— Section 304B—The Ingredients "cruelty soon before death"—Marriage of the deceased survived only for five months during which for four onths she lived in her matrimonial home, so her parents were not expected to rush to the police with the complaint as initial attempts are made to resolve the dispute and save the marriage—Three days before the incident, there was a quarrel between the accused and the deceased which forced the deceased to commit suicide, so it is difficult to imagine a more proximate link between harassment and death of the deceased—Further held, where the dying declaration does not suffer from any infirmity, its veracity could be the basis of conviction without any corroboration.

Gopi @ Hukam v. *State*..... *364*

— Sec. 376—Sentence—Sentencing for any offence has a social goal—Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed—It serves as a deterrent—The principle of proportionality between an offence committed and the penalty imposed are to be kept in view—It is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications as well as its repercussions on the victim.

— Rape is one of the most heinous crimes committed against a woman—It insults womanhood—It dwarfs her personality and reduces her confidence level—It violates her right to life guaranteed under Article 21 of the Constitution of India.

— A minimum of seven years sentence is provided under Section 376(1) of the Indian Penal code (IPC—Sentence for a term of less than seven years can be imposed by a court only after assigning adequate and special reasons for such reduction—Thus, ordinarily sentence for an offence of rape shall not be less than seven years—When the legislature provides for a minimum sentence and makes it clear that for any reduction from the minimum sentence of seven years, adequate and special reasons have to be assigned in the judgment, the courts must strictly abide by this legislative command—Whether there exists any "special and adequate reason" would depend upon a variety of factors and the peculiar facts and circumstances of each case—No hard and fast rule can be laid down in that behalf for universal application.

MD. Taskeen v. *The State (Govt. of NCT) Delhi*..... *394*

— S. 376—Rape-compromise-living as husband and wife-charge sheet already filed—Petitioner and prosecutrix R2-working in the same branch of a private company—Started conversing on the telephone—Prosecutrix visiting petitioner at his residence-staying with him occasionally had developed physical relation refused to marry her—Prosecutrix made

High Court Act, 1966—S. 10—Appeal to Division Bench—Delhi High Court Rules—Chapter II of OS Rules—Rule 4—Letter Patent Appeal—preliminary objection—Maintainability—Appellant filed a suit seeking decree of declaration-possession and mandatory injunction in favour of plaintiff-Defendant no. R1 filed an application under order 1 Rule 10 (2) of CPC for impleadment—Application not opposed by R2 DDA—Plaintiff opposed the application R1 neither necessary party nor proper party to the proceedings-Contended-R1 claiming title to the half share of the suit property—Dispute could not be made to the subject matter of the suit—Appellant also resisted the application on the ground that the appellant was *dominous litus*—Registrar accepted the contention of the appellant and rejected the application filed by R1 by order dated 14.12.2010—Preferred an appeal under Rules 4 of Chapter-II of original side Rules to single Judge-allowed-—Preferred LPA—Preliminary objection-maintainability-whether appeal barred under S. 100 A of CPC—Order passed by single Judge in exercise of his power—Provided for an appeal against the order made by the Registrar under Rule 3 of Chapter-II—Respondent contended—Appeal under S. 10 of Delhi High Court Act against the Judgment of Single Judge lies to Division Bench only-since the present impugned order not passed in exercise of original jurisdiction—Appeal under S. 10 of the Act would not be available in terms of Rule 1 of Chapter-II of Original Side Rules—Court observed—The suit had to be tried and heard by single judge—Registrar acts in certain matters as a delegatee of singe Judge—Rule 4 of Chapter-II of Original Side Rules provides an appeal against an order of the Registrar-in effect provided an appeal to the delegator from the order passed by delegatee in exercise of his power and discharge of functioning delegated to the delegate—Thus single Judge while hearing an appeal under Rule 4 in fact examines order passed in discharge of function of single Judge and in exercise of same power vested in the single judge under ordinary original civil jurisdiction—In view of it—An authority cannot sit in appeal against an order passed in exercise of his jurisdiction—Albeit by its delegate—The power exercised by

single judge under Rule 4—The power to review-Re-Examine order passed by the registrar—The expression 'appeal' in Rule 4 misnomer—Original side rules have been framed in respect of practice and procedure in exercise of the ordinary original civil jurisdiction explicit in the said rule—Same also indicate that the rule contained in Chapter—II of the Original Side Rules relates to original civil jurisdiction—Entire scheme considered in this perspective—Apparent—Single judge exercises ordinarily original civil jurisdiction even while considering a challenge under Rule-4—an appeal under S. 10 would lie from the judgement of single Judge to Division Bench—S. 100 A of CPC is not applicable as the same cannot be termed as appellate power—Preliminary objection regarding Maintainability of the appeal rejected.

Rahul Gupta v. *Pratap Singh & Ors.* *270*

TRADE MARK ACT, 1999—Trade mark-infringment of-identical- deceptively similar- Passing of—Intellectual property Appellate Board (IPAB)—Plaintiff having registered trade mark '4T PREMIUM'—India's first in growing lubricant market and producer of quality branded automotive/industrial product—Product available at more than 50,000 retail counters across India—Product imported under various famous trade marks-4T PREMIUM used extensively and continuously—uninterruptedly, since year 2003—Defendant adopted trade mark with mala fide intention—liable to be injuncted from using 4T PREMIUM—Defendant contended—plaintiff could not claim exclusive right either in the word '4T' OR '4T PREMIUM'—word '4T' denoted 4 strokes engine—word PREMIUM a laudatory word—no one can claim right to use the word exclusively—defendant its trademark 'AGIP' WITH 4T PREMIUM—packing totally different from the plaintiffs—no infringement or passing of. The passing of the defendant's goods as that of plaintiff—defendant never used 4T PRIMIUM separately- used the same with their trade name AGIP 4T PREMIUM—defendant already filed an application for cancellation of plaintiff trade mark before IPAB—Held—when

ILR (2014) I DELHI 1
I.A.

ANIL KHANNA ....PLAINTIFF

VERSUS

GEETA KHANNA & ORS. ....DEFENDANTS

(MUKTA GUPTA, J.)

I.A. NO. : 4730/2011 DATE OF DECISION: 02.09.2013
CS (OS) NO. : 2320/10

(A) Code of Civil Procedure, 1908—S. 9—Suit—Order XII Rule 6—Judgment on admission—Admission of fact clear and unambiguous-admission on law not required-not mandatory to act and pass judgment-an application for judgment against D4 tenant-admission in written statement-D4 admitted plaintiff and D1 to D3 co-sharer of the suit property-D4 inducted into the suit property as tenant by D1 to D3 at the back of the plaintiff-lease executed by D1 to D3 not valid D4 liable to vacate the premises—Contended right of tenancy could not be raised an vague plea of settlement-or a contrary plea of being co-sharer-pleadings insufficient for raising an issue—D4 contended-admissions as alleged not in the written statement-fact stated in the preliminary objection without prejudice-do not constitute reply on merit-verification averment in the preliminary objections-believed to be true-legal information received-D2 to WS division of property took place-being a disputed question could not be decided at this stage—Court Observed-distribution of equal portion to each co-parcner being in possession of each for a long time-accepted-enjoyed by them without any objection-hindrance-denial-obstruction-amounts to division/partition—Held- settled law if a co-parcner is in exclusive possession of any portion of undivided

piece of land or property not exceeding his or her share-her share in possession cannot be disturbed until partition-transferee would also have the right and could not be dispossessed by other co-sharer until partition-the property ancestral-D1 to D3 have right in the said property-left behind by Sh. Ajay Khanna husband of D2 and also through WILL the preliminary objections based on legal advise-not replying on merit where the parties require to plead fact specifically-preliminary objection-contrary plea not amount to admission-further Held-for judgment on admission to be pronounced at any stage admission to be of fact clear and unambiguous-admissions not required of questions of law-however not mandatory for the Court to act and pass judgment the facts and circumstances of each case have to be taken note of plaintiff himself filed lease agreement—Therefore, it cannot be said that the averment in the written statement vague resulting in passing of defence in favour of the plaintiff—Application dismissed.

Further the preliminary objections are based on legal advice. The same are not reply on merits wherein the party is required to plead facts specifically. In preliminary objections parties can even take contrary pleas. The same would not amount to an admission. **(Para 6)**

It is well settled that an admission has to be categorical, in clear and unambiguous terms admitting the case of other side. In **Sneh Vasih and another vs. Filatex India Ltd. and another,** 95 (2002) DLT 373 this Court held:

> "6. Perusal of the relevant extract of Order 12 Rule 6 reproduced above clearly show that there has to be an admission of fact made in pleadings or otherwise and if such admissions have been made the court at any stage may pronounce a judgment in that regard. This clearly reveals that firstly admissions have to be of facts. Admission must be clear and unambiguous.

No admission are required obviously with respect to questions of law which can always be gone into. And second important aspect of Order 12 Rule 6 Code of Civil Procedure is that it is not mandatory for the court to act and pass a judgment because facts and circumstances of each case have to be taken note of. These principles are well recognized and reference can well be made with advantage to the decision of this court in the case of Madhav leasing Finance (P) Ltd. v. Erose Educational Infotech Pvt. Ltd.68(1997) DLT 846 . In the cited case there was a registered lease agreement. After the expiry of the period of lease civil suit was filed against the tenant for handing over the possession. The defendant had taken the plea that the lease deed as well as the hire agreement were orally renewed for a further period of two years. The said fact was again controverter by the plaintiff in that case. This court held that under Order 12 Rule 6 a decree can only be passed where admissions are clear and unambiguous and once it was not so in the peculiar facts of that case this court did not deem it appropriate to pronounce the judgment qua the possession of the premises." **(Para 7)**

(B) Code of Civil Procedure, 1908—S. 9—Suit—Order VI Rule 16—Striking of the pleadings—S. 151—Inherent Power—Suit for declaration of lease as null and void-mandatory injunction-alienating the property-paint defamatory and malicious averment-matrimonial relation between his deceased brother and D1 wife of Mr. Ajay Khanna casting aspersions on the paternity of party-averments not relevant-would embarrass the fair trial-liable to be struck off Pleading directed to be struck off-amended plaint be filed.

The only ground on which the Plaintiff supports the pleadings is that these facts are so stated in the Will of his deceased brother. However, in the present case, the averments in the

plaint though stated to be part of Will of Shri Ajay Khanna, relied upon by the Plaintiff, are neither relevant nor necessary for determination of the real issue between the parties besides being scandalous, mischievous and objectionable. Permitting such allegations to be retained on the record would not only embarrass the fair trial of the proceeding but would also amount to permitting scandalous facts in the pleadings indirectly which cannot be permitted to be done directly. **(Para 7)**

Important Issue Involved: (a) Unnecessary scandpalous, frivolous of fictitious pleadings which tend to prejudice and embarrass or delay the fair trial are liable to be struck off (b) for the judgment to be pronounced on admission, such admissions must be admission of facts, must be clear and unambiguous terms admitting the case of other parties. (c) admission of questions of law is not required.

[Gu Si]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Arun Khosla and Ms. Shreeanka Kakkar, Advocates.

FOR THE DEFENDANT : Mr. Ashish Verma, Advocate for Defendant Nos. 1& 3. Mr. R.K. Sachdeva, Advocate for Defendant No. 2 Mr. Gaurav Dua, Advocate for Defendant No. 4. Mr. P.K. Mittal, Advocate for Defendant No. 6/DDA.

CASES REFERRED TO:

1. *Paam Antibiotics Ltd.* vs. *Sudesh Madhok,* 186 2012 DLT 6520
2. *Sathi Vijay Kumar,* 2006 (13) SCC 353.
3. *Sneh Vasih and another* vs. *Filatex India Ltd. and another,* 95 (2002) DLT 373.
4. *Mrs. Rekha Singal* vs. *Lavleen Singal,* 96 (2002) DLT 289.

5. *D.M. Deshpande and others* vs. *Janardhan Kashinath Kadam (dead) by LRs and others,* AIR 1999 SC 1464.

6. *Manjit K. Singh* vs. *S. Kanwarjit Singh,* 58 (1995) DLT 208.

7. *I. Gouri and others* vs. *Dr. C.H. Ibrahim and another,* AIR 1980 Kerala 94.

8. *Sant Ram Nagina Ram* vs. *Daya Ram Nagina Ram and others,* AIR 1961 Punjab 528.

9. *Chhedi Lal and another* vs. *Chhotey Lal,* AIR (38) 1951 Allahabad 199.

RESULT: Application dismissed.

MUKTA GUPTA, J.

1. By this application the Plaintiff seeks judgment against Defendant No. 4 in view of the admissions made in the written statement filed by the Defendant No. 4. According to the Plaintiff, the Defendant No. 4 has admitted the following facts:

i. The Plaintiff and Defendant Nos. 1 to 3 being co-owners of the suit property; and

ii. Defendant No. 4 having been inducted into the suit property as tenant by the Defendant Nos. 1 to 3 at the back of the Plaintiff.

2. Learned counsel for the Plaintiff contends that by the present application the Plaintiff is not challenging the issues framed but seeks judgment on admission. A party has to plead the facts specifically and airy-fairy defence is not permissible. If the facts are not specifically stated regarding tenancy then no issue could have been framed. Reliance is placed on **D.M. Deshpande and others vs. Janardhan Kashinath Kadam (dead) by LRs and others,** AIR 1999 SC 1464. It is further submitted that the Defendant No. 4 has admitted that the Plaintiff is a co-sharer with the Defendant Nos. 1 to 3 and thus no valid lease could have been executed by the Defendants 1 to 3. As there is no valid tenancy, the Defendant No. 4 is liable to vacate the suit premises. The right of tenancy cannot be raised on a vague plea of settlement or a contrary plea of being co-shares. Relying on **Paam Antibiotics Ltd. vs. Sudesh**

Madhok, 186 2012 DLT 652 it is contended that laconic pleadings are insufficient for the purposes of raising an issue. In view of the rights of co-sharers, the common property cannot be alienated or put in tenancy without the consent of all the co-sharer. Reliance is placed on **I. Gouri and others vs. Dr. C.H. Ibrahim and another,** AIR 1980 Kerala 94; **Sant Ram Nagina Ram vs. Daya Ram Nagina Ram and others,** AIR 1961 Punjab 528 and **Chhedi Lal and another vs. Chhotey Lal,** AIR (38) 1951 Allahabad 199.

3. Learned counsel for the Defendant No. 4 on the other hand contends that the admissions as alleged are not there in the written statement. Further the facts stated in the preliminary objections are without prejudice and do not constitute reply on merits. In the verification it is clearly stated that the averments in the preliminary objections are believed to be true on the basis of legal information received. The Defendant No. 2 in the written statement has stated that division of the properly took place. This being the disputed question cannot be decided at this stage as the Defendant No. 2 is yet to enter the witness box. Further the lessee is not required to go into the ownership as to whether there is a co-sharer or not or whether there is partition of property or not. Further the lease deed has already been placed by the Plaintiff.

4. I have heard learned counsel for the parties.

5. Learned counsel for the Plaintiff has taken me through the written statement of Defendant No. 4. In para-6 of the preliminary objections in the written statement filed by Defendant No. 4, it is stated "Thus the Plaintiff as a co-sharer in the estate of his father cannot disturb Defendant No. 1 to 3 and the Defendant No. 4 being their tenant. Hence the present case is liable to be dismissed on this ground alone." This averment cannot be read in isolation. The preliminary objection No. 6 of the Defendant No. 4 in the written statement is that the Defendant Nos. 1 to 3 and the Plaintiff have been in exclusive, uninterrupted and settled possession of the suit property and the second floor respectively, since beginning, which are absolutely equal and same in size and area and as such none of them is in possession of any area in excess to his/her share. Moreover the Plaintiff never objected to or raised any claim against the suit property in any manner, prior to the present suit, as the record shows. Therefore, this amounts to division/ partition of the building. Though distribution of equal portion to each co-parcener and the same

being in possession of each for a long time and having been accepted and enjoyed by them without any objection, hindrance, denial and obstruction amounts to division/partition, but otherwise also it is settled law that if a co-sharer is in exclusive possession of any portion of an undivided piece of land of property not exceeding his or her share, he or she cannot be disturbed in his/her possession until partition and his transferee would also have the rights and cannot be dispossessed by the other co-sharer until partition. In the instant case the Defendant Nos. 1 to 3 were in exclusive possession of the suit property, which as per the Will dated 6th March, 1997 fell to the share of Shri Ajay Khanna who was the husband of the Defendant No. 1 and late Shri Ajay Khanna vide his Will dated 27th December, 1999 has bequeathed his share in the properties of his father in favour of his wife Smt. Geeta Khanna, the Defendant No. 1. Otherwise also, since the Property (entire) is ancestral, only Defendant Nos. 1 to 3 have rights in the suit property left behind by Shri Ajay Khanna even in the absence of a Will.

6. Further the preliminary objections are based on legal advice. The same are not reply on merits wherein the party is required to plead facts specifically. In preliminary objections parties can even take contrary pleas. The same would not amount to an admission.

7. It is well settled that an admission has to be categorical, in clear and unambiguous terms admitting the case of other side. In **Sneh Vasih and another vs. Filatex India Ltd. and another,** 95 (2002) DLT 373 this Court held:

> "6. Perusal of the relevant extract of Order 12 Rule 6 reproduced above clearly show that there has to be an admission of fact made in pleadings or otherwise and if such admissions have been made the court at any stage may pronounce a judgment in that regard. This clearly reveals that firstly admissions have to be of facts. Admission must be clear and unambiguous. No admission are required obviously with respect to questions of law which can always be gone into. And second important aspect of Order 12 Rule 6 Code of Civil Procedure is that it is not mandatory for the court to act and pass a judgment because facts and circumstances of each case have to be taken note of. These principles are well recognized and reference can well be made with advantage to the decision of this court in the case of Madhav leasing Finance (P) Ltd. v. Erose Educational Infotech Pvt. Ltd.68(1997) DLT 846 . In the cited case there was a registered lease agreement. After the expiry of the period of lease civil suit was filed against the tenant for handing over the possession. The defendant had taken the plea that the lease deed as well as the hire agreement were orally renewed for a further period of two years. The said fact was again controverter by the plaintiff in that case. This court held that under Order 12 Rule 6 a decree can only be passed where admissions are clear and unambiguous and once it was not so in the peculiar facts of that case this court did not deem it appropriate to pronounce the judgment qua the possession of the premises."

8. Further there is no admission by the Defendant No. 4 that he had been inducted into the suit property as tenant by the Defendant Nos. 1 to 3 at the back of the Plaintiff. Since Defendant No. 4 is a stranger to the purported oral partition between the Plaintiff and Defendant Nos. 1 to 3 who are the legal heirs of the deceased brother of the Plaintiff, his raising an inference from an exclusive, uninterrupted, peaceful possession cannot be faulted.

9. Learned counsel for the Plaintiff further states that the no particulars regarding the tenancy etc. have been pleaded and thus the pleas of Defendant No. 4 are vague. In **D.M. Deshpande** (supra) their Lordships were dealing with the case where the Appellant stated that he was a tenant however, no particulars regarding the alleged tenancy created in his favour were filed nor it was mentioned who created the tenancy and how the said tenancy came into existence. In the present case the Plaintiff himself has filed the Lease Agreement between the Defendant No. 1 and Defendant No. 4 and thus it cannot be said that the averments in the written statement are vague resulting in passing of a decree in favour of the Plaintiff.

10. Consequently, the application is dismissed.

I.A. No. 6867/2012 (by Defendant Nos. 1 & 3 u/Order VI Rule 16 r/w Section 151 CPC)

1. By this application the Defendant Nos. 1 and 3 seek striking out the defamatory and irrelevant pleadings from the plaint.

2. Learned counsel for Plaintiff submits that the prayer of the

Plaintiff in the suit is for declaration of lease deed dated 22nd September, 2010 executed by Defendant Nos. 1 to 3 in favour of Defendant No. 4 in respect of the First Floor of the property bearing No. D-837, New Friends Colony, New Delhi-110065, as null and void ab-initio and therefore vests no right, title or interest in the Defendant No. 4; grant of mandatory and permanent injunction restraining defendant No.4 from alienating or parting with possession of the suit property during the pendency of the suit and to hand over peaceful vacant possession of the suit property to the plaintiff and awarding of costs of the suit. Thus the averments with regard to the alleged relations between Defendant No. 1 and her husband are irrelevant and not necessary for the adjudication of the suit besides being false and baseless.

3. Learned counsel for the applicant/Defendant Nos. 1 and 3 submits that in the plaint the Plaintiff who is the brother-in-law of Defendant No. 1 and uncle of Defendant Nos. 2 and 3, has made defamatory and malicious averments with regard to the matrimonial relations between his deceased brother Shri Ajay Khanna and Defendant No. 1, the wife of late Shri Ajay Khanna. He has also casted aspersions on the paternity of Defendant Nos. 2 and 3. The averments made in the plaint have no relevant to the issue involved in the suit. Reliance is placed on **Sathi Vijay Kumar,** 2006 (13) SCC 353; **Manjit K. Singh vs. S. Kanwarjit Singh,** 58 (1995) DLT 208 and **Mrs. Rekha Singal vs. Lavleen Singal,** 96 (2002) DLT 289.

4. Learned counsel for the Plaintiff/non-applicant on the other hand contends that the averments which are sought to be deleted are based on the Will of his late brother/ husband of Defendant No. 1 and thus cannot be said to be scandalous, malicious, false, fabricated or irrelevant so as to direct expunging the same from the pleadings.

5. I have heard learned counsel for the parties.

6. As mentioned above the present suit is for declaration, permanent and mandatory injunction and for possession of the suit property. Defendant No. 1, 2 and 3 are the wife and children of deceased brother of the Plaintiff. The case of the Plaintiff in the suit is that the father of the Plaintiff and father- in-law of Defendant No. 1 died on 8th June, 1997 leaving behind the Will dated 6th March, 1997 bequeathing therein all his movable and immovable assets to the Plaintiff and his late brother Shri Ajay Khanna, who also unfortunately died prematurely on 31st January,

2000.

7. Order VI Rule 16 CPC reads as under:-

> **"16. Striking out pleadings.-** The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading -
>
> (a) which may be unnecessary, scandalous, frivolous or vexatious, or
>
> (b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or
>
> (c) which is otherwise an abuse of the process of the court."

8. Thus this provision clearly empowers the Court to strike out any pleading if it is unnecessary, scandalous, frivolous or vexatious or tends to prejudice, embarrass or delay the fair trial of the suit or is otherwise an abuse of the process of Court. The underlying object of the Rule is to ensure that every party to a suit presents his pleading in an intelligible form without causing embarrassment to his adversary. In **Sathi Vijay Kumar** (supra) the Hon'ble Supreme Court while dealing with the provisions of Order VI Rule 16 held-

> "27. The above provision empowers a Court to strike out any pleading if it is unnecessary, scandalous, frivolous or vexatious or tend to prejudice, embarrass or delay fair trial of the suit or is otherwise an abuse of the process of the Court. The underlying object of the rule is to ensure that every party to a suit should present his pleading in an intelligible form without causing embarrassment to his adversary [vide Davy v. Garrett).
>
> 28. Bare reading of Rule 16 of Order 6 makes it clear that the Court may order striking off pleadings in the following circumstances; (a) Where such pleading is unnecessary, scandalous, frivolous or vexatious; or (b) Where such pleading tends to prejudice, embarrass or delay fair trial of the suit; or (c) Where such pleading is otherwise an abuse of the process of the Court.
>
> 29. ...
>
> 30. ...

31. ...

32. ...

33. At the same time, however, it cannot be overlooked that normally a Court cannot direct parties as to how they should prepare their pleadings. If the parties have not offended the rules of pleadings by making averments or raising arguable issues, the Court would not order striking out pleadings. The power to strike out pleadings is extraordinary in nature and must be exercised by the Court sparingly and with extreme care, caution and circumspection [vide **Roop Lal v. Nachhatar Singh Gill, K.K. v. K.N. Modi ; United Bank of India v. Naresh Kumar**)

34. More than a century back, in **Knowles v. Roberts Bowen, L.J.** said:

> "It seems to me that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right. It is a recognized principle that a defendant may claim ex debito justitiae to have the plaintiff's claim presented in an intelligible form, so that he may not be embarrassed in meeting it; and the Court ought to be strict even to severity in taking care to prevent pleadings from degenerating into the old oppressive pleadings of the Court of Chancery."

9. The only ground on which the Plaintiff supports the pleadings is that these facts are so stated in the Will of his deceased brother. However, in the present case, the averments in the plaint though stated to be part of Will of Shri Ajay Khanna, relied upon by the Plaintiff, are neither relevant nor necessary for determination of the real issue between the parties besides being scandalous, mischievous and objectionable. Permitting such allegations to be retained on the record would not only embarrass the fair trial of the proceeding but would also amount to

permitting scandalous facts in the pleadings indirectly which cannot be permitted to be done directly. In view thereof the portions of Paragraph Nos. 9, 10, 15, 17, and 24 as detailed in Para-4 of I.A. No. 6867/2012 are directed to be struck out.

Application is disposed of. Amended plaint be filed expunging these paragraphs within four week.

ILR (2014) I DELHI 12
W.P.(C)

JAIPAL SINGH AND ORS. ....PETITIONER

VERSUS

UOI AND ORS. ....RESPONDENTS

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

W.P.(C) 5539/2013, 4528/2013 & 5059/2013 **DATE OF DECISION: 06.09.2013**

Constitution of India, 1950—Article 226—Petitioners seek quashing of Signals whereby benefit to Petitioners under ACP scheme has been denied on the grounds that if they have qualified SUOCC Course after completion of 24 years of service then the benefit can be given only from the date of completion of the course and not from completion of 24 years of regular service. Impugned Signals in contravention to the letter issued by the Directorate General in consultation with Ministry of Home Affairs. Respondent cannot be allowed to take advantage of their own wrong. Petitioners did not undertake said course since the Respondents did not detail the Petitioners to undergo the same. Held- It is the responsibility of the respondent

to detail the individual for the pre promotional cadre course. Having not done so, the respondents cannot be allowed to withhold the benefits entitled to an individual for their own faults. Petitioners granted financial upgradation from date of completion of 24 years of service, and granted arrears. Writ allowed.

Before us, it is an admitted position that the petitioners became eligible for the financial upgradation on completion of 24 years of regular service and pursuant to the clarification dated 6th March, 2012, the said benefit was indeed granted to the petitioners vide order dated 1st February, 2013 and 2nd May, 2013. So far as they being given opportunity for completing the SUOCC course is concerned, they have been detailed for the said course after completion of 24 years of regular service and all of them have successfully completed the same. **(Para 12)**

Undoubtedly for the reasons recorded in **Hargovind Singh** (supra), the petitioner could not be deprived of the financial up-gradation for this period. It is apparent from the working of the ACP scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in **Hargovind Singh** (supra) as well as the present case. The completion of the promotional cadre course is akin to completion of the requisite training upon appointment/ promotion. It does not change the date of the appointment or the date of his promotion. **(Para 13)**

The respondents hold a person entitled for undergoing SUOCC course for several years when the employee is not offered an opportunity to undergo the said course even though he may be willing and able to do so. Having not allowed them to undergo the said course the respondents cannot be allowed to take away the benefit of second financial up gradation to the petitioner under the ACP scheme. **(Para 15)**

Admittedly it is the responsibility of the respondents to detail the individual for the pre promotional cadre course. Having

not done so the respondents cannot be allowed to with hold the benefits entitled to an individual for their own faults. **(Para 16)**

Important Issue Involved: Respondent-Government cannot withhold benefits to Petitioner-employees on lack of completion of a course when such course was not detailed by the Respondents themselves to the petitioner.

[An Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. Ankur Chibber, Adv.

FOR THE RESPONDENTS : Mr. Neeraj Chaudhari, CGSC for UOI, Mr.Yogesh Yogi, Adv. for Mr. Joginder Sukhija, Adv. for R-1 to R-4, Mr. Ankur Chibber, Adv., Mr. Jatan Singh, CGSC and Mr. S. Qureshi, Adv. for UOI.

CASES REFERRED TO:

1. *R.S Rathore* vs. *UOI and others* being W.P.(C)1506/2012.
2. *Tulsi Das* vs. *UOI 9and others being* W.P.(C) 1881/2012.
3. *Hargovind Singh* vs. *Central Industrial Security Force* WP(C) No.6937/2010.
4. *Bhagwan Singh* vs. *UOI & Ors.* WP(C) No.8631/2009.

RESULT: Writ Petition allowed.

GITA MITTAL, J. (Oral)

W.P.(C) 4258/2013

It is to be noted that by an error, presence of counsels on the 9th July, 2013 and 3rd September, 2013 has been erroneously recorded. Mr.Ankur Chibber, Advocate represents the petitioner while Mr.Joginder Sukhija appears for the respondents in this matter. The presence of counsels on the 9th July, 2013 and 3rd September, 2013 shall stand corrected.

W.P.(C) 5539/2013, W.P.(C) 4258/2013 & W.P.(C) 5059/2013

1. The petitioners in these cases seek quashing of Signals dated 28th May, 2013 and 3rd July, 2013 whereby the respondents have denied benefit to the petitioners under the ACP Scheme on the ground that if they have qualified SUOCC Course after completion of 24 years of service then they will be eligible for the 2nd financial upgradation under the ACP Scheme from the completion of said promotional course and not from completion of 24 years of regular service. The petitioners have further sought for directions to the respondents to grant 2nd financial upgradation to the petitioners as provided under the ACP Scheme on completion of 24 years of regular service.

2. The undisputed facts in the instant case necessary for adjudication of the writ petitions are noticed herein after. As per the ACP Scheme in order to be eligible for grant of 2nd financial upgradation, an employee is required to have completed 24 years regular service from the date of his appointment to a post without any promotion in the last 12 years and he should have successfully undertaken the pre-promotional cadre course.

3. Admittedly all the petitioners had completed their 24 years of regular service without there being any promotion in the last 12 years. However, the respondents did not grant the 2nd financial upgradation to the petitioners on the ground that under the ACP Scheme a person was required to fulfill all the norms required for a normal promotion and unless and until the same were fulfilled the said financial benefits could not be given to the individual. In the instant cases, the respondents took the plea that the petitioners had not undertaken the pre-promotional cadre course despite completion of 24 years of service and thus, the 2nd financial benefit could not be granted to them. It is worth while mentioning that the said pre-promotional cadre course could not be undertaken by the petitioners for no fault of theirs but for the reason that the respondents for their own fault did not detail the petitioners to undergo the said pre-promotional courses.

4. The petitioners aggrieved by the illegal acts of the respondents made various representations to the respondents. The respondents after considering the above representations of the aggrieved persons and after analyzing the said issue, passed an order dated 6th March, 2012 issued by the office of Directorate General, CRPF which reads as under:

"Sub: Grant of Financial Benefits under ACP/MACP Scheme-Clarification.

A case was referred to the MHA seeking clarification in connection with grant of financial up-gradation under MACP scheme to the Constables and fixation of pay thereupon. The issue was examined in MHA, DoPT and Department of Expenditure (MoF). After due examination the Ministries have clarified the position as under:

A) The case of Cts who have qualified promotional course (i.e. SCC) and allowed 1st ACP benefit from the next date of termination of SCC qualified by them may be reviewed and they may now be granted financial up-gradation under ACP and MACP schemes as

under:

Sl. No. Categories of CTs Modalities for Grant of Financial up-gradation benefits under ACP/MACP Schemes

1) CTs who qualified promotional course within maximum permissible three chances.

Since these CTs were detailed on promotional course after completion of more than 12 years of service, they may be allowed 1st financial up-gradation under ACP Scheme (of August 1999) from the date of completion of 12 years of service subject to fulfillment of other eligibility conditions, as there is no fault on their part for late detailment on promotional course.

Financial up-gradation under MACP will be admissible to such CTs wherever they complete 20/30 years of continuous regular service or spent 10 years continuously in the same Grade Pay whichever is earlier."

5. That pursuant to the said clarification issued by the Directorate General office in consultation with Ministry of Home Affairs, the respondents passed an order dated 1.2.2003 whereby the 2nd financial up-gradation was granted to petitioners from the date they had completed 24 years regular service from the date of their appointment. Pursuant to the said order, the respondents had also issued an order dated 2nd May, 2013 showing the actual fixation of pay to the petitioners after grant of 2nd financial up-gradations.

6. Despite having issued the above orders after issuance of clarification by the Directorate General office as well as the Ministry of Home Affairs, the respondents issued the impugned Signals dated 28th May, 2013 and 3rd July, 2013 whereby it was informed that a Head Constable/GD who qualify SUOCC Course before completion of 24 years regular service will be eligible for financial up-gradation from the date of completion of 24 years regular service. However, if he has qualified SUOCC after completion of 24 years regular service, then he is eligible for the financial up-gradation from the date of said promotional course viz-a-viz other conditions.

7. Learned counsel has also emphasized that pursuant to the order dated 6th March, 2012, the respondents had granted the said 2nd financial upgradation to the petitioners vide its order dated 1st February, 2013 and also fixed their pay as per order dated 2nd May, 2013. Having given the said benefit, the respondents cannot withdraw the said benefit without issuing a show cause notice or giving an opportunity to the petitioners to be heard.

8. In the above background, the learned counsel for the petitioners has argued that the impugned signals issued by the respondents is in direct contradiction to the letter dated 6th March, 2012 issued by the Directorate General office in consultation with Ministry of Home Affairs wherein it has categorically been decided that since these Constables (Cts) were detailed on promotional course after completion of more than 12 years of service, they may be allowed 1st financial up-gradation under ACP Scheme (of August 1999) from the date of completion of 12 years of service subject to fulfillment of other eligibility conditions, as there is no fault on their part for late detailment on promotional course. Learned counsel for the petitioners had argued that once the respondents have taken the said decision for grant of 1st financial up-gradation, there can be no different yardsticks for grant of 2nd financial upgradation.

9. It is also submitted that the respondents cannot be allowed to take benefit of their own wrong. He has submitted that the reason for non-completion of pre-promotional cadre course of the petitioners before completion of 24 years service is due to the reason that the respondents had not detailed the petitioners for the said course. Having not done so, the respondents cannot be allowed to withhold a benefit which the petitioners were otherwise entitled to on completion of 24 years of service

only on the ground that they had not completed the pre-promotional cadre course.

10. In support of his contention the learned counsel for the petitioners has placed reliance on the pronouncement of this Court order dated 15th February, 2011 reported in WP(C) No.6937/2010 **Hargovind Singh V. Central Industrial Security Force.** The petitioner in this case also was seeking restoration of his second financial up-gradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial up-gradation with effect from 1st September, 2008. It is noteworthy that the petitioner was granted the second up-gradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in Para Nos. 5 and 6 of the judgment which was to the following effect:

> '5. The undisputed position is that the petitioner was granted the benefit of the 2nd up-gradation under the ACP scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus, the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2009 for which he expressed his willingness to attend the course on 29.10.2004.'

11. This very contention is urged before us just as in the present case the petitioner Hargovind Singh also did not get an opportunity to undergo the PCC course on the date he became eligible for grant of further financial up-gradation which was withdrawn. On this aspect in **Hargovind Singh** (supra) the Court has ruled on the respondents. contention urged before us as well, and commented upon the responsibility of the department to detail the person for undertaking the promotional course. In this regard observations made in Para 8 to 14 of the judgment are being relied upon which reads as under:

> "8. Learned counsel for the respondents would urge that the

issue at hand is squarely covered against the petitioner as per the judgement and order dated 30.9.2010 disposing of WP(C) No.8631/2009 **Bhagwan Singh Vs. UOI & Ors.**

9. A perusal of the decision in **Bhagwan Singh's** case (supra) would reveal that the petitioner therein was working as a Head Constable and was denied the second up-gradation under the ACP scheme on account of the fact he had consciously refused to undergo the mandatory promotional courses which would have made him eligible to be promoted as an Assistant Sub-Inspector and, in writing, had given that he foregoes the right to be promoted. 10. The Division Bench noted paragraph 10 of the ACP Scheme which reads as under:

10. Grant of higher pay scale under the ACP scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently. In regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribed in the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second up-gradation under the ACP scheme only after he completes the required eligibility service/period under the ACP scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial up-gradation after rendering 12 years of regular service and after 2 years therefrom if he refused regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second up-gradation under the ACP scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial up-gradation (2+10) in that higher grade i.e. after 25 years (12+2+1+10) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.

11. In the instant case, facts noted hereinabove, would show that the respondents offered to detail the petitioner for the mandatory PCC course to be held with effect from 15.11.2004. We shall deal with the effect of the petitioner not joining the said course, but relevant would it be to note that the petitioner's entitlement to the to the ACP benefit accrued with effect from the month of November 1999 and it is not the case of the respondents that till they offered petitioner the chance to clear the PCC course commencing with effect from 15.11.2004, any earlier opportunity was granted to the petitioner to attend the course.

12. It is an admitted position that the department has to detail persons for undertaking the promotion cadre course and attending said courses is not at the option of the officers concerned.

13. If that be so, the respondents cannot take advantage of not discharging their obligation which precedes the obligation of the incumbent to clear the promotion cadre course. The prior obligation of the department is to detail the person concerned to undertake the promotion cadre course.

14. As regards petitioner's willingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village."

12. Before us, it is an admitted position that the petitioners became eligible for the financial upgradation on completion of 24 years of regular service and pursuant to the clarification dated 6th March, 2012, the said benefit was indeed granted to the petitioners vide order dated 1st February, 2013 and 2nd May, 2013. So far as they being given opportunity for completing the SUOCC course is concerned, they have been detailed for the said course after completion of 24 years of regular service and all of them have successfully completed the same.

13. Undoubtedly for the reasons recorded in **Hargovind Singh**

(supra), the petitioner could not be deprived of the financial up-gradation for this period. It is apparent from the working of the ACP scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in **Hargovind Singh** (supra) as well as the present case. The completion of the promotional cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion.

14. The observations of the Division Bench in **Hargovind Singh** (supra) are in consonance with the facts of the present case. After May 2003, the present petitioner was detailed for undertaking PCC only in July 2004. It is an admitted position that the petitioner accepted this offer and has successfully undertaken the PCC which was conducted between 5th July, 2004 to 21st August, 2004. In this background, the petitioner cannot be denied of his rightful dues till date.

15. The respondents hold a person entitled for undergoing SUOCC course for several years when the employee is not offered an opportunity to undergo the said course even though he may be willing and able to do so. Having not allowed them to undergo the said course the respondents cannot be allowed to take away the benefit of second financial up gradation to the petitioner under the ACP scheme.

16. Admittedly it is the responsibility of the respondents to detail the individual for the pre promotional cadre course. Having not done so the respondents cannot be allowed to with hold the benefits entitled to an individual for their own faults.

17. The said issue has also been adjudicated by various pronouncements of this Court which are as follows- **R.S Rathore Vs UOI and others** being W.P.(C)1506/2012, **Tulsi Das Vs UOI and others** being W.P.(C) 1881/2012 and others.

18. In view of the forgoing, we direct as follows:-

(i) a writ of certiorari is issued quashing signals dated 28th May, 2013 and 3rd July, 2013

(ii) the respondents are directed to grant the 2nd financial upgradation to the petitioners from the date they had completed 24 years of regular service

(iii) the respondents are directed to fix the pay of the petitioners and pension of the petitioners who may have retired pursuant to the grant of 2nd financial upgradation within a period of six weeks from today. The order passed by the respondents shall be communicated to the petitioners. The arrears in terms of this order shall be released to the petitioners within a period of four weeks thereafter.

19. These writ petitions are allowed in the above terms.

ILR (2014) I DELHI 22
CS (OS)

HARCHARAN SINGH HAZOORIA ...PLAINTIFF

VERSUS

KULWANT SINGH HAZOORIA & ORS. ....DEFENDANTS

(MUKTA GUPTA, J.)

I.A.NO. : 13091/2013 IN CS (OS) NO. : 2244/2008 **DATE OF DECISION: 01.10.2013**

Civil Procedure Code, 1908—Order XIV, Rule 15—Application for deletion of issue. Suit praying for partition of the suit property in equal shares as per the Will of the late mother of the parties made in 1996. In the Written Statement Defendant have challenged Plaintiff's locus standi to file the present suit—Late mother of the parties, who was admittedly absolute owner of the property, had alienated the suit property during her life time vide gift deed to the answering Defendants—Therefore, alleged Will is irrelevant, since property was alienated before the Will came into

operations. Plaintiff has disputed the validity of the gift deeds by which Defendants claim absolute ownership of the suit property—Plaintiff submits that in view of Defendants admitting to the Will, Plaintiff was no longer required to prove validity of the Will, therefore the relevant issues be modified accordingly. Held: There is no admission about the genuineness of the Will by the Defendants—The Defendants being absolute owners of the suit property, the plaintiff cannot claim partition thereof or claim any right, or little therein—To base a claim on a will, Plaintiff has to prove genuineness of the Will, apart from existence. Admission about making a Will does not amount to admission of due execution of the Will. Therefore, Application dismissed.

A perusal of the written statement would thus show that wherever there is an averment regarding the Will, the defendants have used the term "alleged Will" and have in general denied the averments relating to the alleged Will. Undoubtedly there is no specific denial that the Will dated 5th January, 1996 was never made. However, at the same time there is no admission about the genuineness or legality of the Will. In light of these facts, it is thus to be examined whether the plaintiff is required to prove the validity of the Will. **(Para 7)**

In *S.R. Srinivasa and Others* (supra) the Hon'ble Supreme Court while dealing with a similar issue held that admission about making of a Will does not amount to admission of due execution and genuineness of the Will. The two stand on a different footing and parties who stakes claim on the basis of Will is required to prove both the execution and genuineness of the Will. It was held -

> "18. In the written statement Defendant 1 claimed that the entire movable and immovable property had been bequeathed to Indiramma in a will dated 18-6-1974. The first appellate court upon examination of the

entire evidence accepts the submission made on behalf of the petitioners that the execution of the will is shrouded by suspicious circumstances. The first appellate court also negatived the submission made on behalf of the first defendant that the plaintiffs have admitted the execution of the will in the subsequent suit. Upon examination of the evidence, the first appellate court had come to the conclusion that PW 1 had not admitted the genuineness of the will anywhere. This witness had also stated that he had come to know about the will of Puttathayamma from the written statement filed by Defendant 1. It is, therefore, held that there can be no presumption with regard to the genuineness of the will on the basis of the alleged admission. Therefore the first appeal was allowed, judgment and decree of the trial court were set aside. The suit filed by the appellant-plaintiffs was decreed with costs declaring that the legal representatives of the plaintiffs are the owners of the suit property and they are entitled for possession of the suit schedule property.

41. The aforesaid observations are fully applicable in this case. Admittedly, none of the attesting witnesses have been examined. Here, the signature of the scribe cannot be taken as proof of attestation. Therefore, it becomes evident that the execution of a will can be held to have been proved when the statutory requirements for proving the will are satisfied. The High Court has however held that proof of the will was not necessary as the execution of the will has been admitted in the pleadings in OS No. 233 of 1998, and in the evidence of PW 1.

42. The contention that the execution of the will has been admitted by the appellants herein had been negated by the first appellate court in the following manner:

"What is admitted under Ext. 36 i.e. the plaint in OS No. 233 of 1998 at Para 7 is only about the will and not the genuineness of the will. During evidence of PW 1, it is elicited in the cross-examination that he came to know about the will of Puttathayamma as it was revealed in the written statement and that Puttathayamma might have written the will dated 4-7-1974. But PW 1 has not admitted the genuineness of the will anywhere in his evidence. Therefore the contention of the learned advocate for the first respondent that the execution of the will is admitted and therefore its genuineness is to be presumed cannot be accepted." **(Para 8)**

Dealing with the admissions, it was held –

"47. The aforesaid two judgments along with some other earlier judgments of this Court were considered by this Court in **Gautam Sarup v. Leela Jetly** [(2008) 7 SCC 85], wherein it was observed as follows: (SCC pp. 90 & 94, paras 16 & 28)

"16. A thing admitted in view of Section 58 of the Evidence Act need not be proved. Order 8 Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of Order 12 Rule 6 of the Code of Civil Procedure may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom. ...

***

28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

48. Examined on the basis of the law stated above we are unable to agree with the High Court that there was no need for independent proof of the will, in view of the admissions made in OS No. 233 of 1998 and the evidence of PW 1. In fact there is no admission except that Puttathayamma had executed a will bequeathing only the immovable properties belonging to her in favour of Indiramma. The first appellate court, in our opinion, correctly observed that the aforesaid admission is only about the making of the will and not the genuineness of the will. Similarly, PW 1 only stated that he had come to know about the registration of the will of his grandmother favouring Indiramma through the written statement of the first defendant. The aforesaid statement is followed by the following statements "Other than that I did not know about the will. She was not signing in English. I have not seen her signing in Kannada. There was no reason for my grandmother to write a will favouring Indiramma." Even in the cross-examination he reiterated that "I know about the will written by Puttathayamma on 18-6-1974 bequeathing the properties to Indiramma only through the written statement of the first defendant". **(Para 9)**

Important Issue Involved: To base a claim on a will,

parties are required to prove existence and genuineness of the same.

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Bikas Dhawan with Mr. S.P. Das, Advocates.

FOR THE DEFENDANTS : Mr. Sanjeev Sindwani, Sr. Advocate with Ms. Shalini Kapoor, Ms. Promil Seth and Ms. Kriti Arora, Advocates for D-1 & 3.

CASES REFERRED TO:

1. *Kanwarjitsingh R Chadha* vs. *Sahebrao Gajanan Salve and others* Apeal No.826 of 2013.
2. *Balathandayutham and another* vs. *Ezhilarasan,* (2010) 5 SCC 770.
3. *S.R. Srinivasa and others* vs. *S. Padmavathamma,* (2010) 5 SCC 274.
4. *Gautam Sarup* vs. *Leela Jetly* [(2008) 7 SCC 85].
5. *R. Vellingiri and Gokila* vs. *S R Kannaian and others* (Appeal No.828 of 2007.
6. *Rajan Suri and another* vs. *State and another*, AIR 2006 Delhi 148.
7. *Thayyullathil Kunhikannan and others* vs. *Thayyullathil Kalliani and others,* AIR 1990 Kerala 226.

RESULT: Application dismissed.

MUKTA GUPTA, J.

1. By this application under Order XIV Rule 15 CPC the plaintiff seeks deletion of issue No.9 and amendment of issue No.10 framed by this Court on 25th May, 2012.

2. The main contention of learned counsel for the plaintiff is that the Will dated 5th January, 1996 of late Smt. Jaswant Kaur i.e. the

mother of plaintiff and defendantNo.1is not specifically denied by defendant No.1 in his written statement and hence the same is deemed to be admitted. Further in view of the admission made, the plaintiff is not required to prove the validity of the Will and thus issue No.9 is redundant and issue No.10 is required to be modified accordingly. Reference is made to Order VIII Rule 3, 4 and 5 CPC and Sections 58 and 68 of the Evidence Act. Reliance is placed on **Balathandayutham and another v. Ezhilarasan,** (2010) 5 SCC 770, **Thayyullathil Kunhikannan and others v. Thayyullathil Kalliani and others,** AIR 1990 Kerala 226, **Rajan Suri and another v. State and another,** AIR 2006 Delhi 148, **R. Vellingiri and Gokila v. S R Kannaian and others** (Appeal No.828 of 2007 decided by High Court of Madras on 5th September, 2007) and **Kanwarjitsingh R Chadha v. Sahebrao Gajanan Salve and others** (Apeal No.826 of 2013 decided by Bombay High Court on 4th July, 2013).

3. Learned counsel for the defendants No.1 and 3 on the other hand contends that the defendants have not admitted the Will and have used the words 'alleged Will' in the written statement. Thus, there is no admission by the defendants. Alternatively even if this Court holds that the defendants have not denied the Will specifically is thus deemed to be admitted, the same is not a proof of genuineness of the Will which is required to be proved as per Section 68 of the Indian Evidence Act. Execution of the Will and genuineness of the Will are different matters and to base his claim on the alleged Will of late Smt. Jaswant Kaur, the plaintiff is required to prove that a genuine and valid Will was executed by her. Reliance is placed on **S.R. Srinivasa and others v. S. Padmavathamma,** (2010) 5 SCC 274.

4. I have heard learned counsel for the parties. The issues sought to be deleted and modified are as under:-

> "9. Whether Ms. Jaswant Kaur has validly executed the Will dated 5th January, 1996? OPP.
>
> 10. Whether the plaintiff is entitled to a decree of partition as prayed for? OPP"

5. In paras 4, 11 and 14 of the plaint, the plaintiff has pleaded that "In the year 1996, late Jaswant Kaur executed her last will and testament dated 5-1-1996. As per the said will, the said premises bearing No.60,

Ring Road, Lajpat Nagar III, New Delhi was to devolve upon the Plaintiff and DefendantNo.1 in two equal shares. Further, the Defendant No.3 was to receive a sum of Rs.10,00,000/- from the Plaintiff and Defendant No.1 in equal shares. Further the Will settled all her other movable assets and bank balances as well as ornaments between the parties herein. The Plaintiff states that the said will dated 5-1-1996 was the last will and testament of late Jaswant Kaur and was executed by her with sound and deposing mind. It is only some time on or about 2006 that the late Jaswant Kaur became very unwell and with advancing age was incapable of managing her own affairs and was also incapable of forming a judgment as to what was in her own interest". It is further pleaded that during the pendency of suit being CS(OS) No. 707/08 late Jaswant Kaur expired on 15-8-2008 and after her expiry, the plaintiff took up the matter with regard to partition of the premises as per the Will and defendant No.1 assured the plaintiff that wishes of their mother would be respected and requested the plaintiff to wait for a period of forty days. In para 14 of the plaint the plaintiff has stated, "the gift deeds dated 23rd May, 2007 and 2nd June, 2008 are not genuine and/or are void and no right, title or interest has been created in favor of defendants No.1 and 3 by virtue of the gift deeds. Late Jaswant Kaur had already executed a Will and testament bequeathing her entire property equally between the Plaintiff and Defendant No.1 and accordingly the gift deeds dated 23rd May, 2007 and 2nd June, 2008 are void and have been created by defendants No.1 and 3 only to defeat the right of the plaintiff. The said gift deeds are alleged to have been executed when late Jaswant Kaur was not in a fit state of mind to execute the said gift deeds or form a judgment as to what was in her own interest. The said gift deeds are doubtful, suspicious and ex facie bogus and it is therefore necessary to seek a declaration that the said gift deeds are void and/or of no legal effect and are not binding on the plaintiff".

6. In the written statement filed by defendants No.1 and 3 to the amended plaint in para 7 of the preliminary objections it is stated that "the plaintiff has placed reliance on the alleged Will of 1996 by the deceased respected mother. He claims share in the property on the basis thereof. It is a fundamental truism of law that execution of a testament does not preclude the testator or executants from alienating the property during his/her lifetime. This is exactly what late Smt. Jaswant Kaur, the respected

mother had done. She alienated, on the showing of the plaintiff himself, the property in question during her lifetime. The plaintiff has no locus standi to challenge the said alienation by the mother for admittedly she was the absolute owner of the property and had absolute right to deal with the same. More so, when not only alienation was done by the deceased respected mother but the answering defendants as owners of the property exercised their rights as owner during her lifetime". In replies to paras 4, 11 and 14 of the plaint it is stated in the written statement, "paragraph No.4 of the plaint is wrong and denied. The alleged execution of the Will by deceased respected mother lost relevance during her lifetime itself when she alienated the property and registered documents vesting the property unto the answering defendants. The parents had spent money on the plaintiff for his education abroad and helped him even in settling in Germany. The plaintiff owns a palatial house in Pulhen, Germany with swimming pool etc. In any event, the deceased respected mother being the absolute owner of the property in question was entitled to alienate the same and she did so in her lifetime in favour of defendants No.1 and 3. The property in question now vests in defendants No.1 and 3. Defendant No.1 is the owner of first floor and defendant No.3 for the remaining portion with proportionate right in the land underneath. The answering defendants being absolute owner of the suit property, the plaintiff cannot seek partition thereof or claim any right, title or interest therein. In fact, he is in unauthorized occupation of a room in the property. This Court would direct him to remove himself from the property besides paying mesne profit for unauthorized use and occupation. In reply to para 11, it is stated that paragraph No.11 of the plaint is correct to the extent that deceased mother of the parties died on 15th August, 2008. Rest of the paragraph was stated to be wrong and was denied. The plaintiff all along knew that the property stood vested unto the defendants No.1 and 3 absolutely. There was no occasion for partition of the same. There was no occasion to give any assurance to the plaintiff as alleged. The alleged Will as stated hereinbefore became irrelevant as the deceased had dealt with and alienated the property during her lifetime. It is a fundamental truism of law that a Will comes into operation only after the death of the testator. Once the corpus of the testament is dealt with by the testator before her death, then there is nothing further to be dealt with by any one after her death based on the alleged Will. The plaintiff admittedly is the brother of answering defendant No.1 and as a brother

he was allowed to occupy a room. He taking advantage of the love and courtesy extended by defendant No.1 is illegally staking a claim in the property in suit notwithstanding the fact that he shifted out of the country way back in 1961 and had no occasion to look after the deceased mother or the family". In reply to para 14 it is stated "the contents of para 14 of the plaint are stated to be wrong and denied. It is denied that the gift deeds dated 23rd May, 2007 and 2nd June, 2008 are not genuine and are void. Plea is denied of any substance. It is denied that no right, title or interest was created in favour of the answering defendants by virtue of gift deeds. The alleged Will dated 5th January, 1996 insofar as property in suit is concerned stood abrogated by virtue of the fact that the property was dissented. It is denied that gift deeds are illusory and are eyewash. The plaintiff never had any rights in the suit property, the question of they being defeated does not arise. The gift deeds were executed in accordance with law and registered in the presence of the Sub-Registrar".

7. A perusal of the written statement would thus show that wherever there is an averment regarding the Will, the defendants have used the term "alleged Will" and have in general denied the averments relating to the alleged Will. Undoubtedly there is no specific denial that the Will dated 5th January, 1996 was never made. However, at the same time there is no admission about the genuineness or legality of the Will. In light of these facts, it is thus to be examined whether the plaintiff is required to prove the validity of the Will.

8. In *S.R. Srinivasa and Others* (supra) the Hon'ble Supreme Court while dealing with a similar issue held that admission about making of a Will does not amount to admission of due execution and genuineness of the Will. The two stand on a different footing and parties who stakes claim on the basis of Will is required to prove both the execution and genuineness of the Will. It was held -

> "18. In the written statement Defendant 1 claimed that the entire movable and immovable property had been bequeathed to Indiramma in a will dated 18-6-1974. The first appellate court upon examination of the entire evidence accepts the submission made on behalf of the petitioners that the execution of the will is shrouded by suspicious circumstances. The first appellate court also negatived the submission made on behalf of the first

defendant that the plaintiffs have admitted the execution of the will in the subsequent suit. Upon examination of the evidence, the first appellate court had come to the conclusion that PW 1 had not admitted the genuineness of the will anywhere. This witness had also stated that he had come to know about the will of Puttathayamma from the written statement filed by Defendant 1. It is, therefore, held that there can be no presumption with regard to the genuineness of the will on the basis of the alleged admission. Therefore the first appeal was allowed, judgment and decree of the trial court were set aside. The suit filed by the appellant-plaintiffs was decreed with costs declaring that the legal representatives of the plaintiffs are the owners of the suit property and they are entitled for possession of the suit schedule property.

41. The aforesaid observations are fully applicable in this case. Admittedly, none of the attesting witnesses have been examined. Here, the signature of the scribe cannot be taken as proof of attestation. Therefore, it becomes evident that the execution of a will can be held to have been proved when the statutory requirements for proving the will are satisfied. The High Court has however held that proof of the will was not necessary as the execution of the will has been admitted in the pleadings in OS No. 233 of 1998, and in the evidence of PW 1.

42. The contention that the execution of the will has been admitted by the appellants herein had been negated by the first appellate court in the following manner:

"What is admitted under Ext. 36 i.e. the plaint in OS No. 233 of 1998 at Para 7 is only about the will and not the genuineness of the will. During evidence of PW 1, it is elicited in the cross-examination that he came to know about the will of Puttathayamma as it was revealed in the written statement and that Puttathayamma might have written the will dated 4-7-1974. But PW 1 has not admitted the genuineness of the will anywhere in his evidence. Therefore the contention of the learned advocate for the first respondent that the execution of the will is admitted and therefore its genuineness is to be presumed cannot be accepted."

9. Dealing with the admissions, it was held –

"47. The aforesaid two judgments along with some other earlier judgments of this Court were considered by this Court in **Gautam Sarup v. Leela Jetly** [(2008) 7 SCC 85], wherein it was observed as follows: (SCC pp. 90 & 94, paras 16 & 28)

"16. A thing admitted in view of Section 58 of the Evidence Act need not be proved. Order 8 Rule 5 of the Code of Civil Procedure provides that even a vague or evasive denial may be treated to be an admission in which event the court may pass a decree in favour of the plaintiff. Relying on or on the basis thereof a suit, having regard to the provisions of Order 12 Rule 6 of the Code of Civil Procedure may also be decreed on admission. It is one thing to say that without resiling from an admission, it would be permissible to explain under what circumstances the same had been made or it was made under a mistaken belief or to clarify one's stand inter alia in regard to the extent or effect of such admission, but it is another thing to say that a person can be permitted to totally resile therefrom. ...

***

28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

48. Examined on the basis of the law stated above we are unable to agree with the High Court that there was no need for independent proof of the will, in view of the admissions made in OS No. 233 of 1998 and the evidence of PW 1. In fact there is no admission except that Puttathayamma had executed a will bequeathing only the immovable properties belonging to her in favour of Indiramma. The first appellate court, in our opinion,

correctly observed that the aforesaid admission is only about the making of the will and not the genuineness of the will. Similarly, PW 1 only stated that he had come to know about the registration of the will of his grandmother favouring Indiramma through the written statement of the first defendant. The aforesaid statement is followed by the following statements "Other than that I did not know about the will. She was not signing in English. I have not seen her signing in Kannada. There was no reason for my grandmother to write a will favouring Indiramma." Even in the cross-examination he reiterated that "I know about the will written by Puttathayamma on 18-6-1974 bequeathing the properties to Indiramma only through the written statement of the first defendant".

10. In **Balathandayutham and another** (supra) relied upon by leaned counsel for the plaintiff, the execution of the Will asserted by one party was not denied by the other party. However, it was contended that the first Will dated 25th September, 1972 was not a genuine one and was revoked by the subsequent Will dated 25th April, 1980. However, the Court went on to note that the execution of the first Will was not disputed whereas for the subsequent Will no attesting witnesses were brought to prove the same. Further the subsequent Will was an unregistered document and the attestators to the said Will were still alive even though the scribe was not alive. It was also admitted that the testator was not well for about four months before death thus at the time of execution of the second Will, the testator was unwell. Thus, the Court held that the subsequent Wills were not proved. It would be thus seen that to prove the Will the Trial Court, first Appellate Court and the High Court applied the principles laid down in Section 68 of the Evidence Act which was upheld by the Supreme Court. In light of this, the Hon'ble Supreme Court held that the subsequent Wills were shrouded by various suspicious circumstances and thus the Appellant therein does not succeed having not discharged their onus. 11, Thus the Supreme Court also laid emphasis on the proof of genuineness of the Will. As noted above to base a claim on a Will, the parties are not only required to prove the existence of the Will but also the genuineness of the same. As noted above, the defendants themselves repeatedly noted the Will as alleged Will and have taken the

alternative pleas. Further the Issue No.9 is with regard to validity of the Will and not the existence of the Will. In view thereof, issue No.9 cannot be deleted and issue No.10 cannot be accordingly directed to be modified as prayed for.

11. Application is dismissed

ILR (2014) I DELHI 35
CS (OS)

BUTNA DEVI **...PLAINTIFF**

VERSUS

AMIT TALWAR AND ORS. **....DEFENDANTS**

(MUKTA GUPTA, J.)

.A. NO. : 4672/2013 IN CS (OS) NO. : 1687/2006 **DATE OF DECISION: 01.10.2013**

Code of Civil Procedure, 1908—Order VI—Rule 17, Order VIII, Rule 6A: Whether it is permissible for the Defendant to move an application for amendment of Written Statement after framing of issues and prior to evidence being led. Plaintiff filed the present suit seeking a declaration that sale deed entered into between the parties be declared null and void due to non payment of sale consideration along with a decree of permanent injunction—Alternatively prayed that Defendant be directed to pay the amount of consideration with damages—Subsequently, Plaintiff amended the plaint deleting the alternative prayer—Thereon the present application was filed by the Defendant/applicants to amend WS and file counter claim to incorporate the alternative prayer—Contended

that amendment to WS is necessitated by the Plaintiff withdrawing alternative relief. Plaintiff contends that as per proviso to Order VI Rule 17, no application for amendment shall be allowed after commencement of trial—Current application being moved by the Defendants to overcome adverse orders whereby the Plaintiff's application for amendment of Plaint was allowed—Further, present application filed beyond period of limitation specified in Order VIII Rule 6A. Held: As Per O. 6 R. 17 CPC no application for the amendment shall be allowed after the trial has commenced unless the Court comes to a conclusion that inspite of due diligence the party could not have raised the matter before the commencement of trial. Leave to amend WS cannot be denied on the ground that trial had commenced—Counter claim necessitated by amendment of plaint by the Plaintiff—Period of limitation accrues from date of cause of action, i.e. when the Plaintiff amended the plaint—Present counter claim is within limitation—Defendant permitted to amend WS and file counter claim.

As per the proviso to Order VI Rule 17 CPC no application for the amendment shall be allowed after the trial has commenced unless the Court comes to the conclusion that inspite of due diligence the party could not have raised the matter before the commencement of the trial. The issue as to when the trial commences is no longer res integra. The Hon'ble Supreme Court in **Baldev Singh and others vs. Manohar Singh and another,** 2006 (6) SCC 498 held:

> "17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the Code of Civil Procedure provides that amendment of pleadings shall not be allowed when the trial of the Suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary

evidence in the Suit. From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the Trial Court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinafter, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 of the Code of Civil Procedure which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings."

(Para 9)

In **Link Engineering (P) Ltd. v. Asea Brown Boveri Ltd. & Others.,** 140 (2007) DLT 53 this Court noted that the issues were framed on 28th August, 2006 and on the same date the parties were directed to file the list of witnesses within six weeks and plaintiff was directed to file affidavits of witnesses within eight weeks and 4th December, 2006 was fixed for recording of the evidence. Before the said date, on 17th November, 2006 the plaintiff filed an application seeking amendment of the plaint. After considering the decisions of Supreme court in **Baldev Singh & Others v. Manohar Singh & Another,** (2006) 3 SCC 498 and **Ajendraprasadji N. Pande and Another v. Swami Keshavprakeshdasji N. and Others,** (2007) 1 JT 579 it was held that the trial did not commence on 28th August, 2006 when issues were framed. This Court noted that if the affidavits were not to be filed the date of appearance of the witnesses would be the date of commencement of the trial. This Court noted that it would not be appropriate to shut out the plaintiff from seeking amendment in the plaint on the ground that there is commencement of the trial. **(Para 10)**

In Mohd. Saleem and others vs. Naseer Ahmed, AIR 2007

Delhi 48 the Court observed:

"14. The conspectus of the aforesaid pronouncements and definitions as to when a commencement of trial takes place leaves no manner of doubt that it refers to a stage after framing of issues and after the hiatus period thereafter where steps have to be taken to start the trial by examination Of witnesses whether in the form of filing of affidavit or otherwise.

15. In view of the aforesaid position, it cannot be said that on framing of issues itself the trial has commenced and thus the proviso to Rule 17 of Order 6 of the said Code would come into play." **(Para 11)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. R.M. Sinha, Advocate.

FOR THE DEFENDANT : Mr. Aman Mehta, Advocate.

CASES REFERRED TO:

1. *Rajesh Sharma* vs. *Krishan Pal and Another,* 2011 (126) DRJ 34.
2. *Ajendraprasadji N. Pande and Another* vs. *Swami Keshavprakeshdasji N. and Others,* (2007) 1 JT 579.
3. *Link Engineering (P) Ltd.* vs. *Asea Brown Boveri Ltd. & Others.,* 140 (2007) DLT 53.
4. *Andhra Bank* vs. *ABN Amro Bank N.V. and others* AIR 2007 SC 2511.
5. *Baldev Singh & Others* vs. *Manohar Singh & Another,* (2006) 3 SCC 498.
6. *Smt. Neelam Gupta* vs. *Smt. Sheela Devi and others,* 87 (2000) DLT 368.

RESULT: Application allowed.

MUKTA GUPTA, J.

1. By this application the Defendant No. 1 seeks to amend the written statement along with the counter claim thereby adding para-13 in the preliminary objections as under:

> "13. That the Defendant No. 1 reserves his right to file counter claim to pay the balance payment of Rs. 30,88,249/- as alleged by the Plaintiff and the Plaintiff be directed to hand over the peaceful physical possession of the suit premises to the Defendant No. 1."

2. Learned counsel for the Defendant/applicant contends that the amendment in the written statement and the filing of the counter claim is necessitated because the Plaintiff has amended the plaint by withdrawing the alternate relief. The Plaintiff had made an alternate prayer in the plaint seeking directions to the Defendant No. 1 to return the cheque amount of Rs. 30,88,249/- with damages of a sum of Rs. 5 lakhs and interest pendentelite and future. By way of I.A. No. 15749/2011 under Order VI Rule 17 CPC the Plaintiff sought amendment of the plaint deleting this alternate prayer in the suit which was allowed vide order dated 14th February, 2012. Hence the Defendant has been compelled to file the present application reserving the right to file the counter claim with regard to return of Rs. 30,88,249/- to the Plaintiff.

3. Learned counsel for the Defendant/applicant submits that in view of this prayer as already made in the suit, as it stood, the Defendant was not required to file the counter claim and only when the amendment in the plaint was allowed vide order dated 14th February, 2012, the Defendant/Applicant filed the present application on 11th March, 2013. It is contended that there is no delay in filing the present application and even if there is a delay the same is not a ground to reject the amendments as held by the Hon'ble Supreme Court in **Andhra Bank vs. ABN Amro Bank N.V. and others** AIR 2007 SC 2511. Further at this stage this Court cannot go into the merits of the amendment and cannot test the veracity or truthfulness of the amendments sought to be made. Reliance is placed on **Rajesh Sharma vs. Krishan Pal and Another,** 2011 (126) DRJ 34. The trial is yet to begin. Though issues have been framed however, the evidence by way of affidavit of the Plaintiff's witnesses have not been filed. Further even where the trial has started the amendment in the plaint or the written statement can be sought subject to the condition that the

parties seeking the amendment has to show that despite due diligence it was not in possession of the necessary evidence with it.

4. Learned counsel for the Plaintiff/non-applicant on the other hand states that vide order dated 14th February, 2012 when the amendment in the plaint was allowed this Court clearly held that no amendment in the written statement is necessary since no facts have been added in the plaint except that one prayer has been deleted. This order dated 14th February, 2012 has become final and the Defendant/Applicant cannot now seek recalling of the said order in the garb of the present application. Further the amendment sought to be brought is barred by limitation. The Defendant filed the written statement in November, 2006 without a counter claim. He subsequently also filed an application for depositing of the sum of Rs. 30,88,249 however, the same was declined. Thus now to overcome all the adverse orders the Defendant/applicant cannot seek amendment of the written statement. Order VIII Rule 6A CPC bars filing of a counter claim beyond the period of limitation. Reliance is placed on **Smt. Neelam Gupta vs. Smt. Sheela Devi and others,** 87 (2000) DLT 368.

5. I have heard learned counsel for the parties.

6. The Plaintiff filed the present suit in August, 2006 inter alia seeking a decree of declaration that the Sale Deed dated 4th August, 2006 registered vide Register No. 5638, Volume No. 12070, Page No. 144 to 157 executed by the Plaintiff in favour of Defendant No. 1 be declared as null and void as the sale consideration mentioned in the sale deed pursuant to the cheque bearing No. 186931 dated 3rd August, 2006 amounting to Rs. 30,88.249/- drawn on Citi Bank (Financial), New Delhi has not been paid to the Plaintiff besides a decree of permanent injunction. In the alternative it was also prayed that the Defendant No. 1 be directed to return the cheque amount of Rs. 30,88,249/- with damages amounting to Rs. 5 lakhs and interest pendentelite and future.

7. The Defendant No. 1 filed his written statement within time as observed vide order dated 4th January, 2007 however, no counter claim was made and rightly so.

8. The Plaintiff filed an application being I.A. No. 15749/2011. under Order VI Rule 17 read with Section 151 CPC seeking amendment of plaint by deleting the alternative prayer in Prayer (i) as noted above. This Court vide order dated 14th February, 2012 allowed the application

on the ground that it is well settled that the Plaintiff can withdraw any relief claimed in the suit or entire suit at any stage. It was further observed that no amended written statement was required since no new facts have been added and only a prayer had been deleted. Vide order dated 1st August, 2012 issues were framed and the Plaintiff was directed to file evidence by way of affidavit of its witnesses within six weeks. As no copy of the chief affidavit was served to the Defendant the matter was listed for Plaintiff's evidence on 14th March, 2013. In the meantime, the Defendant/applicant filed the present application being I.A. No. 4672/2013 u/Order Order VI Rule 17 CPC for amendment of the written statement on 5th March, 2013 which came up before this Court on 19th March, 2013.

9. As per the proviso to Order VI Rule 17 CPC no application for the amendment shall be allowed after the trial has commenced unless the Court comes to the conclusion that inspite of due diligence the party could not have raised the matter before the commencement of the trial. The issue as to when the trial commences is no longer res integra. The Hon'ble Supreme Court in **Baldev Singh and others vs. Manohar Singh and another,** 2006 (6) SCC 498 held:

> "17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the Code of Civil Procedure provides that amendment of pleadings shall not be allowed when the trial of the Suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the Suit. From the record, it also appears that the Suit was not on the verge of conclusion as found by the High Court and the Trial Court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinafter, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 of the Code of Civil Procedure which confers wide power and unfettered discretion to the Court to allow an amendment of the written statement at any stage of the proceedings."

10. In **Link Engineering (P) Ltd. v. Asea Brown Boveri Ltd. & Others.,** 140 (2007) DLT 53 this Court noted that the issues were framed on 28th August, 2006 and on the same date the parties were directed to file the list of witnesses within six weeks and plaintiff was directed to file affidavits of witnesses within eight weeks and 4th December, 2006 was fixed for recording of the evidence. Before the said date, on 17th November, 2006 the plaintiff filed an application seeking amendment of the plaint. After considering the decisions of Supreme court in **Baldev Singh & Others v. Manohar Singh & Another,** (2006) 3 SCC 498 and **Ajendraprasadji N. Pande and Another v. Swami Keshavprakeshdasji N. and Others,** (2007) 1 JT 579 it was held that the trial did not commence on 28th August, 2006 when issues were framed. This Court noted that if the affidavits were not to be filed the date of appearance of the witnesses would be the date of commencement of the trial. This Court noted that it would not be appropriate to shut out the plaintiff from seeking amendment in the plaint on the ground that there is commencement of the trial.

11. In Mohd. Saleem and others vs. Naseer Ahmed, AIR 2007 Delhi 48 the Court observed:

> "14. The conspectus of the aforesaid pronouncements and definitions as to when a commencement of trial takes place leaves no manner of doubt that it refers to a stage after framing of issues and after the hiatus period thereafter where steps have to be taken to start the trial by examination Of witnesses whether in the form of filing of affidavit or otherwise.
>
> 15. In view of the aforesaid position, it cannot be said that on framing of issues itself the trial has commenced and thus the proviso to Rule 17 of Order 6 of the said Code would come into play."

12. The issues in the present suit were framed on 1st August, 2012 and the matter was listed for Plaintiff's evidence on 14th March, 2013 before which date the Defendant filed the present application. In view of the legal position it would not be thus appropriate to deny the leave to amend the written statement on the ground that trial had commenced. Further the question in the present case is whether the counter claim of

the Defendant was barred by limitation in view of order VIII Rule 6A which provides that a Defendant in a suit may, in addition to his rights of pleadings a set off under Rule 6, set up, by way of counter claim against claim of the Plaintiff, any right or claim in respect of the cause of action accruing to the Defendant against the Plaintiff either before or after the filing of the suit but before the Defendant has delivered his defence or before the time limited for delivering his defence has expired. The period of limitation for the counter claim will have to be seen from the date of cause of action accruing to the Defendant which obviously would be after the filing of the plaint. In the present case it is an admitted position that the Plaintiff had prayed for an alternative prayer of directions to the Defendant No. 1 to return the cheque amounting to Rs. 30,88,249/-. In view of this prayer of the Plaintiff herself Defendant No. 1 was thus not required to take a preliminary objection reserving his right to file the counter claim to pay a balance amount of Rs. 30,88,249/- and directions to hand over the peaceful physical possession of the suit premises to the Defendant No. 1. This has been undoubtedly necessitated by the amendment brought in the plaint by the Plaintiff deleting the alternate prayer which was allowed vide order dated 14th February, 2012. The present counter claim is within limitation from the order dated 14th February, 2011 and thus cannot be said to be barred by limitation as contended by learned counsel for the Plaintiff.

13. Further the reference of the Plaintiff to the order dated 14th February, 2011 observing that no amended written statement is required is also misconceived. The said order was not on the specific prayer of the Defendant No. 1/applicant for setting up of a counter claim and will not be a bar to the relief which can be granted to the applicant/Defendant No.1 in the present application.

In view of the aforesaid discussion and the facts of the case the application is allowed.

The Defendant No. 1 is permitted to amend the written statement and file counter claim as prayed for.

Application is disposed of.

CS (OS) No. 1687/2006

Amended written statement and counter claim be filed within four weeks. Replication to the written statement and written statement to the counter claim be filed within four weeks thereafter.

List before the learned Joint Registrar for further proceeding on 16th December, 2013.

ILR (2013) I DELHI 44
W.P.(C)

SANJAY KUMAR .....PETITIONER

VERSUS

UNION OF INDIA AND ORS. .....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 2291/2012 DATE OF DECISION: 01.10.2013

Service Law—Armed Forces—Central Civil Services (Temporary Services) Rules, 1965—Rule, 5 (1)—Petitioner was issued a driving license which bore no. 83920/Mth by District Transport office, Thoubal, Manipur—Pursuant to advertisement regarding filling up of vacancy for post of Constable/Driver in CRPF, Petitioner applied for appointment to said post—After a rigorous selection process and having fulfilled all eligibility requirements relevant to appointment, Petitioner was issued order of appointment to post of Constable (Driver)—Respondents sought verification

of driving of Petitioner from District Transport Officer/ Respondent No. 4 which had issued DL to Petitioner—Respondent No. 4 writing from Manipur wrongly mentioned DL No. 83920/Mth—In view of erroneous communications received from District Transport Officer, Manipur, to effect that Petitioner was holding DL No. 83920/Mth, Respondents proceeded to issue a notice informing that his services would stand terminated w.e.f. date of expiry of period of one month from date which notice was served upon him—Faced with this difficult situation, Petitioner proceeded to office of Respondent No. 4 personally whereupon a letter was issued by Respondent No. 4 reaffirming validity correctness of license issued to Petitioner as well as fact that same bore no. 83920/Mth and specifically stated that reply furnished by his office earlier was erroneous and wrong—However, no heed was given thereof and services of Petitioner were terminated without conducting inquiry—Order challenged before HC—Held—Show cause notice and impugned orders of termination resulted merely on account of erroneous communications which Respondent No. 3 received from Respondent No. 4—Respondent No. 3 has conducted a verification and re-verification and has received correct information based thereon—Only reason on which show cause notice was issued to Petitioner and his services were terminated was fact that driving license no. 83920/Mth was not verified by concerned authority as having been validly issued to Petitioner—This position was factually erroneous and impugned orders based thereon are, therefore, not sustainable.

Important Issue Involved: Termination order passed by Respondents based on erroneous communications from Licensing Authority even after receiving correct information received after reverification is not sustainable.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Ms. Avni Singh, Advocate.

FOR THE RESPONDENTS : Mr. Ashish Nischal, Advocate.

RESULT: Allowed.

GITA MITTAL, J. (ORAL)

1. By way of the present writ petition, the petitioner has assailed the order dated 2nd June, 2011 terminating his service as a Constable/ driver with the Central Reserve Police Force and the order dated 18th August, 2011 passed by the respondent no.4 rejecting the petitioner's revision petition.

2. The facts giving rise to the instant writ petition are in a narrow compass and largely undisputed. The petitioner was issued a driving licence on the 17th November, 2008 which bore no.83920/Mth by the District Transport Office, Thoubal, Manipur which was valid for the period from 17th November, 2008 to 16th November, 2011.

3. It appears that the petitioner thereafter applied for a licence from the Haryana Transport Authority inasmuch as he was residing in the state of Haryana on the 30th June, 2009. The petitioner was issued a new driving licence by the Haryana Transport Authorities which bore the number 1591/C-2/09 with the validity period upto 10th November, 2011. It needs to be borne in mind that this new driving licence was issued on the basis of the driving licence bearing no.83920/Mth issued by the District Transport Office, Thoubal, Manipur.

4. The petitioner has contended that the Haryana Transport Authorities had conducted due verification and ensured the validity of the driving licence issued to the petitioner at Thoubal, Manipur prior to issuance of new licence to the petitioner. This submission by the petitioner is supported by the plea taken by the District Transport Officer, NUH, Mewat, Haryana/ respondent no.5 before us in the counter affidavit wherein it is submitted that the driving licence issued in favour of the petitioner by the District Transport Officer, Thoubal, Manipur, was renewed on 30th June, 2009 by the District Transport Officer, NUH, Mewat, Haryana after completion of all formalities.

5. It appears that pursuant to an advertisement issued in 2009 regarding filling up of the vacancy for the post of Constable/Driver in the Central Reserve Police Force, the petitioner applied for appointment to the said post. As required, he submitted all required documents including those relating to his driving licence. It is submitted by Ms.Avni Singh, learned counsel for the petitioner that he had duly given details of the driving licence no.83920/Mth.

6. After a rigorous selection process and having fulfilled all eligibility requirements relevant to the appointment, the petitioner was issued an order of appointment to the post of Constable (Driver). The petitioner joined duties on 25th July, 2009 at the Group Centre, CRPF, Gandhinagar, Gujarat wherefrom he was sent to the Recruit Training Centre, Avadi for basic training. The petitioner submits that he was found physically and medically fit and also satisfactorily participated in the heavy vehicle driving test carried out both at the time of selection as well as during the basic training at Avadi. As per prescribed process, the respondents no.1 & 3 proceeded with the matter of verification of documents of the selected candidates.

7. The respondents have placed reliance on three letters dated 4th August, 2009; 15th October, 2009 & 6th January, 2010 which were sent to the District Transport Officer, Thoubal, Manipur seeking verification of the driving licence bearing no.83920/Mth which had been issued to the petitioner in Manipur. 8. In response thereto, the respondents received a letter dated 18th January, 2010 whereby the respondent no.4 writing from Manipur, informed the DIGP, GC, Gandhinagar, Gujarat that the petitioner had been issued a driving licence on 17th November, 2008 which was valid upto 16th November, 2011. However, the number of such driving licence was wrongly mentioned as "83902/Mth.

This error was repeated in the letters dated 28th February, 2010; 21st April, 2010 as well as the letter dated 7th October, 2011.

9. It appears that the respondent nos.1 to 3 sought clarification from the respondent no.4 about the petitioner's driving licence. In response to the respondents letter dated 12th February, 2011, the respondent no.4 from the office of the District Transport Officer, Thoubal, Manipur issued a letter dated 28th February, 2011 upon verifications from the record which reads as follows:-

"With reference to your letter No.V-I-I/2011 dated the 12th Feb. 2011 on the above cited subject, I am to inform you that the Driving Licence Nos.83902/Mth is standing in the name of Sanjay Kumar S/O Bani Singh of VPO Khusputeh and Dist. Rewari, Haryana and DL No.83920/Mth is standing in the name of S.N. Mandal S/O B.N. Mandal, Vill and PO Rebari, Dist. Dhubri, Assam. The details are given below

Sl. No.	Name and address issue	Date of expiry	Date of expiry	Class
1. DL No. 83902/ Mth	**Sanjay Kumar S/O Bani Singh of Vehicle VPO Khuspura, Teh and Dist. Rewari Haryana**	**17-11-08**	**16-11-2011**	**Heavy Transport**
2. DL.No. 83920/ Mth	S.N. Mandal S/O B.N. Mandal VPO Jhapurabari Dist. Dhubri, Assam	17-11-08	16-11-2011	Heavy Transport Vehicle

It is as per record maintained by this Office."

(Emphasis supplied)

10. We find that in the counter affidavit which has been filed, the respondents have admitted receipt of an earlier letter from respondent no.4 setting out the same position as above. In para 6, it is stated that by the letter dated 29th December, 2010, the District Transport Officer, Thoubal, Manipur had informed them that the driving licence no.83920 which has been issued to the petitioner was correct and that differences may have arisen on account of clerical error.

11. In view of the erroneous communications received from the District Transport Officer, Thoubal, Manipur, to the effect that the petitioner was holding driving licence no.83902/Mth, the respondents proceeded to issue a notice dated 2nd May, 2011 to the petitioner purporting to be in exercise of jurisdiction under Rule 5(1) of the Central

Civil Services (Temporary Services) Rules, 1965 informing him that his services would stand terminated with effect from the date of expiry of the period of one month from the date on which the notice was served upon him.

12. Faced with this difficult situation, the petitioner proceeded to the office of the respondent no.4 personally whereupon a letter dated 12th May, 2011 was issued by the respondent no.4 to the respondent no.3 re-affirming the validity and correctness of the licence issued to the petitioner as well as the fact that the same bore no.83920/Mth. The respondent no.4 specifically stated that the reply furnished by his office by the letter dated 7th October, 2010 was erroneous and wrong.

13. The petitioner has submitted that he had placed this communication before the respondents. However, no heed was given thereof. Instead an order dated 2nd June, 2011 was passed terminating his services without any further inquiry.

14. It is noteworthy that the letter dated 12th May, 2011 was written and signed by Mr.Simon Keishing, the very officer who had issued the letters dated 18th January, 2010 and 7th October, 2010. Interestingly, the petitioner's driving licence no.83920/Mth has been signed and issued by the same officer.

15. The petitioner assailed the order of termination dated 2nd June, 2011 by way of Revision Petition dated 17th June, 2011. However, the same was rejected unceremoniously by an order passed on 18th August, 2011. The rejection ignored the communication dated 29th December, 2010 admittedly received by the respondent no.3 as well as the letter dated 12th May, 2011 placed by the petitioner on record before the respondent authorities.

16. The petitioner has assailed the order of termination dated 2nd June, 2011 as well as the revisional order dated 18th of August, 2011 by way of the present petition. As noted above, the petitioner has impleaded the District Transport Officer, Thoubal, Manipur as respondent no.4 apart from the authorities who had passed the impugned order.

17. The counter affidavit filed in opposition to the writ petition has disclosed that the respondents have commenced a verification of the licences under orders of the DIG. It is informed by the respondent nos.1

to 3 that re-verification was requested by their Transport Department based whereon further communications were exchanged with the District Transport Officer, Thoubal, Manipur. Photocopies of the letters sent by the respondent no.3 and the response dated 25th April, 2012 from the respondent no.4 have been produced and have been taken on record.

18. The communication bearing no.3/11/DL/DTO/TBL dated 25th April, 2012 has been received by the respondents from Mr.Simon Keishing, District Transport Officer, Thoubal, Manipur. In this letter, the respondent no.4 reiterates the fact that driving licence no.83920/Mth stood issued to the petitioner. The communication also states that driving licence no.83902/Mth was issued to Shri S.N. Mandal. The author of this letter has requested a pardon from the DIGP for the wrong information furnished in the letter dated 28th February, 2011. Regret has been expressed for the wrong information which was furnished. It is noteworthy that the said Shri Keishing has enclosed two photocopies of the driving licences noted above.

19. The above narration would show that the show cause notice and the impugned orders of termination dated 2nd June, 2011 and 18th August, 2011 resulted merely on account of the erroneous communications which the respondent no.3 received from the respondent no.4. The respondent no.3 has conducted a verification and re-verification and has received the correct information based thereon.

20. It is an admitted position that the only reason on which the show cause notice was issued to the petitioner and his services were terminated was the fact that the driving licence no.83920/Mth was not verified by the concerned authority as having been validly issued to the petitioner. This position was factually erroneous and the order dated 2nd June, 2011 as well as the revisional order dated 18th August, 2011 against the petitioner based thereon are, therefore, not sustainable. 21. In view of the above, we direct as follows:-

(i) The orders dated 2nd June, 2011 & 18th August, 2011 are hereby set aside and quashed.

(ii) As a result, the petitioner shall stand reinstated in service. Appropriate orders in this behalf be passed within four weeks and communicated immediately thereafter to the petitioner.

(iii) It is further directed that the petitioner shall be entitled to the benefits of notional seniority. The petitioner shall be deemed to have been continued in service as if the order dated 2nd June, 2011 has not intervened, for all purposes including computation of his pension. The petitioner shall, however, not be entitled to back wages. The respondents shall pass orders in terms of these directions within four weeks as well as communicate the same to the petitioner.

This writ petition is allowed in the above terms.

ILR (2013) I DELHI 51
CRL. A.

RAJ KUMAR **....APPELLANT**

VERSUS

STATE OF DELHI **....RESPONDENT**

(S.P. GARG, J.)

CRL.A. NO. : 229/2003 **DATE OF DECISION: 03.10.2013**

Indian Penal Code, 1860—Sections 342, 304, 34—Appellant was convicted U/s 342/304 /34 of Code—He challenged conviction urging FIR was not lodged promptly and is fatal to prosecution case. Held:—The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. Undoubtedly, the promptness in lodging

the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.

Conviction of A-1 is based primarily on the statement of PW1 (Madan Lal), deceased's father who recorded statement (Ex.PW-1/A). The occurrence took place at about 08.00 A.M. on 15.11.1996. The inordinate delay in lodging First Information Report with the police on 16.11.1996 at 12.50 A.M has not been explained. FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of the version. In the case of **'Jai Prakash Singh v. State of Bihar & Anr.',** 2012 CRI.L.J.2101, the Supreme Court held :

"The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account

of what has actually happened, and who was responsible for the offence in question." **(Para 2)**

Important Issue Involved: The FIR in criminal case is vital and valuable piece of evidence, though may not be substantive piece of evidence. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.

[Sh Ka]

APPEARANCES:

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

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

CASE REFERRED TO:

1. *Jai Prakash Singh* vs. *State of Bihar & Anr.,* 2012 CRI.L.J.2101.

RESULT: Appeal allowed.

S.P. GARG, J.

1. Raj Kumar (the appellant/A-1), Anil @ Gopi (A-2), Naresh Kumar @ Nippi (A-3) and Lalita (A-4) were arrested in case FIR No. 415/96 PS Vivek Vihar and sent for trial for committing offences under Sections 342/304/34 IPC on the allegations that on 15.11.1996 at about 08.00 A.M. at House No. 107, Old Tejab Mil, Shahdara, they in furtherance of common intention gave beatings to Vivek with hockey, kicks and fists blows after wrongfully confining him. Vivek succumbed to the injuries on 19.11.1996. The police machinery was set in motion when Daily Diary (DD) No. 83B (Ex.PW-11/A) was recorded at PS KrishnaNagar at 07.45 P.M. on receiving information that a boy who was severely beaten was lying in serious condition in a gali in front of B-23, Jagatpuri, Sarwaria Medical Centre. The investigation was assigned to HC Rajbir Singh who with Constable went to the spot and came to know that the

injured had already been taken to SDN Hospital. He collected the MLC of injured Vivek and was informed that the patient had been taken to Monga Nurshing Home, Krishna Nagar. The investigation was taken over by ASI Rajinder Singh who went to Monga Nurshing Home, Krishna Nagar. Since Vivek was unconscious, the Investigating Officer recorded Madan Lal's statement (Ex.PW-1/A) and lodged First Information Report. On 16.11.1996, Raj Kumar (A-1) was arrested and pursuant to his disclosure statement a broken bat used to beat Vivek was recovered. Post-mortem examination of the body was conducted. Statements of the witnesses conversant with the facts were recorded. During the course of investigation, A-2 to A-4 were arrested. After completion of investigation, a charge-sheet was submitted in the Court. The prosecution examined nineteen witnesses. In their 313 statements, A-1 to A-4 pleaded false implication. The Trial Court, by the impugned judgment, acquitted A-2 and A-3 of the charges. A-1 was held guilty for committing offence punishable under Section 304 part-II IPC and sentenced to undergo RI for three years with fine Rs. 10,000/-. A-4 was convicted under Section 342 IPC and directed to pay fine of Rs. 1,000/-. It is apt to note that State did not challenge acquittal of A-2 and A-3 and conviction of A-4 under Section 342 IPC only. It appears that A-4 has opted not to prefer appeal.

2. Conviction of A-1 is based primarily on the statement of PW1 (Madan Lal), deceased's father who recorded statement (Ex.PW-1/A). The occurrence took place at about 08.00 A.M. on 15.11.1996. The inordinate delay in lodging First Information Report with the police on 16.11.1996 at 12.50 A.M has not been explained. FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of the version. In the case of **'Jai Prakash Singh v. State of Bihar & Anr.',** 2012 CRI.L.J.2101, the Supreme Court held :

"The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. The object of

insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question."

3. In his statement (Ex.PW-1/A), Madan Lal disclosed that at about 11.00 A.M. his neighbour Sawan informed him at his shop that Vivek was detained by girl's uncle and mother in their house when he had gone to deliver a letter to her and asked him to go to make him understand. When he went to spot with Sawan, he found that Vivek had been detained in a room in the house after giving beatings. A-1 and his two associates whose names were ascertained Gopi (A-2) and Nippi (A-3) aged 22/23 caused beatings to Vivek with hockey, legs and fists blows. He was made to execute a compromise and thereafter, came back to his shop. After some time, Vivek was left at his residence. Due to the injuries Vivek became unconscious and his condition deteriorated. He made telephone call at No. 100 and Vivek was taken to SDN Hospital. From there, he shifted him to Monga Nurshing Home. Apparently, the complainant did not claim A-4's presence at the spot and did not assign any overt act to her. Madan Lal did not offer any reason for not reporting the incident to the police soon after coming to know at about 11.00 A.M., that his son Vivek was severely beaten by the assailants and the beatings were given to him in his presence in the house. It is unclear why Madan Lal did not intervene to restrain the assailants to give beatings to his son. His conduct is quite unnatural and unreasonable as from the spot he did not take Vivek with him to his shop or residence or hospital. He left Vivek at the spot/ house where he was allegedly confined and beaten, and conveniently returned to his shop without lodging any complaint with the police. While appearing as PW-1 in the Court, Madan Lal made vital

improvements and introduced new facts which did not find mention in statement (Ex.PW-1/A). In his Court statement, he disclosed that one 'Puppy' had come to his shop at 8 or 8.30 A.M. and he had gone with him to the spot on his scooter. Puppy is Sawan's son. He did not depose that Sawan had informed him about the incident and he had accompanied him to the spot. Sawan was not examined during investigation and was not produced in the Court as a witness. He further came up with a new plea that one lady (A-4) was present in the house and he saw A-1 and A-4 beating Vivek with a bat. Other two accused persons (A-2 and A-3) gave slaps and beatings to Vivek and he was unable to speak and became unconscious. He returned to the shop after being threatened by A-1. The accused persons left Vivek at the shop later on and he admitted his son Vivek in the hospital where he was declared 'dead' by the doctors. This version given for the first time is in-consistent with the statement (Ex.PW 1/A). The complainant, deceased's father is not imagined not to intervene and to restrain the accused persons to inflict severe beatings to Vivek. He did not raise any alarm and left the boy inside the house without ensuring his protection from beating. He did not bother about the wellbeing of the child. This conduct makes his presence at the spot highly doubtful. It is also not clear when Vivek was left at the complainant's shop by whom and in what physical condition. Delay in taking the child to hospital in such a precarious condition is unexplained. PW-1 (Madan Lal) did not disclose at what time he took the injured/ victim to the hospital and if so from where i.e. house or shop. PW-2 (Lalit Kumar), his cousin, has contradicted him and claimed that when he returned from office to his house that day, his cousin (Vivek) was unconscious and was taken by him to hospital after informing police at No. 100. In the cross-examination, he disclosed that he saw Vivek at 06.30 P.M. at his house which was at a distance of 3 or 4 houses. He further stated that none else had accompanied him at that time when he admitted Vivek at the hospital. He elaborated that first he took Vivek to SDN Hospital and from there he was shifted to Monga Nurshing Home, Krishna Nagar. MLC (Ex.PW-15/A) records that Vivek was taken to SDN Hospital, Shahdara at 08.30 P.M. by HC Hans Raj of PCR. It further contains an endorsement at 10.15 P.M. whereby Madan Lal shifted Vivek to a private hospital at his own responsibility. MLC at Monga Nurshing Home, mark 'X' & 'Y' reveals that Vivek was admitted there at 02.00 A.M. on 16.11.1996. The prosecution witnesses have given

divergent statements as to from which place Vivek was taken to hospital i.e. whether from the house of the accused persons, shop/house of the complainant or from the street in front of B-23, Jagatpuri, Sarwaria Medical Centre.

4. Complainant in his Court statement did not identify bat (Ex.P1) allegedly recovered at the instance of A-1 with which Vivek was beaten. Learned Addl. Public Prosecutor after seeking Court's permission cross-examined him on various facts. He denied the suggestion that the bat produced before the Court was recovered at the instance of A-1. Madan Lal was unable to tell the exact location of the house where he had gone and the beatings were given to the deceased. He further stated that he remained in the room for half or quarter to one hour and after about two hours Vivek was brought to his house in an unconscious condition. He again give another version that he saw A-1 who left Vivek on a two wheeler scooter on the backside of his shop. He was confronted with statement (Ex.PW-1/DA) on various facts. No visible injuries were seen on the body of Vivek. The complainant was shown document (Ex.PW1/DA) and he admitted his signatures thereon at point 'A'. However, he was unable to disclose as to who had written it and where it was executed. Ex.PW-1/DA records the statement of deceased Vivek where he admitted his guilt and promised not to tease the girl. Similarly, Madan Lal put endorsement after the victim had given the promise in Ex.PW-1/DA. There was no occasion to leave the child at the house thereafter.

5. On the same set of evidence, A-2 and A-3 were acquitted by the Trial Court. PW-7 (HC Hans Raj of PCR) deposed that he received a call of quarrel at 10 or 10.30 P.M. He was declared hostile and was cross-examined by Addl. Public Prosecutor. In the cross-examination, he denied the suggestion that the call was received at 07.40 P.M. There were 20 or 25 persons gathered at the spot but no independent public witness was

examined. He gave a contradictory statement that the father of the victim had accompanied them in the PCR. PW-9 (Const. Om Prakash) revealed that complainant's statement was recorded at his house No. 107, Old Tejab Mohalla at 12.30 A.M. The investigation carried out is highly defective and is full of loopholes and cannot be accepted and trusted to base conviction. The prosecution witnesses have given altogether divergent versions and have contradicted each other on material facts. Presence of the complainant at the spot has not been established, positively. The delay in lodging the FIR is unexplainable. Conduct of the prosecution witnesses including that of the complainant is highly unreasonable and unnatural and is not in accord with acceptable human behaviour. His testimony becomes questionable and cannot be treated as so trustworthy and unimpreachable to record a conviction. Acquittal of co-accused on similar evidence makes the prosecution case weak. The appellant deserves benefit of doubt. The impugned judgment cannot be sustained and is set aside. In the result, the appeal is allowed. Conviction and sentence passed by learned Addl. Sessions Judge are hereby set aside. The appellant is acquitted of the charge. Bail bond and surety bond stand discharged. Trial Court record be sent back forthwith.

ILR (2014) I DELHI 58
EFA

SHRI SATISH KUMAR JHUNJHUNWALA ....APPELLANT

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

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

EFA (OS) NO. : 36/2011, DATE OF DECISION: 10.10.2013
CM. NO. : 19322/2011

Code of Civil Procedure, 1908—Order XXI Rule 50(2)—Section 32 (2) of Partnership Act, 1932—Contract dated

15.10.1986 entered into between M/s Binode Engineering & Mechanical Works ("the judgment-debtor firm") and the Union of India—Certain disputes in the course of the performance of the contract matter were referred to arbitration in 1996 (through a letter dated 21.12.1996)—Award was passed on 25.03.1998 in favour of the Union of India—Award was then made a rule of Court under Section 17 of the Arbitration Act, 1940 in CS (OS) 815A/1998 on 15.03.2004 judgment debtor firm became non-functional due to differences between the partners—Union of India sought to initiate execution proceedings against petitioner—Admitted partner of the firm at the time of signing of the contract in Execution Case No. 119/2008 case was then transferred to the High Court of Calcutta by an order dated 17.04.2007 to facilitate execution against the property of petitioner—Petitioner pleaded that the proceedings against him were not maintainable—Recovery could only be against the firm and not against its partners—Application, EA No. 471/2008, for stay of the decree under Order XXI Rule 26 of the CPC by the judgment-debtor firm was also rejected by this Hon'ble Court—Union of India filed an application under Order XXI Rule 50(2) CPC, before a single Judge of this Court to satisfy the decree against properties of petitioner—The Single Judge granted leave under Order XXI Rule 50(2), leading to the present appeal. Held: Court which passed the decree, i.e. the Court which made the arbitral award in question a rule of Court under Section 17 of the Arbitration Act, 1940—Execution proceedings the matter was transferred under Section 39, CPC—Assets sought to be utilized in the execution of the decree situated in the jurisdiction of the Calcutta High Court—Appellant made three fold suggestions first, appellant was neither provided notice of the underlying suit or of the execution proceedings, until proceedings reached the Calcutta High Court-second, words referred to in

clause (b) or clause (c) of sub-rule (1) of Rule 50 of Order XXI are to be read in contradistinction to the persons, i.e. partners, referred to in clauses (b) and (c)-third, after transferring the decree, the transferor court, i.e. this Court, has no jurisdiction in respect of the proceedings Sub-rule (2), if read as against sub-rule 1 does not refer to partners of the firm but to third persons unappealing—Clauses (b) and (c) of sub-rule 1 do not exhaust all categories of partners that may be proceeded against—Such that sub-rule (2) only deals with thirds persons—Core of Rule 50-individual partners not involved in the proceedings-in which case they would be covered under clauses (b) or (c) of sub-rule 1-their assets may still be utilized in the execution proceedings Court which passed the decree grants leave after hearing the individual on the question of his liability vis-a-vis his relationship with firm finally, Court which passed the decree in this was this Court which made the arbitral award into a rule of Court—No distinction can be read into Rule 50(2) between the bench seized of the execution proceedings and that which heard the matter on the original side—Transferring the decree, the transferor Court does not retain the power to grant leave, is contrary to the express terms of Section 42 transferee Court does not obtain the power to grant leave to execute such decree against any person other than such a person as is referred to in clause (b), or clause (c), of sub-rule (1) of rule 50 of Order XXI retiring partner discharged from any liability to a third party for acts of the firm done before his retirement by an agreement made by him with third party and the partners of the reconstituted firm—Such agreement may also be implied by a course of dealing after he had knowledge of the retirement.

Important Issue Involved: Core of Rule 50 is to ensure that the assets of the individual partners who have not been

involved in the proceedings not falling within clause (b) and (c) will Still be utilized in execution proceedings, once the partner's liability is established.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Rakesh Tiku, Sr. Advocate with Mr. Amit Panigrahi & Mr. Tushar Roy, Advocates.

FOR THE RESPONDENT : Mr. J.M. Kalia, Advocate for UOI, Mr. Debasish Moitra, Advocate for Respondent No. 3.

CASES REFERRED TO:

1. *Topanmal Chhotamal* vs. *Kundomal Gangaram and Ors.* AIR 1960 SC 388.)
2. *Pottiswami, alleged partner of Pottiswami and Brothers* vs. *Salt Sulaiman (Mitta),* AIR 1942 Mad 501.
3. *Kalu Ram and Ors.* vs. *Sheonand Rai Jokhi Ram,* AIR 1932 Pat 323.

RESULT: Appeal dismissed.

S. RAVINDRA BHAT, J. (OPEN COURT)

1. This is an appeal from an order allowing an application under Order XXI Rule 50(2) of the Code of Civil Procedure ("CPC") by the decree holder seeking leave to proceed with execution proceedings against the partners of the judgment debtor's firm.

2. The facts leading to the decree in this case, and the execution proceedings are that a contract dated 15.10.1986 was entered into between M/s. Binode Engineering & Mechanical Works, a registered firm, (*"the judgement-debtor firm"*) and the Union of India for the supply of 3850 tonnes of cast iron sleeper plates. Due to certain disputes in the course of the performance of the contract (the details of which are not relevant at this stage of the execution proceedings), the matter was referred to arbitration in 1996 (through a letter dated 21.12.1996). The award was

passed on 25.03.1998 in favour of the Union of India, the decree-holder, for an amount of Rs. 81,31,371/- (Rs. 35,36,750/- towards the value of scrap and Rs. 45,94,621/- towards interest at the rate of 12% per annum on the value of the scrap from 01.09.1988 to 31.12.1996) and against the judgement-debtor firm. The award was then made a rule of Court under Section 17 of the Arbitration Act, 1940 in CS (OS) 815A/1998 on 15.03.2004, after dismissing objections raised by the judgement debtor firm.

3. Around the same time as the award, the judgement-debtor firm became non-functional due to differences between the partners. Subsequently, the Union of India sought to initiate execution proceedings against Satish Kumar Jhunjhunwala (the petitioner/appellant), an admitted partner of the firm at the time of signing of the contract, in Execution Case No. 119/2008 before this Court. This case was then transferred to the High Court of Calcutta by an order dated 17.04.2007, to facilitate execution against the property of Mr. Jhunjhunwala. Before the Calcutta High Court, Mr. Jhunjhunwala took the plea that the proceedings against him were not maintainable as the recovery could only be against the firm as such, and not against its partners. In the meantime, an application, EA No. 471/2008, filed for stay of the decree under Order XXI Rule 26 of the CPC by the judgement-debtor firm was also rejected by this Court. Subsequently, the Union of India filed an application under XXI Rule 50(2) CPC, before a Single Judge of this Court in order to satisfy the decree as against the properties of Mr. Jhunjhunwala by obtaining leave to proceed against his assets. The Single Judge granted leave under Order XXI Rule 50(2), leading to the present appeal.

4. Learned senior counsel for Mr. Jhunjhunwala, Mr. Rakesh Tiku, made a three-fold submission: first, that since Mr. Jhunjunwala was neither provided notice of the underlying suit (either before the arbitral tribunal or at the time of filing of the award under Section 14 of the Arbitration Act before this Court) or of the execution proceedings, until the stage at which the proceedings reached the Calcutta High Court, making his assets liable would amount to creating a liability unfounded in the decree itself, which an executing court cannot do. Secondly, the learned senior counsel argued that the words *"execute such decree against any person, other than such a person as is referred to in clause (b) or clause (c) of sub-rule (1) of Rule 50 of Order XXI"* are to be read in

contradistinction to the persons, i.e. partners, referred to in clauses (b) and (c), and thus, do not refer to partners of the firm at all, but rather to other persons. Finally, the learned senior counsel argued that after transferring the decree, the transferor court, i.e. this Court, has no jurisdiction in respect of the proceedings. Mr. Tiku also argued that Rule 50 in using the words *"[c]ourt which passed the decree"* envisaged the Court that heard the underlying matter and passed the decree (an expression of liability), and not the same Court, i.e. this Court, sitting in its execution powers. Thus, although the present application seeking leave was filed before the Single Judge of the Delhi High Court (the Court which passed the original decree in the matter as well), the argument states that the application must lie to the same court, i.e. the same bench or judge, that heard the underlying matter. For this, learned senior counsel placed reliance on a decision of the Patna High Court, **Kalu Ram and Ors. v. Sheonand Rai Jokhi Ram,** AIR 1932 Pat 323, and a decision of the Madras High Court, **Pottiswami, alleged partner of Pottiswami and Brothers v. Salt Sulaiman (Mitta),** AIR 1942 Mad 501.

5. The learned counsel for the Union of India submits that as on the date of filing the application, more than Rs.3,50,00,000/- was legally recoverable as a decretal amount, and as of today, the amount stands close to Rs.5,00,00,000/-. Learned counsel submits that even though the decree was transferred under Section 39, CPC to the Calcutta High Court, this Court as the transferee court retains the power to grant leave to execute the decree against partners of the firm under Section 42, CPC. Accordingly, the jurisdiction of this Court is established. Further, learned counsel submits that the judgment-debtor firm named Mr. Jhunjunwala, the appellant/petitioner, as a partner in the partnership deed submitted to the Railway Board vide letter dated 11.05.1987 at the time of awarding the contract. Moreover, in similar terms, the judgement-debtor firm at the time of the contract awarded in its favour furnished a General Power of Attorney executed by all the partners, including Mr. Jhunjhunwala, in a letter dated 13.10.1987. Thus, it is submitted that given that Mr. Jhunjhunwala does not fall within the various sub-clauses of sub-rule (1) of Rule 50, but that his liability as a partner is established contemporaneously with the awarding of the contract through documents admitted to by the judgement-debtor firm itself, this case is fit for grant of leave to proceed against his assets.

6. Before addressing the arguments raised by the parties, and the discussion, it is helpful to extract certain provisions of the CPC. Firstly, Order XXI Rule 50 reads:

> **"50. Execution of decree against firm** - (1) Where a decree has been passed against a firm, execution may be granted -
>
> (a) against any property of the partnership;
>
> (b) against any person who has appeared in his own name under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;
>
> (c) against any person who has been individually served as a partner with a summons and has failed to appear: Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 30 of the Indian Partnership Act, 1932 (9 of 1932).
>
> (2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.
>
> (3) Where the liability of any person has been tried and determined under sub-rule (2) the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.
>
> (4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.
>
> (5) Nothing in this rule shall apply to a decree passed against a Hindu Undivided Family by virtue of the provision of rule 10 of Order XXX."

7. Section 37, CPC reads as follows:

"37. Definition of Court which passed a decree.-The expression "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to, include-

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

[Explanation -The Court of first instance does not cease to have jurisdiction to execute a decree merely on the ground that after the institution of the suit wherein the decree was passed or after the passing of the decree, any area has been transferred from the jurisdiction of that Court to the jurisdiction of any other Court; but in every such case, such other Court shall also have jurisdiction to execute the decree, if at the time of making the application for execution of the decree it would have jurisdiction to try the said suit.]"

8. Section 39, CPC provides that:

"39. Transfer of Decree: (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court of competent jurisdiction

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed the decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

(3) For the purposes of this section, a Court shall be deemed to be a Court of competent jurisdiction if, at the time of making the application for the transfer of decree to it, such Court would have jurisdiction to try the suit in which such decree was passed.

[(4) Nothing in this section shall be deemed to authorise the Court which passed a decree to execute such decree against any person or property outside the local limits of its jurisdiction.]"

9. Section 42, CPC, which is relevant for purposes of this appeal, reads as follows:

"42. Powers of Court in executing transferred decree:

(1) The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

(2) Without prejudice to the generality of the provisions of sub-section (1) the powers of the Court under that subsection shall include the following powers of the Court which passed the decree, namely:-

(a) power to send the decree for execution to another Court under section 39;

(b) power to execute the decree against the legal representative

of the deceased judgment-debtor under section 50;

(c) power to order attachment of a decree.

(3) A Court passing an order in exercise of the powers specified in sub-section (2) shall send a copy thereof to the Court which passed the decree.

(4) Nothing in this section shall be deemed to confer on the Courts to which a decree is sent for execution any of the following powers, namely-

(a) power to order execution at the instance of the transferee of the decree;

(b) in the case of a decree passed against a firm, power to grant leave to execute such decree against any person other than such a person as is referred to in clause (b), or clause (c), of sub-rule (1) of rule 50 of Order XXI."

10. In this case, the *"court which passed the decree"* was the Delhi High Court, i.e. the Court which made the arbitral award in question a rule of Court under Section 17 of the Arbitration Act, 1940. In execution proceedings pursuant to the decree, which were also seized of by this Court, the matter was transferred under Section 39, CPC given that the assets sought to be utilized in the execution of the decree were situated in the jurisdiction of the Calcutta High Court. However, in the proceedings before the Calcutta High Court the question of the liability of Mr. Jhunjhunwala came to the fore. Concededly, Mr. Jhunjhunwala did not appear in his own name under Rule 6 or 7 of Order XXX, nor did he submit to on the pleadings, nor was he adjudged as a partner, nor was he served with a summons as a partner at any stage of the proceedings. The mandate of Order XXI, Rule 50 (1) clearly excluded automatic recovery against his assets. Rather, the Union of India, the judgement-holder, was required to obtain leave under sub-rule 2. Here, Mr. Jhunjhunwala's argument that sub-rule (2), if read as against sub-rule 1, does not refer to partners of the firm, but to third persons, is unappealing. Clauses (b) and (c) of sub-rule 1 do not exhaust all categories of partners that may be proceeded against, such that it could be said that sub-rule (2) only deals with third persons. Indeed, clauses (b) and (c) only concern certain categories of partners who have either admitted liability,

or have been put on notice and failed to tender a reply, such that they can be proceeded against. Other individuals, or more specifically, other partners, may be proceeded against under sub-rule (2) after their liability is established in the manner provided for in the sub-section. Consequently, Mr. Jhunjhunwala's second argument also falls, i.e. given that he was not party to any proceedings before the arbitral tribunal, or the decreeing Court, executing the decree against his assets would amount to creating liability, which is an impermissible activity for an executing court. This argument also, in the Court's opinion, misses the core of Rule 50, the import of which is to ensure if individual partners have not been involved in the proceedings, -in which case they would be covered under clauses (b) or (c) of sub-rule 1, -their assets may still be utilized in the execution proceedings if the 'court which passed the decree' grants leave after hearing the individual on the question of his liability vis-a-vis his relationship with firm. That is precisely the stage of proceedings that this case is currently at, i.e. determining whether Mr. Jhunjhunwala was a partner at the time of signing the contract between the judgement-debtor firm and the Union of India, such that – in consonance with the general principle laid out in Section 25 of the Partnership Act – he can be made personally liable. Accordingly, unless the claim of the decree-holder that the decree should be passed against the partners personally has been decided against the decree-holder by the decreeing court, in which case the executing court is bound by the limitation placed on the decree itself and cannot execute it against the partners personally, the same question can be raised through an application under rule 50(2). (See, **Topanmal Chhotamal v. Kundomal Gangaram and Ors.** AIR 1960 SC 388.)

11. In this regard, the learned Single Judge relied upon the partnership deed submitted by the judgement-debtor firm to the Railway Board vide letter dated 11.05.1987 at the time of awarding the contract, which names Mr. Jhunjunwala as a partner. This established his liability at the relevant time, i.e. at the time of signing the contract, and is sufficient cause to grant leave. Neither before the learned Single Judge, nor in the present appeal proceedings has Mr. Jhunjhunwala raised any questions as to this document, or even generally as to his partnership at the time of signing the contract, and thus, his liability.

12. Rather, the primary argument put forward by Mr. Jhunjhunwala is that the present application seeking leave under sub-rule (2) has not

been made to the 'court which passed the decree', and thus, being improperly made, is liable to be dismissed. This argument, however, is not persuasive. The Court which passed the decree in this case was this Court, in its original jurisdiction under Section 17 of the Arbitration Act, 1940. The present execution application was filed before a Single judge of this Court. The argument that the proper forum for the application is the original side of this Court which passed the decree, and not another bench of this Court hearing execution matters draws a non-existent distinction. Sub-rule (2) requires only that the application be filed before the Court which passed the decree, and does not draw any further distinctions. Here, the application was made to the learned Single Judge as the Court which passed the decree, and was seized of the execution proceedings. Furthermore, to claim that this Court, after transferring the decree, does not retain the power to grant leave, is contrary to the express terms of Section 42, which states that the transferee court does not obtain the power to grant leave to execute such decree against any person other than such a person as is referred to in clause (b), or clause (c), of sub-rule (1) of rule 50 of Order XXI. Rather, the necessarily implication must remain that such a power is retained by the Court which 'passed the decree', and in this case, the Court which transferred the matter, i.e. this Court. The reliance placed here on the decisions in **Kalu Ram** (supra) and **Pottiswami** (supra) is incorrect, as in those cases the Court to which the application seeking leave was made was the transferee court, which is not the 'court which passed the decree' [as is made amply clear by Section 42(4)(b)] which in this case is the Calcutta High Court, and not this Court.

13. The appellant had sought to urge that there was no material to arrive at a finding that he could be fastened with the liability of the firm,

given that there had been a reconstitution. In this regard, the Court observes that this contention had been examined by the learned Single Judge, who took into consideration precisely the same objection, made on behalf of the other judgment debtors and the firm and held that there was nothing to indicate that the document of 1992, relied upon in that regard, had ever been notified or put to the decree holder Union of India. The learned Single Judge referred to provisions of Section 32(2) of the Partnership Act, which provides that a retiring partner may be discharged from any liability to a third party for acts of the firm done before his retirement *"by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement."* This Court is in full agreement with the reasoning of the learned Single Judge, as there is no material forthcoming to substantiate that the appellant ever mentioned to the Union of India, let alone showed that any implied agreement could be inferred through its conduct with him, about its awareness of the arrangement. Therefore, he continued to remain liable for the acts of the firm, of which he was undoubtedly a partner when the transaction with the Union of India took place, which led to its (firm's) liability, crystallizing in the award that later culminated in a decree of this Court.

14. In the light of the foregoing reasons, this Court finds no reason to interfere with the impugned judgment and order of the learned Single Judge. The appeal being devoid of merit is accordingly dismissed without any order as to costs.

ILR (2014) I DELHI 70
W.P. (C)

SUNIL KUMAR **....PETITIONER**

VERSUS

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

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 6523/2013 DATE OF DECISION: 10.10.2013

Service Law—Disciplinary proceedings—Petitioner, on Departmental Inquiry found guilty of having assaulted the fellow employee causing grievous injuries and also the previous three punishments and the allegation of his being habitual of misconduct—Disciplinary Authority, accepting the inquiry report awarded punishment of removal from service-appeal rejected-revision rejected—Challenged in writ—Held, finding of guilty on the charge of assault on fellow employee stands supported by evidence on record—However, as regards the previous misconduct, the same was the allegations that he overstayed the leave unauthorizedly for which minor penalties were imposed on him—In view of the circumstances of the petitioner, respondents directed to reconsider the proportionately of sentence, though upholding the finding of guilt.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. S.N. Kaul and Mr. R.S. Kaushik, Advocates.

FOR THE RESPONDENTS : Ms. Barkha Babbar, Advocate for UOI.

RESULT: Writ Petition Disposed of.

GITA MITTAL, J. (Oral)

C.M.No. 14181/2013

Exemption is allowed subject to just exceptions.

Application is disposed of.

W.P.(C) 6523/2013

1. By way of the present writ petition the petitioner has assailed the order dated 18th January, 2012 passed by the disciplinary authority accepting the enquiry report dated 27th December, 2011.

2. The petitioner was employed as a Sweeper in the CISF as back as on 01.08.1994. It is not disputed that he was awarded punishment for overstay on 31st July, 2001, 8th May, 2008 and 9th August, 2010. In this background, with regard to the incident occurred on 25th October, 2011, disciplinary proceedings was conducted against the petitioner pursuant to the memorandum of charges dated 8/9th November, 2011 wherein the following charges under Rule 36, CISF Rules, 1969 were levelled against the petitioner:

"Article of Charge-I

On 25.10.2011 at about 2225 hrs, while on two days Medical Rest member of the Force No.9413400023 constable/sweeper Sunil Kumar beat constable/sweeper Phool Singh after coming inside the unit's Barrack and caused him grievous injury on his face. It amounted to misconduct, irresponsible behaviour and gross indiscipline.

Article of Charges-II

The member of the Force No.941340083 constable/sweeper Sunil Kumar had been awarded three minor punishment during his past service. He did not improve his conduct despite been awarded these punishment. He is habitual of doing acts of misconduct." 3. In his reply, the petitioner had taken up the stand that he was on medical rest on the fateful day i.e. on 25th October, 2011 and therefore denied involvement in the incident which was the subject matter of the first charge.

4. In the disciplinary proceedings, the respondents examined ten witnesses. No defence was led by the petitioner. The Enquiry Officer submitted a report dated 27th December, 2011 holding that both the charges taken were proved against petitioner. This report of the Enquiry Officer was accepted by an order dated 18th January, 2012 of the disciplinary authority whereby the punishment of penalty of removal from service was also imposed against him. The petitioner filed a statutory appeal assailing the order of the disciplinary authority which was rejected

by an order passed on 31st May, 2012.

5. The revision to the Inspector General of the CISF was also rejected by the order passed on 31st August, 2012.

6. Before us the petitioner has challenged the orders of the disciplinary authority, appellate authority and revisionary authority primarily on the ground that the same were supported by no reliable evidence. We find that so far as the first charge is concerned, the prosecution has examined the victim Phool Singh as PW10 who has unequivocally supported the prosecution and his testimony could not be shaken by the petitioner in the cross-examination.

7. So far as occurrence is concerned, apart from PW10 Phool Singh, PW1- SI Rulia Ram has supported the same inasmuch as he has reached the spot hearing the noise created by Constable Phool Singh. PW1 SI/Exe Rulia Ram also clearly stated that he had seen Ct./Swpr. Sunil Kumar (petitioner herein) running from the room of Const.Phool Singh and that he ran away on his scooter.

8. It is trite that the statement of the victim, if found true, can be relied upon to support the conviction even in a criminal case. There is no reason at all to doubt the statement made by Const.Phool Singh. The same is supported by contemporaneous evidence not only by SI/Exe.Rulia Ram but also by PW3 Daya Ram who reached the spot and saw Const.Phool Singh in an injured condition. PW9 HC/GD B.S.Singh has also deposed to the same effect.

9. Learned counsel for the petitioner has vehemently urged that Const.Phool Singh deserves to be disbelieved for the reason that he did not get a medical examination conducted on the same date. This witness has given an explanation for the same. It is has been pointed out that the incident had occurred in the late hours of the night of 26th October, 2011. The hospital was closed on account of it being a gazetted holiday as it was the Diwali festival; The victim has stated that he was given first aid treatment in the Unit Lines and that he had gone to the hospital on 27th October, 2011. In this regard, the NHPC doctor has confirmed the injuries suffered by Const.Phool Singh vide a prescription slip no.11820 dated 27.10.2011 which was proved in the enquiry as Ex.PW-10/Exb-I & Exb-II. Our attention has been drawn to this prescription slip as well,

which contains details of the injuries which PW10 Phool Singh had suffered at the ends of the petitioner.

10. It is also noteworthy that in the cross-examination of the prosecution witnesses, the petitioner has clearly admitted his presence at the spot when he has questioned PW1 SI/Exe Rulia Ram to describe the clothes which he was wearing at the time of incident. Similar questions to the other witnesses also support the presence of the petitioner at the spot on fateful night. PW8 Const. Kuldeep Singh has also categorically stated that the petitioner had gone to the barrack to drop him on his scooter.

11. In view of the evidence which has been led by the prosecution against the petitioner, we are satisfied that the finding of guilt on the first charge of the petitioner is clearly supported by the evidence on record and the challenge thereto by the petitioner on the ground that it was based on no evidence is misconceived and hereby rejected.

12. So far as second charge is concerned, learned counsel for the petitioner has urged that the petitioner was penalised in the year 2001, 2008 and 2010 on the allegations that he had unauthorizedly overstayed leave. It is submitted that minor penalties were imposed on him on all these three occasions for these charges.

13. The petitioner is stated to have completed 18 years when he was removed from service pursuant to the order dated 18th January, 2012. It is submitted by learned counsel for the petitioner that the petitioner has ailing wife and two school going children. The petitioner is stated to

be also supporting his aged and ailing parents and the entire family is stated to be at the verge of starvation. It is submitted that apart from the alleged incident there is no other allegation on the petitioner of misbehaviour with any force personnel. It is contended that in these circumstances, the punishment which has been imposed upon the petitioner causes grave injustice to him and same is disproportionate to the allegations which were made against him.

A prayer is made that the concerned authorities may be directed to examine the case of the petitioner on the aspect of proportionality of the punishment, even if the charges against him were held to be proved.

14. In view of the above, while upholding the finding of guilt of the petitioner by the orders dated 18th January, 2012, 31st May, 2012 and 31st August, 2012, we set aside the order dated 31st August, 2012 of the Revisional Authority to the extent it sustains the punishment imposed on the petitioner and direct as follows:

(i) The respondents shall re-consider the proportionality of the sentence which has been imposed upon the petitioner.

Appropriate orders in this regard be passed within eight weeks from today and be communicated to the petitioner.

(ii) In case, the revisional authority maintains the order of sentence, the petitioner may seek from the respondents grant of relief of any other kind, say in the nature of compassionate allowance for instance under Rule 41 of the CCS (Pension) Rules, if the same is admissible, and consider the same in the light of settled principle.

The writ petitioner is disposed of in the above terms.

ILR (2014) I DELHI 75
W.P. (C)

SURAJ BHAN AND ORS. ....PETITIONERS

VERSUS

UOI AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 6550/2013 DATE OF DECISION: 11.10.2013

Service Law—Petitioners challenged denial of benefit under ACP Scheme on the ground that if they had qualified SUOCC course after completion of 24 years of service, then they would be eligible for second financial upgradation under ACP Scheme from completion of the said promotional course and not from completion of 24 years of regular service—Held, since all the petitioners had completed 24 years of regular service without any promotion in past 12 years and the respondents did not grant second financial upgradation on the ground that under ACP scheme a person is required to fulfill all the norms required in normal promotion, on the grounds that the petitioners had not undertaken the pre-promotional cadre course despite completion of 24 years of service, in view of the law laid down in Hargovind Singh case, petitioners could not be deprived of financial upgradation—Further held, since the petitioners were detained for undertaking SUOCC course only in 2005 and they successfully undertook the same between October 2005 to January 2006, petitioners could not be denied all their rightful dues till date—Also, held respondents having not fulfilled their responsibility to detain the petitioners for pre-promotional cadre course, they cannot be allowed to withhold the benefits entitled to the petitioners—Respondents directed to grant second financial upgradation from the date they have completed 24 years of regular service.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONERS : Mr. Ankur Chibber, Advocate.

FOR THE RESPONDENTS : Mr. Himanshu Bajaj, Advocate.

CASES REFERRED TO:

1. *Jaipal Singh and Others* vs. *Union of India and Others.* WP(C) No. 5539/2013.
2. *R.S Rathore* vs. *UOI and others* being W.P.(C)1506/2012.
3. *Tulsi Das* vs. *UOI and others* being W.P.(C) 1881/2012.
4. *Hargovind Singh* vs. *Central Industrial Security Force* WP(C) No.6937/2010.
5. *Bhagwan Singh* vs. *UOI & Ors.* WP(C) No.8631/2009.
6. *Jaipal & others* vs. *UOI* being W.P.(C) No. 5539/1993.

RESULT: Writ Petition Allowed.

GITA MITTAL, J. (Oral)

1. The petitioners in these cases seek quashing of Signals dated 28th May, 2013 and 3rd July, 2013 whereby the respondents have denied benefit to the petitioners under the ACP Scheme on the ground that if they have qualified SUOCC Course after completion of 24 years of service then they will be eligible for the 2nd financial upgradation under the ACP Scheme from the completion of said promotional course and not from completion of 24 years of regular service. The petitioners have further sought for directions to the respondents to grant 2nd financial upgradation to the petitioners as provided under the ACP Scheme on completion of 24 years of regular service.

2. The undisputed facts in the instant case necessary for W P (C) adjudication of the writ petitions are noticed herein after. As per the ACP Scheme in order to be eligible for grant of 2nd financial upgradation, an employee is required to have completed 24 years regular service from the date of his appointment to a post without any promotion in the last 12 years and he should have successfully undertaken the pre-promotional cadre course.

3. Admittedly all the petitioners had completed their 24 years of regular service without there being any promotion in the last 12 years.

However, the respondents did not grant the 2nd financial upgradation to the petitioners on the ground that under the ACP Scheme a person was required to fulfill all the norms required for a normal promotion and unless and until the same were fulfilled the said financial benefits could not be given to the individual. In the instant cases, the respondents took the plea that the petitioners had not undertaken the pre-promotional cadre course despite completion of 24 years of service and thus, the 2nd financial benefit could not be granted to them. It was also stated that the said pre-promotional cadre course could be undertaken by the petitioners for no fault of theirs but for the reason that the respondents for their own fault did not detail the petitioners to undergo the said pre-promotional courses.

4. The petitioners aggrieved by the illegal acts of the respondents made various representations to the respondents. The respondents after considering the above representations of the aggrieved persons and after analyzing the said issue, passed an order dated 6th March, 2012 issued by the office of Directorate General, CRPF which reads as under:

"Sub: Grant of Financial Benefits under MACP Scheme- Clarification.

A case was referred to the MHA seeking clarification in connection with grant of financial up-gradation under MACP scheme to the Constables and fixation of pay thereupon. The issue was examined in MHA, DoPT and Department of Expenditure (MoF). After due examination the Ministries have clarified the position as under:

A) The case of Cts who have qualified promotional course (i.e. SCC) and allowed 1st ACP benefit from the next date of termination of SCC qualified by them may be reviewed and they may now be granted financial up-gradation under ACP and MACP schemes as under:

Sl. No.	Categories of CTs	Modalities for Grant of Financial up-gradation benefits under ACP/ MACP Schemes
1)	CTs who qualified promotional course within maximum permissible three	Since these CTs were detailed on promotional course after completion of three years of service, the 2nd financial upgradation under ACP Scheme (on 1st August 1999) from the date of completion of 12 years of service subject to fulfillment of other eligibility conditions, as there is no fault on their part for late detailment on promotional course. Financial up-gradation under MACP will be admissible to such CTs wherever they complete 20/30 years of continuous regular service in the same 10 years continuously in the same Grade Pay whichever is earlier."

chances.

5. Pursuant to the said clarification issued by the Directorate General office in consultation with Ministry of Home Affairs, the respondents passed an order dated 1.2.2013 whereby the 2nd financial up-gradation was granted to petitioners from the date they had completed 24 years regular service from the date of their appointment. Pursuant to the said order, the respondents had also issued an order dated 10th April, 2013 showing the actual fixation of pay to the petitioners after grant of 2nd financial up-gradations.

6. Despite having issued the above orders after issuance of clarification by the Directorate General office as well as the Ministry of Home Affairs, the respondents issued the impugned Signals dated 28th May, 2013 and 3rd July, 2013 whereby it was informed that a Head Constable/GD who qualify SUOCC Course before completion of 24 years regular service will be eligible for financial up-gradation from the date of completion of 24 years regular service. However, if he has qualified SUOCC after completion of 24 years regular service, then he is eligible for the financial up-gradation from the date of said promotional course viz-a-viz other conditions.

7. Learned counsel has also emphasized that pursuant to the order dated 6th March, 2012, the respondents had granted the said 2nd financial upgradation to the petitioners vide its order dated 1st February, 2013 and also fixed their pay as per order dated 10th April, 2013. Having given the

said benefit, the respondents cannot withdraw the said benefit without issuing a show cause notice or giving an opportunity to the petitioners to be heard.

8. In the above background, the learned counsel for the petitioners has argued that the impugned signals issued by the respondents is in direct contradiction to the letter dated 6th March, 2012 issued by the Directorate General office in consultation with Ministry of Home Affairs wherein it has categorically been decided that since these Constables (Cts) were detailed on promotional course after completion of more than 12 years of service, they may be allowed 1st financial up-gradation under ACP Scheme (of August 1999) from the date of completion of 12 years of service subject to fulfillment of other eligibility conditions, as there is no fault on their part for late detailment on promotional course. Learned counsel for the petitioners had argued that once the respondents have taken the said decision for grant of 1st financial up-gradation, there can be no different yardsticks for grant of 2nd financial upgradation.

9. It is also submitted that the respondents cannot be allowed to take benefit of their own wrong. He has submitted that the reason for non-completion of pre-promotional cadre course of the petitioners before completion of 24 years service is due to the reason that the respondents had not detailed the petitioners for the said course. Having not done so, the respondents cannot be allowed to withhold a benefit which the petitioners were otherwise entitled to on completion of 24 years of service only on the ground that they had not completed the pre-promotional cadre course. A statement is made by learned counsel for the petitioners stating that the petitioners had never been offered any opportunity to undergo the SUOCC Promotional Cadre course for which they had expressed their unwillingness. Mr. Ankur Chhibber, learned counsel for the petitioners clarifies that the petitioners underwent the SUOCC Promotional course between the period w.e.f. October 2005 to January 2006 in the very first attempt.

10. In support of his contention the learned counsel for the petitioners has placed reliance on the pronouncements of this Court vide order dated 15th February, 2011 reported in WP(C) No.6937/2010 **Hargovind Singh V. Central Industrial Security Force** and vide order dated 6th September, 2013 in WP(C) No. 5539/2013 **Jaipal Singh and Others v.**

Union of India and Others. The petitioners in these cases also were seeking restoration of their second financial up-gradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial up-gradation with effect from 1st September, 2006. It is noteworthy that the petitioner was granted the second up-gradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in Para Nos. 5 and 6 of the judgment in Hargovind Singh (supra) which was to the following effect:

> "5. The undisputed position is that the petitioner was granted the benefit of the 2nd up- under the ACP scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus, the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2009 for which he expressed his willingness to attend the course on 29.10.2004."

11. This very contention is urged before us just as in the present case the petitioner **Hargovind Singh** also did not get an opportunity to undergo the PCC course on the date he became eligible for grant of further financial up-gradation which was withdrawn. On this aspect in **Hargovind Singh** (supra) the Court has ruled on the respondent's contention urged before us as well, and commented upon the responsibility of the department to detail the person for undertaking the promotional course. In this regard observations made in Para 8 to 14 of the judgment are being relied upon which reads as under:

> "8. Learned counsel for the respondents would urge that the issue at hand is squarely covered against the petitioner as per the judgement and order dated 30.9.2010 disposing of WP(C) No.8631/2009 **Bhagwan Singh Vs. UOI & Ors.**
>
> 9. A perusal of the decision in **Bhagwan Singh's** case (supra) would reveal that the petitioner therein was working as a Head

> Constable and was denied the second up-gradation under the ACP scheme on account of the fact he had consciously refused to undergo the mandatory promotional courses which would have made him eligible to be promoted as an Assistant Sub-Inspector and, in writing, had given that he foregoes the right to be promoted.
>
> 10. The Division Bench noted paragraph 10 of the ACP Scheme which reads as under:
>
> "10. Grant of higher pay scale under the ACP scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently. In regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribed in the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second up-gradation under the ACP scheme only after he completes the required eligibility service/period under the ACP scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial up-gradation after rendering 12 years of regular service and after 2 years therefrom if he refused regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second up-gradation under the ACP scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial up-gradation (2+10) in that higher grade i.e. after 25 years (12+2+1+10) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.
>
> 11. In the instant case, facts noted hereinabove, would show that the respondents offered to detail the petitioner for the mandatory PCC course to be held with effect from 15.11.2004.

We shall deal with the effect of the petitioner not joining the said course, but relevant would it be to note that the petitioner's entitlement to the to the ACP benefit accrued with effect from the month of November 1999 and it is not the case of the respondents that till they offered petitioner the chance to clear the PCC course commencing with effect from 15.11.2004, any earlier opportunity was granted to the petitioner to attend the course.

12. It is an admitted position that the department has to detail persons for undertaking the promotion cadre course and attending said courses is not at the option of the officers concerned.

13. If that be so, the respondents cannot take advantage of not discharging their obligation which precedes the obligation of the incumbent to clear the promotion cadre course. The prior obligation of the department is to detail the person concerned to undertake the promotion cadre course.

14. As regards petitioner's willingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village."

12. Before us, it is an admitted position that the petitioners became eligible for the financial upgradation on completion of 24 years of regular service and pursuant to the clarification dated 6th March, 2012, the said benefit was indeed granted to the petitioners vide order dated 1st February, 2013 and 10th April, 2013. So far as they being given opportunity for completing the SUOCC course is concerned, they have been detailed for the said course after completion of 24 years of regular service and all of them have successfully completed the same."

13. Undoubtedly for the reasons recorded in **Hargovind Singh** (supra), the petitioner could not be deprived of the financial up-gradation for this period. It is apparent from the working of the ACP scheme by the respondents that a person is entitled to the financial benefit on the

date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in **Hargovind Singh** (supra) as well as the present case. The completion of the promotional cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion.

14. The observations of the Division Bench in **Hargovind Singh** (supra) are in consonance with the facts of the present case. The present petitioners were detailed for undertaking the SUOCC Course only in October 2005 . It is an admitted position that the petitioners accepted this offer and had successfully undertaken the SUOCC Course which was conducted between October 2005 to January 2006. In this background, the petitioners cannot be denied of their rightful dues till date.

15. The respondents hold a person entitled for undergoing SUOCC course for several years when the employee is not offered an opportunity to undergo the said course even though he may be willing and able to do so. Having not allowed them to undergo the said course the respondents cannot be allowed to take away the benefit of second financial up gradation to the petitioner under the ACP scheme.

16. Admittedly it is the responsibility of the respondents to detail the individual for the pre promotional cadre course. Having not done so the respondents cannot be allowed to with hold the benefits entitled to an individual for their own faults.

17. The said issue has also been adjudicated by various pronouncements of this Court which are as follows:-

(i) **R.S Rathore Vs UOI and others** being W.P.(C)1506/2012;

(ii) **Tulsi Das Vs UOI and others** being W.P.(C) 1881/2012 and

(iii) **Jaipal & others Vs. UOI** being W.P.(C) No. 5539/1993.

18. In view of the forgoing, we direct as follows:-

(i) a writ of certiorari is issued quashing signals dated 28th May, 2013 and 3rd July, 2013.

(ii) the respondents are directed to grant the 2nd financial

upgradation to the petitioners from the date they had completed 24 years of regular service

(iii) the respondents are directed to fix the pay of the petitioners and pension of the petitioners who may have retired pursuant to the grant of 2nd financial upgradation within a period of six weeks from today. The order passed by the respondents shall be communicated to the petitioners. The arrears in terms of this order shall be released to the petitioners within a period of four weeks thereafter.

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

ILR (2014) I DELHI 84
W.P. (C)

UNION OF INDIA **....PETITIONER**

VERSUS

NISHA PRIYA BHATIA **....RESPONDENTS**

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

W.P. (C) NO. : 3704/2012 & CM APPL. NOS. : 7772, 7774, 8894, 9639 & 10289/2012 **DATE OF DECISION: 21.10.2013**

Constitution of India, 1950—Article 226—Rule 9—Research & Analysis wing (Recruitment, Cadre & Service) Rules, 1975—Respondent was Class I Executive cadre officer in the Cabinet Secretariat [also known as the R&AW]—Respondent alleged sexual harassment at workplace sometime in 2007—Constitution of two Committees reports of the Committee (dated 19.05.2008 and 30.09.2008), although not direct subject matter of these proceedings-

allegations of sexual harassment could not be substantiated—The Union Government under Rule 135(1)(a) of the Rules, compulsorily retired the respondent on the ground of her being exposed as an Intelligence Officer—Respondent challenged the order of compulsory retirement in O.A. 50/2010 the CAT quashed the said order of compulsory retirement and directed consequential relief to be granted to her—Union Government questioned the decision in the CAT in W.P. (C) 2735/2010 ("the UOI's 2010 petition")—On 3.05.2010, Court, issued notice to show cause to the respondent; stayed the order of the CAT—On 10.05.2010, an order fixing the respondent's provisional pension under Rule 69 of the CCS (Pension) Rules, 1972 ("Pension Rules") based upon her pay drawn as on 28.08.2008, with effect from 19.12.2009, issued—Respondent contested the order of provisional pension before CAT by filing O.A. 1665/2010—Contending that the submission of UOI in ("the UOI's 2010 petition") alleging unauthorised absence between 29.08.2008 and 26.11.2009 was not justified—Respondent also filed O.A. 1967/2010, urging grounds similar and identical to those in O.A. 1665/2010—Respondent's aforesaid application—Treatment of the period between August 2008 and November 2009 as unauthorized absence was not justified—Disposed of by common order dated 28.04.2011—On 29.09.2011 respondent filed O.A. 3613/2011—CAT, by its impugned order allowed O.A. 3613/2011 on 11.05.2012 directing the regularization of two spells of alleged unauthorised absence-enjoining the Government from initiating disciplinary proceedings against the respondent-directing the Union Government to revise the respondent's pension with consequential benefits-hence this present writ petition.

Held: the respondents had initiated sexual harassment complaint-dismissed due to lack of evidence but made

certain adverse remarks against the Government for failure to comply with Vishaka guidelines-these issues although not directly related, are an important background for present dispute—Hon'ble Court took note of the hostile work environment faced by respondent-No period of unauthorised absence was proved-there was no grave misconduct that would disentitle the retired respondent from pension benefits—No attempt or effort to issue a charge sheet or consider that such absence amounted to "grave misconduct".

Important Issue Involved: (A) Any law made or action taken by the employer, corporate statutory or instrumentality under Article 12 must act fairly, justly and reasonably. Right to fair treatment is an essential inbuilt of natural justice.

(B) "Grave misconduct" or grave negligence can, in given cases included unauthorized absence of a public servant from duties, or his or her refusal to discharge the functions assigned or attached to his office. However, whether every omission to report for duties is "grave "misconduct or negligence, would depend on the circumstances appearing from the record.

(C) Power of the President to withhold pension is hedged with a condition precedent that a finding should be recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sudhir Walia with Ms. Varsha Juneja & Mr. Akhil Sachar, Advocates.

FOR THE RESPONDENTS : Ms. Nisha Priya Bhatia, Respondent in person.

CASES REFERRED TO:

1. *Vishakha* vs. State of Rajasthan [1997(7) SCC 323].
2. *Delhi Transport Corporation* vs. *DTC Mazdoor Congress* AIR 1990 SC 101.
3. *D.V. Kapoor* vs. *Union of India* AIR 1990 SC 1923.
4. *D.S. Nakara* vs. *Union of India* 1983 (2) SCR 165.
5. *State of Punjab* vs. *Gurdial Singh,* AIR 1979 SC 319.

RESULT: Writ Petition dismissed.

S. RAVINDRA BHAT, J.

1. In this writ petition, the Union Government feels aggrieved by an order of the Principal Bench of the Central Administrative Tribunal (hereafter called "the CAT") in O.A. No. 3613/2011. The CAT allowed the respondent/petitioner's (hereafter called "the respondent" or "Ms. Bhatia") application and directed the regularization of two spells of alleged unauthorized absence and also directed the Union Government to revise the respondent's pension with effect from 19.12.2009 with consequential benefits.

2. The facts necessary for deciding the case are that the respondent was a 1987 batch Class I Executive cadre officer in the Cabinet Secretariat [also known as the R&AW]. The events which led to her compulsory retirement with effect from 18.12.2009 have to be recapitulated. The respondent had alleged sexual harassment at the workplace sometime in 2007. This led to the constitution of two Committees. Although the reports of these Committees are not the direct subject matter of these proceedings, yet the reports of the Committee (dated 19.05.2008 and subsequent report of another Committee dated 30.09.2008) indicated that the allegations of sexual harassment could not be substantiated. On 08.12.2009, the Union Government, by invoking its powers under Rule 135(1)(a) of the Research & Analysis Wing (Recruitment, Cadre & Service) Rules, 1975, compulsorily retired the respondent on the ground of her being exposed as an Intelligence Officer and thus becoming unemployable in the organization. The respondent in the present case

challenged the order of compulsory retirement in O.A. 50/2010. After considering the arguments of the rival contentions, pursuant to notice issued to the respondents, the CAT quashed the said order of compulsory retirement and directed consequential relief to be granted to her. The Union Government, in turn, questioned the decision of the CAT before this Court in W.P.(C) 2735/2010. This Court, by an order dated 03.05.2010, issued notice to show cause to the respondent and in the meanwhile, stayed the order of the CAT, directing the respondent's reinstatement. The Court, however, clarified that,

> ".....This, however, will not prejudice the right of the respondent to claim her compulsory retirement benefits in accordance with law after fulfilling the formalities as contemplated under the rules. In case, the respondent claims her retrial benefits, the same be released to her within one week after fulfilling formalities by her. The claim of such retiral benefits by her shall be without prejudice to her rights and contentions....."

3. On 10.05.2010, an order fixing the respondent's provisional pension under Rule 69 of the CCS (Pension) Rules, 1972 ("Pension Rules"), based upon her pay drawn as on 28.08.2008, with effect *from 19.12.2009, was issued. This order stated that the provisional pension should be released,* "from 19.12.2009 till her period of unauthorized absence is regularized." The respondent contested the order of provisional pension to the extent that it treated a substantial period till the date of the order of compulsory retirement as period of unauthorized absence, by filing O.A. 1665/2010 before the CAT. In that proceeding, the respondent argued that the Union Government's submission in W.P. (C) 2735/2010 (hereafter referred to as "the UOI's 2010 petition") about an alleged period of unauthorised absence between 29.08.2008 and 26.11.2009 was not justified. She referred to previous proceedings before the CAT which had dealt with the ongoing proceedings enquiring into the allegations of sexual harassment and certain orders made by the Tribunal and consequently by this Court. The respondent pointed-out that in those proceedings, i.e. O.A. 2687/2008, the Union Government had acknowledged that the respondent joined the office on 06.04.2009. She also contended that she was prevented from attending her office and relied upon an endorsement alleged to have been given by a Commander of the SSB Batallion on 29.08.2008. Prior to filing the said application

(O.A. 1665/2010), the respondent had also made a representation claiming regularization of the period of her absence. That was, however, rejected by the Central Government, through its order of 28.05.2010. She consequently challenged that rejection too, by filing O.A.1967/2010, urging grounds similar and identical to those in O.A.1665/2010.

4. During the pendency of the said applications, O.A.1665/2010 and O.A.1967/2010, an interim/Miscellaneous Application (M.A.) 2115/2010 was moved by the respondent, claiming a direction that all the communications alleged to have been issued from time to time to her to be produced. A reply was filed by the respondents; the CAT disposed of the application on 29.09.2010. In the course of this order, the CAT recorded the statement of counsel for the Union Government in the following terms:

> "XXXXXX XXXXXX XXXXXX
>
> 2. Learned counsel for the respondents states at the Bar, under instructions from the respondents, that no letters other than the aforementioned four (letters dated 01.12.2008, 06.04.2009, 18.02.2010 and 28.05.2010) had been addressed by the official respondents to the applicant herein in the context of the controversy about absence for the period under reference.
>
> XXXXXX XXXXXX XXXXXX"

5. The respondent's original applications, being O.A's 1665/2010 and 1967/2010, claiming that the treatment of the period between August 2008 and November 2009 as unauthorized absence was not justified – were disposed of by common order dated 28.04.2011. The Tribunal noticed that till the date of its order, no charge sheet had been issued to the respondent and the matter was being dragged on. The Tribunal also noticed that in its previous order dated 15.05.2009, in O.A. 2687/2008, the Union Government had been directed to permit the respondent to join duties and that their insistence for submission of the certificate of transfer ought to have been waived. The Union Government's contentions too were noticed. The Tribunal was of the opinion that in view of the disputed nature of the facts and allegations, an appropriate effort to regularize such periods of alleged absence due to delay or inaction on the

part of the Union Government in issuing the Identity Card or correct posting orders ought to be made and thereafter the Union Government, for the unauthorized absence for the same period, issue a charge sheet to the respondent and give full opportunity to the defendant to defend herself. The operative directions in that regard (in O.A.1665/2010 and O.A.1967/2010 made on 28.04.2011) were as follows:

"XXXXX XXXXX XXXXX

30. In view of above facts, both the OAs can be disposed of by giving following directions:-

(i) Respondents shall first make an effort to regularize such period of alleged absence which occurred due to any delay or inaction on their part in issuing the I-Card or correct posting order or due to any court order etc. They shall also consider the attendance register which is stated to have been signed by the applicant, her PA and the Field Officer attached with her.

(ii) After considering the above facts, if respondents still feel that applicant was unauthorisedly absent for some period, they shall issue definite charge sheet to the applicant, giving her full opportunity to defend herself and then decide the period in accordance with law.

(iii) Respondents shall ensure that none of the officers against whom applicant had filed complaints of sexual harassment or corruption are appointed as Inquiry Officer or Presenting Officer because she has an apprehension, they may be biased against her. This direction has been given because justice should not only be done but seem to have been done also.

(iv) In case respondents decided to initiate the enquiry, it shall be completed within 4 months from the date of receipt of a copy of this order subject to co-operation by the applicant.

(v) We permit the applicant to accept the cheques prepared by the respondents, if not already collected, within 15 days, from the date of receipt of a copy of this order, which shall of course be without prejudice to her rights.

XXXXX XXXXX XXXXX"

6. On 29.09.2011, Ms. Bhatia filed O.A. 3613/2011, seeking a direction to the Union Government to forbear from proceeding in any manner and to treat the period of alleged unauthorized absence from 29.08.2008 to 26.11.2009 and that the failure to comply with the previous order of the CAT dated 28.04.2011 should result in regularization of the said period of alleged unauthorized absence from duty, and issue consequential orders. The CAT issued notice; the Union Government entered appearance and filed its response on 14.03.2012. In this reply, the Union Government stated that an in-house enquiry was conducted by Joint Secretary, who submitted its report on 29.09.2011 in which he stated that of the total period of alleged unauthorized absence of 29.08.2011 to 26.11.2009, the period of 07.04.2009 to 09.06.2009 could be considered as on duty. The reply also stated that the Union Government had two options, either to regularize the period of unauthorized absence by granting leave, or issuing charge sheet, after obtaining approval from the disciplinary authority under Rule 9 of the CCS (Pension) Rules. The affidavit went on to state that after examining the issues involved, an order dated 27.02.2012 was issued, leaving it to the Secretary (R) to take appropriate action. The reply inter alia stated as follows:

"XXXXXX XXXXXX XXXXXX

5. That the Secretary(R), Government of India, after considering the entire issue and keeping in view the facts and circumstances of the case has only two options in the matter-

(i) To regularize the period of her absence from 29.8.2008 to 5.4.2009 and 10.06.2009 to 26.11.2009 (total 390 days) as EL of 226 days and remaining by Half Pay Leave, if any, at the credit of Ms. Bhatia. The period from 6.4.2009 to 9.6.2009 may be treated as duty; or

(ii) To get the Departmental Enquiry initiated against Ms. Bhatia under the relevant Pension Rules for the period of her unauthorized absence.

6. These are the limited options available to the respondents. The respondents will like to take a lenient view and go for the first option because of the financial difficulties encountered by the petitioner who has two college going daughters. The respondents

will prefer that Ms. Bhatia comes forward and agrees to get her leave regularized as above. It would enable the Department to release full pensionery dues to which she is entitled to get as per provisions of Rule 135 of R&AW (RC&S) Rules, 1975. Her pensionery dues to which she would become entitled are as follows:

In accordance with the provision of Rule 135 of R&AW (RC&S) Rules, Ms. Bhatia would have drawn Basic Pay of Rs.75,700/- (equivalent to HAG + scale of Rs.75,500 – 80,000/- admissible to DGs in IPS Pay Rules) as on 30.04.2023, i.e., her date of superannuation. Based on that, she is entitled to a basic pension of Rs.37,850/- (50% of Rs.75,700) plus Dearness Relief (DR) thereon w.e.f. 19.12.2009. At present, she has been sanctioned and being paid a provisional pension of Rs.27,770/- plus DR, as admissible. This position will continue as long as the period of unauthorized absence is not settled.

7. However, in case this is not acceptable to the petitioner and she refuses to get her absence from duty regularized the respondent will have no other option but to conduct DE against petitioner. If a DE is held for which there is sufficient material on record to do so, it will drag the applicant to a lengthy departmental proceedings to be held under Rule 9 of CCS (Pension) Rules, 1972 which may take time to complete. The applicant will continue to face financial hardships as she would not get the final pension, till the finalization of the Departmental Enquiry.

8. It is respectfully submitted that this decision has been taken keeping in view the spirit of the order dated 28.04.2011 passed by this Hon'ble Tribunal.

XXXXXX XXXXXX XXXXXX"

7. Ms. Bhatia had filed a miscellaneous application (M.A.), seeking directions for an early hearing and disposal of her original application. In reply, the UOI, after denying certain allegations and underlining that the respondent's applications contained unwarranted allegations against Judges, stated as follows:

"XXXXXX XXXXXX XXXXXX

6.....However, keeping in view the spirit of the order dated 28.04.2011 passed by this Hon'ble Tribunal, the Respondent once again reiterates the averments made in para 5 of the reply dated 14.03.2012. On further consideration of the matter, it is submitted that in furtherance to the offer made earlier in the reply dated 14.03.2012, the Respondent is prepared to treat the period of her absence as "Child Care Leave". In that case, the Applicant (Ms. Nisha Priya Bhatia) shall have no pecuniary loss. As already submitted earlier, the total period of her absence is – 29.08.2008 to 26.11.2009. As per the in-house enquiry conducted by the Jt. Secretary, period from 07.04.2009 to 09.06.2009 (63 days) could be considered as "on duty", giving her the benefit of doubt, after considering the copy of attendance register. In so far as the remaining period from 29.08.2008 to 05.04.2009 and 10.06.2009 to 26.11.2009 (390 days) can be considered as "Child Care Leave"/"Earned Leave."

7. It may be mentioned here that the Applicant (Ms. Nisha Priya Bhatia) has been paid entire salary for the entire period i.e. 29.08.2008 to 26.11.2009 alongwith all other benefits, which she was entitled to.

XXXXXX XXXXXX XXXXXX"

The impugned order

8. The CAT, by its impugned order allowed O.A. 3613/2011 on 11.05.2012. In the course of this order, the CAT noted that the scope of this proceeding was not to decide the veracity or truthfulness of sexual harassment in R&AW or the correctness of certain criminal cases registered against the respondent. It set-out the scope of its jurisdiction as being circumscribed to consider the issue of unauthorized absence for the period 29.08.2008 to 26.11.2009 – minus the period 07.04.2009 to 09.06.2009. The Tribunal observed inter alia that its previous orders have noticed that:

"8... The Tribunal observed that certain spells which were disputed could have been regularized by the respondents on their own, and that the respondents had admitted that the applicant had

formally applied for a new identity card on 28.05.2008, which was issued on 10.02.2009, i.e., after a period of over nine and a half months, and that if the respondents had taken so much period in preparing the identity card, and the applicant had not been allowed to join office for want of the identity card, the said period cannot be attributed to the applicant ..."

9. The CAT, however, held that the respondents were required to make an effort to regularize such period of absence, which could have happened due to delay or inaction on their part in issuing the Identity Card and also issuing Attendance Register. It proceeded to hold that up to 10.02.2009 it could not be alleged that the respondent was on unauthorized absence and that she had valid reasons for not attending office for want of valid Identity Card. It thus accepted the respondent's contentions about her being prevented from joining the duties. The Tribunal also noticed that, *"the applicant also argued that during this period of unauthorised absence she was regularly paid the salary and never during the said period she was called upon to explain as to under what circumstances she had remained absent....."* After repeating that it was not supposed to enquire into the veracity of allegations regarding sexual harassment, the Tribunal noticed that about nine and a half months were taken in preparing the Identity Card; and that a certificate was obtained from a doctor stating that she was a psychiatric patient. These facts were not disputed by the Union Government. Even while refraining from making adverse comments on these and other facts, the Tribunal felt constrained to hold that the respondent was treated indifferently. It also noticed that no enquiry had been initiated and conducted and that in view of the prolonged delay on the part of the Union Government in deciding the issue, it was not justified in treating such period as having been spent on unauthorized absence, thus disentitling the respondent to full pension. In the light of these findings, the Tribunal allowed O.A. 3613/2011, and directed that the period of alleged unauthorized absence from 29.08.2008 to 05.04.2009 and 10.06.2009 to 26.11.2009 should be regularized. The Central Government were also directed not to hold any enquiry and that the respondent's basic pension was directed to be revised upwards, and fixed at Rs.37,850/- with Dearness Relief admissible with effect from 19.12.2009.

The Union Government's contentions

10. The Union argues, in its pleadings and the submissions of Shri P.P. Malhotra, learned Additional Solicitor General, that the impugned order is in error in finding that the Respondent could not attend to her duties, because she was not issued a new I-Card. It argued that these findings are totally contrary to record, because no official of the Organization was ever prevented from entering the office on the ground that his/her I-Card has not been renewed. The Government had issued Circulars whereby the last date of renewal had been extended from time to time. These records were produced before the Tribunal in previous proceedings [O.A. No. 1665/2010 & 1967/2010], which had directed the Department to hold an inquiry regarding these disputed questions of fact by order dated 28.04.2011.

11. It was argued that even though the Tribunal observed that it was not concerned with issues facts relating to allegations concerning sexual harassment and was only going to decide whether the departmental inquiry should be conducted against the Respondent regarding her unauthorised absence from duty, nevertheless, in its impugned order proceeded to return adverse findings on all these issues without any material to support the same and also without calling for any record in order to decide the truthfulness or otherwise of these allegations.

12. It was contended that the Tribunal overlooked that the Union of India had taken a lenient view in the matter, in view of the spirit of the order dated 28.04.2011, and had therefore made an offer in its affidavits dated 14.03.2012 and 30.04.2012, which was declined by the Respondent. The Tribunal erroneously took an adverse view of the lenient stand taken by the Department with regard to the question of unauthorized absence of the Respondent. It is argued that such observations in the impugned judgment were contrary to the directions issued by another Bench of the Tribunal in para 30 of the order dated 28.04.2011. It was emphasized that the Department had decided to take a lenient view and gave first option, i.e. to regularize the remaining period of unauthorized absence, provided the Respondent accepted the same by making a formal application in this regard. It was further submitted that the Union's affidavit before the Tribunal had stated, in its earlier order, that in case the Respondent, did not accept the its proposal, the Department will have no other option, but had to conduct the departmental inquiry against the Respondent. The learned ASG relied on the following ground urged in the

writ petition:

> "It is also important to submit here, that the Department filed yet another affidavit on 30.04.2012, in response to the application (M.A. No. 919/2012) filed by the Respondent herein in O.A. No. 3613/2011, wherein yet another option was given to the Respondent herein that the Department in furtherance of its earlier offer made in its affidavit dated 14.03.2012, is prepared to treat the period of her absence as "Child Care Leave", so that the Respondent does not suffer any financial loss. However, this offer was subject to the Respondent making a formal application to the Department. It is relevant to mention here, that during the course of hearing, the Hon'ble Tribunal had specifically asked the official of the Department, who was present in Court, whether the Department agreed that no departmental inquiry shall be held, in case the Respondent herein made an application for regularizing her period of absence? After obtaining instructions from the Department, the Hon'ble Bench was informed that the Department shall conclude the matter and no departmental inquiry shall be initiated, in case such an application is made by the Respondent herein."

13. The learned ASG submitted that the question regarding the respondent's unauthorized absence could only be decided in a regular departmental inquiry in view of their being disputed question of facts. The Tribunal could not have inquired into the matter and decided complicated question of facts on the basis of affidavits and without affording any opportunity to the Department to produce the relevant record on these issues.

14. The ASG argued that the impugned order is also untenable because it overlooked that after the Respondent's refused of the Central Government's the offer, the latter had requested that it should be permitted to hold the departmental inquiry in terms of directions contained in para 30(ii) of the order dated 28.04.2011. The Tribunal was also informed that in view of the pendency of the fresh O.A. No. 3613/2011, Union Government was advised not to proceed in the matter. By issuing the impugned directions to regularize the period of unauthorized absence, and at the same time refrain from holding any inquiry, the Tribunal had made an order based on conclusions which were contrary to its previous

directions, and based on untenable assumptions. It was contended that a joint reading of the previous order of the Tribunal, and the impugned order clearly revealed that the earlier order nowhere returned findings of fact, contrary to the latter order's underlying assumptions. Furthermore, whether the I-card had been issued after inordinate delay, or whether the allegations of the respondent's being prevented from joining duty were warranted or justified, clearly did not lie within the domain of the Tribunal's jurisdiction. It could also not injunct or prevent the Central Government from exercising its statutory powers and exercising its discretion to hold an inquiry, in terms of Rule 9 of the Pension Rules.

15. It was contended on behalf of the Union Government that the Tribunal erred in overlooking essential facts, which were apparent from the records, produced in the course of hearings in O.A. No. 1665/2010 & 1967/2010 namely:

(a) The I-Card of Ms. Bhatia was to expire on 31.08.2008. She applied for renewal of her I-Card on 21.08.2008 and her application was received in the office on 25.08.2008;

(b) According to instructions, all the officials had to be photographed at the Headquarters for issuance of new series of I-Card. Ms. Bhatia too was informed about the same by letter dated 15.09.2008. *In this very letter, she was also informed about the latest instructions regarding existing I-Card holders being permitted to use their old I-Cards till 30.11.2008;*

(c) Ms. Bhatia did not come forward to complete the necessary formalities for issuance of new I-Card;

(d) The time for renewal of 31.08.2008 was extended till 30.11.2008 by Circular dated 21.08.2008 – All the officials were allowed to use their old I-Cards for entry and exit in the office;

(e) The time for renewal was further extended up to 31.12.2008 by Circular dated 26.11.2008 – All the officials were allowed to use their old I-Cards for entry and exit in the office;

(f) All officials who could not get their new I-Cards, were permitted to obtain "daily pass" for the purpose of entry and exit in the office. No official was denied entry on account of non-issuance of new I-Card;

(g) A temporary I-Card was issued to Ms. Bhatia on 04.02.2009 after she completed the formalities;

(h) A permanent I-Card was issued to her on 10.02.2009;

16. It is argued that no official was prevented or debarred from entering the office on account of non-issuance of new Identity Card as stated herein above. The security officials had been issuing "daily passes" after 31.12.2008 to all those, whose new I-Cards were not ready due to incomplete formalities. It was therefore contended that Ms. Bhatia did not complete the formalities for issuance of new I-Card, even though the period was extended from time to time. It is further submitted that Ms. Bhatia also did not apply for daily pass like other officials after 31.12.2008. It is stated that during the hearing of O.A. Nos. 1665/2010 & 1967/2010, the Union Government had produced the letter dated 15.09.2008 along with the circulars dated 21.08.2008 and 26.11.2008 to demonstrate, that the Respondent's averments were factually incorrect. Those facts were disputed by the Respondent and therefore the Tribunal in Paras 29-30 of the previous order dated 28.04.2011, directed the Central Government to resolve the issue of issuance of I-Card, firstly by making an effort to regularize such period of absence, which occurred due to delay or inaction in issuing the I-Card.

17. The learned ASG argued that the Tribunal, besides proceeding on assumptions, could not have precluded the Union Government from exercising its jurisdiction under Rule 9 of the Pension Rules by a virtual preventive order, as it were. The power under the provision was in public interest, in order to ensure discipline, and no Tribunal or court could substitute its discretion in the matter.

Respondent's contentions

18. The respondent, Ms. Bhatia contends that despite lapse of over 5 months the Central Government ignored the directions issued by the CAT; it neither regularized the period of her alleged unauthorized absence (from 29.08.08 to 26.11.09) did it issue any charge sheet to her to decide the matter in accordance with law. The Central Government could not be permitted to sit over the matter endlessly, and harass her (the respondent).

19. It is argued that on 26.10.07, the respondent complained to the competent authority on the subject sexual exploitation of women employees

in the R&AW and indifference & involvement of Secretary i.e. Shri Ashok Chaturvedi. Her troubles started thereafter; within a month of the complaint and behind her back, staff officer to Secretary obtained a letter dated 26.11.07 from a doctor (Dr. Rajat Ray) at the AIIMS Hospital which *'suggested presence of a Psychiatric illness in the applicant'*. There was a campaign thereafter by Shri Ashok Chaturvedi to project that Ms. Bhatia was a mentally unstable person and guilty of insubordination as well. It was argued that wherever the respondent went with her grievances – to the PMO, the National Commission for Women, the NHRC, or the police – she was turned away with the allegation that she had complained against Shri Ashok Chaturvedi as she was mentally unstable. It is alleged that surveillance was mounted against her and her phones were tapped. She relies on a letter dated 20.04.2010 written to her by the RTI Cell of the Indian Army in response to an RTI application filed by her to the following effect:

> "As per Mr. N.K. Sharma, Jt. Secretary RAW an FIR has been filed against Mrs. Nisha Priya Bhatia for harassing colleagues, destruction of Govt. property and obstruction of work. CCTV's have been installed around her residence to keep a check on her movement as she had in the past, tried to commit suicide in from of the PM's office".

20. Ms. Bhatia submits that efforts by her seniors to keep her out of work started in November, 2007 – within less than a month of her complaint dated 26.10.07. Shri Ashok Chatuvedi, by an order dated 08.11.07, posted her as Director (Trg) and another officer, Shri S.

S. Mohapatra, the then Director (Trg) as Director (PR) Hqrs. However, a week later, by another order dated 16.11.07, the posting of Shri S.S. Mohapatra as Director (PR) was cancelled. This meant two officers were posted against once sanctioned post of Director (Trg) and since Shri Mohapatra was the sitting Director (Trg), the respondent was left, without any work charge. There is only one sanctioned post of Director (Trg) in the R&AW; for this, the respondent relied on a noting dated 08.04.08 by Accounts Officer, (B & F). The respondent, in an institute of which she had been Head, was given a shabby cubicle next to a toilet to sit in. She was compelled to first proceed on leave and then to struggle, complain and represent to the PMO to reclaim her charge of

Director (Trg).

21. Ms. Bhatia states that the restraint imposed upon her due to the posting orders was duly noted by the committee which enquired into her complaint against Shri Ashok Chaturvedi. The committee completed its deliberations on 23.01.09. However, the Cabinet Secretariat, Rashtrapati Bhawan – under whose aegis the said enquiry was conducted – for reasons best known to it – did not supply to her a copy of its report. This compelled her to file court cases. These culminated in a contempt petition in the Supreme Court, i.e. SLP (C) No. 1257/2010. In partial compliance of the interim order dated 04.07.11 in the Special Leave Petition, the Cabinet Secretariat supplied to her 18 pages of enquiry report – after deleting from it names of all witnesses. The respondent relies on the following extract of the report (page 64) that:

> "Ms. Nisha Priya Bhatia was posted back to Gurgaon as Director (Trg) vide order No. 4/SPS/2007(2)8657 dated 08.11.2007. This order also indicated in Gurgaon would take charge as in Delhi. The order was revised vide order No. 4/SPS/ 2007 (2)- 864 dated 16th November 2007 to cancel the posting of So, the exchange of charges, as envisaged in the first order dated 8.11.2007 was not effected.
>
> Therefore, when Ms. Nisha Priya Bhatia was posted back to the Training Institute, she was not able to take change as Director (Trg) as directed in the order dated 08.11.2007 continued as she therefore became a second officer of director level there. The situation must have been certainly awkward for her as she no longer had the power and perquisites enjoyed by her in her earlier stint as Director (Trg) She proceeded on leave on 21 November 2007 this situation was rectified only after was posted out of the Training Institute and she resumed change of Director (Trg) in Gurgaon on 17 December, 2007. The entire situation did create a hostile environment at the work place at a point of time when the complaint of sexual harassment against Shri Ashok Chaturvedi had not even been referred to the Departmental complaints committee. The respondent should have considered these aspects carefully and accorded Ms. Nisha Priya Bhatia a proper environment to work in. The Respondent should have ensured that the order of 8th November 2007 was complied with

> and that Ms. Nisha Priya Bhatia was given the charge of the Training Institute as Director (Trg) as per this Order".

It is submitted that the allegation about the respondent's complaint against Shri Ashok Chatuvedi because she was mentally unstable had started appearing in major newspapers. Her seniors also attempted to initiate enquiries against her for flimsy reasons. Late in the evening 23.07.08, her office was raided. The enquiry report notes this incident in the following words:

> "Complaint
>
> 1. "That in the evening of July 23, 2008, the complainant's office premises were raided by the Department Security Officials from New Delhi, the July 23 raid was a clear attempt by the department to intimate the complainant and humiliate her in front of her colleagues in an institute of which she had been the head for three years. The August 25, 2008 memo by was a cover up for the raid following the complainant complaint to the PM through the ACPR (Appointment Cell Prime Minister's Residence)"
>
> Finding
>
> This incident was indicated by as a security check and not a raid. However, the fact that the information about the check was available to the staff at the institute and not to the Director (Trg) was perhaps not called for."

22. The respondent characterizes the raid as an act of criminal intimidation directed against her. She began to be increasingly concerned and her harassment was aggravated. On 29-08-08, she went to her office in Gurgaon as usual; while lunching in the afternoon, her official car and driver, were suddenly withdrawn by Shri Ashok Chaturvedi. The driver informed her that he had been asked to leave her there and then and report at Hqrs with the vehicle. She hired a taxi to return to her office at the department's Training Institute in Gurgaon. There, counter intelligence officials and jawans of the SSB platoon guard this campus physically prevented her from entering her office premises. She found that counter intelligence officials had entered her office room and established control over her belongings. These were acts of criminal trespass and wrongful restraint. The enquiry report at Annexure A/10

(page 69) notes the subject of her official status henceforth in the following words

> "Complaint
>
> 2. The complaint Committee considered that there were several questions with regard to Ms. Bhatia's official status. This issue was raised when Shri Ashok Chatuvedi appeared before the committee on December 6, 2008.
>
> Finding
>
> When asked whether Ms. Nisha Priya Bhatia was put on compulsory wait in August 2008, Shri Ashok Chatuvedi informed the Complaints committee that the system of compulsory wit is not in vogue in R&AW Ms. Nisha Priya Bhatia posting as Director attached to additional Secretary (Trg) was a posting like any other normal posting in the Department. She was entitled to all the usual facilities, room, staff etc., which was given to her. It is entirely a different matter that she did not avail them by deciding to stay away from office.
>
> Subsequent to the discussion with Shri Ashok Chaturvedi on 06.12.2008 the committee learnt vide communication No. 501/28/2/2008- CA.V dated 18.12.2008 from the Cabinet Secretariat that Ms. Nisha Priya Bhatia was issued an order No. 1/63/2007-T.L 5594 dated 1-12-2008 which was delivered to her by hand on 7-12-2008. As per her letter dated 8-12-2008, Ms. Bhatia indicates that the letter under reference alleges her absence from duty since 29-08-2008 is unauthorized.
>
> It is not clear why the department had taken more than 3 months to seek the explanation of Ms. Nisha Priya Bhatia for unauthorized absence from duty."

Ms. Bhatia submits that this finding is evidence that the Government issued the letter of 1st December 2008 in regard to her absence from duty only after it was queried on the subject by the enquiry committee. She also states that no state agency took cognizance of any complaint, and relies on copies of telegrams dated 30th August, 2008 to the Secretary and Additional Secretary regarding the acts of intimidation and trespass;

she also relies on the letter of 31.08.2008 issued by the Commander of the SSB platoon guarding the Training Campus that her office had been locked by counter intelligence officers. She also relies on a complaint dated 11.09.2008 to the police against such acts of intimidation and an RTI application to CPIO, Delhi Police, of 2010 seeking action taken information.

23. Ms. Bhatia argues that the Central Government's allegations on her absence from duty were baseless, which is also evident from the fact that it was unsure of the period of absence. Though in the order dated 10.05.10 sanctioned her pension, the period of absence was alleged to be 29.08.08 to 26.11.09. In its writ petition dated 24.04.10 before the Court, challenging the CAT's order dated 16.03.10 quashing the order of compulsory retirement, the Union Government contended submits that the period of her absence was 29.08.08 – 09.06.09. Both the said periods of alleged absence from duty conflict with the Government's statement, in its affidavit dated 06.07.09 before CAT, that she joined duties on 06.04.09. It was argued by Ms. Bhatia that she availed all remedies available to her in law to work at her office – and to demand, from law enforcement agencies – that action be taken for wrongfully restraining her from performing her duties as a public servant. Contesting the department's allegation that she was absent from duty from 29.08.08 to 26.11.08, it was argued that the Government would have taken action against the applicant under the CCS (CCA) Rules 1964. The Union Government did not take any action in this context even after the order dated 28.04.2011 of the CAT in O.A. Nos. 1665/10 & 1967/10 directing that it should (i) either regularize the period of her alleged absence or (ii) it should issue a definite charge sheet to her and decide the period of her absence in accordance with law – in case it believed that she had indeed been unauthorizedly absent from duty. The Union Government's reluctance to hold inquiry was remarkable as it had otherwise spared no effort in registering FIR's against her in various police stations – under various provisions of law. It was argued, lastly, that Rule 9 of the Pension Rules authorize inquiries into allegations of misconduct of retired public servants after superannuation in exceptional cases, i.e. where there are grave allegations. Ms. Bhatia stressed that the expression "grave" misconduct have to be interpreted as applicable to rare category of cases where the public servant's conduct is reprehensible, and involves moral turpitude. She submitted that it cannot possibly extent to cases like the present one,

where the Central Government is aware of the alleged misconduct right through the period of service, grants full salary and allowances, issues a compulsory retirement order and does nothing to hold an inquiry thereafter. She emphasized that in this case the Central Government has gone on record, in affidavits to say that no inquiry would be held if she were to apply for leave, which would be granted as a matter of course. Such conduct rules out the possibility of the public servant's action being "grave misconduct", she submitted.

Analysis and conclusions

24. As evident, the scope of the present proceeding is with respect to the correctness of the Tribunal's order, enjoining the Union Government from initiating disciplinary proceedings against Ms. Bhatia, and its direction to release all retirement and terminal benefits.

25. The factual narrative in the preceding part of this order would reveal that Ms. Bhatia had levelled allegations of sexual harassment at the workplace in November 2007. During the course of hearings in the present writ petition, the Union Government had, in compliance with directions made by this Court, produced copies of the two enquiry reports and certain other related documents, in sealed cover. They were opened in court and later, copies of those reports and documents were made available to the court for its consideration.

26. The first committee (the Shashi Prabha Committee) comprised of Shashi Prabha, (Chairperson), MS. Anita Menon M/s P.C. Sethi; Ms. Nirmala Malla; A.K. Chaturvedi; Ms. Anjali Pandey and Ms. Tara Kartha. The conclusions of this committee, in its report, are as follows:

> "There is lack of evidence to support Ms. Nisha Priya Bhatia's complaint against Shri Sunil Uke regarding sexual harassment. Moreover, in her letter dated 24.12.2007 (Annexure –J) Ms. Bhatia has herself withdrawn the complaint against Shri. Sunil Uke. The Department has already repatriated Shri Uke on 30;08.2007 to his parent cadre. While Ms. Bhatia's complainant regarding harassment against Shri Uke could not be substantiated due to lack of any evidence for the same, the statements/ depositions in the CD (Annexure –Q-1 to Q8) of six witnesses indicate strained relations between the two officers. Shri Sunil

> Uke's own submission to the committee (copy enclosed at Annexure – W) reflects a bias against Ms. Bhatia from the beginning based on his earlier posting as Director, CIS and hearsay about Ms. Bhatia as learnt from other officers. His statement that Ms. Bhatia's reputation is well known to one and all in the department". Reveals a prejudiced attitude towards a female Junior colleague.
>
> 2. While there is no proof to substantiate Ms. Bhatia's complaint of sexual harassment against Shri Sunil Uke, circumstantial evidence including Shri Sunil Uke's own submission before the Committee points to Shri Uke's discriminatory attitude towards a junior female colleague which itself violates the spirit of the right to gender equality as laid down by the Hon'ble Supreme Court's guidelines on the issue.
>
> 3. Ms. Bhatia threat to take her own life, allegation of threats to her from other quarters and her behavior on subsequent occasions (Annexure –C) appear to indicate a disturbed state of mind. As such counseling may benefit her.
>
> 4. The Committee tried to go into all further issues raised by Ms. Nisha Priya Bhatia to the limits of its mandate. While the committee acknowledged the difficulties in providing "proof" of sexual harassment at the work place. It was fell that Ms. Nisha Priya Bhatia repealed refusal to appear before the committee despite as many as seven notices to her constrained the committee from making any meaningful assessment of these issues."

27. The Union Government apparently constituted another committee, to enquire into the same allegations levelled by Ms. Bhatia. This committee was tasked with the duty of enquiring into allegations levelled against Shri Ashok Chaturvedi. The committee was comprised of very senior high-ranking retired bureaucrats, and chaired by Ms. Rathi Vinay Jha, (IAS retired). The report did not find evidence to support the allegations of Ms. Bhatia. However the comments made in the course of its report, of 23-01-2009 are damaging. They are extracted below:

> "xxxx xx xxx
>
> (b) The Rules/ Regulations of Government and public sector

bodies relating to conduct and discipline should include rule/ regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender.

(c) As regards private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing orders) Act, 1946.

(d) appropriate work conditions should be provided in respect of work leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee women should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

In view of these requirements Shri Ashok Chaturvedi should have taken serious and immediate note of the complaint by Ms. Nisha Priya Bhatia and had formally enquired into. The remarks reflect his indifferent attitude towards such complaints and situations.

(ii) The said complaint received in early August 2007 was not referred to the Committee on Sexual harassment in the department immediately. There was a delay in referring to the Committee till December 2007.

(iii) The Departmental Committee on sexual harassment was also not properly constituted as per the Visakha guidelines. As per this requirements, the complaints committee should have had a third party as a representative on an NGO or other body who is a familiar with the issue of sexual harassment while the committee sexual harassment was reconstituted on 01.11.2007. Ms. Tara Kartha, National Security Council Secretariat was appointed as a member of this committee only in April 2008. It is not clear in what manner Ms. Tara Kartha qualified to represent an NGO or anybody familiar with the issue of sexual harassment so even at this stage, it was not a committee constituted in accordance with the Visakha guidelines.

(iv) The Complaints Committee noted that despite receiving many notices from the Departmental Committee. Ms. Nisha Priya Bhatia did not appear before them citing the following grounds :

- Need to constitute the Departmental Committee as per Visakha guidelines.

- That her complaint of sexual harassment is also against Shri Ashok Chatuvedi, Secretary (R)

- That the chairperson of the complaints committee is not senior enough to enquire into allegations against Shri Sunil UKe, Joint Secretary and Shri Ashok Chatuvedi, Secretary (R),

In April 2008, she sent to notes to indicate that since the Cabinet Secretariat was inquiring into the matter, she was satisfied with this action.

(v) The Complaints Committee also observed that the Departmental committee on sexual harassment should have questioned the delay in the reference of the complaint of Ms. Nisha Priya Bhatia to them.

Stated that she did not know about the complaint till such as it was referred to the committee headed by her. However as per the admission of one of its members, everyone in the office knew about this incident.

(vi) The Complaints committee also considered that it was necessary for R&AW to have examined the allegations of sexual harassment by Ms. Nisha Priya Bhatia against Shri Sunil Uke while he was still in the department. The Statement by Shri Ashok Chaturvedi that repatriation of Shri Uke to his parent department was in the form of 'punitive action' even before any enquiry was formally held to investigate the veracity of Ms. Nisha Priya Bhatia allegations of sexual harassment reflects non-compliance with the Visakha Guidelines calling for proper formal procedure in enquiry into such cases. Transfer or repatriation of an officer cannot be defined in any way as punitive action, if there was any need to punish Shri Uke after a formal enquiry. If Shri Ashok Chaturvedi held that this transfer/ repatriation was punitive action, it implies that the charge of sexual harassment made by Ms. Nisha Priya Bhatia was correct / established.

An Examination of the report of the Departmental Committee on

sexual harassment submitted in May 2008 established that the complaint By Ms. Nisha Priya Bhatia was not given timely attention or proper inquiry and redressal.

The written comments by Shri Ashok Chaturvedi on file reflect his lack of concern or respect for ensuring immediate attention to the complaint. It also reflects Sh. Ashok Chatuvedi lack of knowledge of the requirements in the visakha guidelines.

Further even when the complaint was referred to the departmental committee on sexual harassment, the secretary (R) did not pay heed to the constitution of the committee as required in the Visakha Guidelines

This act was, therefore, in gross violation of the Visakha Guidelines."

28. The Additional Solicitor General argues – we think rightly – that the reports pertaining to allegations of sexual harassment at the workplace are in respect of the previous period; The Union Government's contention here is upon the fact that the misconduct of unauthorized absence pertains to a later period i.e. 29.08.2008 to 26.11.2009. Whilst there is undeniable merit in this argument, the court at the same time would not completely undermine the relevance of those facts. As is often said, coming events cast their shadows. In this case, the observations of the committee- particularly the Rathi Vinay Jha committee in its report of January, 2009, are damaging to the Union Government which in no uncertain terms stands indicted or not taking timely and adequate action to redress and establish the grievance committee mandated by the Vishaka guidelines (mandated in the Supreme Court judgment in **Vishakha v State of Rajasthan** [1997(7) SCC 323].

29. The objective of putting in place guidelines in Vishaka was to ensure that the workplace was rendered safe, and assure female employees that in the event of similar future behavior, the employer would take prompt and serious action. In that sense, the requirement of taking action is not merely subjective to the incident, or facts of a case, it is to comply with, and sub-serve a wider societal purpose. It also signifies the employer's willingness to take remedial action that would assure the female employees and officials that their workplace is safe from harassment and discrimination. The Supreme Court's later decision in Medha Kotwal

Lele v Union of India added another dimension to the Vishaka judgment; its directions are far reaching. They are reproduced here:

"16. In what we have discussed above, we are of the considered view that guidelines in Vishaka should not remain symbolic and the following further directions are necessary until legislative enactment on the subject is in place.

(i) The States and Union Territories which have not yet carried out adequate and appropriate amendments in their respective Civil Services Conduct Rules (By whatever name these Rules are called) shall do so within two months from today by providing that the report of the Complaints Committee shall be deemed to be an inquiry report in a disciplinary action under such Civil Services Conduct Rules. In other words, the disciplinary authority shall treat the report/findings etc. of the Complaints Committee as the findings in a disciplinary inquiry against the delinquent employee and shall act on such report accordingly. The findings and the report of the Complaints Committee shall not be treated as a mere preliminary investigation or inquiry leading to a disciplinary action but shall be treated as a finding/report in an inquiry into the misconduct of the delinquent.

(ii) The States and Union Territories which have not carried out amendments in the Industrial Employment (Standing Orders) Rules shall now carry out amendments on the same lines, as noted above in clause (i) within two months.

(iii) The States and Union Territories shall form adequate number of Complaints Committees so as to ensure that they function at taluka level, district level and state level. Those States and/or Union Territories which have formed only one Committee for the entire State shall now form adequate number of Complaints Committees within two months from today. Each of such Complaints Committees shall be headed by a woman and as far as possible in such Committees an independent member shall be associated.

(iv) The State functionaries and private and public sector undertakings/ organisations/ bodies/institutions etc. shall put in

place sufficient mechanism to ensure full implementation of the Vishaka guidelines and further provide that if the alleged harasser is found guilty, the complainant – victim is not forced to work with/under such harasser and where appropriate and possible the alleged harasser should be transferred. Further provision should be made that harassment and intimidation of witnesses and the complainants shall be met with severe disciplinary action.

(v) The Bar Council of India shall ensure that all bar associations in the country and persons registered with the State Bar Councils follow the Vishaka guidelines. Similarly, Medical Council of India, Council of Architecture, Institute of Chartered Accountants, Institute of Company Secretaries and other statutory Institutes shall ensure that the organisations, bodies, associations, institutions and persons registered/affiliated with them follow the guidelines laid down by Vishaka. To achieve this, necessary instructions/ circulars shall be issued by all the statutory bodies such as Bar Council of India, Medical Council of India, Council of Architecture, Institute of Company Secretaries within two months from today. On receipt of any complaint of sexual harassment at any of the places referred to above the same shall be dealt with by the statutory bodies in accordance with the Vishaka guidelines and the guidelines in the present order.

17. We are of the view that if there is any non-compliance or non- adherence to the Vishaka guidelines, orders of this Court following Vishaka and the above directions, it will be open to the aggrieved persons to approach the respective High Courts. The High Court of such State would be in a better position to effectively consider the grievances raised in that regard."

Earlier, during the pendency of the proceedings in Medha Kotwal Lele, the Supreme Court had issued directions; these were quoted in the final judgment:

"On 26.4.2004, after hearing the learned Attorney General and learned counsel for the States, this Court directed as follows :

"Complaints Committee as envisaged by the Supreme Court in its judgment in Vishaka's case will be deemed to be an inquiry

authority for the purposes of Central Civil Services (Conduct) Rules, 1964 (hereinafter called CCS Rules) and the report of the complaints Committee shall be deemed to be an inquiry report under the CCS Rules. Thereafter the disciplinary authority will act on the report in accordance with the rules."

30. This Court repeatedly emphasizes and underlines the above aspect because though not directly relevant to decide whether the impugned directions of the CAT were justified, they provided a contextual backdrop which could not be ignored at all. The context was that Ms. Bhatia was perceived as "difficult" and that her relations with a colleague were strained (to put it mildly) and that his views about her were derogatory – a conclusion drawn by the Shashi Prabha committee. Likewise, the conclusions of the Rathi Vinay Jha committee are no less an indictment of the inadequacy – in terms of timeliness of the response – of the Union Government. The latter committee went to the extent of stating that the transfer of Mr. Uke was a vindication of Ms. Bhatia's allegations.

31. These facts and circumstances, when Ms. Bhatia was in a hostile work environment that she was subjected to a posting order which sought to transfer on 08.11.07 as Director (Trg). There is no denial by the Union Government that another officer, the then Director was initially posted out as Director (PR) Hqrs. That transfer order was, a week later, by another order dated 16.11.07, cancelled. The result was that two officers were posted against one sanctioned post of Director (Trg). Ms. Bhatia's allegation that as Shri Mohapatra was the sitting Director (Trg), she was without any work charge. Only one sanctioned post of Director (Trg) in the R&AW undeniably exists. This is established by a noting dated 08.04.08 of the Accounts Officer (B & F). Ms. Bhatia also alleges that as Head of an Institute, was given a shabby cubicle next to a toilet to work from. She, under these circumstances proceeded on leave and then complained and represented to the PMO to claim her charge of post of Director (Trg). These facts culminate in the alleged misconduct of unauthorized absence; however they are also linked with her allegations of harassment at the workplace. There cannot be any doubt that what is an act of harassment may be one incident, or a series of incidents; omissions to respond appropriately (as has been commented by the Jha committee) can also constitute harassment. The events, after November 2007 are thus a live link with the allegations of misconduct

levelled against Ms. Bhatia and therefore, acquire some relevance.

31. It is a matter of record that Ms. Bhatia approached the CAT in 2008 itself (through OA No. 2687/08) sometime in November (2008) claiming that she ought to be given a posting commensurate with her rank and status. In this, she had alleged that her office had been trespassed, and also made serious allegations. The Central Government's affidavit refuted the allegations stating that: *"The Applicant can collect whatever was found in her almirah [by officers of the petitioner organization]. Which is lying safe. Nothing belonging to the applicant has been kept in sealed custody."* It was in this proceeding that the CAT ordered, on 15.05.2009, the Union Government to permit Ms. Bhatia to join duties and that their insistence for submission of the certificate of transfer ought to be waived. In the same proceedings, while disposing of an miscellaneous application (MA No. 1089/2009 in OA No. 2687/08), the CAT directed on 26.11.09 that:

> "the learned counsel has further stated that the respondents (officers of the petitioner organization) would consider re-posting the applicant back to the executive cadre after six months when tempers have cooled down."

On 08.12.2009, the order compulsorily retiring Ms. Bhatia was issued. The Central Government did not settle her terminal dues; provisional pension was sought to be paid to her. Her applications to the CAT (O.A's 1665/2010 and 1967/2010) against this move- as also the Central Government's stand that between 29.08.2008 and 26.11.2009 she was unauthorizedly absent- were disposed of, with a direction to the Union to first scrutinize its records to find out if any period or periods could be treated as on duty, and then hold a factual inquiry. The Union Government did not complete its task with the time allocated by CAT; this led Ms. Bhatia to file another application OA 3613/2011. In this proceeding, the Central Government filed an affidavit, in reply to a miscellaneous application for directions. It was stated, importantly, in the said affidavit, that:

> "the total period of her absence is – 29.08.2008 to 26.11.2009. As per the in-house enquiry conducted by the Jt. Secretary, period from 07.04.2009 to 09.06.2009 (63 days) could be considered as "on duty", giving her the benefit of doubt, after considering the copy of attendance register. In so far as the remaining period from 29.08.2008 to 05.04.2009 and 10.06.2009 to 26.11.2009 (390 days) can be considered as "Child Care Leave"/"Earned Leave."
>
> 7. It may be mentioned here that the Applicant (Ms. Nisha Priya Bhatia) has been paid entire salary for the entire period i.e. 29.08.2008 to 26.11.2009 alongwith all other benefits, which she was entitled to."

It is significant to note that the affidavit of one Shri Vinod Kumar, Deputy Secretary, in reply to Ms. Bhatia's application (in OA No. 2687/08) admitted that she had joined duties on 06-04-2009:

> "Para 3 – It is admitted that the applicant had joined office on 06.04.09. It is also reiterated that despite her being absent since 29.08.08 another posting order of the applicant was issued on 27.11.08 and she was never debarred from attending office. Her absence from duty w.e.f. 29.08.08 was of her own volition. Further, it is submitted that whether the order of her posting is half type written and half computerized is immaterial as long as it is signed by the competent authority."

Crucially, this affidavit nowhere stated that Ms. Bhatia continued to be absent unauthorizedly.

32. The relevant provisions of the Pension Rules (1972) are Explanation (b) to Rule 8 (5), and Rule 9. The former (explanation (b) to Rule 8 (5)) reads as follows:

> "(b) the expression 'grave misconduct' includes the communication or disclosure of any secret official code or password or any sketch, plan, model, article, note, document or information, such as is mentioned in Section 5 of the Official Secrets Act, 1923 (19 of 1923) (which was obtained while holding office under the Government) so as to prejudicially affect the interests of the general public or the security of the State."

Rule 9, to the extent it is relevant, is reproduced below:

> "9. Right of President to withhold or withdraw pension

1[(1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement :

(2).....(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment, -

(i) shall not be instituted save with the sanction of the President, (ii) shall not be in respect of any event which took place more than four years before such institution, and (iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service."

33. It is a matter of law that public employment arises out of status (i.e. the law governs the tenure and terms of employment, rather than contract-Ref. Roshanlal Tandon v Union of India AIR 1968 SC). Equally, pension is neither bounty nor largesse, but deferred salary, which the public employee cannot be deprived of, except in accordance with law (**D.S. Nakara v Union of India** 1983 (2) SCR 165). It is in consonance with this principle, that the Union Government framed Rule 9 of the Pension Rules. It visualizes a situation where a public employee, drawing pension, can be deprived of a part of that pension, provided a prescribed procedure is followed and preconditions are met with. These are not only procedures, but also safeguards. Unlike a serving public employee, who can be indicted for every kind of lapse, misconduct or negligence, (minor or major) and visited with an entire range of penalties, the severest one being dismissal from service, a retired public employee's pension can be deprived only if she (or he) is found guilty of grave misconduct or negligence. The expression "grave" injects a degree, an element of seriousness. Furthermore, that enquiry should be completed and the retired

public servant should be found guilty of such grave misconduct within four years of his (or her) retirement. The expression "institution" refers to issuance of a charge sheet proposing the departmental inquiry. In **D.V. Kapoor v Union of India** AIR 1990 SC 1923, the Supreme Court had occasion to deal with Rule 9; the Court observed as follows:

"It is seen that the President has reserved to himself the right withhold pension in whole or in part therefore whether permanently or for a specified period or he can recover from pension of the whole or part of any pecuniary loss caused by the Government employee to the Government subject to the minimum. The condition precedent is that in any departmental enquiry or the judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service of the original or on re-employment. The condition precedent thereto is that there should be a finding that the delinquent is guilty of grave misconduct or negligence in the discharge of public duty in office, as defined in Rule 8(5), explanation (b) which is an inclusive definition, i.e. the scope is wide of mark dependent on the facts or circumstances in a given case. Myriad situation may arise depending on the ingenuinity with which misconduct or irregularity was committed. It is not necessary to further probe into the scope and meaning of the words 'grave misconduct or negligence' and under what circumstances the findings in this regard are held proved....

6. As seen the exercise of the power by the President is hedged with a condition precedent that a finding should be recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty while in office, subject of the charge. In the absence of such a finding the President is without authority of law to impose penalty of with- holding pension as a measure of punishment either in whole or in part permanently or for a specified period, or to order recovery of the pecuniary loss in whole or in part from the pension of the employee, subject to minimum of Rs.60.

7. Rule 9 of the rules empowers the President only to with- hold or withdraw pension permanently or for a specified period in

whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory fight. The measure of deprivation therefore, must be correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Art. 41 of the Constitution."

34. Apart from the disclosure made by the Union Government in its affidavits before it, what persuaded the CAT to hold that there ought to be no further inquiry into the matter was that the said Government itself changed the position, stating in an affidavit that 63 days period could be treated as "in service". Yet its most contemporaneous affidavit (of Shri Vinod Kumar, adverted to above) nowhere mentioned in June, 2009 that Ms. Bhatia continued to absent herself. It was filed after 12th June, 2009. According to the later affidavit – filed in 2012, Ms. Bhatia had lapsed into unauthorized absence. The second aspect was that there were conflicting versions as to whether the lack of an identity card (which had been applied by Ms. Bhatia on 21.08.2008) amounted to a hindrance to her joining the service. Though the Central Government stated that no such hindrance existed, Ms. Bhatia disputed it. As a matter of fact, the I-card was issued only in February 2009. Having regard to the previous accusations levelled against some officials and the senior most officer of the organization, and the underlying hostility that was faced by Ms. Bhatia, her statements cannot be brushed aside. If other facts, such as the opinion of Dr. Ray (who had not even examined Ms. Bhatia, but ventured to comment on her mental health) which was given some publicity and the First Information Report lodged against her (as per the information given to her under the Right to Information Act) are taken into consideration, the possibility of her being subjected to continued hostile treatment and obstructed cannot be ruled out.

35. This Court has no difficulty in accepting the general proposition that "grave misconduct" or grave negligence can, in given cases included unauthorized absence of a public servant from duties, or his or her refusal to discharge the functions assigned or attached to his office. However, whether every omission to report for duties is "grave" misconduct or negligence, would depend on the circumstances appearing from the record. D.V. Kapoor"s case is one instance where such continued

absence was held not to be "grave" misconduct warranting withholding of pension under Rule 9. In the present case, neither was any inquiry initiated, nor even contemplated at the time the respondent, Ms. Bhatia, was served with the compulsory retirement order. It was only when the Central Government prevaricated in the release of her terminal dues, and she demanded proper orders, that a provisional pension fixation order was made on 10.05.2010, after this court made an order on 03.05.2010 in the Central Government's 2010 Petition (challenging the striking down of the compulsory retirement order). The provisional pension fixation order stated that it was for the period "from 19.12.2009 till her period of unauthorized absence is regularized." The allegations regarding unauthorized absence were made by the Union Government in O.A.1665/2010 and O.A.1967/2010. Yet, no attempt or effort to issue a charge sheet or consider that such absence amounted to "grave misconduct" was made. Even after disposal of those proceedings, till the new application – OA 3613/2011 was filed in September, 2011, no attempt to examine whether the omission or conduct was worthy of inquiry under Rule 9 was undertaken. In this context, the affidavit of the Union Government, stating that certain periods (of Ms. Bhatia's absence) could be considered to be on duty, is extremely relevant. In that affidavit, it was submitted that:

> "In so far as the remaining period from 29.08.2008 to 05.04.2009 and 10.06.2009 to 26.11.2009 (390 days) can be considered as "Child Care Leave"/"Earned Leave."

36. The position of the Central Government is curious indeed. Before this court, it argues that the entire period of absence is unauthorized, and amounts to "grave" misconduct, warranting Rule 9 inquiry. At the same time, it expresses willingness to condone the lapse, as it were and treat the period as if Ms. Bhatia were on leave, provided she applies for it. This approach, is conflicting and inconsistent. There can be no question of condoning a "grave" misconduct, - a category of unacceptable behaviour of public servants, which includes allegations of embezzlement and defalcation which can lead to forfeiture of pension, permanently or for some period. The mere fact that the Central Government is in a position to state that the conduct is "condonable" and the period capable of "regularization" implies that it is not "grave misconduct" having regard to the overall circumstances of the case.

37. It has been said that power, wherever vested, in a public authority or agency, must be exercised fairly and justly:

> "Any law made or action taken by the employer, corporate statutory or instrumentality under Article 12 must act fairly, justly and reasonably. Right to fair treatment is an essential inbuilt of natural justice. Exercise of unbridled and uncanalised discretionary power impinges upon the right of the citizen; vesting of discretion is no wrong provided it is exercised purposively judiciously and without prejudice. .." (**Delhi Transport Corporation v DTC Mazdoor Congress** AIR 1990 SC 101).

Every public authority is also under a duty to act within the bounds of the power conferred or vested in him, to further the objectives for which such powers are created and take into consideration only relevant circumstances, bona fide and reasonably. Sans any of these, the exercise of power is colourable, as held in **State of Punjab v Gurdial Singh,** AIR 1979 SC 319:

> "considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action, mala fides or fraud on power, vitiates the acquisition or other official act."

The matter was put even more forcefully in Ravi Yashwant Bhoir v. District Collector, Raigad & Ors., AIR 2012 SC 1339, as follows:

> "37... Legal malice" or "malice in law" means something done without lawful excuse. It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill-feeling and spite. Mala fide exercise of power does not imply any moral turpitude.
>
> It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, where intent is manifested by its injurious acts. Passing an order for unauthorized purpose constitutes malice in law."

38. Having regard to the entire conspectus of circumstances which have been unravelled to this court in these proceedings, i.e. the previous history of grievances articulated by Ms. Bhatia, concerning her sexual harassment at the workplace and the several adverse remarks made against the Union Government officials with respect to the lack of any action in tune with the Vishaka guidelines (which amount to an indictment of culpable omission on their part); their intrinsic connection with Ms. Bhatia's transfer and the charges and counter charges levelled by and against her; the affidavits filed by the Union Government; its unexplained inaction in regard to any proposal to hold inquiry under Rule 9 any time after the compulsory retirement order or even its omission to issue charge sheet for a long time, its willingness to condone the allegations provided Ms. Bhatia applies for leave- this Court has no doubt that the CAT's impugned order directing the Union Government to not hold any inquiry into allegations of Ms. Bhatia's period of absence, was justified and calls for no interference. Similarly, its direction to fix her pension with effect from 19.12.2009, without treating such periods as unauthorized absence and take consequential action, and without requiring her to apply for leave, and to release differential amounts, are hereby affirmed. The amounts which are to be paid to Ms. Bhatia, shall be released within 4 weeks. All consequential terminal benefits shall be revised within the same period and paid to her. All such amounts shall carry interest @ 9 per cent per annum from 19.12.2009 till date of payment. The writ petition is dismissed, in terms of the above directions. All pending applications also stand dismissed. The Petitioner shall pay Rs.25,000/- costs to the respondent.

ILR (2014) I DELHI 119
CS (OS)

PUNEET MIGLANI **...PLAINTIFF**

VERSUS

SUFRACE FINISHING EQUIPMENT CO. & ORS. **....DEFENDANTS**

(MUKTA GUPTA, J.)

I.A. NO. : 14068/2010 IN CS (OS) NO. : 1090/2010 **DATE OF DECISION: 23.10.2013**

Code of Civil Procedure, 1908—Order 37, Rule 3(5): Suit filed by the Plaintiff u/o 37 for recovery of commission earned for the work done by Plaintiff, along with interest—Application filed by the Defendant u/O 37 R 3(5) seeking unconditional leave to defend. Plaintiff entered into an agreement with the Defendants for procuring orders for various products—As per the agreement Plaintiff was earning variable commissions on the orders secured—Plaintiff claims that due to Plaintiff's diligence, Defendants agreed to an enhanced flat commission rate of 10% verbally—However, thereafter commission was curtailed—Hence, the present suit. Defendants contend that for enforcement of verbal agreement, no suit under Order 37 CPC will lie—Plaintiff has filed no documents to verify the claim of the Plaintiff—Since case of plaintiff is not based on determined liability, Defendants/applicants are entitled to leave to defend, hence the instant application. Held: Agreement of enhancement of commission verbal, thus provisions of Order 37 Rule 1(2)(b) not applicable to the present case—In view of liability not being acknowledged, nor claim being in pursuance of a written agreement, Plaintiff has not made out a case for trial u/O 37, CPC—Defendants granted leave to defend.

8. In my view, a suit for recovery of such an amount does not qualify as a suit under Order 37 of the CPC. A suit, from the averments in the plaint has to fall under Order 37. The averments in the plaint in the present case do not show as to on what written contract the amounts sought to be recovered as a debt or liquidated demand in money is sought to be recovered. No single document has been

referred to in the plaint, wherein the suit amount is contained as a debt due from the defendant to the plaintiff.

9. Order 37 of the CPC was intended to be an exception to the ordinary adversorial adjudicatory process adopted in this country and in which process certain delays owing to the requirement of giving opportunity of being heard and lead evidence were implicit. It was thought that where the suit was only for recovery of money on the basis of a document, the genuineness whereof could not be doubted or where owing to the existence of a written document disclosing the amount claimed in the suit, it was expedient to shift the onus to the defendant, it was enacted that the defendant would not be entitled to contest the suit till satisfies the court that he had a defence. However, I find myself unable to apply the said principles to the instant suit. I am unable to deduce from any document or documents the amount due. Merely because the claim is based on documents would not make the suit fall under Order 37 of the CPC. Claims in a large number of suits are based on documents but such suits do not fall under Order 37. Where a large number of documents have to be collated, interpreted and effect thereof to be adjudicated in juxta position of other documents, merely because the suit is based on documents would not make it fall under Order 37 of the CPC. That is the position in the present case." **(Para 6)**

Thus the application is disposed of granting leave to defend to the Defendants.

CS (OS) 1090/2010

Written statement be filed within four weeks. Replication be filed within four weeks thereafter.

List before the learned Joint Registrar for completion of pleadings and admission/denial of the documents on 16th January, 2014.

The matter be placed before this Court for framing of issues

on 16th July, 2014. **(Para 7)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. N.K. Nayyar, Advocate.

FOR THE DEFENDANTS : Mr. R. Singhavi, Advocate.

CASES REFERRED TO:

1. *Bank of India and another* vs. *Madura Coats Ltd.,* 157 (2009) DLT 240 (DB).
2. *Juki Singapore PTE Ltd.* vs. *Jay Cee Enterprises Pvt. Ltd. and another,* 157 (2009) DLT 580.
3. *Mechalec Engineers and Mfr.* vs. *Basic Equipment Corporation,* 1977 Rajdhani Law Reporter (SC) 184.

RESULT: Application allowed.

MUKTA GUPTA, J.

1. By this application under Order XXXVII Rule 3 (5) CPC the Defendants seek unconditional leave to defend.

2. Learned counsel for the Defendants/applicants contends that as per Para-7 of the plaint it is stated that the commission of the Plaintiff was enhanced to on flat rate of 10% on all products of Defendant No. 1 w.e.f. 1st November, 2005 on the basis of verbal agreement. For enforcement of the terms of verbal agreement, no suit under Order XXXVII CPC is maintainable. Further no invoices or bills of exchange have been filed thus the present suit is not maintainable under Order XXXVII CPC. The case of the Plaintiff is based allegedly on the statements of account which show varying percentage of commission awarded, that is, 5%, 7.5%, 10% thus the claim of the Plaintiff on the basis of the documents filed itself stands falsified that the parties verbally settled commission @10% which has not been awarded to the Plaintiff. Further no documents of the year 2009-2010 have been filed by the Plaintiff to base the claim. All accounts had been settled between the Plaintiff and the Defendants and that is why no document of the contemporary period is available. It is an admitted fact that the Plaintiff had stopped working for the Defendant vide its letter dated 10th October, 2008 and all the

works referred have come into existence in 2008. Most of these works have been completed in the year 2010. Certain agreements relied upon like with Shri Ganesh and COMFMOW PR -1729 were never executed by the Defendants as the work orders of these two companies stand cancelled. Since the case of the Plaintiff is not based on a determined liability, the Defendants/applicants are entitled to leave to defend. Reliance is placed on **Bank of India and another vs. Madura Coats Ltd.,** 157 (2009) DLT 240 (DB) and **Juki Singapore PTE Ltd. vs. Jay Cee Enterprises Pvt. Ltd. and another,** 157 (2009) DLT 580.

3. Learned counsel for the Plaintiff on the other hand contends that the Plaintiff has relied upon the documents of the Defendants which itself show that the Plaintiff was entitled to a commission @10%. In view of this admitted liability, no leave to defend is required to be granted to the Defendants. The Defendants have concealed material facts, the defence raised by the Defendants is sham and thus no leave to defend be granted. Reliance is placed on **Mechalec Engineers and Mfr. vs. Basic Equipment Corporation,** 1977 Rajdhani Law Reporter (SC) 184.

4. I have heard learned counsel for the parties.

5. The present suit has been filed by the Plaintiff against the Defendants under Order XXXVII CPC seeking recovery of Rs. 31,31,210.96 along with interest @15% per annum on account of the commission earned for the work done by the Plaintiff. It is stated that the father of the Plaintiff who is the proprietor of M/s Veetech Associates entered into an agreement dated 17th July, 1999 with the Defendant No. 2 on behalf of Defendant Nos. 1 and 3 to 5 for procuring orders for various products, equipments being manufactured by all Defendants. As per the agreement, the Plaintiff was entitled to certain amount of commission for the various followed up works/orders secured in Northern Region or other areas. Subsequently by fresh agreement dated 15th December, 2003 the agreement was extended by Defendant No. 2 on behalf of all the Defendants. Due to the diligent and hard work put in by the Plaintiff the business of the Defendants increased manifold and thus the Defendant No. 2 acting on behalf of Defendant Nos. 1, 3 to 5 happily and favorably agreed to allow commission at the flat rate of 10% on all products of Defendant No. 1 w.e.f. 1st November, 2005 on the basis of verbal agreement and started releasing commission accordingly. However, thereafter the Defendants curtailed the commission arbitrarily and

malafidely and thus a balance of Rs. 31,31,210.96 is being held back by the Defendants illegally.

6. A perusal of the plaint itself shows that the agreement of enhancing the commission between the Plaintiff and Defendant No. 2 on behalf of Defendant Nos. 1 and 3 to 5 was oral and thus provision of Order XXXVII Rule 1 (2) (b) is not applicable to the facts of the present case. Further a perusal of the document filed by the Plaintiff show that for a particular period in November, 2005 rate of commission of 10% was noted, as also mentioned vide letter dated 30th November, 2005 however, the commission statements for the period March, April and July, 2008 etc. show that the rate of commission has been calculated @5% or 7.5%. In view of the liability not being acknowledged or the claim not being in pursuance of written agreement or based on a bill of exchange etc. the plaintiff has not made out a case for trial under Order XXXVII CPC. Thus, the defendants are required to be granted unconditional leave to defend. While dealing with the similar situation, wherein the accounts had to be collated, interpreted and given effect to, this Court in Juki Singapore PTE Ltd. (supra) held that such a suit would not fall under Order XXXVII CPC. It was held:

> "7. Though the plaint states that the suit is filed under Order 37 of the CPC, as required to be stated under Rule 2 thereof, but it has nowhere been specified as to under which clause specified in Rule1 (2) of Order 37, the suit falls. During the course of arguments, it was argued that the suit was on the basis of the balance amount due on the invoices of sale of goods by the plaintiff to the defendant. Undoubtedly, it has been held by this court that a suit on the basis of such invoices lies under Order 37 of the CPC. However, the present is not a suit on the basis of invoices for the recovery of the amount thereof but is for recovery of balance due on an account between the parties as set out in para 9 of the plaint. The said account besides the

invoices contains entries of debits and credits between the parties. Out of the amount due on the said account, the plaintiff claims to have deducted further amounts admitted to be due to the defendant and to have added the amount of another invoice, for which initially the defendant No.2 bank was also claimed to be liable. The matter does not end there; from the order dated 15th December, 2005 (Supra) it seems that certain other entries are there in the said account between the parties of the payments by the defendant to the plaintiff and for the reason whereof the plaintiff dropped the defendant No.2 bank from the array of parties. There is nothing to show as to what is the final amount claimed to be due on the aforesaid accounts between the parties. During the course of the hearing it was stated that a sum of Rs.40,17,000/- was paid during the pendency of the suit. However, there is nothing on record in that respect and ultimately an account may have to be taken of the same also.

8. In my view, a suit for recovery of such an amount does not qualify as a suit under Order 37 of the CPC. A suit, from the averments in the plaint has to fall under Order 37. The averments in the plaint in the present case do not show as to on what written contract the amounts sought to be recovered as a debt or liquidated demand in money is sought to be recovered. No single document has been referred to in the plaint, wherein the suit amount is contained as a debt due from the defendant to the plaintiff.

9. Order 37 of the CPC was intended to be an exception to the ordinary adversorial adjudicatory process adopted in this country and in which process certain delays owing to the requirement of giving opportunity of being heard and lead evidence were implicit. It was thought that where the suit was only for recovery of money on the basis of a document, the genuineness whereof could not be doubted or where owing to the existence of a written document disclosing the amount claimed in the suit, it was expedient to shift the onus to the defendant, it was enacted that the defendant would not be entitled to contest the suit till

satisfies the court that he had a defence. However, I find myself unable to apply the said principles to the instant suit. I am unable to deduce from any document or documents the amount due. Merely because the claim is based on documents would not make the suit fall under Order 37 of the CPC. Claims in a large number of suits are based on documents but such suits do not fall under Order 37. Where a large number of documents have to be collated, interpreted and effect thereof to be adjudicated in juxta position of other documents, merely because the suit is based on documents would not make it fall under Order 37 of the CPC. That is the position in the present case."

7. Thus the application is disposed of granting leave to defend to the Defendants.

CS (OS) 1090/2010

Written statement be filed within four weeks. Replication be filed within four weeks thereafter.

List before the learned Joint Registrar for completion of pleadings and admission/denial of the documents on 16th January, 2014.

The matter be placed before this Court for framing of issues on 16th July, 2014.

ILR (2014) I DELHI 126
W.P. (C)

INDRAJ SINGH **....PETITIONER**

VERSUS

UOI AND ORS. **....RESPONDENTS**

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 8756/2011 **DATE OF DECISION: 23.10.2013**

Service Law—Court of Inquiry—Petitioner, deployed at Tripura fell ill and was administered treatment in 2001, whereafter upon deterioration of condition, shifted to AIIMS for further treatment till 2002—Petitioner applied for inquiry about his disease and for payment of Seema Prehari Bima Yojana as well as hard area lump sum grant—Court of Inquiry conducted in 2006 by the Deputy Commandant challenged by petitioner on the grounds that the same proceeded on presumption as if petitioner was suffering with pulmonary tuberculosis—Held, in view of the record of the inquiry, petitioner deserves to be given opportunity to place on record his treatment record and examined material witnesses, so petitioner deserves the issuance of directions to conduct Court of Inquiry.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Arun Srivastava, Advocate.

FOR THE RESPONDENTS : Ms. Barkha Babbar, Advocate.

RESULT: Writ Petition allowed with directions.

GITA MITTAL, J. (Oral)

1. The petitioner in this case has prayed for a direction of this court to conduct a Court of Inquiry qua examining and giving opinion as to whether the condition of the petitioner is attributable or aggravated by his service conditions. It appears that while deployed at Tripura between 26th January, 2001 to 11th February, 2001, the petitioner was treated in the Battalion Headquarters at Nalkata as a suspected case of PF Malaria. Upon discharge on 11th February, 2001, he was advised line rest for two days. The petitioner has submitted before us that his condition did not improve and on 20th February, 2001 he had applied for 60 days earned leave for "self treatment". This application was processed by the Commandant as well as Dr.B.N.Das. The petitioner also submits that he had been advised to take leave and for treatment in some good hospital

for the reason that there was no good facility available within reach at the petitioner's place of posting. The petitioner was also advised not to proceed alone on sick leave to his own station and was advised to search for a person of his own station who could accompany him upto his house. He has claimed before us that HC Budhram who belongs to Jaipur was requested by the petitioner and had accompanied him to his home town. The petitioner submits that the earned leave was sanctioned only after the intervention by Dr.B.N.Das on 8th March, 2001. It is the petitioner's contention that all these circumstances clearly establish that the petitioner developed the disease while on bonafide duty and that he was not well when he proceeded on leave as advised.

2. Accompanied by HC Budhram the petitioner was able to reach his house only on 11th March, 2001. Without any delay on 13th March, 2001, the petitioner was taken to SMS Hospital, Jaipur as he was feeling severe headache and pain in spinal cord accompanied with the blockage of his urinary passage. The petitioner has submitted that he remained unconscious for two days and thereafter felt paralysed in lower half portion of his body. This position has continued thereafter.

3. On 19th April, 2001, an application for leave was sent on behalf of the petitioner to the Unit. On 6th August, 2001, the petitioner was brought from Jaipur and he received treatment at the All India Institute of Medical Sciences (AIIMS), Delhi till 6th October, 2002.

4. On 22nd November, 2005, the petitioner applied for the inquiry about his disease and for the payment of Seema Prahari Bima Yojna (SPBY) as well as Hard Area lump-sum grant.

5. The Court of Inquiry was directed by an order passed on 14th August, 2006. A man Court of Inquiry was conducted by Sh.M.P.S.Rana, Deputy Commandant on 1st November, 2006.

6. The petitioner submits that this Inquiry was misconceived and proceeded on a presumption as if the petitioner was suffering from Pulmonary Tuberculosis which was incorrect.

7. In this regard, our attention has been drawn to the report dated 18th June, 2002 submitted by Dr.(Prof.) D.S.Mathur with regard to the petitioner's condition in reference to the letter dated 7th May, 2002. A perusal of the report would show that Dr.D.S.Mathur had diagnosed

sickness of the petitioner as a case of 'tubercular arachnoiditis'. The report mentions that the petitioner was on anti tubercular treatment for the last one and a half years.

8. The respondents also appear to have passed an order dated 14th August, 2006 directing another one man Court of Inquiry. On 1st November, 2006, such Court of Inquiry was conducted by Sh.M.P.S.Rana, Deputy Commandant.

9. The petitioner complains that the concerned doctor who had seen him for the first time, namely, Dr.B.N.Das was not examined. He also points out that HC Budhram who had accompanied the petitioner from Tripura to Jaipur was also not examined. Without examining these material witnesses, the respondents have arrived at a conclusion that the petitioner's disease was not attributable to his service condition and that the disability which resulted to him was not caused during the government duty.

10. It is noteworthy that according to the respondents, the petitioner received treatment at the Composite Hospital, Tekanpur between 6th October, 2002 to 2nd November, 2004. The petitioner has physically reported to the Battalion Headquarters, 126, BSF, Nalkata on 3rd January, 2005.

11. The opinion of the Court of Inquiry records that there is no physical evidence that his disability was caused during government duty hence it was opined that no question arose for providing him benefit of Seema Prahari Bima Yojna or the Hard Area lump-sum grant.

12. The prayer in the instant writ petition is to the effect that given the omissions in the court of Inquiry as noticed above and mentioned in the writ petition, the respondents are required to be directed to conduct a court of Inquiry afresh giving full opportunity to the petitioner to place the record of his treatment and disease and also after examining the material witnesses. We are of the opinion that such an inquiry is essential to effectively adjudicate upon the claim of the petitioner for grant of the aforenoticed amounts as well as the computation of any other service element or financial benefit which may be admissible to a person who was disabled on account of any cause which may be held to be attributable to his service conditions.

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

(i) The respondents shall appoint a Court of Inquiry afresh which shall examine the circumstances and cause leading to the petitioner's sickness and medical condition.

(ii) The Court of Inquiry shall also give adequate opportunity to the petitioner to place such medical record or other evidence which would facilitate the work of the Court of Inquiry.

(iii) The respondents shall ensure that all evidence relevant for arriving at a conclusion with regard to the petitioner's condition at the relevant time is brought before the court of Inquiry. The complete record of the petitioner's sickness and treatment shall also be produced before the Court of Inquiry.

(iv) The appointment of the Court of Inquiry shall be effected within three weeks from today.

(v) The respondents may consider posting of a medical specialist having expertise in the matter as part of the Court of Inquiry.

(vi) The report of the Court of Inquiry shall be submitted within four months from the date of commencement of proceedings. Copy thereof shall be furnished to the petitioner.

(vii) The petitioner shall be at liberty to invoke legal remedy, if aggrieved by the inquiry report.

This writ petition is allowed in the above terms.

Dasti to parties.

ILR (2014) I DELHI 130
CRL. A.

PRITAM CHAUHAN ....APPELLANT

VERSUS

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

(S.P. GARG, J.)

CRL. A. NO. : 640/2001 DATE OF DECISION: 24.10.2013

Indian Penal Code, 1860—Section 307—Attempt to murder—Quarrel between appellant and victim on slapping a boy aged 8 or 10 years—Appellant brought knife from his house and inflicted injuries on left cheek—Attempt to strike knife blow on stomach foiled Blow on neck taken on left arm, assaulted on left leg, palm and fingers—Injured became unconscious appellant fled the spot taken to hospital—DD No. 43 B recorded on the victim's statement FIR No. 22/1999 under section 307 IPC P.S. Sarita Vihar registered—Injuries opined to be grievous appellant/accused arrested-chargesheeted Convicted for offence u/s. 307 IPC-aggrieved appellant preferred appeal-contended- crime weapon not recovered- injuries were not dangerous in nature- Ingredients of section 307 missing- APP urged- multiple injuries inflicted on various body parts- judgement requires no interference- Held- No animosity between the appellant and victim- no ulterior motive assigned to victim-material facts deposed by injured remained unchallenged in cross examination- victim's version corroborated by PW5- injuries sustained by victim not accidental nor self inflicted—No ground to disbelieve the injured—Ocular and medical evidence not at variance—Non recovery of crime weapon not fatal as injuries caused by sharp weapon—Findings based on proper appreciation of evidence—Injuries caused were not on vital organs—Crime weapon ordinary vegetable

knife—No pre-plan or meditation to inflict injuries—Playing cricket without confrontation—No intention to cause bodily injury sufficient to cause death—Offence u/s. 307 IPC not made out—Injuries caused voluntarily with sharp weapon—Grievous in nature—Held guilty for offence u/s. 326 IPC—Conviction altered—Substantive sentence modified—Compensation of Rs.50,000/- awarded—appeal disposed of.

Important Issue Involved: The testimony of the injured witness is accorded a special status in law.

Non recovery of crime weapon is not fatal.

To justify conviction under Section 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. It is sufficient to justify a conviction under Section 307IPC if there is present an intent coupled with some overt act in execution thereof.

The nature of weapon used, the intention expressed by the accused at the accused at the time of the act, the motive for commission of the offence, the nature and size of the injuries, the parts of the body of the victim selected for causing injuries and the severity of the blow or blows are vital factors that can be convicted of an attempt of murder.

The Section 307 may apply even if no hurt is caused. The causing of hurt is merely an aggravating circumstance. What the Court has to see is whether the act, irrespective of its Result, was done with the intention or knowledge and under circumstances mentioned in section 307 IPC.

Section 357 Cr.P.C. should be read as imposing mandatory duty on the court to apply its mind to the question of awarding compensation in every case.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANT : Mr. Sudhir Batra, Advocate.

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

CASES REFERRED TO:

1. *Ankush Shivaji Gaikwad* vs. *State of Maharashtra* (2013) 6 SCC 770.
2. *State of Uttar Pradesh* vs. *Naresh and Ors.,* (2011) 4 SCC 324.
3. *Abdul Sayed* vs. *State of Madhya Pradesh,* (2010) 10 SCC 259.

RESULT: Appeal Disposed of.

S.P. GARG, J.

1. Pritam Chauhan (the appellant) has questioned the legality of the judgment dated 25.08.2001 of learned Additional Sessions Judge in Sessions Case No.28/2000 arising out of FIR No.221/1999 registered at Police Station Sarita Vihar by which he was convicted under Section 307 IPC and awarded RI for three years with fine Rs.1,000/-. The facts emerging from the record of the case are as under:

2. On 18.05.1999 at about 07.15 P.M. near Madanpur Khadar, Pritam Chauhan inflicted injuries with a knife to Sunder Singh in an attempt to murder him. The police machinery came into motion after recording Daily Diary (DD) No.43B (Ex.PW-10/A) at 07.45 P.M. at Police Station Sarita Vihar about a quarrel near Girls school, Madanpur Khadar and the investigation was taken over by SI Parveen Kumar who with Ct.Madan Pal went to the spot. The injured had already been taken to Holy Family hospital. SI Parveen Kumar recorded Sunder's statement (Ex.PW-3/A) in the hospital and lodged First Information Report after making endorsement (Ex.PW-11/A) thereon. During the course of investigation, statements of witnesses conversant with the facts were recorded and the accused was arrested. Injuries suffered by the victim were 'grievous' in nature. After completion of the investigation in a charge-sheet submitted in the court, Pritam Chauhan was duly charged and brought to trial. The prosecution examined 11 witnesses to establish the appellant's guilt. In 313 Cr.P.C. statement, he pleaded false implication and examined Rajender Singh (DW-1) in defence. On appreciating the

evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment held the appellant guilty of the offence under Section 307 IPC. Being aggrieved, he has preferred the appeal.

3. Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective and ignored the vital circumstance of non-recovery of crime weapon. The injuries on the victim's body were not 'dangerous' in nature and were described 'grievous' without any basis. Ingredients of Section 307 IPC were missing. Counsel adopted alternative plea for appellant's release on probation as he has a family with two children to take care of them and had remained in custody for 15 days before release on bail. He offered to pay reasonable compensation to the victim. Learned Additional Public Prosecutor urged that multiple injuries were inflicted on various body parts of the victim and impugned judgment requires no interference.

4. I have considered the submissions of the parties and have examined the record. After the occurrence took place at 07.15 P.M., Daily Diary (DD) No. 43 B (Ex.PW-10/A) was recorded at 07.45 P.M. at Police Station Sarita Vihar and SI Parveen Kumar lodged First Information Report at 09.30 P.M. after recording victim's statement without any delay. In the first version (Ex.PW-3/A) the victim narrated graphic account as to how Pritam Chauhan brought knife from his house and inflicted multiple injuries on the body. In Court statement as PW-3 he proved the version given to the police at the first instance without any variation or major improvements. He described the genesis of the occurrence that at about 07.00 P.M. when he, Umesh, Babli and five-six boys after playing cricket in the fields were coming to their respective houses, Pritam Chauhan slapped a boy aged 8 or 10 years coming from the opposite direction. When he intervened to protect the child by taking him in his lap, the appellant in annoyance brought a knife from his house and inflicted injuries on his left cheek near his eye. The attempt to struck a knife blow on stomach was foiled with a bat in his hand. The appellant again gave a blow on his neck but he took it on his left arm and was assaulted on his left leg, palm and fingers. Several knife blows given blindly made him unconsciousness and he was taken to Holy Family hospital where he lodged report (Ex.PW-3/A). In the cross-examination, the witness disclosed that Shammi was the child rescued by him. He denied to have given a false statement at the instance of Ravinder and Parsa Pandit. It reveals that no discrepancy could be elicited in his cross-examination to discredit his version. Prior to the occurrence, the victim

the complainant at the time of incident deposed on similar lines and gave detailed account of the incident and specifically deposed that Pritam Chauhan stabbed Sunder by a knife and caused injuries on cheek, hands and leg. Despite lengthy cross-examination, his testimony could not be shattered on material facts. PW-9 (Ram), victim's brother, received a call from his parents and was informed that Sunder was stabbed by the accused. He reported the matter to the police station Sarita Vihar. The injuries sustained by the victim were not accidental or self-inflicted. The testimony of the injured witness is accorded a special status in law and no good grounds exist to disbelieve the injured. In the case of **'State of Uttar Pradesh vs. Naresh and Ors.',** (2011) 4 SCC 324, the Supreme Court held:

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

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

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

wounds at the back of left fore-arm 9 X 5 c.m. over the middle 1/3rd and 6 X 4 c.m. distal 1/3rd left fore arm with deep extensive damage to most of the muscles and the back of left forearm. Another wound 4 X 1 c.m. on the palm of right hand was found. The patient underwent operation on 19.05.1999 and remained in hospital for treatment till 24.05.1999. In 313 statement, the appellant did not give plausible explanation to the incriminating circumstances proved against him. Non-recovery of crime weapon is not fatal as injuries were caused with 'sharp weapon'. The Trial Court after considering the rival contentions of the parties concluded that the appellant was the author of the injuries. The findings are based upon proper appreciation of evidence and need no interference. The prosecution, however, could not establish commission of offence under Section 307 IPC. The injuries caused to the victim were not on vital organs. The crime weapon was an ordinary vegetable knife. There was no pre-plan or meditation to inflict injuries to the victim. Prior to the occurrence, the victim and the appellant familiar with each other were together playing cricket without any confrontation whatsoever. Only on their way back, a child aged 8 or 10 years unexpectedly came from the opposite direction and the appellant slapped him. The complainant's interference to rescue the child annoyed him and he in a sudden fit of rage inflicted injuries to the victim after fetching a knife from his house. To justify conviction under Section 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. It is sufficient to justify a conviction under Section 307 IPC if there is present an intent coupled with some overt act in execution thereof. The nature of weapon used, the intention expressed by the accused at the time of the act, the motive for commission of the offence, the nature and size of the injuries, the parts of the body of the victim selected for causing injuries and the severity of the blow or blows are vital factors that can be taken into consideration in coming to a finding whether in a particular case the accused can be convicted of an attempt of murder. The Section may apply even if no hurt is caused. The causing of hurt is merely an aggravating circumstance. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in Section 307 IPC.

7. Apparently, the appellant had no intention to cause bodily injuries sufficient to cause death to the victim or had the knowledge that injuries inflicted by him could be fatal. The prosecution was nevertheless able to establish that injuries were caused voluntarily by the appellant with a sharp weapon and thus he can be held guilty for committing offence

attempted to save a child from the beatings at the hands of the appellant. In Hazara Singh v.Raj Kumar & Ors. 2013 Crl.L.J.2299 the Supreme Court observed:

> " It is unfortunate that the High Court failed to appreciate that the reduction of sentence merely on the ground of long pending trial is not justifiable...
>
> It further observed:
>
> "..... Mr. Jain said that the High Court has enhanced the fine and compensated the injured and, therefore, we should not enhance the sentence. Accepting such a submission would mean that if your pockets can afford, commit serious crime, offer to pay heavy fine and escape tentacles of law. Power of wealth need not extend to overawe court processes."

9. In **Ankush Shivaji Gaikwad vs. State of Maharashtra** (2013) 6 SCC 770 it is emphasized that victim is not to be forgotten in criminal justice system and Section 357 Cr.P.C. should be read as imposing mandatory duty on the court to apply its mind to the question of awarding compensation in every case. Considering the facts and circumstances of the case the sentence order is modified to the extent that the substantive sentence under Section 326 IPC shall be two years. The appellant shall pay Rs.50,000/- as compensation to the victim and shall deposit it with the Trial Court within 15 days to be released to the victim/complainant after due notice.

10. The appellant is directed to surrender and serve the remaining period of sentence. For this purpose, he shall appear before the Trial court on 06.11.2013. The Registry shall transmit the Trial Court records forthwith.

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

ILR (2014) I DELHI 138
W.P.(C)

JASVIR SINGH **....PETITIONER**

VERSUS

services as constable of ITBP during probation—admittedly, the petitioner failed to inform his employer about the pendency of serious criminal charges against him—Petitioner took a plea that the form was filled up as dictated by his senior—Held, the plea taken up for the first time during writ petition is misconceived—further held, merely because the petitioner was acquitted in the criminal case, the charge of suppression of vital information does not get diluted.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Dr. Sriniwas Rao & Mr. Vivek Sheel, Advocates.

FOR THE RESPONDENTS : Ms. Barkha Babbar, Adv. for UOI.

RESULT: Writ Petition dismissed.

GITA MITTAL, J. (ORAL)

1. By way of the present writ petition the petitioner has assailed the order dated 18th December, 2012 whereby the respondents terminated his service as a Constable (General Duty) with the Indo Tibetan Border Police (ITBP) during his probation.

2. The petitioner was recruited pursuant to an offer of appointment dated 12th December, 2011 which contains the following caution:

> "If any declaration made or information furnished by you found false or it is found that you have suppressed any vital information then you will be liable to be terminated from the service or any action which will be deemed suitable by the Govt."

3. After the petitioner's initial recruitment, the respondents got his character verification done as per the rules by the District Police Officer concerned. Information was received from Deputy Commissioner of Police Kaithal , Haryana to the effect that Case No.104 dated 24th June, 2009 under Section 379 of the Indian Penal Code (IPC) was pending against the petitioner in the court of Kaithal. This case was pending at the time of receipt of the said character verification report and had not been disclosed by the petitioner in the form which was required to be filled by him.

misconceived.

6. The respondents have stated that they had complied with the requirements of law and principles of natural justice inasmuch as before proceeding against the petitioner, one month notice under Rule 22 of the ITB Police Rules, 1994 was issued and served upon the petitioner seeking an explanation from him with regard to furnishing false information while recruitment. Accordingly, the respondents passed an order dated 18th December, 2012 terminating the services of Sh.Rajendra Kumar, Sh.Pawan Kumar and the petitioner. The above narration would show that the respondents have given an opportunity to the petitioner to explain the circumstances in which he had furnished false information. The petitioner's reply was duly considered by the respondents and was found unfavourable. Rule 22 of the ITB Police Rules, 1994 postulates nothing further. The respondents have passed the order dated 18th December, 2012 in compliance of the principles of natural justice.

7. Learned counsel for the petitioner has contended that the petitioner was acquitted in the criminal trial by a judgment dated 14th March, 2013 passed by the Chief Judicial Magistrate. It is not the conviction in a criminal case which weighs for the writ petitioner in passing the order dated 18th December, 2012. The termination rests only on the ground that the petitioner suppressed vital information and in fact furnished false information to the effect that he had not been implicated in a criminal case.

8. The impugned order dated 18th December, 2012 also points out that the petitioner who had been implicated in a case registered for commission of an offence under Section 379 of the IPC, he was tried for commission of an offence under Section 411 of the IPC i.e. for possession of stolen property.

9. The impugned order also notices that the Ministry of Home Affairs of the Government of India notified Policy Guidelines for considering cases of candidates against whom criminal cases are pending and their appointment in Central Armed Police Forces. The Government of India has taken a considered view and decided that categorised cases which may be considered undesirable for appointment in the Central Armed Police Forces includes cases concerned with serious offences/ moral turpitude in which the person concerned may be considered for recruitment.

10. At Serial no.9 of the Category of cases considered serious

for the impugned action, but the fact that he served false information. We are not impressed with the explanation sought to be rendered at this stage that the information was wrongly furnished. The petitioner was under trial in the year 2013 and was fully aware of the said fact. The petitioner ought to have furnished such information and left it to the judgment of the respondent as to whether he was to be recruited or not. He failed to provide such information in the instant case.

12. In view of the above discussion, we find no merit in the writ petition, which is dismissed.

ILR (2014) I DELHI 141
W.P. (C)

TILAK RAJ TANWAR **....PETITIONER**

VERSUS

D.D.A. **....RESPONDENT**

(G.P. MITTAL, J.)

W.P.(C) NO. : 6295/2012 **DATE OF DECISION: 28.10.2013**

Constitution of India, 1950—Art. 226—Petitioner, lawful owner of property in Mahavir Enclave which got acquired, sought a writ for directing the DDA to allot alternate residential DDA flat in view if the scheme of 2004 for evictees of Mahavir Enclave—at the time of valuation report in respect of the superstructure, inadvertently name of brother of petitioner was mentioned by the Collector, so compensation for superstructure was awarded to brother of the petitioner only, who is respondent no.3— Learned ADJ corrected the mistake on reference and held the petitioner entitled to the compensation—since respondent no.3, brother of petitioner preferred not to contest, it is evident that he has no claim in respect of alternate allotment under the scheme.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajesh Dagar, Advocate with Mr. Swastik Singh, Advocate.

FOR THE RESPONDENT : Mr. Arjun Pant, Advocate for R-1. Ms. Sangeet Sondhi, Advocate for R-2.

RESULT: Writ Petition Allowed.

G.P. MITTAL, J. (ORAL)

1. This writ petition under Article 226 of the Constitution of India has been filed by the Petitioner with the following prayer:-

> "writ(s), order(s) and direction(s) in the appropriate nature directing the respondent no.1 to allot the alternative residential DDA flat to the petitioner in view of the scheme known as "Evictees of Mahavir Enclave-III 2004" framed for the purpose of rehabilitation of the persons whose residential/commercial properties was acquired by the Govt. of NCT of Delhi for construction of 18 mtr. road widening for Planned Development of Delhi vide award no.1/2003-2004 dated 29.04.2003."

2. The case of the Petitioner is that he was the lawful owner of property bearing no.C-25 and C-26, Mahavir Enclave-III, New Delhi having a total area measuring 150 sq. yds. He was in actual and physical possession of this property. By virtue of Notification No.F.10(43)/98/L&B/LA/13120 and declaration vide Notification No.F.10(43)/98/L&B/LA/1315 dated 30.04.2001, land measuring 6 Bighas 8 Biswas, including the land in occupation of the Petitioner was acquired for public purpose, that is, for construction and widening of road and Planned Development of Delhi. The valuation report in respect of the super structure and the land was made by the concerned authority.

3. While carrying out the valuation in respect of the super structure

by award No.1/2003-2004, the name of Ashok Kumar, brother of the Petitioner was inadvertently mentioned by the Land Acquisition Collector. This led to the award of compensation of acquisition of the super structure and the land underneath it in favour of Ashok Kumar only (Respondent No.3 herein).

4. By an order dated 03.07.2008, the Court of learned ADJ on reference made by LAC, corrected the mistake and held that IP No.2, Tilak Raj, that is, the Petitioner herein is entitled to get the amount of compensation and similarly, there was another reference in respect of compensation payable to the Petitioner in respect of the land acquired. By an order dated 29.03.2010, Mr. Arun Bhardwaj, learned ADJ, held the Petitioner to be entitled to compensation in respect of 81 sq. yds. of land which was acquired.

5. By a letter dated 19.01.2011, the Ministry of Urban Development (Delhi Division) through Under Secretary made a recommendation for allotment of an alternative DDA flat in favour of the Petitioner herein. However, on account of mistake, the allotment of Flat No.410, Type A, Pocket III, Block B was made in favour of Ashok Kumar (Respondent No.3 herein), brother of the Petitioner.

6. The contention raised by the learned counsel for the Petitioner is that since the mistake in recording the name in the awards of compensation had been corrected by the learned ADJ by orders stated above and the recommendation was also made by the Ministry of Urban Development (Delhi Division) for allotment of the flat in the name of the Petitioner only, there was no occasion for Respondent No.1 to have allotted the flat in the name of Respondent No.3, brother of the Petitioner.

7. Although, on the basis of the documents produced on record, it was apparent that it was the Petitioner who was entitled to the allotment of the alternative flat, yet in order to avoid any controversy, Ashok Kumar, brother of the Petitioner was ordered to be impleaded as a party in this writ petition as Respondent No.3. A notice was duly served upon him. He has preferred not to contest the present petition.

8. It is evident that he has no claim in respect of the allotment of alternative flat which as per the documents placed on record is to be made in favour of the Petitioner.

9. The writ petition is according allowed with direction to Respondent No.1 to allot Flat No.410, Pocket-III, Block-B (Type A), Ground Floor in favour of the Petitioner.

10. The allotment letter shall be issued by the DDA within a period of six weeks.

11. A copy of the order be given Dasti to the learned counsel for the Petitioner and learned counsel for Respondent No.1.

12. The writ petition stands disposed of accordingly.

ILR (2014) I DELHI 144
W.P.(C)

OM PARKASH ....PETITIONER

VERSUS

UOI & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

W.P. (C) NO. : 10802/2005 DATE OF DECISION: 29.10.2013

Constitution of India, 1950—Writ petition— latches— Petitioner sought mandamus directing the respondents to allot alternative plot in Dwarka on the grounds that his father was owner of the land in Jasola which was acquired and his father passed away in 1986, though he received compensation in 1987— held, since petitioner did not even respond to the letters of the respondent no.2 in 1991 and 1992 and falsely took up the plea that he was asked to produce the documents in 1997, though he failed to produce any such letter of respondent no.2, the petition is bad for delay and laches and cannot be entertained.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Neeraj Dev Gaur, Advocate.

FOR THE RESPONDENTS : Mr. R.V. Sinha with Mr. A.S. Singh, Advocates for Respondent No.1/UOI. Mr. Sanjay Kumar Pathak with Mr. Praneet Singh, Advocates for Respondent No.2. Ms. Shobhana Takiar with Ms. Ritagya Riti, Advocates for Respondent DDA.

CASE REFERRED TO:

1. *Government of NCT of Delhi* vs. *Veerwati,* 2012 (3) AD (Delhi) 89.

RESULT: Writ Petitioner Dismissed.

G.P. MITTAL, J. (ORAL)

1. The Petitioner seeks a writ of mandamus directing the Respondents to allot an alternative plot of land measuring 400 sq. yds in Dwarka on the ground that his father Late Harchand was owner of 25 bigha and 8 biswas of land falling in revenue estate of Village Jasola. A Notification No.4(9)/64-L&H dated 06.04.1964 under Section 4 of Land Acquisition Act, 1894 (the Act) was issued by the Government of Delhi for acquisition of certain lands for planned development of Delhi. This was followed by another Notification No.F-4(9)/64/L&H dated 07.12.1966 under Section 6 of the Act and an award of compensation was made vide award No.6-D/Supplementary/86-87. The Petitioner's father expired on 25.06.1986 leaving behind the Petitioner and his five sisters as his only legal heirs. The Petitioner also received the compensation for acquisition of the land on 29.01.1987.

2. The case of the Petitioner is that as per the scheme framed and governed by the Respondents, the Petitioner was entitled to alternative allotment of a plot measuring 400 sq. yds in Dwarka. The Petitioner alleges that as per the policy and the scheme framed, he wrote letters dated 27.01.2004 and 18.03.2004 to Respondent No.2 informing it that he had submitted the relevant papers asked for on 27.01.2004. The

Petitioner also requested the Respondents to reopen his file bearing No.32(29)14/87/L&B/ALT. The Petitioner states that other persons, namely, Ishar Singh Chauhan, Ajit Singh Chauhan, Bhim Singh Chauhan, Sukhdev Singh Chauhan and Jai Singh Chauhan whose land was similarly acquired have been allotted a residential plot measuring 400 sq. yds. The Petitioner, therefore, says that the act of the Respondents in allotting residential land to the above stated five persons who were lower in seniority than him was arbitrary and was violative of Article 14 of the Constitution of India. Thus, as stated above, the Petitioner prays for issuance of a writ of mandamus directing Respondents to allot a plot measuring 400 sq. yds of residential land in Dwarka to him.

3. Before I advert to the counter affidavit filed by the Respondents, I may mention that the Petitioner in the writ petition is completely silent on his part if he ever applied for allotment of an alternative plot in accordance with the policy of the Respondents. However, in the rejoinder filed by him when the Petitioner was reminded about his application and the action taken by Land and Building Department of Government of Delhi, he came up with the plea that he had applied for allotment of the alternative plot within one year from the date of award of compensation paid to him. The compensation was paid to the Petitioner on 29.01.1987 and application for allotment was moved by the Petitioner on 28.09.1987. He thus stated that there was no delay on his part in applying for an alternative plot. He raised a new plea that in January, 1997, he was required to submit the death certificate, relinquishment deed, indemnity bond which he did on 31.01.1997. In the year 2003-04, the Petitioner was required to submit legal heirs certificate, etc. which he also did but the plot was not allotted to him. In the counter affidavit filed by Respondent No.2, the acquisition of the land and award of compensation was not disputed. Respondent No.2(Land and Building Department, Government of NCT of Delhi) took the plea that by letters dated 17.12.1991 and 30.12.1991, the Petitioner was asked to produce requisite documents, that is, revenue record, death certificate, affidavits, etc. The Petitioner, however, failed to produce the required documents. His case was, therefore, closed due to non-submission of documents and an intimation in this regard was communicated to him by a letter dated 23.01.1992. The Respondent No.2 took up the plea that the death certificate, relinquishment deed and indemnity bond were submitted by the Petitioner

on 13.01.1997, that is, after a gap of five years. Thus, it was stated that on account of delay and latches and the Petitioner's case having already been closed, he was not entitled to an alternative allotment of a plot of land.

4. It is urged by the learned counsel for the Petitioner that the letters dated 17.12.1991, 30.12.1991 and 23.01.1992 were not received by him and, therefore, the case of the Petitioner was liable to be reopened and the Petitioner was entitled to allotment of an alternative plot.

5. On the other hand, learned counsel for the Respondent No.2 has produced the original file of the Petitioner relating to allotment of an alternative plot of land. The Petitioner did make an application dated 28.09.1987 in the prescribed proforma. He also attached the certificate issued by the Land Acquisition Collector (LAC) that the Petitioner was paid a compensation of Rs. 9,26,660/- in respect of the acquisition of the land as mentioned in the certificate. The Petitioner has further filed an affidavit stating that neither he nor any of his dependent owned any house or plot in the Union Territory of Delhi. It is sought to be contended on behalf of the Petitioner that the earlier mentioned letters were not received by the Petitioner. It is urged that the address mentioned in the letters dated 17.12.1991, 30.12.1991 and 23.01.1992 is an incomplete address. Although, this plea is being raised by the Petitioner for the first time, yet it would be relevant to mention that although in the writ petition the Petitioner has mentioned his address as 24, Village Jasola, yet in all the documents, that is, the certificate dated 22.04.1987 issued by the LAC, the affidavit dated 23.04.1987 sworn and filed by the Petitioner, the application for allotment of alternative plot, the address is simply mentioned as resident of Village Jasola. The Respondent No.2 has also produced the original despatch register whereby the letters dated 17.12.1991 and 23.01.1992 were posted to the Petitioner. Once it is established that the letters were duly posted, a presumption under Section 114(f) of the Evidence Act, 1872 can be raised against the Petitioner that the letters must have been received by him in the ordinary course of business.

6. The learned counsel for the Petitioner relies on a Division Bench judgment of this Court in **Government of NCT of Delhi v. Veerwati,** 2012(3)AD(Delhi) 89 to buttress his argument that even a closed case can be reopened by the authority. In Veerwati, the case for alternative allotment of the plot was closed on 07.12.1993. The Respondent was

informed about the closure of his case by a letter dated 09.12.1993. Although, the Respondent had disputed receipt of the letter, she had stated in the writ petition that when she visited the office of DDA on 10.12.1993 to find out the progress of his case, she was informed about the closure of case file due to non-submission of the relevant documents. The Respondent in that case immediately submitted the documents by a letter dated 27.12.1993 and requested the competent authority to process her case and to allot her an alternative plot. This was followed by a reminder dated 21.03.1994. In the instant case, as stated earlier, letters dated 17.12.1991 and 30.12.1991 were written to the Petitioner asking him to submit certain documents. Since the Petitioner failed to produce the same, a letter dated 23.01.1992 was written by registered post to the Petitioner informing him that his case has been closed. As stated above, although no proof of despatch of the letter dated 30.12.1991 has been produced by the Respondent, but the proof of despatch of letters dated 17.12.1991 and 23.01.1992 has very much been produced and the presumption of service under Section 114(f) which is liable to raised against the Petitioner has not been rebutted.

7. The instant case is covered by a judgment of this Court in W.P.(C).1515/2007 titled **Smt. Mishro Devi. v. The Secretary, Land and Building Department, Government of NCT of Delhi & Anr.** decided on 27.02.2007 where in similar circumstances, the Petitioner's case was closed by a letter dated 27.02.1992. The learned Single Judge held that the inaction of the Petitioner for eighteen years from the date of the allotment will indicate that she was not at all interested in the allotment of land. The Petitioner, in that case, unsuccessfully challenged the order before the Division Bench in LPA 221/2007 which was dismissed by an order dated 26.03.2007.

8. It is evident that the Petitioner was guilty of delay and latches. He did not even respond to the letters written by Respondent No.2 in the year 1991 and 1992. He falsely took up the plea that he was asked to produce the documents in the year 1997, though he failed to produce any such letter written by Respondent No.2 on record. Since the petition suffers from delay and latches, the same cannot be entertained.

9. The writ petition is accordingly dismissed.

ILR (2014) I DELHI 149
W.P.(C)

ANIL KUMAR SHARMA ...PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. 6855/2013 DATE OF DECISION: 30.10.2013
C.M. NO. : 14858/2013

Service Law—Compassionate appointment—father of petitioner who was employed with BSF, suffered an injury which required his discharge in 1982 from BSF—on attaining the age of majority, the petitioner applied for compassionate appointment in 1988 and was offered a post of water carrier in 2004 which he accepted—after accepting the appointment in class IV, the petitioner made representations that he is entitled to appointment in class III post—respondents rejected the representations, so petitioner filed WP(C) 6957/05 for the same benefit, which was dismissed in 2005—petitioner again made representations to the respondents followed by legal notice—respondents rejected the representations, hence the petitioner had no legal right or entitled to the reliefs sought.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Azhar Qayum & Mr. D.V. Shukla, Advocates.

FOR THE RESPONDENTS : Mr. Hashmat Nabi, Advocate for R-1 to R-3.

RESULT: Writ Petition Dismissed.

GITA MITTAL, J. (Oral)

1. By way of the instant writ petition, the petitioner seeks issuance of a Writ of Mandamus directing the respondents to appoint him as a Class III employee in the position of Assistant Sub-Inspector or Class II to which he is eligible instead of Class IV employee. The petitioner is the son of Late Sh.B Raj Dayal Rai who was employed with the Border Security Force (BSF) and unfortunately suffered injury which required his discharge on 26th April, 1982 from service of the Force.

2. On attaining age of 18 years, the petitioner applied for compassionate appointment with the Border Security Force on 7th October 1988 which was followed by issuance of several reminders. It is undisputed before us that sometime in August, 2004, the petitioner was offered a post of Water Carrier on compassionate basis with the BSF which he accepted. After accepting the appointment the petitioner submits that he has been making representations that he was entitled to an appointment in a class III post as against appointment of Class IV, which had been accepted by him. We may note that the petitioner was also seeking retrospective service benefit from 1988 when he had first applied for appointment on compassionate grounds.

3. Inasmuch as the respondents failed to favourably consider the same, the petitioner filed W.P.(C) 6957/2005 in this court which was seeking the above benefits. This writ petition was dismissed by the court vide an order passed on 25th April, 2005, the operative part of which reads as follows:

> "In support of his demands it is not shown, at any stage, his entitlement. He also claims that he should have been appointed to Class III post instead of Class IV post.
>
> This petition on the face of it appears to be a charter of demands than an enforcement of any rights suffering from any rules or law which in our view can be accorded consideration by the Competent Authority of BSF.
>
> Petition is dismissed with observations that in case petitioner makes any representation to the Director General of BSFraising

any of his legitimate demands, it be considered and decided under law."

4. The issue of entitlement to appointment as a Class III employee or the other relief noted above stood concluded by the above order.

5. The petitioner thereafter claims to have filed representation to the respondents in purported compliance of the directions by the court. The petitioner even served a legal notice dated 9th May, 2005 reiterating the above demands which stood rejected by the court order. The respondents proceeded to initially decide these representations vide order dated 24th October, 2007 informing the petitioner as follows:

"2. It is to bring to your notice that your appointment is in the compassionate appointment category being ward of a deceased personnel. As per DOP & T instructions compassionate appointment are made against group 'C' and group 'D' posts only if the individual meets the laid down criteria and possesses requisite qualification for the post.

3. You were considered for the compassionate appointment under this provision but was found unfit medically for appointment as CT (GD). However, DG, BSF considered your case sympathetically being a ward of deceased BSF pers and granted following condonation to appoint you as CL-IV (Enrolled follower) in order to help out your family living in distress due to your father's death. (a) In age by 10 yrs 03 months 21 days.

4. You were offered the post, which you were at liberty to decline if you think it is below your dignity. Compassionate appointment are made to help out the families in distress of those Govt. Servants who die in harness. There is no other consideration of such appointments.

5. As regards your request for out of turn promotion, it is inform you that out of turn promotion has been stopped in the Force as per latest Govt. Orders. Moreover you do not have any outstanding merit for such consideration.

6. You are advised to concentrate on your personal job and show excellence in this instead to resorting to this infractuous

representations etc."

6. It is noteworthy that the petitioner complained by way of a writ petition bearing no.3403 of 2007 which was filed in the Jharkhand High Court with regard to the failure of the respondents to pass orders on his representations. We are informed that such writ petition is pending even on date.

7. Learned counsel for the respondents submits that the pendency of this writ petition would not in any way impact the present writ petition inasmuch as before the Jharkhand High Court the petitioner has only sought directions for disposal of the representations and in view of the order dated 24th October, 2007, that writ petition has been rendered infructuous.

8. Be that as it may, no grievance at all has been made by the petitioner with regard to the order dated 24th October, 2007. It is noteworthy that the order has not been passed on any statutory appeal or representation. This court had already noted in the order passed on 25th April, 2005 that the petitioner had no legal right or entitlement to the reliefs sought. These very reliefs are again pressed in the present writ petition. These observations would bind the consideration by this court.

9. In any case, the order passed by the respondents on 24th October, 2007 has been faulted by the petitioner. The present writ petition has been filed after the passage of five years thereafter and would be prohibited by delay and laches.

10. It is noteworthy that the respondents have also granted condonation of age by over 10 years to the petitioner while giving compassionate appointment. The petitioner has been given benefit of the welfare scheme without having undergone the selection process which candidates undergoing the regular selection would be required to undergo.

11. For all these reasons, this writ petition is wholly misconceived.

We find no merit in the writ petition which is hereby dismissed.

ILR (2014) I DELHI 153
FAO (OS)

DDA **....APPELLANT**

VERSUS

DURGA CONSTRUCTION CO. **.....RESPONDENT**

(BADAR DURREZ AHMED & VIBHU BAKHRU, JJ.)

FAO (OS) NO. : 485-86/2013 **DATE OF DECISION: 07.11.2013**

Code of Civil Procedure, 1908—First Appeal—Arbitration & Conciliation Act, 1996—S. 34-Objections-refiling-condonation of delay-166 days—S. 151 CPC—Inherent powers—Delhi High Court Rule—Volume 5 Chapter 1-A—Rule 5-an Application for condonation of delay of 166 days in refiling the objection moved under S. 151 CPC before single judge-dismissed—FAO preferred—Respondent contended-no jurisdiction to condone the delay beyond the period of 3 months and 30 days-not permitted in the first instance to file objection-cannot be permitted at the second instance-consequently a refiling done after prescribed statutory period-no jurisdiction to condone the delay beyond the period of 30 days—Held—The Court has jurisdiction to condone delay in refiling even if the period extends beyond the time specified under the Act-however-object of arbitration and conciliation act is to ensure that the arbitration proceedings are concluded expeditiously-jurisdiction not be exercised-delay in filing frustrate the object of the Act-the applicant to satisfy-pursued the matter diligently and delays beyond

control and unavoidable-inordinate delay of 166 days-appellant not able to offer satisfactory explanation-liberal approach not called for-appeal dismissed.

A plain reading of section 34(3) of the Act indicates that the period of limitation prescribed is with respect to making an application for setting aside an award and not in respect of further steps once such an application is made. Thus, there is no time specified in the Act, in respect of re-filing of an application under section 34 of the Act, which has been returned to remove to certain defects. Thus, in our view, while section 34(3) of the Act does indicate the intention of the legislature to ensure that there is no undue delay in filing of an application under section 34 of the Act, the same does not provide any time limit for re-presenting the application. Any restriction with regard to the jurisdiction of the court in condoning the delay in re-filing cannot be read into the provision of section 34(3) of the Act. **(Para 15)**

In our view, filing of an application and re-filing the same after removing defects, stand on completely different footings in so far as the provision of limitation is concerned. It is now well-settled that limitation does not extinguish an obligation but merely bars a party to take recourse to courts for availing the remedies as available to the party. Thus, in the event a party fails to take expeditious steps to initiate an action within the time as specified, then the courts are proscribed from entertaining such action at the instance of such a party. The rationale of prescribing time limits within which recourse to legal remedies can be taken has been explained by the Supreme Court in the case of **Bharat Barrel and Drum Mfg. Co. Ltd. v. ESI Corpn.:** (1971) 2 SCC 860 as under:

> "7. ..... The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of evidence documentary as well as oral to enable the defendant to contest the claim against him; secondly

to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain dormant without asserting them in a court of law. The principle which forms the basis of this rule is expressed in the maximum vigilantibus, non dermientibus, jura subveniunt (the laws give help to those who are watchful and not to those who sleep). Therefore the object of the statutes of limitations is to compel a person to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims. ...." **(Para 16)**

Thus, in our view a Court would have the jurisdiction to condone delay in re-filing even if the period extends beyond the time specified in section 34(3) of the Act. However, this jurisdiction is not to be exercised liberally, in view of the object of the Arbitration and Conciliation Act to ensure that arbitration proceedings are concluded expeditiously. The delay in re-filing cannot be permitted to frustrate this object of the Act. The applicant would have to satisfy the Court that it had pursued the matter diligently and the delays were beyond his control and were unavoidable. In the present case, there has been an inordinate delay of 166 days and in our view the appellant has not been able to offer any satisfactory explanation with regard to the same. A liberal approach in condoning the delay in re-filing an application under section 34 of the Act is not called for as it would defeat the purpose of specifying an inelastic period of time within which an application, for setting aside an award, under section 34 of the Act must be preferred. **(Para 25)**

Important Issue Involved: (a) The Court has Jurisdiction to condone the delay in refiling of the objections beyond the statutory period prescribed (b) To condone the delay, the party must satisfy the court that the matter was pursued diligently and delay is beyond his control and unavoidable, liberal approach is uncalled for.

[Gu Si]

APPEARANCES:

FOR THE APPELLANT : Mr. Arun Birbal, Advocate.

FOR THE RESPONDENT : Mr. Samrat Nigam, Mr. Amit Punj and Mr. J. Mahajan.

CASES REFERRED TO:

1. *Delhi Transco Ltd. & Anr.* vs. *Hythro Engineers Pvt. Ltd.:* 2012 (6) R.A.J. 299 (Del.).
2. *India Tourism Dev. Corporation Ltd.* vs. *R.S. Avtar Singh & Co.:* FAO(OS) No.58/2011, Decided on 10.02.2011.
3. *M/s. Competent Placement Services through its Director/ Partner* vs. *Delhi Transport Corporation through its Chairman:* 2011 (2) R.A.J. 347 (Del).
4. *The Executive Engineer* vs. *Shree Ram Construction Co.*: 2011 (2) R.A.J. 152 (Del.).
5. *Improvement Trust* vs. *Ujagar Singh,* (2010) 6 SCC 786.
6. *DSA Engineers (Bombay)* vs. *Housing & Urban Development Corporation Ltd.:* 2003 (1) AD (Delhi) 411.
7. *Union of India* vs. *Popular Construction Company:* (2001) 8 SCC 470.
8. *Union of India* vs. *Popular Construction Co.,* AIR 2001 SC 4010.
9. *S.R. Kulkarni* vs. *Birla VXL Limited:* 1998 (5) AD (Delhi) 634.
10. *D.C. Sankhla* vs. *Ashok Kumar Parmar:* 1995 (1) AD (Delhi) 753.
11. *Ashok Kumar Parmar* vs. *D.C. Sankhla:* 1995 RLR 85.
12. *Indian Statistical Institute* vs. *Associated Builders:* (1978) 1 SCC 483.
13. *Bharat Barrel and Drum Mfg. Co. Ltd.* vs. *ESI Corpn.:* (1971) 2 SCC 860.

RESULT: Appeal dismissed.

VIBHU BAKHRU, J.

1. The appellant has preferred the present appeal impugning the order dated 06.04.2011 passed by a learned Single Judge of this court in O.M.P. No.89/2009 (hereinafter referred as the 'impugned order'). By the impugned order, the learned Single Judge has dismissed the application bearing I.A. No.1711/2010 filed by the appellant under section 151 of CPC for condonation of delay of 166 days in re-filing the Objections under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act').

2. The controversy involved in the present case is whether the delay of 166 days in re-filing the Objection under section 34 of the Act can be condoned beyond the statutory period of limitation of three months and thirty days as prescribed under section 34(3) of the Act.

3. The facts relevant for examining the controversy in the present appeal are briefly stated as under.

4. Certain disputes arose between the appellant and the respondent and the same were referred to arbitration. An arbitral award dated 02.04.2009 was made pursuant to the said reference. Being aggrieved with the award, the appellant filed an application under section 34 of the Act (being O.M.P. No.89/2009) whereby the appellant challenged a part of the arbitral award. Admittedly, the said Objections were filed on 24.07.2009 with a delay of 17 days. The Registry of this Court raised certain objections and the said application under section 34 of the Act was returned under objections on the same day. It has been stated by the appellant (in the application for condonation for delay in re-filing) that the award was on A4 size paper running into 147 pages and the same was required to be retyped and filed on legal size paper. The application under section 34 of the Act was re-filed on 24.08.2009 with a typed copy of the award on legal size paper. The Registry of this Court again raised certain objections and the said application was once again returned on the same day i.e. on 24.08.2009.

5. It is stated that the application was re-filed on 23.12.2009 after receiving the complete arbitral record. It has been stated by the appellant (in application for condonation for delay in re-filing) that a part of the record was not provided and in the absence of complete documents, counsel for the appellant could not re-file the Objection till 23.12.2009.

It was also stated that the concerned Executive Engineer retired on 30.11.2009 which also delayed the re-filing. The Registry of this Court again raised certain objections and, as per the appellant, the application under section 34 of the Act was finally re-filed on 06.01.2010, after removing all the objections. Therefore, according to the appellant, there was a delay of 166 days in re-filing the Objection. The appellant had filed an application bearing I.A. No.1711/2010 in OMP No. 89/2009 for condonation of delay of 166 days in re-filing the said application under section 34 of the Act.

6. However, as per the respondent, the delay in re-filing exceeds 166 days as, according to the respondent, the Registry of this Court had again pointed out certain defects on 06.01.2010 which were finally cured and the application under section 34 of the Act was re-filed for the last time on 05.02.2010 and not on 06.01.2010 as asserted by the appellant. It is contended by the respondent that the same is evident from the fact that the affidavits annexed with the application under section 34 of the Act, the stay application and the application for condonation of delay indicates that the same were attested on 01.02.2010. Therefore, as per the respondent, there was a delay of 195 days in re-filing the said application.

7. The learned Single Judge allowed the application (I.A. No.1710/2010 in O.M.P. No.89/2009) filed by the appellant for condonation of delay of 17 days in filing the application under section 34 of the Act. However, the application (I.A. No.1711/2010 in O.M.P. No.89/2009) for condonation of delay of 166 days in re-filing the application was dismissed. Consequently, the application preferred under section 34 of the Act being O.M.P. No.89/2009 also stood rejected. The relevant portion of the impugned order is quoted as under:-

> "The submission of the learned counsel for the petitioner is that the respondent-contractor has been awarded interest under the award and delay in re-filing would be duly compensated, if the objections are eventually dismissed on merits. Petitioner placed reliance on the decision of the Supreme Court in **Improvement Trust Vs. Ujagar Singh,** (2010) 6 SCC 786, to submit that unless it is a case of mala fides which are writ large from the conduct of the party, generally as a normal rule, delay should be condoned. An attempt should be made to allow the matter to be

contested on merits rather than to throw it out on such technicalities.

Having heard learned counsel for the petitioner as well as learned counsel for the respondent, I am not inclined to allow the present application which seeks condonation of delay of 166 days in re-filing the petition. The original period of limitation within which objections can be preferred to the award is three months. The power of the court to condone delay is only limited to 30 days and not thereafter. The Supreme Court has held in **Union of India Vs. Popular Construction Co.,** AIR 2001 SC 4010, that the power of the court to condone delay does not extend beyond the period of 30 days. The delay in re-filing of the petition has to be viewed in the light of the aforesaid period of limitation which is not stretchable beyond the period of three months and thirty days.

xxxx xxxx xxxx xxxx xxxx

The judgment of the Supreme Court in **Improvement Trust** (supra), in my view, has no application to present case as it cannot be said that the delay in re-filing is not "huge", particularly when the statutory period of limitation cannot be stretched beyond 30 days beyond the limitation period of three months, and the delay in re-filing alone is 166 days. The said decision was rendered by the Supreme Court while considering a case falling under Section 5 of the Limitation Act. Even though Limitation Act is applicable to a petition under the Arbitration and Conciliation Act, the limitation provided under Section 34(3) is elastic only to a limited extent, and not beyond that.

For the aforesaid reasons, I find no merit in this application and the same is dismissed."

8. Aggrieved by the impugned order, the appellant has preferred the present appeal. This Court had, by an order dated 03.10.2011, permitted the appellant to deposit the decretal amount in court within a period of three weeks from the date of the said order. The appellant has deposited the entire decretal amount along with interest and the same is placed in a Fixed Deposit. In view of the deposit made by the appellant, this court had by an order dated 19.12.2011 stayed the execution of the arbitral

award.

9. It is contented on behalf of the appellant that the learned Single Judge has erred in holding that the delay in re-filing of the petition has to be viewed in light of the period of limitation as specified under section 34(3) of the Act and the same is not stretchable beyond the period of three months and thirty days. It is contended that the court is not powerless to condone the delay in re-filing of an application under section 34 of the Act. A court may decline to condone the delay in re-filing where it is found that the approach of the applicant is negligent or malafide and intended to delay the proceedings. However, in cases where the applicant is able to show sufficient cause for the delay, the courts would exercise their jurisdiction to condone the delay. The counsel for the appellant has placed reliance on a judgment passed by a Division Bench of this court in the case of **S.R. Kulkarni v. Birla VXL Limited:** 1998 (5) AD (Delhi) 634. It is also contended that if the defects are of such character as would render a plaint as non est in the eyes of law, then the date of presentation would be the date of re-filing after removal of the defects. However, if the defects are formal or ancillary in nature not affecting the validity of the plaint, the date of presentation would be the date of original presentation for the purpose of calculating the period of limitation. It is contended that the same principle would be equally applicable for an application under section 34 of the Act. Since in the present case, the defects are only formal and ancillary in nature, the application should be taken as filed within the specified period and the delay in re-filing ought to be condoned. The learned counsel for the appellant placed reliance on a decision of this court in **DSA Engineers (Bombay) v. Housing & Urban Development Corporation Ltd.:** 2003 (1) AD (Delhi) 411.

10. It is contented on behalf of the respondent that the Courts have no jurisdiction to condone the delay in re-filing if the delay in re-filing is beyond the period of three months and thirty days as specified under section 34(3) of the Act. It is argued on behalf of the respondent that what is not permitted in the first instance, i.e. to file objections beyond three months per section 34(3) of the Act, cannot be permitted to be done at the second stage. Consequently, if the re-filing is done after the prescribed statutory period, the court will have no jurisdiction to condone the delay even in cases where the initial filing was within time. The

courts lack the jurisdiction to condone delay beyond the period of 30 days as specified under section 34(3) of the Act. The counsel for the respondent has placed reliance on the judgments passed by Division Benches of this Court in **India Tourism Dev. Corporation Ltd. v. R.S. Avtar Singh & Co.:** FAO(OS) No.58/2011, Decided on 10.02.2011, **Delhi Transco Ltd. & Anr. v. Hythro Engineers Pvt. Ltd.:** 2012 (6) R.A.J. 299 (Del.) and **The Executive Engineer v. Shree Ram Construction Co.:** 2011 (2) R.A.J. 152 (Del.) in support of his contention that the court does not have the jurisdiction to condone any delay beyond the period of 120 days (i.e. three months and 30 days) from the date on which the award was received or from the date on which request under section 33 of the Act was disposed of. It is also contended that a failure to file the certified copy of the award must be read as a failure to file a signed copy of the award and the same would be a fatal defect and would render the filing of the application under section 34(3) of the Act inconsequential.

11. The counsel for the respondent has also placed before us the orders passed by the Supreme Court dismissing the Special Leave Petitions preferred against the judgment dated 12.11.2010 passed by the Division Bench of this Court in **The Executive Engineer v. Shree Ram Construction Co.** (supra). It is further pointed out that the said decision was also followed by another Division Bench of this Court in the **India Tourism Dev. Corporation Ltd.** (supra) and the Special Leave Petitions preferred against the decision in **India Tourism Dev. Corporation Ltd.** (supra) have also been dismissed by the Supreme Court. A copy of the said decision of the Supreme Court in SLP Nos.9175-9176/2011 decided on 22.07.2013 has also been placed before us.

12. It is also contented by the counsel for respondent that as per Rule 5 in Chapter 1-A (a) of Volume 5 of the Delhi High Court Rules, the objections should have been re-filed within a time not exceeding 7 days at a time, and 30 days in aggregate to be fixed by the Deputy Registrar/ Assistant Registrar, Incharge of the Filing Counter. Rule 5(3) of the said Rules also makes it abundantly clear that in case the petition is filed beyond the time allowed by the Deputy Registrar/Assistant Registrar, Incharge of the Filing Counter under Sub-Rule 1, it shall be considered as a fresh institution. The moment it becomes a fresh filing, then under the settled law, the delay beyond the expiry of prescribed

period cannot be condoned on any ground. The maximum period of 30 days is provided under Rule 5, Chapter 1, Part A of Vol. 5 of the High Court Rules and Orders for removing the objections by re-filing of the petition. In the present case, the same was not done and the application was filed after the expiry of 166 days.

13. We have heard the learned counsel for the parties at length. The questions that arise for consideration in the present appeal are, whether a court has the jurisdiction to condone delay in re-filing of an application under section 34 of the Act, where the aggregate period of delay exceeds the period of limitation as specified under section 34(3) of the Act. And if so, whether the delay in re-filing ought to be condoned in the present case.

14. Section 34(3) of the Act is relevant and is reproduced below:-

> "(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:
>
> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

15. A plain reading of section 34(3) of the Act indicates that the period of limitation prescribed is with respect to making an application for setting aside an award and not in respect of further steps once such an application is made. Thus, there is no time specified in the Act, in respect of re-filing of an application under section 34 of the Act, which has been returned to remove to certain defects. Thus, in our view, while section 34(3) of the Act does indicate the intention of the legislature to ensure that there is no undue delay in filing of an application under section 34 of the Act, the same does not provide any time limit for re-presenting the application. Any restriction with regard to the jurisdiction of the court in condoning the delay in re-filing cannot be read into the provision of section 34(3) of the Act.

16. In our view, filing of an application and re-filing the same after removing defects, stand on completely different footings in so far as the provision of limitation is concerned. It is now well-settled that limitation does not extinguish an obligation but merely bars a party to take recourse to courts for availing the remedies as available to the party. Thus, in the event a party fails to take expeditious steps to initiate an action within the time as specified, then the courts are proscribed from entertaining such action at the instance of such a party. The rationale of prescribing time limits within which recourse to legal remedies can be taken has been explained by the Supreme Court in the case of **Bharat Barrel and Drum Mfg. Co. Ltd. v. ESI Corpn.:** (1971) 2 SCC 860 as under:

> "7. ..... The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of evidence documentary as well as oral to enable the defendant to contest the claim against him; secondly to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain dormant without asserting them in a court of law. The principle which forms the basis of this rule is expressed in the maximum vigilantibus, non dermientibus, jura subveniunt (the laws give help to those who are watchful and not to those who sleep). Therefore the object of the statutes of limitations is to compel a person to exercise his right of action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims. ...."

17. The cases of delay in re-filing are different from cases of delay in filing inasmuch as, in such cases the party has already evinced its intention to take recourse to the remedies available in courts and has also taken steps in this regard. It cannot be, thus, assumed that the party has given up his rights to avail legal remedies. However, in certain cases where the petitions or applications filed by a party are so hopelessly inadequate and insufficient or contain defects which are fundamental to the institution of the proceedings, then in such cases the filing done by the party would be considered non est and of no consequence. In such cases, the party cannot be given the benefit of the initial filing and the date on which the defects are cured, would have to be considered as the date of the initial filing. A similar view in the context of Rules 1 & 2 of

Chapter IV of the Delhi High Court (Original Side) Rules, 1967 was expressed in **Ashok Kumar Parmar v. D.C. Sankhla:** 1995 RLR 85, whereby a Single Judge of this Court held as under:

> "Looking to the language of the Rules framed by Delhi High Court, it appears that the emphasis is on the nature of defects found in the plaint. If the defects are of such character as would render a plaint, a non-plaint in the eye of law, then the date of presentation would be the date of re-filing after removal of defects. If the defects are formal or ancillary in nature not effecting the validity of the plaint, the date of presentation would be the date of original presentation for the purpose of calculating the limitation for filing the suit."

A Division Bench of this Court upheld the aforesaid view in **D.C. Sankhla v. Ashok Kumar Parmar:** 1995 (1) AD (Delhi) 753 and while dismissing the appeal preferred against decision of the Single Judge observed as under:

> "5. ..... In fact, that is so elementary to admit of any doubt. Rules 1 and 2 of (O.S.) Rules,1967, extracted above, do not even remotely suggest that the re-filing of the plaint after removal of the defects as the effective date of the filing of the plaint for purposes of limitation. The date on which the plaint is presented, even with defects, would, therefore, have to be the date for the purpose of the limitation act."

18. In several cases, the defects may only be perfunctory and not affecting the substance of the application. For example, an application may be complete in all respects, however, certain documents may not be clear and may require to be retyped. It is possible that in such cases where the initial filing is within the specified period of 120 days (3 months and 30 days) as specified in section 34(3) of the Act, however, the re-filing may be beyond this period. We do not think that in such a situation the court lacks the jurisdiction to condone the delay in re-filing. As stated earlier, section 34(3) of the Act only prescribes limitation with regard to filing of an application to challenge an award. In the event that application is filed within the prescribed period, section 34(3) of the Act would have no further application. The question whether the Court should, in a given circumstance, exercise its discretion to condone the delay in

re-filing would depend on the facts of each case and whether sufficient cause has been shown which prevent re-filing the petition/application within time.

19. The Supreme Court in the case of **Union of India v. Popular Construction Company:** (2001) 8 SCC 470 has held that the time limit prescribed under section 34 of the Act to challenge an award is not extendable by the Court under section 5 of the Limitation Act, 1963 in view of the express language of section 34(3) of the Act. However, this decision would not be applicable in cases where the application under section 34 of the Act has been filed within the extended time prescribed, and there is a delay in re-presentation of the application after curing the defects that may have been pointed out. This is so because section 5 of the Limitation Act, 1963 would not be applicable in such cases. Section 5 of the Limitation Act, 1963 provides for extension of the period of limitation in certain cases where the Court is satisfied that the appellant/ applicant had sufficient cause for not preferring an appeal or making an application within the specified period. In cases, where the application/ appeal is filed in time, section 5 would have no application. The Supreme Court in the case of **Indian Statistical Institute v. Associated Builders:** (1978) 1 SCC 483 considered the applicability of section 5 of the Limitation Act, 1963 where the objection to an award under the provisions of the Arbitration Act, 1940 was filed in time but there was substantial delay in re-filing the same. The High Court in that case held that there was a delay in filing the objections for setting aside the award and consequently, rejected the application for condonation of delay. An appeal against the decision of the High Court was allowed and the Supreme Court rejected the contention that there was any delay in filing objections for setting aside the award. The relevant extract from the decision of the Supreme Court is reproduced below:-

> "9. ..... In the circumstances, it cannot be said that objections were not filed within time or that because they were not properly stamped the objections could not be taken as having been filed at all. Therefore, in our view, there had not been any delay in preferring the objections. The delay, if any, was in complying with the directions of the Registrar to rectify the defects and refiling the objections. The delay, as we have pointed out earlier, is not due to any want of care on the part of the appellant but due to circumstances beyond its control.
>
> 10. The High Court was in error in holding that there was any delay in filing the objections for setting aside the award. The time prescribed by the Limitation Act for filing of the objections is one month from the date of the service of the notice. It is common ground that the objections were filed within the period prescribed by the Limitation Act though defectively. The delay, if any, was in representation of the objection petition after rectifying the defects. Section 5 of the Limitation Act provides for extension of the prescribed period of limitation if the petitioner satisfies the court that he had sufficient cause for not preferring the objections within that period. When there is no delay in presenting the objection petition Section 5 of the Limitation Act has no application and the delay in representation is not subject to the rigorous tests which are usually applied in excusing the delay in a petition under Section 5 of the Limitation Act. The application filed before the lower court for condonation of the delay in preferring the objections and the order of the court declining to condone the delay are all due to misunderstanding of the provisions of the Civil Procedure Code. As we have already pointed out in the return the Registrar did not even specify the time within which the petition will have to be represented."

20. It follows from the above that once an application or an appeal has been filed within the time prescribed, the question of condoning any delay in re-filing would have to be considered by the Court in the context of the explanation given for such delay. In absence of any specific statute that bars the jurisdiction of the Court in considering the question of delay in re-filing, it cannot be accepted that the courts are powerless to entertain an application where the delay in its re-filing crosses the time limit specified for filing the application.

21. Although, the courts would have the jurisdiction to condone the delay, the approach in exercising such jurisdiction cannot be liberal and the conduct of the applicant will have to be tested on the anvil of whether the applicant acted with due diligence and dispatch. The applicant would have to show that the delay was on account of reasons beyond the control of the applicant and could not be avoided despite all possible efforts by the applicant. The purpose of specifying an inelastic period of

limitation under section 34(3) of the Act would also have to be borne in mind and the Courts would consider the question whether to condone the delay in re-filing in the context of the statute. A Division Bench of this High Court in **M/s. Competent Placement Services through its Director/ Partner v. Delhi Transport Corporation through its Chairman:** 2011 (2) R.A.J. 347 (Del) has held as under:

> "9. In the light of these provisions and decisions rendered by the Hon'ble Supreme Court, it is thus clear that no petition under Section 34 of the A&C Act can be entertained after a period of three months plus a further period of 30 days, subject to showing sufficient cause, beyond which no institution is permissible. However, the rigors of condonation of delay in refiling are not as strict as condonation of delay of filing under Section 34(3). But that does not mean that a party can be permitted an indefinite and unexplainable period for refilling the petition."

22. The decision of a Division Bench of this Court in **The Executive Engineers v. Shree Ram Construction & Co.** (supra) which is relied upon by the respondent also does not support the contention that this Court would not have the jurisdiction to condone the delay in re-filing beyond the period of three months and 30 days as specified under section 34(3) of the Act. The Court in that decision had pointed out that, in the context of Arbitration and Conciliation Act, liberality in condoning the delay in re-filing would be contrary to the intention of the Parliament. However, this does not imply that the Court would have no jurisdiction to condone the delay in re-filing beyond the period as specified in section 34(3) of the Act. This is also apparent from Para 41 of the said judgment which reads as under:

> "41. The question, which still requires to be answered, is whether a reasonable explanation has been given with regard to delay of 258 days in the refiling of the Objections. Since this delay crosses the frontier of the statutory limit, that is, three months and thirty days, we need to consider whether sufficient cause had been shown for condoning the delay. The conduct of the party must pass the rigorous test of diligence, else the purpose of prescribing a definite and unelastic period of limitation is rendered futile. The reason attributed by the Appellant for the delay is the ill health of the Senior Standing Counsel. However,

> as has been pithily pointed out, the Vakalatnama contains the signatures of Ms Sonia Mathur, Standing Counsel for the Department; in fact, it does not bear the signature of Late Shri R.D.Jolly. Because of the explanation given in the course of hearing, we shall ignore the factum of the Vakalatnama also bearing the signature of another Standing Counsel, namely, Ms Prem Lata Bansal. We have called for the records of OMP No.291/2008 and we find that the Objections have not been signed by Late Shri R.D.Jolly but by Ms Sonia Mathur on 9.8.2007, on which date the supporting Affidavit has also been sworn by the Director of Income Tax. In these circumstances, the illness of Late R.D.Jolly is obviously a smokescreen. No other explanation has been tendered for the delay. The avowed purpose of the A&C Act is to expedite the conclusion of arbitral proceedings. It is with this end in view that substantial and far reaching amendments to the position prevailing under the Arbitration Act 1940 have been carried out and an altogether new statute has been passed. This purpose cannot be emasculated by delays, intentional or gross, in the course of refiling of the Petition/Objections. The conduct of the Appellant is not venial. We find no error in the conclusion arrived at by the learned Single Judge and accordingly dismiss the Appeal."
>
> (underlining added)

23. The abovementioned decision of **The Executive Engineers v. Shree Ram Construction** (supra) has also been considered by this Court in **Delhi Transco Ltd. v. Hythro Engineers Pvt. Ltd.** (supra), wherein it has been explained as under:-

> "9. The decision in **Competent Placement Services** (supra), in our view, does not say anything to the contrary from what has been observed by the Division Bench in **Shree Ram Construction Co.** (supra). All that has been observed by the same Division Bench on the same day, is that the rigors of condonation of delay in re-filing are not as strict as condonation of delay in filing under Section 34(3). At the same time, the Division Bench also observed *"but that does not mean that a party can be permitted an indefinite and unexplainable period*

for re-filing the petition".

10. It is in **Shree Ram Construction Co.** (supra) that the Court actually examined as to what is the magnitude of delay in re-filing, which the Court may tolerate and permit to be condoned in a given case. Obviously, there cannot be any hard & fast rule in that respect, and the Court would have to examine each case on its own facts & merits and to take a call whether, or not, to condone the delay in refiling the objection petition, when the initial filing of the petition is within the period of limitation. However, what is to be borne in mind by the Court is that the limitation period is limited by the Act to three months, which is extendable, at the most, by another thirty days, subject to sufficient cause being disclosed by the petitioner to explain the delay beyond the period of three months. Therefore, it cannot be that a petitioner by causing delay in re-filing of the objection petition, delays the re-filing to an extent which goes well beyond even the period of three months & thirty days from the date when the limitation for filing the objections begins to run. If the delay in re-filing is such as to go well and substantially beyond the period of three months and thirty days, the matter would require a closer scrutiny and adoption of more stringent norms while considering the application for condonation of delay in refiling, and the Court would conduct a deeper scrutiny in the matter. The leniency shown and the liberal approach adopted, otherwise, by the Courts in matter of condonation of delay in other cases would, in such cases, not be adopted, as the adoption of such an approach by the Court would defeat the statutory scheme contained in the Act which prescribes an outer limit of time within which the objections could be preferred. It cannot be that what a petitioner is not entitled to do in the first instance, i.e. to file objection to an award beyond the period of three months & thirty days under any circumstance, he can be permitted to do merely because he may have filed the objections initially within the period of three months, or within a period of three months plus thirty days, and where the refiling takes place much after the expiry of the period of three months & thirty days and, that too, without any real justifiable cause or reason."

(underlining added)

24. The respondent has also relied upon the order of the Supreme Court dated 22.07.2013 dismissing Special Leave Petition No. 9175-9176/2011 in **India Tourism Development Corp. Ltd. v. R.S. Avtar Singh & Co.** The above Special Leave Petitions arose from the judgment order dated 10.02.2011 in FAO No. 58/2011 and CM No. 2252/2011 which in turn had relied upon the judgment in **The Executive Engineers v. Shree Ram Construction & Co.** (supra). As the Special Leave Petitions against the decision in **The Executive Engineers v. Shree Ram Construction & Co.** (supra) had been dismissed, an application was moved for dismissal of the said Special Leave Petitions. The Supreme Court allowed the application and dismissed the Special Leave Petitions. The said order also cannot be read to hold that a court does not have the jurisdiction to condone delay in re-filing of an application under section 34 of the Act, beyond the period of three months and thirty days, where the initial filing was within the time as specified under section 34(3) of the Act.

25. Thus, in our view a Court would have the jurisdiction to condone delay in re-filing even if the period extends beyond the time specified in section 34(3) of the Act. However, this jurisdiction is not to be exercised liberally, in view of the object of the Arbitration and Conciliation Act to ensure that arbitration proceedings are concluded expeditiously. The delay in re-filing cannot be permitted to frustrate this object of the Act. The applicant would have to satisfy the Court that it had pursued the matter diligently and the delays were beyond his control and were unavoidable. In the present case, there has been an inordinate delay of 166 days and in our view the appellant has not been able to offer any satisfactory explanation with regard to the same. A liberal approach in condoning the

delay in re-filing an application under section 34 of the Act is not called for as it would defeat the purpose of specifying an inelastic period of time within which an application, for setting aside an award, under section 34 of the Act must be preferred.

26. In our view, although this Court has the jurisdiction to condone the delay in re-filing the subject application, nonetheless, exercise of this jurisdiction in favour of the appellant is not warranted in the facts of this case. Accordingly, the present appeal stands disposed of with no order as to costs. The decretal amount which has been placed in a fixed deposit, is directed to be released to the respondent.

ILR (2014) I DELHI 171
WP. (C)

RAMESH FONIA **....PETITIONER**

VERSUS

UOI AND ORS. **....RESPONDENTS**

(GITA MITTAL & DEEPA SHARMA, JJ.)

WP. (C) NO. : 8107/2011 **DATE OF DECISION: 18.11.2013**

Constitution of India, 1950—Article 226: Petitioner joined BSF in November, 1997 and suffered two injuries during the course of his duties in 1998, and then against in 2006—Medical Board observed that the Petitioner was permanently incapacitated for any kind of service, noting that such incapacitation occurred in the course of service—Thereby, Petitioner was retired on 4th September, 2009 on the ground of physical unfitness—The Accounts Division refused to grant the Petitioner disability pension due to the Petitioner, on the grounds that Petitioner was himself responsible for the injury and the injury sustained by him was attributable to a bona fide government duty as opined by the Court of injury proceedings. The Petitioner's case is that Medical board proceedings were never served—Secondly, injury sustained was attributable to service, therefore Petitioner is entitled to disability pension—Respondents contend that Petitioner failed to appeal against the finding of the Medical Board and that after the 1998 injury, Petitioner ought to have refrained from physically strenuous activities.

Held: The copy of the Medical Boards's proceedings were not served on the Petitioner—Hence, no meaningful challenge to the same could be laid out—Secondly, evening games were an internal part of the petitioner's duties. Therefore, injuries suffered by the Petitioner while playing volleyball at the BOP was suffered by him while he was on duty and are attributable to bonafide government service, which has resulted in his disability. Rejection of petitioners claim for disability pension quashed—Arrears due to be computed and paid—Further entitled to costs of Rs.20,000.

The challenge by the petitioner in the present case rests primarily on two grounds. The first ground is that the medical board proceedings relied upon by the respondents were never furnished to the petitioner and that the petitioner had access to them for the first time on the 16th of September, 2008 when they were filed along with the counter affidavit of the respondents to the present writ petition. As such, the petitioner was deprived of the opportunity to challenge the same. The second ground on which the petitioner assails the rejection of his claim by the respondent and refusal of the disability pension is premised on the contention that the injury which was suffered by the petitioner was unquestionably attributable to his service inasmuch as the same was suffered during the course of bonafide duty,

entitling the petitioner to the award and payment of disability pension as per the applicable rules and guidelines. **(Para 9)**

So far as the first contention of the petitioner is concerned, the respondents rely on the communication dated 16th April, 2009 whereby the petitioner has been informed that the medical board which examined him at the BSF Berhampore Hospital on 16th September, 2008 had found him unfit for further service in the BSF and the finding of the medical board declaring him unfit for further service under Rule 19(3) of BSF Rules, 1969 was thereby conveyed to the petitioner. By this communication, the petitioner was informed that he may appeal against the said decision of the medical board within 15 days of this communication. A perusal of this communication would show that the respondents have not enclosed a copy of the board proceedings with the letter. The tenor of the letter shows that the petitioner was being informed about the finding of the unfitness by the said medical board for the first time by this communication. It is therefore, apparent that the respondents have not furnished a copy of the medical board proceedings to the petitioner. There is thus certainly merit in the petitioner's contention that a copy of the board proceedings was never furnished to him and he was never given opportunity to appeal against the said decision. **(Para 10)**

Certainly a meaningful challenge to the medical board proceedings could have been laid by the petitioner only if he had access to the proceedings of the board. The respondent's objection that the petitioner failed to appeal against the finding and, therefore, the same binds him is of no consequence or effect in this background. **(Para 12)**

It is, therefore, manifest that despite the leg injury sustained by the petitioner as well as his medical categorization, he was freely posted in difficult areas by the respondents. No exemption from performance of any kind of duty was granted to him. The respondents have also stated in the counter

affidavit that the petitioner was performing the duties of a Company Commander, which is a leadership position carrying with it the responsibility of a large contingent of troops in difficult and remote parts of the country. **(Para 18)**

The respondents did not make any special dispensation so far as work allocation was concerned qua the petitioner. He has been treated and performed duties like any other person who was not in a low medical category. **(Para 32)**

So far as attributability of the second injury is concerned, the only circumstance for denying that the same is an endorsement by the Company Commandant made on the 4th of December, 2006 wherein the Commandant had stated that no one else but the officer himself was responsible for the injury sustained while playing volley ball on 14th of August, 2006.

This endorsement only clarifies that no other person was involved in the infliction of the injuries which were suffered during the match. This endorsement cannot be treated as the Commandant having been stated that the same was not attributable to the service. In fact, we may note that it is the case of the respondents that no other senior officer was present at the post on the 14th of August, 2006 to support their contention that there was no pressure on the petitioner to play the games. Therefore the Commandant was not present when the petitioner suffered the injury and was incompetent to comment on the injury suffered by the petitioner. **(Para 36)**

From the above discussion, the inevitable and only possible conclusion is that the evening games were the integral part of the petitioner's duties. It is also a fact that the petitioner was not exempted from performance of any part of the assigned duty. The respondents have themselves not treated the petitioner as any special case of low medical category. He was being assigned postings and positions just as any

other BSF personnel who was not a low medical category including the hard postings. The respondents recognized the leadership required by a person in the position of a commander. There is no dispute that the petitioner had to motivate the troops towards the acquisition of physical fitness by participation in the games. The same is only possible by the officer leading from the front. It therefore, has to be held that the injuries suffered by the petitioner on 14th of August, 2006 while playing volleyball at the Border Out Post (BOP) Barapansuri (Mizoram) was suffered by him while he was on duty. **(Para 38)**

As a result, it has to be held that the petitioner was entitled to grant of disability pension which has been wrongly denied to him. **(Para 41)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Arun Srivastava, Advocate.

FOR THE RESPONDENT : Mr. Himanshu Bajaj. CGSC.

RESULT: Writ Petition allowed.

GITA MITTAL, J.

1. By way of the present writ petition, a challenge is laid to the refusal of the respondents to grant disability pension to the petitioner even though he retired from service on grounds of medical unfitness resulting from an injury suffered by him while on bonafide government duty deployed at the Border Out Post (BOP) Barapansuri (Mizoram). The adjudication hinges on the issue as to whether the injuries suffered by the petitioner are attributable to service or not.

2. The facts giving rise to the present petition to the extent necessary for the purposes of the present writ petition are briefly noted hereafter.

3. The petitioner joined service with the Border Security Force on the 15th of November 1997. While undergoing his basic training at the BSF Academy at Tekanpur on the 25th of June, 1998, the petitioner sustained injuries resulting in his placement in the low medical category

during the annual medical examination by the medical board on the 15th of March, 2002. The petitioner was re-examined by the BSF medical board which assembled on the 20th of January, 2003 at Bikaner which continued to place him under the low medical category S1H1A3(L)(T-48)P1E1 with effect from 20th January, 2003 to 19th January, 2004. On the 18th of January, 2004, the petitioner was re-examined by the medical board at Sri Ganga Nagar which again placed him under the low medical category S1H1A3(L)(P) P1E1.

4. On the 14th of August, 2006, the petitioner was posted as the Company Commander at the BOP Barapansuri (Mizoram). He was injured while playing a volleyball match with the company troops deployed under him and sustained injury on his right knee.

5. The medical board held on 16th of September, 2008 at Roshanbagh (West Bengal) assessed the petitioner's disability from both the injuries at 59% and observed that he was completely and permanently incapacitated for further service of any kind in the BSF in consequence of *"effects of old ACL tear (Lt) side (Optd) with screws in situ with medical meniscus injury and IDK (Rt) knee"*. The medical proceedings placed by the respondents with the counter affidavit disclose the following findings:-

"02. Was the disability contracted in Service? Yes

03. Was it contracted in circumstances over which he had no control? Yes

04. Is it directly attributable condition of Service? No.

05. If so, by what specific condition? COI done but not mentioned that the injury sustained on Govt. Duty.

06 & 07.xxx xxx xxx

08. Percentage of disability 59% permanent (As assessed by previous medical board)"

6. It appears that the respondents thereafter proceeded to serve the petitioner with the notice to show cause for his proposed invalidation from BSF Service due to permanent disability and thereafter issued an order dated 4th September, 2009 retiring the petitioner from service on the ground of physical unfitness for the aforenoticed reason under the provisions of Rule 18 of the BSF Rules 1969 with pensionary benefits as admissible under the CCS (Pension) Rules with immediate effect or

from the date of his release whichever was later. The petitioner accordingly proceeded on retirement with effect from the afternoon of 30th September, 2009.

7. So far as release of the pension to the petitioner was concerned, these papers were submitted to the Pay and Accounts Department, BSF New Delhi vide communication dated 30th September, 2009 from the 105 BN BSF. The Pay and Accounts Department of the BSF refused to release the disability pension with the normal pension to the petitioner taking the view that the petitioner was himself responsible for the injuries sustained on 14th August, 2006. As such, the petitioner was granted only invalid pension equivalent to Rs.13,730/- with effect from 1st October, 2009. In the counter affidavit, the respondents have taken the stand that the Pay and Accounts Department has refused to pay the disability pension to the petitioner due to the reason that the injury sustained by him was not attributable to a bonafide government duty as opined by the then commandant 105 BN BOP in the remarks endorsed by him in the court of inquiry proceedings held on 4th of December, 2006.

8. The respondents have also urged that the medical board proceedings held on 16th September, 2008 were approved by the Inspector General (Personnel), BSF Headquarter, New Delhi on 21st October, 2008 and thereafter forwarded to 105 BN. It has been submitted that the BSF Headquarters, New Delhi thereafter had issued a show cause notice dated 16th April, 2009 to the petitioner conveying the proposed action to retire him on medical grounds and informing the petitioner that he could appeal against the decision of the medical board within 15 days of the communication failing which orders to retire him would be passed. The respondents have contended that the petitioner kept silent and did not respond to the show cause notice as such, and on the expiry of the 15 days period, the petitioner was retired from service with the BSF as no representation or objection was received from him.

9. The challenge by the petitioner in the present case rests primarily on two grounds. The first ground is that the medical board proceedings relied upon by the respondents were never furnished to the petitioner and that the petitioner had access to them for the first time on the 16th of September, 2008 when they were filed along with the counter affidavit of the respondents to the present writ petition. As such, the petitioner

was deprived of the opportunity to challenge the same. The second ground on which the petitioner assails the rejection of his claim by the respondent and refusal of the disability pension is premised on the contention that the injury which was suffered by the petitioner was unquestionably attributable to his service inasmuch as the same was suffered during the course of bonafide duty, entitling the petitioner to the award and payment of disability pension as per the applicable rules and guidelines.

10. So far as the first contention of the petitioner is concerned, the respondents rely on the communication dated 16th April, 2009 whereby the petitioner has been informed that the medical board which examined him at the BSF Berhampore Hospital on 16th September, 2008 had found him unfit for further service in the BSF and the finding of the medical board declaring him unfit for further service under Rule 19(3) of BSF Rules, 1969 was thereby conveyed to the petitioner. By this communication, the petitioner was informed that he may appeal against the said decision of the medical board within 15 days of this communication. A perusal of this communication would show that the respondents have not enclosed a copy of the board proceedings with the letter. The tenor of the letter shows that the petitioner was being informed about the finding of the unfitness by the said medical board for the first time by this communication. It is therefore, apparent that the respondents have not furnished a copy of the medical board proceedings to the petitioner. There is thus certainly merit in the petitioner's contention that a copy of the board proceedings was never furnished to him and he was never given opportunity to appeal against the said decision.

11. It is noteworthy that the respondents have enclosed with the counter affidavit the copy of the receipt of the letter dated 16th April, 2009. This receipt also does not contain any reference to the copy of the board proceeding having been ever served upon the petitioner.

12. Certainly a meaningful challenge to the medical board proceedings could have been laid by the petitioner only if he had access to the proceedings of the board. The respondent's objection that the petitioner failed to appeal against the finding and, therefore, the same binds him is of no consequence or effect in this background.

13. At this stage, we may also note that the petitioner appears to

have made an inquiry under the Right to Information Act from the respondents in respect of his claim for disability pension. The respondents responded to the same by letter dated 12th November, 2010 wherein they referred to the definition of disability pension as given in the relevant book. The extract of this reads as follows:-

> "If a Government servant is boarded out of Government service on account of his disablement due to wound, injury or disease and that disablement is accepted as due to Government service, the Government servant will be granted disability pension. This disability pension will be in addition to invalid pension/gratuity, if admissible under CCS (Pension) Rules, 1972."
>
> From the above, it becomes crystal clear that disability element is only granted to those personnel whose disablement is accepted due to Government service. It is for your information that your injury was not accepted to Government service. Besides in COI, (which was conducted to find out the circumstances under which you had sustained injury) Comdt of your unit has opined that "Officer sustained another internal injury on his right leg (due to twisting of leg) while he was playing volleyball match on 14-6-2009 at BOP Barapansuri for which no one else but the officer himself is responsible." Apart from the above, it is also stated in medical board proceedings that the injury sustained by you is nor directly attributable condition of service. Hence, in conclusion, it is stated that you are not entitled to have disability elements."
>
> (Underlining by us)

14. It is now necessary to consider the second issue raised which arises in the present case which relates to the attributability of the injuries suffered by the petitioner which rendered him medically unfit to continue in service.

15. The respondents have taken a position that in view of the injury suffered by the petitioner in 1998 while undergoing basic training, he ought to have refrained from participating in any games. In fact, in the counter affidavit, the respondents have taken the plea that the petitioner had been placed in the low medical category due to the left knee injury sustained on 25th of June, 1998 and that he was not considered fit for

all duties at par with other fit force personnel and thus he stood exempted from undergoing any kind of force level courses involving physical strain and excused from undergoing heavy exercises like field physical efficiency test (FPET) etc. This very submission of the respondents, unsupported by any formal order in this regard, is completely unworthy of any credence.

16. The matter deserves scrutiny from yet another aspect as well. The petitioner has contended that his placement in the low medical category did not impact his performance of normal duties. He was also posted in difficult areas and was performing operational duties throughout the period when he was under the low medical category. The respondents at no point of time accorded any special treatment to the petitioner nor had to exempt him from discharge of normal duties because of his medical categorisation.

17. So far as the petitioners, postings are concerned, the respondents have disclosed that after the injuries suffered by the petitioner on the 25th of June, 1998, the petitioner served with 105 BN BSF at different places including Rajouri (Jammu); Sri Ganga Nagar (Rajasthan); Lunglei (Mizoram) and Roshanbagh (West Bengal) from 1st January, 1999 to 30th September, 2009 when he retired from the BSF.

This position is not disputed by the respondents.

18. It is, therefore, manifest that despite the leg injury sustained by the petitioner as well as his medical categorization, he was freely posted in difficult areas by the respondents. No exemption from performance of any kind of duty was granted to him. The respondents have also stated in the counter affidavit that the petitioner was performing the duties of a Company Commander, which is a leadership position carrying with it the responsibility of a large contingent of troops in difficult and remote parts of the country.

19. Being a member of a disciplined force such as the BSF, the petitioner was thus duty bound to perform all functions as any other Company Commander who may not have suffered any injury. In fact the Company Commander has to lead the company, especially to ensure the fitness of all BSF personnel posted therein.

20. The petitioner has pointed out that he had received a letter dated

8th April, 2006 from the office of the Commandant pointing out the poor performance of the sports team of 105 BN BSF during the Inter – Bn Competition – 2008. It was in this communication that Commandant had inter alia pointed out the low motivational level amongst the players to participate in the games or to achieve desired standard or put in additional efforts to succeed. The Commandant has specifically noted that the personnel were also heard putting forward their apprehensions that they might get hurt if they play and thus they are not interested in participating. The Commandant noted that this was the negative trend which was required to be arrested. In this background, the Commandant had directed the commanders (including the petitioner) to look at these two aspects very minutely and take all corrective steps immediately. It was further stated that any future deviations were likely to pose more difficulties.

21. Mr. Arun Srivastava, learned counsel for the petitioner has drawn our attention to the guidelines provided to the Company Commanders who are in occupation of the post in **"Border Security Force Mannual - Volume I OPS Directorate"**. The respondents have prescribed the daily routine in this manual for all the members of the force at the duty post. The relevant extract is as under:-

> **"Daily Routine**
>
> 10. Unless otherwise ordered, the following routine will be followed at the BOP:-
>
> (a) Stand to
>
> (b) Setting out of Ops
>
> (c) P T (d) Breakfast
>
> (e) Trg period (only 2 periods)/sending patrols.
>
> (f) Lunch and rest
>
> (g) OTW (Own time work) as decided by BOP Comdrs.
>
> **(h) Game**
>
> (i) Evening roll call
>
> (j) Sending of patrols/laying of border ambush/nakas."
>
> (Emphasis by us)

22. Games are thus an integral part of the daily routine to be

followed by BSF personnel at the Border Out Post.

This position is also undisputed on record.

23. Learned counsel for the petitioner has drawn our attention to the guidelines issued by the respondents for computing the attributability of disability under Rule 3(A)(2) of the **Central Civil Services (Extraordinary Pension) Rules**. The relevant extract of Rule 3(A)(2) of the **Central Civil Services (Extraordinary Pension) Rules** reads as follows:-

> "3-A. Eligibility
>
> (1) xxx xxx xxx
>
> (2) There shall be a causal connection between-
>
> (a) disablement and Government service ; and
>
> (b) death and Government service,
>
> for attributablity or aggravation to be conceded, Guidelines in this regard are given in the Appendix, which shall be treated as part and parcel of these Rules."

24. Under this rule, the respondents have notified Guidelines for conceding attributability of disablement or death to government service. The respondents have prescribed when a person subjected to the disciplinary code of the Central Armed Police Battalions would be deemed to be 'on duty'. In this regard para 4(b)(iii) of the Guidelines reads as follows:-

> "4(a). xxx xxx xxx
>
> (b) A person subject to the disciplinary code of the Central Armed Police Battalions, is 'on duty'.
>
> (i) xxx xxx xxx
>
> (ii) xxx xxx xxx
>
> (iii) During the period of participation in recreation, organized or permitted by service authorities, and during the period of travelling in a body or singly under organized arrangements."

(Emphasis supplied)

25. On application of these guidelines as well, it has to be held that the petitioner who was participating in games organized in the Battalion at the place of his posting was on bona fide duty.

26. The respondents have relied on the Border Security Force Manual Volume IX – Medical Directorate in support of their contention regarding employability limitations of different low medical category gradings. It is urged that such low medical category personnel who were in grade 'A3(L)' has a disease or disability above knee on one side, including pelvic girdle should be able to walk up to 5 KM at his own pace and that such low medical category personnel are fit for sedentary duties only.

27. So far as the personnel with the low medical category A3(L) is concerned, Border Security Force Manual Volume IX – Medical Directorate provides as follows:-

"(b) A3(L)

Has a disease or disability above knee on one side, including pelvic girdle should be able to walk up to 5 KM at his pace.	

28. We have noticed hereinabove the injuries suffered by the petitioner. The injuries of the petitioner were not above the knee. It did not involve the pelvic girdle. There is nothing on record to show that the petitioner was not able to perform normal duties. In fact the respondents have assigned him operational duties and no complaint in his work has been pointed out. The above guideline has no application in the instant case.

29. It is urged that with effect from 15th March, 2002, due to the left knee injury sustained on 25th June, 1998 , the petitioner was placed in low medical category S1H1A3(L)(T-48)P1E1. It is submitted that there are limitations with regard to personnel placed in grading A3(L) and that as per the Border Security Force Manual Volume I at page 111, there are employability limitations of different low medical category gradings so far as persons placed in the category A3(L) are concerned.

30. We find that there is no limitation on the employability of the

petitioner at any point because of the injury which he suffered in the year 1998. This is evident from the communication dated 8th April, 2008 noticed above and the various postings of the petitioner.

31. The above narration would show that even though the petitioner had been placed in the low medical category because of the injuries suffered by him in 1998, the same made no difference so far as his postings in difficult areas was concerned. It also made no difference to the position which the petitioner occupied or the work which was assigned to him.

32. The respondents did not make any special dispensation so far as work allocation was concerned qua the petitioner. He has been treated and performed duties like any other person who was not in a low medical category.

33. Also on record are the proceedings of the one man court of inquiry appointed by the Commandant 105 BN BSF vide the order dated 4th November, 2006 to inquire into the circumstances in which the petitioner sustained injury during the volley ball match. The statement of the petitioner was recorded wherein he had stated that he had suffered injuries when he was playing volley ball with the company troops as part of the daily company routine which is mandatory to ensure fitness of the troops in terms of mental and physical health. In answer to the question by the court that having known that his left leg had already been damaged and operated upon, why the petitioner took risk of playing volley ball during which he had sustained injury on 14th August, 2006, the petitioner had answered as follows:-

> "Ans. Sir, I was operated in 2002 and since then I am doing regular exercise, even the doctor also advice me to do exercise. I am also doing operation duty for last 04 years in spite of my LMC. The fact is known to all Senior officers right from Comdt. to IG. In spite of my permanent LMC I have been put in operation duty at BOP in hard areas like Mizoram, & I have been doing such duties to the satisfaction of my seniors.
>
> Hence I did not find any problem in playing volley ball which I have been playing for last so many years. I am also doing CRP, patrolling, checking etc. for last so many years. Even at Ganga

Nagar also I was Coy Cdr at I.B. and performing various types of Ops. Duties. It was a matter of chance that I got injured while playing volley ball at BOP.

Moreover being Coy Cdr it is my duty to ensure physical fitness of troops & for the same my physical association in all the activities is must. As a part of my duties I always play with troops."

34. The impugned order dated 4th September, 2009 retiring the petitioner from service on the grounds of physical unfitness however, is for the reasons of the injury suffered by him in his left knee in the year 1998 as well as the injury on the right knee suffered in the year 2006. The impugned order has been passed under the provisions of Rule 18 of the BSF Rules 1969 with pensionary benefits as admissible under the CCS (Pension) Rules.

35. The respondents have raised no dispute that the first injury suffered in the year 1998 was attributable bonafide to government duty.

36. So far as attributability of the second injury is concerned, the only circumstance for denying that the same is an endorsement by the Company Commandant made on the 4th of December, 2006 wherein the Commandant had stated that no one else but the officer himself was responsible for the injury sustained while playing volley ball on 14th of August, 2006.

This endorsement only clarifies that no other person was involved in the infliction of the injuries which were suffered during the match. This endorsement cannot be treated as the Commandant having been stated that the same was not attributable to the service. In fact, we may note that it is the case of the respondents that no other senior officer was present at the post on the 14th of August, 2006 to support their contention that there was no pressure on the petitioner to play the games. Therefore the Commandant was not present when the petitioner suffered the injury and was incompetent to comment on the injury suffered by the petitioner.

37. We find that in fact the very same Company Commandant has submitted his opinion on the 9th of December, 2006, the relevant extract whereof reads as follows:-

"Opinion of the Commandant/Head of Office

(a)(i) Was the individual in the course of performance of an official task or a task the failure to do which would constitute and offence triable under the disciplinary code applicable to him? (Indicate the nature of the task, by whom it was ordered and when)

- Injury in the left knee of the officer occurred during the basic training which further aggravated during deployment of unit in CI Role.

- Injury in the right knee of the officer occurred during **participation of officer in the evening games (Volley Ball) at BOP."**

(b) Was the accident due to wholly/partially to:

(i) serious negligence: **No, there was no fault on the part of officer leading to injury**

And/or

(ii) misconduct of the individual? **NO**

(indicate the nature of the serious negligence or misconduct and the grounds on which the opinion is based)"

(Emphasis by us)

38. From the above discussion, the inevitable and only possible conclusion is that the evening games were the integral part of the petitioner's duties. It is also a fact that the petitioner was not exempted from performance of any part of the assigned duty. The respondents have themselves not treated the petitioner as any special case of low medical category. He was being assigned postings and positions just as any other BSF personnel who was not a low medical category including the hard postings. The respondents recognized the leadership required by a person in the position of a commander. There is no dispute that the petitioner had to motivate the troops towards the acquisition of physical fitness by participation in the games. The same is only possible by the officer leading from the front. It therefore, has to be held that the injuries suffered by the petitioner on 14th of August, 2006 while playing volleyball

at the Border Out Post (BOP) Barapansuri (Mizoram) was suffered by him while he was on duty.

39. We also conclude that court of inquiry conducted by the respondents only recorded the facts relating to the injuries suffered by the petitioner. It had returned no findings on the question of attributability of the injuries.

40. In view of the above discussion, we hold that the injuries suffered by the petitioner when he was on bonafide government duty were attributable to his service and that the same has resulted in disability which was evaluated by the respondents as 59% disablement in the medical board proceedings held on 21st October, 2008.

41. As a result, it has to be held that the petitioner was entitled to grant of disability pension which has been wrongly denied to him.

42. We accordingly set aside and quash the rejection of the petitioner's claim for grant of disability pension. The respondents are directed to reconsider the petitioner's claim for disability pension having regard to the above findings and pass orders thereon within four weeks from today. The order passed thereon shall be forthwith communicated to the petitioner. Arrears shall also be computed and conveyed to the petitioner within six weeks and payment of the amounts due to him shall be effected within eight weeks.

43. The petitioner shall be entitled to costs which are assessed at Rs.20,000/- and shall be paid to the petitioner within eight weeks from today.

This writ petition is allowed in the above terms.

ILR (2014) I DELHI 187
WP. (C)

ASIM CHAUDHARY **....PETITIONER**

VERSUS

UNION OF INDIA AND ORS. **....RESPONDENTS**

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 4836/2013 **DATE OF DECISION: 19.11.2013**

Constitution of India, 1950—Article 226; Whether there is a right and entitlement of a deputationist to continue on deputation after expiration of period of original appointment. Petitioner is an officer of ONGC—Petitioner applied for deputation as Director (Administration) of FSSAI, a nascent organization in 2010—Advertisement stipulated that tenure of deputation would be three years—In Petitioner's appointment letter it was specified that appointment was for a period of one year, extendable to two years—Petitioner unconditionally accepted such terms and joined the organization.

Upon expiry of one year—Petitioner's tenure was extended only for another 6 months. Upon expiry of such period Petitioner was relieved of his duties and was repatriated to ONGC—Petitioner raised an objection regarding such repatriation a day before expiry by stating that terms of advertisement in terms of tenure, be followed—Respondents replied stating that Petitioner's duties as a consultant were specified in letter of appointment, and Petitioner could not be regularized to the said post Petitioner approached CAT. Respondents contended that petitioner is bound by the well settled legal principle that a deputationist has no right to continue after period of deputation—Tribunal dismissed the petition, hence the present writ petition.

Held: **No challenge laid to the authority of the borrowing department to make an appointment for a period of less than three years. Petitioner unequivocally**

accepted terms of appointment in appointment letter, thus accepting respondent's action. Tenure of petitioner being clearly stipulated, contention that period of deputation has to be for three years is devoid of legal merits. Further, petitioner has concealed material facts, which is not disputed. Therefore, resent challenge is not legally tenable. Petition dismissed.

The challenge by the petitioner raises primarily an issue of the right and entitlement of a deputationist to continue on deputation after expiry of the period for which he had been originally so appointed. **(Para 2)**

So far as the plea that the appointment letter was contrary to the advertisement is concerned, we find that the advertisement does not in any case suggest that the deputation has to be for a period of three years. The use of the expression 'normally' therein manifests that discretion is conferred on the borrowing department to stipulate the period of deputation within three years. The advertisement does not state that the tenure 'will' be three years. The two expressions are not the same. **(Para 26)**

No challenge is laid to the authority of the borrowing department to make an appointment of the deputationist on a period which is less than three years. Certainly, no prohibition in this regard is to be found in the documents placed before us. **(Para 28)**

We have no manner of doubt that the tenures of both of the petitioner's appointments were clearly stipulated by the respondents and his contention that the period of deputation has to be for a period of three years, is completely devoid of legal merits. **(Para 35)**

The petitioner accepted the stipulations in the offers of appointment without any objection. He is, certainly, estopped from objecting thereafter or raising the challenge which he did before the Central Administrative Tribunal. **(Para 37)**

The Tribunal has concluded that the appellant has concealed material facts. The petitioner does not dispute the non-disclosure of the complete documents before the Tribunal. **(Para 49)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Govind Jee, Advocate. for Mr. Prashant Bhusan, Advocate.

FOR THE RESPONDENT : Mr. Amrit Pal Singh CGSC For R-1/ UOI, Mr. Sudhir Nandrajog, Sr. Advocate with Sumit Babbar, Advocate . & Mr. Vikramaditya, Advocate for FSSAI.

CASES REFERRED TO:

1. *Sumer Singh & Ors.* vs. *State of Haryana & Ors.* CWP No.11960/2012.
2. *Union of India through Government of Pondicherry & Anr.* vs. *V. Ramakrishnan & Ors.* (2005) 8 SCC 394.
3. *Punjab State Electricity Board & Anr.* vs. *Baldev Singh* (1998) 5 SCC 450.
4. *Bahadursinh Lakhubhai Gohil* vs. *Jagdishbhai M. Kamalia* SCC para 25.

RESULT: Writ Petition dismissed.

GITA MITTAL, J.

1. The present writ petition assails the order dated 17th July, 2013 passed by the Central Administrative Tribunal rejecting the petitioner's original application wherein he had prayed for the following reliefs:-

"a) To issue a writ of mandamus directing Resp No 1 to allow the applicant to complete his deputation in the Food Safety and Standards Authority of India as per the DoPT Rules OM No.2/ 99/91-Estt. (P-II) dated 5.1.1994, as amended from time to time, and DoPT OM No.6/8/2009 dated 17.6.2010, as per the original advertisement.

b) Direct to Resp No.1 that the period of engagement of the applicant beyond 31.7.2012 till 17.12.2012 should be regularized and he treated as on duty.

(c) Direct that the pay and other allowances including statutory deductions and remittances may be paid, considering the financial difficulties being faced by him.

(d) Direct the Central Government that the post of CEO should . - filled at the earliest as he is the legal representation and administrative and financial head under the Food Safety And Standards Act, 2006.

(e) Direct that Cost should be awarded to the applicant for this litigation, which has really been thrust upon him by the arbitrary action of the Chairperson and acting CEO of FSSAI.

(f) Award compensation to the applicant for the unwarranted hassle and mental agony caused to him by this litigation."

2. The challenge by the petitioner raises primarily an issue of the right and entitlement of a deputationist to continue on deputation after expiry of the period for which he had been originally so appointed.

3. It is necessary to notice certain basic facts in some detail inasmuch as the petitioner's entire challenge rests on the plea that his tenure of deputation would not be governed by the period specified in the letter of appointment or the extension thereof but would be deemed to be the period of maximum deputation stipulated in the advertisement issued by the respondents.

4. The petitioner is admittedly an officer of the Oil & Natural Gas Corporation Limited (hereinafter referred to as 'ONGC') holding a permanent lien to a post with this organisation. At the relevant time, the borrowing organisation, the Food Safety & Standards Authority of India (hereinafter referred to as 'FSSAI'), a statutory body set up under the Food Safety & Standards Act, 2006 was in the nascent stages of its organisation. It issued an advertisement in August, 2010 inviting applications for filling up a single post of Director (Administration) on deputation. So far as the period of deputation stipulated in clause 5 is concerned, the advertisement stipulated that "the - tenure of deputation will normally be three years".

5. The petitioner's candidature found favour with the respondents and he was offered an appointment by a letter dated 22nd December, 2010 wherein the respondents offered the petitioner the post of Director (Administration) for a period of only *"one year extendable to further two years"*.

The petitioner unconditionally accepted the offer of appointment and on 2" February, 2011 joined the organisation on deputation without any protest or demur.

6. It is noteworthy that the period of one year came to an end on 1st February, 2012. The respondent however issued a letter dated 10th February, 2012 extending the period of the petitioner's tenure on deputation by six months only till 31st July, 2012. Even at this stage, no objection was found by the petitioner to such extension.

7. The petitioner has placed before us the office orders dated 30th July, 2012 wherein the respondents refer to the prior communication dated 10th February, 2012. The respondents unequivocally declared that consequent upon the completion of his extended period of deputation, the petitioner stands relieved of his duties with the FSSAI w.e.f. 31st July, 2012 and repatriated to his parent organisation i.e. the ONGC. The petitioner was directed to report to his parent organisation.

8. It is only on the eve of expiry of the extended period of deputation that the petitioner became wiser and started raising objections. For the first time, on 30th July, 2012, the petitioner raised an objection by way of a letter dated 30th July, 2012 submitting that the terms of advertisement for the post of Director (Administration) ought to be followed. Reference was made to the orders of the Department of Personnel & Training of the Government of India which have been quoted in his appointment letter. The petitioner prayed that the decision of the respondents may be therefore reviewed. The respondents have submitted that even this objection was made to the Director (Enforcement) of the FSSAI and no representation was submitted to any competent authority in the organisation.

9. During the course of hearing, Mr.Sudhir Nandrajog, learned senior counsel for the respondent-FSSAI has handed over a copy of the letter dated 10th February, 2012 which has been referred to in the respondent's letter of 30th July, 2012. There was no objection to the same being taken on record or scrutinized by us.

10. At this stage, it is necessary to note the manner in which the petitioner has proceeded in the matter. Instead of abiding by the directives of the borrowing department, the petitioner made an application dated 31st July, 2012 to the FSSAI seeking grant of ten days leave w.e.f. 31st July, 2012. It is noteworthy that in this communication, the petitioner sought leave for the reason that he has *"preparing to join at new place of posting"*. Implicit in this request is the petitioner's acceptance of the termination of his deputation and the intention to abide by the directive to resume his duty with his parent department. This was followed by a communication dated 8th August, 2012, also addressed to the FSSAI, whereby the petitioner sought extension of his leave till 24th August, 2012 due to pressing family requirements.

11. The respondents informed the petitioner by an order of 24th August, 2012 that he had been relieved from the services of FSSAI w.e.f. 31st July, 2012 and was granted earned leave w.e.f. 1st August, 2012 to 24th August, 2012. He was once again directed to report to his parent organisation. There was still no resumption of duty with ONGC. However, the petitioner followed up with communications dated 31st August, 2012, 29th August, 2012 and 10th September, 2012 seeking extension of leave for one or the other reason. These requests were also favourably considered and the petitioner was informed of the same by the order dated 12th September, 2012 & 27th September, 2012. In each communication, the petitioner was directed to report to his parent organisation.

12. In the meantime, it appears that the petitioner was approaching the Ministry of Health & Family Welfare seeking continuation of his deputation with the FSSAI. In this regard, a letter dated 27th November, 2012 was addressed on behalf of the FSSAI to the Ministry informing it about the circumstances in which the petitioner had been appointed. The respondents clearly informed the Ministry that a conscious decision stood taken by the Chairperson and CEO in-charge to repatriate the petitioner to his parent office looking at his *"fit with the organisation"*. The letter notes that nothing adverse with regard to the petitioner has come to notice. It was also pointed out that the petitioner had been appointed only for one year subject to extension of two years and that his case had been reviewed and the deputation was extended for only six months i.e. upto 31st July, 2012.

13. The Ministry responded by a communication dated 7th December, 2012 referring to an office memorandum dated 25th February, 2009 which contained a stipulation with regard to premature reversion to the parent cadre of the deputationist. It was pointed out that on premature reversion, the services of the deputationist could be returned to the parent department after giving advance notice of three months to the lending department/Ministry and the employee concerned. The Ministry requested the respondents to review and reconsider the deputation terms of the petitioner in view of the *"hardship being faced by his family"* due to *"premature termination of the deputation"*.

14. It is this position which is asserted by the petitioner in support of his challenge by way of the present writ petition contending that his deputation was for a period of three years and could not have been prematurely terminated. The submission is that termination required a compliance with the requirement of the Office Memorandum dated 17th June, 2010.

15. This is countered by learned senior counsel for the respondents submitting that the petitioner's deputation tenure was for a period of one year which was extended by six months and he has been repatriated after the expiry of the full period of deputation. It has been submitted that the instant case is not a case of premature repatriation and, therefore, the stipulation under the Office Memorandum dated 17th June, 2010 does not have application.

16. Another important event, which intervened, deserves to be noticed. Despite the above position, the respondents did review the case of the petitioner so far as his appointment was concerned. While reiterating the above position with regard to the petitioner's tenure as a deputationist and his repatriation, the respondents issued an order dated 18th December, 2012 wherein it was clearly noted that there was *"no vacancy at the Director level in FSSAI"*. The respondents further stated that a compassionate view was taken by them in the background of the petitioner's "familial need" and the FSSAI was willing to take the petitioner on deputation till the end of May, 2013 as a "Consultant". The respondents thereupon made an offer of appointment as Consultant to the petitioner vide their letter dated 18th December, 2012, the material terms whereby deserve to be noted in extenso and read as follows:-

"(i) Your fresh deputation will commence from your date of joining till the end of May, 2013. There will be no regularization of the period from your date of repatriation till the date of joining.

(ii) You will be relieved on 31/05/2013 (AN) and no further extension of deputation will be given. Your appointment order will carry your relief order w.e.f. 31/05/2013 (AN). No further order for your relief will be required."

17. The petitioner accepted the fresh appointment as Consultant on compassionate grounds unconditionally and submitted a joining report on 18th December, 2012 again without any protest at all. It is also essential to note that the office order dated 20th December, 2012 issued by the respondents whereby the petitioner was taken on strength with effect from 18th December, 2012 pointed out that the petitioner's appointment would be till 31st May, 2013. It was also stipulated that the appointment was for him to assist in a specific task in the Kumbh Mela operation. 18. By a letter dated 21st December, 2012, the petitioner subsequently sought that his deputation be continued beyond 31st July, 2012 till 1st February, 2014 on the post of Director (Administrator) for which he had been relieved by his parent department. The petitioner pointed out that he had not been relieved by the ONGC for the post of Consultant and also prayed for regularization of the period beyond 31st July, 2012 till 17th December, 2012.

The respondents reiterated the stand already taken in their response dated 24th December, 2012. The petitioner was clearly informed that he had joined duties as Consultant with the FSSAI in terms of the letter dated 18th December, 2012 which spelt out the terms of his appointment. He was clearly told that he shall not raise any issue regarding non-relevant issues of the past and that, if he was desirous, he may mention that he was not agreeable to the terms within 48 hours following which the FSSAI would take appropriate action regarding him. The petitioner was required to inform the respondents that he was agreeable to the terms and conditions in the said letter. The respondents unequivocally informed the petitioner that he was not being continued in the substantive post of Director (Administration) from 31st July, 2012 when his deputation ended; that regularization of the period of the petitioner's absence without leave could not be done by the FSSAI and no further reopening of the

terms of appointment was possible.

19. The petitioner unequivocally and unconditionally accepted the terms of appointment contained in the letter dated 18th December, 2012 by way of his communication dated 27th December, 2012. We may note that the petitioner also states therein that he had taken up the Kumbh Mela assignment assigned to him by a letter dated 20th December, 2012. Despite this position, the petitioner filed the Original Application No.736/2013 before the Central Administrative Tribunal seeking the above prayers.

20. The respondents opposed the maintainability of the petition as well as the petitioner's claim on merits inter alia on the ground that the petitioner was initially appointed as a deputationist on clearly notified terms and conditions which he unconditionally accepted. The petitioner was bound by the well settled principle that a deputationist has no legal right to continue in the post after the period of deputation. The respondents also challenged the maintainability of the application at the instance of the petitioner on the ground that he was estopped by his conduct, as noted above, from raising a challenge to the action of the respondents. The respondents also assailed the maintainability of the application at the instance of the petitioner on the ground that he was guilty of suppression of material record and facts and therefore, had approached the Tribunal with unclean hands disentitling him of any relief whatsoever.

21. The Tribunal conducted a detailed consideration of the issues and by its judgment dated 17th July, 2013 agreed with the respondents on all issues and dismissed the application filed by the petitioner resulting in the challenge thereto by way of the present writ petition.

22. Before us, the petitioner has challenged the judgment of the Central Administrative Tribunal on the very grounds which were pressed before the Tribunal. The petitioner has firstly contended that his period of deputation could not have been less than three years and the appointment for a lesser period was contrary to the office memorandum dated 5th January, 1994 issued by the Department of Personnel & Training '('DOPT' hereafter) as well as the period stipulated in the advertisement.

23. We have noted above that the advertisement in the instant case stated that the tenure of deputation would normally be three years.

24. So far as the office memorandum dated 5th January, 1994 issued by the DoPT is concerned, Clause 8 thereof merely prescribes that the period of deputation/foreign service would be "subject to a maximum of three years" in all cases except for those posts where a longer period of tenure is prescribed in the recruitment rules. The petitioner has placed reliance on Clause 9 of the memorandum which is concerned with premature reversion of a deputationist to the parent cadre.

25. As noted above, the petitioner's appointment letter stated that he was appointed as Director (Administration) on deputation basis *"initially for a period of one year extendable to further two years"*. It cannot be denied that it is the letter of appointment which provides the terms and conditions under which the petitioner was appointed. He accepted such appointment without any objection. The Tribunal has concluded that so far as the deputation period is concerned, the appointment letter had divided it into two parts - the initial period being for one year extendable by further period of two years. The intendment of the authorities being that it would enable the borrowing department an opportunity to examine the conduct of the deputationist and to consider change which may have taken place in the organisation during the period. A stock of this situation or a review was required to be taken at the end of period of one year. The extension of two years was permissible only upon satisfactory completion of the initial period.

26. So far as the plea that the appointment letter was contrary to the advertisement is concerned, we find that the advertisement does not in any case suggest that the deputation has to be for a period of three years. The use of the expression 'normally' therein manifests that discretion is conferred on the borrowing department to stipulate the period of deputation within three years. The advertisement does not state that the tenure 'will' be three years. The two expressions are not the same.

27. Clause 8 of the Memorandum dated 5th January, 1994 stipulates only a maximum period of three years of the deputation. It prescribes no minimum period.

28. No challenge is laid to the authority of the borrowing department to make an appointment of the deputationist on a period which is less than three years. Certainly, no prohibition in this regard is to be found

in the documents placed before us.

29. As noted above, the petitioner accepted the terms and conditions stipulated in the appointment letter dated 22nd December, 2010 which included the appointment for the period of one year as well as the extension thereof by the letter dated 10th February, 2012 by a period of six months without any protest. It is only after the respondents had passed the order relieving the petitioner on 30th July, 2012 and repatriating him to the ONGC, that the petitioner submitted for the first time a representation on the same date.

30. The conduct which followed also showed that the petitioner had accepted the legality and validity of the respondents' action inasmuch as he accepted his appointment on deputation in the post of consultant by the letter dated 18th December, 2012 for the period till end of May, 2013. The petitioner made a representation only after joining his assignment as a consultant. However, after the firm response by the respondents' letter dated 24th December, 2012, the petitioner addressed a letter dated 27th December, 2012 accepting all terms and conditions of his appointment as Consultant. In fact, the petitioner specifically accepted the assignment of the Kumbh Mela work assigned to him in such capacity. The petitioner, thus, abandoned all objections.

31. The respondents have placed before this court a communication dated 29th January, 2013 addressed by the FSSAI to the ONGC setting out the fact that the petitioner had been relieved from his initial appointment w.e.f. 31st July, 2012. However, in view of the representation made by the petitioner to the Ministry of Health & Family Welfare and the direction dated 7th December, 2012, the respondents took a compassionate view of his familial need and appointed him as Consultant.

32. The respondents also informed the ONGC that the petitioner had been sanctioned leave till 30th September, 2012 and not granted any leave thereafter and that his appointment as Consultant was for a specific period till the end of Kumbh Mela which would be over by 10th March, 2013 and the petitioner's services may not be required thereafter and that he may be surrendered to the ONGC w.e.f. 31st March, 2013.

33. The petitioner appears to have sent a representation dated 1st February, 2013 stating that his deputation was to complete on 1st February, 2014 and that the respondents are required to review the

orders which they have passed which are violating the DoPT orders again.

34. In their response, the respondents reiterated their above noted stand.

35. We have no manner of doubt that the tenures of both of the petitioner's appointments were clearly stipulated by the respondents and his contention that the period of deputation has to be for a period of three years, is completely devoid of legal merits.

36. Mr.Nandrajog, learned senior counsel has rightly pointed out that the deputation is a tripartite agreement between the employee, the borrowing and the lending departments. It would come to an end when anyone of the three does not desire to continue the same.

37. The petitioner accepted the stipulations in the offers of appointment without any objection. He is, certainly, estopped from objecting thereafter or raising the challenge which he did before the Central Administrative Tribunal.

38. Even otherwise, the petitioner has only been repatriated to his parent department. It is not the petitioner's case that the same results in punitive consequences to him.

39. The petitioner has placed reliance on para 32 the pronouncement of the Supreme Court reported at (2005) 8 SCC 394 **Union of India through Government of Pondicherry & Anr. Vs. V. Ramakrishnan & Ors.** which reads thus:

> "32. Ordinarily, a deputationist has no legal right to continue in the post. A deputationist indisputably has no right to be absorbed in the post to which he is deputed. However, there is no bar thereto as well. It may be true that when deputation does not result in absorption in the service to which an officer is deputed, no recruitment in its true import and significance takes place as he is continued to be a member of the parent service. When the tenure of deputation is specified, despite a deputationist not having an indefeasible right to hold the said post, ordinarily the term of deputation should not be curtailed except on such just grounds as, for example, unsuitability or unsatisfactory performance. But, even where the tenure is not specified, an order of reversion can

> be questioned when the same is mala fide. An action taken in a post-haste manner also indicates malice. (See **Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia** SCC para 25)."

40. This judicial precedent reiterates the well settled legal proposition that a deputationist has no legal right to continue in the office. So far as the tenure of deputationist is concerned, when specified, the Supreme Court has declared that ordinarily the tenure should be completed. It could be curtailed on just grounds which include unsuitability or unsatisfactory performance. When the tenure is not specified, the order of tenure can be questioned when the same is mala fide or action is taken in a post-haste manner suggesting malice.

41. In the instant case, the petitioner does not dispute that he has served the full prescribed tenures on deputation. There is no premature termination. The well settled legal principles negate the petitioner's challenge.

42. It appears that before the Tribunal, reliance was also placed on the pronouncement of the judgment of the High Court of Punjab & Haryana dated 25th April, 2013 in CWP No.11960/2012 **Sumer Singh & Ors. Vs. State of Haryana & Ors.** wherein the court had held as follows:-

> "9. xxx In the facts of the present case, as the petitioners had never been validly appointed to the post of Conductors/Drivers, no right came to vest in them to continue on such post. There would be no requirement of observance of the principles of natural justice prior to taking a decision calling upon the petitioners to join back on their substantive posts."

43. The court had also held that the impugned order did not entail any adverse civil consequences to the petitioner. Placing reliance on (1998) 5 SCC 450 **Punjab State Electricity Board & Anr. Vs. Baldev Singh,** it was held that there was no requirement of grant of a hearing before the order.

44. Learned counsel for the appellant has urged before us that the learned Tribunal has erred in holding that the post of Director (Administration) did not exist and that the borrowing organisation has no option but to repatriate the applicant to its parent organisation. The factual

narration above shows that the petitioner accepted the termination of his period of deputation. He unconditionally accepted the appointment as a Consultant as well as its specified tenure. Even if there were vacancies in the post of Directors, the petitioner is stopped from laying claim thereto.

45. In this regard, the Tribunal has also referred to the circumstances in which the respondents re-considered the decision to repatriate the petitioner. Before us also it is pointed out that the respondents re-worked the assignment of duties to the directors. It is pointed out that the work of administration and surveillance was being looked after by two separate directors when the petitioner had been appointed on deputation as Director (Administration). Subsequently, in an administrative shuffle, the work of both administration and surveillance was entrusted to the Director (Surveillance). For this reason, the respondents maintained that the petitioner did not 'fit the field' and had even informed the Ministry in this regard.

46. It is pointed out that the compassionate appointment of the petitioner as a Consultant was effected in this background pursuant to the Ministry data dated 7th December, 2012 upon a review of the termination of the petitioner's services with the respondents. Inherent is his acceptance of the Consultant's position is the termination of his appointment as Director (Administration).

47. The petitioner's tenure as a Consultant has also come to an end of May, 2013 and he stands relieved from the FSSAI.

48. So far as the reliance on the Office Memorandum dated 17th June, 2010 to the Directorate of Personnel & Training is concerned, the same applies to a case of premature reversion as pointed out. As there is no premature repatriation of the petitioner, the Office Memorandum dated 17th June, 2010 has no application to the instant case.

49. The Tribunal has concluded that the appellant has concealed material facts. The petitioner does not dispute the non-disclosure of the complete documents before the Tribunal.

50. For all these reasons, the challenge by the petitioner to the order dated 17th July, 2013 is factually and legally not tenable.

The writ petition is, accordingly, dismissed.

ILR (2014) I DELHI 201
IA.

DR. (MRS.) PRAMILA SRIVASTAVA ....PLAINTIFF

VERSUS

ASHA SRIVASTAVA & ORS. ....DEFENDANT

(JAYANT NATH, J.)

IA. NO. : 11837/2013 DATE OF DECISION: 20.11.2013
(U/S 24 R/W SEC.151 CPC
CS (OS) NO. : 491/2008

Code of Civil Procedure, 1908—Section 24 Scope—Consolidation of suits—Substantial & sufficient similarity of issues arising in two different suits—Eligible for consolidation—Probate petition and suit involve common issues and witnesses—Interest of parties is a factor to be considered for consolidation of two suit—Deposition of common witnesses is a factor in considering consolidation—No legal bar in trying both of them together.

The Hon'ble Supreme Court in the case of **Chitivalsa Jute Mills vs. Jaype Rewa Cement,** 2004(3) SCC 85 in para 12 held as follows:

> "12. ... Complete or even substantial and sufficient similarity of the issues arising for decision in two suits enables the two suits being consolidated for trial and decision. The parties are relieved of the need of adducing the same or similar documentary and oral

evidence twice over in the two suits at two different trials. The evidence having been recorded, common arguments need to be addressed followed by one common judgment. ... **(Para 24)**

Similarly reference may be had to the judgment in the case of **Virender Gupta vs. Nitender Gupta and Ors.,** 31(1987) DLT 406 where Division Bench of this Court directed consolidation of probate proceedings and the suit for partition and rendition of accounts. This Court held as follows:

"7. We find that the issues framed in Suit No. 1675/84 are all embracing and they fully cover the entire dispute between the parties. We see no legal bar to both the probate petition and the suit being tried together. We see no need to decide the controversy raised in the appeal in the probate proceedings. We accordingly order that suit No. 1675 of 1984 and the probate case No. 46/83 shall be tried together. The evidence shall be recorded in Suit No. 1675 of 1984". **(Para 30)**

Important Issue Involved: Complete or even substantial and sufficient similarity of issue arising for decision in two different suits, enables them for consolidation for trial and decision.

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. Sanjiv Kakra, Ms. Vaishali Kakra and Mr. Irfan Ahamed Advocate.

FOR THE RESPONDENT : Mr. Sandeep P. Agarwal, Mr. Jeevesh Nitesh K. Sharma, Advocates for D1, 2, 3 & 5.

CASES REFERRED TO:

1. *Sandeep Behl and Anr.* vs. *Shubh Kumar Range and Ors.,* I.A. No. 14577/2011 in CS(OS) 2114/2010 decided on 18.07.2012.
2. *Thakur Dass Virmani & Ors.* vs. *Smt. Raj Minocha & Anr.,* 84(2000) DLt 534.
3. *Nirmala Devi* vs. *Arun Kumar Gupta,* JT 2000 (4) SC 229.
4. *Col. Suresh Chand & Anr.* vs. *Shri Satish Dayal,* I.A. no. 11307/2009 in CS(OS)2319/2006 decided on 28.01.2010.
5. *Chitivalsa Jute Mills* vs. *Jaype Rewa Cement,* 2004 (3) SCC 85.
6. *Nirmala Devi* vs. *Arun Kumar Gupta and Ors.,* JT 2000 (4) SC 229.
7. *Virender Gupta* vs. *Nitender Gupta and Ors.,* 31(1987) DLT 406.

RESULT: Application Allowed.

JAYANT NATH, J.

IA No. 11837/2013(u/S 24 r/w S151 CPC)

1. This is an application filed by the plaintiff under Section 24 of the Civil Procedure Code seeking consolidation of the present suit with the Testamentary Case No. 89/2008 titled as *'Gautam Srivastava vs. State and Others'*. It is the contention of the plaintiff that the parties to the present suit are also the parties to the aforesaid probate proceedings. Defendant No. 2 has relied upon Will dated 26.04.2005 alleged to have been executed by Late Sh.R.P.Srivastava. Hence, it is stated that the issue as to whether the said Will executed by Late Sh. R.P. Srivastava is a genuine and valid Will and last testament of Late Sh.R.P. Srivastava is germane for disposal of the present suit and the probate proceedings. Hence the present application for consolidation.

2. The present suit is filed seeking a decree of partition, separate possession and for rendition of true and complete accounts of the properties of R.P. Srivastava & Sons HUF. The controversy pertains to the estate of Late Sh. R.P. Srivastava who had married twice. The plaintiff is the widow of the pre-deceased son of Late Sh.R.P. Srivastava from his first wife. Defendant No. 1 herein is the widow and the second wife of Late

Sh.R.P. Srivastava. Defendants No.2 and 3 are the children of defendant No.1 and late Shri R.P.Srivastava.

3. The probate case bearing Test Case No.89/2008 is filed by defendant No.2 as Executor of the stated Will of Shri R.P.Srivastava dated 26.4.2005, wherein it is claimed that the entire estate was bequeathed by late Shri R.P.Srivastava to defendant No.1.

4. It is noteworthy that the plaintiff had filed a similar application earlier also being IA No. 10410/2012. This application was allowed by this Court on 25.09.2012 and it was observed that no prejudice would be caused to the defendants if probate petition is tried with the present suit and a direction was passed to consolidate the said matters.

5. Against the said order dated 25.09.2012, the defendants had filed FAO(OS) No. 587/2012. The said order dated 25.09.2012 was stayed by the Division Bench on 07.12.2012. On 29.01.2013, the appeal was admitted and the interim order was made absolute. On 14.03.2013, the plaintiff made a submission that he seeks withdrawal of the prayer made in IA No. 10410/2012 for consolidation of two cases and seeks liberty that in case the present suit expeditiously comes up for trial, he would be at liberty to move the Single judge for appropriate directions. Relevant portion of the said order reads as follows:-

> "Learned counsel for the respondent fairly states that in view of the stages of the two proceedings being different, he seeks to withdraw the prayer made in I.A. No. 10410/2012 for consolidation of the two cases which has been allowed by the learned Single Judge vide impugned order dated 25.09.2012. He, however, seeks liberty that in case he is able to bring up his partition suit expeditiously for trial and in the meantime the stage of probate proceedings are such that its trial would not be delayed, he would be at liberty to move the learned Single Judge for appropriate directions. The second prayer he makes is that the appellant should not also try to delay CS(OS) No. 491/2008.
>
> Learned counsel for the appellant has no objection for the aforesaid two prayers."

6. The present application is filed in view of the said liberty given by the Division Bench. It is stated that as now both the proceedings are

at the same stage, there would be no delay in trial of either of the matters, if they are consolidated.

7. Learned counsel for the plaintiff has strenuously urged that defendant No. 2 herein who is the petitioner in probate case has filed a list of 20 witnesses in the probate case. The said defendant No. 2 along with defendants No. 1, 3 and 5 have filed a list of witnesses of 38 witnesses in the present suit. It is urged that there are 34 witnesses between the parties which are common in the present suit and the probate proceedings. It is further urged that earlier when the Division Bench was seized of the matter, in the present suit issues had not been framed. Now, it is stated that on 19.07.2013 issues were framed by the Court. A Court Commissioner, namely, Sh. S.M.Chopra, retired ADJ has been appointed to record evidence. The same Court Commissioner is recording evidence in the probate proceedings. It is further urged that in the probate proceedings, as of now only the first witness of the petitioner therein (defendant No. 2 herein) is being cross-examined. Hence, it is stated that in terms of the liberty granted by the Division Bench, the present suit and the probate proceedings are approximately at the same stage of trial and hence, the present application has been filed urging that the two matters be consolidated and heard together. He relies upon judgment of the Hon'ble Supreme Court in the case of **Nirmala Devi vs. Arun Kumar Gupta,** JT 2000 (4) SC 229 to contend that a probate petition can be clubbed with a suit.

8. Learned counsel appearing for defendants No. 1 to 3 and 5 has strenuously urged that the beneficiary of the Will in the probate petition, namely, the second wife of Late Sh. R.P. Srivastava is a senior citizen being above the age of 80 years. It is submitted that the present application is only an attempt to delay the whole proceedings. The probate petition throws up limited questions of law and facts which could be expeditiously disposed of. On the other hand, the present suit has raised various issues which would require a detailed trial and needlessly delay the proceedings in the probate petition. Reliance is placed on the following three judgments to contend that in such circumstances as that of the present case, the Court would normally not exercise power under Section 24 of the Civil Procedure Code.

(i) **Sandeep Behl and Anr. Vs. Shubh Kumar Range and Ors.,** I.A. No. 14577/2011 in CS(OS) 2114/2010 decided

on 18.07.2012.

(ii) **Thakur Dass Virmani & Ors. Vs. Smt. Raj Minocha & Anr.,** 84(2000) DLt 534

(iii) **Col. Suresh Chand & Anr. Vs. Shri Satish Dayal,** I.A. no. 11307/2009 in CS(OS)2319/2006 decided on 28.01.2010.

9. It is also urged that one of the reasons for the delay which has taken place so far is that on account of the liberty given by the Division Bench, the plaintiff has been deliberately delaying and prolonging the cross-examination in the probate proceedings and various hearings have taken place where cross-examination of the first witness is continuing. It is submitted that the plaintiff cannot be permitted to take advantage of his own wrong.

10. In rejoinder, the learned counsel for the plaintiff has stated that the issues raised in the present suit are substantially common with the probate petition. The basic issue is whether Late Sh.R.P. Srivastava had executed the Will dated 26.04.2005 and the only other basic issue is whether the properties which are subject matter of said alleged Will were part of the R.P. Srivastava & Sons HUF. It strenuously urged that these are the basic two issues and unless the matters are heard together, the parties would be put to needless expense and delay inasmuch as 34 witnesses who are common would have to be examined and cross-examined twice over. Reliance is placed on various documents to show that Late Sh. R.P.Srivastava had represented some of the properties to be HUF properties. It is further urged that the present suit has been filed earlier in point of time and it is further urged that the delay in cross-examining the witness in the probate proceedings has taken place on account of vague and evasive replies which are being given by the witness of the petitioner in the probate petition.

11. Reference may be had to Section 24 of the Civil Procedure Code which reads as follows:-

> **24.“ General power of transfer and withdrawal.** –(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage.
>
> (a) Transfer any suit,, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or
>
> (b) Withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and
>
> (i) Try or dispose of the same, or
>
> (ii) Transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
>
> (iii) Retransfer the same for trial or disposal to the Court from which it was withdrawn.
>
> (2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which is thereafter to try or dispose of such suit or proceeding may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.
>
> (3) For the purpose of this section - (a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court; (b) .proceeding. includes a proceeding for the execution of a decree or order.
>
> (4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.
>
> (5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it..

24. The Hon’ble Supreme Court in the case of **Chitivalsa Jute Mills vs. Jaype Rewa Cement,** 2004(3) SCC 85 in para 12 held as follows:

> “12. ... Complete or even substantial and sufficient similarity of the issues arising for decision in two suits enables the two suits being consolidated for trial and decision. The parties are relieved

of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials. The evidence having been recorded, common arguments need to be addressed followed by one common judgment. ...

25. In the present case, a perusal of the issues framed here and in the probate proceedings would show that there is commonality of issues involved. The issues in the present suit were framed on 19.07.2013 which reads as follows:

"1. Whether Late Shri R.P.Srivastava had signed and executed a legal and valid will dated 26.04.2005? If so its effect. OPD-1,2,3,5.

2. Whether the properties mentioned in paras 8 and 9 of the plaint were the self acquired properties of Late Sh.R.P.Srivastava? If so its effect. OPD-1,2,3,5

3. Whether the properties mentioned in paras 8 and 9 of the plaint were the properties of "R.P.Srivastava & Sons (HUF)" and have also been acquired from the funds of "R.P.Srivastava & Sons (HUF)"? If so its effect. OPP

4. To what share, if any, is the plaintiff entitled to in respect of the properties mentioned in paras 8 and 9 of the plaint? OPP

5. Whether the plaintiff is entitled to a decree of partition and separate possession in respect of the properties mentioned in paras 8 and 9 of the plaint? OPP.

6. Whether the defendant is liable to render true and complete accounts of the properties of "R.P.Srivastava & Sons (HUF)" and/or Sh.R.P.Srivastava? OPP

7. Whether the plaintiff is entitled to decree of Mandatory injunction as prayed for in the plaint? OPP

8. Whether the plaintiff is entitled to decree of permanent injunction as prayed for in the plaint? OPP.

9. Whether, there was any HUF between Late Mr.R.P.Srivastava and his family by the name of R.P.Srivastava & Sons (HUF), and if yes, who were its members? OPP.

10. Whether the plaintiff has undervalued the suit and has failed to pay the requisite court fees? OPD

11. Relief."

26. In the probate proceedings, the following issues were farmed:.

1. Whether the Will dated 26.04.2005 was duly executed by Late Shri R.P. Srivastava? OPP

2. Whether Late Shri. R.P. Srivastava was not in a sound state of mind when he executed the Will dated 26.04.2005, as alleged in the objections? OPO.

3. Whether the petitioner is entitled to probate of the Will dated 26.04.2005?.

27. Clearly, the basic controversy between the parties centres around the legality and validity of the Will dated 26.04.2005 alleged to have been executed by late Sh. R.P.Srivastava. This is a common issue on which parties will have to lead evidence in this suit and in the probate petition.

28. The other issues as mentioned above which pertain to the present suit revolve around the controversy as to whether the properties mentioned in the plaint are self-acquired properties of Late Sh.R.P. Srivastava or are part of the RP.Srivastava & Sons (HUF) and if so, the effect of the same. Even if the probate is granted, for the beneficiary of the Will to enjoy the fruits of the Will, the issue as to whether the properties in question belonged to Mr. R.P. Srivastava or M/s R.P.Srivastava & Sons (HUF) is an issue that will have to be crossed.

29. Reference may be had to the judgment of Hon'ble Supreme Court in the case of **Nirmala Devi vs. Arun Kumar Gupta and Ors.,** JT 2000 (4) SC229 relied upon by the learned counsel for the plaintiff which states as follows:-

"4. ... Therefore, now remains the question whether the probate proceedings could be clubbed with the suit. Learned counsel for respondent No. 1 submitted that the civil suit is of the year 1987 and that despite various orders of the High Court, it has remained pending and the probate proceedings are initiated by the appellant in 1997 regarding the Will of 1984. Be that as it may, the decision

> in the probate proceedings on the question of proof of the Will, will have a direct impact on the suit. Only on this short ground and without expressing any opinion on the merits of the controversy between the parties, we request learned District Judge, Gopalganj to make it convenient to dispose of the Probate proceedings being Probate Case No. 11 of 1997 along with civil suit being T.S. No. 27 of 1987....

30. Similarly reference may be had to the judgment in the case of **Virender Gupta vs. Nitender Gupta and Ors.,** 31(1987) DLT 406 where Division Bench of this Court directed consolidation of probate proceedings and the suit for partition and rendition of accounts. This Court held as follows:

> "7. We find that the issues framed in Suit No. 1675/84 are all embracing and they fully cover the entire dispute between the parties. We see no legal bar to both the probate petition and the suit being tried together. We see no need to decide the controversy raised in the appeal in the probate proceedings. We accordingly order that suit No. 1675 of 1984 and the probate case No. 46/83 shall be tried together. The evidence shall be recorded in Suit No. 1675 of 1984".

31. Keeping in view the legal position, it would be in the interest of parties that the two matters be consolidated and heard together. This is especially so keeping in view the fact that large number of witnesses of the parties are common and will be deposing in the present suit and also in the probate petition for both the cases. The Court Commissioner appointed by this Court to record evidence is the same. Separate trials will mean that a large number of witnesses will depose separately twice over in the probate and in this Suit. This would be a waste of judicial time and needless expense to the parties. The possibility of conflicting decisions also cannot be ruled out.

32. Further, at the earlier stage when this Court had passed order dated 25.09.2012, the present suit was still at the stage of completion of pleadings. Today, issues have been framed and the matter has been referred to the Court Commissioner for recording evidence. On the other hand, the probate petition is pending at the initial stage of recording of evidence inasmuch as the cross-examination of the first witness has not

been completed.

33. The judgments relied upon by learned counsel for the defendant do not help the case of the defendant. The reliance of the learned counsel appearing for the defendant on the case of **Sandeep Behl and Anr. Vs. Shubh Kumar Range and Ors.** (supra) is misplaced. In that case, the probate proceedings were at an advanced stage and on the verge of conclusion as the evidence of only the objectors therein was left to be recorded, whereas the evidence of the petitioner therein had already been recorded. In the suit which was sought to be consolidated even admission/denial of documents had not been taken place. It was on those facts as the proceedings in the probate proceedings were at an advance stage, the court directed that this Court should await the outcome of the probate case so as to ensure that there is no conflict of decisions in the suit with that of the probate case.

34. Similarly in the case of **Thakur Dass Virmani & Ors. Vs. Smt. Raj Minocha & Anr.,** (supra), this Court had merely held that pendency of a suit for partition is no bar for grant of probate or letters of administration. In that case, this Court was dealing with an appeal against an order granting letters of administration. It was in this context that this Court had held that pendency of a suit for partition is no bar for grant of petition or letters of administration. This case does not deal with the consolidation of two matters.

35. In the case **Col. Suresh Chand & Anr. Vs. Shri Satish Dayal** (supra) this Court declined to consolidate the suit and probate petition in view of the submission of the learned counsel for the plaintiff therein that evidence of the testimonial cases can be completed in a short span and in case the testimonial cases are permitted to be clubbed with the two suits, the testimonial cases would be delayed. It was further held that the nature of the evidence in the said suits and the real controversy in the suits is different. On those grounds, the court declined to consolidate the two suits.

36. In view of the above, there is merit in the present application. The same is allowed. It is directed that the present suit be heard along with probate case No. 89/2008 which is pending in this High Court. Both the matters are being tried by the same Court Commissioner.

37. Recording of evidence has already commenced in the

testamentary case. Whatever evidence the parties led may be treated as common for disposal of both the matters. Defendant No. 2 is presently leading evidence in the testamentary case and will complete his evidence. The other defendant and plaintiff may thereafter lead their evidence in the sequence to be decided by the Court Commissioner.

38. The application is accordingly disposed of.

CS(OS) 491/2008 and IA No. 16136/2013 (u/O 7 R 14 CPC)

List before the Joint Registrar on the date already fixed i.e. 26.11.2013.

ILR (2014) I DELHI 212
CS(OS)

KAILASH CHAND BANSAL ....PLAINTIFF

VERSUS

PUNJABI BAGH CLUB & ORS. ....DEFENDANT

(JAYANT NATH, J.)

IO. NO. : 11525/2012 (U/O 39 R 1 & 2 CPC) IN CS (OS) NO. : 1848/2012

DATE OF DECISION: 20.11.2013

Code of Civil Procedure, 1908—Order XXXIX Rule 1 & 2—Injunction order sought—Balance of convenience is also not in favour of the plaintiff—Plaintiff failed to make out prima facie case—Injunction, if granted would tantamount to decreeing of suit—Hence denied.

I may also note that the injunction order that is now sought in the present application if granted would actually tantamount to allowing the Suit itself. The Hon'ble Supreme Court while dealing with the case of the Writ Petitioner in the case of

Bank of Maharasthra versus Race Shipping & Transport Co. Pvt. Ltd. and Another, (1995) 3 SCC 257 in para 11 held as follows:-

> "Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations." **(Para 15)**

In my view prima facie plaintiff has not been able to show that defendant no.1 has no jurisdiction or has not acted in good faith or has violated any of the principles of natural justice. **(Para 17)**

Keeping in view the above facts the plaintiff has failed to make out a prima facie case. Balance of convenience is also not in favour of the plaintiff. Directions have already been passed for appointment of a Court Commissioner who has been directed to endeavour to complete the recording of evidence of the parties within three months from today. It would not be appropriate, at this stage on the facts of this case, to stay the expulsion of the plaintiff from membership of defendant No.1 Club. The present application is accordingly dismissed. **(Para 18)**

Important Issue Involved: Practice of granting interim orders which practically give the principal relief sought in the suit/petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of consideration, should be deprecated.

[As Ma]

Appearances:

FOR THE APPELLANT : Mr. Siddharth Bambhaand Mr. Shyam D. Nandan Advocates.

FOR THE RESPONDENT : Mr. P.D. Gupta, Advocate for D1 to 3.

CASES REFERRED TO:

1. *B.C.C.I.* vs. *Netaji Cricket Club* MANU/SC/0019/2005: AIR 2005 SC 592.
2. *Kalyan Kumar Dutta Gupta* vs. *B.M.Verma* MANU/WB/0024/1995: AIR 1995 Cal.140(DB).
3. *Bank of Maharashtra* vs. *Race Shipping & Transport Co. Pvt. Ltd. and Another,* (1995) 3 SCC 257.
4. *T.P. Daver* vs. *Lodge Victoria* MANU/SC/0018/1962: AIR 1963 SC 1144.

RESULT: Application dismissed.

JAYANT NATH, J.

IA No. 11525/2012(u/O 39 R 1 & 2)

1. The present Suit has been filed by the plaintiff seeking a decree declaring Enquiry Report dated 15.01.2012 and the consequent expulsion letter dated 21.5.2012 suspending the plaintiff's primary membership of the defendant No.1 to be null and void. Alongwith the Suit the present application is filed seeking stay of the operation of letter dated 21.5.2012.

2. The brief facts as narrated in the plaint are that the plaintiff is stated to be a member of defendant No.1 Club. Defendant No.1 Club is registered under the Society Registration Act, 1860. Defendants No.2 and 3 are the President and Secretary of the Club and are stated to be responsible for the day to day affairs. The plaintiff was elected and has been serving as the General Secretary of the Club since the year 2008. Elections were held on 27.3.2011 when the plaintiff lost in the elections to defendant No.3 with a margin of 250 votes. It is stated that the defendants with mala fide intention to settle their personal grudges and to conceal their illegal activities issued a letter dated 16.6.2011 to the plaintiff suspending his membership from defendant No.1 Club. The plaintiff challenged the said letter in a suit filed in this High Court being

CS(OS)1675/2011. Vide Order dated 26.7.2011 this Court set aside the said letter and directed the defendant to conduct an enquiry against the plaintiff regarding all the allegations levied against him. The enquiry was to be concluded within one month. On 4.8.2011 the defendants issued a letter giving an option to the plaintiff to choose three Committee members of the Club from a list of six members so as to constitute the enquiry panel. The Managing Committee issued a charge sheet to the plaintiff where three different charges were levied The charges read as follows:

> "I That the plaintiff has while functioning as general secretary indulged in embezzlement and misappropriation of the official records thus causing financial loss to club.
>
> II That the plaintiff while functioning as general secretary since 2008 misused his official position by himself indulging in falsification of record and forgery and also influenced and forced his subordinate staff to make false and fictions entries in the official record for his personal pecuniary benefits.
>
> III That the plaintiff while functioning as general secretary since 2008 cheated the club for his personal pecuniary benefits causing loss loss of revenue and reputation to the club."

3. It is stated that the plaintiff filed a response to the charge sheet. It is further stated that hearings took place virtually every alternate day and that on 20.10.2011 the Managing Committee decided that as there is no evidence against the plaintiff, the enquiry proceedings be closed. On 5.2.2012 the plaintiff claims that he received a Show Cause Notice issued by defendant No.3 where it was for the first time informed to the plaintiff that the enquiry proceedings have been concluded and enquiry report was submitted on 15.1.2012 holding the plaintiff guilty of all the charges levelled against the plaintiff. The plaintiff challenged the validity and legality of the Enquiry Report. The plaintiff submitted a written response on 13.2.2012. The plaintiff demanded a personal hearing from the Managing Committee which was afforded to him on 3.4.2012 and 7.5.2012. On 11.5.2012 the plaintiff received another letter calling upon him to deposit Rs.7.18 lacs within three days. In reply, the plaintiff without admitting any liability is stated to have offered to deposit the money. The plaintiff on 28.5.2012 received a letter dated 21.5.2012 informing the plaintiff that the Managing Committee passed a resolution

expelling him from the primary membership of the defendant club. Hence, the present Suit has been filed.

4. The defendants have filed their written statement. The defendants have stated that the plaintiff as General Secretary of the Club misappropriated the official funds and caused loss to the Club to the extent of Rs.6,62,050/-. It is further stated that he misused his official position by committing falsification of record and forgery and influencing the supporting staff. It is stated that the said amount was received by the plaintiff on account of membership fee in cash from three persons who were enrolled as members. No receipts were issued to the said three persons. No entries were made in the Club Records about the money received. The contention of the plaintiff that the said amount received was paid in front of the President of the Club to Mr.Chopra to settle some MCD issues is denied. It is stated that this is only an afterthought to justify non deposit of money admittedly received by the plaintiff. It is further pointed out that the Enquiry Committee has after giving full opportunity to the plaintiff submitted its report pointing out the said forgery, falsification and manipulation of records and financial loss caused to the club. It is further stated that the defence put up by the plaintiff is absolutely sham and moonshine. It is stated that the charges are grave, serious and of financial embezzlement and hence the present Suit and the present application are liable to be dismissed.

5. I have heard learned counsel for the parties.

6. Learned counsel for the plaintiff has relied upon Clause 11(c) of the Rules of the defendant club, which stipulate that a member is liable to be expelled by a resolution of the Managing Committee provided not less than 2/3rd of the members of the Managing Committing are present. The said Clause reads as follows:-

> "11....
>
> (c) If any member refuses or neglects to comply with any of the bye-laws, Rules and Regulations and directions and is guilty of such conduct as in the opinion of the Managing Committee is likely to endanger the harmony or in its opinion prejudicially affects the character or stability or interests of the club, such member shall be liable to be expelled by a resolution of the Managing Committee provided that not less than 2/3rd of the members of the Managing Committee present at the meeting shall have voted in favour of the same and provided also that at least 7 days notice of the meeting is given at which such resolution for his expulsion is intended to be moved and that he shall at such meeting and before the passing of such resolution have had an opportunity of giving such defence as he may think fit. It shall be in the power of the Managing Committee to exclude such member from the club till such resolution has either been passed or rejected. The Managing Committee shall give or post to him by registered post a letter containing a notification of the said resolution. On the passing of such resolution the member shall for with cease to be a member of the club and shall not have any claim against the Managing Committee or the club. Any fees or subscription paid in advance after adjusting the same towards the dues by him shall be refundable. Quorum at such meeting shall be ten members instead of five members of the Managing Committee. No appeal shall lie from the decision of the Managing Committee."

7. It is stated that in terms of the above Clause no notice of meeting was given when such resolution of expulsion was moved and no hearing was given to the plaintiff when such resolution was considered by the Managing Committee.

8. Reliance is also placed on the Order of the High Court dated 26.7.2011 which was a consent order whereby defendants had agreed to revoke the suspension order and conduct an Enquiry against the plaintiff and to conclude the same within one month. It is stated that the enquiry that has been conducted was not in accordance with the said order of this Court. Hence, it is stated that expulsion of the plaintiff is not in accordance with Clause 11(c) of the Rules of the Club and the Order passed by this Court dated 26.7.2011. Hence, it is contended that the present application is liable to be allowed and an injunction order is liable to be passed staying the operation of the letter dated 21.5.2012 expelling the defendant from membership of the plaintiff.

9. Learned counsel for the plaintiff has further submitted that his clients are ready to deposit the sum of Rs.7 lacs which is the amount

said to have been taken by the plaintiff in Court. He also submits that the expulsion order dated 21.5.2012 wrongly relies on a communication to state that the plaintiff has admitted his liability. Learned counsel for the plaintiff has also relied upon the judgments in **Deepak R.Mehtra & Ors. versus National Sports Club of India & Ors.** Manu/DE/1686/2009 to contend that this Court has powers to grant injunction as sought for.

10. On the other hand, learned counsel for the defendant has submitted that the applicable clause for expulsion of the plaintiff is not Clause 11(c) but Clause 11(a) where the Managing Committee can suspend or expel a member by a resolution of the Committee to be passed by 3/4th members present at the meeting. Reliance is also placed on the Show Cause Notice issued by defendant No.1 on 4.2.2012 to which Reply was filed by the plaintiff. Reliance is also placed on letter sent by the plaintiff where he is stated to have agreed to deposit Rs.7,18,335/-by arranging cheques from three members which were due from them. It is stressed that serious charges of embezzlement and fraud have been duly proved by a duly constituted Enquiry Committee. The Enquiry Committee has also been constituted in accordance with the order of this High Court dated 26.7.2011. It is further stated that since an Order has already been passed expelling the defendant from membership of the Club on 21.5.2012, no purpose will be served now in October 2013 by staying the said order. It is further stated that the defendants are ready in case a Court Commissioner is appointed to record evidence so that evidence is concluded and the matter can be expeditiously disposed of.

11. Prima facie it appears that the applicable Clause for expulsion of the plaintiff of the Rules of the defendant club is 11(c) of the Rules of the defendant Club which requires that a member can be expelled on the grounds as stated in the said Clause only after giving seven days' notice of the meeting in which such resolution for expulsion is intended to be moved and at such meeting before passing such resolution the member must have an opportunity of giving such defence as he may think fit.

12. In paragraph 28 of the plaint a specific averment has been made by the plaintiff that in terms of Rule 11(c) of the bye-laws the Managing Committee did not follow the procedure. The written statement in the corresponding paragraph does not deny that Rule 11(c) of the bye-laws are not applicable to the facts of the present case. Hence, the applicable

provision would prima facie be Rule 11(c) of the bye-laws of defendant No.1 Club. For expulsion of the plaintiff as a member of the defendant No.1 Club, prima face the procedure as prescribed in the said clause would have to be followed. The submissions of the learned counsel for the defendant to the contrary do not appear to be correct.

13. A perusal of the record would show that a Show Cause Notice has been given to the plaintiff on 4.2.2012 whereby he was asked to show cause as to why his membership be not terminated in the light of findings of the enquiry panel holding him guilty of the charges levelled by the Managing Committee. Admittedly, a hearing was also given to the plaintiff as admitted by the plaintiff himself in paragraph 22 of the plaint where it is stated that the Managing Committee heard him on 03.04.2012 and 7.5.2012 where he made oral as well as written representations. It is true that on 3.4.2012 or 7.5.2012 the Managing Committee did not pass the resolution expelling the plaintiff from the Membership of the Club. This appears to have been done by the Managing Committee in its meeting held on 21.5.2012.

The contention of the plaintiff that a hearing ought to have been given to the plaintiff also on 21.5.2012 when the resolution was passed by the Managing Committee expelling the plaintiff from the membership of the club prima facie does not appear to be correct. The essence of Clause 11(c) of the Rules of the Club is that before expulsion of a member, he must be given adequate opportunity of explaining himself. Hence, before such a resolution is passed by the Managing Committee, seven days' notice of the meeting is to be given if a resolution of expulsion is intended to be moved and at such meeting an opportunity of giving his defence should also be given to the member intended to be expelled. In the present case there is no dispute that the notice was received and the Managing Committee heard the plaintiff. Hence, prima facie the Managing Committee of defendant club gave full opportunity to the plaintiff to give his version and also gave him an oral hearing. Hence, prima facie Clause 11(c) of the Club Regulations was complied with. It is not possible to accept that after the plaintiff has been fully heard, if the meeting is adjourned in an adjourned meeting also the plaintiff must be present and heard all over again. The contention of the plaintiff to the said extent does not appear correct.

14. One must also take into account the fact that the resolution of defendant No.1's Managing Committee was passed based on the report of an enquiry Committee. The Enquiry Committee had been appointed pursuant to a consent order passed by this Court on 26.7.2011. Subsequently, the plaintiff filed an application for clarification of the said order dated 16.07.2011 on 18.8.2011. The application was disposed of whereby some changes were made in the composition of the Enquiry Committee by the defendant. Learned Senior counsel who appeared for the plaintiff on instructions from the plaintiff had submitted in the Court hearing on 18.08.2011 that the offer of defendants that they were willing to replace Mr.Bhupesh Ahuja with Mr.Kuldip Singh Channa as a Member of the Enquiry Committee was acceptable to the plaintiff. Hence, the plaintiff had accepted the composition of the Enquiry Committee. This Enquiry Committee has after detailed enquiry found the plaintiff guilty of all the charges levelled against him.

15. I may also note that the injunction order that is now sought in the present application if granted would actually tantamount to allowing the Suit itself. The Hon'ble Supreme Court while dealing with the case of the Writ Petitioner in the case of **Bank of Maharashtra versus Race Shipping & Transport Co. Pvt. Ltd. and Another,** (1995) 3 SCC 257 in para11 held as follows:-

> "Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations."

16. Reference may also be had to the judgment relied upon by learned counsel for the plaintiff. In the case of **Deepak R.Mehtra & Ors. versus National Sports Club of India,** (supra) this Court noted the legal position pertaining to Management of Clubs. Paragraph 11 of the

said judgment reads as under:-

> "11. The Apex Court in **T.P. Daver v. Lodge Victoria** MANU/SC/0018/1962: AIR 1963 SC 1144 held that jurisdiction of a civil court in such matters is rather limited; it cannot obviously sit as a court of appeal from decisions of such body; it can set aside the order of such a body, if the body acts without jurisdiction or does not act in good faith or acts in violation of principles of natural justice. The Apex Court again in **B.C.C.I. v. Netaji Cricket Club** MANU/SC/0019/2005: AIR 2005 SC 592, in para 82 of the judgment held that an association or a club which has framed its rules are bound thereby. The strict implementation of such rules is imperative. Necesarily, the office bearer in terms of the Memorandum and Articles of Association must not only act within the four corners thereof but exercise their respective powers in an honest and fair manner. In **Kalyan Kumar Dutta Gupta v. B.M.Verma** MANU/WB/0024/1995: AIR 1995 Cal.140(DB), the civil court was held to have jurisdiction where allegation was that the club had followed a procedure not warranted by the Rules of the Club."

17. In my view prima facie plaintiff has not been able to show that defendant no.1 has no jurisdiction or has not acted in good faith or has violated any of the principles of natural justice.

18. Keeping in view the above facts the plaintiff has failed to make out a prima facie case. Balance of convenience is also not in favour of the plaintiff. Directions have already been passed for appointment of a Court Commissioner who has been directed to endeavour to complete the recording of evidence of the parties within three months from today. It would not be appropriate, at this stage on the facts of this case, to stay the expulsion of the plaintiff from membership of defendant No.1 Club. The present application is accordingly dismissed.

19. It is clarified that the views expressed herein are for the purpose of disposal of this application. Parties are free to raise their contention at the time of final adjudication of the suit.

20. It is, further clarified that in case there is needless delay in completion of evidence by the defendants, the plaintiff would have liberty to approach this Court again for appropriate orders/directions to expedite

the trial/restoration of his membership.

CS(OS) 1848/2012

21. List the matter before Joint Registrar on 03.02.2014 for further proceedings.

ILR (2014) I DELHI 222
CS (OS)

VALVOLINE CUMMINS LIMITED ....PLAINTIFF

VERSUS

APAR INDUSTRIES LIMITED ....DEFENDANT

(MUKTA GUPTA, J.)

IA NO. : 16704/2011 IN CS(OS) NO. : 2597/2011 **DATE OF DECISION: 22.11.2013**

Code of Criminal Procedure, 1908—Suit-S.9—Order XXXIX Rule 1 and 2—ad-interim injunction—Trade Mark Act, 1999—Trade mark-infringment of-identical-deceptively similar—Passing of Intellectual property Appellate Board (IPAB)—Plaintiff having registered trade mark '4T PREMIUM'—India's first in growing lubricant market and producer of quality branded automotive/industrial product—Product available at more than 50,000 retail counters across India—Product imported under various famous trade marks-4T PREMIUM used extensively and continuously—uninterruptedly, since year 2003—Defendant adopted trade mark with mala fide intention—liable to be injuncted from using 4T PREMIUM—Defendant contended—plaintiff could not claim exclusive right either in the word '4T' OR '4T PREMIUM'—word '4T' denoted 4 strokes engine—word PREMIUM a laudatory word—no one can claim right to use the word exclusively—defendant its trademark 'AGIP' WITH 4T PREMIUM—packing totally different from the plaintiffs—no infringement or passing of. The passing of the defendant's goods as that of plaintiff—defendant never used 4T PRIMIUM separately- used the same with their trade name AGIP 4T PREMIUM—defendant already filed an application for cancellation of plaintiff trade mark before IPAB—Held—when the two marks not identical the plaintiff have to establish- mark used by the defendant so nearly resemble the plaintiff's trademark as it likely to mislead to a false conclusion in relation to good in respect to which it is registered—the defendant using word AGIP and its logo alongwith 4T PREMIUM and not simplicitor 4T PREMIUM—Even the plaintiff using the word 'VOLVOLINE' with 4T PREMIUM—application dismissed.

A perusal of the product of the Plaintiff shows that it uses the name of its company before 4T PREMIUM, that is, VALVOLINE 4T PREMIUM and not simplicitor '4T PREMIUM'. Similarly the Defendant has though used the word 4T PREMIUM however, the container also depicts its logo and the company name AGIP. Packaging and colouring etc. of the two products are totally different. **(Para 9)**

Important Issue Involved: (a) passing of is a common law remedy an action of deceit. (b) An action of infringement is a statutory remedy conferred on registered proprietor (c) Where the similarity between plaintiff's and defendant's mark is too close either visually, phonetically or otherwise the court reaches the conclusion that there is imitation, no further evidence is required to establish the right of the plaintiff is violated.

[Gu Si]

CASES REFERRED TO:

1. *Rich Products Corporation and another* vs. *Indo Nippon Food Ltd.,* 2010 42 PTC 660 (Delhi).
2. *Marico Limited* vs. *Agro Tech Foods Limited,* 174 (2010) DLT 279.
3. *Puma Stationer P. Ltd. and another* vs. *Hindustan Pencils Ltd.,* 2010 (43) PTC 479 (Delhi).
4. *Nestle India Limited* vs. *Mood Hospitality Private Limited,* 2010 (42) PTC 514 Delhi.
5. *Cadila Healthcare Ltd. v. Gujrat Co-operative Milk Marketing Federation Ltd. and Ors.* 2009 (VIII) AD 350.
6. *Ishi Khosla* vs. *Anil Aggarwal and another,* 2007 (34) PTC 370 Delhi.
7. *The Gillette Company and others* vs. *A.K. Stationery and others,* 2001 (21) PTC 513 (Delhi).
8. *Sunder Nagar Association* vs. *Welfare Club (regd.) and another,* 1995 PTC 270.
9. *J.R. Kapoor* vs. *Micronix India,* 1994 (14) PTC 260 SC.
10. *Kaviraj Pandit Durga Dutt Sharma* vs. *Navaratna Pharmaceutical Laboratories,* AIR 1965 SC 980.

RESULT: Application dismissed.

MUKTA GUPTA, J.

1. By this application under Order XXXIX Rule 1 and 2 CPC the Plaintiff seeks ad-interim injunction in favour of the Plaintiff and against the Defendant in relation to the trademark '4T PREMIUM' or any other mark identically or deceptively similar to the Plaintiff's mark '4T PREMIUM' amounting to infringement of the Plaintiff's registered trademark under No. 1261544 or leading to passing off the goods or business of the Defendant as that of the Plaintiff.

2. Learned counsel for the Plaintiff contends that the Plaintiff is a 50-50 joint venture of Valvoline International Incorporation, USA and Cummins India Limited, the two 500 Fortune Company, that is, Ashland Inc. and Cummins. Inc. The Plaintiff is India's fastest growing lubricant marketer and producer of quality branded automotive/industrial products.

The Plaintiff's products include automotive lubricants, transmission fluids, gear oil, hydraulic lubricants, automotive filters, specialty products, greases and cooling system products. The Plaintiff's products are available in more than 15,000 retail counters across India. The products of the Plaintiff are imported under various famous trademarks one of which is '4T PREMIUM' which has been used extensively, continuously and uninterruptedly by the Plaintiff since the year 2003 in India. The Plaintiff has been manufacturing and selling multi-grade engine oils under the trade name '4T PREMIUM' under the strict quality control and supervision. The products of the Plaintiff under the trademark '4T PREMIUM' improve engine life and provide maximum power, besides giving special protection to air cooled engines of four stroke motorcycles and are thus recommended for use in four stroke model Hero Honda, Bajaj, TVS, Yamaha, Suzuki, Honda, Kinetic Engineering, LML and all other makes. The Plaintiff is the proprietor of the trademark '4T PREMIUM' in Class-4 for engine oils vide registration No. 1261544 dated 16th January, 2004.

3. Learned counsel for the Plaintiff states that the plaintiff does not claim any exclusive right in the use of mark "4T" which indicates four stroke engine oil as number of other companies are marketing the same however, the Plaintiff is aggrieved by the Defendants use of the trademark '4T PREMIUM' which is likely to lead to the confusion and deception amongst the members of the public. The Defendant is neither registered proprietor nor has filed any trademark application for registration of the trademark '4T PREMIUM'. The Defendant has adopted the Plaintiff's trademark '4T PREMIUM' with mala fide intention, hence the Defendant is liable to be injuncted from using the trademark '4T PREMIUM'. Though number of companies is using "4T" but none is using '4T PREMIUM' and only one other company Veedol is using the same to which also the Plaintiff has given a notice. Reliance is placed on **Kaviraj Pandit Durga Dutt Sharma vs. Navaratna Pharmaceutical Laboratories,** AIR 1965 SC 980; **Sunder Nagar Association vs. Welfare Club (regd.) and another,** 1995 PTC 270; **Ishi Khosla vs. Anil Aggarwal and another,** 2007 (34) PTC 370 Delhi.

4. Learned counsel for the Defendant on the other hand contends that the Plaintiff cannot claim exclusive right either in the word "4T" or "4T PREMIUM" because the word "4T" denotes four stroke engine and the word PREMIUM is a laudatory word descriptive of the goods and

no-one can claim the right to use the word exclusively. The Defendant uses its trademark 'AGIP' with '4T PREMIUM'. The packing of the Defendant is totally different from the Plaintiff and thus there can neither be any infringement nor passing of the Defendant's goods as that of the Plaintiff. The Defendant has never used the mark '4T PREMIUM' separately and has always used the same with its trade name 'AGIP'. The Defendant has already filed an application for cancellation of the Plaintiff's trademark before the Intellectual Property Appellate Board as the same could not have been registered in the first instance itself. Reliance is placed on **Puma Stationer P. Ltd. and another vs. Hindustan Pencils Ltd.,** 2010 (43) PTC 479 (Delhi); **Nestle India Limited vs. Mood Hospitality Private Limited,** 2010 (42) PTC 514 Delhi; **J.R. Kapoor vs. Micronix India,** 1994 (14) PTC 260 SC; **The Gillette Company and others vs. A.K. Stationery and others,** 2001 (21) PTC 513 (Delhi); **Rich Products Corporation and another vs. Indo Nippon Food Ltd.,** 2010 42 PTC 660 (Delhi) and **Marico Limited vs. Agro Tech Foods Limited,** 174 (2010) DLT 279.

5. I have heard learned counsel for the parties.

6. The present suit was filed on 18th October, 2011 when summons in the suit and notice in the present application was issued. The present application is pending since then and no ad-interim ex-parte injunction was granted to the Plaintiff till date. In the meantime pleadings and admission/denial of the suit are complete and thus issues have been framed however, since the Defendant has already filed an application before the Intellectual Property Appellate Board for cancellation of the Plaintiffs trademark the present suit is directed to be stayed under Section 124 of the Trademark Act. Since the stay of the proceedings in the suit is not a bar in deciding the application under Order XXXIX Rule 1 and 2 CPC this Court has proceeded to hear the application.

7. The case of the Plaintiff is that the Plaintiff is using the trademark '4T PREMIUM' exclusively, continuously and uninterruptedly since the year 2003 in India. The advertising, publicity and sales promotion expenses of the Plaintiff for the period from 1996-2010 are approximately Rs. 11,92,645,334/- . The claim of the Plaintiff is that due to the extensive advertising and promotional activities undertaken by it the goods of the Plaintiff under the trademark '4T PREMIUM' have become extremely

popular amongst the consumers at large. The sales figures of the engine oil under the trademark '4T PREMIUM' are as follows:

Year	Volume (Ltrs)	Value (Rs.)
2004-2005	22555	2,454,059
2005-2006	103905	11,855,251
2006-2007	47774	6,881,965
2007-2008	141641	15,950,705
2008-2009	324701	43,151,502
2009-2010	406164	56,972,239
2010-2011	412854	62,296,659

8. It is the claim of the Plaintiff that the trademark '4T PREMIUM' has come to be identified with that of the Plaintiff. It has lost its primary meaning and has acquired a secondary significance as distinctive trademark used in the course of the trade indicating a source, an indicator and symbol of highest standard of quality. The Plaintiff applied for and obtained registration of the trademark '4T PREMIUM' in India in Class-4 for engine oils vide registration No. 1261544 on 16th January, 2004 claiming its user since 30th September, 2003. It is the admitted case of the Plaintiff that it has no objection to the use of mark "4T" simplicitor which the other players in the market are using such as CASTROL POWER, RS GPS 4T, SERVO 4T ZOOM, REPSOL 4T RIDER, RELIABLE 4T, HIZOL HONDA 4-T PLUS. The claim of the plaintiff is to the use of the mark '4T PREMIUM' because the Plaintiff's mark has acquired distinctive significance and is now associated with the product of the Plaintiff. According to the Plaintiff, the Defendant dishonestly and with malafide intention is using the trademark of the Plaintiff, infringing its trademark and passing of its goods as that of the Plaintiff. The case of the Defendant is that the Plaintiff cannot claim any exclusive right to use the word 4T as the same indicates 'four stroke engine oil' and the word premium is a totally descriptive of the goods, is laudatory in nature and has no trademark significance attached to it. There are other companies which are using 4T premium with their lubricants with the name of their company or Extra Premium etc. The use of word PREMIUM in the oil

products is common and global. The Trademark of the Plaintiff has been wrongly registered and the Defendant has filed an application challenging the same. The labels of the Plaintiff's products and the Defendant's products are entirely different. The colour prints of the same are also totally different. There is no resemblance between the VALVOLINE 4T PREMIUM of the Plaintiff and AGIP 4T PREMIUM of the Defendant. The Defendant has also given his consolidated sales figure. According to the Defendant it launched its product AGIP 4T PREMIUM in the year 2007 as AGIP 4T RED and AGIP SUPER 4T. In August, 2008 the Defendant marketed and upgraded its products by introducing AGIP 4T RED, AGIP 4T PLUS, AGIP 4T PREMIUM and AGIP 4T ECO. It further upgraded its products in the year 2011. The use of words RED, PLUS, PREMIUM, ECO and FURY are totally descriptive, common to trade and have no trademark significance.

9. A perusal of the product of the Plaintiff shows that it uses the name of its company before 4T PREMIUM, that is, VALVOLINE 4T PREMIUM and not simplicitor '4T PREMIUM'. Similarly the Defendant has though used the word 4T PREMIUM however, the container also depicts its logo and the company name AGIP. Packaging and colouring etc. of the two products are totally different.

10. In **Marico Ltd.** (Supra) while dealing with the trademark 'LOW ABSORB' the Division bench of this Court held that in light of ratio laid down in case of **Cadila Healthcare Ltd. v. Gujrat Co-operative Milk Marketing Federation Ltd. and Ors.** 2009 (8) AD (Delhi) 350, the Appellant can have no exclusive ownership rights on the Trade Mark LOW ABSORB. It was further held that it is unable to hold that the appellant's trademark "Sugar Free" is a coined word; at best it is a combination of two popular English words. This Court upheld the order of the learned Single Judge refusing the injunction on the point that besides the word LOW ABSORB TECHNOLOGY. the prominent trademark of the Defendant 'SUNDROP' also appeared on the package. The colour scheme of the respective packages was also different. Similarly this court in **Nestle India Ltd.** (supra) refused to set aside the interim injunction granted on the ground that the expression 'YO' cannot be equated with 'YO! China'. 'YO!' by itself is not a trademark. Similarly in **The Gillette Company and others** (supra) this Court held that the real question to be answered is that whether there would be confusion

and deception in the minds of the consumers. It held that it was difficult to agree with the submissions of the Plaintiff therein that the use of trademark 'EKCO FLEXGRIP' by the Defendant would create confusion with the Plaintiff's trademark 'LUXOR PAPER MATE FLEXGRIP'. It was held that if the complete trademarks adopted by the two parties are compared, the same are totally different and confusion seems to be unlikely. In **Rich Products Corporation and another** (supra) this Court held that despite the word 'Whip Topping' being a common word, the combinations were totally different in 'RICH'S WHIP TOPPING' and 'BELLS WHIP TOPPING' It was held:

> 36. Since lengthy submissions were made by both sides with respect to whether or not "WHIP TOPPING" is a generic and/ or a descriptive expression, it may be necessary to briefly touch upon this aspect of the matter. The word 'generic' ordinarily would mean that which has character of or belongs to a genus or class (see New Shorter Oxford English Dictionary, Edition 1993 at page 1074); whereas the word 'descriptive' would mean that which seeks to describe, characterized by description, consist of or concern with description or observable things or qualities (see New Shorter Oxford English Dictionary, Edition 1993 at page 644). Whether a word or expression is 'generic' or 'descriptive' or both is dependent on the facts and circumstances arising in a particular case. It is quite possible that a word or expression which is 'generic', i.e., which refers to a genus or a class is also descriptive as the word by itself characterize the qualities of the product. The line dividing the two in certain cases may get blurred. The word 'whip' by itself means, in the context of the present case, a light fluffy desert made with whipped cream or beaten eggs (see New Shorter Oxford English Dictionary, Edition 1993 at page 3670), while the word 'topping' means a top layer or garnish put on food (see New Shorter Oxford English Dictionary, Edition 1993 at page 3342). Similarly, the word 'cream' means part of liquid that gathers at the top; froth etc. or a liquid rich in droplets or particles of the dispersed phase that forms a separate (especially upper) layer in an emulsion or suspension when it is allowed to stand or is centrifuged (see New Shorter Oxford English Dictionary, Edition 1993 at page 543). The words "Whip Topping", when juxtaposed would, in

my view, be representative of toppings or garnishes for food items which have cream like quality. Therefore, it is, in my opinion, both 'generic' as well as 'descriptive' of the product. The submission of Mr Gupta that the words 'WHIP TOPPING' is distinctive because it relates to a non-dairy product is not substantiated by any evidence on record which would demonstrate that the words "WHIP TOPPING" are associated only with a cream which is not dairy based.

37. It is not disputed by the learned Counsel for the defendant, as it cannot be, that descriptive words and expression can be registered. Even if they are not registered they can be protected, provided it has attained secondary distinctive meaning by its extensive use and publicity. In other words use is a question of degree. What one needs to ask oneself is whether the descriptive mark has become the trade mark. The defendant can ward off a challenge in respect of a mark in which the plaintiff claims proprietorship rights and seeks to enforce his rights whether on the basis of the registration or otherwise; on the ground that the trade mark is a descriptive word or consists of words which are descriptive of the character and quality of the product as long as the use is bonafide or that the descriptive word is well known or used extensively by third parties.

38. The plaintiff, in order to demonstrate that "WHIP TOPPING" has attained secondary distinctive meaning, has relied upon the affidavits of PW1 to PW4. The plaintiffs' witnesses attempted to prove the extensive promotion of its trade mark "RICH'S WHIP TOPPING" through indices such as the world wide turnover of its product, which included the sales in India, the amount spent on promotional material and the extensive publicity received over the years in newspapers and journals both in India and abroad. I have already observed hereinabove the use of the mark by itself does not translate into distinctiveness. The distinctiveness should be of an order which displaces the "primary descriptive meaning" of the word. The evidence placed before me falls well short of this standard. Assuming that one were to accept the evidence produced as an indicator of the fact that words "WHIP TOPPING", which is part of the plaintiffs' trade mark "RICH'S

WHIP TOPPING", has attained secondary distinctive meaning, the very fact in at least in two jurisdictions i.e., the USA and the New Zealand the plaintiffs' mark "RICH'S WHIP TOPPING" has been registered with limitation. While the U.S. registration excludes use of the word 'Topping'; the New Zealand company office has excluded the use of the words "WHIP TOPPING". Even in India the plaintiffs have of their own accord disclaimed their right to the letter 'S' and the word 'Topping'. In these circumstances, I am not persuaded to hold that the use of the words "WHIP TOPPING" by the defendant in its trade mark "BELLS WHIP TOPPING" would infringe either the statutory rights vested in the plaintiffs' registered trade mark "RICH'S WHIP TOPPING", or even constitute violation of any common law rights that the plaintiffs would have in its mark "RICH'S WHIP TOPPING" for the reasons given herein below. In the context of what is said by me above, there is therefore also no necessity for me to deal with the submission that the defence of "character" and "quality" referred to in Section 35 of the Trade Marks Act are used in the adjectible sense, though I have doubts about the tenability of this argument. The example most commonly used, which comes to my mind, is that of a 'soap'. Can 'soap' be used by itself as a mark? The answer in my opinion is clearly in the negative since it describes the product; however, it nevertheless is a noun.

11. In **Kaviraj Pandit Durga Dutt Sharma** (surpa) relied upon by learned counsel for the Plaintiff the Hon'ble Supreme Court held that an action for passing off is a Common Law remedy being in substance an action for deceit, that is, a passing off by a person of his own goods as those of another, that is not the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of the exclusive right to the use of the trade mark in relation to those goods. It was further held that where the similarity between the Plaintiff's and Defendant's mark is too close either visually, phonetically or otherwise and the Court reaches the conclusion that there is an imitation, no further evidence is required to establish that the Plaintiff's rights are violated. It was held that if two marks are identical, no further question arises and the infringement is made out. When the two marks are not identical, the

Plaintiff would have to establish that the mark used by the Defendant so nearly resembles the Plaintiff's registered trademark as is likely to deceive a false conclusion in relation to the goods in respect of which it is registered.

12. In **Cadila Healthcare Ltd. v. Gujrat Co-operative Milk Marketing Federation Ltd. and Ors.** 2009 (VIII) AD 350 it was held:

> 8. In our view, at this juncture i.e. at the interim stage, even assuming distinctiveness claimed by the appellant in its favor qua its artificial sweetener, the appellant has rightly been declined an injunction by the learned Single Judge since it is evident and has indeed been found by the learned Single Judge that the use of the term 'Sugar Free' by the respondent is not in the trademark sense but as a common descriptive adjective. The learned Single Judge has found and in our view rightly that the respondent has not used the expression in a trademark sense but only in a descriptive sense in the following passage:
>
> > 54. It is important to be borne in mind that use of a descriptive expression as a trade mark by a trader, irrespective of the said trade mark having acquired a secondary meaning and distinctiveness in relation to the trader's products, does not entitle such trader from precluding other traders from using the said expression for the purposes of describing the characteristic features of their products. I have no hesitation in stating, albeit without prejudice to the rights and interests of the plaintiff in the present suit, that by adopting such a purely descriptive and laudatory expression 'Sugar Free' as its trade mark, the plaintiff must be prepared to tolerate some degree of confusion which is inevitable owing to the wide spread use of such trade mark by fellow competitors. Simply because the plaintiff claims to be using the expression 'Sugar Free' as a trade mark much prior to the launch of the defendant's product Pro Biotic Frozen Dessert in the market does not give this Court a good ground for imposing a blanket injunction on the defendant from using the expression 'Sugar Free', especially when the defendant intends to use this expression only in its descriptive sense and not as a trade mark, and even otherwise, when the use of this expression is widespread in relation to foods and beverages.
>
> We fully agree with and reaffirm the said finding.

9. We are unable to hold that the appellant's trademark 'Sugar Free' is a coined word; at best it is a combination of two popular English words. The mere fact that the appellant's product cannot be directly consumed or eaten and merely is an additive does not detract from the descriptive nature of the trade mark. Once a common phrase in the English language which directly describes the product is adopted by a business enterprise, such adoption naturally entails the risk that others in the field would also be entitled to use such phrases provided no attempt is made to ride on the band wagon of the appellant's indubitably market leading product 'Sugar Free'. In this connection, merely because the attributes of 'sugar free' can be described by other phrases cannot detract from the common usage of the phrase 'Sugar Free' as denoting products which do not contain sugar and any trader which adopts such mark in the market place, does so with the clear knowledge of the possibility of other traders also using the said mark. That is precisely the reason for the denial of protection to such marks by refusing registration as envisaged by Sections 9, 30 and 35 of the Act. The said Sections read as follows: -

9. Absolute grounds for refusal of registration.-(1) The trade marks-

(a) which are devoid of any distinctive character, that is to say, not capable of distinguishing the goods or services of one person from those of another person;

(b) which consist exclusively of marks or indications which may serve in trade to designate the kind, quality, quantity, intended purpose, values, geographical origin or the time of production of the goods or rendering of the service or other characteristics of the goods or service;

(c) which consist exclusively of marks or indications which have become customary in the current language or in the bona

fide and established practices of the trade, shall not be registered: Provided that a trade mark shall not be refused registration if before the date of application for registration it has acquired a distinctive character as a result of the use made of it or is a well-known trade mark.

(2) A mark shall not be registered as a trade mark if-

(a) it is of such nature as to deceive the public or cause confusion;

(b) it contains or comprises of any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India;

(c) it comprises or contains scandalous or obscene matter;

(d) its use is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950 (12 of 1950).

(3) A mark shall not be registered as a trade mark if it consists exclusively of-

(a) the shape of goods which results from the nature of the goods themselves; or

(b) the shape of goods which is necessary to obtain a technical result; or

(c) the shape which gives substantial value to the goods.

30. Limits on effect of registered trade mark.-(1) Nothing in Section 29 shall be construed as preventing the use of a registered trade mark by any person for the purposes of identifying goods or services as those of the proprietor provided the use-

(a) is in accordance with honest practices in industrial or commercial matters, and

(b) is not such as to take unfair advantage of or be detrimental to the distinctive character or repute of the trade mark.

(2) A registered trade mark is not infringed where-

(a) the use in relation to goods or services indicates the kind, quality, quantity, intended purpose, value, geographical origin,

the time of production of goods or of rendering of services or other characteristics of goods or services;

(b) a trade mark is registered subject to any conditions or limitations, the use of the trade mark in any manner in relation to goods to be sold or otherwise traded in, in any place, or in relation to goods to be exported to any market or in relation to services for use or available or acceptance in any place or country outside India or in any other circumstances, to which, having regard to those conditions or limitations, the registration does not extend;

(c) the use by a person of a trade mark-

(i) in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark if, as to those goods or a bulk or which they form part, the registered proprietor or the registered user conforming to the permitted use has applied the trade mark and has not subsequently removed or obliterated it, or has at any time expressly or impliedly consented to the use of the trade mark; or

(ii) in relation to services to which the proprietor of such mark or of a registered user conforming to the permitted use has applied the mark, where the purpose and effect of the use of the mark is to indicate, in accordance with the fact, that those services have been performed by the proprietor or a registered user of the mark;

(d) the use of a trade mark by a person in relation to goods adapted to form part of, or to be accessory to, other goods or services in relation to which the trade mark has been used without

infringement of the right given by registration under this Act or might for the time being be so used, if the use of the trade mark is reasonably necessary in order to indicate that the goods or services are so adapted, and neither the purpose nor the effect of the use of the trade mark is to indicate, otherwise than in accordance with the fact, a connection in the course of trade between any person and the goods or services, as the case may be;

(e) the use of a registered trade mark, being one of two or more trade marks registered under this Act which are identical or nearly resemble each other, in exercise of the right to the use of that trade mark given by registration under this Act.

(3) Where the goods bearing a registered trade mark are lawfully acquired by a person, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not infringement of a trade by reason only of-

(a) the registered trade mark having been assigned by the registered proprietor to some other person, after the acquisition of those goods; or

(b) the goods having been put on the market under the registered trade mark by the proprietor or with his consent.

(4) Sub-section (3) shall not apply where there exists a legitimate reason for the proprietor to oppose further dealings in the goods in particular, where the condition of the goods, has been changed or impaired after they have been put on the market.

35. Saving for use of name, address or description of goods or services.-Nothing in this Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with any bona fide use by a person of his own name or that of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business, or the use by any person of any bona fide description of the character or quality of his goods or services.

Thus, it is clear that the mark or indication which serves to designate the

quality of the goods of the appellant, which indeed the phrase 'Sugar Free' does, would be an absolute ground for refusal of registration of a mark unless it has acquired a distinctive character. The expression can at best be said distinctive qua the artificial sweetener of the appellant and mere starting of the marketing of the drink 'sugar free D'lite' cannot give the appellant the right to claim distinctiveness in the expression 'Sugar Free' in relation to all the food products.

13. In the present case as noted above the Defendant is using the word "AGIP" and its logo along with "4T PREMIUM" and not simplicitor "4T PREMIUM". Further even the Plaintiff is using the word "VALVOLINE" with "4T PREMIUM" and not "4T PREMIUM". In view of the aforesaid discussion, I find no reason to grant interim injunction in favour of the Plaintiff and against the Defendant.

Application is accordingly dismissed.

ILR (2014) I DELHI 237
W.P. (C)

ABHIMANYU SINGH ....PETITIONER

VERSUS

UNION OF INDIA THROUGH ITS HOME SECRETARY & ORS. ....RESPONDENT

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C). NO. : 6752/2013 DATE OF DECISION: 25.11.2013

Constitution of India, 1950—Article 2226—Writ Petition—Service Law-delay and laches—Condonation of 18 years delay-unauthorized absence without leave-dismissal-petitioner while posted with 11th BN BSF at Dhole Chera Assam on 8th May, 1995—Received a letter from his home regarding sickness of his wife

and children-leave application not granted-distress upon the illness of his wife and children-could not bear anxiety. Being stressed and in fit of emotions, left unit on 11.05.1995 for home in Bihar—Having just recovered from injury in a grenade attack in G&K and condition of wife and children went into deep depression-remained hospitalized-respondent issued show cause notice on 25.07.1995—Tentative to terminate services for long period of absence without sanction-given opportunity to make representation before the Commandant on or before 24.08.1995, failing which to be presumed no defence to put forth—Failed to respond—Dismissed from service from 25.10.1995—Preferred writ petition—Court observed-the ground of sickness not supported by documents-long period of unauthorized absence from duty in disciplined force such as BSF did not permit condonation of unauthorized absence—Held—18 years of long delay after passing of the order, would itself merit rejection of the petition on account of unexplained delay laches—Writ petition dismissed.

We may note that the writ petition has been filed after more than 18 years of the passing of the impugned order dated 28th October, 1995 which by itself would merit rejection of the petition on account of unexplained delay and laches. Be that as it may, we have otherwise considered the petitioner's case on the merits of the contentions raised in the petition.

(Para 17)

Important Issue Involved: (a) Delay of 18 years in filing the writ petition cannot be condoned.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. Pradeep Kumar Yadav, Advocate.

FOR THE RESPONDENT : Mr. Barkha Babbar, Advocate.

RESULT: Writ Petition dismissed.

GITA MITTAL, J. (Oral)

1. The respondents are present on adv ance notice and have produced the relevant record.

2. By way of the present writ petition, the petitioner has sought setting aside of the order dated 28th October, 1995, whereby, the petitioner was administratively dismissed from services on the ground that he was absent without leave w.e.f. 11th May, 1995 till date of passing of such order.

3. This order was passed after issuance of notice to show cause to the petitioner. The petitioner rests on the sole ground that while posted with 11th Battallion of BSF since 8th May, 1995 at the Dhol Chera, Assam, he received a letter from his home with regard to sickness of his wife and children. It is submitted that his leave application through proper channel was not granted. The petitioner was distressed upon the news of illness of his wife and children and he could not bear the ensuing anxiety . Being stressed and in a fit of emotions, the petitioner left his Unit on 11th May, 1995 for his home in the State of Bihar. As a result of the condition of his wife and children and having just recovered from injury in a grenade attack, while on duty in Jammu and Kashmir, the petitioner went into deep depression.

4. It is also submitted that the petitioner remained hospitalized for the treatment of such depression. In support of the writ petition, the petitioner placed reliance on copies of two letters claimed to have been written by his wife dated 10th August, 1998, and the other or undated letter to the Commanding of the 11th Battalion of BSF.

5. We may note that the petitioner has filed typed copies of these two communications which were purported to have been sent years after the passing of the impugned order dated 28th October, 1995. These letters nowhere contain any reference to the sickness of the petitioners' family members i.e. his wife and children and make no reference of the fact that their sickness necessitated the petitioner to leave urgently without having sanctioned leave from his unit.

6. The letters are not supported by any proof from dispatch by the author of the letter or its receipts by the respondents. The respondents before us dispute the receipt of these letters. Be that as it may, these letters are claimed to have been sent long after the passing of the impugned order dated 28th October, 1995 whereby the petitioner was removed from services.

7. The record placed before us by the respondents reflects that after the petitioner disappeared on 11th May, 1995 from the Unit, the respondents initiated proceedings for his apprehension. We are informed that on 11th May, 1995, apprehension for the petitioner was sent to the Superintendent of Police, District Vaishali, Bihar having jurisdiction for the petitioner's home town.

8. This was not a fruitful exercise inasmuch as, the petitioner did not return to the Unit. On expiry of 30 days of unauthorized absence of the petitioner, a court of enquiry was held by the respondents to enquire into the circumstances under which, he was absenting w.e.f. 11th May, 1995 under the provisions of section 62 of BSF Act.

9. The respondents, thereafter issued a notice to show cause dated 25th July, 1995 informing the petitioner about the tentative proposal to terminate his services by way of dismissal on account of long period of absence without sanctioned leave calling upon the petitioner to show

cause against the same.

10. The petitioner was given opportunity to make his representation and place his defence before the Commandant of the 11th Battalion, BSF on or before 24th August, 1995 failing which, it was to be presumed that the petitioner had no defence to put forth.

11. The petitioner failed to respond to this notice. As a result, the respondent passed an order dated 28th October, 1995 being satisfied that the petitioner's absence without leave was without any reasonable cause. The petitioner was dismissed form service w.e.f. of 28th October, 1995. The respondent also directed that the period of petitioner's absence w.e.f. 11th May, 1995 to 28th October, 1995 be treated as dies non.

12. The above narration manifests that the impugned order was passed after due compliance with the requirements of the statute as well as principles of natural justice and cannot be subject to a challenge for any violation thereof.

13. We have been informed that the petitioner had on prior six occasions also either absented himself or proceeded on leave without getting them sanctioned and orders for regularising such leave were passed in this regard. Details of the absence from duty have been placed before us. Inasmuch as impugned action was not premised on these instances of the petitioner's absence without leave, this aspect of the matter does not require detain us any further.

14. We may note that in the writ petition, the petitioner has claimed that his wife has addressed the letter dated 10th August, 1998 to the Commandant of 11th Battalion with regard to the petitioner's deteriorating state of health. As per the copy placed on record of the letter dated 10th August, 1998 written by Smt. Renu Devi, wife of the petitioner, it has been mentioned therein that due to deterioration of his mental condition, the petitioner came out without sanction of any leave. She stated that she had not received any reply from the unit and requested the authorities not to disturb the livelihood of the family. She also informed that she was getting his treatment done and after some improvement she would send the petitioner to the unit.

15. The second representation purportedly sent by petitioner's wife addressed to the Director General of the BSF has also been placed on

record. The petitioner's wife has admitted the petitioner's fault and pardon thereof has been sought.

16. The writ petition as well as the representations to the respondents do not explain any sufficient grounds which would enable the authorities to consider the aspect of the petitioner's sickness. In any case, the long period of absence unauthorisedly from a disciplined force as the Border Security Force, in the facts and circumstances as laid down does not permit condonation of the petitioner's unauthorized absence from duty.

17. We may note that the writ petition has been filed after more than 18 years of the passing of the impugned order dated 28th October, 1995 which by itself would merit rejection of the petition on account of unexplained delay and laches. Be that as it may, we have otherwise considered the petitioner's case on the merits of the contentions raised in the petition.

18. We find no merit in the writ petition which is hereby dismissed.

19. No order as to costs.

ILR (2014) I DELHI 242
W.P.(C).

R.K. ANAND AND ORS. .....PETITIONERS

VERSUS

DELHI CO-OPERATIVE HOUSING FINANCE CORPORATION LTD. & ORS. .....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 7370/2013 DATE OF DECISION: 25.11.2013
CM NO. : 15826, 15827/13

Constitution of India, 1950—Article 226—Writ Petition—

Delhi Co-operative Societies Act, 2003—S. 70—Delhi Co-operative Housing Finance Corporation Ltd. (DCHFC)-Housing Loan-Default-Recovery certificate—Loan of Rs.51.52 lacs taken from the DCHFC to complete the construction of flats of Neelkamal CO-operative group Housing Society for its members-Society defaulted in making timely payment of installment—Loan secured by way of mortgage deed—DCHFC proceeded with recovery suit in 2010-recovery certificate issued for 1,20,06,7.1/- with interest @ 15.9% execution proceedings filed—R4 Assistant Collector/ Recovery Officers—Issued a public dated 4.3.2013 for sale of assets of society including the flats occupied by different members—During the proceedings of execution-order dtd. 14 August, 2013 passed-directing members/GPF holders/residents to apportion amounts payable by Society in terms of recovery certificate—Further informed-no objection certificate (NOC) could be issued against the members who clear full and final payment-Some members filed objections disputing liability-objections pending-Petitioners No. 3 to 7 deposited the amount in compliance of the order by way of cheque and sought NOC-R4 returned the cheques-appears that the society claiming amount against several members in proceedings under S. 70 of Delhi Co-operative Societies Act, 2003—Preferred writ petition—Contended-depite *bona fide* as well as sincere efforts to comply with the order, non acceptance of tender would be foisting-unwarranted interest liability and would be highly prejudicial—Held-directed R4 to accept payment from such members of the Society who are willing to pay as apportioned by R4 subject to subsequent adjustment on the finalization of proceedings before different forums—Writ petition disposed of.

In view of the above, we direct as follows:-

(i) The respondent no.4 shall accept tenders of amounts

made in terms of the order dated 14th August, 2013 in Execution Case No.526/2008-2009 from the members of the respondent no.3/Society. Such amount shall be towards the discharge of the liability of the members under the order dated 14th August, 2013.

(ii) In case there is a variation of the liability of the petitioners in any proceedings pending before the Delhi Co-operative Tribunal or by any court, the petitioners shall be bound by such adjudication and shall be liable to make good the deficiency between the amount which is tendered in terms of the order dated 14th August, 2013 and the adjudication of apportionment as on 30th September, 2013.

(iii) In order to obviate any further disputes, it is also directed that in case any other member of the Society seeks to comply with the order dated 14th August, 2013, such member shall be liable for interest which would be payable on the amount apportioned w.e.f. 30th September, 2013 till the date of tender.

(iv) In case the adjudication by any forum or court results in reduction/assessment of further liability of a member who has made payment in terms of the order dated 14th Augusts, 2013 as well as the order being passed by us today, it shall be the responsibility of respondent no.1 to forthwith return the excess amount with interest at the rate of 15.5% per annum from the date of payment.

(vi) We also clarify that so far as the conduct of public auction of property of the respondent no.3 in order to recover the amounts due and payable by it to the respondent no.1 is concerned, the same shall stand restricted to the remaining liability of the respondent no.3 after adjustment of the amounts which are recovered from the members and against such members who do not deposit in terms of the order dated 14th August, 2013.

(vii) We also clarify that there is no stay of execution of the

proceedings and it shall be open for the respondent no.3 to proceed expeditiously in the matter accordingly.

(viii) The payment by the member(s) as well as receipt of amounts by the respondents shall be without prejudice to the respective rights and contentions of the parties.

This writ petition and applications are disposed of in the above terms.

Copy of this order be given dasti to counsel for the parties. (**Para 10)**

Important Issue Involved: (a) A bona *fide* and sincere efforts to comply with order to pay amount to avoid payment of interest, should be honoured.

[Gu Si]

APPEARANCES:

FOR THE PETITIONERS	**:**	Mr. Bharat Bhushan Bhatia, Advocaat with Mr. Akshay Bhatia, Advocate & Mr. Ashok Verma, Advocate.
FOR THE RESPONDENT	**:**	Mr. Sunil Sabharwal, Advocate. for R-1/DCHFC Mr. Arjun Pant, Advocate. for R-3. Mr. Anil Kumar, Advocate. for R-4.

RESULT: Writ Petition disposed off.

GITA MITTAL, J. (ORAL)

1. By way of the present petition, the petitioners submit that the members of the Neel Kamal Cooperative Group Housing Society (hereinafter referred to as 'Society') has taken loan of Rs.51.52 lacs from the Delhi Co-operative Housing Finance Corporation (hereinafter referred to as "DCHFC") to complete the construction of flats for its members. It appears that the Society defaulted in making timely payment of the instalments to the DCHFC. It is also pointed out that the loan

which was taken by the Society, was secured by execution of a mortgage deed. In the year 2010, the DCHFC proceeded with the recovery suit against the Society impleaded as respondent no.3 before us. These proceedings culminated in issuance of a recovery certificate to the tune of Rs.1,20,06,701/- with interest at the rate of 15.5% per annum.

2. In execution proceedings filed by the DCHFC, the Assistant Collector & Recovery Officer, DCHFC-respondent no.4 before us, issued a public notice dated 4th March, 2013 for sale of the assets of the Society which would include flats occupied by different members including the present petitioners.

3. During these proceedings, an order dated 14th August, 2013 has been passed by the respondent no.4 directing members/GPA holders/ residents of respondent no.3-Society to apportion amounts found payable by the Society in terms of the recovery certificate and informing the members that 'No Objection Certificate' would be issued against the members who cleared full and final payments.

4. We are informed that some of the members of the Society filed objections before the respondent no.4 disputing liability to pay any amount under the order dated 14th August, 2013. These objections are stated to be pending even on date.

5. Before us, the petitioner nos.3 to 7 submit that they deposited the amounts in compliance of the order dated 14th August, 2013 by way of cheques with the respondent no.4 and sought issuance of the no objection certificate in terms of the order dated 14th August, 2013. The respondent no.4, however, returned the cheques to the petitioners under cover of its communication dated 28th September, 2013 stating that the order dated 14th August, 2013 had yet not been enforced by it.

6. The instant writ petition makes a grievance that in view of the above, despite the bona fide as well as sincere efforts of the petitioners to comply with the order dated 14th August, 2013 and non-acceptance of the tender by the petitioners, the petitioners would be foisted with an unwarranted interest liability as and when the respondent no.4 opted to enforce the order dated 14th August, 2013. The petitioners contend that the same would be highly prejudicial given their sincere intention and efforts to comply with any lawfully payable demands.

7. We are also informed that at the instance of the Society, proceedings under Section 70 of the Delhi Co-operative Societies Act, 2003 are pending wherein the Society is claiming amounts against several members including the petitioners. These proceedings culminated in awards which were in favour of petitioner nos.1 to 5 and 7. So far as these petitioners are concerned, we are informed by learned counsels for the respondents who are present today, that the society has impugned the awards by way of statutory appeals. These appeals are pending on date. The award was in favour of the Society and against petitioner no.6 who has assailed the said award by way of a statutory appeal.

8. Be that as it may, it cannot be disputed that the respondent no.1/ DCHFC is entitled to repayment of its dues. By the order dated 14th August, 2013 passed in execution proceedings, the DCHFC has crystallized the liability on that date and has also apportioned the same amongst the members. Therefore, so far as such members of the Society who are willing to pay the amount as apportioned by the respondent no.4 is concerned, they deserve to be permitted to deposit the amounts and the respondent no.4 is liable to be directed to accept the payment thereof as a lawful tender towards discharge of the liability of such members in terms of the order dated 14th August, 2013.

9. We are informed by learned counsel appearing for respondent no.4 that in a meeting held on 8th August, 2013 between the members of the society and the respondent no.4, the amounts due to the respondent no.1 were apportioned and quantification thereof was effected. This quantification has been noted in the order dated 14th August, 2013 wherein the Assistant Collector has effected quantification of amounts payable by members after categorising them as LIG & MIG flat owners. The petitioners claim to have deposited amount in terms of such apportionment. The respondent no.4 has duly communicated the quantification of the liability of the flat owners.

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

(i) The respondent no.4 shall accept tenders of amounts made in terms of the order dated 14th August, 2013 in Execution Case No.526/ 2008-2009 from the members of the respondent no.3/Society. Such amount shall be towards the discharge of the liability of the members under the order dated 14th August, 2013.

(ii) In case there is a variation of the liability of the petitioners in any proceedings pending before the Delhi Co-operative Tribunal or by any court, the petitioners shall be bound by such adjudication and shall be liable to make good the deficiency between the amount which is tendered in terms of the order dated 14th August, 2013 and the adjudication of apportionment as on 30th September, 2013.

(iii) In order to obviate any further disputes, it is also directed that in case any other member of the Society seeks to comply with the order dated 14th August, 2013, such member shall be liable for interest which would be payable on the amount apportioned w.e.f. 30th September, 2013 till the date of tender.

(iv) In case the adjudication by any forum or court results in reduction/assessment of further liability of a member who has made payment in terms of the order dated 14th Augusts, 2013 as well as the order being passed by us today, it shall be the responsibility of respondent no.1 to forthwith return the excess amount with interest at the rate of 15.5% per annum from the date of payment.

(vi) We also clarify that so far as the conduct of public auction of property of the respondent no.3 in order to recover the amounts due and payable by it to the respondent no.1 is concerned, the same shall stand restricted to the remaining liability of the respondent no.3 after adjustment of the amounts which are recovered from the members and against such members who do not deposit in terms of the order dated 14th August, 2013.

(vii) We also clarify that there is no stay of execution of the proceedings and it shall be open for the respondent no.3 to proceed expeditiously in the matter accordingly.

(viii) The payment by the member(s) as well as receipt of amounts by the respondents shall be without prejudice to the respective rights and contentions of the parties.

This writ petition and applications are disposed of in the above terms.

Copy of this order be given dasti to counsel for the parties.

ILR (2014) I DELHI 248
CRL.A.

JOGINDER SINGH @ MOR ....APPELLANT

VERSUS

STATE OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 250/2003, 327/2003& 63/2005 **DATE OF DECISION: 25.11.2013**

Indian Penal Code, 1860—Section 307—Attempt to Murder—Section 34—Common intention—Arms Act, 1950—Section 25 and 27—Possession and use of arms—Criminal Procedure Code, 1973—Section 357—Compensation to victim—Appellant/accused fired at the complainant PW6—Missed—Hit another person and caused injuries—Shot fired again—Hit PW6 and caused injuries—Appellants fled the spot—Injured removed to Hospital—DD No. 36 dated 08.06.1995 recorded—MLCs collected—Injuries to complainant opined to be dangerous and described as gunshot injuries—Injured opined to be grievous—On the Statement of complainant FIR No. 339/95 PS Janakpuri registered—Accused persons named therein—Appellant/accused arrested—Made disclosure statements—Country made pistols recovered—Sent for expert examination to FSL—Appellant/accused person alongwith Ashwani and Sanjiv Sethi arrested and charge Sheeted—Accused persons Ashwani and Sanjiv Sethi discharged—Charges against the appellants/accused persons framed—prosecution examined 22 witnesses—

Statement of appellants u/s. 313 Cr. P.C. recorded—Denied complicity in crime and pleaded false implication—Appellants convicted for offences u/s. 307/34 IPC and u/s. 25/27 Arms Act—Sentenced to undergo imprisonment and fine—Aggrieved appellants preferred appeals—Contended—Witnesses PW7 and PW19 not present the spot and falsely introduced as eye witnesses—Lacked creditability being interested witnesses—Complainant is B.C. of the area—Involved in a number for criminal cases—Recoveries are doubtful—Pistols recovered not connected/linked with the crime—Nature of injuries suffered by PW6 not proved—Other injured withheld and not produced—Investigation is tainted and unfair—Ld. APP contended—Conviction based upon fair appraisal of evidence—The other injured could not be traced and examined—Held—Conduct of PW7 and PW19 unnatural and unreasonable—presence at the spot highly suspicious—Complainant PW6 proved the version given to police at first instance without major variations—Other injured not traceable—No adverse inference can be drawn against the prosecution—Country made pistols recovered from the appellants—Shot fired from one of the pistols—Appellants arrived at the scene having made preparation, participated by firing and facilitated commission of crime—shared common intention—injury to PW6 caused on a vital organ—Injuries dangerous in nature—Injuries not self inflicted or accidental in nature—No variance and conflict between ocular and medical evidence—Involvement in the incident established beyond reasonable doubt—Conviction sustained—Substantive sentences modified—Compensation awarded—Appeal disposed of.

Important Issue Involved: Where the FIR is lodged soon after the incident promptly, there is least possibility of fabrication of a false story in a short interval.

When the conduct of witnesses who claim to be present at the spot but do not report the matter to the police, nor do interfere in the scuffle nor do take victims to the hospital, such conduct is quite unnatural and unreasonable and is not in accordance with the acceptable human behaviour making their presence at the spot highly suspicious.

Injured is the most natural witness who is accorded a special status in law.

Where efforts were made to summons and examine a witness but he was not traceable, it cannot be said that the prosecution did not intentionally or deliberately produce him in the Court for giving evidence and no adverse inference can be drawn against the prosecution.

The Court are concerned with quality and not quantity of evidence and in a criminal trial conviction can be based on the sole testimony of a witness if it inspires confidence.

Non recovery of crime weapon is not fatal to the prosecution case and does not discredit the testimony of the injured.

To justify conviction under Section 307 IPC, It is not essential that bodily injury capable of causing death should have been inflicted. It is sufficient if there is present an intent coupled with some overt act in execution thereof. If the injury inflicted has been with the avowed object or intention to cause death, the nature, extent or character of the injury or whether such injury was sufficient to actually causing death are irrelevant factors for adjudging the culpability under section 307 IPC.

The nature of weapon used, the intention expressed by the accused at the act, the motive for commission of the offence, the nature and size of the injuries, the parts of the body of the victim selected for causing injuries and the severity of the blow or blows are important factors that can be taken

into consideration in coming to a finding whether in a particular case, the accused can be convicted for an attempt of murder.

Victim is not to be forgotten in criminal justice system and Section 357 Cr. P.C. Should be read as imposing mandatory duty on the Court to apply its mind to the question of awarding compensation in every case.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANT : Crl.A. 250/2003 : Mr. Rajeev Gaur Naseem, Advocate. Crl.A. 327/2003 : Mr. Anurag Jain, Advocate. Crl.A. 63/2005 : Mr. Sitab Ali Chaudhary, Advocate.

FOR THE RESPONDENT : Crl.A. 250/2003, Crl.A. 327/2003, and Crl.A. 63/2005 : Mr. Lovkesh Sawhney, Advocate.

CASES REFERRED TO:

1. *Ankush Shivaji Gaikwal* vs. *State of Maharashtra,* 2013 (6) SCC 770.
2. *State of Uttar Pradesh* vs. *Naresh and Ors.,* (2011) 4 SCC 324.
3. *Abdul Sayed* vs. *State of Madhya Pradesh,* (2010) 10 SCC 259.

RESULT: Appeal disposed of.

S.P. GARG, J.

1. Joginder Singh @ Mor (A-1), Kuldip Kumar @ Raju Langda (A-2) & Sunil @ Ganja (A-3) impugn a judgment dated 01.04.2003 of learned Addl. Sessions Judge in Sessions Case No. 38/98 arising out of FIR No. 339/95 PS Janak Puri by which they were convicted under Sections 307/34 IPC and 25/27 Arms Act. By an order dated 02.04.2003, they were sentenced to undergo RI for five years with fine Rs. 10,000/

- each under Sections 307/34 IPC; RI for one year with fine Rs. 1,000/ - each under Sections 25/27 Arms Act. The sentences were directed to operate concurrently.

2. Allegations against the appellants were that on 08.06.1995 at about 09.30 P.M. at Mangal Bazar Road, Uttam Nagar, Delhi near Sharma Hotel, they in furtherance of common intention attempted to murder Jai Bhagwan by firing at him. The first shot aimed at Jai Bhagwan missed and hit Nagendu who sustained injuries. They fired again and the shot hit the complainant Jai Bhagwan on his chest. The police machinery came into motion after Daily Diary (DD) No. 36 (Ex.PW-15/A) was recorded at 10.00 P.M. on 08.06.1995 at Police Post, East Uttam Nagar on information from PCR that 'firing' was going on behind Arya Samaj Road Temple. The investigation was assigned to SI R.D.Yadav who with Const.Ram Kumar and other police officials went to the spot. The injured had already been taken to DDU Hospital. SI R.D.Yadav collected MLCs of the victims Jai Bhagwan and Nagendu and lodged First Information Report after recording Jai Bhagwan's statement (Ex.PW-6/A). Scooter No. DL-4 SC 9623 found at the spot was seized. During the course of investigation, statements of the witnesses conversant with the facts were recorded. A-1 to A-3 were arrested and pursuant to their disclosure statements, A-2 and A-3 recovered country-made pistols. Exhibits were sent to Forensic Science Laboratory (FSL). Ashwani and Sanjiv Sethi charge-sheeted along with A-1 to A-3 were discharged vide order dated 15.01.1999 and the State did not challenge the discharge order. A-1 to A-3 were duly charged and brought to Trial. To bring home their guilt, the prosecution examined twenty-two witnesses. In their 313 statements, the appellants pleaded false implication and denied their complicity in the crime. After hearing the contentions of the parties and appreciating the evidence on record, the Trial Court, by the impugned judgment, convicted A-1 to A-3 for the offences mentioned previously. Being aggrieved, they have preferred the appeals.

3. Appellants' counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. PW-7 (Lekh Raj) and PW-19 (Ramesh Mehta) were falsely introduced as eye witnesses though they were not present at the spot. The Trial Court fell in grave error to place reliance on their tainted version. They lacked credibility being interested witnesses and having criminal antecedents. Complainant Jai

Bhagwan himself was involved in number of criminal cases and was Bad Character (BC) of the area. The recoveries are doubtful. The country made pistol recovered was not connected / linked with the crime. The concerned doctor who medically examined Jai Bhagwan was not produced to prove the nature of injuries suffered by him. The investigation is tainted and unfair. Adverse interference is to be drawn against prosecution for withholding Nagendu, the other injured. The counsel adopted alternative argument to release the appellants for the sentence already undergone by them in case they were found guilty. Learned Addl. Public Prosecutor supporting the judgment urged that it is based upon fair appraisal of evidence and warrants no interference. Despite all efforts to procure Nagendu's presence, he could not be traced and examined.

4. I have considered the submissions of the parties and have examined the record. The occurrence took place at about 09.30 P.M. and Daily Diary (DD) No. 36 (Ex.PW-15/A) was recorded at Police Post East Uttam Nagar at 10.00 P.M. The Investigating Officer went to the spot. He collected the MLCs of both the victims at DDU Hospital. After recording Jai Bhagwan's statement (Ex.PW-6/A), he lodged First Information Report at 12.50 A.M. by making endorsement (Ex.PW-22/A) thereon, promptly without delay. Nagendu's MLC (Ex.PW-4/A) records the arrival time of the patient at 10.15 P.M. Jai Bhagwan was taken to DDU Hospital at 10.10 P.M. as recorded in the MLC (Ex.PW-4/B). The FIR was registered on the statement of the complainant in which he gave vivid detail of the incident as to how the assailants had arrived at the spot by Scooter No. DL-4 SC 9623 at 09.30 P.M. where he had gone to purchase 'subzi'. He further disclosed that A-1 and A-2 fired at him with country made pistols and he sustained gunshot injuries on chest. He was able to escape the first shot which hit a servant working at Sharma Hotel. The assailants fled the spot. Since the FIR was lodged soon after the incident promptly, there was least possibility of fabrication of a false story in a short interval. A-1 to A-3 were named in the FIR and specific role was ascribed to them. In his Court statement, PW-6 (Jai Bhagwan) proved the version given to the police at the first instance without major variations and deposed that on 08.06.1995, he had gone to Sharma Hotel, Mangal Bazar for purchasing 'subzi'. When he was present outside the hotel at about 09.30 P.M. all the accused persons arrived on a two wheeler Scooter No. DL-4 SC 9623. A-1 fired the shot aiming at him but it hit a boy at the hotel as he bent down. Thereafter, the shot fired at

him by A-2 hit on the left side of chest and he started bleeding from mouth. A-3 who drove the two-wheeler scooter exhorted A-1 and A-2 to kill him ('maro sale ko'). After the incident, he was medically examined at DDU Hospital and his statement (Ex.PW-6/A) was recorded. The assailants had previous acquaintance with him. In the cross-examination, he elaborated that the first shot was fired from close range and at the time of second shot, A-2 was standing near him. He admitted his involvement in many criminal cases but volunteered to add that he was acquitted in those cases. He further admitted that he had no previous dealings with A-1. He was semiconscious when the doctor examined him after he was taken to the hospital by Gopal. He admitted that he was Bad Character (BC) of the area but denied that injuries were caused to him by unidentified assailants to whom he was unable to recognise due to darkness. It appears that despite lengthy and searching cross-examination, no material discrepancy could be elicited to discard the version of the victim. No ulterior motive was assigned to him for falsely implicating the appellants. The injuries were not self-inflicted or accidental in nature. The victim had no sound reasons to spare the real assailants and to falsely rope in the innocent for the injuries sustained by him. The injuries on his body establish his presence at the crime scene. PW-1 (Gopal) corroborated his version to the extent that he had taken Jai Bhagwan to the hospital in injured condition. PW-2 (Satish Chand) had taken Nagendu, a karigar at his dhaba, to DDU Hospital. There is no variance and conflict between the ocular and medical evidence. PW-5 (Dr.Puneet Chhibar) who medically examined Nagendu vide MLC (Ex.PW-5/A) was of the opinion that he suffered 'grievous' injuries. PW-4 (Sant Ram) from DDU Hospital proved the MLC (Ex.PW-4/B) prepared by Dr.Tresa by which Jai Bhagwan was examined and the nature of injuries was opined 'dangerous'. In MLC's (Ex.PW-4/A & Ex.PW-4/B), the injuries were described as 'gunshot' injuries.

5. PW-7 (Lekh Raj) and PW-19 (Ramesh Mehta) claimed to have witnessed the occurrence, however, their presence at the spot appears doubtful. Their names do not find mention in the victim-Jai Bhagwan's statement (Ex.PW-6/A). None of them reported the incident to the police. Neither did they interfere in the scuffle nor did they take the victims to the hospital. Their conduct is quite unnatural and unreasonable and is not in accord with the acceptable human behaviour. It makes their presence

at the spot highly suspicious. However, exclusion of their evidence would not dilute the cogent and reliable testimony of most natural witness PW-6 (Jai Bhagwan), the injured, which is accorded a special status in law. In the case of **'State of Uttar Pradesh vs.Naresh and Ors.',** (2011) 4 SCC 324, the Supreme Court held :

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

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

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

7. Efforts were made to summon and examine injured Nagendu but he was not traceable. It cannot be said that the prosecution did not intentionally or deliberately produce him in the Court for giving evidence. No adverse inference can be drawn against the prosecution on that account. The fact remains that Nagendu who sustained injuries was

taken to DDU Hospital and was medically examined by PW-5 (Dr.Puneet Chhibar). PW-2 (Satish Chand) categorically deposed that on 08.06.1995, he took Nagendu who used to work at his dhaba to make chapatti, to DDU Hospital in injured condition. This independent public witness has no reasons to make false statement. It is not necessary to multiply witnesses to prove a prosecution case. The Courts are concerned with quality and not with quantity of evidence and in a criminal trial, conviction can be based on the sole evidence of a witness if it inspires confidence. Country-made pistol (Ex.P1) with cartridge (Ex.P2) and country-made pistol (Ex.P3) with cartridge (Ex.P4) were recovered pursuant to A-3 and A-2's disclosure statements, respectively. As per CFSL report (Ex.PW-22/D), cartridge (Ex.P2) was fired from the country-made pistol (Ex.P1). It could not be ascertained if the cartridge (Ex.P4) was fired from the country-made pistol (Ex.P3) as it was not in working order and its firing pin was missing. Non-recovery of the crime weapon is not fatal to the prosecution case and does not discredit the testimony of the injured.

8. A-1 to A-3 had arrived at the scene after making preparation and were armed with deadly weapons. A-1 and A-2 participated in the crime by firing at PW-6 (Jai Bhagwan). A-3 facilitated the commission of crime and drove A-1 and A-2 on scooter No. DL-4 SC 9623 which was abandoned at the spot after the firing incident, to the scene of the crime. He also exhorted A-1 and A-2 to kill the complainant by uttering 'Maro Sale Ko'. After the crime, they all fled the spot together. Inference can be drawn from the proved circumstances that A-1 to A-3 shared common intention to eliminate Jai Bhagwan by firing at him. To justify conviction under Section 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. It is sufficient if there is present

an intent coupled with some overt act in execution thereof. If the injury inflicted has been with the avowed object or intention to cause death, the nature, extent or character of the injury or whether such injury was sufficient to actually causing death are irrelevant factors for adjudging the culpability under Section 307 IPC. The nature of weapon used, the intention expressed by the accused at the time of the act, the motive for commission of the offence, the nature and size of the injuries, the parts of the body of the victim selected for causing injuries and the severity of the blow or blows are important factors that can be taken into consideration in coming to a finding whether in a particular case, the accused can be convicted of an attempt of murder. In the instant case, A-1 and A-2 were armed with deadly weapons. A-1 had fired at Jai Bhagwan. However, he was able to escape by benting down and it hit an innocent helper – Nagendu, working at a hotel/ dhaba and caused grievous injuries on his body. The unsuccessful attempt to target PW-6 (Jai Bhagwan) did not deter the assailants and A-2 fired at PW-6 (Jai Bhagwan) and it hit him on his chest, a vital body organ causing injuries 'dangerous' in nature on his body. Apparently, A-1 and A-2 attacked PW-6 (Jai Bhagwan) to eliminate him. It is true, the victim was involved in number of criminal cases and was Bad Character (BC) of the area but that did not give licence to the appellants to take law in their hands and to put an end to his life. Discharge of Ashwani and Sanjiv Sethi for various reasons detailed in the order on charge has no impact on the appellants' conviction as their involvement in the incident has been established beyond reasonable doubt. The findings of the Trial Court under Sections 307/34 IPC and under Sections 25/27 Arms Act are sustained / affirmed.

9. A-1 to A-3 were directed to undergo RI for five years with total fine Rs. 11,000/- each. A-3's nominal roll dated 26.09.2013 reveals that he has suffered incarceration for two years, four months and twenty days besides earning remission for seven months and twenty seven days. The unexpired portion of sentence is one year, eleven months and thirteen days. He is not a previous convict and has clean antecedents. His overall jail conduct was satisfactory. He was not armed with country-made pistol and did not fire at the victims. Considering the role in the incident, he deserves to be released for the period already undergone by him in custody. He shall however, pay fine Rs. 11,000/- (if not paid earlier) within fifteen days or else shall undergo default sentence.

10. A-1's nominal roll dated 27.09.2013 shows that he remained in custody for eleven months and fourteen days besides earning remission for three months and fourteen days. A-2's nominal roll dated 27.09.2013 reveals that he suffered custody for one year and twenty eight days besides earning remission for three months and fifteen days. They have clean antecedents and are not involved in any other criminal case. Considering these aspects, the sentence order is modified and the substantive sentence of A-1 and A-2 is reduced from five years to three years. Other terms and conditions of the sentence are left undisturbed.

11. In **'Ankush Shivaji Gaikwal vs. State of Maharashtra',** 2013 (6) SCC 770, the Supreme Court emphasized that victim is not to be forgotten in criminal justice system and Section 357 Cr.P.C. should be read as imposing mandatory duty on the Court to apply its mind to the question of awarding compensation in every case. The appellants have informed the Court that Jai Bhagwan has since expired. Accordingly, A1, A-2 and A-3 are directed to deposit Rs. 40,000/- , Rs. 40,000/- and Rs. 20,000/- respectively as compensation before the Trial Court within fifteen days. The Trial Court shall issue notice to Jai Bhagwan's widow to receive the compensation and in case of her non-availability, the amount would be disbursed to his sons and daughters in equal proportions.

12. A-1 and A-2 are directed to surrender before the Trial Court on 02.12.2013 to serve the remaining period of sentence. The Registry shall transmit the Trial Court records forthwith. The appeals stand disposed of in the above terms.

ILR (2014) I DELHI 259
W.P. (C)

AMARDEEP DABAS ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENT

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C). NO. : 1250/2013 DATE OF DECISION: 26.11.2013
CM NO. : 2369/13

Constitution of India, 1950—Article 226—Writ Petition—Armed force Tribunal (AFT)—Air Force Order 3 of 2008—Para 38—Disciplinary proceedings—Censure-Selection-appointment-right of—Petitioner enrolled in Indian Air Force on the post of Airman in June, 2000—Appointed as Leading Aircraft Man in June 2001—Deployed on security duty in July, 2005 at Forward Air Base, Tejpur, Assam—Complaint made by civilian—Petitioner involvement in making civil driving licences from DTO-commission basis-Enquiry initiated-Awarded censure-Trade changed from Indian Air Force Police to ESSA-not challenged-Also awarded some adverse entries in service record-Respondent invited application from eligible airman to apply for ground duty officer course—Petitioner applied—Application processes by Board of Officers—Cases recommended to command H.Q. for inclusion in the written examination-qualified written examination as well as in the interview-Included in the list of successful candidates-also found medically fit-informed by Commanding Officer name not included for commissioning-candidature cancelled-because of censure-proceeded with cancellation based on para 38 (f) of AFO 3 of 2008—filed O.A.-challenged-unsuccessful—Preferred writ petition—Contended—Application and candidature required to be Processed in terms of AFO 39 of 2006—Procedure for commission prescribed-once the petitioner's candidature cleared by Board and head quarter-no discretion available to reject the candidate—Contended AFO3 of 2008 in terms of Para 38 (a) award of censure can be considered only once by the authority or the board of officers—Held—After examining the scheme of air force order—Para 38 shows that sub—Para (f) mandatorily provides censure given to the candidate by competent authority

to be considered for suitability of airman for commissioning into the air force-use of expression "also" clearly shows power under (f)-additional to the power conferred in Sub—Para (a) to (e)—Sub—Para (f) strictly related to commissioning—further held—Merely because a person is brought on merit list does not give a person right for appointment—Writ petition dismissed.

While the petitioner has placed reliance on para 38(a), the respondents have relied on para 38(f) afore-noticed both before the Armed Forces Tribunal as well as in the present proceedings. It is noteworthy that sub para (a) only states that censure will be considered only once. The instant case is concerned with accelerated commissioning into the officer rank of the Air Force, pursuant to a competitive examination and an interview which is prescribed. The issue, therefore, does not relate merely to eligibility of the person participating in the examination and the selection process but also, after his meeting the eligibility criterion and his successfully undertaking the written examination and interview, the suitability of such candidate for the appointment. It has thus been left open to the competent authority to consider suitability of the candidates to such commissioning as well. The scheme of para 38 shows that in sub para (f) it mandatorily provides that a censure given to a candidate, shall also be taken into consideration by the competent authority for considering suitability of the Airman for commissioning into the Air Force. The use of the expression 'also. clearly shows that the power under Section (f) is additional to the power conferred on the authority in paras (a) to (e). Sub para (f) is strictly related to 'commissioning' with which we are concerned in the present case.

(Para 15)

It is trite that merely because a person has been brought on the merit list, does not give a person right for appointment. The appointing authority is within its right to examine the suitability of the person concerned for his appointment. The

authority may be required to record reasons for effecting appointment of a person who is on the merit list.

(Para 25)

Important Issue Involved: (a) A Candidate being successful in written examination and interview, shown in the list of successful candidates by itself does not give right for appointment.

[Gu Si]

APPEARANCES:

FOR THE PETITIONERS : Mr. S.S. Pandey, with Petitioner in Person.

FOR THE RESPONDENTS : Mr. Pavan Narang, with Mr. Anish Dhingra, & Ms. Vasundhara Chauhan, Advocates.

RESULT: Writ Petition dismissed.

GITA MITTAL, J. (Oral)

1. The petitioner in the instant case has assailed the judgment dated 4th February, 2013 passed in OA No.4 of 2013 Cpl. Amardeep Dabas Vs. Union of India & Ors. by the Armed Forces Tribunal. A challenge was laid before the Tribunal to an order dated 3rd December, 2012 communicated to the petitioner under cover of a letter dated 11th December, 2012 cancelling his candidature for commissioning as a flying officer in the Indian Air Force.

2. To the extent necessary, the facts giving rise to the instant petition are briefly noted hereafter.

3. The petitioner was enrolled in the Indian Air Force on 22nd June, 2000 in the post of Airman. In June, 2001, he was appointed as Leading Aircraftman and in July, 2005, was promoted to the post of Corporal. Between 2001 to 2005, the petitioner was employed on security duties at a forward Air Base i.e. 11th Wing Air Force Station, located in Tezpur, Assam.

4. On 9th August, 2005, a court of inquiry was ordered by the

respondents against the petitioner based on a complaint made by a civilian on the following grounds:-

"(a) Entering house of Shri Pinku Chetry, resident of Goraimari, in his absence, and forcing his wife to hand over a civil driving license belonging to Shri Sarkar.

(b) Committing forgery by submitting fake address certificates and other documents bearing signatures and stamps of different units/sections of 11 Wing, to District Transport Officer, Tezpur, for procuring driving licences for civilians.

(c) Committing forgery by making a fake Service Driving Licence, for the purpose of obtaining a Heavy Motor Vehicle (HMV) civil during licence for Shri Pinku Chetry.

(d) Involvment in making Civil Driving Licenses for Civilians from DTO, Tezpur, on commission basis ranging from Rs. 1000/- to Rs.2500/-."

5. The court of inquiry was ordered to inquire into the involvement of the petitioner. It is undisputed that in this court of inquiry, on the 4th June, 2007, the Air-Officer-Commanding-in-Chief in Headquarters, Eastern Area Command (EAC), after considering the material against the petitioner, awarded severe displeasure for 18 months. In addition, the petitioner's case was processed for change of trade on disciplinary grounds. His trade was changed from the Indian Air Force Police to Environment Support Service Assistant (ESSA). It is undisputed before us that the petitioner submitted his willingness to the change of trade as well. It appears that with effect from 1st July, 2009, the petitioner was promoted to the rank of Corporal as well.

6. In respect of these allegations, a show cause notice dated 16th January, 2007 was issued to the petitioner to show cause as to why he should not be removed from service under Section 20(3) of the Air Force Act, 1950 read in conjunction with Rule 18 of the Air Force Rules, 1969, on account of blameworthiness for the above allegations. The petitioner submitted a preliminary as well as a detailed reply to the notice. After considering the entire facts and circumstances of the case and the replies submitted by the petitioner, he was still found blameworthy by the AOC-in-C, EAC for the following lapses:-

"(a) Entering house of a civilian i.e. Shri Pinku Chetry in his absence, and pressuring his wife to hand over a Civil Driving License belonging to Shri Sarkar, and

(b) Involvement in making Civil Driving License for Civilians from DTO, Tezpur, on commission basis ranging from Rs.1000/- to Rs.2500/-."

The AOC-in-C EAC, has therefore, awarded to the petitioner his 'severe displeasure. for 18 months on 4th June, 2007.

7. We may note that censure awarded to the petitioner as well as the change of trade from the Indian Air Force Police to ESSA, has not been challenged by the petitioner by way of any statutory appeal or by way of the present writ petition.

8. Apart from this censure, in respect of the loss of luggage by the petitioner, he was awarded a red ink entry on the 14th of October, 2008 and a black ink entry on the 28th May, 2009.

9. It appears that the respondents invited applications from eligible and desirous Airman to apply for the Ground Duty Officers Course (hereinafter referred to as 'GDOC.). The petitioner claims to have applied for 131, 132 & 133 Ground Duty Officers Courses. The petitioner could not clear the selection process for the 131 & 132 GDOC.

10. The instant case relates to the petitioner's application for the 133 GDOC and confines its challenge to the same. Applications for this course were invited vide a communication dated 8th December, 2011. The petitioner has claimed that he satisfied all eligibility requirements and had submitted application in compliance of the laid down procedure prescribed in the advertisement. It is also urged that as per the applicable procedure, the application was processed by the Board of officers and his case was recommended to the Command Headquarter for inclusion in the written examination. The petitioner submits that he not only qualified the written examination but also the interview which was held by the Air Force Selection Board and he was included in the list of successful candidates. In the medical test conducted on 7th July, 2010, he was found medically fit. Despite the above, the petitioner's name did not feature in the list of successful candidates published on the website on 20th December, 2012. The petitioner was informed on 24th December,

2012 by his Commanding Officer that his name was not included in the list of successful candidates for such commissioning and that his candidature has been cancelled because of the afore-noticed censure awarded to him in the year 2007. The petitioner has also submitted that he learnt that the respondents had proceeded with the cancellation of his candidature based on para 38(f) of AFO 3/2008.

11. The challenge by the petitioner rests primarily on the ground that the petitioner's application and candidature was required to be processed in terms of AFO 39 dated 3rd November, 2006 wherein procedure for commissioning has been prescribed. It is urged that once the petitioner's candidature was cleared by the Board as well as Headquarters and that he had successfully undertaken not only the written examination but the interview as well as medical examination, no discretion was available to any other person to reject the petitioner's candidature on merit.

12. So far as the AFO 3 dated 18th January, 2008 is concerned, it is urged by Mr.S.S. Pandey, learned counsel for the petitioner that in terms of Clause 38(a), the award of censure can be considered only once by the authority or the Board of Officers before whom the Airman's case came comes up for consideration after award of the censure. The submission is that the petitioner having crossed the stage of first consideration by the authority and his candidature having been approved by the Board of Officers, for this reason as well, no discretion lay with any authority for rejecting the petitioner's merit and that the petitioner was entitled to commissioning with the Indian Air Force in terms of the laid down procedure.

13. The issue which has been considered by the Armed Forces Tribunal and has been pressed before us, is as to the manner in which the respondents would be required to consider the candidature for Airman for commissioning in the Indian Air Force.

14. Given the limited issue which has been pressed before us, we may usefully advert to the prescription contained in Air Force Order 3 of 2008; which standardises aspects with regard to processing, conduct and conclusion of disciplinary and administrative action in respect of the Air Force personnel. As per the introduction to the Air Force Order 3 of 2008, it provides guidelines on important issues directly or indirectly

relating to disciplinary/administrative actions which were not specifically laid down in any other Air Force publication. We may usefully advert to the paragraph 38 of the Air Force Order 3 of 2008 which is captioned "Effect of Censure", the relevant portion whereof reads thus:-

"Effect of Censure

38. (a) The award of Censure will be considered only once by the authority or Board of Officers before which the airman's case first comes up for consideration after the award of Censure. The award shall be considered irrespective of the currency of the Censure.

(b) Censure awarded to an airman will be considered while deciding his suitability or otherwise for his promotion to the next higher rank only e.g. if an airman incurs Censure in the rank of JWO. Such award shall be considered for grant of acting rank of WO only. To determine suitability of the airman for promotion, the gravity of misconduct, the authority which censured the airman and the period for which the Censure was awarded would be taken into account.

(c) The award of Severe Displeasure and 'Displeasure' shall carry negative marks while considering an airman for promotion to the acting rank of JWO, WO and MWO. If such award of Censure has not been considered on any earlier occasion. The basis for awarding negative marks shall depend upon the status of the authority that censured the airman and in case of Severe Displeasure, besides the authority, the period for which the Severe Displeasure was awarded will also be taken into consideration. If after taking into account the negative marks for the award of Censure, the airman is cleared for promotion, then, the currency of 'Severe Displeasure' will not be the ground to deter his promotion.

xxx xxx xxx

(f) The **Censure shall also be taken into consideration by the competent authority for considering suitability of airmen for commissioning** important assignments and

courses postings abroad courses abroad extension of service etc."

(Emphasis supplied)

15. While the petitioner has placed reliance on para 38(a), the respondents have relied on para 38(f) afore-noticed both before the Armed Forces Tribunal as well as in the present proceedings. It is noteworthy that sub para (a) only states that censure will be considered only once. The instant case is concerned with accelerated commissioning into the officer rank of the Air Force, pursuant to a competitive examination and an interview which is prescribed. The issue, therefore, does not relate merely to eligibility of the person participating in the examination and the selection process but also, after his meeting the eligibility criterion and his successfully undertaking the written examination and interview, the suitability of such candidate for the appointment. It has thus been left open to the competent authority to consider suitability of the candidates to such commissioning as well. The scheme of para 38 shows that in sub para (f) it mandatorily provides that a censure given to a candidate, shall also be taken into consideration by the competent authority for considering suitability of the Airman for commissioning into the Air Force. The use of the expression 'also' clearly shows that the power under Section (f) is additional to the power conferred on the authority in paras (a) to (e). Sub para (f) is strictly related to 'commissioning' with which we are concerned in the present case.

16. We may note that Air Force Order 3 of 2008 was issued w.e.f. 18th January, 2008 and was applicable to the Selection Process conducted by the respondents. This fact is undisputed. Therefore, the rigors of para 38(f) of Air Force Order 3 of 2008 had to be applied by the respondents.

17. In view thereof, the vehement submission of learned counsel for the petitioner that the censure could have been considered only by the authority who first considers the petitioner's application and recommends the same or the Board of Officers before whom Airman comes up after award of censure, is without any merit and has been rightly rejected by the Armed Forces Tribunal.

18. It is noteworthy that the original record of the case has been scrutinized by the Armed Forces Tribunal. The same has been produced before us as well. Given the detailed finding returned by the Armed

Forces Tribunal with regard to the unsuitability of the petitioner based on his antecedent record, it is not necessary for us to repeat the findings.

19. Learned counsel for the petitioner has submitted that given the dicta of the Supreme Court dated 13th September, 1996 entitled **Jahar Singh Vs. Union of India & Ors.,** the petitioner's candidature could not have been cancelled by the respondents. In this case, cancellation of Jahar Singh's candidature for appearance for the PO & RMS Accountant examination was challenged. Jahar Singh had been granted unqualified and unconditional permission to participate in the examination and he had also been informed that he had qualified for the post. The Supreme Court noted that the respondents had been unable to produce any rule or circular which empowered the respondents to cancel his candidature. The Tribunal had set aside the order cancelling the candidature of the petitioner yet had not granted relief. It was in this background that the Supreme Court had accepted the appeal filed by Jahar Singh and had directed the respondents to grant the benefit to him. No principle of law as urged by the petitioner has been laid in this judicial pronouncement. The judgment has been rendered in the facts of the case we have noted heretofore.

20. It is an admitted position before us that the petitioner was awarded a censure. There is a mandate in para 38(f) of AFO 3 of 2008 that the censure awarded to him was mandatorily required to be taken into consideration by the competent authority for considering his suitability for commissioning. The competent authority would be the authority considering the petitioner's candidature for issuance of the offer of appointment. In the instant case, no offer of appointment had been issued to the petitioner.

21. It was at this stage that the respondents arrived at a finding of unsuitability of the petitioner for commissioning and rejected his candidature. No right, therefore, would flow in favour of the petitioner, merely because the respondents had overlooked para 38(f) while considering his application and permitting him to participate in the examination and interview.

22. Learned counsel for the petitioner has urged that so far as the permanent commissioning of an airman in the Indian Air Force is concerned, the procedure, therefore is prescribed in the AFO 39 of 3rd November, 2006 and reliance has been placed on para 3. Mr.Pandey, learned counsel for the petitioner has urged that in terms thereof the petitioner's case having been recommended by his station-in-commander and the same having been scrutinized by the Board of Officers, no discretion remained with the authorities to cancel his candidature.

23. We may usefully extract the provisions contained in para (e) of sub para 3 of Armed Force Order 39 which reads as follows:-

> "(e) Airman who incurred any Red Ink Entry in Sheet Roll, due to lack of integrity, moral turpitude, financial irregularities or such other act of misdemeanour or against whom criminal proceedings or investigation/inquiry of such a nature are pending which in the opinion of Commanding Officer make them unfit for commissioning, shall not be considered for commissioning. Further, airmen who incurred more than one Red Ink Entry for any type of offence in the preceding five years will not be considered for commissioning. Commanding Officers of such applicants will ensure that their applications are not forwarded."

24. The stipulation in para (e) is clear and unequivocal. It renders Airmen who have incurred more than one red ink entry for any type of offence in the preceding five years, not eligible for consideration for commissioning. A mandate is given to the commanding officer to ensure that such applications of such applicants are not forwarded. Para (e) also stipulates that Airmen who have incurred any red ink entry in the sheet roll due to lack of integrity, moral turpitude, financial irregularities or such other act of misdemeanour which in the opinion of commanding officer make them unfit for commissioning, shall not be considered for commissioning.

25. It is trite that merely because a person has been brought on the merit list, does not give a person right for appointment. The appointing authority is within its right to examine the suitability of the person concerned for his appointment. The authority may be required to record reasons for effecting appointment of a person who is on the merit list.

26. The Tribunal has noted that the original file placed before it

showed the reasons recorded for not appointing the petitioner. The Tribunal has noted that the record showed that the subordinate officer had erred in making the recommendations of the cases petitioner. The respondents have stated that the petitioner was permitted to apply for the written as well as the Air Force Selection Board interview due to oversight of understanding of AFO 3 of 2008 by the Board of Officers completed at the station level. This was pointed out by the Directorate of Intelligence and remedial measures were taken resulting in cancellation of the petitioner's candidature. The record of the respondents includes the inputs received from the Directorate of Intelligence which are also against the selection of the petitioner.

27. The record of the respondents shows that an inquiry was conducted with regard to the recommendations of the petitioner's candidature by the Station Commanding Officer as well as the Board of Officers and the possibility of misinterpretation of the applicable Air Force orders which may have resulted in the recommendation of the petitioner's candidature.

28. The petitioner has placed before us the directions made by the respondents in the communication dated 13th December, 2012 reiterating the position that the procedure for commissioning of Airman as laid down in Air Force Order 39 of 2006 has to be read in conjunction with para 38(f) of Air Force Order 3 of 2008.

29. In view of the above, the challenge laid down by the petitioner is hopelessly misconceived and is hereby rejected. The writ petition is dismissed. CM No.2369/2013

30. In view of the writ petition having been dismissed, this application does not survive for adjudication and is dismissed.

ILR (2014) I DELHI 270
FAO (OS)

RAHUL GUPTA **....PETITIONERS**

VERSUS

PRATAP SINGH & ORS. **....RESPONDENT**

(BADAR DURREZ AHMED & VIBHU BAKHRU, JJ.)

FAO (OS) NO. : 183/2013 **DATE OF DECISION: 26.11.2013**

Code of Civil Procedure, 1908—S, 9—Suit—Specific Relief Act, 1963—Suit for declaration and mandatory injunction—Order 1 Rule X CPC—Impleadment—proper party-Necessary party—First Appeal—S. 100 A—No further appeal in certain cases—Delhi High Court Act, 1966—S. 10—Appeal to Division Bench—Delhi High Court Rules—Chapter II of OS Rules—Rule 4—Letter Patent Appeal—preliminary objection—Maintainability—Appellant filed a suit seeking decree of declaration-possession and mandatory injunction in favour of plaintiff-Defendant no. R1 filed an application under order 1 Rule 10 (2) of CPC for impleadment—Application not opposed by R2 DDA—Plaintiff opposed the application R1 neither necessary party nor proper party to the proceedings-Contended-R1 claiming title to the half share of the suit property—Dispute could not be made to the subject matter of the suit—Appellant also resisted the application on the ground that the appellant was *dominous litus*—Registrar accepted the contention of the appellant and rejected the application filed by R1 by order dated 14.12.2010—Preferred an appeal under Rules 4 of Chapter-II of original side Rules to single Judge-allowed-—Preferred LPA—Preliminary objection-maintainability-whether appeal barred under S. 100 A of CPC—Order passed by single Judge in exercise of his power—Provided for an appeal against the order made by the Registrar under Rule 3 of Chapter-II—Respondent contended—Appeal under S. 10 of Delhi High Court Act against the Judgment of Single Judge lies to Division Bench only-since the present impugned order not passed in exercise of original jurisdiction—Appeal under S. 10

of the Act would not be available in terms of Rule 1 of Chapter-II of Original Side Rules—Court observed—The suit had to be tried and heard by single judge—Registrar acts in certain matters as a delegatee of singe Judge—Rule 4 of Chapter-II of Original Side Rules provides an appeal against an order of the Registrar-in effect provided an appeal to the delegator from the order passed by delegatee in exercise of his power and discharge of functioning delegated to the delegate—Thus single Judge while hearing an appeal under Rule 4 in fact examines order passed in discharge of function of single Judge and in exercise of same power vested in the single judge under ordinary original civil jurisdiction—In view of it—An authority cannot sit in appeal against an order passed in exercise of his jurisdiction—Albeit by its delegate—The power exercised by single judge under Rule 4—The power to review-Re-Examine order passed by the registrar—The expression 'appeal' in Rule 4 misnomer—Original side rules have been framed in respect of practice and procedure in exercise of the ordinary original civil jurisdiction explicit in the said rule—Same also indicate that the rule contained in Chapter—II of the Original Side Rules relates to original civil jurisdiction—Entire scheme considered in this perspective—Apparent—Single judge exercises ordinarily original civil jurisdiction even while considering a challenge under Rule-4—an appeal under S. 10 would lie from the judgement of single Judge to Division Bench—S. 100 A of CPC is not applicable as the same cannot be termed as appellate power—Preliminary objection regarding Maintainability of the appeal rejected.

Given that the powers exercised by the Registrar under Rule 3 of Chapter II of the O.S. Rules are as a delegate of the court and that the Ordinary Original Civil Jurisdiction of the Delhi High Court vests with the Single Judge, the next question that is to be addressed is whether an order passed

by a Registrar under Rule 3 of Chapter II of the O.S Rules can be considered as an order of the delegator. A Constitution Bench of the Supreme Court in the case of **Roop Chand v. State of Punjab:** AIR 1963 SC 1503 considered the question whether an Order passed by a delegate of the government was an order of the government or the delegate, in the context of East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 and held as under:

> "11. The question then arises, when the Government delegates its power, for example, to entertain and decide an appeal under Section 21(4), to an officer and the officer pursuant to such delegation hears the appeal and makes an order, is the order an order of the officer or of the Government? We think it must be the order of the Government. The order is made under a statutory power. It is the statute which creates that power. The power can, therefore, be exercised only in terms of the statute and not otherwise. In this case the power is created by Section 21(4). That section gives a power to the Government. It would follow that an order made in exercise of that power will be the order of the Government for no one else has the right under the statute to exercise the power. No doubt the Act enables the Government to delegate its power but such a power when delegated remains the power of the Government, for the Government can only delegate the power given to it by the statute and cannot create an independent power in the officer. When the delegate exercises the power, he does so for the Government. It is of interest to observe here that Wills, J. said in **Huth v. Clarke** [LR (1890) 25 QBD 391] that "the word delegate means little more than an agent". An agent of course exercises no powers of his own but only the powers of his principal. Therefore, an order passed by an officer on delegation to him under Section 41(1) of the power of the Government under Section 21(4), is for the purposes

of the Act, an order of the Government. If it were not so and it were to be held that the order had been made by the officer himself and was not an order of the Government and of course it had to be one or the other then we would have an order made by a person on whom the Act did not confer any power to make it. That would be an impossible situation. There can be no order except as authorized by the Act. What is true of Section 21(4) would be true of all other provisions in the Act conferring powers on the Government which can be delegated to an officer under Section 41(1). If we are wrong in the view that we have taken, then in the case of an order made by an officer as delegate of the Government's power under Section 21(4) we would have an appeal entertained and decided by one who had no power himself under the Act to do either. Plainly, none of these things could be done."

Applying the ratio of the aforesaid judgment of the Supreme Court in **Roop Chand v. State of Punjab** (supra), it follows that the order of the Registrar under Rule 3 of the O.S Rules is an order of the court exercising Original Jurisdiction (and not of the Registrar, who merely acts as a delegate). Viewed in this context, any appeal from the order of the Registrar to a Single Judge would, in effect, amount to the principal examining an order which is passed by his delegate in exercise of the powers which are originally vested with the principal. There is a complete identity of the powers exercised by the Registrar in matters specified in Rule 3 of Chapter II of the O.S. Rules and the jurisdiction vested with the Single Judge. **(Para 21)**

As an ordinary rule, delegation of powers or functions by an authority or a person to another authority does not imply that the said principal authority is completely denuded of its power. This is so, because the delegate in exercise of the delegated powers acts as a principal. Thus, while the delegate can exercise the power, the principal too can

exercise the same power unless there is any specific statutory provision which bars the same. The Supreme Court in the case of **Godawari S. Parulekar & Ors. v. State of Maharashtra:** AIR 1966 SC 1404 also expressed a similar view and cited the following passage, from **Huth v. Clarke:** 25 Q.B.D. 391, with approval:-

"Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself." **(Para 22)**

In view of the above, would it be correct to consider an appeal under Rule 4 of the said Rules as an appeal in the true sense? In our view, the answer to the said question would be in the negative. This is so because an authority cannot sit in appeal against an order which has been passed in exercise of its jurisdiction, albeit by its delegate. At best the power exercised by the Single Judge under Rule 4 of the O.S. Rules is a power to review and re-examine orders passed by the Registrar. We accept the contention that the expression appeal in Rule 4 of the O.S. Rules is a misnomer as an appeal under Rule 4 of chapter II of the O.S. Rules, could certainly not be considered as an appeal but a mere re-examination/review of the order passed by the Registrar. We are persuaded by the decision of a Division Bench of the Madras High Court in **Sreyas Sripal v. M/s. Upasana Finance Ltd.** (supra), whereby, on the basis of similar reasoning, that Court has also concluded that the court did not exercise powers of appeal, against an order of a Master, under Order XIV Rule 12 of the Madras High Court Original Side Rules. Accordingly, the bar under Section 100A of the Code was not applicable and appeals before a Division Bench, against an orders passed by Single Judges, were maintainable. The relevant extract of the said judgement is quoted below:-

"8. Applying the same logic, this Court cannot exercise

the power of appeal or revision against the order of the Master, which is passed by him in the capacity as a delegate of the High Court. It is well settled that ordinarily an appeal would lie from a lower Authority to the higher Authority and an order passed by the delegate is in exercise of powers given by the delegator and such an order is not appelable or revisable. Therefore, we are inclined to accept the contention of the learned Senior Counsel Mr. Yashod Vardhan that the word appeal in Order XIV Rule 12 is a misnomer, but it is actually a power of review of this Court. Therefore, such an order passed by the Master is not appealable or revisable by the learned Judge under Rule 12. The power conferred under Rule 12 is really in the nature of power of revision. Consequently, the bar under Section 100A of the Code of Civil Procedure is not attracted and the appeals are perfectly maintainable." **(Para 23)**

It is necessary to consider that the scheme and the provisions of the O.S. Rules relate to the exercise of original jurisdiction. The O.S. Rules have been framed in respect of the practice and procedure for the exercise of the ordinary original civil jurisdiction, as is made explicit in the Preamble to the said Rules. The heading of Chapter II of the O.S. Rules is "exercise of original civil jurisdiction". The same also indicates that the Rules contained in Chapter II of the O.S. Rules relate to exercise of original civil jurisdiction. If the entire scheme of the O.S. Rules is considered in the perspective that it relates to exercise of ordinary original civil jurisdiction, then it would be apparent that a Single Judge exercises ordinary original civil jurisdiction even while considering a challenge under Rule 4 of Chapter II of the said Rules. In this view of the matter, an appeal under Section 10 of the Act from a judgment of a Single Judge would lie to a Division Bench of this Court. Section 100A of the Code would not be applicable as the powers exercised by a Single Judge under Rule 4 of Chapter II of the O.S. Rules cannot be termed as appellate powers and the expression 'appeal' in Rule 4 of

Chapter II of the O.S. Rules is a misterm. **(Para 27)**

Important Issue Involved: (a) The appeal against the order of Registrar to the Single Judge amount to a delegator examining the order passed by delegate and does not amount to an appeal under Code of Civil Procedure .(b) A letters patent appeal to DB against the order of single Judge from an order passed by Registrar is not barred under S. 100 A of CPC. (c) Delegation, as the word is generally used does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself.

[Gu Si]

APPEARANCES:

FOR THE PETITIONERS : Mr. Jasmeeet Singh with Mr. Saurabh Tiwari & Mr. Kritika Mehra.

FOR THE RESPONDENT : Mr. A.P.S. Ahluwalia, Sr. Advocate with Mr. S. S. Ahluwalia for R-1. Mr. Rajesh Kumar for R-2. Mr. Arjun Pant, Advocate for R-3.

CASES REFERRED TO:

1. *Doctor Morepan Ltd. and Anr.* vs. *Poysha Power Generation Pvt. Ltd.* FAO(OS) No. 403/2013.
2. *Avtar Narain Behal* vs. *Subhash Chander Behal:* 154 (2008) DLT 140.
3. *Akash Gupta* vs. *Frankfinn Institute of Air Hostess Training & Anr.*: AIR 2006 Delhi 325.
4. *Kamal Kumar Dutta & Anr.* vs. *Ruby General Hospital Ltd. & Ors.:* (2006) 7 SCC 613.
5. *Godawari S. Parulekar & Ors.* vs. *State of Maharashtra:* AIR 1966 SC 1404.
6. *Roop Chand* vs. *State of Punjab:* AIR 1963 SC 1503.

7. *Huth* vs. *Clarke* [LR (1890) 25 QBD 391].

RESULT: Preliminary objection regarding maintainability of the appeal rejected.

VIBHU BAKHRU, J.

1. This is an appeal preferred by the appellant/plaintiff challenging the order dated 05.02.2013 passed by a learned Single Judge of this Court in OA No.19/2011 which in turn was filed in CS(OS) No.1098/2008. The said order dated 05.02.2013 is hereinafter referred to as the "impugned order".

2. The learned Single Judge has, by the impugned order, set aside the order dated 14.12.2010 passed by a Joint Registrar of this Court in IA No.15286/2008 in CS(OS) No.1098/2008. The Joint Registrar had, by the said order dated 14.12.2010, rejected the application filed by respondent no. 1 under Order 1 Rule 10(2) of the Code of Civil Procedure (hereinafter referred to as the "Code") seeking impleadment as a defendant in the aforementioned suit filed by the appellant/plaintiff.

3. Aggrieved by the order dated 14.12.2010 passed by the Joint Registrar rejecting the application of respondent no. 1 for impleadment as a defendant in the suit, the respondent no. 1 had preferred an appeal under Rule 4 of Chapter II of the Delhi High Court (Original Side) Rules, 1967 (hereinafter referred to as the 'O.S. Rules') before the learned Single Judge. The learned Single Judge has by the impugned order allowed the said appeal and impleaded respondent no. 1 as a party to the suit filed by the plaintiff. The plaintiff being aggrieved by the said impugned order has filed the present appeal.

4. The respondent no. 1 has raised a preliminary objection as to the maintainability of the present appeal and has contended that the impugned order has been passed in an appeal from an order passed by a Joint Registrar of this Court and, thus, the impugned order has not been passed by the learned Single Judge in exercise of his ordinary original civil jurisdiction. Consequently, the present appeal is not maintainable by virtue of section 100A of the Code.

5. The disputes between parties relates to a plot of land measuring 460 sq. yds. bearing no. 39, Motia Khan Dump Scheme, Rani Jhansi Road, New Delhi (hereinafter referred to as the "said property") which

was allotted jointly to one Brij Lal Mehra and Gurdayal Singh by the Delhi Improvement Trust sometime in 1956. Brij Lal Mehra expired in 1960 and was survived by his two sons and a daughter (who has been arrayed as defendant no. 2 in the suit). Both the sons of late Sh. Brij Lal Mehra were unmarried and expired in the year 1999. Accordingly, his daughter, namely defendant no. 1, is claiming one half share of the suit property as a legal heir of late Sh. Brij Lal Mehra. There is no dispute with regard to the undivided share of the said property belonging to late Sh. Brij Lal Mehra and/ or the claim of defendant no. 1 to the said share. The disputes relate to Gurdyal Singh's share of the said property (hereinafter referred to as the "suit property"). Sh. Gurdayal Singh also expired in the year 1974 and was not survived by any class I legal heir. His brother Rajender Singh filed a probate case being Probate Case No.193/1978 claiming to be the legal heir of Gurdayal Singh and was granted the letters of administration by an order dated 19.12.1979 passed in the said probate case. Rajinder Singh passed away on 02.10.1989.

6. The plaintiff is claiming to be the owner of the suit property belonging to Gurdayal Singh. The plaintiff claims that Rajender Singh had, prior to his demise on 02.10.1989, sold the suit property by executing a General Power of Attorney in favour of one Raghubir Singh and executing an Agreement to Sell in favour of his wife Darshan Kaur. Both the General Power of Attorney as well as the Agreement to Sell are dated 21.08.2009. It is claimed that Raghubir Singh and Darshan Kaur had further sold the suit property to the plaintiff by a registered General Power of Attorney and an Agreement to Sell.

7. Respondent no. 1 is also claiming ownership of the suit property through late Sh. Rajender Singh, as being one of his legal heirs. It is stated by respondent no. 1 that Rajender Singh was survived by his widow, two sons namely Hardas Singh and Pratap Singh and two daughters namely Paramjeet Kaur and Smt Narender Bhatia. The widow of Rajender Singh expired on 05.06.1995 and subsequently one of his daughters namely Paramjeet Kaur also passed away on 05.01.2000. The other two legal heirs of Rajender Singh namely Smt Narender Bhatia and Sh Hardas Singh are stated to have relinquished their rights in the suit property in favour of respondent no. 1.

8. Defendant no. 1 had preferred a writ petition against the DDA, in this Court being W.P.(C) No.9169/2007, in respect of the said property.

Both the appellant and respondent no. 1 had filed applications for being impleaded as parties in the said writ petition which were allowed and both the appellant and the respondent no. 1 had been impleaded in the said writ petition. The said writ petition was disposed of by this Court by an order dated 03.02.2010 directing the DDA to dispose of the claims of all the three claimants namely the appellant/plaintiff, respondent no. 1 and respondent no. 2/defendant no. 1 after hearing the said parties.

9. The appellant filed a suit being CS(OS) No.1098/2008, inter-alia, seeking a decree of declaration that the plaintiff was the owner of the suit property. The plaintiff has further sought a decree of possession directing the DDA to handover possession of the suit property. In addition, the plaintiff has also sought a decree of mandatory injunction directing the DDA to execute a perpetual lease in respect of the said property in favour of the plaintiff and defendant no. 1. Respondent no. 1 filed an application being IA No.15286/2008 under Order 1 Rule 10(2) of the Code for being impleaded as a party in the said suit filed by the appellant/plaintiff. The said application was not opposed by the respondent no. 2 & the DDA (defendants in the suit). However, the plaintiff opposed the said application contending that respondent no. 1 was neither necessary nor a proper party to the proceedings filed by the plaintiff. It was contended that respondent no.1 was claiming a title adverse to that of the vendor from whom the plaintiff had acquired the title to half share of the suit property and this dispute could not be made the subject matter of the suit filed by the plaintiff. The appellant further resisted the application filed by respondent no. 1 on the ground that the appellant was dominus litus. The learned Registrar accepted the contention of the appellant and rejected the application filed by the respondent no. 1 by an order dated 14.12.2010.

10. Aggrieved by the order dated 14.12.2010 passed by the learned Registrar, respondent no. 1 preferred an appeal under Rule 4 of Chapter II of the O.S. Rules which was allowed by the impugned order.

11. It is not necessary to examine the rival contentions on merits to consider the preliminary objection raised by respondent no. 1 regarding maintainability of the present appeal. The only question that arises for our consideration at the present stage is whether the present appeal is barred by virtue of Section 100A of the Code.

12. The impugned order has been passed by the learned Single Judge in exercise of his powers under Rule 4 of Chapter II of the O.S. Rules which provides for an appeal against any order made by the Registrar under Rule 3 of Chapter II of the said Rules. It is contended by the respondent that an appeal, by virtue of section 10 of the Delhi High Court Act, 1966 (hereinafter referred to as the 'Act') would lie to a Division Bench of the High Court only against a judgment of a Single Judge passed in exercise of the original civil jurisdiction. It is contended that since, in the present case, the impugned order has not been passed in exercise of the original civil jurisdiction, an appeal under Section 10 of the Act would not be available. Respondent no. 1 has relied upon the decision of a Full Bench of this Court in **Avtar Narain Behal v. Subhash Chander Behal:** 154 (2008) DLT 140, in support of his contention that after insertion of Section 100A in the Code, a Letters Patent Appeal would not lie against a judgment passed by a Single Judge in a first appeal. The respondent has further relied upon the decision of a Division Bench of this Court in the case of **Akash Gupta v. Frankfinn Institute of Air Hostess Training & Anr.:** AIR 2006 Delhi 325, in support of his contention that Rule 4 of Chapter II of the O.S. Rules not only provides for a forum of appeal but also provides a right to appeal and therefore, the jurisdiction exercised by the learned Single Judge while passing the impugned order in an appeal preferred under said Rule 4 was appellate jurisdiction. The learned counsel for the appellant has also placed strong reliance on the order dated 16.09.2013 passed by a Division Bench of this Court in FAO(OS) No. 403/2013 titled **Doctor Morepan Ltd. and Anr. v. Poysha Power Generation Pvt. Ltd.** wherein the Division Bench had, following the judgment in **Avtar Narain Behal v. Subhash Chander Behal** (supra), dismissed the appeal as not being maintainable. It is stated by the learned counsel appearing on behalf of the respondent, that the question raised in the said appeal being FAO(OS) No.403/2013 was identical to the question of maintainability being raised in the present appeal.

13. The learned counsel appearing on behalf of the appellant has contended that the jurisdiction exercised by the learned Single Judge under Rule 4 of Chapter II of the O.S. Rules is not appellate jurisdiction but the High Court's original jurisdiction. It is contended that the O.S. Rules have admittedly been made under Section 122 and 129 of the Code. Section 129 of the Code expressly empowers the High Court to

make rules as to their Original Civil Procedure. Thus, the expression 'appeal' occurring in Rule 4 of Chapter II of the O.S. Rules cannot be considered to be an appeal in the true sense. The powers exercised by the learned Single Judge under the said Rule 4 are in essence powers of review. As such, any orders passed in respect of a challenge to any order passed by the Registrar would be an order in exercise of the original civil jurisdiction and not appellate jurisdiction. The learned counsel for the appellant has also placed reliance on a decision dated 09.07.2007 in OSA No. 141/2007 & AMP No. 142/2007 rendered by a Division Bench of the Madras High Court in case of Sreyas Sripal v. M/s. Upasana Finance Ltd., wherein a similar issue had arisen in the context of the original side rules framed by the Madras High Court.

14. We have heard the learned counsel for the parties.

15. The principal controversy that has to be addressed is whether the jurisdiction exercised by a Single Judge while hearing an appeal under Rule 4 of Chapter II of the O.S. Rules is appellate jurisdiction or ordinary original civil jurisdiction.

16. In order to address the controversy in the present case, it would be relevant to refer to Section 10 of the Act as well as Rules 3 and 4 of Chapter II of the O.S. Rules. Section 10 of the Act reads as under:-

> **"10. Powers of Judge** ù (1) Where a single Judge of the High Court of Delhi exercises ordinary original civil jurisdiction conferred by sub-Section (2) of Section 5 on that Court, an appeal shall lie from the judgment of the single Judge to a Division Court of that High Court.
>
> (2) Subject to the provisions of sub-section (1), the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and Division Courts of the High Court of Punjab and with respect to all matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the High Court of Delhi."

17. Rule 4 and the relevant extract of Rule 3 of Chapter II of the O.S. Rules are reproduced below:-

> **"3. Power of the Registrar** - The powers of the Court including

> the power to impose costs in relation to the following matters may be exercised by the registrar:
>
> xxxx xxxx xxxx xxxx xxxx
>
> (57) Deal with and decide applications under Order I Rule 10 of the Code of Civil Procedure.
>
> xxxx xxxx xxxx xxxx xxxx
>
> 4. Appeal against the Registrar's orders - Any person aggrieved by any order made by the Registrar under Rule 3 may, within fifteen days of the making of such order, appeal against it to the Judge in Chambers. The appeal shall be in the form of a petition bearing Court fee stamp of the value of Rs. 2.65 P."

18. Section 122 of the Code, *inter alia,* provides that the High Courts may make Rules regulating their own procedure. Section 128(1) of the Code provides that such Rules made by the High Court may provide for matters relating to the procedure of Civil Courts subject to the same not being inconsistent with the Code. Section 128(2) of the Code specifies the matters in respect of which rules may be made. Clause (i) of section 128(2) of the Code, inter alia, provides for delegation of judicial, quasi-judicial and non-judicial duties to a Registrar. Section 129 of the Code enables the High Court to make rules to regulate its own procedure in exercise of its original civil jurisdiction. Section 122, 128(2)(i) and section 129 of the Code are relevant for the purposes of examining whether the present appeal is maintainable and are reproduced hereunder for ready reference.

> **"122. Power of certain High Courts to make rules.** - High Courts not being the Court of a Judicial Commissioner may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.
>
> xxxx xxxx xxxx xxxx xxxx
>
> **128. Matters for which rules may provide.-**
>
> (1) xxxx xxxx xxxx xxxx

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely: -

xxxx xxxx xxxx xxxx

(i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and

xxxx xxxx xxxx xxxx xxxx

129. Power of High Courts to make rules as to their original civil procedure. - Notwithstanding anything in this Code, any High Court not being the Court of a Judicial Commissioner may make such rules not inconsistent with the Letters Patent or order or other law establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code."

19. The O.S. Rules must be read in conjunction with sections 122, 128 and 129 of the Code. The Preamble of the O.S. Rules also expressly states that the O.S. Rules have been made, in exercise of powers conferred by section 122 and section 129 of the Code, with respect to practice and procedure for exercise of the ordinary original civil jurisdiction. Rule 1 of Chapter II of the said O.S. Rules mandates that every suit before the Court in its ordinary original civil jurisdiction would be tried and heard by a Single Judge. Rule 1 of Chapter II of the O.S. Rules is quoted below:-

"1. Jurisdiction to be exercised by a Judge/Single Every suit coming before the Court in its Ordinary Original Civil Jurisdiction shall be tried and heard by a Single Judge."

Rule 3 of Chapter II of the said O.S. Rules provides that the powers of the Court in relation to certain matters specified therein would be exercised by the Registrar. It is clear from the language of the O.S. Rules read with section 128 of the Code that the judicial functions to be discharged by a Registrar are discharged by the Registrar as a delegate of the court.

20. In terms of Rule 1 of Chapter II of the O.S. Rules, the suit

itself has to be tried and heard by a Single Judge. Thus, while the original jurisdiction is exercised by the Single Judge, the Registrar acts in certain matters as a delegate of the Single Judge. Rule 4 of Chapter II of the O.S. Rules, which provides for an appeal against the order of the Registrar, in effect provides an appeal to the delegator from the orders passed, by the delegate, in exercise of the powers and discharge of functions delegated to the delegate. Thus, viewed from this perspective, the Single Judge while hearing an appeal under Rule 4 of Chapter II of the O.S. Rules is in fact examining orders which are passed in discharge of the functions of the Single Judge and in exercise of the same powers which are otherwise vested with the Single Judge that is the ordinary civil jurisdiction of the court while trying a suit.

21. Given that the powers exercised by the Registrar under Rule 3 of Chapter II of the O.S. Rules are as a delegate of the court and that the Ordinary Original Civil Jurisdiction of the Delhi High Court vests with the Single Judge, the next question that is to be addressed is whether an order passed by a Registrar under Rule 3 of Chapter II of the O.S Rules can be considered as an order of the delegator. A Constitution Bench of the Supreme Court in the case of **Roop Chand v. State of Punjab:** AIR 1963 SC 1503 considered the question whether an Order passed by a delegate of the government was an order of the government or the delegate, in the context of East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948 and held as under:

"11. The question then arises, when the Government delegates its power, for example, to entertain and decide an appeal under Section 21(4), to an officer and the officer pursuant to such delegation hears the appeal and makes an order, is the order an order of the officer or of the Government? We think it must be the order of the Government. The order is made under a statutory power. It is the statute which creates that power. The power can, therefore, be exercised only in terms of the statute and not otherwise. In this case the power is created by Section 21(4). That section gives a power to the Government. It would follow that an order made in exercise of that power will be the order of the Government for no one else has the right under the statute to exercise the power. No doubt the Act enables the Government to delegate its power but such a power when delegated remains

the power of the Government, for the Government can only delegate the power given to it by the statute and cannot create an independent power in the officer. When the delegate exercises the power, he does so for the Government. It is of interest to observe here that Wills, J. said in **Huth v. Clarke** [LR (1890) 25 QBD 391] that "the word delegate means little more than an agent". An agent of course exercises no powers of his own but only the powers of his principal. Therefore, an order passed by an officer on delegation to him under Section 41(1) of the power of the Government under Section 21(4), is for the purposes of the Act, an order of the Government. If it were not so and it were to be held that the order had been made by the officer himself and was not an order of the Government and of course it had to be one or the other then we would have an order made by a person on whom the Act did not confer any power to make it. That would be an impossible situation. There can be no order except as authorized by the Act. What is true of Section 21(4) would be true of all other provisions in the Act conferring powers on the Government which can be delegated to an officer under Section 41(1). If we are wrong in the view that we have taken, then in the case of an order made by an officer as delegate of the Government's power under Section 21(4) we would have an appeal entertained and decided by one who had no power himself under the Act to do either. Plainly, none of these things could be done."

Applying the ratio of the aforesaid judgment of the Supreme Court in **Roop Chand v. State of Punjab** (supra), it follows that the order of the Registrar under Rule 3 of the O.S Rules is an order of the court exercising Original Jurisdiction (and not of the Registrar, who merely acts as a delegate). Viewed in this context, any appeal from the order of the Registrar to a Single Judge would, in effect, amount to the principal examining an order which is passed by his delegate in exercise of the powers which are originally vested with the principal. There is a complete identity of the powers exercised by the Registrar in matters specified in Rule 3 of Chapter II of the O.S. Rules and the jurisdiction vested with the Single Judge.

22. As an ordinary rule, delegation of powers or functions by an

authority or a person to another authority does not imply that the said principal authority is completely denuded of its power. This is so, because the delegate in exercise of the delegated powers acts as a principal. Thus, while the delegate can exercise the power, the principal too can exercise the same power unless there is any specific statutory provision which bars the same. The Supreme Court in the case of **Godawari S. Parulekar & Ors. v. State of Maharashtra:** AIR 1966 SC 1404 also expressed a similar view and cited the following passage, from **Huth v. Clarke:** 25 Q.B.D. 391, with approval:-

> "Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself."

23. In view of the above, would it be correct to consider an appeal under Rule 4 of the said Rules as an appeal in the true sense? In our view, the answer to the said question would be in the negative. This is so because an authority cannot sit in appeal against an order which has been passed in exercise of its jurisdiction, albeit by its delegate. At best the power exercised by the Single Judge under Rule 4 of the O.S. Rules is a power to review and re-examine orders passed by the Registrar. We accept the contention that the expression appeal in Rule 4 of the O.S. Rules is a misnomer as an appeal under Rule 4 of chapter II of the O.S. Rules, could certainly not be considered as an appeal but a mere re-examination/review of the order passed by the Registrar. We are persuaded by the decision of a Division Bench of the Madras High Court in **Sreyas Sripal v. M/s. Upasana Finance Ltd.** (supra), whereby, on the basis of similar reasoning, that Court has also concluded that the court did not exercise powers of appeal, against an order of a Master, under Order XIV Rule 12 of the Madras High Court Original Side Rules. Accordingly, the bar under Section 100A of the Code was not applicable and appeals before a Division Bench, against an orders passed by Single Judges, were maintainable. The relevant extract of the said judgement is quoted below:-

> "8. Applying the same logic, this Court cannot exercise the power of appeal or revision against the order of the Master, which is passed by him in the capacity as a delegate of the High Court. It is well settled that ordinarily an appeal would lie from a lower

Authority to the higher Authority and an order passed by the delegate is in exercise of powers given by the delegator and such an order is not appelable or revisable. Therefore, we are inclined to accept the contention of the learned Senior Counsel Mr. Yashod Vardhan that the word appeal in Order XIV Rule 12 is a misnomer, but it is actually a power of review of this Court. Therefore, such an order passed by the Master is not appealable or revisable by the learned Judge under Rule 12. The power conferred under Rule 12 is really in the nature of power of revision. Consequently, the bar under Section 100A of the Code of Civil Procedure is not attracted and the appeals are perfectly maintainable."

24. The decision of the Full Bench of this Court in the case of **Avtar Narain Behal v. Subhash Chander Behal** (supra) is inapplicable to the facts of the present case. The question that fell for consideration by the Court in that case was whether the Letters Patent Appeal, against a judgment of a Single Judge of this Court in first appeal, would be maintainable having regard to the provisions of Section 100A of the Code. In the said case, the respondent had filed a petition for grant of probate/letters of administration which were allowed by the learned District Judge, Delhi. The appellant preferred an appeal against the judgment of the learned District Judge under Section 299 of the Indian Succession Act, 1925 which was dismissed by a learned Single Judge of this Court. A Letters Patent Appeal was filed by the appellant against the judgment passed by the learned Single Judge. The controversy in that case related to maintainability of an appeal against a judgment passed by a Single Judge in appeal preferred under a special statute. The Court held that since the powers exercised by the learned Single Judge were appellate powers, a Letters Patent Appeal would not be maintainable by virtue of Section 100A of the Code. The issue whether the learned Single Judge exercised appellate powers was not an issue in that case as, indisputably, the judgment of the learned Single Judge in that case was passed in an appeal provided under the Indian Succession Act, 1925. The Full Bench of this Court followed the decision of the Supreme Court in **Kamal Kumar Dutta & Anr. v. Ruby General Hospital Ltd. & Ors.:** (2006) 7 SCC 613 whereby the Supreme Court had concluded that where an appeal from an original order, has been decided by a Single Judge then in such cases, Letters Patent Appeal is not available as the same has been

withdrawn by amending Section 100A of the Code. In that case, the question arose whether a Letters Patent Appeal would lie against an order of a Single Judge passed in an appeal preferred, under Section 10F of the Companies Act, 1956, from an order passed by the Company Law Board. This case too was in respect of an appeal decided by a Single Judge under a special statute i.e. the Companies Act, 1956. As stated earlier, the question examined in **Avtar Narain Behal v. Subhash Chander Behal** (supra) was in the context of Letters Patent Appeal against orders passed by the Single Judge in appeals from original orders preferred under special acts. The controversy in the present case essentially revolves around whether the appeal provided under Rule 4 of the O.S. Rules is an appeal in the true sense. As stated earlier, in our view, a Single Judge does not exercise appellate jurisdiction while exercising powers under Rule 4 of the O.S. Rules. Rule 4 in essence only provides for re-examination by a Single Judge of an order that, has been passed by the Registrar as his delegate and in that sense, in substance, is an order passed by the Court which is being re-examined by the Court itself.

25. In the case of **Akash Gupta v. Frankfinn Institute of Air Hostess Training & Anr.:** AIR 2006 Delhi 325 (DB), the question that arose for consideration was whether an appeal would lie under Rule 4 of Chapter II of the O.S. Rules against any order made by the Registrar under Rule 3 of Chapter II of the said Rules, even if no appeal was provided under the Code, the Act or the Letters Patent. The Court held that Rule 4 of Chapter II of the O.S. Rules provided not only a forum but also the right of appeal and all orders made under Rule 3 of Chapter II of the O.S. Rules could be made subject matter of an appeal under Rule 4 of Chapter II of the O.S. Rules. Reference to Order 43 Rule 1 of the Code was not required, to examine whether an appeal under Rule 4 of Chapter II of the O.S. Rules was maintainable or not. This decision also does not further the case of the respondent. The controversy in that case related to whether all orders of the Registrar were subject to an appeal under Rule 4 of the O.S. Rules. Indisputably, an order passed in exercise of powers under said Rule 3 by a Registrar of this Court can be made a subject matter of challenge under Rule 4 of Chapter II of the O.S. Rules. The issue whether the powers exercised under said Rule 4 was appellate power or not was not a subject matter of consideration in that case.

26. The order dated 16.09.2013 passed by a Division Bench of this Court in **Doctor Morepan Ltd. and Anr. v. Poysha Power Generation Pvt. Ltd.** (supra), dismissed the said appeal in limine in view of the decision in **Avtar Narain Behal v. Subhash Chander Behal** (supra). The said order dated 16.09.2013 neither contains any discussion as to the facts of the said matter nor records any of the rival contentions. The said order does not provide any reasoning as to the controversy involved. It is apparent that the questions, whether the powers exercised by the Registrar under Rule 3 of Chapter II of the O.S. Rules were exercised as a delegate or not and whether a Single Judge exercises original civil jurisdiction while deciding a challenge under Rule 4 of Chapter II of the O.S. Rules were neither placed nor considered by the court. The said order thus offers no assistance to the respondent.

27. It is necessary to consider that the scheme and the provisions of the O.S. Rules relate to the exercise of original jurisdiction. The O.S. Rules have been framed in respect of the practice and procedure for the exercise of the ordinary original civil jurisdiction, as is made explicit in the Preamble to the said Rules. The heading of Chapter II of the O.S. Rules is "exercise of original civil jurisdiction". The same also indicates that the Rules contained in Chapter II of the O.S. Rules relate to exercise of original civil jurisdiction. If the entire scheme of the O.S. Rules is considered in the perspective that it relates to exercise of ordinary original civil jurisdiction, then it would be apparent that a Single Judge exercises ordinary original civil jurisdiction even while considering a challenge under Rule 4 of Chapter II of the said Rules. In this view of the matter, an appeal under Section 10 of the Act from a judgment of a Single Judge would lie to a Division Bench of this Court. Section 100A of the Code would not be applicable as the powers exercised by a Single Judge under Rule 4 of Chapter II of the O.S. Rules cannot be termed as appellate powers and the expression 'appeal' in Rule 4 of Chapter II of the O.S. Rules is a misterm.

28. In view of the above, we reject the preliminary objection regarding maintainability of the present appeal. Renotify the present appeal for directions on 06.01.2014.

ILR (2013) I DELHI 290
CRL. A.

DEEPAK ...APPELLANTS

VERSUS

STATE ...RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 149/2000 DATE OF DECISION: 03.12.2013

Indian Penal Code, 1860—Section 307, 326, 397—Appellant impugns the order of the Addl. Sessions Court convicting Appellant u/s 307, 304 r/w s. 397, IPC. Case of the prosecution is that Appellant, along with another in furtherance of common intention inflicted injuries to the victim with a knife, and deprived him of Rs. 800/- FIR was registered and on completion of investigation Appellant was chargesheeted and brought to trial—Appellant claimed false implication—Addl. Sessions Court—Convicted—Contended that testimony of PW1 who turned hostile during cross examination and thus could not be relied upon—That conviction u/s 397 IPC was unsustainable due to non recovery of crime weapon—Further,. that Appellant wasn't charged u/s 392, IPC, therefore conviction under the same was unsustainable Held:

• Prosecution has established case beyond reasonable doubt—Simply because witness turned hostile in the cross examination, version given under oath during examination in chief cannot be disbelieved—Law to the effect that merely when the witness turns hostile, whole of his evidence is not liable to be thrown away, is well settled.

- **The prosecution was not able to prove that the appellant had intention and knowledge to cause death. The conviction u/s 307 require alternation to offence u/s 326 IPC.**

- **No force in the contention that conviction with the aid of S. 397 is not permissible in the absence of non recovery of knife.**

Madan Lal and Man Singh were taken to the Hindu Rao Hospital by Babu Lal from the spot. PW-3 (Babu Lal), Man Singh's father, rushed to the spot on hearing a noise and found both Man Singh and Madan Lal lying there with stab injuries. When he enquired from them as to who had inflicted the injuries, Man Singh disclosed that Deepak and Pankaj had given knife blows to them. This assertion remained unchallenged in the cross-examination. MLCs Ex.PW-6/A (of Man Singh) and Ex.PW-6/B (of Madan Lal) record arrival time of the patients at 08.55 A.M. and 09.00 A.M., respectively. Madan Lal who had sustained injuries 'simple' in nature was declared fit to make statement. In his statement given to the police at the first available opportunity, he gave graphic detail of the occurrence and implicated both Deepak and Pankaj for robbing Rs. 800/- and causing injuries to them by a knife. Since the First Information Report was lodged in promptitude by sending rukka at 01.30 P.M. after the occurrence took place at 08.15 A.M., there was least possibility of fabrication of a false story in a short interval. PW-4 (Man Singh), in Court statement fully supported the prosecution and ascribed a specific and definite role to Deepak in the incident. He testified that on 28.01.1997 at about 08.15 A.M. he had gone to the complainant Madan Lal's shop where he was counting money. In the meantime, Deepak and Pankaj arrived there. Deepak snatched Rs. 800/- from Madan Lal and on his resistance, was stabbed on left thigh. When he intervened to save Madan Lal, Pankaj took out a knife and Deepak stabbed him on the left cheek. After the occurrence, Pankaj

and Deepak fled the spot. In the cross-examination, he explained that he was working at complainant's shop and had no previous grudge with the accused. He expressed ignorance if there was any prior money transaction between Deepak and Madan Lal. The accused was unable to bring out any material contradiction or discrepancy in cross-examination to disbelieve the version given by the injured eyewitness. No ulterior motive was assigned for making false statement. PW1 (Madan Lal), in examination-in-chief recorded on 01.02.1999, proved the version given to the police in the statement (Ex.PW-1/A) without any variations or improvements. He implicated Deepak for robbing Rs. 800/- from him and also causing injuries by a knife to him and Man Singh. The appellant did not opt to cross-examine him that time. When he was recalled for cross-examination on 16.09.1999 after a lapse of 7 months, he took a somersault and denied any role to Deepak in the incident. It appears that after examination on 01.02.1999, the complainant was won over and completely resiled from the statements given to the police and in the Court. Apparently, Madan Lal did not present true facts in the cross-examination. Deepak was known to him prior to the incident for the last many years and had no occasion to falsely name him for committing robbery and causing injuries to them. He had given an eye-witness account of entire incident and FIR was lodged at his instance. Simply because in the cross-examination, the witness turned hostile and did not implicate the accused, the version given in the examination-in-chief recorded on oath on a prior date cannot be disbelieved and discarded. The law is now well settled that merely the witness is declared hostile, whole of his evidence is not liable to be thrown away. In Crl.A.No. 432/2010, 'Naresh Kumar vs. State' decided on 04.09.2013, this Court observed :

> "18. 1991 Cr.L.J. 2653 (1), **Khujji alias Surendra Tiwari V. State of M.P.** is a direct authority on the point in hand. In that case also, examination-in-chief of the witness was recorded on 16.11.76, when he

identified all the assailants by name. His cross-examination commenced on 15.12.76. In that cross-examination, he stated that since the accused had their backs towards him, therefore, he count not see their faces. On the basis of that statement, it was submitted that evidence regarding identity of the accused was rendered highly doubtful and it would be hazardous to convict the appellant solely on the basis of identification of such a wavering witness. Hon'ble High Court came to the conclusion, which was up held by Hon'ble Apex Court that during one month period that elapsed since the recording of his examination-in-chief, something transpired which made him shift his evidence on the question of identity to help the appellant. His statement in cross-examination on the question of identification of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. As such, it was observed that there was no material contradiction to doubt his testimony. It was further observed that evidence of declared hostile is not wholly effaced from record and that part of evidence, which is otherwise acceptable, can be acted upon. Reliance was placed on well settled decisions of Hon'ble Supreme Court- **Bhagwan Singh v. State of Haryans,** (1976) 2 SCR 921 : Air 1976 SC 202; **Rabinder Kumar Dev v. State of Orissa,** (1976) 4 SCC 233: AIR 1977 SC 170 and **Sayed Akbar v. State of Karnataka,** (1980) 1 SCR 95: AIR 1979 SC 1848 – Where it was held that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

19. Substantially, similar view was taken in 2009 (XI)

AD SC 125 **Alagarsamy& Ors. Vs. State** by Deputy Superintendent of Police. In that case also, the witness was declared hostile at the fag end of his cross-examination. The examination-in-chief of witness was recorded on 02.04.01 and on the same day he was cross-examined by three defence counsels. Then only later on, on 26.06.01, when he was recalled, he was treated as hostile witness. Hon'ble High Court commented that witness was tried to be won over, after his cross-examination and this comment was approved by Hon'ble Apex Court and it was observed that law is not well settled that merely because witness is declared as hostile witness, whole of his evidence is not liable to be thrown away. Reference was made to **Syed Akbar Vs. State of Karnatka,** 1980 (1) SCC 30, **Rabindera Kumar Dey vs. State of Orissa,** 1976 (4) SCC 233 and **Bhagwan Singh Vs. State of Haryana,** 1976 (1) SCC 389." **(Para 4)**

I do not find any force in the contention raised by the counsel for the appellant that conviction with the aid of Section 397 IPC is not permissible in the absence of non-recovery of knife. It is true that the crime weapon could not be recovered during investigation. Soon after the incident, the appellant fled the spot and could not be apprehended for long and was declared Proclaimed Offender. The prosecution was, thus, not able to recover the weapon of offence at his instance. Both the victims categorically deposed about the use of knife by the offender while inflicting injuries. PW-4 (Man Singh) suffered 'grievous' injuries by the 'knife' used to rob the complainant by Deepak. Testimony of PW-10 (Dr.P.K.Suneja) is of utmost importance in this regard. He deposed that on local examination, the patient had incised wound over left cheek of size of 3 cm in length and it was extending to the oral cavity. The accused did not cross-examine the expert to ascertain the size and dimension of the weapon used in the incident. It cannot be inferred that the weapon used was not a 'deadly' one in nature.

(Para 6)

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Nitin Dahiya, Advocate.

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

CASES REFERRED TO:

1. *Alagarsamy& Ors.* vs. *State* 2009 (XI) AD SC 125.
2. *Khujji alias Surendra Tiwari* vs. *State of M.P.* 1991 Cr.L.J. 2653 (1).
3. *Syed Akbar* vs. *State of Karnatka,* 1980 (1) SCC 30.
4. *Bhagwan Singh* vs. *State of Haryana,* 1976 (1) SCC 389.
5. *Rabinder Kumar Dev* vs. *State of Orissa,* (1976) 4 SCC 233: AIR 1977 SC 170.

RESULT: Appeal disposed.

S.P. GARG, J.

1. Deepak impugns a judgment dated 25.01.2000 of learned Addl. Sessions Judge in Sessions Case No. 10/98 arising out of FIR No. 95/97 PS Model Town whereby he was convicted under Sections 307, 394 reach with Section 397 IPC and by an order dated 27.01.2000, awarded RI for seven years with fine Rs. 10,000/- under Section 307 IPC; RI for seven years with fine Rs. 10,000/- under Section 397 IPC. Both the sentences were to operate concurrently.

2. The case of the prosecution as projected in the charge-sheet was that on 28.01.1997 at about 08.15 A.M. at B-412, Lal Bagh, Aakash Tailors, GTK Road, Delhi, Deepak and his companion Pankaj in furtherance of common intention inflicted injuries to Man Singh by a knife and deprived Madan Lal of Rs. 800/-after stabbing him. The police machinery came into motion when Daily Diary (DD) No. 5A was recorded at PS Model Town at 09.20 A.M. on getting information from duty constable Rattan Pal informing admission of Man Singh and Madan Lal in Hindu Rao Hospital. The Investigating Officer lodged First Information Report after recording Madan Lal's statement (Ex.PW-1/A). During investigation,

efforts were made to find out the culprits in vain. Subsequently, Deepak was arrested in FIR No. 187/91, PS Sulatanpuri and was taken into custody in this case (he was earlier Proclaimed Offender). Pankaj could not be apprehended and arrested. After completion of investigation, Deepak was duly charged and brought to trial. The prosecution examined twelve witnesses and produced medical evidence. In 313 statement, the appellant pleaded false implication. After considering the rival contentions of the parties and appreciating the evidence on record, the Trial Court, by the impugned judgment, convicted Deepak giving rise to the filing of the present appeal.

3. I have heard learned counsel for the parties and have examined the record. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of PW1 (Madan Lal), who resiled from the Court statement in the cross-examination. The appellant was not charged under Section 392 IPC and conviction under Section 397 IPC is unsustainable in the absence of non-recovery of crime weapon. Learned Addl. Public Prosecutor urged that both the victims have fully supported the prosecution and their testimony has been corroborated by medical evidence.

4. Madan Lal and Man Singh were taken to the Hindu Rao Hospital by Babu Lal from the spot. PW-3 (Babu Lal), Man Singh's father, rushed to the spot on hearing a noise and found both Man Singh and Madan Lal lying there with stab injuries. When he enquired from them as to who had inflicted the injuries, Man Singh disclosed that Deepak and Pankaj had given knife blows to them. This assertion remained unchallenged in the cross-examination. MLCs Ex.PW-6/A (of Man Singh) and Ex.PW-6/B (of Madan Lal) record arrival time of the patients at 08.55 A.M. and 09.00 A.M., respectively. Madan Lal who had sustained injuries 'simple' in nature was declared fit to make statement. In his statement given to the police at the first available opportunity, he gave graphic detail of the occurrence and implicated both Deepak and Pankaj for robbing Rs. 800/- and causing injuries to them by a knife. Since the First Information Report was lodged in promptitude by sending rukka at 01.30 P.M. after the occurrence took place at 08.15 A.M., there was least possibility of fabrication of a false story in a short interval. PW-4 (Man Singh), in Court statement fully supported the prosecution and ascribed a specific

and definite role to Deepak in the incident. He testified that on 28.01.1997 at about 08.15 A.M. he had gone to the complainant Madan Lal's shop where he was counting money. In the meantime, Deepak and Pankaj arrived there. Deepak snatched Rs. 800/-from Madan Lal and on his resistance, was stabbed on left thigh. When he intervened to save Madan Lal, Pankaj took out a knife and Deepak stabbed him on the left cheek. After the occurrence, Pankaj and Deepak fled the spot. In the cross-examination, he explained that he was working at complainant's shop and had no previous grudge with the accused. He expressed ignorance if there was any prior money transaction between Deepak and Madan Lal. The accused was unable to bring out any material contradiction or discrepancy in cross-examination to disbelieve the version given by the injured eyewitness. No ulterior motive was assigned for making false statement. PW1 (Madan Lal), in examination-in-chief recorded on 01.02.1999, proved the version given to the police in the statement (Ex.PW-1/A) without any variations or improvements. He implicated Deepak for robbing Rs. 800/- from him and also causing injuries by a knife to him and Man Singh. The appellant did not opt to cross-examine him that time. When he was recalled for cross-examination on 16.09.1999 after a lapse of 7 months, he took a somersault and denied any role to Deepak in the incident. It appears that after examination on 01.02.1999, the complainant was won over and completely resiled from the statements given to the police and in the Court. Apparently, Madan Lal did not present true facts in the cross-examination. Deepak was known to him prior to the incident for the last many years and had no occasion to falsely name him for committing robbery and causing injuries to them. He had given an eye-witness account of entire incident and FIR was lodged at his instance. Simply because in the cross-examination, the witness turned hostile and did not implicate the accused, the version given in the examination-in-chief recorded on oath on a prior date cannot be disbelieved and discarded. The law is now well settled that merely the witness is declared hostile, whole of his evidence is not liable to be thrown away. In Crl.A.No. 432/2010, 'Naresh Kumar vs. State' decided on 04.09.2013, this Court observed :

> "18. 1991 Cr.L.J. 2653 (1), **Khujji alias Surendra Tiwari v. State of M.P.** is a direct authority on the point in hand. In that case also, examination-in-chief of the witness was recorded on

16.11.76, when he identified all the assailants by name. His cross-examination commenced on 15.12.76. In that cross-examination, he stated that since the accused had their backs towards him, therefore, he count not see their faces. On the basis of that statement, it was submitted that evidence regarding identity of the accused was rendered highly doubtful and it would be hazardous to convict the appellant solely on the basis of identification of such a wavering witness. Hon'ble High Court came to the conclusion, which was up held by Hon'ble Apex Court that during one month period that elapsed since the recording of his examination-in-chief, something transpired which made him shift his evidence on the question of identity to help the appellant. His statement in cross-examination on the question of identification of the appellant and his companion is a clear attempt to wriggle out of what he had stated earlier in his examination-in-chief. As such, it was observed that there was no material contradiction to doubt his testimony. It was further observed that evidence of declared hostile is not wholly effaced from record and that part of evidence, which is otherwise acceptable, can be acted upon. Reliance was placed on well settled decisions of Hon'ble Supreme Court-**Bhagwan Singh v. State of Haryans,** (1976) 2 SCR 921 : Air 1976 SC 202; **Rabinder Kumar Dev v. State of Orissa,** (1976) 4 SCC 233: AIR 1977 SC 170 and **Sayed Akbar v. State of Karnataka,** (1980) 1 SCR 95: AIR 1979 SC 1848 – Where it was held that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

19. Substantially, similar view was taken in 2009 (XI) AD SC 125 **Alagarsamy& Ors. Vs. State** by Deputy Superintendent of Police. In that case also, the witness was declared hostile at the

fag end of his cross-examination. The examination-in-chief of witness was recorded on 02.04.01 and on the same day he was cross-examined by three defence counsels. Then only later on, on 26.06.01, when he was recalled, he was treated as hostile witness. Hon'ble High Court commented that witness was tried to be won over, after his cross-examination and this comment was approved by Hon'ble Apex Court and it was observed that law is not well settled that merely because witness is declared as hostile witness, whole of his evidence is not liable to be thrown away. Reference was made to **Syed Akbar Vs. State of Karnatka,** 1980 (1) SCC 30, **Rabindera Kumar Dey vs. State of Orissa,** 1976 (4) SCC 233 and **Bhagwan Singh Vs. State of Haryana,** 1976 (1) SCC 389."

5. PW-11 (Dr.Suresh Kr.Bansal) proved MLC Ex.PW-6/B (of victim Madan Lal) and the nature of injuries was opined simple by sharp weapon. PW-10 (Dr.P.K.Suneja) examined Man Singh vide MLC Ex.PW6/ A and opined the nature of injuries as 'grievous' caused by sharp object (Ex.PW-10/A). Both, these witnesses were not cross-examined despite an opportunity given. The accused did not deny his presence at the spot. There are no valid reasons to suspect the statements of the injured eyewitnesses which are accorded a special status in law. The fact that they got injuries in the occurrence establishes their presence at the spot. They are not expected to let the real culprits go scot free and to falsely implicate the appellant with whom there was no previous history of hostile relations. The prosecution was able to establish beyond reasonable doubt that Deepak was author of the injuries to both Madan Lal and Man Singh and snatched Rs. 800/-from the complainant. Man Singh (Madan Lal's employee) was not the target of attack. Injuries were caused to him when he intervened to save Madan Lal. No attempt was made to rob cash or other article from his possession. The appellant had no grudge or enmity to eliminate him. The injuries inflicted were not on vital organ but were on cheek and were opined 'grievous' in nature. There is nothing on record to show as to for how much duration, Man Singh remained admitted in the hospital. No repeated blows with the weapon were inflicted on vital organs. When taken to hospital soon after the incident, Man Singh was conscious and was not admitted for any operation etc. The prosecution was, thus, not able to prove that the appellant had intention and knowledge to cause death. The conviction under Section 307 IPC

requires alternation to offence under Section 326 IPC.

6. I do not find any force in the contention raised by the counsel for the appellant that conviction with the aid of Section 397 IPC is not permissible in the absence of non-recovery of knife. It is true that the crime weapon could not be recovered during investigation. Soon after the incident, the appellant fled the spot and could not be apprehended for long and was declared Proclaimed Offender. The prosecution was, thus, not able to recover the weapon of offence at his instance. Both the victims categorically deposed about the use of knife by the offender while inflicting injuries. PW-4 (Man Singh) suffered 'grievous' injuries by the 'knife' used to rob the complainant by Deepak. Testimony of PW-10 (Dr.P.K.Suneja) is of utmost importance in this regard. He deposed that on local examination, the patient had incised wound over left cheek of size of 3 cm in length and it was extending to the oral cavity. The accused did not cross-examine the expert to ascertain the size and dimension of the weapon used in the incident. It cannot be inferred that the weapon used was not a 'deadly' one in nature.

7. Appellant's nominal roll on record reveals that he remained in custody for three years and fourteen days besides earning remission for three months and twenty five days as on 24.07.2001 and was enlarged on bail by an order dated 23.01.2002. Nominal roll further reveals that he was involved in another FIR No. 187/91 under Section 307/147/148 IPC and 27 Arms Act PS Sultanpuri whose outcome is not clear. The incident pertains to the year 1997 and the appellant has suffered the ordeal of the trial / appeal for about sixteen years. Considering these facts and circumstances, sentence order is modified and Deepak is awarded RI for seven years with fine Rs. 2,000/-and failing to pay the fine to undergo SI for one month under Section 394 read with Section 397 IPC; RI for five years with fine Rs. 2,000/-and failing to pay the fine to undergo SI for one month under Section 326 IPC. Both the sentences shall run concurrently. The period already suffered by the appellant in custody, in this case, shall be counted and set off under Section 428 IPC. The appellant shall surrender before the Trial Court on 10th December, 2013 to serve the remaining period of substantive sentence.

8. The appeal stands disposed of in the above terms. Pending application (if any) also stands disposed of. Trial Court record be sent

back forthwith with the copy of the order.

ILR (2014) I DELHI 301
W.P (C)

SEVEN HEAVEN BUILDCONS P. LTD. & ANR. ....PETITIONERS

VERSUS

D.D.A. & ANR. ....RESPONDENTS

(G.P. MITTAL, J.)

W.P.(C) NO. : 8523/2008 DATE OF DECISION: 05.12.2013

Constitution of India, 1950—Article 226; whether petitioners are entitled to refund of earnest money along with interest. Respondent invited tenders for shops/offices—Petitioner successfully bid for a unit—Earnest money deposited—Petitioner failed to deposit balance bid amount within the prescribed period—Respondents then cancelled allotment and forfeited bid amount—Hence, the present petition. Admittedly, not disclosed in tender document that same unit was earlier bid upon, and cancelled since Chief Post Master General expressed an interest in the property—However, since no further action was taken by CPMG, unit was auctioned again, by which present Petitioner was declared successful—Earlier bidder, whose bid was cancelled, filed a civil suit against the DDA in which the Petitioner was impleaded. No restraint order was granted against DDA from execution of a conveyance in favour of the petitioner— Suit of earlier bidder was dismissed during pendency of present writ petition—Petitioners contend that they were unable

to secure a loan for the balance bid amount due to pendency of the civil suit—Therefore, they are entitled to refund of the earnest money along with interest. Respondents contend that it was not a condition that the purchaser would be entitled to raise a loan—No document has been placed on record to prove the same—Successful bidder cannot be allowed to withhold payment due to frivolous litigation commenced by a third person. Held: Petitioner successful in auction—Failed to pay entirely—Reason stated that he could not avail loan to pay due to some pending litigation on auctioned property—Held, no valid reason—It was not one of the conditions of auction that successful builder would be entitled to avail loan—Forfeiture of earnest money is in terms of tender.

On the other hand, the case is squarely covered by a Division Bench judgment of this Court in Aggarwal Associates where the Petitioner declined to deposit the balance sale consideration on the ground that there was some dispute between the MCD and the DDA. The Division Bench while upholding the order passed by the learned Single Judge that the DDA was bound to deliver possession of the property only on the Petitioner depositing the balance 75% of the bid money, held that the Petitioner wanted to project a case that the DDA was not in a position put the Petitioner in possession which was only a make-believe affair. In the instant case also, in the first tender the unit/shop was offered for post office only whereas in the second tender (in question) the unit/shop was offered as a general shop (professional office). The Division Bench dealt with at great length as to what is bid amount, what is earnest money and what are the consequences of deposit of such money, and when the same can be forfeited. Paras 2 to 7 of the judgment in Aggarwal Associates are extracted hereunder:-

> "2. The learned Counsel Mr. Vashisht submitted that the DDA was not in a position to give possession of the property, therefore, the petitioner was fully justified

in not paying the balance 75%. The DDA has no right to forfeit the sum of Rs.7,50,000/-. The learned Counsel for the DDA submitted that the auction conditions provide for forfeiture and the petitioner did not act in accordance with the terms and conditions of the auction notice, the DDA was always ready to hand over possession of the property and, as a matter of fact, the petitioner by letter dated 16.4.1994 asked for extension of time by 45 days for the payment of balance amount. The possession of the plot was always with the DDA and in terms of Clause 2(viii) of the Terms and Conditions of the Auction, the auction was liable to be cancelled and the DDA was entitled to pass an order forfeiting the earnest money.

3. The Supreme Court had an occasion to consider the question of the right of the DDA to forfeit the amount in **Delhi Development Authority v. Grishthapana Cooperative Group Housing Society Ltd.,** 1995 Supp (1) SCC 751. The facts as noticed by the Supreme Court are this:

"The appellant proposed to allot land to about 260 Cooperative Group Housing Societies in Dwaraka Phase-I, so also to about 60 such societies in Narela. When the proposal was first made on 1.10.1990, the cost was fixed at Rs. 975/- per sq. m. for Dwaraka land and Rs. 950/- for Narela land. The societies interested in the allotment land were required to deposit Rs. 5 lakhs as earnest money and to formally apply for allotment. On the interested societies accepting the offer, formal allotment was made by communication of the appellant dated 25.1.1991. Before possession of the land came to be delivered, the appellant by its communication dated 3.11.1992 stated that the premium of the land shall be payable at Rs. 1650.65 per sq. m. which was the value determined by the Government of India, vide its notification dated 21.10.1992/23.10.1992. Some of

the societies approached the Delhi High Court being aggrieved at the enhancement of the premium. The High Court ultimately upheld the enhancement, which decision has since been reported in 26 Delhi Reported Judgments 156. On this Court being approached against the judgment of the High Court by way of special leave petitions, the same came to be disposed of by extending the time of paying the first instalment upto 31.5.1993 which date had been fixed by the High Court as 30.4.1993. This Court made it clear in its order that the facility to pay first instalment with interest will be available only upto 31.7.1993; and no extension of time beyond this date would be granted."

The respondents not paying the amount, as ordered by the Supreme Court, the DDA forfeited a sum of Rs.5/- lakhs, which was payable as earnest money as per clause 4 II of the allotment order dated 3.11.1992. This was challenged before this Court and this Court directed the DDA not to make any deduction and directed the DDA to refund the entire amount. That was challenged before the Supreme Court.

4. The Supreme Court noted the submission on behalf of the DDA in the following terms:

"In support of the first legal proposition, Mr. Jaitley referred us principally to a three-Judge Bench decision of this Court in **Hanuman Cotton Mills v. Tata Air Craft Ltd.,** 1969) 3 SCC 522 in which there is a detailed discussion of what is meant by earnest money and what are the consequences of deposit of such money and when can the same be forfeited. The Bench after reviewing various decisions noted in the judgment which includes that of the Privy Council rendered in Chiranjit Singh v. Har Swarup, AIR 1926 PC 1, culled out the following principles regarding the 'earnest' at page 139: (SCC p. 531, para 21)

"(1) It must be given at the moment at which the

contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."

5. The Society which was the respondent before the Supreme Court Contended:

"In view of the aforesaid legal position, the contention advanced by Mr. Bishwajit Bhattacharya for the respondents is that there was no acceptance of the offer given on 3.11.1992 in which mention was made about the rate of premium being Rs. 1650.65. The appellant is, therefore, not entitled, according to the learned Counsel, to forfeit the earnest money, as no such money had been deposited after this date in token of acceptance of the proposal."

6. The Supreme Court held that the sum of Rs. 5 lakhs, which was deposited, was liable to be forfeited by the D.D.A. and judgment of this Court reversed.

7. The dictum laid down by the Supreme Court is that the terms agreed between the parties have to be considered for considering the question of the right to forfeiture by one of the parties to the contract."

(Para 23)

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Anil K. Aggarwal with Mr. Abhay Kumar, Advocates.

FOR THE RESPONDENTS : Mr. Ajay Verma, Advocate for Respondent No. 1/DDA.

CASES REFERRED TO:

1. *Haryana Finance Corporation & Anr.* vs. *Rajesh Gupta,* AIR 2010 SC 338.
2. *ABL International Ltd. & Anr.* vs. *Export Credit Guarantee Corporation of India Ltd. & Ors.,* 2004 (3) SCC 553.
3. *Mohd. Gazi* vs. *State of M.P. & Ors.* (2000) 4 SCC 342.
4. *Aggarwal Associates (Promoters) Ltd.* vs. *DDA & Anr.,* 69 (1997) DLT 716 (DB).
5. *Delhi Development Authority* vs. *Grishthapana Cooperative Group Housing Society Ltd.,* 1995 Supp (1) SCC 751.
6. *Gujarat State Finance Corporation* vs. *Lotus Hotels Pvt. Ltd.,* (1983) 3 SCC 379, in para 11.
7. *Gujarat State Financial Corpn.* vs. *Lotus Hotels (P) Ltd.* (1983) 3 SCC 379.
8. *Ramana Dayaram Shetty* vs. *International Airport Authority of India* (1979) 3 SCC 489.
9. *Hanuman Cotton Mills* vs. *Tata Air Craft Ltd.,* 1969) 3 SCC 522.

RESULT: Writ Petition Dismissed.

G.P. MITTAL, J.

1. By virtue of this writ petition under Article 226 of the Constitution of India, the Petitioners seek refund of the earnest money of Rs. 64,21,000/- along with interest.

2. The facts of this case are not in very much dispute. By an advertisement dated 21.03.2008, the DDA invited tenders in respect of 170 freehold build-up shops/offices in a prime location of Delhi. Petitioner No.1 submitted a tender in respect of a unit situated at LSC, Vikas Puri,

Block-C, Ground Floor. The Petitioner's offer of Rs. 2,56,84,000/- being the highest was accepted. Consequently, 25% of the bid amount towards earnest money amounting to Rs.64,21,000/- was deposited with the DDA by way of Draft No.052208 dated 27.03.2008. It is also not in dispute that in the tender document, it was not disclosed to Petitioner No.1 that the earlier stated office unit was part of a previous auction wherein successful bidder was not allotted the office unit in view of reservation of the office unit for post office purpose. By an allotment letter dated 21.04.2008, the DDA demanded the balance amount of the bid price of Rs.1,92,63,045/-. By a letter dated 26.04.2008, the Petitioner informed the DDA that in the allotment letter, the Petitioner's name was wrongly mentioned as Seven Heaven Builders Pvt. Ltd. instead of Seven Heaven Buildcons Pvt. Ltd. On Petitioner's request to correct the document in order to avail a loan facility, the DDA corrected the name of the first Petitioner by a revised letter No.3073 dated 23.06.2008 requiring the first Petitioner to deposit balance amount within 30 days. The DDA further informed the Petitioner that if the payment is not made with interest within a period of 180 days, the allotment would stand automatically cancelled and EMD forfeited.

3. According to the Petitioners, the first Petitioner started the process of trying to obtain a loan for the arrangement of the balance amount to be deposited with the DDA. To the utter shock and surprise of the Petitioners, Petitioner No.1 was served with summons in Suit No.1577/2009 titled **Shashi Bala Nangia v. DDA & Ors.** In the said civil suit, it was claimed that Respondent No.2, one Shashi Bala Nangia, Plaintiff before the learned Civil Judge was declared a successful bidder in respect of this very office unit in an auction held on 19.04.2000. In the said civil suit, it was averred that DDA had withdrawn the office unit from the tender on the ground that it was required to be allotted to the Office of Chief Post Master General, Delhi. Along with the civil suit, an application under Order XXXIX Rules 1 and 2 CPC was also filed by Respondent No.2 (herein) for grant of a temporary injunction.

4. It is not in dispute that no ex parte or interim injunction on merits was granted in favour of Respondent No.2. Thus, the DDA was to execute the conveyance deed in favour of the present Petitioner.

5. It is the admitted case of the parties that during the pendency

of the writ petition, the said civil suit was dismissed. Respondent No.2 was further also unsuccessful in the appeal preferred against the judgment dated 11.05.2012 passed by the learned Civil Judge.

6. The case of the Petitioners is that Petitioner No.1 was denied loan facility in view of the pendency of the civil suit filed by Respondent No.2. The Petitioners relied on a letter dated 26.09.2008(Annexure P-10) written by RVAG Centurion Infra Solutions Ltd. to Petitioner No.1. The Petitioners represented to the DDA to extend the time for depositing of the balance amount because of the pendency of dispute being raised by Respondent No.2 claiming allotment of the office/shops space in question. The request to extend the time was rejected by the DDA by a letter dated 03.10.2008 (Annexure P-11). Petitioner No.1 was directed to deposit the balance amount as per the terms of the allotment letter failing which the DDA shall cancel the allotment and forfeit the EMD in accordance with the terms and the conditions of the tender.

7. In the counter affidavit filed by the DDA, the facts stated are not disputed. Rather, it is admitted that Respondent No.2 did participate in the tender programme opened on 19.04.2000 for the office which showed it's usage as 'post office'. Subsequently, the bid of Respondent No.2 was rejected on the ground that several representations were received from different tender purchasers that they were interested in the unit but did not tender for the same because it was reserved for a post office and thus, the amount deposited by Respondent No.2 was refunded without any deduction. In the counter affidavit, it is stated that the restricted use of 34 vacant properties, i.e., 17 post offices and 17 banks was changed to 'general' office use after following due formalities. Thereafter, the said units were put to auction again on 28.03.2008 as "office use only" in which the Petitioner was the highest bidder. The representation for extension of time made by the Petitioners is not disputed by the DDA. It is stated that after examining the representation, the Petitioner was informed that he was obliged to make the payment in terms of the Demand-cum-Allotment letter dated 21.04.2008 failing which the DDA shall have no alternative except to cancel the allotment and forfeit the earnest money. In the written statement dated 31.05.2010 filed in CS (OS) No.1577/2009, a specific plea was taken that the unit in question was floated in the tender invited on 19.04.2000 for use of "post office" and the space was offered to the Postal Department. A request dated

11.04.2000 was received from the Chief Post Master General and the space was offered to the post office on licence fee. It was requested to the Chief Post Master General to convey his consent for allotment, but no response was received and thereafter the use of units meant for "banks" and "post office" lying vacant with the DDA were changed in consultation with the Planning Department and were offered to the general public. Paras B, 1,2 and 3 of the written statement of the DDA is extracted hereunder:

"B. Brief synopsis:

1. That a unit measuring 81.7 sq.mtrs at LSC, Vikas Puri, Block-C was floated in tender invited on 19.04.2000. The answering defendant had received three tenders against the said unit and Mrs.Shahi Bala Nangia was found the highest bidder who offered the amount of Rs. 15,11,000/- and deposited Rs. 3,77,750/- as earnest money by P.O./DD No.514130 dated 18.04.2000 towards the 25% of the tendered amount. Since the unit in question was earmarked for the use of "Post Office" and the answering defendant had received several representations from the Postal Department stating that they were interested in the unit but did not tender for the same and a request dated 11.04.2000 from Chief Post Master General, Delhi Circle, was received for allotment of the said unit, the bid/tender of Mrs. Shashi Bala Nangia was rejected and about this, she was informed vide letter date 31.05.2000 and the P.O./DD deposited by her was also returned therewith.

2. That subsequently, the Chief Post Master General was offered the said unit vide letter dated 01.03.2002 to allot the same to the Postal Department on licence fee at the rate of Rs.2,24,800/- per annum which would be increased by 10% every year. It was requested to the Chief Post Master General to convey their consent for allotment. But no response therefrom was received.

3. That thereafter, the use of units meant for "Banks" & "Post Offices" lying vacant with DDA were changed after consulting the Planning Deptt. of DDA into use of "Office" and the said unit was disposed of through tender invited

on 28.03.2008 which was in favour of M/s Seven Heaven Buildcon Pvt. Ltd."

8. In para 16 of the written statement filed by the DDA, the DDA stated as under:

"16. That in reply to this para, it is admitted that the unit which was put to auction in the year 2008 was the same unit which was put to auction in the year 2000. However, it is submitted that the unit was put to tender again after getting its use changed into "office" because there was no requirement/acceptance received from the Postal Authority. The Reserve Price keeps changing from year to year depending upon the average auction/tender rate fetched during the last preceding financial year. It is, however, denied that in the tender form which was floated in the year 2008, the term P.O. had been clarified to be "Prop. Office". However, it is made clear that the term P.O. was clarified as "Pro Office", which means professional office. It is denied that the answering defendant acted mal fide in inviting bid for the same shop at the higher reserve price. It is pertinent to mention that in the year 2000, the use of the unit in question was "Banks" and "Post Offices" whereas after the change of the use as "Office", after due permission from the competent authority, the unit was floated in the fresh tender in the year 2008."

9. The DDA has taken up a plea that there is no restraint order passed by the Civil Court in the civil suit filed by Respondent No.2 and thus, the DDA is willing to handover possession of the unit/shop in question to the Petitioner on payment of premium with applicable interest in accordance with demand letter issued on 21.04.2008. The DDA has further taken up a plea that a letter dated 03.10.2008 was written to the Petitioners to deposit the balance amount of '1,92,63,045/- in accordance with the demand-cum-allotment letter dated 21.04.2008 within the stipulated period, failing which the allotment was liable to be cancelled and the earnest money to be forfeited.

10. The learned counsel for Respondent No.1 states that it is not one of the terms and conditions of the auction that the purchaser (Petitioner No.1 herein) would be entitled to raise a loan to make the payment. No document has been placed on record to prove the same. A successful

bidder cannot be permitted to withhold the payment to the owner of a plot simply because some unnecessary and unwarranted litigation has been commenced by a third person.

11. In a separate reply to the writ petition filed by Respondent No.2 (who was the initial successful bidder in the auction), it is admitted that the DDA had informed Respondent No.2 that since the unit/shop was earmarked for the post office, it had decided to withdraw the said unit/shop from the tender and it was to be allotted to the Chief Post Master General, Delhi, who had requested for the said space for opening of a post office. Respondent No.2 has further taken up the plea that since the shop/unit in question was not allotted to the post office, a suit was filed by her against the DDA and the Petitioner. Respondent No.2 has thus prayed for allotment of the unit/shop to her on the terms and conditions of the initial auction.

12. The learned counsel for the Petitioner referring to **ABL International Ltd. & Anr. v. Export Credit Guarantee Corporation of India Ltd. & Ors.,** 2004 (3) SCC 553 has urged that if the State acts in an arbitrary manner even in a matter of contract, the aggrieved party can approach the Court by way of a writ under Article 226 of the Constitution and the Court depending upon the facts of the said case is empowered to grant relief.

13. There is no dispute about the proposition of law as urged by the learned counsel for the Petitioner. In ABL International relying on **Gujarat State Finance Corporation v. Lotus Hotels Pvt. Ltd.,** (1983) 3 SCC 379, in para 11 the Supreme Court observed as under:-

> "11. In the case of **Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd.** (1983) 3 SCC 379 this Court following an earlier judgment in **Ramana Dayaram Shetty v.International Airport Authority of India** (1979) 3 SCC 489 held:
>
> The instrumentality of the State which would be 'other authority' under Article 12 cannot commit breach of a solemn undertaking to the prejudice of the other party which acted on that undertaking or promise and put itself in a disadvantageous position. The appellant Corporation, created under the State Financial Corporations Act, falls within the expression of 'other authority' in Article 12 and if it backs out from such a promise, it cannot be said that the only remedy for the aggrieved party would be suing for damages for breach and that it could not compel the Corporation for specific performance of the contract under Article 226."

14. Now, the question for consideration is whether the DDA has acted in a totally arbitrary manner and that the Petitioner can be granted relief by virtue of this writ petition.

15. It is not in dispute that a civil suit was filed by Respondent No.2 (herein) against the DDA and the Petitioner was impleaded as Defendant No.2 in the said civil suit. Respondent No.2 admittedly in the said civil suit sought the relief of cancellation of the auction in question. It is also not in dispute that in the said civil suit, no restraint order was granted against the DDA from execution of a conveyance in favour of the Petitioner. The said civil suit, as well as first appeal thereto has also been since dismissed by the Courts of competent jurisdiction and the matter has attained finality.

16. Relying on **Haryana Finance Corporation & Anr. v. Rajesh Gupta,** AIR 2010 SC 338 and **Mohd. Gazi v. State of M.P. & Ors.** (2000) 4 SCC 342, Mr. Anil K. Aggarwal, learned counsel for the Petitioner has argued that where the seller is unable to pass on a marketable title, he is not entitled to forfeit the earnest money on refusal of the purchaser to pay the balance sale consideration.

17. On the other hand, Mr. Ajay Verma, learned counsel for Respondent No.1 DDA has relied upon a Division Bench judgment of this Court in **Aggarwal Associates (Promoters) Ltd. v. DDA & Anr.,** 69 (1997) DLT 716 (DB) to buttress his contention that the DDA was always willing to transfer a valid title and deliver possession of the shop in question to the Petitioner and the earnest money paid by the Petitioner stood forfeited on account of violation of the terms of the auction.

18. In Haryana Finance Corporation (HFC) on 08.01.1998, the HFC had issued an advertisement for sale of various units including the land of M/s. Unique Oxygen Pvt. Ltd., Old Hansi Road, Jind. Respondent Rajesh Gupta on that very day had deposited an amount of Rs.2.5 lacs by way of earnest money. Said Rajesh Gupta on visiting the factory

premises on 21.01.1998 found that the premises did not have any appropriate passage from the road and therefore wrote a letter dated 21.01.1998 requesting HFC to apprise him about the same so that they did not face any problem if they acquire the unit as per the offer. The HFC preferred not to respond to the said letter. By a letter dated 19.02.1998, HFC called Rajesh Gupta for negotiation and enhanced the bid amount from Rs.25 lacs to Rs.50 lacs. Rajesh Gupta again wrote a letter dated 07.03.1998 raising the same issue about the approved/authorised passage to the factory sufficient to pass a truck through it. It was matter of record that by a letter dated 03.04.1998, the Branch Manager of HFC had brought the objection of Rajesh Gupta to the notice of the Head Office. The Branch Manager was informed by the head office that a clear cut passage had been provided to the unit as per the documents submitted by the defaulting unit at the time of availing loan. On 13.04.1998, the Branch Manager wrote another letter to the Head Office of HFC pointing out the discrepancies in the area of the factory as also of the passage. In spite of the factual position, the HFC issued a letter dated 18.05.1998 to the Respondent advising him to deposit the balance bid amount within 15 days failing which the amount of earnest money would be forfeited without further notice. The Respondent again raised the issue regarding the passage at the open house held by HFC at Hisar on 12.06.1998. The HFC relied upon a demarcation report of the Revenue Officers dated 27.06.1998 (made after the bid that 16.5 ft. passage is provided in the west of the unit). Not satisfied with the report, the Respondent did not pay the balance amount whereupon the HFC forfeited the sum of Rs.2.5 lacs deposited by the Respondent and thereafter invited fresh tenders for the sale of the land, which was challenged before the Punjab and Haryana High Court.

19. The facts of *Haryana Finance Corporation* are clearly distinguishable. In that case Respondent had deposited bid amount of Rs.2.5 lacs on 08.01.1998. He wrote a letter dated 29.01.1998 on his observations upon the visit to the factory on 21.01.1998. HFC did not give any response to the doubts raised by the Respondent and rather invited him for negotiation by a letter dated 19.02.1998 and thereby on negotiation, the bid amount was enhanced from Rs.25 lacs to Rs.50 lacs. It was not only Respondent Rajesh Gupta who had raised concern about the passage before he was called for negotiations and the bid amount was enhanced but also the Branch Manager of the HFC who had pointed out

the discrepancies in the actual passage and the records. It was in these circumstances that the Supreme Court had observed that the HFC had acted unfairly and was trying to take advantage of it's own wrong. Consequently, decision to set aside the forfeiture was passed.

20. Similarly, in Mohd. Gazi, a tender notice inviting tenders for disposal of tendu leaves of 1995 session was issued by the State of MP on 20.11.1995. Respondent No.4 offered his tender in respect of different lots including Lot No.597 and was declared the highest bidder for the said Lot on 02.12.1995. On account of some complaints made by other bidders and allegations of manipulations on the part of the officials of the State of M.P., the highest bid of Respondent No.4 was not accepted and his tender was cancelled by an order dated 27.01.1996. Fresh notice for tenders for the aforesaid Lot was issued on 20.15.1996 in which the Appellant Mohd. Gazi was declared as the highest bidder. In the meantime, Respondent No.4 filed a writ petition in the High Court challenging the order of cancellation dated 27.01.1996 and re-tender notice dated 23.05.1996. On his prayer for grant of interim relief, the High Court by an order dated 18.06.1996 issued the interim direction restraining the State of M.P. from taking any step pursuant to the fresh tender notice. Appellant Mohd. Gazi was not impleaded as a party/respondent in the said writ petition. He received a letter from the officials of the State of M.P. calling upon him to execute a purchase agreement as per clause 7(2) of the tender notice with the Conservator of Forest after depositing the balance security as shown in the letter dated 01.19.1996. Consequently, the Appellant deposited a sum of '2,68,217.72P as security amount. The Appellant also filed an application for intervention in the writ petition filed by Respondent No.4 which was rejected on 01.04.1997. The writ petition filed by Respondent No.4 was disposed of by a learned Single Judge of the High Court by quashing the order dated 27.01.1996 to the extent by which the earnest money deposited by Respondent No.4 had been directed to be forfeited and a direction was issued to refund the earnest money to Respondent No.4. After the disposal of the aforesaid writ petition, the Appellant also by his letter dated 24.04.1997 requested Respondents No.2 and 3 to refund the security amount of Rs.2,68,271.72P. 21. The Hon'ble Supreme Court after noticing the facts held as under:-

> "3. The facts of the case giving rise to the determination of the questions of law formulated hereinabove are that a tender notice

inviting tenders for disposal of tendu leaves for the 1995 session was issued by the respondent State on 20-11-1995. Respondent 4 offered his tender in respect of different lots including Lot 597 and was declared the highest bidder for the said lot on 20-12-1995. On account of some complaints made by other bidders and on account of alleged manipulations on the part of the respondent officials the highest bid of Respondent 4 was not accepted and his tender cancelled by order dated 27-1-1996. Fresh notice for tenders for the aforesaid lot were issued on 20-5-1996 in which the appellant herein was declared the highest bidder. In the meantime, Respondent 4 filed Writ Petition No. 2147 of 1996 in the High Court challenging the order of cancellation of tender dated 27-1-1996 and retender notice dated 23-5-1996. He also prayed for interim relief to the extent that pursuant to the fresh tender notice dated 20-5-1996 the respondent officials be restrained from executing any fresh agreement. The High Court vide order dated 18-6-1996 issued an interim direction restraining the respondent officials from taking any step pursuant to the fresh tender notice. It is pertinent to note that the appellant herein was not impleaded as a party-respondent in the aforesaid writ petition. He received a letter from officials Respondents 1 to 3 calling upon him to execute purchase agreement as per clause 7(2) of the tender notice with the Conservator of Forests after depositing the balance security as shown in the letter dated 1-9-1996. Consequently, the appellant deposited a sum of Rs 2,68,217.72 as security amount. The appellant also filed an application for intervention in the writ petition filed by Respondent 4 which was rejected on 1-4-1997. The writ petition filed by Respondent 4 was disposed of by a learned Single Judge of the High Court by quashing order dated 27-1-1996 to the extent by which the earnest money deposited by Respondent 4 had been directed to be forfeited and a direction was issued to refund the earnest money to Respondent 4. After disposal of the aforesaid writ petition the appellant requested Respondents 2 and 3 to refund his security amount of Rs 2,68,217.72 vide his letter dated 24-4-1997. He pleaded that tendu leaves, which was a perishable item, had already perished and become rotten with the result that its value had become useless by lapse of time. He also

prayed for 18% interest on the security amount which was alleged to have illegally been detained by the respondent officials for no fault of the appellant. It is contended by the appellant that after his letter dated 24-4-1997 Respondent 2 sent an ante-dated letter dated 10-4-1997 directing the appellant to execute the agreement by 10-5-1997 and deposit the remaining tender price in four instalments as detailed therein. Apprehending that the authorities might proceed to forfeit his earnest money and blacklist him, the appellant was constrained to file Writ Petition No. 1934 of 1997 in the High Court praying for quashing of order dated 1-4-1997 and refund of earnest money along with an amount of Rs 10 lakhs claimed as damages. He further prayed that he should not be compelled to enter into an agreement in pursuance of a letter dated 19-6-1996. The writ petition was allowed by a learned Single Judge of the High Court on 10-12-1997 with a direction to Respondents 1 to 3 to refund the security amount to the appellant forthwith. Not satisfied with the order of the learned Single Judge, Respondents 1 to 3 filed a letters patent appeal before the Division Bench of the High Court which was partly allowed vide the order impugned in this appeal.

4. It is not disputed that on account of litigation initiated by Respondent 4 without impleading the appellants as party in his litigation, he was prevented from taking the benefit of the acceptance of his tender notice by the respondent officials. It also cannot be denied that tendu leaves are a perishable item. For no fault of his the appellant was prevented from collecting the tendu leaves for which he had deposited his security amount. It is worth noticing that when the writ petition filed by Respondent 4 was partly allowed by a learned Single Judge of the High Court, the respondent officials had not filed a letters patent appeal.

5. In Writ Petition No. 1934 of 1997 filed by the appellant, the learned Single Judge of the High Court held on facts:

"In view of these circumstances, this Court has no hesitation in holding that the contract between the parties has frustrated. The respondents are not entitled to compel the petitioner to purchase or lift the tendu leaves at the price quoted by him. The respondents are duty-bound to return the money received from

the petitioner at the time of submission of the tender. If the respondents suffer any losses because of the acts of Respondent 4 they are free to take proper legal proceedings before the competent court of law for recovery of damages if the laws permit them. The petition is allowed. No costs."

6. The Division Bench, while disposing of the LPA, also found that the appellant could not be held responsible for not lifting the tendu leaves and thereby had not committed breach of any condition of the tender. Finding that the State was also not responsible for any breach, the Division Bench decided to pass the order impugned on the basis of equities. The arguments advanced on behalf of the appellant before the Division Bench that there was no fault on his part because he had offered bid and was prepared to accept the tendu leaves which he could not lift on account of stay order were found by the Division Bench to be not erroneous. The Division Bench held that "the submission of the learned counsel does not appear to be erroneous". As the State also could not be held responsible for the fault, the Division Bench directed that a sum of Rs 30,000 be deducted from the earnest money of the appellant. Such a direction of the High Court cannot be sustained in view of the findings of fact returned in favour of the appellant."

22. In my view the authorities cited above are not applicable to the facts of the present case and hence are of no help to the Petitioners.

23. On the other hand, the case is squarely covered by a Division Bench judgment of this Court in Aggarwal Associates where the Petitioner declined to deposit the balance sale consideration on the ground that there was some dispute between the MCD and the DDA. The Division Bench while upholding the order passed by the learned Single Judge that the DDA was bound to deliver possession of the property only on the Petitioner depositing the balance 75% of the bid money, held that the Petitioner wanted to project a case that the DDA was not in a position put the Petitioner in possession which was only a make-believe affair. In the instant case also, in the first tender the unit/shop was offered for post office only whereas in the second tender (in question) the unit/shop was offered as a general shop (professional office). The Division Bench dealt

with at great length as to what is bid amount, what is earnest money and what are the consequences of deposit of such money, and when the same can be forfeited. Paras 2 to 7 of the judgment in Aggarwal Associates are extracted hereunder:-

"2. The learned Counsel Mr. Vashisht submitted that the DDA was not in a position to give possession of the property, therefore, the petitioner was fully justified in not paying the balance 75%. The DDA has no right to forfeit the sum of Rs.7,50,000/-. The learned Counsel for the DDA submitted that the auction conditions provide for forfeiture and the petitioner did not act in accordance with the terms and conditions of the auction notice, the DDA was always ready to hand over possession of the property and, as a matter of fact, the petitioner by letter dated 16.4.1994 asked for extension of time by 45 days for the payment of balance amount. The possession of the plot was always with the DDA and in terms of Clause 2(viii) of the Terms and Conditions of the Auction, the auction was liable to be cancelled and the DDA was entitled to pass an order forfeiting the earnest money.

3. The Supreme Court had an occasion to consider the question of the right of the DDA to forfeit the amount in **Delhi Development Authority v. Grishthapana Cooperative Group Housing Society Ltd.,** 1995 Supp (1) SCC 751. The facts as noticed by the Supreme Court are this:

"The appellant proposed to allot land to about 260 Cooperative Group Housing Societies in Dwaraka Phase-I, so also to about 60 such societies in Narela. When the proposal was first made on 1.10.1990, the cost was fixed at Rs. 975/- per sq. m. for Dwaraka land and Rs. 950/- for Narela land. The societies interested in the allotment land were required to deposit Rs. 5 lakhs as earnest money

and to formally apply for allotment. On the interested societies accepting the offer, formal allotment was made by communication of the appellant dated 25.1.1991. Before possession of the land came to be delivered, the appellant by its communication dated 3.11.1992 stated that the premium of the land shall be payable at Rs. 1650.65 per sq. m. which was the value determined by the Government of India, vide its notification dated 21.10.1992/23.10.1992. Some of the societies approached the Delhi High Court being aggrieved at the enhancement of the premium. The High Court ultimately upheld the enhancement, which decision has since been reported in 26 Delhi Reported Judgments 156. On this Court being approached against the judgment of the High Court by way of special leave petitions, the same came to be disposed of by extending the time of paying the first instalment upto 31.5.1993 which date had been fixed by the High Court as 30.4.1993. This Court made it clear in its order that the facility to pay first instalment with interest will be available only upto 31.7.1993; and no extension of time beyond this date would be granted."

The respondents not paying the amount, as ordered by the Supreme Court, the DDA forfeited a sum of Rs.5/- lakhs, which was payable as earnest money as per clause 4 II of the allotment order dated 3.11.1992. This was challenged before this Court and this Court directed the DDA not to make any deduction and directed the DDA to refund the entire amount. That was challenged before the Supreme Court.

4. The Supreme Court noted the submission on behalf of the DDA in the following terms:

"In support of the first legal proposition, Mr. Jaitley referred us principally to a three-Judge Bench decision of this Court in **Hanuman Cotton Mills v. Tata Air Craft Ltd.,** 1969) 3 SCC 522 in which there is a detailed discussion of what is meant by earnest money and what are the consequences of deposit of such money and when can the same be forfeited. The Bench after reviewing various

decisions noted in the judgment which includes that of the Privy Council rendered in Chiranjit Singh v. Har Swarup, AIR 1926 PC 1, culled out the following principles regarding the 'earnest' at page 139: (SCC p. 531, para 21)

"(1) It must be given at the moment at which the contract is concluded.

(2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.

(3) It is part of the purchase price when the transaction is carried out.

(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.

(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."

5. The Society which was the respondent before the Supreme Court Contended:

"In view of the aforesaid legal position, the contention advanced by Mr. Bishwajit Bhattacharya for the respondents is that there was no acceptance of the offer given on 3.11.1992 in which mention was made about the rate of premium being Rs. 1650.65. The appellant is, therefore, not entitled, according to the learned Counsel, to forfeit the earnest money, as no such money had been deposited after this date in token of acceptance of the proposal."

6. The Supreme Court held that the sum of Rs. 5 lakhs, which was deposited, was liable to be forfeited by the D.D.A. and judgment of this Court reversed.

7. The dictum laid down by the Supreme Court is that the terms agreed between the parties have to be considered for considering the question of the right to forfeiture by one of the parties to the contract."

24. Since the forfeiture of the earnest money was in terms of the tender, the Petitioner cannot make any grievance about the same.

25. It is true that by letter dated 26.09.2008, RVAG Centurion Infra Solutions Ltd. informed the Petitioner that the Petitioner's request for loan proposal of Rs.150 lacs could not be considered because of the litigation in respect of the above mentioned property, the fact however, remains that it was not one of the conditions of the offer that the successful bidder would be entitled to avail loan from any Financial Institutions. Since, the Petitioner has violated the terms and conditions of the bid, the Respondent was entitled to forfeit the earnest money in terms of the tender.

26. The writ petition, thus, is devoid of any merit and the same is accordingly dismissed.

27. Pending applications, if any, also stands disposed of.

ILR (2014) I DELHI 321
W.P. (C)

SALIM LALVANI ....PETITIONER

VERSUS

DELHI DEVELOPMENT AUTHORITY ....RESPONDENT

(G.P. MITTAL, J.)

W.P. (C) NO. : 8095/2012 DATE OF DECISION: 05.12.2013

Constitution of India, 1950—Article 226: Whether on account of dispute between legal heirs of a deceased who was a lease holder of a DDA plot and a third person, DDA can withhold mutation in favour of the legal heir or make it subject to the outcome of such dispute. Petitioner's father was alloted land by DDA. After the death of father and mother and upon execution of relinquishment deed by Petitioner's sister, Petitioner became sole lease holder of the said plot.

Despite repeated request DDA did not substitute name of petitioner as lessee. Writ petition filed by Petitioner allowed and DDA directed to decide application of Petitioner. Not decided, Petitioner filed contempt. DDA contended that suit for specific performance filed by third party against the petitioner had earlier sold a portion of the plot to the third party—Intimated Respondent that petitioner had earlier sold a portion of the plot to the third party, thereby in view of pending litigation mutation was effected subject to outcome of the civil suit. Whether on account of dispute between legal heirs of a deceased who was a lease holder of a DDA plot and a third person, DDA can withhold mutation in favour of the legal heir or make it subject to the outcome of such dispute. HELD—DDA does not dispute the genuineness/validity of documents on the basis of which the petitioner became entitled to the lease hold rights in the plot. There is no existing right in favour of third party. DDA therefore, is neither under any obligation nor is expected to entertain any application by any third party and to either delay mutation or pass an order of substitution subject to any dispute which might be raised by any third party. In case third party succeeds in the litigation nothing prevents DDA from taking action in accordance with law. Writ petition allowed. DDA directed to amend the contents of the mutation by deleting the words that mutation/substitution of the subject property shall be "subject to the outcome of court case no. CS (OS) 1995/2008".

Admittedly, there is a dispute between the Petitioner and one Vijay Israni (V.I.) who has filed a suit for specific performance of a contract dated 19-29.04.2008 against the Petitioner being CS (OS) No.1995/2008 pending disposal in this Court. According to the Agreement to Sell which has been set up by said V.I., the Petitioner had agreed to sell the plot in question to him on a total monetary consideration of Rs. 4 crores. Out of the same, an advance of Rs.5 lacs

was given by said V.I. to the Petitioner and out of the remaining, certain amounts were payable on execution of a certain GPA and the balance at the time of execution of the Sale Deed. I need not go into the averments made in the said civil suit. Suffice it to say that a suit for specific performance is pending against the Petitioner. The case of the Petitioner is that the said V.I. had himself committed the breach of the agreement and failed to pay the amount as agreed and thus, the contract stood rescinded. In any case, the Petitioner avers that in spite of the pending dispute, the DDA could not have effected mutation in favour of the Petitioner, subject to the outcome of the said civil suit.

(Para 7)

There is no gain saying that the DDA does not dispute the genuineness/validity of the document on the basis of which the Petitioner became entitled to the lease hold rights in Plot No.149, Block A-I, in the layout plan of Safdarjung Development Residential Scheme, New Delhi and that is why mutation was effected in his favour. **(Para 10)**

Admittedly, there is no existing right in favour of Vijay Israni. The DDA is therefore, neither under any obligation nor is expected to entertain any application by any third party and to either delay mutation or pass an order of mutation subject to any dispute which might be raised by any third party.

(Para 11)

In the eventuality of Vijay Israni succeeding in the litigation pending before the original side of this Court, nothing prevents the DDA then to take action in accordance with the order passed by the Court. **(Para 12)**

Important Issue Involved: DDA cannot withhold mutation or make them subject to outcome on account of proceedings initiated by a third party.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Vijay Kaundal Advocate, with Mr. Rupesh Gupta, Advocate.

FOR THE RESPONDENTS : Ms. Shobhana Takiar, Advocate.

RESULT: Writ Petition allowed.

G.P. MITTAL, J.

1. The short question falling for determination in the instant writ petition is whether on account of any dispute between the legal heirs of a deceased, who was a lease holder of a DDA plot and a third person, the DDA can withhold mutation in favour of the legal heirs or make it subject to the outcome of any such dispute.

2. Let me recapitulate the facts.

3. Late Shri Parmanand Jhuromal Lalvani (PJL), father of the Petitioner was the highest bidder of Plot No.149, Block A-I, in the layout plan of Safdarjung Development Residential Scheme, situated at Ring Road South Delhi. Said PJL was allotted the earlier said plot and a lease deed was executed in his favour. On his (PJL) demise, his wife Mrs. Mohini P. Lalvani succeeded to the said plot on the basis of a Will executed by him. Thereafter, the Petitioner and his sister Ms. Anjali Lavani succeeded to the said plot on the basis of a Will executed by their mother Mrs. Mohini P. Lavani, who expired on 12.06.2007. Ms. Anjali Lalvani by a relinquishment deed dated 25.10.2010 relinquished her 50% share in favour of the Petitioner and thus the Petitioner has become the sole lease holder in respect of the plot.

4. The Petitioner filed a testamentary case bearing No.47/2007 and he was granted probate in respect of the Will executed by Mrs. Mohini P. Lalvani by an order dated 21.10.2011 passed by this Court.

5. By an application dated 01.09.2011, the Petitioner applied for substitution of his name as a lessee in respect of the plot in question. The Respondent DDA wrote a letter dated 19.10.2011 to him seeking certain documents including the original relinquishment deed executed by Ms.

Anjali Lavani. In pursuance of the letter dated 19.10.2011 written by the DDA, the Petitioner furnished certain documents including the original relinquishment deed executed by Ms. Anjali Lalvani. Despite repeated visits made by the Petitioner's counsel, the Petitioner failed to get any further response which forced him to file a writ petition being W.P.(C) No.4229/2012. The same came to be disposed of by the learned Single Judge of this Court by an order dated 24.07.2012 with directions to the DDA to decide the application for mutation moved by the Petitioner within a period of eight weeks.

6. According to the Petitioner, the application was not decided as per the directions of the court compelling him to move a contempt petition. In any event, ultimately a mutation letter dated 04.12.2012 was issued in favour of the Petitioner, which is extracted hereunder:-

> "As per direction of Hon'ble High Court of Delhi dated 17.10.2012 and 30.11.2012, in supersession of earlier mutation letter dated 15.10.2012 & 25.10.2012, I am to inform you that consequent upon the death of Smt. Mohini P. Lalvani w/o Late Shri Parmanand Jhuromal Lalvani, the lessee/mutate of the plot under reference and on the basis of documents furnished by you and other documents including relinquishment deed registered vide No.13538 in Additional Book No.1 Vol. No.5610 on pages 105 to 118 dated 29.10.10 in the office of Sub-Registrar-IX, Delhi mutation of plot No.149, Block-A-1, Safdarjung Enclave, New Delhi, is allowed in the name of Shri Salim Lalvani being the real son of late Smt. Mohini P. Lalvani w/o late Shri Parmanand Jhuromal Lalvani subject to payment of all outstanding dues against the plot, if any and subject to outcome of Court Case No. CS(OS) 1995/2008."

7. Admittedly, there is a dispute between the Petitioner and one Vijay Israni (V.I.) who has filed a suit for specific performance of a contract dated 19-29.04.2008 against the Petitioner being CS (OS) No.1995/2008 pending disposal in this Court. According to the Agreement to Sell which has been set up by said V.I., the Petitioner had agreed to sell the plot in question to him on a total monetary consideration of Rs. 4 crores. Out of the same, an advance of Rs.5 lacs was given by said V.I. to the Petitioner and out of the remaining, certain amounts were payable on execution of a certain GPA and the balance at the time of

execution of the Sale Deed. I need not go into the averments made in the said civil suit. Suffice it to say that a suit for specific performance is pending against the Petitioner. The case of the Petitioner is that the said V.I. had himself committed the breach of the agreement and failed to pay the amount as agreed and thus, the contract stood rescinded. In any case, the Petitioner avers that in spite of the pending dispute, the DDA could not have effected mutation in favour of the Petitioner, subject to the outcome of the said civil suit.

8. The sole defence taken to the writ petition by the Respondent is that by a letter dated 29.03.2012, the said V.I. had intimated to the DDA that the Petitioner had sold his one-half undivided share in the earlier said plot in favour of V.I. on the basis of the Agreement to Sell dated 19-29.04.2008. Thus, V.I. was required to attend the office of the DDA on 10.05.2008 and in view of the pending litigation between the Petitioner and V.I., the mutation was effected only subject to the outcome of the CS(OS) No.1995/2008.

9. It is contended that the Petitioner's motive in making a request for deletion of the crucial safety clause in the mutation letter smacks of mala fides on the part of the Petitioner. It is thus prayed that the writ petition is liable to be dismissed.

10. There is no gain saying that the DDA does not dispute the genuineness/validity of the document on the basis of which the Petitioner became entitled to the lease hold rights in Plot No.149, Block A-I, in the layout plan of Safdarjung Development Residential Scheme, New Delhi and that is why mutation was effected in his favour.

11. Admittedly, there is no existing right in favour of Vijay Israni. The DDA is therefore, neither under any obligation nor is expected to entertain any application by any third party and to either delay mutation or pass an order of mutation subject to any dispute which might be raised by any third party.

12. In the eventuality of Vijay Israni succeeding in the litigation pending before the original side of this Court, nothing prevents the DDA then to take action in accordance with the order passed by the Court.

13. I need not go into the question of mala fides and demand of illegal gratification claimed to have been raised by some officers of the DDA to effect mutation in favour of the Petitioner. There is no escape from the conclusion that filing of a civil suit for specific performance on the basis of an agreement to sell ought not to have been taken cognizance by the DDA for effecting the mutation subject only to the outcome of the decision therein. It is also noteworthy that the DDA is not even a party and could not have been a party to the said civil suit filed by Vijay Israni against the Petitioner.

14. Consequently, the writ petition succeeds. This Court hereby issues a writ of mandamus directing the Respondent DDA to amend the contents of the mutation letter bearing No.F.4(176)/1963/LAB(R)/DDA/6400 dated 04.12.2012 by deleting the words that mutation/substitution of the subject property shall be "subject to outcome of Court Case No. CS(OS) 1995/2008" within a period of six weeks.

15. The writ petition is allowed in above terms.

16. Pending application also stands disposed of.

ILR (2014) I DELHI 327
W.P. (C)

BABU RAM **....PETITIONER**

VERSUS

LAND & BUILDING DEPARTMENT & ANR. **....RESPONDENTS**

(G.P. MITTAL, J.)

W.P. (C) NO. : 1582/2013 **DATE OF DECISION: 05.12.2013**

Constitution of India, 1950—Article 226—Petitioner seeking reopening of file for allotment of an alternative plot which was closed in 1992—Petitioner applied for allotment of alternative plot of land on lieu of land acquired for development, as per policy of Govt. of Delhi in 1989. Despite expiry of sufficient time petitioner failed to receive any information—RTI filed in 2005 revealed file of the Petitioner was closed since relevant documents weren't furnished despite communications—Petitioner didn't receive communication, alleged malafides on the part of the Respondent—Hence, present writ petition. Respondent contends despite repeated requests Petitioner didn't furnish required information—Petitioner's case therefore closed in 1992 and the same communicated to the Petitioner—Policy doesn't allow reopening of closed cases. Held: Petitioner does not specifically deny receiving communications from the Respondent—Petitioner approached Respondent after 20 years of closure of his case—While Limitation Act normally doesn't apply to proceedings u/Article 226, settled law that WP filed beyond period of limitation prescribed for civil suits be dismissed on delay and laches.

It is true that the provisions of Limitation Act, 1963 do not apply to the proceedings under Article 226 of the Constitution of India, but in a catena of cases it has been held that if a writ petition is filed beyond the period of limitation prescribed for filing a civil suit for a similar cause, the High Court would be well entitled not to entertain the petition on the ground of delay and laches. **(Para 12)**

This case is squarely covered by the judgment of the Division Bench of this Court in **Govt. of NCT of Delhi v. Jagdish Singh,** 192 (2012) DLT 368, wherein it was reiterated that a person should approach the Court within reasonable time to avail legal remedy. The delay of ten years in approaching the Court was stated to be an abnormal delay by the Division Bench. Paras 6 and 7 of the judgment in Jagdish Singh are extracted hereunder:-

"6. We find force in this submission. We may point out that when the respondent received rejection letter dated 23.2.1999, he responded to the same vide his letter dated 14.7.1999 refuting the stand of the DDA by alleging that he had never received any letter qua the first allotment. 7. Thus, it cannot be said that the respondent was ignorant. He was aware of his rights. In such circumstances, after receiving the rejection order in the year 1999, there was no reason for him to wait for an abnormal period of ten years before approaching the Court in the year 2009. We have to keep in mind that the purpose of the scheme for allotment of alternate plot is to give succour for those persons whose lands were acquired and on this deprivation; they become homeless or need house in this city. Such persons have to file appropriate application within time and it is also necessary for them to avail legal remedies without delay. Since we find that there is an inexplicable delay of more than ten years, that itself is sufficient to reject the petition of the appellant." **(Para 16)**

Important Issue Involved: While Limitation Act doesn't apply to proceedings under Article 226, settled law holds that a writ petition filed beyond period of limitation prescribed for civil suits must be dismissed on delay and laches.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Puneet Goel, Advocate.

FOR THE RESPONDENTS : Ms. Urvi Kuthiala, Advocate.

CASES REFERRED TO:

1. *Govt. of NCT of Delhi* vs. *Jagdish Singh,* 192 (2012) DLT 368.
2. *Banda Development Authority, Banda* vs. *Moti Lal Agarwal & Ors.,* (2011) 5 SCC 394.
3. *State of Madhya Pradesh and Another* vs. *Bhailal Bhai & Anr.,* AIR 1964 SC 1006.

RESULT: Writ Petition dismissed.

G.P. MITTAL, J.

1. By virtue of this writ petition under Article 226 of the Constitution of India, the Petitioner seeks a writ of mandamus directing reopening of his File No.F.30(10)/28/29/89/L&B/Alt 4425, dated 06.02.1992 for allotment of an alternative plot, which was closed by letter dated 06.02.1992.

2. The Petitioner further seeks allotment of alternative plot in lieu of his acquired land. According to the averments made in the writ petition, 1447 Bighas of the Petitioner's land situated in the area of Karkardooma was acquired by Notification No.F.15(III)/59-LSC, dated 13.11.1959 for planned development of Delhi. Award No.54/69-70 dated 30.03.1971 was passed in this regard. As per the policy of the Delhi Govt. any person whose land measuring more than 10 acres is acquired is eligible for alternative allotment of a plot measuring 400 sq. yds.

3. By an application dated 27.04.1989, the Petitioner applied for allotment of an alternative plot of land in lieu of the land acquired as per the policy of the Govt. of NCT of Delhi. The Petitioner also submitted a copy of jama bandi by letter dated 30.07.1990 in response to the letter dated 03.07.1990 written by Respondent No.1.

4. The Petitioner's grievance is that despite expiry of sufficient time, the Petitioner failed to receive any response from the Respondents and therefore, he moved an application under the Right to Information Act, 2005 in the office of Respondent No.1 and then obtained a certified copy of the file relevant to the Petitioner's application for alternative allotment of a plot.

5. The Petitioner was shocked to learn that his file was closed as he (the Petitioner) had failed to furnish the required documents in spite of receiving letters dated 03.07.1990 and 31.01.1992. It is stated that the letter dated 31.01.1992 was never received by the Petitioner. It is further stated that the record appears to have been manipulated by the Respondents

to cover up their own wrong.

6. In the counter affidavit filed by the Respondents, it is stated that by a letter dated 20.07.1990, the Petitioner was asked to deposit various documents, viz., affidavit as per specimen, jama bandi, khatoni attested by Tehsildar, Relinquishment Deed, if any etc. In response to the said letter, the Petitioner furnished a copy of the jama bandi, which was in Urdu. Since the jama bandi was in Urdu, the same could not be understood by the officials and thus, the Petitioner was asked to furnish a translated copy thereof. Thereafter, Respondent No.1 by a letter dated 13.01.1992 again required the Petitioner to furnish the documents, failing which his case would be closed. Despite repeated written requests, the Petitioner failed to furnish the required information. The Petitioner's case was therefore, closed and he was informed about the same by a letter dated 06.02.1992. The letter closing the Petitioner's case was duly delivered at his address and there is no policy to reopen the closed case. Thus, Respondent No.1 has prayed for dismissal of the present writ petition.

7. At the outset, it was stated by the learned counsel for the Respondents that there was a clerical mistake in the letter dated 06.02.1992 written to the Petitioner in mentioning the dates of the two letters as 03.07.1990 and 31.01.1992. He has submitted that in fact the Petitioner was written letters dated 03.07.1990 and 13.01.1992.

8. The Petitioner himself has placed on record letter dated 03.07.1990 (Annexure P-5), letter dated 13.01.1992 (Annexure P-7) and letter dated 06.02.1992 (Annexure P-8) purported to have been written by Respondent No.1, through which the Petitioner's case for allotment of alternative plot was closed. As per the case of Respondent No.1, letters dated 03.07.1990 and 13.01.1992 were written seeking certain documents from the Petitioner and on his failure to do the same, his file was closed by letter dated 06.02.1992.

9. In the entire writ petition, it has nowhere been averred by the Petitioner that the letter dated 13.01.1992 and 06.02.1992 were not received by him. After the closure of his case in the year 1992, the Petitioner woke up only in 2012 when he moved certain applications under the RTI Act and approached the Public Grievance Commission for redressal of his grievance.

10. The learned counsel for the Petitioner submits that Respondent No.1 has now invented a false story of writing letters dated 13.01.1992 and 06.02.1992. He relies on the judgment of this Court in Lekh Ram v. Land & Building Department & Ors., W.P.(C) No.2118/2013, decided on 22.04.2013 to urge that a time bound direction can be issued to process the Petitioner's application for allotment of an alternative plot.

11. The authority cited by the learned counsel for the Petitioner is not attracted to the facts of the present case. In the aforesaid case, the application of the Petitioner was not processed and his case had not been closed and he (the Petitioner in that case) only wanted processing of his application in a time bound manner. I have already observed above that the writ petition is completely silent that the letter dated 13.01.1992 asking for some documents and then the letter dated 06.02.1992 closing the Petitioner's case were not received by him. In the absence of any denial, it has to be presumed that these letters were duly received. Although it is not the case of the Petitioner that the letters dated 13.01.1992 and 06.02.1992 were not received by him, even if that would have been so, he cannot be granted relief if he approaches this Court after a long period of twenty years.

12. It is true that the provisions of Limitation Act, 1963 do not apply to the proceedings under Article 226 of the Constitution of India, but in a catena of cases it has been held that if a writ petition is filed beyond the period of limitation prescribed for filing a civil suit for a similar cause, the High Court would be well entitled not to entertain the petition on the ground of delay and laches.

13. In **State of Madhya Pradesh and Another v. Bhailal Bhai & Anr.,** AIR 1964 SC 1006, the Supreme Court held as under:-

> "21. .....Learned Counsel is right in his submission that the provisions of the Limitation Act do not as such apply to the

granting of relief under Art.226. It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 can be measured. This Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable....."

14. Similarly in **Banda Development Authority, Banda v. Moti Lal Agarwal & Ors.,** (2011) 5 SCC 394, the Supreme Court laid down that if a writ petition is filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the High Court should not ordinarily entertain the writ petition. In para 17, the Supreme Court held as under:-

"17. It is true that no limitation has been prescribed for filing a petition under Article 226 of the Constitution but one of the several rules of self-imposed restraint evolved by the superior courts is that the High Court will not entertain petitions filed after long lapse of time because that may adversely affect the settled/ crystallised rights of the parties. If the writ petition is filed beyond the period of limitation prescribed for filing a civil suit for similar cause, the High Court will treat the delay unreasonable and decline to entertain the grievance of the petitioner on merits."

15. In the instant case, the Petitioner approached the Respondent and the Public Grievance Commission only in 2012, that is, after 20 years of the closure of his case.

16. This case is squarely covered by the judgment of the Division Bench of this Court in **Govt. of NCT of Delhi v. Jagdish Singh,** 192 (2012) DLT 368, wherein it was reiterated that a person should approach the Court within reasonable time to avail legal remedy. The delay of ten years in approaching the Court was stated to be an abnormal delay by the Division Bench. Paras 6 and 7 of the judgment in Jagdish Singh are extracted hereunder:-

"6. We find force in this submission. We may point out that when the respondent received rejection letter dated 23.2.1999,

he responded to the same vide his letter dated 14.7.1999 refuting the stand of the DDA by alleging that he had never received any letter qua the first allotment. 7. Thus, it cannot be said that the respondent was ignorant. He was aware of his rights. In such circumstances, after receiving the rejection order in the year 1999, there was no reason for him to wait for an abnormal period of ten years before approaching the Court in the year 2009. We have to keep in mind that the purpose of the scheme for allotment of alternate plot is to give succour for those persons whose lands were acquired and on this deprivation; they become homeless or need house in this city. Such persons have to file appropriate application within time and it is also necessary for them to avail legal remedies without delay. Since we find that there is an inexplicable delay of more than ten years, that itself is sufficient to reject the petition of the appellant."

17. On account of this abnormal delay of twenty years in approaching the Court and that too when the receipt of the letters dated 13.01.1992 and 06.02.1992 is not specifically denied by the Petitioner, this Court will not entertain the writ petition.

18. The writ petition is accordingly dismissed.

ILR (2014) I DELHI 334
I.A.

ARVIND GARG ....PLAINTIFF

VERSUS

NEETA SINGHAL ....DEFENDANT

(JAYANT NATH, J.)

I.A. NO. : 19812/2012 (U/O 6 R 17 CPC) IN CS(OS) NO. : 347/2010 **DATE OF DECISION: 06.12.2013**

Code of Civil Procedure, 1908—Order VI Rules 17—Party proposing to make amendment—Application for amendment of pleadings must clearly state what is proposed to be omitted, altered, substituted or added to the original pleadings—Amendment cannot be allowed if it tantamount to changing the whole plaint with a new plaint—Complete replacement of old plaint with a completely new plaint is not permitted under Order VI Rule 17.

Hence in view of the said judgments, it is clear that when a party moves an application for amendment of pleadings, it must state what is proposed to be omitted, altered, substituted or added to the original pleadings. The present application makes no such effort. **(Para 14)**

What the plaintiff actually intend to do is not really alter or amend the pleadings but replace the entire pleadings with altogether new pleadings. In my view, complete replacement of old plaint with a completely new plaint is not permitted under Order 6 Rule 17 CPC. It may be possible to permit such a change in certain special circumstances under section 151CPC. But no such special circumstances are pleaded or argued. **(Para 19)**

Important Issue Involved: Party moving an application for amendment of pleadings must state the portion proposed to be omitted, altered, substituted or added to original pleadings.

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. Lalit Gupta, Ms. Payal Gupta and Mr. P. Gautham, Advocates with plaintiff in person.

FOR THE RESPONDENT : Mr. Shoeb Shakeel and Mr. Shishir Kumar, Advocates.

CASES REFERRED TO:

1. *Gurdial Singh* vs. *Raj Kumar Aneja,* (2002)2 SCC 445.
2. *M/s. Estralla Rubber* vs. *Dass Estate (Pvt.) Ltd.,* AIR2001 SC 3295.
3. *Kedar Nath & Ors.* vs. *Ram Parkash,* 76 (1998) DLT 755.

RESULT: Application Dismissed.

JAYANT NATH, J.

IA No. 19812/2012 (u/O 6 R 17 CPC)

1. The plaintiff has filed the present suit for declaration, permanent and mandatory injunction against the plaintiff's wife, the defendant. The plaintiff contends that in the period 2002 to 2009 from his own source of income and funds, he purchased several movable and immovable properties. It is further averred that some of the immovable properties were purchased in the joint name with the defendant, his wife, while some properties were purchased in the single name of the defendant out of love and affection. Hence, he has filed the present suit claiming exclusive ownership of the suit properties and seeking a declaration to declare him the owner of the said movable and immovable properties.

2. The present application is filed under Order 6 Rule 17 CPC for amendment of the plaint.

3. It is stated in the application that the plaintiff had filed IA No.13237/2010 under Order 1 Rule 10 CPC for impleadment of the daughter of the parties as a necessary and proper party. This application was allowed on 05.07.2011. It is stated that pursuant to impleadment of additional defendant under Order 1 Rule 10 CPC as a consequence thereof, the existing plaint requires to be suitably amended as provided under Order 1 Rule 10 (4) CPC. It is further stated that the defendant has in the written statement taken various objections.

4. It is further stated that in the given facts and circumstances, it is almost impossible to amend the existing plaint by adding and/or deleting paragraphs and/or lines in between. The plaintiff is stated to have filed an earlier application under Order 6 Rule 17 CPC for amendment of the plaint. However, it is stated that as this Court was of the view that the

proposed amendment be specified in the application, hence the earlier application for amendment i.e. IA No. 13238/2010 was withdrawn with leave and liberty to file a fresh amendment application.

5. The present application is now filed for seeking amendment of the plaint.

6. I have heard the learned counsel for the parties.

7. Learned counsel for the plaintiff submits that the amendments which are now being sought are as a consequence of the addition of defendant No. 2 as a party. It is further stated that no admission is sought to be withdrawn and no relief is sought to be added which is barred by time. Only an additional relief of possession is being sought. He also relies upon the judgment of the Supreme Court in the case of **M/s. Estralla Rubber vs. Dass Estate (Pvt.) Ltd.,** AIR2001 SC 3295 to submit that every amendment of pleading is to be allowed where such amendment is required for proper and effective adjudication of controversy between the parties and to avoid multiplicity of judicial proceedings subject to certain conditions such as allowing amendment should not result in injustice to the other side, a clear admission should not be allowed to be withdrawn and a time barred claim cannot be allowed to be raised.

8. Learned counsel for the defendant has opposed the application and submitted that the proposed amendment seeks to amend every para of the plaint. The application does not mention which portion of the plaint is sought to be amended, what is being added and what is being deleted.

9. First I will deal with the submission of the learned counsel for the plaintiff, namely, that by the present amendment application, no relief which is barred by time is sought to be added, no admission is sought to be withdrawn and that the nature of the plaint after the amendments remain the same. Learned counsel for the defendant has controverted this contention. However, when it was requested to the learned counsel for the defendant to point out as to what portion of the proposed amendments tends to change the nature of the case, he was unable to do so.

10. But that does not settle the matter. The amendment as proposed virtually tentamounts to substituting the whole plaint with a virtually new plaint. A perusal of the proposed amendments would show that each and every para of the original plaint, namely, paras 1 to 18 are sought to be

substituted by new paras. There is no attempt to point out what is sought to be incorporated in the proposed amendment. The lines, phrases and words which are being added or deleted have not been mentioned in the present application. It is not possible to decipher from a reading of this application as to what is being amended or what is being deleted or what is being added. What is mentioned in the application is the way in which the paras would be read after the proposed amendment is carried out. Hence, it is not possible to find out as to whether any new cause of action is being introduced, whether admission made is sought to be replaced, etc. It is also not possible to make out whether the proposed amendments are necessary for the purpose of determining the real questions in controversy between the parties.

11. Reference may be had to the judgment of the Full Bench of this High Court in the case of **Kedar Nath & Ors. vs. Ram Parkash,** 76 (1998) DLT 755. In para 17 of this judgment, this Court held as follows:-

> "17. Any party whether it be the plaintiff or the defendant proposing to make an amendment in his pleading must make an appropriate application setting out specifically, (i) the additional pleading sought to be added, (ii) the pleading sought to be deleted or altered, so that the Court may clearly form an opinion as to the nature and extent of the proposed amendment and its legal implications for the purpose of, exercising its discretionary jurisdiction of permitting or denying the prayer for amendment: Once an amendment is allowed, if the amendment be minor, negligible or clerical merely, such amendment may be incorporated in the original pleading by using red ink and certified by the Court Master or the Judge after being initialled and dated by the party making the same. If the amendment be substantial in character then an amended pleading should be filed setting out all the contents of the original pleading; therefrom scoring out by drawing a single line across such portions as have been deleted by the leave of the Court by using a red ink pen; and setting out the portions allowed to be added by the Court either by typing out in red ink or by highlighting the same in red or yellow. The utility of this practice is that white ink or by highlighting the same in red or yellow. The utility of this practice is that while appreciating the case of a party, the Court can know what was

the case originally pleaded by the party and what was the case pleaded by way of amendment. At times this would be immense utility to the Judge adjudicating upon the credibility of the case set out by the party going at the trial."

12. Reference may also be had to the judgment of the Hon'ble Supreme Court in the case of **Gurdial Singh vs. Raj Kumar Aneja,** (2002)2 SCC 445. In para 13, the Hon'ble Supreme Court held as follows:-

> 13. .... Unless and until the court is told how and in what manner the pleading originally submitted to the court is proposed to be altered or amended, the court cannot effectively exercise its power to permit amendment. An amendment may involve withdrawal of an admission previously made, may attempt to introduce a plea or claim barred by limitation, or, may be so devised as to deprive the opposite party of a valuable right accrued to him by lapse of time and so on. It is, therefore, necessary for an amendment applicant to set out specifically in his application, seeking leave of the court for amendment in the pleading, as to what is proposed to be omitted from or altered or substituted in or added to the original pleading.

13. The Hon'ble Supreme Court in the said judgment also took into account an amendment which is applicable in the State of Punjab and Haryana and the Union Territory of Chandigarh where Order 6 Rule 17 sub-clause 2 has been added which reads as follows:-

> "17.(2) Every application for amendments shall be in writing and shall state the specific amendments which are sought to be made indicating the words or paragraphs to be added, omitted or substituted in the original pleading."

14. Hence in view of the said judgments, it is clear that when a party moves an application for amendment of pleadings, it must state what is proposed to be omitted, altered, substituted or added to the original pleadings. The present application makes no such effort.

15. Apart from the above, in my view, the amendment cannot even otherwise be allowed as it virtually tentamounts to changing the whole plaint with a new plaint.

16. Order 6 Rule 17 CPC provides as follows:-

> "17. Amendment of pleadings.-The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:"

17. Hence, the aforesaid provision permits a party to alter or amend his pleadings. The meaning of 'alter' in the Black's Law Dictionary, Sixth Edition-1996 by Henry Campbell reads as follows:-

> **"Alter:** To make a change in; to modify; to vary some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially. To change in one or more respects, but without destruction of existence or identity of the thing changed; to increase or diminish."

18. The meaning of 'amend' in the Black's Law Dictionary, Sixth Edition-1996 by Henry Campbell reads as follows:" Amend. To improve. To change for the better by removing defects or faults. To change, correct, revise.

19. What the plaintiff actually intend to do is not really alter or amend the pleadings but replace the entire pleadings with altogether new pleadings. In my view, complete replacement of old plaint with a completely new plaint is not permitted under Order 6 Rule 17 CPC. It may be possible to permit such a change in certain special circumstances under section 151CPC. But no such special circumstances are pleaded or argued.

20. The present application is completely without any merit. The same is hence dismissed.

CS(OS) 347/2010 and I.A. Nos. 15151-52/2013

21. List on 30.01.2014 the date already fixed in the applications.

ILR I (2014) DELHI 340
CS (OS)

MAHESH SINGHAL .....PLAINTIFF

VERSUS

BHUPINDER NARAIN BHATNAGAR .....DEFENDANT

(JAYANT NATH, J.)

IA NO. : 22691/2012 (U/S 151 R/W O39 R4 CPC) IN CS(OS) NO. : 354/2012

DATE OF DECISION: 06.12.2013

Specific Relief Act, 1963—Section 16 (c)—Plaintiff filed the suit seeking specific performance of an agreement to sell—Plaintiff deposited the balance amount in the form of fixed deposit and the defendant was restrained from creating any third party interest or transfer possession of property in question—Plaintiff filed the application seeking withdrawal of deposit but prayed for continuation of interim injunction—Combined reading of Section 16(c) and Explanation (i) leads that there is no statutory provision under the Specific Relief Act to Claim specific performance for the plaintiff to deposit the balance sale consideration when filing a suit pertaining to specific performance—It is not necessary that before grant of injunction in a suit for specific performance for purchase of immovable property that a direction has to be passed for deposit of balance sale consideration—It is based on facts and equity—Held, Plaintiff is allowed to withdraw sale consideration deposited in the Court—Evidence shall be recorded expeditiously—Plaintiff to remain bound to re-deposit the amount as directed by the Court.

Section 16(c) and explanation (i) to Section 16 of the Specific Relief Act reads as follows:-

"16. **Personal bars to relief.**-Specific performance of a contract cannot be enforced in favour of a person....

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms and performance of which has been prevented or waived by the defendant.

Explanation.-For the purposes of clause (c),-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court; ..." **(Para 14)**

A perusal of the said statutory provision would show that in view of Section 16 (c) of the said Act, it is necessary to aver and prove by the plaintiff that he has performed and has always been ready and willing to perform the essential terms of the contract. The explanation (i) further clarifies that it is not essential for the plaintiff to actually deposit in Court any money. It would follow from a reading of the said statutory provisions that there is no statutory requirement under the Specific Relief Act to claim Specific Performance for the plaintiff to deposit the balance sale consideration when filing a suit pertaining to specific performance of an agreement pertaining to an immovable property. **(Para 15)**

Important Issue Involved: It is not in every case that before grant of injunction in a suit for specific performance of the sale of immoveable property, a direction has to be passed to the Plaintiff to deposit the balance sale consideration and the same would depend on the facts and circumstances of each case, if the court is of the view that facts and equities demand so, a specific direction may be given.

[As, Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajshekhar Rao and Mr. Anirudh wadhwa, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Katyal, Advocate.

CASES REFERRED TO:

1. *Mohan Overseas Pvt. Ltd.* vs. *Goyal Tin & General Industries,* (2010) 169 DLT 487 (DB).
2. *SABH Infrastructures Ltd* vs. *Jay Shree Bagley,* 2010 (114) DRJ 493.
3. *Gonugunta Gopala Krishna Murthy* vs. *Uppala Jwala Narasinham and Anr.,* 2001 (5) ALT 88.
4. *Sukhbir Singh and others* vs. *Brij Pal Singh and others,* AIR 1996 SC 2510.
5. *Sukhbir Singh and Ors.* vs. *Brijpal Singh* MANU/SC/0629/1996 : AIR 1996 SC 2510.
6. *Rajesh Kumar* vs. *Manoj Jain,* 1998 (47) DRJ 353.
7. *Syed Dastagir* vs. *T.R. Gopalkrishnasetty,* JT 1999(3) SC 642.
8. *N.P. Thirugnanam* vs. *Dr.R.Jagan Mohan Rao and Ors.,* (1995) 5 SCC 115.
9. *M/s. Ansal Properties & Industries Pvt. Ltd.* vs. *Rajinder Singh and Anr.,* 1989 (17) DRJ 161
10. *Gomathinayagam Pillai and Ors.* vs. *Pallaniswami Nadar* MANU/SC/0067/1996: [1967] 1 SCR 227.
11. *Bank of India Ltd.* vs. *Jameshjeet A.H. Chinoy and Ors.* AIR 1950 PC 90).
12. *A.H. Chinoy and Chinoy and Company,* AIR 1950 PC 90.
13. *Ardashir M. Mama* vs. *Flora Sasson* MANU/PR/0024/1928 : AIR 1928 PC 208.

RESULT: Application Disposed.

JAYANT NATH, J.

IA No. 22691/2012 (u/S151 r/w O 39 R 4 CPC)

1. The plaintiff has filed the accompanying suit seeking specific performance of an agreement to sell dated 08.08.2011. As per the plaint, the plaintiff entered into an agreement to sell with the defendant whereby the defendant agreed to sell property bearing No. 213, Dayanand Vihar, Delhi 110092 admeasuring 163 sq. yards for a total consideration of Rs.3.83crores. A sum of Rs. 10 lacs was paid as earnest money at the time of signing of the agreement to sell and purchase. It is averred in the plaint that the balance sale consideration of Rs. 3.73 crores was to be paid by the plaintiff to the defendant on or before 15.01.2012.

2. This matter came up for hearing before the Court on 13.02.2012 when the learned counsel appearing for the plaintiff made a submission that the plaintiff is ready and willing to deposit the balance amount of Rs. 3.73 crores in the form of Fixed Deposit before this Court. Subject to deposit of the said sum in the form of Fixed Deposit Receipt within a period of four weeks, the defendant was restrained from creating any third party interest or to transfer possession of the same in favour of any third person till further orders. The plaintiff has deposited the said FDR of Rs. 3.73 crores.

3. The above interim orders were passed in IA No.27172/2011 which has not yet been disposed of. The plaintiff has in the meantime filed the present application IA No.2269/2012 for modification of the said interim orders passed by this Court on 13.2.2012.

4. It is averred in the present application that the conduct of the plaintiff in voluntarily depositing the balance sale consideration amply demonstrates the bonafides of the plaintiff. It is averred that on account of the fact that the money is deposited in Court, the defendant has since the starting of the litigation been trying to delay the matter. A lot of time has been wasted in filing the written statement on one pretext or the other. It is hence stated that the plaintiff is suffering as the defendant is delaying the proceedings and funds are locked up in the fixed deposit. It is further averred that locking of the funds is causing serious prejudice to the plaintiff and there is an opportunity cost to the plaintiff as the plaintiff is being deprived of the use of the said money. It is further

stated that the plaintiff has been forced to borrow money from third parties at commercial rates and it is causing needless financial burden. Hence, it is stated that the interim injunction may be continued but the plaintiff be permitted to withdraw the said deposit. It is stated that in case the present application is not allowed, substantial and irreparable prejudice will be caused to the plaintiff while on the other hand no prejudice will be caused to the defendant.

5. An undertaking is given in para 15 of this application that the plaintiff undertakes to deposit the money in Court as and when he is called upon to do so, in case the application is allowed.

6. The defendant has opposed the present application. In reply, it is averred that the plaintiff has not approached this Court with clean hands. It is stated that in fact, the terms and conditions of the sale were reduced in writing on 05.08.2011 whereby it was stated that the total sale consideration in respect of the suit property would be Rs. 3.83 crores out of which 39 lacs was to be paid as advance by the plaintiff to the defendant by 15.08.2011. The balance sale consideration was to be paid by 05.02.2012. The plaintiff is stated to have paid a token sum of Rs. 1 lac on that date, namely, 05.08.2011. It is averred that all these terms were stated in a written slip/receipt which has been deliberately suppressed by the plaintiff. As far as the agreement to sell dated 08.08.2011 which is relied upon by the plaintiff, it is stated that the same was not signed by the defendant out of his own free will and the same is not enforceable in the eyes of law. It is further stated that the said agreement to sell dated 08.08.2011 does not override the terms and conditions agreed upon on 05.08.2011.

7. Regarding the contention about the plaintiff not approaching this Court with clean hands it is further averred that on 10.09.2012, this matter was listed before the Joint Registrar for the purpose of admission/denial of documents. The plaintiff produced the original agreement to sell and purchase dated 08.08.2011. It was, at that stage, revealed that the original agreement to sell was different as compared to the photocopy which was placed on record earlier inasmuch as the photocopy placed on record has signatures of only one witness whereas the original produced by the plaintiff at the time of admission/denial of documents had the signatures of two witnesses. In view of the said position, the Joint

Registrar on 10.09.2012 directed that the said original Agreement to Sell be taken on record and placed in a sealed cover. The defendant has averred that an application under Section 340 Cr.P.C. being Crl. M.A. No. 19259/2012 on account of manipulation of the said document had been filed by the defendant.

8. It is further stated that despite having agreed to pay the balance sum of Rs. 39 lacs as earnest money by 15.08.2011, time being the essence of contract, the plaintiff has failed to pay the same. It is further averred that the plaintiff was aware that the deal was entered into to facilitate purchase of three flats for the three sons of the defendant in his lifetime. It is stated that defendant is 85 years old who has been manipulated by the plaintiff. Hence, the application is opposed.

9. I have heard the learned counsel for the parties. 10. Learned counsel for the defendant has relied on the judgment of the Division Bench of this High Court in the case of **Mohan Overseas Pvt. Ltd. vs. Goyal Tin & General Industries,** (2010) 169 DLT 487 (DB) to contend that in cases pertaining to specific performance of contract relating to immovable properties, when passing injunction orders directing the plaintiff to deposit sale consideration in the Court, would have the effect of placing the parties on an equal footing. Hence, no injunction order could be passed in a Suit for specific performance unless the plaintiff deposits in Court the full balance sale consideration. Learned counsel has also relied upon the judgement of another Division Bench of this High Court in the case of **SABH Infrastructures Ltd vs. Jay Shree Bagley,** 2010 (114) DRJ 493 where the judgment in **Mohan Overseas P. Ltd. vs. Goyal Tin & General Industries,** (supra) was reiterated. Based on these two judgments of the Division Bench of this High Court it is argued that the money deposited by the plaintiff cannot be released without vacating the stay order.

11. Learned counsel has further submitted that one of the principles for granting an injunction to the plaintiff is that he must approach the court with clean hands. He relies on the averment as stated above about suppression of the hand written note dated 05.08.2011 and the interpolation done in the agreement to sell dated 08.08.2011 by the plaintiff to submit that the plaintiff has not approached this Court with clean hands. He further submits that the plaintiff is guilty of manipulating an old man by making him sign an agreement which he never intended to sign. He

further avers that there is no reason to permit the plaintiff to withdraw the amount deposited in Court inasmuch as the defendant is ready in case this Court appoints a Court Commissioner to record evidence so that the matter is expeditiously disposed of.

12. Learned counsel for the plaintiff has vehemently submitted that there is no statutory obligation on the plaintiff to deposit the entire sale consideration in Court. Reliance is placed on Explanation (i) to Section 16 of the Specific Relief Act where it is stated that it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court. It is submitted that a huge amount of money of Rs. 3.73 crores is locked up without serving any purpose whatsoever for either of the parties. It is further averred that none of the judgments hold that it is mandatory for the plaintiff to deposit the said amount before being granted any injunction. Reliance is placed on the following judgments:-

(i) **Mohan Overseas P. Ltd. vs. Goyal Tin & General Industries,** (2010) 169 DLT 487.

(ii) **M/s. Ansal Properties & Industries Pvt. Ltd. vs. Rajinder Singh and Anr.,** 1989 (17) DRJ 161

(iii) **Gonugunta Gopala Krishna Murthy vs. Uppala Jwala Narasinham and Anr.,** 2001 (5) ALT 88.

(iv) **Rajesh Kumar vs. Manoj Jain,** 1998 (47) DRJ 353.

(v) **Syed Dastagir vs. T.R. Gopalkrishnasetty,** JT1999(3) SC 642.

(vi) **N.P. Thirugnanam vs. Dr.R.Jagan Mohan Rao and Ors.,** (1995) 5 SCC 115.

13. It is also argued that the defendant is deliberately delaying the proceedings so that the plaintiff suffers. Reliance is placed on the fact that the written statement was placed on record only on 10.09.2012.

14. Section 16(c) and explanation (i) to Section 16 of the Specific Relief Act reads as follows:-

> "16. **Personal bars to relief.**-Specific performance of a contract cannot be enforced in favour of a person....
>
> (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms and performance of which has been prevented or waived by the defendant.
>
> Explanation.-For the purposes of clause (c),-
>
> (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court; ..."

15. A perusal of the said statutory provision would show that in view of Section 16 (c) of the said Act, it is necessary to aver and prove by the plaintiff that he has performed and has always been ready and willing to perform the essential terms of the contract. The explanation (i) further clarifies that it is not essential for the plaintiff to actually deposit in Court any money. It would follow from a reading of the said statutory provisions that there is no statutory requirement under the Specific Relief Act to claim Specific Performance for the plaintiff to deposit the balance sale consideration when filing a suit pertaining to specific performance of an agreement pertaining to an immovable property.

16. The Division Bench of this High Court in the Case of **Mohan Overseas P. Ltd. vs. Goyal Tin & General Industries** (supra) in para 20 held as follows:

> "20. In this analysis, it seems to us that there are myriad alternatives which the Court can adopt in suits for specific performance. If it is satisfied that it would be unconscionable or unfair for the Defendant to transfer or create any third party interest in the immovable property which is the subject-matter of a concluded contract the Court can pass an injunction. Keeping in mind that specific performance orders are essential equitable reliefs, the Court will not allow the pendency of a suit to work inequities against the owners of the property. The mere rejection of a temporary injunction does not remove this imbalance since the very pendency of the suit has the effect of jeopardizing the title of the Defendant/Owner. Broadly speaking, we are of the opinion that in most cases, directing the Plaintiff to deposit the

sale consideration in the Court, would have the effect of placing the parties on equal footing. Obviously, this is the rationale behind the First Explanation to Section 16(c) of the SR Act which preserves the power of the Court to make such direction. ....”

17. It would be necessary to also have a look on the judgments relied upon by the learned counsel for the plaintiff. Reference may be had to the judgment of the Division Bench of this High Court in the case of **M/s. Ansal Properties & Industries Pvt. Ltd. vs. Rajinder Singh and Anr.** (supra). In para 7 of this judgment, this court held as follows:

> “7. ... Normally, therefore, no money is to be tendered and it is only in cases where the Court feels that, though an averment may have been made in the plaint as postulated by explanation to Section 16, the plaintiff may not actually have the money to pay the consideration, therefore, in order to bind the plaintiff or to satisfy itself above the truthfulness of the averment, the Court may direct the plaintiff to deposit the money in Court. This course, in our view, should be adopted rarely, and only when the Court is of the opinion that the averment of the plaintiff being ready and willing to perform the contract may not be quite true.”

18. In view of Section 16(c) of the Act, the Hon’ble Supreme Court in the case of **N.P. Thirugnanam vs. Dr.R.Jagan Mohan Rao and Ors.** (supra) in para 5 held as follows:

> “5. ... The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness

> to perform his part of the contract is to be adjudged with reference to the contract of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was always ready and willing to perform his part of the contract.

19. The Single Judge of this High Court in the case of **Rajesh Kumar vs. Manoj Jain** (surpa) held as follows:

> “35. The question is whether it is necessary for the plaintiff in a suit for specific performance either to deposit in Court or prove at this stage that he has got ready cash with him to show his readiness and willingness to do his part of the agreement to sell. Under Section 16(c) of the Specific Relief Act, the plaintiff seeking specific performance is to plead and prove during trial that he had performed or has always been ready and willing to perform essential terms of the contract which are to be performed by him continuously between the date of the contract and the date of the hearing of the suit (**Gomathinayagam Pillai and Ors. v.Pallaniswami Nadar** MANU/SC/0067/1996: [1967] 1 SCR 227 and **Ardashir M. Mama v. Flora Sasson** MANU/PR/0024/1928 : AIR 1928 PC 208.
>
> 36. In order to prove himself to be ready and willing to perform his obligation under a contract to purchase, the purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. (**Bank of India Ltd. v. Jameshjeet A.H. Chinoy and Ors.** AIR 1950 PC 90).
>
> 37. In **Sukhbir Singh and Ors. v. Brijpal Singh** MANU/SC/0629/1996 : AIR 1996 SC 2510 also it has been held that law is not in doubt that it is not a condition that respondent should have ready cash with him.
>
> 38. In any case, by depositing the balance sale consideration, the plaintiff has prima facie shown his financial position, capacity to finance the purchase and his readiness and willingness. Since the defendant is not ready and willing as at present to complete the sale, the plaintiff should not be burdened with the condition that he should part with the balance sale price at this stage.”

In that case also a Suit was filed for specific performance of the Agreement to Sell. This Court while passing an ex parte interim order restraining the defendant therein from creating, selling, alienating or creating third party interest directed the plaintiff to deposit the balance sale consideration of Rs.36,89,000/- in the form of FDR. The plaintiff complied with the said directions. The plaintiff later filed an application claiming for release of the said FDRs which was opposed by the defendant. This Court in view of the above observations held that the Suit is likely to take time to reach finality and that in the meantime plaintiff cannot be deprived of use of his money as well as enjoyment of the property. This Court noted as follows in paragraph 40:

> "40. The suit is likely to take time to reach its finality, In the meantime, he cannot be deprived the use of his money as well as the enjoyment of the property. Equity helps honest plaintiff against defendant who breaches solemnly given undertaking."

The application of the plaintiff for release of FDRs was allowed. Reference may also be had to the judgment of the Privy Council in the case of Bank of India, Ltd. vs. Jamsetji **A.H. Chinoy and Chinoy and Company,** AIR 1950 PC 90 wherein in para 15 the Privy Council held as follows:-

> "15. ... But to prove himself ready and willing a purchaser has not necessarily to produce the money or to vouch a concluded scheme for financing the transaction. The question is one of fact, and in the present case the Appellate Court had ample material on which to found the view it reached. Their Lordships would only add in this connexion that they fully concur with Chagla A.C.J. when he says: "in my opinion, on the evidence already on record it was sufficient for the court to come to the conclusion. that the first plaintiff was ready and willing to perform his part of the contract. It was necessary for him to 'work out actual figures and satisfy the court what specific' amount a bank would have advanced on the mortgage; of his property and the pledge of these shares."

20. Reference may also be had to the judgment of the Hon'ble Supreme Court in the case of **Sukhbir Singh and others versus Brij Pal Singh and others,** AIR 1996 SC 2510 where in paragraph 5 the

Hon'ble Supreme Court held as follows:-

> "5. Law is not in doubt and it is not a condition that the respondents should have ready cash with them. The fact that they attended the Sub-Registrar's office to have the sale deed executed and waited for the petitioners to attend the office of the Sub-Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till date of the decree. It would, therefore, be clear that the courts below have appropriately exercised their discretion for granting the relief of specific performance of the respondents on sound principles of law."

21. The proposition that follows from the above case law is that it is not in every case that before grant of injunction in a suit for specific performance of immovable property a direction has to be passed to the plaintiff to deposit balance sale consideration. It would depend on the facts and circumstances of each case. If the Court is of the view that on the facts equities demand, plaintiff would be directed to deposit the balance sale consideration as provided in explanation (i) of Section 16 of the Specific Relief Act before granting interim orders to the plaintiff.

22. Lot of stress has been laid by the learned counsel for the defendant on the Judgment of the Division Bench in the case of **Mohan Overseas P. Ltd. vs. Goyal Tin & General Industries,** (supra). As already noted above, this Court did not hold in the said case that whenever an injunction is granted in a suit for specific performance for agreement to sell immovable property the plaintiff must deposit the balance sale consideration in Court. That was a case in which the learned Single Judge had dismissed the injunction application and had held that there was no concluded contract between the parties. It was in those circumstances that the appellant had himself held out in the appeal that he was ready and willing to deposit the entire sale consideration. This offer was made by the appellant to show his bona fide. It was in those circumstances that the Court directed the appellant to deposit the balance sale consideration in Court. It was laid down that directing the plaintiff

to deposit sale consideration in the Court, would have the effect of placing the parties on equal footing. There was no proposition laid down, as argued by the learned counsel for the defendant, that no interim order can be passed against the defendant in a suit for specific performance of agreement for sale of immovable property unless the entire balance sale consideration is deposited in Court.

23. As far as the case of **SABH Infrastructures Ltd vs. Jay Shree Bagley** (supra) is concerned, that was a case where the plaintiff had paid a sum of Rs. 21 lacs when he entered into the agreement whereas the learned Single Judge had directed him to deposit a balance consideration of Rs. 1.74 crores. The court noted that the plaintiff has invested only a sum of Rs.21 lacs in a property transaction the total value of which was Rs.7.40 crore. The matter pertained to a Collaboration Agreement. It was in those circumstances that the Division Bench took the view that there were no grounds to interfere in the order passed by the learned single judge exercising discretion and directing the plaintiff to deposit the said sum of Rs. 1.74 crores. In that case, the defendant had strongly urged that the suit is not maintainable inasmuch as a Collaboration Agreement or MOU is not enforceable. It was on those facts that the learned single judge had passed an order for injunction based on deposit of the amount of Rs.1.74 crores. The court had in the said judgement noted as follows:-

> "6. ... The obverse has not been considered, namely, whether it is equitable that on payment of a meagre sum which represents less than five per cent of the consideration a plaintiff would be entitled to freeze transactions on a property for a substantial period of time. Where property prices are volatile and ascendant, it would always be the interest and endeavour of a speculator to file a suit for specific performance by creating the illusion of disputes. ..."

24. The other argument of learned counsel for the defendant, namely, that the plaintiff has not come to Court with clean hands would also not have a bearing for the purposes of determination of the present application. Defendant has prima facie not been able to show any serious prejudice due to the stated acts which allegedly constitute acts of the plaintiff in not approaching the Court with clean hands. It is a question of interpretation of documents as to whether the subsequent agreement dated 8.8.2011

between the parties superseded the terms and conditions of the earlier Agreement dated 5.8.2011. The total agreed sale consideration in the two agreements is the same. There is only some variation in the advance payment. There is also some variation in the date of payment of the final consideration. The receipt dated 05.08.2011 states that the balance sale consideration was to be paid by 05.02.2012 whereas the agreement to sell dated 08.08.2011 states that the balance sale consideration was to be paid earlier, namely, by 15.01.2012. As to whether the agreement to sell dated 08.08.2011 supersedes and/or rescind or alter or extinguish the previous contract as set to be envisaged in receipt dated 05.08.2011 is a question of fact which will have to be determined after the evidence is led by the parties.

25. Regarding the additions, having been made to the original agreement to sell dated 8.8.2011 the only addition that has been purportedly done by the plaintiff is that the copy of the agreement to sell that had been originally filed had signature of one witness whereas the original Agreement to Sell produced by the plaintiff had signatures of two witnesses. There are no changes in the terms and conditions of the Agreement in the copy originally filed and the original produced later. The alleged interpolation has prima facie at this stage caused no prejudice to the defendant.

26. In the present case, the plaintiff had on his own offered to deposit the full balance sale consideration of Rs. 3.73 crores on 13.02.2013 when IA No. 27172/2012 came up for hearing. Based on the said statement, the Court granted injunction in favour of the plaintiff restraining the defendant from creating third party interest and from transferring possession of the property in favour of third person. The plaintiff has deposited the amount. The said amount of Rs. 3.73 crores has been lying deposited in Court since March, 2012.

27. There is merit in the submission of learned counsel for the plaintiff that there has been needless delay on the part of the defendant in pursuit of the present case. Summons were issued on 13.2.2012 by this Court, returnable for 27.3.2012. On 27.3.2012 learned counsel for the defendant entered appearance. On 13.8.2012 learned counsel for the defendant had stated that he had recently been engaged and he sought an adjournment to assist the Court. He stated that the written statement had

already been filed alongwith an application for condonation of delay. The Court noted that the written statement and the application are not on record. On 3.9.2012 the Joint Registrar noted that the written statement is not on record. On 10.9.2012 the Joint Registrar finally noted that the written statement is on record. Thereafter the defendant filed IA No.21423/2012 on 27.11.2012 for amendment of the written statement. The amendments seek to add averments that the Agreement to Sell and purchase dated 8.8.2011 is manipulated, tampered and void on various grounds. The said application is still pending disposal. Hence, even the issues are yet to be framed. It is apparent that the disposal of the Suit is likely to take some time. A large amount is lying blocked for which there is a heavy cost being borne by the plaintiff.

28. One may look at the conduct of the parties prior to the filing of the suit. Agreement to sell, as per the plaintiff, has been executed on 08.08.2011 and the last date for making payment of balance sale consideration was 15.01.2012. The plaintiff sent a legal notice to the defendant much prior to the date of making payment, namely, 21.11.2011 calling upon the defendant to receive the balance sale consideration of Rs. 3.73 crores and execute necessary title documents in favour of the plaintiff within 7 days of the receipt of this notice. Hence, in fact the plaintiff was seeking to pre-pone the date of completion of the transaction. Counsel for the defendant sent a reply to the said legal notice on 17.01.2012 i.e. after the date fixed for payment of balance sale consideration stating that the defendant has been constantly requesting the plaintiff and the broker for a copy of the agreement to sell but to no avail. It is further stated that the defendant is an old man and has now discovered that he cannot on his own perform his part of the agreement. The present suit is thereafter filed expeditiously, namely, on 08.02.2012. In the written statement, the defendant has taken the plea that the defendant being an old man has been manipulated by the plaintiff and made to sign the agreement to sell dated 08.08.2011. Hence, it is stated that the agreement to sell was not entered into by the defendant with his free will and has been got signed under misrepresentation. Receipt of advance of Rs. 10 lacs is not denied. Hence, in view of the above facts, the prima facie conclusion is that the plaintiff has acted bona fide. It is a matter of fact that there are minor differences in the two agreements. If the plaintiff had to really take advantage of manipulation, deceit and force, then there would have been material differences in the terms and conditions of the

two documents.

29. It is, however, no doubt true that the continuation of the injunction order does cause some prejudice to the defendant inasmuch as a valuable property worth Rs. 3.83 crores is sought to be entangled/ is sought to be stayed by filing the present suit by the plaintiff who has paid mere Rs. 10 lacs to the defendant which is even less than 10% of the sale price.

30. However, in my view, in view of the facts of this case, no purpose would be served to have the balance sale consideration deposited in Court. To protect the interest of the defendant, the present application is allowed subject to the condition that once the pleadings of the parties are complete and issues are framed, the evidence of the parties shall be recorded by a retired ADJ who will be appointed as a Court Commissioner. The entire costs of recording of evidence by the Court Commissioner shall be borne exclusively by the plaintiff and endeavour shall be made to complete the evidence within a period of six months. The plaintiff will not be entitled to seek adjournment other than on account of some serious impediment which would be at the discretion of the Court Commissioner. The plaintiff shall also remain bound by its undertaking to re-deposit the said amount of Rs. 3.73 crores if later directed by the Court. An affidavit to the said effect shall be filed by the plaintiff to the said effect within two weeks.

31. Hence, subject to above, the present application is allowed. The plaintiff is permitted to take back fixed deposit of Rs. 3.73 crores along with accumulated interest. The interim order dated 03.02.2012 to that extent is modified. The application is disposed of.

32. It is, however, clarified that all observations made herein are only for the purpose of disposal of the present application. Nothing contained herein shall in any way affect the rights and contentions of the parties at the time of final adjudication of the suit.

CS(OS) 354/2012

List before the Joint Registrar on 03.02.2014 for further proceedings.

ILR (2014) I DELHI 356
CS (OS)

ASHOK KUMAR RAIZADA .....PLAINTIFF

VERSUS

THE BANK OF RAJASTHAN & ANR. .....DEFENDANT

(JAYANT NATH, J.)

CS(OS) NO. : 1730/2010 DATE OF DECISION: 09.12.2013

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act)—Section 34—Whether the civil Court has no jurisdiction to entertain the suit on account of Section 34 of SARFAESI Act?—Facts of the present case show that there is an arguable case of fraud—The relationship between the plaintiff and defendant of a creditor and a borrower is denied in the present case—Hence, civil Court has jurisdiction to entertain the suit despite Section 34 of SARFAESI Act.

The facts of the present case undoubtedly show that there is an arguable case of fraud having been done as there are various sale deeds floating for the same property. Prima facie it appears that Chander Prakash Aggarwal appears to have been in possession of two separate sale deeds for the same property and appears to have created separate mortgages in favour of defendant No. 1 and in favour of defendant No. 2 respectively. The plaintiff also claims ownership of the said suit property. There is another person by the name of Alok Gupta who also appears to be claiming title to the suit property. An FIR being FIR No. 88/2009 also appears to have been registered against the said Alok Gupta and appropriate proceedings are pending. Clearly, the facts of this case would fall within the exceptional

category pointed by the Supreme Court in the case **Mardia Chemicals vs. Union of India** (supra). Hence, I hold that this Court would have the territorial jurisdiction to try the present case. **(Para 17)**

Important Issue Involved: If by clever drafting Plaintiff creates an illusion of a cause of action, to maintain a suit or oust the jurisdiction of the Tribunal or to keep the banks and financial institutions at bay, the court is duty bound to nip it in the bud.

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. S.C. Singhal, Advocate.

FOR THE RESPONDENT : Mr. S.K. Garg, Advocate for D-1. Mr. Rohit Verma, Advocate.

CASES REFERRED TO:

1. *V. Thulasi* vs. *Indian Overseas Bank,* III (2011) BC 556.
2. *Ritu Gupta & Anr.* vs. *Usha Dhand & Ors.* in CS(OS) 188/2011.
3. *State Bank of India* vs. *Jigishaben B.Sanghavi & Ors.,* II(2011) BC 139 (DB).
4. *Swati Organics Ltd. & Ors.* vs. *State Bank of India & Ors,* III (2008) BC 80 (DB).
5. *Mardia Chemicals Ltd.* vs. *Union of India and Ors.,* AIR 2004 SC 2371.
6. *I.T.C. Ltd.* vs. *Debts Recovery Appellate Tribunal* MANU/SC/0968/1998 : 1998 (2) SCC 70.
7. *T. Arvandandam* vs. *T.V. Satyapal* MANU/SC/0034/1977 : 1977 (4) SCC 467.

RESULT: Ordered accordingly.

JAYANT NATH, J.

CS (OS) No.1730/2010

1. On 8.5.2012, this Court had framed a preliminary issue which reads as under:-

> "1. Whether the civil Court has no jurisdiction to entertain the present suit on account of Section 34 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002? OPD"

Arguments were heard on the said issue.

2. The present Suit is filed by the plaintiff seeking a decree of declaration holding that the Sale Deeds dated 15.4.2005 and 29.6.2005 in favour of Late Chander Prakash Aggarwal deposited with defendant No.1/ ICICI Bank Limited (previously The Bank of Rajasthan Ltd) and Punjab National Bank/defendant No.2 respectively and other related documents relating to property No.A-59, Shankar Garden, New Delhi are forged and fabricated and do not pertain to the said property and that the sale deed dated 11.2.1986 of the plaintiff related to the said property are genuine and to declare that the plaintiff is the absolute owner of the said property and has nothing to do with the loan granted by defendants No.1 and 2 to late Shri Chander Prakash Aggarwal.

3. As per the plaint it is averred that the plaintiff is the owner and in possession of the said property/land No.A-59, Shankar Garden, New Delhi measuring 216-2/3 sq.yds which the plaintiff is stated to have purchased vide Registered Sale Deed dated 11.2.1986 from Shri Sarjivan Kumar Sood, Shri Puran Chand Sood, Shri Ashok Kumar Sood and Shri Pradeep Kumar Sood all sons of late Shri Chaman Lal Sood. It is stated that on 18.12.2008 plaintiff received information from the neighbours that a notice has been pasted on its boundary wall whereby a Receiver has been appointed. It revealed that one Shri Alok Gupta had preferred an Appeal and certain orders had been passed in favour of Shri Alok Gupta. The plaintiff claims that on enquiry it was revealed that the said Shri Alok Gupta had produced Sale Deed dated 26.10.1971. The plaintiff claims that on verification from the records of the Sub Registrar Office, no Sale Deed was found to be registered. The plaintiff hence filed FIR No.88/2009 with the relevant Police Station. It is averred that a challan has been filed by the police. The plaintiff filed an appeal being S.A. No.474/2008 before the Debt Recovery Tribunal-III and on 23.12.2008 the DRT-III was pleased to quash the order of attachment by the

Authorized Officer declaring that the property of the plaintiff cannot be taken as a secured asset of the bank.

4. It is stated that despite the said order from DRT plaintiff was informed by defendant No.1/Bank of Rajasthan that the property stood mortgaged to them by Shri Chander Prakash Aggarwal who had expired in May, 2009. It was further revealed that the said Shri Chander Prakash Aggarwal had also taken a loan from Defendant No.2/Punjab National Bank to the tune of Rs.3.75 crores and mortgaged the said suit property by depositing title deed. Punjab National Bank/defendant No.2 proceeded under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI Act) The plaintiff filed WP(C) No.10510/2009 to restrain the defendants from taking possession of Suit property. Ultimately, it is stated that from the Counter-Affidavit filed by the banks it was revealed that the Sale Deed created in favour of late Shri Chander Prakash Aggarwal, which was deposited with the Bank of Rajasthan is dated 15.4.2005 and is executed by one Shri Jagdish Chander as Attorney of Smt. Mayawati. The Sale Deed deposited with the defendant No.2/Punjab National Bank by the said late Shri Chander Prakash Aggarwal dated 29.6.2005 is stated to have been executed by one Shri Lehja Singh Yadav as General Power of Attorney of Smt.Mayawati, wife of Shri Sardari Mal Gupta.

5. The Writ Petition was disposed of by this Court on 28.7.2010 observing that disputed questions of facts, cannot be decided in the writ jurisdiction and, therefore, the plaintiff was advised to take appropriate measures including filing of a Civil Suit. Hence, the present Suit is filed by the plaintiff.

6. Apart from the above, it is further averred that in the documents created in favour of Smt. Mayawati, the boundaries of the plot are shown as North Plot No. A-60, South Plot No. A-58. The plaintiff submits that he was able to trace out all the particulars of plots A-58, A60 and A62 which are adjoining plots of the plaintiff. It is stated that these plots are also having the same particulars of the land as it exists in the sale deed of the plaintiff, namely, Village Possangipur and Rec. No. 6, Killa No. 23. Hence, it is strenuously urged that the sale deeds in favour of Smt. Mayawati and Late Shri Chander Prakash Aggarwal are fake and do not relate to the suit property.

7. The defendant No.1 in the Written Statement has claimed that defendant No.1 has taken action under Section 13(2) of the SARFAESI Act and that under the said Act the plaintiff has a remedy available under Section 17 before the Debts Recovery Tribunal, Delhi. Hence, it is stated that in view of Section 34 of the SARFAESI Act the present Suit is barred. It is further denied that the plaintiff is the owner of the said suit property. It is averred that the same is owned by late Shri Chander Prakash Aggarwal, who had purchased it vide Sale Deed dated 15.4.2005 from Shri Jagdish Chand. The said Shri Chander Prakash Aggarwal as sole proprietor of M/s.Apolo Industries had created a valid equitable mortgage by deposit of title deeds in favour of the said defendant on 1.6.2005 and had also deposited all original title deeds pertaining to the said property.

8. Defendant No.2/Punjab National Bank has in the Written Statement stated that it has filed an Original Application (O.A.) bearing No.2134/2009 titled Punjab National Bank versus M/s.Shiva Industries & others of which defendants No.3 to 6 have been arrayed as Legal Heirs of deceased Late Shri Chander Prakash Aggarwal for recovery of Rs.3,29,82,681/-before DRT. It is stated that the said Late Chander Prakash Aggarwal mortgaged the said suit property in favour of said defendant No.2. It is further stated that the said defendant has also initiated proceedings under Section 13(2) of SARFAESI Act by sending a notice dated 04.05.2009 and the remedy available with the plaintiff is under Section 17 of the said Act. It is reiterated that Late Shri Chander Prakash Aggarwal had purchased the suit property vide sale deed dated 29.06.2005 which was executed in his favour by Smt. Mayawati through her attorney Sh. Lehaja Singh Singh Yadav.

9. Defendants No.3 to 6 have also filed written statement stating that they have no knowledge about the ownership of the suit property and are in no way concerned with the same. Hence, it is averred that the said defendants are liable to be deleted from the array of parties. The said defendants No. 3 to 6 are the legal representatives of late Shri Chander Prakash Aggarwal.

10. Based on the above averments, issues were framed and issue No.1 was treated as preliminary issue.

11. Learned counsel appearing for the plaintiff has submitted that

the present Suit is filed pursuant to a fraud played upon by the defendants on the plaintiff. Various allegations are reiterated, namely, that there cannot be two Sale Deeds of different dates in favour of the same person. It is averred that relying upon the judgment of the Hon'ble Supreme Court in the case of **Mardia Chemicals Ltd. v. Union of India and Ors.,** AIR 2004 SC 2371 that the present Suit would be maintainable as the Hon'ble Supreme Court in the said case has carved out an exception in paragraph 51 where it was stated that to a limited extent jurisdiction of Civil Courts can be invoked where the action of secured creditors is fraudulent for his claim is absurd and untenable.

12. There have been no serious submissions made by the learned counsel for defendants No.1 and 2. They have, however, relied upon **State Bank of India versus Jigishaben B. Sanghavi & Ors.,** II(2011) BC 139 (DB) and **Swati Organics Ltd. & Ors. versus State Bank of India & Ors,** III (2008) BC 80 (DB) to claim that the present Suit is barred under Section 34 of the SARFAESI Act.

13. Section 34 of the SARFAESI Act reads as follows:-

> "34. Civil court not to have jurisdiction.No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

The Hon'ble Supreme Court in the case of **Mardia Chemicals Ltd. vc. Union of India and Ors.**(supra) in paragraph 51 held as follows:-

> 51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages.

14. In the present case clearly there are serious allegations of fraud

which have been raised. The plaintiff has admittedly nothing to do with defendants No.1 and 2 inasmuch as neither he is a creditor nor is he a guarantor. He is not a party to any proceedings initiated by defendant Bank before the DRT.

15. Reference may be had to the judgment of the Madras High Court in the case of **V. Thulasi vs. Indian Overseas Bank,** III (2011) BC 556. In para 29 of this judgment, the Court held as follows:-

> "29. By clever and astute drafting, the Plaintiff might create an illusion of cause of action by trying to bring civil suit within the parameters laid down by the Supreme Court in **Mardia Chemicals case,** MANU/SC/0323/2004 : (2004) 4 SCC 311. Pointing that Court has duty to see if such allegations of fraud are thrown just for the purpose of maintaining a suit, in Punjab National Bank v. J. Samsath Beevi 2010(3) CTC 310, Justice V. Ramasubramanian held as under:
>
> > 8. But at the same time, the Court has a duty to see, if such allegations of fraud are thrown, just for the purpose of maintaining a suit and ousting the jurisdiction of the Tribunal and to keep the Banks and Financial Institutions at bay. If by clever drafting, the Plaintiff creates an illusion of a cause of action, the Court is duty bound to nip it in the bud. To find out if it is just a case of clever drafting, the Court has to read the plaint not formally, but in a meaningful manner. So is the dictum of the Apex Court in **T. Arvandandam vs. T.V. Satyapal** MANU/SC/0034/1977 : 1977 (4) SCC 467. It was again reiterated by the Court in **I.T.C. Ltd. vs. Debts Recovery Appellate Tribunal** MANU/SC/0968/1998 : 1998 (2) SCC 70, by holding that clever drafting, creating illusions of cause of action are not permitted in law. The ritual of repeating a word or creation of an illusion in the plaint can certainly be unraveled and exposed by the Court while dealing with an application under Order VII, Rule 11(a)."

16. Similarly this Court in the case of **Ritu Gupta & Anr. vs. Usha Dhand & Ors.** in CS(OS) 188/2011 in para 16 held as follows:-

> "16. Without expressing any final view on the above contentions of the parties, the Court, prima facie, is satisfied that the pleas urged by the parties raises triable issues. Prima facie, it also does appear that the Sale Deeds executed by defendant No. 1 in quick succession in respect of the same property are of doubtful validity and that the plea that they are vitiated on account of fraud would require evidence to be led by the parties before a final view can be taken in the matter. The Court is of the view that the case falls within the exceptional category pointed out by the Supreme Court in the Mardia Chemicals vs. Union of India (supra), with the caveat that it is premature for the Court to express any view as to which of the parties has been party to the fraud that prima facie appears to have been committed."

17. The facts of the present case undoubtedly show that there is an arguable case of fraud having been done as there are various sale deeds floating for the same property. Prima facie it appears that Chander Prakash Aggarwal appears to have been in possession of two separate sale deeds for the same property and appears to have created separate mortgages in favour of defendant No. 1 and in favour of defendant No. 2 respectively. The plaintiff also claims ownership of the said suit property. There is another person by the name of Alok Gupta who also appears to be claiming title to the suit property. An FIR being FIR No. 88/2009 also appears to have been registered against the said Alok Gupta and appropriate proceedings are pending. Clearly, the facts of this case would fall within the exceptional category pointed by the Supreme Court in the case **Mardia Chemicals vs. Union of India** (supra). Hence, I hold that this Court would have the territorial jurisdiction to try the present case.

18. The reliance of learned counsel for defendants No.1 and 2 in the case of **State Bank of India versus Jigishaben B. Sanghavi & Ors,** (supra) is misplaced as that was a case in which the Court held that mere raising of a bald plea of fraud is not sufficient to bring the case within the exception carved out by the Hon'ble Supreme Court in **Mardia Chemicals Ltd. v. Union of India and Ors.** (supra). In that case the entire grievance was with respect to validity of the mortgage which was executed in favour of the bank.

19. Similarly, in the case of **Swati Organics Ltd. & Ors. versus**

State Bank of India & Ors. (supra), on the facts of that case, the relationship between the plaintiff and the defendant of a Creditor and a borrower was not denied. Hence, the Court held that Section 34 of the SARFAESI Act was squarely applicable. The present issue is decided accordingly. This Court has the jurisdiction to decide this case.

20. List before the Joint Registrar on 03.02.2014 for further proceedings.

IA No.11308/2010(u/O 39 R 1 & 2 CPC)

21. This is an application under Order 39 Rules 1 and 2 CPC. This Court on 27.08.2010 has directed status quo of possession and title of the suit property to be maintained.

22. In view of my decision above while giving a decision on the preliminary objection it is apparent that there are seriously disputed questions of facts as to whether any valid mortgage has been created regarding the suit property in favour of defendant No.1 or defendant No.2 and about the title of the suit property. Clearly the plaintiff has made out a prima facie case. The balance of convenience is also in favour of the plaintiff. In case the property is allowed to be sold/ transferred, irreparable loss and injury is likely to be cause to the plaintiff.

23. Accordingly, the parties to the suit are directed to maintain status quo of possession and title of the suit property till further orders.

24. The application stands disposed of.

ILR (2014) I DELHI 364
CRL. A.

GOPI @ HUKAM **.....APPELLANT**

VERSUS

STATE **.....RESPONDENT**

(S.P. GARG, J.)

CRL.A. NO. : 115/2000 & 73/2000 **DATE OF DECISION: 16.12.2013**

Indian Penal Code, 1860—Section 304B—The Ingredients "cruelty soon before death"—Marriage of the deceased survived only for five months during which for four onths she lived in her matrimonial home, so her parents were not expected to rush to the police with the complaint as initial attempts are made to resolve the dispute and save the marriage—Three days before the incident, there was a quarrel between the accused and the deceased which forced the deceased to commit suicide, so it is difficult to imagine a more proximate link between harassment and death of the deceased—Further held, where the dying declaration does not suffer from any infirmity, its veracity could be the basis of conviction without any corroboration.

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT **:** Sushant Singh, Advocate with Mr. P.C. Arya & Mr. Tejinder Singh, Advocates.

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

1. *S.Govindaraju* vs. *State of Karnataka,* 2013(10) SCALE 454.
2. *Hira Lal & Ors.* vs. *State,* AIR 2003 SC 2865.

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Gopi @ Hukam (A-1) and Shanti Devi (A-2) question the legality and correctness of a judgment dated 17.07.1999 of learned Addl. Sessions Judge in Sessions Case No. 2/98 arising out of FIR No. 978/97 PS Mangolpuri by which they were held guilty for committing offences

punishable under Sections 498A/304B IPC read with Section 34 IPC and were awarded RI for seven years each under Section 304B IPC. The facts projected in the charge-sheet are as under :

2. Hemlata, PW-1 (Babu Lal)'s daughter was married to A-1 on 17.05.1997. Various dowry articles were given to her by her parents according to their financial capacity. After the marriage, Hemlata lived at her matrimonial home i.e. House No. I-735, Mangolpuri. It is the case of the prosecution that after marriage, she had to face harassment and cruelty at the hands of her husband and his mother in connection with the demand for dowry. When she was unable to bear the harassment and cruelty meted out to her, on 05.10.1997 at about 11.30 A.M., she poured kerosene and set herself ablaze. She suffered 95% -98% burn injuries on her body and was taken to ESI Hospital, New Delhi by A-1, her husband. Daily Diary (DD) No. 43B (Ex.PW-10/A) was recorded at 03.25 P.M. on 5.10.1997 at PS Mangolpuri after getting information of the incident and the investigation was assigned to SI Prakash Chand who with Const. Raja Ram went to the hospital and collected Hemlata's MLC (Ex.PW-2/A). Since she was physically unfit to make statement, the Investigating Officer informed PW-6 (R.L.Sharma, Sub Divisional Magistrate) and he lodged First Information Report after recording her statement (Ex.PW6/A) on 06.10.1997 at 03.30 P.M. Hemlata succumbed to the injuries on 06.10.1997 in the hospital. As it was a case of unnatural death, postmortem examination was conducted on the body on 07.10.1997 and in the opinion of PW-3 (Dr.B.N.Acharya), cause of death was 98% ante-mortem burns with septicaemia. During the course of investigation, statements of the witnesses conversant with the facts were recorded. Both the accused persons were arrested; sent for trial; duly charged and brought to trial. The prosecution examined ten witnesses to establish their guilt. In their 313 statements, they pleaded false implication and denied their complicity in the crime. They claimed that Hemlata was never ill-treated and her incurable disease was the reason to commit suicide. She was unhappy with her marriage which was not to her liking. DW-1 (Darshan Lal), DW2 (Maya) and DW-3 (Rambir) appeared in defence. The Trial Court, after considering the evidence particularly the dying declaration and the rival submissions of the parties came to the conclusion that both the appellants were responsible for her dowry death. Being aggrieved by the orders of conviction and sentence, they have preferred the appeals.

3. I have heard the learned counsel for the parties and have examined the record. Learned counsel appearing for the appellant has submitted that the Trial Court failed to appreciate the evidence in its correct perspective and ignored material contradictions in the statements of PWs-1, 5, 7, 8 & 9 without valid reasons. There was no demand of dowry at the time of marriage and allegations regarding harassment or cruelty in connection with dowry demands emerged only after the sad demise. Prior to occurrence, none had any grievance about the conduct and behaviour of the appellants. Neither the deceased nor her parents ever lodged any complaint with any authority for physical or mental torture to the deceased. Rekha, deceased's sister, staying in the matrimonial home did not inform her parents or any relative regarding the cruelty meted out to her. The provisions of Sections 304B/498A IPC were not attracted as there was no cogent and worthwhile evidence on record to establish that 'soon before death', Hemlata was tortured on account of non-fulfilment of dowry demands. The Trial Court did not give weightage to the material inconsistencies in the statements of PW-2 (Dr.R.K.Sharma) and PW-6 (R.L.Sharma, SDM) regarding obtaining of thumb impression of the deceased on the dying declaration. It does not contain a truthful version of what actual had happened. It was recorded on the next day of the incident and there was every possibility of her parents to tutor her. The real and immediate cause for committing suicide was that Hemlata was unable to stand or walk due to incurable disease for which she was getting regular medical treatment. Since, she had affairs with a boy in the neighbourhood before marriage and was forced to marry A-1, she was not happy to stay in the matrimonial home. She was frustrated and depressed due to her illness. Per contra, learned Addl. Public Prosecutor for the State vehemently opposed the appeal contending that Hemlata, 26 years old girl died within six months of her marriage in the matrimonial home. The appellants doubted her fidality alleging that she had developed relations with a neighbour and wanted to marry him. The dying declaration recorded by a responsible Officer clearly implicates them for her death. The other witnesses examined by the prosecution have corroborated her version without major variations.

4. It is admitted position that Hemlata died within six months of her marriage with A-1 in the matrimonial home. It is also undeniable that her death was a case of suicide and it was caused by 95% -98% burn

injuries suffered by her. Both the appellants were present when Hemlata brought an end to her life by pouring kerosene on her body. She was taken to hospital by A-1 and MLC (Ex.PW-2/A) at ESI Hospital, New Delhi records the arrival time of the patient at 03.45 P.M. The alleged history records that Hemlata 'got burnt herself by pouring kerosene oil upon herself due to a quarrel with husband'. This statement was made by Hemlata to PW-2 (Dr.R.K.Sharma) who medically examined her in the presence of her husband (A-1). She was conscious that time. A-1 did not contradict her and did not disclose any reason to PW-2 (Dr.R.K.Sharma) compelling Hemlata to pour kerosene on her body to set herself on fire. Apparently, A-1 had quarrelled with the deceased soon prior to the incident and she was driven to commit suicide. The appellants did not give any plausible reason for the quarrel that occurred on the day of incident.

5. PW-6 (R.L.Sharma, SDM) recorded dying declaration (Ex.PW-6/A) on 06.10.1997 at 03.30 P.M. after Hemlata was declared fit for statement. MLC (Ex.PW-2/A) records that Hemlata was conscious when taken to ESI Hospital on 05.10.1997 and had given the alleged history to the examining doctor herself. PW-6 in his Court deposition unequivocally stated that after satisfying himself that Hemlata was conscious and in a stable and fit mental and physical condition to make statement, he recorded it in question-answer form, questioned her regarding her name, husband's name, date of marriage and what had lead to the incident. She answered all the questions freely, voluntarily and coherently. He further deposed that Hemlata disclosed that her husband and mother-in-law used to harass her and due to that, she took the step to burn herself. She specifically stated that her mother-in-law used to severely harass her and she should be dealt with according to law along with her husband. The statement was read over and her left thumb impression was taken at point 'A' on Ex.PW-6/A. In the cross-examination, he explained that delay in recording the statement was due to the victim's inability to give statement due to her physical and mental condition on 05.10.1997. He denied that dying declaration (Ex.PW-6/A) was fabricated and did not contain her thumb impression at point 'A'. In the instant case, dying declaration was recorded by Sub Divisional Magistrate in question-answer form and as far as practicable, in her own words. When a dying declaration is recorded by a competent Magistrate in the words of the maker of the declaration, it would stand on a much higher footing and has higher evidentiary value.

A competent Magistrate has no axe to grind against the person named in the dying declaration of the victim and in the absence of circumstances showing anything to the contrary, he should not be disbelieved by the Court. PW-6 (R.L.Sharma, SDM) being independent witness holding high position had no reason to do anything which was not proper. The authenticity of dying declaration recorded by him, thus, cannot be doubted. Normally, the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to medical opinion. PW-2 (Dr.R.K.Sharma) deposed that on 06.10.1997 at about 03.30 P.M. after examining the patient, he had declared her fit to make statement vide endorsement (Ex.PW-2/B). Before recording the statement, PW-6 had satisfied himself about the mental fitness of the deceased. No suggestion was put to the witness that she was under the influence of her parents and family members and was tutored to make it. No circumstances have been brought on record to infer that the declaration was result of tutoring, prompting or imagination. It is true PW-2 (Dr.R.K.Sharma) and PW-6 (R.L.Sharma, SDM) have given conflicting version regarding obtaining of thumb / toe impression. The doctor in his wisdom got toe impression of the victim on the MLC (Ex.PW-2/A) on 05.10.1997 as her thumbs were burnt. The dying declaration (Ex.PW-6/A) recorded next day bears her thumb impression at point 'A' on Ex.PW-6/A. This inconsistency is not material to doubt the veracity and genuineness of the dying declaration recorded by a competent Officer. In the dying declaration, Hemlata consistently implicated both the appellants for forcing her to commit suicide. She disclosed that the appellants were quarrelling with her for the last three days. On the day of incident itself, they picked up a quarrel with her. She disclosed that her parents had given dowry articles according to their capacity and she was being harassed & tortured for dowry by them. In the dying declaration, she divulged definite reason which prompted her to commit suicide i.e. harassment caused by them. She appealed to award suitable punishment to the appellants; specifically her mother-in-law who used to treat her with cruelty. The appellants did not give plausible explanation as to why Hemlata opted to implicate them and what prompted a newly wedded wife to take extreme step within six months of her marriage. The surrounding circumstances forcing the deceased to commit suicide were within their special knowledge and under Section 106 of the Evidence Act, it was their bounden duty to disclose and prove as the incident

occurred in the matrimonial home. They took inconsistent and divergent defence that she had developed relations with a boy in the neighbourhood before marriage and wanted to marry him. However, the name of the said boy never surfaced during trial. Another suggestion was put to her father that she (Hemlata) was not maintaining good character before marriage or that her marriage with A-1 was against her will. It was also suggested that she used to frequently give calls to his neighbour which were objected to by the appellants. Another reason given was that the deceased was suffering from an incurable disease and committed suicide on that account. It has come on record that Hemlata was suffering from some sexual disease and was unable to walk and stand. PW-9 (Rekha) had come to stay in the matrimonial home to assist her. However, it has not been established that the disease was incurable despite regular treatment given to her. The appellants did not produce on record any medical documents to assess the degree / extent of the disease and to find it out if it was not curable. They did not divulge as to what was the immediate compelling circumstance which forced the deceased to commit suicide that day. They denied all the questions put to them in examination under Section 313 and did not furnish any explanation whatsoever to any question. They pleaded a false defence that Hemlata had developed intimacy with a boy before marriage and wanted to marry him. Observations of Supreme Court in case **'S.Govindaraju vs. State of Karnataka',** 2013(10) SCALE 454, are relevant to note :-

> "23. It is obligatory on the part of the accused while being examined under Section 313 Code of Criminal Procedure, to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence in order to decide whether or not the chain of circumstances is complete. When the attention of the accused is drawn to circumstances that inculpate him in relation to the commission

> of the crime, and he fails to offer an appropriate explanation, or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances.
>
> 24. This Court in **Rohtash Kumar v. State of Haryana** : JT 2013 (8) SC 181 held as under:
>
> Undoubtedly, the prosecution has to prove its case beyond reasonable doubt. **However, in certain circumstances, the accused has to furnish some explanation to the incriminating circumstances, which has come in evidence, put to him. A false explanation may be counted as providing a missing link** for completing a chain of circumstances.
>
> (Emphasis added)
>
> 25. The prosecution successfully proved its case and, therefore, provisions of Section 113 of the Evidence Act 1872 come into play. The Appellant/accused did not make any attempt, whatsoever, to rebut the said presumption contained therein. More so, Shanthi, deceased, died in the house of the Appellant. He did not disclose as where he had been at the time of incident. In such a fact-situation, the provisions of Section 106 of Evidence Act may also be made applicable as the Appellant/accused had special knowledge regarding such facts, though he failed to furnish any explanation thus, the court could draw an adverse inference against him."

6. The dying declaration recorded by the deceased does not suffer from any infirmity and its veracity could not be doubted. It is true and volunteer and was not the result of tutoring by interested parties. Great solemnity and sanctity is attached to the words of a dying person. Once the Court is satisfied that the declaration is true and voluntary, it could base conviction without corroboration.

7. PW-9 (Rekha) aged 14 years who was staying in the matrimonial home for the last five days of the incident is the most curicial witness. She deposed that on Saturday at about 10.00 A.M. A-1 and A-2 gave severe beatings to his sister and it continued till Sunday. Thereafter, a quarrel ensued between her sister and A-1. She was given 'chapaties' by

A-1 and after consuming it, she came down and became unconscious. When she came to senses, she found her sister burning and lying on the stairs. Both the accused were standing near her. Accused Gopi and one Parveen took her sister to hospital. She informed her parents on telephone about the incident. In the cross-examination, she explained that she had gone to assist her sister due to her physical illness as she was unable to walk. This child witness had no ulterior motive to falsely implicate the appellants. She denied that Hemlata had put herself on fire as she was fed up with her illness which had crippled her. PW-1 (Babu Lal), deceased's father, also accused the appellants for harassing his daughter on account of dowry demands. He gave a specific instance of cruelty when the bed given in the marriage had broken and she was forced to bring a new one.

He further deposed that during her visits, Hemlata used to tell / inform him that her husband and mother-in-law used to quarrel and beat her for more dowry and were demanding scooter and fridge. In the cross-examination, he fairly admitted that there was no demand of dowry by the appellants at the time of marriage. Dhaneshwari, his sister-in-law, was mediator in the marriage who lived in the neighbourhood of the appellants. PW-5 (Kanhaiya Lal), deceased's maternal uncle, also corroborated his version and deposed that during her visits to him, Hemlata had disclosed that she was being treated with humiliation for bringing insufficient dowry. PW-7 (Hemraj), deceased's brother, informed that after about two months of the marriage, she told him that she was being harassed by the accused and they were demanding a two-wheeler scooter. Bed and table broken at the time of transportation were replaced and given new ones. He also deposed that during conversation with her in the hospital, she told him that she was being given beatings for the last three days. PW-8 (Krishna) deposed on similar lines. No ulterior motive was assigned to all these witnesses for making false statements. There are no valid reasons to disbelieve their evidence as they are the most natural witnesses in whom the deceased could confide. The veracity of the testimony is to be tested on objective parameters and not to be thrown overboard on the ground that these witnesses are related to the deceased. In a matrimonial dispute, it would be inappropriate to expect outsiders to come and depose.

8. The next limb of argument that ingredients of Section 304B are

not attracted in the absence of cruelty or harassment on account of dowry demand soon before death has no force. In **'Hira Lal & Ors. vs. State',** AIR 2003 SC 2865, Supreme Court observed :-

> ".....The expression 'soon before' is very relevant where Section 113-B of the Evidence Act and 304-B IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period of soon before the occurrence. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence."

9. In the instant case, the marriage had lasted only for about five months and during this period she lived at her matrimonial home for about four months. Her parents were not expected to rush to the police authorities to lodge complaints to rule out the possibility of any settlement. Initially, attempts are made to reconcile and resolve the disputes to save marriage. The deceased categorically informed that the appellants used to harass on account of dowry demands during her stay with them. Even before the incident in question, they had quarreled with her for the last three days and it forced her to put an end to her problems by committing suicide. It is difficult to imagine a more proximate link between harassment and cruelty in connection with the demand of dowry and the death of the victim resulting from it. The appellants did not produce any reliable and clinching evidence under Section 113B IPC. The defence witnesses examined did not divulge any specific reason for the deceased to commit suicide. The impugned judgment is based upon proper and fair appreciation of the evidence and warrants no interference. Minor contradictions,

inconsistencies, improvements on trivial matters without effecting the core of the prosecution case cannot be made a ground to reject the evidence in its entirety. Minimum sentence prescribed under Section 304B IPC is seven years and cannot be modified / altered / reduced.

10. The appeals are dismissed being unmerited. The conviction and sentence of the appellants are maintained. The appellants are directed to surrender before the Trial Court on 20th December, 2013 to serve out the remaining period of sentence. Trial Court record be sent back immediately.

ILR (2014) I DELHI 374
CRL. M.C.

MAYANK PANDEY **....PETITIONER**

VERSUS

STATE & ORS. **....RESPONDENTS**

(SUNITA GUPTA, J.)

CRL. M.C. NO. : 2206/2013 **DATE OF DECISION: 16.12.2013**

Code of Criminal Procedure, 1973—S. 482—Inherent Power-Quashing of FIR—Indian Penal Code—S. 376—Rape-compromise-living as husband and wife-charge sheet already filed—Petitioner and prosecutrix R2-working in the same branch of a private company—Started conversing on the telephone—Prosecutrix visiting petitioner at his residence-staying with him occasionally had developed physical relation refused to marry her—Prosecutrix made complaint—Petitioner forced himself upon her and raped her—FIR under S. 376 IPC registered—Petitioner arrested-reached at understanding-married prosecutrix—Petition under S. 482 filed for quashing of FIR-compromised-petitioner and R2 living happily as husband and wife-marriage certificate photographs-placed on record-prosecutrix not to pursue complaint-prosecution opposed the quashing-offence not compoundable—Held—While considering quashing of FIR under S. 482 Cr. PC High Court must have due regard to the nature and gravity of crime-heinous and serious offences of mental depravity or offences like murder-rape-dacoity etc.-not fittingly quashed-even though the victim and victim family and offenders have settled the dispute-such offences not private in nature and have serious impact on society—Petition dismissed.

A perusal of the aforesaid observations goes to show that offence of rape was considered to be one of the heinous and serious offences which is not private in nature but has a serious impact on society and therefore despite the fact that the parties have settled the disputes, the court should not exercise its inherent jurisdiction for quashing of the FIR in such cases. **(Para 9)**

Important Issue Involved: (a) The High Court exercising its jurisdiction under S. 482 Cr. PC cannot quash cases of serious and heinous nature which affect the society at large.

[Gu Si]

APPEARANCES:

FOR THE PETITIONERS : Mr. Rohit Chaudhary, Advocate.

FOR THE RESPONDENTS : Mr. Pramod Saxena, APP for State.

CASES REFERRED TO:

1. *Shimbhu and Anr.* vs. *State of Haryana* 2013 IX AD (S.C.) 109, 2013.
2. *Anil Kumar & Ors.* vs. *State of NCT of Delhi in terms of Crl. M.C. 3216/2012.*

3. *Gian Singh* vs. *State of Punjab and Anr.* (2012) 10 SCC 303.

4. *Pradeep Kumar @ Pradeep Kumar Verma* vs. *State of Bihar and Anr.* (2007) 7 SCC 413.

RESULT: Petition dismissed.

SUNITA GUPTA, J.

1. This is a petition under Section 482 of the Code of Criminal Procedure 1973 for quashing of FIR No. 100/2013 dated 13.03.2013 under Section 376 IPC registered at PS Malviya Nagar, District South, New Delhi.

2. The ground for quashing of the aforesaid FIR is that the matter has been compromised. The petitioner and respondent no. 2 are living happily as husband and wife. Marriage certificate along with marriage photographs have been placed on record. 3. I have heard the learned counsel for the petitioner as well as the learned Additional Public Prosecutor for the State and have gone through the record.

4. The main contention of the counsel for the petitioner is that the petitioner is married to respondent no. 2 and therefore both of them are now living happily. The prosecutrix has agreed not to pursue the complaint and as such keeping in view the larger interest of justice, the FIR be quashed. Reliance was placed on **Pradeep Kumar @ Pradeep Kumar Verma vs. State of Bihar and Anr.** (2007) 7 SCC 413.

5. On the other hand, learned Public Prosecutor for the State has opposed the quashing of the aforesaid FIR and the consequent proceedings on the ground that the offence is non compoundable. Reliance was placed on **Gian Singh vs. State of Punjab and Anr.** (2012) 10 SCC 303 for submitting that even if the prosecutrix has settled the dispute with the petitioner since the offence has a serious impact on society, the FIR cannot be quashed.

6. I have given my considerable thoughts to the respective submissions of learned counsel for the parties and have gone through the record.

7. The FIR in the instant case was registered on 13.03.2013 on the

statement of the prosecutrix wherein she alleged that she was working with Sun Pharmaceuticals as National Head Auditing. She had done MBA from IMM, Qutab Institutional Area in the year 2005-07 and the petitioner was in the same branch. From January, 2011 she and petitioner started conversing on phone and started meeting each other. During this period they visited each other several times at different places in Delhi. Petitioner was residing in Flat No. 11, Aastha Apartments, Savitri Nagar, Near Shiv Mandir as a tenant from October, 2011 to 13th September, 2012. She frequently used to go to his place and used to stay there for 2-3 days in 15 days every month. They were physically involved with each other. During this period, in December, 2011 Mayank tried to forcefully impose himself on her physically and he was drunk also. She stopped him several times, but he assaulted her sexually. In January and February, 2012 he tried the same attempts on her, because of which she got pregnant in the month of February, 2012. She conceived because of forceful sexual assault on her. After knowing this fact he started beating her due to which miscarriage took place in the month of May, 2012 of 10-12 weeks baby. In the month of October, 2011, his family agreed for the marriage but later on refused to marry her. It seems he used her and was never having intention of marrying her. She prayed for necessary action against him.

7. As per the status report, the statement of prosecutrix was recorded under Section 164 Cr.P.C. wherein she reiterated the averments made in the complaint. However, it was further stated that Mayank was arrested and he was granted bail on 18th March, 2013. On 20.03.2013, they got married in Arya Samaj Mandir with the consent of both the families. Now she is living happily with her husband and does not want to pursue the case.

8. The charge sheet was submitted in the Court and the case is pending trial. In **Gian Singh** (Supra), Hon'ble Supreme Court dealt with the scope of powers of High Court to quash criminal proceedings involving non compoundable offences in view of the compromise arrived at between the parties. Various guidelines were laid down and categories of cases in which such powers can be exercised. It will be in fitness of things to reproduce the observations as under:-

> "The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a

criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences Under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil favour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal

proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

9. A perusal of the aforesaid observations goes to show that offence of rape was considered to be one of the heinous and serious offences which is not private in nature but has a serious impact on society and therefore despite the fact that the parties have settled the disputes, the court should not exercise its inherent jurisdiction for quashing of the FIR in such cases.

10. **Shimbhu and Anr. vs. State of Haryana** 2013IX AD (S.C.) 109, 2013 was a case where SLP was preferred before the Hon'ble Supreme Court against the order passed by the High Court whereby the appeals filed by the appellant were dismissed and the order of conviction and sentence awarded by the Additional Sessions Judge was upheld. During the pendency of the appeal the affidavits signed by the victim was placed on record for showing that she has compromised the matter with the accused. It was observed that a compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle. Since the Court cannot always be assured that the consent given by the victim in compromising the case is a genuine consent, there is every chance that she might have been pressurized by the convicts or the trauma undergone by her all the years might have compelled her to opt for a compromise. In fact, accepting this proposition will put an additional burden on the victim. The accused may use all his influence to pressurize her for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe in considering the compromise arrived at between the parties in rape cases to be a ground for the Court to exercise the discretionary power under the proviso of Section 376 (2) of Indian Penal Code.

11. Anil Kumar & Ors. vs. State of NCT of Delhi in terms of Crl. M.C. 3216/2012 was again a case where joint petition under Sections 376/420/34 IPC was filed on the ground that the parties have entered into marriage. However, the petition was dismissed by observing that it was not a fit case where Court should come to the rescue of a perverted person and give him a relief. The offence of rape is a crime against the society. The FIR in such like cases if quashed, will only give impetus to persons with like-minded mentality to commit the crime. Therefore, it is not a fit case where Court ought to exercise its inherent power under Section 482 Cr.P.C. and quash the proceedings.

12. Pradeep Kumar (Supra) relied upon by the learned counsel for the petitioner does not help him in as much as, SLP was filed against the order of High Court whereby the application filed by the appellant for discharge was rejected. In that case, the FIR alleged that accused had physical relationship with the informant on the promise that he would marry her and they were married in a temple but accused denied of that and married another girl. However, statement of informant was recorded under Section 164 Cr.P.C. and a charge sheet was submitted. An application was moved by the accused under Section 227 Cr.P.C. for discharge which was rejected. The matter was remitted for further consideration to see whether the provisions of Section 376/406 IPC have any application to the facts of the case in hand and the application could not have been dismissed in a summary manner.

13. In the instant case charge sheet has already been submitted. It will be open to the petitioner to make necessary submissions as to whether the provisions of Section 376 IPC are made out or not before the Trial Court at the time of hearing arguments on charge and any observation made herein shall have no reflection on merits of the case and it will be for the learned Trial Court to see whether offences under Section 376/406 IPC are made out or not.

14. However, so far as quashing of the petition is concerned, in view of the discussions made above, same is not warranted.

15. That being so, the petition is dismissed.

ILR (2013) I DELHI 380
W.P. (C)

NANAK CHAND ....PETITIONER

VERSUS

DDA ....RESPONDENT

(G.P. MITTAL, J.)

W.P. (C) NO. : 8017/2012 DATE OF DECISION: 17.12.2013

Delhi Development Authority—Allotment of Flats—Constitution of India, 1950—Article 226—Petitioner got himself registered for allotment of MIG flat under Ambedkar Awas Yojna—At time of registration, he gave his current and permanent address—Petitioner was allotted a government accommodation—Petitioner requested DDA for incorporating his changed address in record of DDA—DDA asked him to submit attested copy of ration card or election card so that his address could be changed in office record—Said documents were not submitted by Petitioner as he did not possess same—In spite of representations of Petitioner to DDA to allot a flat, he did not receive any response—In a public meeting in 2012, Petitioner came to know about allotment of a flat in Dwarka to him in year, 2001 and that Demand-cum-Allotment letter (DAL) of same had been returned back undelivered and that allotment of flat made to him had been cancelled on account of non payment of cost of flat within stipulated period—Petitioner approached HC by way of instant petition seeking allotment of a similar flat as allotted to earlier—Plea taken by DDA, DAL was sent to Petitioner at his correspondence/postal address as mentioned in application form with advice to deposit demanded amount as per schedule given in letter—Since

Petitioner failed to deposit amount as required, allotment automatically stood cancelled—Held—Even if DAL was initially sent at old address and received back with report of 'left', DDA was under obligation to send same at current address of Petitioner which was duly provided in year, 2001—Not only this admittedly, information about allotment of flat was also not sent at Petitioner's occupational/office address—It is very unfortunate that in spite of residential address of Petitioner of Government flat allotted to him being available, in respect of government employees also, DDA wants to take a plea that it was not under obligation to send allotment letter at current residential which was duly informed—Writ of Mandamus issued directing DDA to allot a flat of equivalent size preferably in same area, that is Dwarka at price prevalent on date of this order, within period of 12 weeks.

Important Issue Involved: If the Demand-cum—Allotment letter initially sent at the old address of a registrant under any scheme was received back with the report of 'left', the DDA is under an obligation to send the same at the current address of the Petitioner duly provided to DDA.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. R.K. Saini, Adv. with Ms. Seema Salwan, Advocates.

FOR THE RESPONDENT : Mr. Arun Birbal, Advocate.

CASES REFERRED TO:

1. *Dev Raj* vs. *DDA,* W.P.(C) No.7842/2012.
2. *DDA* vs. *Mohinder Singh,* LPA No.1067/2011 decided on 14.02.2012.
3. *DDA* vs. *Ms. Prem Bhatnagar,* LPA No.1098/2011, decided on 14.02.2012.

4. *Ravi Dass* vs. *DDA,* W.P.(C) No.5554/2011, decided on 16.02.2012.
5. *Dev Raj* vs. *DDA,* W.P.(C) No.7842/2012.

RESULT: Allowed.

G.P. MITTAL, J.

1. By virtue of this writ petition under Article 226 of the Constitution of India, the Petitioner seeks allotment of a similar MIG Flat as Flat No.188, (FF), Pocket-B, Sector 13, Dwarka allotted to him was cancelled without any just and reasonable ground.

2. At the time of hearing of the writ petition, Mr. R.K.Saini, learned counsel for the Petitioner conceded that if the Petitioner is found to be entitled to a similar flat now, he (the Petitioner) has no objection in accepting the allotment at current cost.

3. The Petitioner got himself registered for allotment of an MIG flat under the Ambedkar Awas Yojna. He was allotted the Registration No.6362. At the time of registration, he gave his current address and permanent address in the application form as under:-

"(a) Current Address: C/o Shri Jai Prakash, House No.3985, Roshan Ara Road, Delhi-110007

(b) Permanent Address: Nanak Chand, Sr. P.A. Ministry of External Affairs, New Delhi-110011 (being his occupational/office address)"

4. In the year 2001, the Petitioner was allotted a Govt. accommodation, that is, B-16, Pandara Road, New Delhi. By a letter dated 04.10.2001, he made a request to the DDA for incorporating his changed address in the record of the DDA. By a letter dated 22.10.2001, the DDA asked him to submit an attested copy of the ration card or election card so that his address could be changed in the office record. The said documents were not submitted by the Petitioner as he did not possess the same. Since the Petitioner was working as an Under Secretary in the Ministry of External Affairs, he was posted at Panama at that time. On his return in September, 2005, the Petitioner again intimated his new address to the DDA, that is, B-1/167, Kendriya Vihar, Sector 56, Gurgaon

for further correspondence. The Petitioner retired from the govt. service on attaining the age of superannuation in November, 2008 and thereafter made a representation to the Joint Director (Housing) dated 28.04.2009 pointing out the above facts and circumstances and stating that he had not received any intimation about the allotment of a flat to him. By a letter dated 28.08.2009, his request for allotment for flat was turned down without any reason and without even informing him that he had already been allotted a flat bearing No.188, (FF), Pocket-B, Sector 13, Dwarka on his turn in draw of lots held on 22.12.2002. The Petitioner then again made a representation dated 22.12.2009 (Annexure P-5). Since he heard nothing from the DDA, he filed an application under the Right to Information Act, 2005 (RTI Act) on 24.06.2011 seeking information as to why he was being denied allotment of the flat under the scheme. On failure to receive a satisfactory reply, the Petitioner preferred an appeal to the Appellate Authority on 07.09.2011 (Annexure P-6). The Appeal was disposed of by a letter dated 21.09.2011, which is extracted hereunder:-

> "PIO/Dy. Dir. (MIG)-H is directed to furnish the information to the appellant if the same is readily available in their record and in case it is not available appellant may be asked to inspect the concerned documents which are available in the department. The appellant may note down the relevant details and in case the copies of the documents can be supplied as per the provisions of the RTI Act-2005, the same may be given to the appellant."

5. Thus, the DDA failed to take any remedial action in the matter and provide him with demanded documents. The Petitioner, therefore made a representation dated 12.09.2012 (Annexure P-8) to the Vice Chairman of the DDA but yet, as usual he did not receive any response.

6. The Petitioner claims that in the first week of December, 2012, the Petitioner came across a public notice (Annexure P-9) issued by the DDA regarding completion of allotment of different categories of flats stating that no allotment is pending with the DDA and the scheme has already been closed. The Petitioner therefore, attended the public hearing in the office of the DDA on 13.12.2012 and thereby came to know about the allotment of Flat No.188 (FF), Pocket-B, Sector 13, Dwarka, New Delhi to him in the year 2001 and that the Demand-cum-Allotment letter

(DAL) of the same had been returned back undelivered and that the allotment of the flat made to him had been cancelled on account of non payment of the cost of the flat within the stipulated period. The Petitioner, therefore, has approached this Court by way of the instant petition.

7. In the counter affidavit filed by the DDA, it is stated that a DAL with block dates 26/31.12.2011 was sent to the Petitioner at his correspondence/postal address as mentioned in the application form, that is, House No.3985, Roshan Ara Road, Delhi-110007 with advice to deposit the demanded amount as per the schedule given in the letter. Since the Petitioner failed to deposit the amount as required, the allotment automatically stood cancelled. It is stated that the DDA had also published a press notice in leading newspapers on 17.10.2012 as also on the website wherein all the successful allottees of the various draws who had not received their respective DALs were requested to collect the same from the office of Deputy Director within 15 days.

8. In the counter affidavit, the DDA has also taken up the plea that although the Petitioner had given his office address as Nanak Chand, Sr. P.A. Ministry of External Affairs, New Delhi-110011 but as per the income certificate submitted at the time of registration of the flat, he was working in Embassy of India at Kathmandu. The DDA has further taken up the plea that there is no policy to send DALs at all the addresses of the Petitioner.

9. It is not in dispute that at the time of registration for allotment of the flat, the Petitioner had given two addresses and the permanent address was Nanak Chand, Sr. P.A. Ministry of External Affairs, New Delhi-110011. Admittedly, the allotment letter was not sent to the Petitioner at this address. Rather, the DDA has taken up the plea that although the occupational/office address was mentioned as Ministry of External Affairs, yet the allotment letter could not have been issued to him at this address as at the time of registration of the flat, the Petitioner was posted at Kathmandu, as per the income certificate. It is obvious that since the Petitioner was employed in the Ministry of External Affairs, his posting would have changed from one place to another and thus, the Petitioner had not mentioned his permanent address as the Embassy of India, Kathmandu, Nepal, rather, he has mentioned the address as Nanak Chand, Sr. P.A. Ministry of External Affairs, New Delhi-110011. The Petitioner

rightly hoped that if any communication is sent to him at this address, the same will reach him irrespective of the place of his posting. Moreover, it is not in dispute that the Petitioner wrote a letter dated 04.10.2001 to record the change in his current address from House No.3985, Roshan Ara Road, Delhi-110007 to B-16, Pandara Road, New Delhi. In fact, the DDA by a letter dated 22.10.2001 had asked him to submit the attested copy of the ration card and election card so that his address could be changed in the office. It is true that there was slackness on the part of the Petitioner in as much as he did not provide any ration card/election card as demanded. The Petitioner says that he was not in possession of the same. Even if it was so, the Petitioner was expected to inform the DDA about the same. The fact, however, remains that the DDA was very much aware that by a letter dated 04.10.2001, the Petitioner had informed about the change of his address.

10. Therefore, the question for consideration is even if the registrant under any scheme fails to supply copy of the ration card/election card to change his address, is the DDA justified in sending the allotment letter at the old address? Even if the DAL was initially sent at the old address and received back with the report of 'left', the DDA was under an obligation to send the same at the current address of the Petitioner which was duly provided in the year 2001. Not only this, admittedly, the information about the allotment of the flat was also not sent at Petitioner's occupational/office address. The learned counsel for the DDA relies on a judgment of this Court in **Dev Raj v. DDA,** W.P.(C) No.7842/2012, decided on 11.07.2013 to contend that the DDA was not under an obligation to send the communication at all the addresses. However, the contention raised on behalf of the DDA is misconceived.

11. In Dev Raj, the intimation was sent at the given address which was returned with the report of 'left' and the permanent address provided was incomplete and vague. It was in these circumstances that it was held that the DDA had performed it's obligation of sending the information at the available address.

12. The instant case, on the other hand, is covered by the judgments of this Court in **Ravi Dass v. DDA,** W.P.(C) No.5554/2011, decided on 16.02.2012, **Sushil Kumar Jain v. DDA,** W.P.(C) No.7433/2012, decided on 12.11.2013, **DDA v. Mohinder Singh,** LPA No.1067/2011,

decided on 14.02.2012, and **DDA v. Ms. Prem Bhatnagar,** LPA No.1098/2011, decided on 14.02.2012.

13. The DDA was very much in knowledge of the current address, that is, B-16, Pandara Road, New Delhi, which was the residential address of the Petitioner of the Govt. flat allotted to him. It is very unfortunate that in spite of the address being available, in respect of the govt. employees also, the DDA now wants to take a plea that it was not under an obligation to send the allotment letter at the current residential address which was duly informed.

14. The writ petition therefore, has to succeed.

15. The learned counsel for the Petitioner urges that although the Petitioner is not to be blamed for delay in the allotment of the flat to him, yet the Petitioner will be satisfied if the flat is allotted to him at the cost prevalent on the date of filing the writ petition, that is, 20.12.2012. The learned counsel for the Petitioner also relies on the judgments of this Court in **DDA v. Mohinder Singh,** LPA No.1067/2011 decided on 14.02.2012 and **Ms. Prem Bhatnagar v. DDA,** LPA No.1098/2011 dated 14.02.2012.

16. I have perused the judgments in Mohinder Singh and Prem Bhatnagar. In both these cases, the allotment of the flat was ordered to be made by the learned Single Judge at the cost prevalent at the time of issuance of the allotment letter together with simple interest @ 12% per annum. The LPAs filed by the DDA were allowed and the orders passed by the learned Single Judge were modified to the extent that the Appellants were held to be entitled to the allotment of the flat at the cost as on 19.05.2011, that is, the date of the judgments.

17. In view of this, I hereby issue a writ of mandamus, directing the DDA to allot a flat of equivalent size preferably in the same area, that is, Dwarka, New Delhi at the price prevalent on the date of this order, within a period of 12 weeks.

18. On issuance of DAL and on deposit of the allotment money, the possession of the flat shall be delivered to the Petitioner within a period of one month from the date of making the payment, as demanded by the DDA.

19. The writ petition is allowed in above terms with costs quantified at Rs. 15,000/-.

20. Pending applications also stand disposed of.

ILR (2014) I DELHI 387
W.P. (C)

BABU RAM **....PETITIONER**

VERSUS

UNION OF INDIA AND ANR. **....RESPONDENTS**

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 2568/2013 & CM NO. 4850/2013 **DATE OF DECISION: 17.12.2013**

Constitution of India, 1950—Article 226—Petitioner, ex service man applied in SC category and participated in selection process for post of SI/AI in CPO—Petitioner successfully participated—However, no appointment letter issued—Hence, present writ petition. Respondents contended Petitioner was overage despite age relaxation, and thus not offered appointment. In response, Petitioner urged that he may be considered for a Group C posting, incase he was overage for a Group B posting. Held: Petitioner overage by 2 years for Group B posting—No representation made for Group C posting. Even in the writ petition Petitioner seeks appointment to Group B post—Petitioner not entitled to Group C appointment as prayed for. Petition dismissed.

After the respondents have set up this stand in the counter

affidavit, the petitioner has urged that he was eligible for appointment to the post of ASI in the CISF which vacancy the respondents had notified in their advertisement. This post is a Group C post. The respondents have pointed out that the petitioner had opted for only six group B posts and had not opted for any Group C post. The original application form produced by the Staff Selection Commission from the petitioner reflects the following preferences submitted by the petitioner:

"Order of Preference Code

1. Intelligence Officer in Narcotics Control Bureau (NCB) G

2. Sub-Inspector in Indo-Tibetan Border Police Force (ITBP) E

3. Sub-Inspector in Central Industrial Security Force (CISF) A

4. Sub-Inspector in Border Security Force (BSF) C

5. Sub-Inspector in Sashstra Seema Bal (SSB) F

6. Sub-Inspector in Central Reserve Police Force (CRPF) D"

It is manifest from the above that the petitioner had not submitted an option for the post of ASI in the CISF which was carrying the Group C post. **(Para 13)**

The petitioner was aware of his date of birth as well as the stipulation with regard to the permissible relaxation and therefore would have been very well aware of the fact that he did not meet age criteria for the appointment of Group B post. No representation was made by him at any point of time to the effect that he had applied for the post of ASI in the CISF (a Group C post). In the writ petition, the petitioner still seeks issuance of a writ for his appointment to the post of Sub Inspector, the Group B post. For this reason as well, the oral submission made by the petitioner to the effect that he is entitled for appointment to Group C deserves to be

rejected. **(Para 15)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. M. Rais Faroogui and Mr. S.A. Abdi, Advocates.

FOR THE RESPONDENTS : Mr. R.V. Sinha and Mr. P.K. Singh, Advocates.

RESULT: Petition dismissed.

GITA MITTAL, J. (Oral)

1. The petitioner in the instant case has participated in the selection process for the post of SI/ASI in the Central Police Organization conducted pursuant to an advertisement dated 28th May, 2011 in the Employment News/Rozgar Samachar. It is undisputed that the petitioner was an ex-service man candidate who had applied in the Scheduled Caste category and is therefore entitled to age relaxation.

2. The petitioner successfully participated in the written examination; physical efficiency test; medical examination as well as the interview. The grievance of the petitioner that despite his successful participation, as per the result declared on 1st March, 2012, no letter of appointment was issued to the petitioner. His representations dated 4th July, 2012 and 5th February, 2013 were also not responded to.

3. In the counter affidavit, the respondents have taken a stand that the petitioner was overage and therefore was not offered the appointment. In response thereto, the petitioner urged that even though he may have been overage for consideration for appointment to the Group B post of Sub-Inspector in the CISF, BSF, CRPF, however, he was within the age criterion for the appointment to the post of ASI in the CISF, Group C post.

In view of the above, we had called for the original record of the petitioner including the application which he had submitted. The record has been produced and perused by us.

4. The record substantiates the case set up by the respondents. The respondents had offered vacancies for the following post in the

advertisement dated 28th May, 2011:

Sl. No.	Post Code	Post Name	Post Category
1.	A	SI in CISF	Gr. 'B' Post
2.	B	ASI in CISF	Gr. 'C' Post
3.	C	SI in BSF	Gr. 'B' Post
4.	D	SI in CRPF	Gr. 'B' Post
5.	E	SI in ITBP	Gr. 'B' Post
6.	F	SI in SSB	Gr. 'B' Post
7.	G	IO in NCB	Gr. 'B' Post

5. So far as age criteria substantiated by the respondent is concerned, it had been notified that the candidates had to be between 20 to 25 years of age as on 24th June, 2011 stipulated as the cut-off date.

6. The notice of examination further made the following specific prescriptions:

"4. That regarding age limit, the notice of examination stated as under:-

"Para 4 (A) AGE LIMIT: for the post of Sub-Inspector in COPs and Asstt. Sub-Inspector in CISF: 20 – 25 years as on 24.06.2011, the normal closing date for receipt of application. Candidates should not have been born earlier than 25-06-1986 and not later than 23-06-1991.

Age limit for the post of Intelligence Officer in NCB is 20 - 27 years as on 24-06-1984. Candidates should not have been born earlier than 25-06-1984 and not later than 23-06-1991.

4 (B). Category codes and age relaxation available to different category of eligible candidates, for claiming Age Relaxation as on the date of reckoning:

Code	Category	Age relaxation permissible beyond the upper age limit
xx	xx	xxx xxx
	For Group B post	
08	Ex-Servicemen (SC/ST)	10 years
xx	xx	xxx xxx
11	For Group C Post	08 years (3 years + 5 years) after deduction of the military service rendered from the actual age as n the closing date.

The notice is considered sacrosanct by the Commission for the conduct of all its examinations and the Commission adheres strictly to its stipulations. The candidates are also equally bound by its provisions."

7. We may usefully refer to the conditions given in Note-I & Note II of para 12 of the Notice:

> "Note I: Success in the Examination confers no right of appointment unless government is satisfied after such enquiry as may be considered necessary that the candidate is suitable in all respects of appointment to the service/post.
>
> Note II: The candidates applying for the examination should ensure that they fulfil all the eligibility conditions for admission ion the examination. Their admission at all the stages of examination will be purely provisional subject to their satisfying the prescribed eligibility conditions. If, on verification, at any time before or after written examination and interview, it is found that they do not fulfil any of the eligibility conditions, their candidature for the examination will be cancelled by the Commission."

8. The petitioner had opted for the preference bearing code numbers G, E, A, C, F and D. He did not submit any option for Code B which relates to the ASI post in the CISF.

9. The petitioner had also opted only for the Group B posts and had not opted for Group C posts.

10. As per the provisions of para 4 (B), the petitioner as a Scheduled Caste candidate was entitled to 10 years age relaxation for appointment to Group B post. The petitioner was born on 15th May, 1974. With regard to the age-wise eligibility, the respondents had taken the closing dated as on 24th June, 2011. As on this date, the petitioner had attained approximately 37 years of age.

11. So far as recruitment to Group B post is concerned, the petitioner as an ex serviceman cum schedule caste candidate was entitled to 10 years age relaxations as mentioned in para 4 (B) of the recruitment notice for group B posts. We have noted above, the prescription for different vacancies. A candidate was required to fall between 20 to 25 years of age. Even if, the petitioner was granted 10 years age relaxation, as noted above, he was 27 years of age on 24th June, 2011 and was therefore overage by two years for the purpose of selection to the Group B post.

12. The petitioner has pointed out that the respondents had recommended his selection and appointment in the ITBP pursuant to the above examination. However, at the time of the post interview scrutiny, he was found to be overage and therefore no letter of appointment was issued to him.

13. After the respondents have set up this stand in the counter affidavit, the petitioner has urged that he was eligible for appointment to the post of ASI in the CISF which vacancy the respondents had notified in their advertisement. This post is a Group C post. The respondents have pointed out that the petitioner had opted for only six group B posts and had not opted for any Group C post. The original application form produced by the Staff Selection Commission from the petitioner reflects the following preferences submitted by the petitioner:

> "Order of Preference Code
>
> 1. Intelligence Officer in Narcotics Control Bureau (NCB) G
> 2. Sub-Inspector in Indo-Tibetan Border Police Force (ITBP) E
> 3. Sub-Inspector in Central Industrial Security Force (CISF) A

4. Sub-Inspector in Border Security Force (BSF) C

5. Sub-Inspector in Sashstra Seema Bal (SSB) F

6. Sub-Inspector in Central Reserve Police Force (CRPF) D"

It is manifest from the above that the petitioner had not submitted an option for the post of ASI in the CISF which was carrying the Group C post.

14. A half hearted oral submission has been pressed by learned counsel for the petitioner that the Staff Selection Commission has manipulated application of the petitioner. The same is noted only for the sake of rejection. The writ petition does not raise any such issue.

15. The petitioner was aware of his date of birth as well as the stipulation with regard to the permissible relaxation and therefore would have been very well aware of the fact that he did not meet age criteria for the appointment of Group B post. No representation was made by him at any point of time to the effect that he had applied for the post of ASI in the CISF (a Group C post). In the writ petition, the petitioner still seeks issuance of a writ for his appointment to the post of Sub Inspector, the Group B post. For this reason as well, the oral submission made by the petitioner to the effect that he is entitled for appointment to Group C deserves to be rejected.

16. For all these reasons, we find no merit in the writ petition.

The Writ petition and the application are accordingly dismissed.

ILR (2013) I DELHI 394
CRL. A.

MD. TASKEEN **.....APPELLANT**

VERSUS

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

(SUNITA GUPTA, J.)

CRL.A. NO. : 1387/2012 **DATE OF DECISION: 20.12.2013**

Indian Penal Code, 1860—Sec. 376—Sentence—Sentencing for any offence has a social goal—Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed—It serves as a deterrent—The principle of proportionality between an offence committed and the penalty imposed are to be kept in view—It is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications as well as its repercussions on the victim.

Rape is one of the most heinous crimes committed against a woman—It insults womanhood—It dwarfs her personality and reduces her confidence level—It violates her right to life guaranteed under Article 21 of the Constitution of India.

A minimum of seven years sentence is provided under Section 376(1) of the Indian Penal code (IPC—Sentence for a term of less than seven years can be imposed by a court only after assigning adequate and special reasons for such reduction—Thus, ordinarily sentence for an offence of rape shall not be less than seven years—When the legislature provides for a minimum sentence and makes it clear that for any reduction from the minimum sentence of seven years, adequate and special reasons have to be assigned in the judgment, the courts must strictly abide by this legislative command—Whether there exists any "special and adequate reason" would depend upon a variety of factors and the peculiar facts and circumstances of each case—No hard and fast rule can be laid down in that behalf for universal application.

Important Issue Involved: While imposing sentence on persons convicted of rape, the court must be careful and must not overlook requirement of assigning reasons for imposing sentence below the prescribed minimum sentence.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Imran Khan, Advocate.

FOR THE RESPONDENT : Ms. Fizani Hussain, APP.

CASES REFERRED TO:

1. *Simbhu and Anr.* vs. *State of Haryana* 2013 (10) SCALE 595.
2. *Jugendra Singh* vs. *State of Uttar Pradesh* (2012) 6 SCC 297.
3. *State of Andhra Pradesh* vs. *Polamala Raju @ Rajarao* (2000) 7 SCC 75.
4. *State of Karnataka* vs. *Krishnappa* (2000) 4 SCC 75.
5. *State of Punjab* vs. *Gurmit Singh and Ors.* AIR 1996 SC 1393.
6. *Bodhisatwa Gautam* vs. *Subhra Chakraborty* 1996 (1) SCC 490.
7. *State of A.P.* vs. *Bodem Sundara Rao* (1995) 6 SCC 230.

RESULT: Appeal dismissed.

SUNITA GUPTA, J.

1. The challenge in this appeal is to the judgement and order of sentence dated 22nd March, 2012 and 23rd March, 2012 in Sessions Case No. 15/2011 arising out of FIR No. 375/2010 under Sections 363/376/506/34 Indian Penal Code, 1860 (for short, 'IPC') registered as Police Station Sarai Rohilla vide which the appellant was convicted for the offence under Section 376 IPC and sentenced to undergo rigorous imprisonment for 4 years and a fine of Rs 5000/-, in default of payment of fine, to undergo simple imprisonment for 2 months.

2. The prosecution case emanates from the fact that on 11th November, 2010, Complainant Rama Anuj came to the police station Sarai Rohilla and lodged the missing report of his daughter aged about 15 years i.e. the prosecutrix (name withheld to keep her identity confidential) since 8th November, 2010. He further raised his suspicion upon one Sunil who used to live in the same house as the complainant as a tenant and stated that his daughter may have been taken away by the said Sunil by enticing her. On the statement of the complainant, case under Section 363 IPC was registered. During investigation of the case, on 13th November, 2010, accused/appellant Mohd. Taskeen was apprehended from Old Delhi Railway station and prosecutrix was recovered from his custody. Investigating Officer of the case recorded the statement of prosecutrix wherein she stated that accused Md. Taskeen had committed rape upon her by threatening her. Medical examination of both the prosecutrix as well as the accused was conducted. Sections 376/506/34 IPC were added in the chargesheet. During further investigation of the case, Investigating Officer of the case got the statement of the prosecutrix recorded under Section 164 Cr.P.C, prepared site plan, obtained the date of birth certificate of the prosecutrix, sent the exhibits to FSL. After completion of the investigation, a charge sheet under Sections 363/376/506/34 IPC was filed in the court.

3. Charge for offences under Sections 376/506 IPC was framed against the appellant. Appellant pleaded not guilty to the charge and claimed trial.

4. In order to substantiate its case, prosecution examined 16 witnesses. Prosecution basically relied upon the testimony of PW-1 i.e. the prosecutrix. Prosecutrix was aged 15 years and 7 months at the time of the incident. She has deposed that on 8th November, 2010, she had left with one Sunil and was taken by him to the railway station where they boarded the train for going to Saharanpur. However, they boarded the wrong train which went to Ghaziabad and thereafter they came back to Delhi and then again boarded the train which reached Saharanpur. At Saharanpur Railway Station, they met the appellant who also boarded the train in which the prosecutrix and the said Sunil were travelling. Sunil got down from the train by stating that he was going to exchange the railway ticket whereas the prosecutrix and appellant remained in the train. As the train was about to move, the appellant told the prosecutrix that she was

alone and he would take her to Sunil, after which both of them got down from the train. They searched for Sunil at Saharanpur Railway station but he was not found. According to the prosecutrix thereafter she was taken by the appellant to the house of his friend where he committed rape upon her. Appellant had taken her on his motorcycle and they travelled around the city on his motorcycle but again in the night hours, appellant took her in a lonely jhuggi and there again he committed rape upon her. On the next day morning, appellant took the prosecutrix on his motorcycle to the house of one female whom he addressed as Didi but that woman told the appellant that she would not keep the prosecutrix in her house because the prosecutrix was a minor and so the appellant was forced by that woman to leave the prosecutrix and at her instance, appellant agreed to leave the prosecutrix. Thereafter both of them boarded the train for Delhi and reached the Old Delhi Railway station where her father and the police were present and the appellant was apprehended by the police. The entire facts were narrated by the prosecutrix to her father and to the police and her statement was also recorded under Section 164 Cr.P.C. The statement of prosecutrix to the extent of her leaving from her parental home and having been found at the Delhi railway station along with the appellant is corroborated by her father and other police witnesses. Medical evidence also corroborates the version of prosecutrix as scratch marks just below the left anteriorilia, abrasion on left thigh as well as abrasions on posterior commissure were found on her body. Prosecutrix was a girl of tender age of 15 years only.

5. All the incriminating evidence appearing against the accused was put to him while recording his statement under Section 313 Cr.P.C. wherein he denied the case of the prosecution and pleaded his innocence and stated that he has been falsely implicated in the present case.

6. After meticulously examining the evidence led by the prosecution, vide impugned judgement, appellant was convicted for offence under Section 376 IPC and sentenced as stated above. However, he was acquitted of the charge under Section 506 IPC.

7. Feeling aggrieved by the same, present appeal has been preferred by the appellant.

8. I have heard Mr. Imran Khan, learned counsel for the appellant and Ms. Fizani Hussain, learned Additional Public Prosecutor for the state

and have perused the record.

9. At the outset, learned counsel for the appellant submitted that he does not challenge the appeal on merits of the case. Appellant was also called from Jail and he reiterated that he does not want to challenge the appeal on merits. However, it was submitted that appellant was sentenced to undergo rigorous imprisonment for a period of four years out of which he has already undergone imprisonment of 3 years and 6 months. As such, it was submitted that he be released on the period already undergone. Learned APP for the State did not oppose the prayer made by learned counsel for the appellant for releasing the appellant on the period already undergone.

10. I have considered the submissions of learned counsel for the parties and have perused the Trial court record.

11. From the testimony of the prosecutrix and other corroborating evidence, prosecution had succeeded in proving the charge under Section 376 IPC. The findings of learned Trial Court in this regard do not suffer from any infirmity which calls for interference. Even the appellant has opted not to challenge the findings of the Trial Court on conviction under Section 376 IPC. As such, the order of conviction passed by the learned Trial Court stands confirmed.

12. Coming to the quantum of sentence, it is submitted by learned counsel for the appellant that the appellant was awarded rigorous imprisonment of four years and fine. The appellant has already undergone sentence of 3+ years, as such, he be sentenced to the period already undergone.

13. Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for

reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

14. Rape is one of the most heinous crimes committed against a woman. It insults womanhood. It violates the dignity of a woman and erodes her honour. It dwarfs her personality and reduces her confidence level. It violates her right to life guaranteed under Article 21 of the Constitution of India. In this regard, it will be apt to note the observations made by the Apex Court in **Bodhisatwa Gautam v. Subhra Chakraborty** 1996 (1) SCC 490 where it was observed that "rape is violative of the victim's most cherished of the fundamental rights guaranteed under Article 21 of the Constitution of India.

15. Rape is an aberrant, atrocious, horrendous and monstrous burial of her dignity in darkness. It is a crime against the entire society. In **State of Punjab v. Gurmit Singh and Ors.** AIR 1996 SC 1393, Supreme Court observed the effect of rape on a victim with anguish:

> "We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault-it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female."

16. In **Jugendra Singh v. State of Uttar Pradesh** (2012) 6 SCC 297, while dwelling upon the gravity of the crime of rape, Supreme Court had expressed thus:

> "Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of

> encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu."

17. Section 376 IPC provides for punishment for rape. Offence of rape is punishable with imprisonment of either description for a term which shall not be less than seven years but which may be extend to ten years. The convict shall also be liable to fine. Proviso to Section 376(1) states that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. Thus, a minimum of seven years sentence is provided under Section 376(1) of the Indian Penal Code (IPC). Sentence for a term of less than seven years can be imposed by a court only after assigning adequate and special reasons for such reduction. Thus, ordinarily sentence for an offence of rape shall not be less than seven years. When the legislature provides for a minimum sentence and makes it clear that for any reduction from the minimum sentence of seven years, adequate and special reasons have to be assigned in the judgment, the courts must strictly abide by this legislative command.

18. It is a fundamental rule of construction that a proviso must be considered in relation to the main proviso to which it stands as a proviso, particularly, in such penal provisions. Whether there exists any "special and adequate reason" would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf for universal application.

19. Section 376(1) read with the proviso thereto reflects the anxiety of the legislature to ensure that a rapist is not lightly let off and unless there are some extenuating circumstances stated in writing, sentence below the minimum i.e. less than seven years cannot be imposed. While imposing sentence on persons convicted of rape, the court must be careful and must not overlook requirement of assigning reasons for imposing sentence below the prescribed minimum sentence.

20. In **State of Karnataka v. Krishnappa** (2000) 4 SCC 75 the High Court had reduced the sentence of ten years rigorous imprisonment

imposed by the trial court on the accused for an offence under Section 376 of the Indian Penal Code (IPC) to four years rigorous imprisonment. Severely commenting on this indiscretion, Apex Court observed as under:

> "Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the Respondent to show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced. The courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commission of like offences by others. Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity - it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitised Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."

21. In **State of A.P. v. Bodem Sundara Rao** (1995) 6 SCC 230 the Accused was sentenced by the trial court for an offence under Section 376 of the Indian Penal Code (IPC) for ten years. The High Court maintained the conviction, however, reduced the period of sentence

to four years. Supreme Court set aside the High Court's order and enhanced the sentence to seven years which is the minimum prescribed sentence under Section 376 of the Indian Penal Code (IPC). The relevant observations are as under:

> "In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the Legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 year old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the Legislature under Section 376(1) of the Act."

22. In **State of Andhra Pradesh v. Polamala Raju @ Rajarao** (2000) 7 SCC 75 a three Judge Bench of the Supreme Court set aside the judgment of the High Court for non-application of mind to the question of sentencing. The Supreme Court reprimanded the High Court for having reduced the sentence of the accused convicted under Section 376, IPC from 10 years imprisonment to 5 years without recording any reasons for the same. The Court said:

> "... We are of the considered opinion that it is an obligation of the sentencing Court to consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the gravity of the offence...
>
> XXX XXX XXX

... To say the least, the order contains no reasons, much less "special or adequate reasons". The sentence has been reduced in a rather mechanical manner without proper application of mind..."

23. Very recently, in **Simbhu and Anr. v. State of Haryana** 2013 (10) SCALE 595 a three Judge Bench took a serious view about taking a liberal view while awarding sentence for such a heinous crime by observing as under:-

"This is yet another opportunity to inform the subordinate Courts and the High Courts that despite stringent provisions for rape Under Section 376 Indian Penal Code, many Courts in the past have taken a softer view while awarding sentence for such a heinous crime. This Court has in the past noticed that few subordinate and High Courts have reduced the sentence of the accused to the period already undergone to suffice as the punishment, by taking aid of the proviso to Section 376(2) Indian Penal Code. The above trend exhibits stark insensitivity to the need for proportionate punishments to be imposed in such cases."

24. The observations made in the above legal pronouncements reflect what should be the approach of the Courts while sentencing the accused convicted of rape. Present case has to be examined in the light of the above discussion.

25. A perusal of the Trial Court order goes to show that it has taken a liberal view by awarding the sentence of rigorous imprisonment for four years, meaning thereby less than the minimum sentence prescribed under the Act probably, under the proviso to Section 376(1) on the ground that the convict had shown good gesture in agreeing to take the prosecutrix back to her parental home when he was apprehended. This cannot be said to be "special or adequate reason" for imposing sentence less than the minimum sentence prescribed under the Act. However, the State has not preferred any appeal for enhancement of the sentence. Under the circumstances, no case is made out for reducing the sentence further to the period already undergone by the appellant as prayed by learned counsel for the appellant.

26. The result of the aforesaid discussion is that there is no merit in the appeal and the same is accordingly dismissed.

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

ILR (2013) I DELHI 404
W.P. (C)

RAVI CROP SCIENCE ....PETITIONER

VERSUS

UOI & ORS. .....RESPONDENTS

(G.P. MITTAL, J.)

W.P. (C) NO. : 7449/2012 DATE OF DECISION: 20.12.2013

Constitution of India, 1950—Article 226—Customs Act, 1962—Section 2(2), 110(1), (2) and (3) and 124—Petitioner filed writ petition for de-freezing its account frozen by Respondent No. 2 (Directorate of Revenue Intelligence)—Plea taken, Petitioner has neither been indicted nor arraigned as a Notice in show cause notice purported to haver been issued in pursuance of investigation—As per Provisions of Section 110(1) of Act if any goods liable for confiscation under Act are seized and a show cause notice under Section 124 of Act is not Given within six months, then goods are liable to be restored to person from whom goods have been seized—Per contra plea taken, although notice Section 110 (2) to be served within a period of six months is mandatory, yet no such time limit is laid down under Section 124 and thus of goods can continue under Section 124 of Act—Seizure of bank account was under Section 110(3) and there is no provision to serve any notice upon person from whose possession any documents or things are seized—

Held—Section 110 (3) of Act deals with seizure of documents or things which in opinion of proper person would be relevant to any proceedings under Act—Freezing of bank account will not be seizure of any document or thing useful or relevant to any proceedings under Act—Bank account is frozen with a view to recover evaded customs Duty, penalty *etc. etc.,* freezing of bank account may not amount to seizure of any document, but at same time it cannot also amount to seizure of any goods liable for confiscation as well—Since freezing of bank account was not seizure of 'goods' as envisaged under Section 110 of Act, Petitioner is not entitled to de-freezing of bank account unconditionally—Amount deposited in bank Account shall be released, Subject to furnishing of a Bank guarantee to Respondent No. 2 in respect of amount credited in account from date of freezing of amount.

Important Issue Involved: (A) Freezing of the bank account will not be seizure of any document or thing useful or relevant to any proceedings under Section 110(3) of the Customs Act, 1962.

(B) Where bank account stands frozen with a view to recover the evaded customs duty, penalty etc. etc., the freezing of the bank account cannot amount to seizure of any goods liable for confiscation.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Jagmohan Sabharwal, Senior Advocate with Ms. Shikha Sapra, Advocate.

FOR THE RESPONDENTS : Mr. S.K. Dubey, Advocate. with Ms. Anandi Mishra, Advocate. Mr. Roshan Lal Goel, Advocate.

CASES REFERRED TO:

1. *Commissioner of Customs, New Delhi* vs. *Euroasia Global,* (2009) 6 SCC 58.
2. *Jeevraj and Ors.* vs. *Collector of Customs & Ors.,* (1997) 8 SCC 519.
3. *Harbans Lal* vs. *Collector of Central Excise & Customs,* (1993) 3 SCC 656.
4. *Lokenath Tolaram* vs. *B.N. Rangwani* (1974) 3 SCC 575.
5. *Asstt. Collector of Customs* vs. *Charan Das Malhotra* (1971) 1 SCC 697.

RESULT: Disposed of.

G.P. MITTAL, J.

1. By virtue of this writ petition under Article 226 of the Constitution of India, the Petitioner has approached this Court for de-freezing it's account held in Citibank, NA, 27 Central Market, Sector II, Western Avenue Road, Punjabi Bagh, New Delhi which has been frozen by Respondent No.2 (Directorate of Revenue Intelligence).

2. The Petitioner alleges that there were certain allegations of import of high value pesticides/insecticides in the guise of Sodium Bi-Carbonate against certain firms which led to some investigation by Respondent No.2. It is urged that the Petitioner has neither been indicted nor arraigned as a Noticee in the show cause notice purported to have been issued in pursuance of the investigation. In spite of this, the Petitioner's Bank Account bearing No.030874226 which has undergone major changes (in it's Constitution) has been frozen. It is urged that as per the provisions of Sections 110 (1) of the Customs Act, 1962 (the Act), if any goods liable for confiscation under the Act are seized and a show cause notice under Section 124 of the Act is not given within six months, then the goods are liable to be restored to the person from whom the goods have been seized. It is stated that since the Bank account was frozen in July,

2011, the same is liable to be de-freezed.

3. The writ petition has been resisted by Respondents No.1 and 2. Paras 1 to 6 of the counter affidavit which reflects the stand of the Respondents are extracted hereunder:-

> "1. That Intelligence developed by Directorate of Revenue Intelligence, Headquarters, New Delhi, indicated that certain firms were importing high value Pesticides/insecticides/Herbicides/ Fungicides from China under the guise of 'Sodium Bicarbonate', 'Thiony1 Chloride' and 'Sodium Bromide'. Therefore live consignments imported by the firms were intercepted and search operations were carried out by the DRI officials. Samples of goods stored in various warehouses and from various live imported consignments were drawn and sent to Central Insecticides Board, Faridabad and Institute of Pesticide Formulation Technology, Gurgaon for conducting of confirmatory tests thereon.
>
> 2. That the modus operandi employed by the fraudsters was to mis-declare pesticides/insecticides/herbicides/fungicides as 'Sodium Bicarbonate', 'Thiony1 Chloride' and 'Sodium Bromide' and to file Bills of Entry for their clearance at the prevailing import values of 'Sodium Bicarbonate', 'Thiony1 Chloride' and 'Sodium Bromide'. It is noteworthy that the declared import values of 'Sodium Bicarbonate' and 'Thiony1 Chloride' are in the range of USD 220 – USD 250 per Metric Ton whereas the general import values of pesticides/insecticides/herbicides/ fungicides is much higher with the minimum import values being around USD 2000 per Metric Ton. Hence, the extent of undervaluation resorted to by the said firms has been massive. It is estimated that the actual values of the imported goods is ten times higher than that of the declared values.
>
> 3. That statements of the persons involved in such imports and mis-declaration of values and other evidence collected by the DRI so far, reveal that the import of pesticides/insecticides/ herbicides/fungicides was being done in the name of several fake

> front firms by one Mr. Vimal Kumar, proprietor of M/s. V.V.K. Traders, Bhagwan Dass Nagar, East Punjabi Bagh, New Delhi. Goods imported against these fake front firms namely, M/s. Mehta Overseas, M/s. Chopra Overseas and M/s. Umesh Impex and other firms were shown to be sold to individuals against fake cash bills. The imported chemicals with the correct description were shown to be supplied by another set of fake front firms to several firms located mainly at Samba, J&K, controlled by the said Mr. Vimal Kumar through his brother Mr. Kamal Kumar. One such firm namely, M/s Ravi Crop Science, at Samba, was being used by the fraudsters to regularize the illegally imported material/chemicals. The said firm M/s. Ravi Crop Science is a pesticide manufacturing unit.
>
> 4. Goods have also been detained/seized at various warehouses belonging to the said importers. As many as seventy to eighty such consignments estimated to be valued at well over Rs. 40 crores have been imported by the said perons in the names of the fake front firms till date. At M/s/. Ravi Crop Science, Sambah, J&K, stock including imported insecticides/pesticides of different varieties worth more than Rs. 2 crores was detained/seized for further investigation. A rough estimate of the total value of the intercepted/ detained/seized goods is over Rs. 5 cores. A modest estimate of the duty evasion on account of mis-declaration and undervaluation (over the past one and a half years) is in excess of Rs. 4 crore.
>
> 5. That fifteen test reports of the samples of seized chemicals have been received till date and they confirm that the goods are pesticides only.
>
> 6. Thirteen samples drawn from live containers imported in the name of M/s. Umex Impex, M/s. Chopra Overseas and M/s. Mehta Overseas at ICD, Tughlakabad and Nhava Sheva have been confirmed to contain pesticides, namely Paraquat Disholride, Imidacloprid, Chlorpyriphos, Atrzine, Dichlorvos, Fipronil Buprofezine and Thiamethoxam etc. Correlation of batch number

of a herbicide, 'Atrazine Technical' detained at the unit of M/s Ravi Crop Science, Samba with imported goods confirmed that the said goods were mis-declared as 'Sodium Bicarbonate' at the time of import."

4. It has further been stated in the counter affidavit that the import of hazardous and dangerous chemicals is in violation of various laws and poses risk to the health of the persons involved in it's sale and distribution and the same also causes huge amount of loss to the public exchequer.

5. It is stated that during the investigation conducted by Respondent No.2, it was revealed that Mr. Arpit Rajvanshi, former partner of the Petitioner firm M/s. Ravi Crop Science in his statement stated that M/s. Ravi Crop Science had Bank accounts in Punjab National Bank, Muzaffarnagar and Punjab National Bank, Hissar. He further stated that he had returned the cheque book of M/s. Ravi Crop Science to Shri Kamal Alawadi after signing the same. Said Mr. Arpit Rajvanshi also informed that he had no knowledge if M/s. Ravi Crop Science had any account in Citi Bank, New Delhi and that he had not signed any cheque of that account. It is averred that on confronting the account opening form, he (Mr. Arpit Rajvanshi) agreed that his signature appeared on the account opening form as a Partner of the firm. In para 19 of the Counter Affidavit, averments with regard to the proportion of evasion have been made, which is extracted hereunder:-

"19. That during investigation, the answering respondent called for the Account Statement of the Petitioner firm's bank account in Citibank, New Delhi. The said Account statement revealed huge transactions between M/s. Ravi Crop Science, M/s. VVK Traders, M/s. Classic International and M/s. Galaxy Marketing. An Analysis of the Account Statement also revealed that an amount of '4.09 crores had been received in the said account of M/s. Ravi Crop Science from M/s VVK Traders. Also, an amount of '5.60 Crores, '0.66 Crores and '1.75 Crores (total 8.00 Crores) had been transferred into the Bank Accounts of M/s. Classic International, M/s. Galaxy Marketing and M/s. VVK Traders Pvt. Ltd. Respectively. Investigation by the answering respondent has

also revealed that both M/s. Classic International and M/s. Galaxy Marketing were non-existent entities and were floated for the purpose of paper transactions of trade goods. The same has been corroborated by the depositions made by Shri Amit Gupta, R/o C-30 1st Floor, Adarsh Nagar, Delhi, Shri Deepak Bansal Proprietor of M/s. Classic International and Shri Naveen Kumar Gupta, Proprietor of M/s Galaxy Marketing in their depositions made under Section 108 of the Customs Act, 1962. In view of the above, it may be seen that M/s Ravi Crop Science has indulged in transfer of huge amounts to non-existent firms against the purchases of various types of illegally imported pesticides in the name of non-existent firms which were done only on paper, as detailed above. Copy of the said Account Statement from 13.08.2010 to 01.07.2011 is attached herewith as Annexure R-I."

6. It is stated that the condition of serving a notice to the person from whose possession the goods are seized is applicable to the goods which are seized under Section 110 (1) of the Act only and not otherwise.

7. Mr. Jagmohan Sabharwal, learned Senior counsel for the Petitioner while relying on the judgment of the Hon'ble Supreme Court of India in **Harbans Lal v. Collector of Central Excise & Customs,** (1993) 3 SCC 656 has urged that once a notice under Section 110(2) of the Act is not given within a period of six months as mandated, the goods seized are liable to be restored to the person from whose possession they were seized. It is urged that even if an extension is given for six months, the same would be invalid unless the person affected is given a notice before giving such extension.

8. On the other hand, Mr. S.K. Dubey, learned counsel for the Respondents tried to make a distinction between Section 110 and 124 of the Act to contend that although the notice under Section 110(2) to be served within a period of six months is mandatory, yet no such time limit is laid down under Section 124 and thus, the seizure of the goods can continue under Section 124 of the Act. In support of his contention, the learned counsel places reliance on **Jeevraj and Ors. v. Collector of**

Customs & Ors., (1997) 8 SCC 519.

9. Mr. Dubey further urges that unconditional de-freezing of the bank accounts may not be allowed as then it might become difficult for the DRI to recover the customs duty and the penalty levied thereon. The learned counsel presses into service a judgment of the Supreme Court in **Commissioner of Customs, New Delhi v. Euroasia Global,** (2009) 6 SCC 58.

10. Mr. Dubey further relies on a Division Bench judgment of this Court in **Director General, DRI & Ors. v. Sajjan Kumar & Ors.,** LPA No.450/2012, decided on 02.07.2012 to urge that the operation of the bank accounts can be permitted subject only to the condition that the Petitioner will not be entitled to withdraw the amounts deposited on the date of the freezing of accounts and the amounts credited in the accounts in relation to the previous imports.

11. The distinction and the scope of Section 110(2) and 124 were dealt with in great detail by the Hon'ble Supreme Court of India in the judgment of Harbans Lal. The Supreme Court held that Sections 110 and 124 are independent, distinct and exclusive of each other and even if any seized goods are returnable in terms of Section 110 of the Act, the proceedings for confiscation of the goods under Section 124 may still continue. Paras 7 and 8 of the report in Harbans Lal are extracted hereunder:-

> 7. As said before Section 110 is in Chapter XIII covering the subject of search, seizure and arrest. The section operates during the stage of investigation. Section 124, hinted earlier, is in Chapter XIV which covers the topic: confiscation of goods and imposition of penalties. The subject of investigation and that of confiscations and imposition of penalties are ex facie exclusive of each other, the goal of each being different. A Constitution Bench of this Court in I.J. Rao, Asstt. Collector of Customs v. Bibhuti Bhushan Bagh (1989) 3 SCC 202 while interpreting Section 110(2) proviso of the Act has held that when wanting to extend period beyond six months in respect of seizure of goods, the Collector must serve notice on and afford hearing to the owner of the goods

before deciding grant of extension, as his right to restoration of his goods after six months is defeated by the order of extension. It has also viewed that where rights of a person are adversely and prejudicially affected by an order made by an authority in a proceeding, such person is entitled to a predecisional notice irrespective of whether the proceeding is judicial, quasi-judicial or administrative in nature. Earlier in point of time in **Asstt. Collector of Customs v. Charan Das Malhotra** (1971) 1 SCC 697 this Court observed that the Collector was not expected to propose the extension mechanically or as a matter of routine but only on being satisfied that facts exist which indicate that the investigation could not be completed for bona fide reasons within the time provided in Section 110(2) and that, therefore, extension of the period has become necessary. The Court also emphasised that the Collector cannot extend the time unless he is satisfied on facts placed before him that there is sufficient cause necessitating extension, in which case the burden of proof would clearly lie on the Customs authorities applying for extension to show that such extension was necessary. It was also pointed out that on the expiry of the period of six months, from the date of seizure, the owner of the goods would be entitled as of right to restoration of the seized goods, and that right could not be defeated without notice to him that an extension was proposed. It is found that the point was considered again in **Lokenath Tolaram v. B.N. Rangwani** (1974) 3 SCC 575 but this case has been concluded on different considerations. Unquestionably thus is the settled position of law that while extending time under Section 110(2), the owner of the seized goods is entitled to notice, because the seized goods on the expiry of period of six months are required to be returned to him, and if that period was to be extended for another period of six months he had the right to be heard. The High Court in the decision under appeal has thus rightly observed that it was not disputed before it that the ex parte order extending the time by another six months as postulated in Sections 110(2) and 124 of the Act, was vitiated.

8. Then comes the question as to what is the fallout of the order

extending time under sub-section (2) of Section 110 of the Act being vitiated. Learned counsel for the appellant would have us hold that in face of that vitiation, proceedings under Section 124 get lapsed for they could not be initiated without the aid of Section 110. This argument, however, militates against the ratio of Charan Das Malhotra's case and cannot be accepted. In the second half of paragraph 5 of the report of that case this Court observed:-

> "Section 124 provides that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty. The section does not lay down any period within which the notice required by it has to be given. The period laid down in Section 110(2) affects only the seizure of the goods and not the validity of the notice."
>
> (emphasis supplied)

In clear terms, it has thus been held that the period angle causing affectation under Section 110(2), would only pertain to the seizure of goods. The validity of notice under Section 124, for which no period has been laid within which it is required to be given is not affected. The seizure may have, after the expiry of six months or after the expiry of extended period of six months entitled the owner or the person concerned to the possession of the seized goods. This obviously is so because the matter at that stage is under investigation. On launching proceedings under Chapter XIV, Section 124 enjoins issuance of a notice for which no period has been fixed within which notice may be given. The difference is obvious because this goes as a step towards trial. The ratio of this Court aforequoted in Charan Das Malhotra's case thus settles the question aforeposed and the answer is that these two Sections 110 and 124 are independent, distinct and exclusive of each other, resulting in the survival of the proceedings under Section 124, even though the seized goods might have to be returned, or

> stand returned, in terms of Section 110 of the Act, after the expiry of the permissible period of seizure."

12. Thus, it is well settled by the authoritative pronouncement of the Supreme Court in Harbans Lal that if the notice as required under Section 110(2) of the Act is not served, the goods are liable to be returned, though the same may not affect the proceedings for confiscation of the goods under Section 124 of the Act.

13. Jeevraj and Ors., relied upon by the learned counsel for the Respondents in fact reiterates what was laid down in Harbans Lal. It nowhere states that even if no notice under Section 110 (2) in respect of the seizure of the goods is given, the goods can be still continued to be seized for the purpose of confiscation under Section 124 of the Act.

14. Mr. S.K.Dubey, learned counsel for the Respondents has tried to persuade me that the seizure of the bank account in the instant case was not covered under Section 110(2) of the Act, rather the same was done under Section 110 (3) of the Act and there is no provision to serve any notice upon the person from whose possession any documents or things are seized under this Section.

15. Mr. S.K. Dubey urges that the investigation in respect of evasion of customs duty is in progress and show cause notices are likely to be issued to the persons guilty of violation very soon. It is urged that freezing of the bank account was primarily to ensure the recovery of the customs duty, which was evaded on account of mis-declaration of the goods.

16. Section 110(3) of the Act deals with seizure of the documents or things which in the opinion of the proper officer would be relevant to any proceedings under the Act. Freezing of the bank account, in my opinion, will not be seizure of any document or thing useful or relevant to any proceedings under the Act. Rather freezing of the account was only with a view to stop the Petitioner from withdrawing the proceeds of the alleged violations under the Act.

17. In *Euroasia Global,* relied upon by the learned counsel for the Respondents, it was held that the 'goods' defined under Section 2(22)

of the Act includes currency. There is no precedent to show that freezing of the bank account will amount to seizure of currency. Since the Respondents' plea is that the bank account stand frozen with a view to recover the evaded customs duty, penalty, etc. etc., the freezing of the bank account may not amount to the seizure of any document, but at the same time it cannot also amount to seizure of any goods liable for confiscation as well. In Euroasia Global, even in case of seizure of the currency, the Supreme Court held that unconditional release of cash ought not to have been allowed. In para 8, the Supreme Court held as under:-

> "8. However, looking into the facts of the present case, we are of the view prima facie that before adjudication, in exercise of writ jurisdiction on the facts of this case, the High Court ought not to have granted unconditional release of the cash. In fact, we called upon the learned counsel for the respondent to give a bank guarantee. The respondent is not in a position to give a bank guarantee for the amount which he had already withdrawn."

18. Similarly, in *Sajjan Kumar,* the bank accounts were permitted to be operated, subject to the direction that the amount received in respect of past export transactions shall not be withdrawn.

19. The instant case relates to import of certain chemicals and evasion of customs duty thereon.

20. The Respondents in the counter affidavit have stated the chain as to how the misdeclared goods were imported by M/s. VVK Traders, M/s. Mehta Overseas, M/s. Chopra Overseas and M/s. Umesh Impex and other firms and were shown to be sold to individuals against the fake cash bills and imported chemicals with correct description were shown to be supplied by another set of fake front firms to several firms located mainly at Sambha, Jammu & Kashmir and the Petitioner's firm was found to be one of such firms.

21. In this view of the matter, since the freezing of the bank account, as stated above, was not seizure of the 'goods' as envisaged under Section 110 of the Act, the Petitioner is not entitled to de-freezing

of the bank account unconditionally. It is therefore, directed that the amount deposited in Bank Account No.030874226, Citibank, NA, 27 Central Market, Sector II, Western Avenue Road, Punjabi Bagh, New Delhi, after the date of freezing the account shall be released, subject to furnishing of a Bank guarantee to Respondent No.2 in respect of the amount credited in the account from the date of freezing of the account.

22. The writ petition stands disposed of accordingly.

ILR (2014) I DELHI 416

W.P. (C)

JOSE MELETH ....PETITIONER

VERSUS

UOI AND ORS. ....RESPONDENTS

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

W.P. (C) NO. : 1443/2012, DATE OF DECISION: 20.12.2013
C.M. APPL. NO. : 3149/2012

Constitution of India, 1950—Articles 32 & 226—University grant Commission Act, 1956—Section 3 and 26(1)—UGC—(Minimum Qualifications Required for the Appointment and Career Advancement of Teachers in Universities and Colleges) Regulations, 2000—Clause 1.3.1—Petitioner filed petition seeking writ of quo warranto for declaring that fourth respondent Dr. S. Sivakumar is not entitled to hold his position as Research Professor at Indian Law Institute (ILI)—Plea taken, Sivakumar fraudulently obtained post by making false statements and fraudulent misrepresentation before selection committee—Sivakumar's appointment

was contrary to statutory rules as he did not have requisite qualifications in terms of advertisement issued by ILI inviting applications for post of Research Professor and in terms of UGC Regulations for appointment—Per contra plea taken, present proceedings are motivated—Writ Petition of quo warranto is not maintainable as Sivakumar's selection and appointment was not to a statutory post—Petitioner does not have any locus standi to claim quashing of appointment since he was not a candidate—RTI responses received by petitioner from Kerala Law Academy were manipulated and are therefore, to be ignored—Selection of Sivakumar was not only within terms of advertisement issued and bye-laws of ILI, but merited—Held—Points for consideration in this case are whether petitioner has locus standi to agitate this matter—If so, do facts warrant issuance of writ of quo warranto—Petitioner, in opinion of this Court, despite being outsider, possesses necessary locus standi to question appointment in violation of UGC Regulations, which have force of statute—A particular institution may, based upon its internal peculiarities, choose to lay a different emphasis on particular requirements inter se candidates, fact remains that all minimum qualifications prescribed in 2000 UGC Regulations must necessarily be complied with—Limited inquiry to be conducted by this Court while considering a writ of quo warranto is not whether Sivakumar was more qualified candidate for post but rather whether his credential fell below minimum statutory bar imposed by UGC Regulations—If documentary proof provided by petitioner is to be believed, Dr. Sivakumar did not have cumulative ten years teaching or research experience required under 2000 Regulations, whilst if Dr. Sivakumar's documentary proof is considered, that requirement is clearly satisfied—Comprehensive details disclosed in "Academic Profile" render

Sivakumar eligible for post of Research Professor under Second alternate criterion i.e. outstanding scholar with established reputation who has made significant contribution to knowledge and that being case, his further selection lies at discretion of Selection Committee—There is no infirmity in appointment of Dr. Sivakumar as Research Professor at ILI—Writ petition dismissed with cost of Rs. 50,000/-.

Important Issue Involved: (A) UGC Regulations are mandatory and not recommendatory on the statutory authority vested in the UGC under Section 26. It lends credence to the proposition that the 2000 Regulations carry the force of statute and are this liable to be enforced through a writ of quo warranto.

(B) An outsider possesses the necessary locus standi to question an appointment in violation of the UGC Regulations which have the force of statute.

(C) The limited inquiry to be conducted by the Court while considering a writ of quo warranto is not whether the selected candidate was the more qualified candidate for the post, but rather, whether his credential fell below the minimum statutory bar imposed by the Regulations.

(D) Selection Committee sits as an expert body to consider the suitability of the academic qualifications of the candidates which a Court should not and, as a matter of law, cannot review on merits.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Sh. Jayant Tripathi, Advocate.

FOR THE RESPONDENT : Sh. Sumeet Pushkarna with Sh. Gaurav Sharma, Advocates, for Resp. No.1. Sh. Rakesh Munjal, Sr. Advocate with Sh. Rakesh Kumar Garg, Advocate, for Resp. No.2. Sh. Shashank Shekhar, for Sh. Amitesh Kumar, Advocate, for UGC. Sh. R. Venkataramani, Sr. Advocate with Sh. Maneesh Goyal, Advocate, for Resp. No.4.

CASES REFERRED TO:

1. *Central Electricity Supply Utility of Odisha* vs. *Dhobei Sahoo and Ors.,* 2013 (13) SCALE 477.
2. *Rajesh Awasthi* vs. *Nand Lal Jaiswal and Ors.* 2013 (1) SCC 501.
3. *Central Electricity Supply Utility of Odisha* vs. *Dhobei Sahoo and Ors.,* 2013 (13) SCALE 477.
4. *D. Ganesan* vs. *State of Tamil Nadu,* 2012 (2) CTC 177.
5. *Centre for Public Interest Litigation and Anr.* vs. *Union of India (UOI) & Anr.,* 2011 (4) SCC 1.
6. *Hari Bansh Lal* vs. *Sahodar Prasad Mahto and Ors.,* 2010 (9) SCC 655.
7. *Arun Singh @ Arun Kumar Singh* vs. *State of Bihar and Ors.,* (2006) 9 SCC 375.
8. *Dattaraj Nathuji Thaware* vs. *State of Maharashtra & Ors.,* 2005 (1) SCC 590.
9. *Ashok Kumar Pandey* vs. *The State of West Bengal and Ors.,* 2004 (3) SCC 349.

10. *The Mor Modern Cooperative Transport Society Ltd.* vs. *Financial Commissioner and Secretary to Govt. Haryana and Anr.,* (2002) 6 SCC 269.
11. *Dr. Duryodhan Sahu & Ors. Etc. Etc.* vs. *Jitendra Kumar Mishra & Ors.* 1998 (7) SCC 273.
12. *Union of India and Another* vs. *G. Ganayutham (Dead) by LRs,* AIR 1997 SC 3387).
13. *R.K. Jain* vs. *Union of India & Ors.* 1993 (4) SCC 119.
14. *Kashi Prasad* vs. *District Central Co-operative Bank Ltd., Timakgarh and Ors.,* 1992 (1) MPJR 362.
15. *Shri Sitaram Sugar Co. Ltd. and Another* vs. *Union of India and Others,* 1990 (3) SCC 223.

RESULT: Dismissed with costs.

S. RAVINDRA BHAT, J.

1. The petitioner in these proceedings under Article 226 of the Constitution of India, seeks a writ of quo warranto declaring that the fourth respondent (Dr. S. Sivakumar, hereafter referred to as "Sivakumar") is not entitled to hold his position as a Research Professor at the Indian Law Institute, New Delhi (hereafter the "ILI") as he, in the words of the petitioner, *".....fraudulently obtained the post by making false statements and fraudulent misrepresentation before the selection committee ..."* The petitioner alleges that Sivakumar's appointment was contrary to statutory rules as he did not have the requisite qualifications in terms of the advertisement issued by the ILI inviting applications for the post of Research Professor and in terms of the Universities Grants Commission Regulations ("UGC Regulations") for appointment.

2. The brief facts are that in response to an advertisement issued in 2005, Sivakumar, and other candidates, applied to the post of Research Professor in the ILI. Sivakumar submitted his application on 03.10.2005.

The advertised eligibility considerations were that the candidate had to be an eminent scholar with "good academic record" or have a doctoral degree in law or equivalent, "published work of high quality and master's degree in Law with at least 55% of marks or its equivalent grade" and "10 years post graduate teaching/research in universities/colleges and other institutions of higher education." There is no dispute that Sivakumar completed his law graduation in 1990 and subsequently completed his LLM from the University of Kerala, proceeding then to complete his Ph.D. in 1999. After processing the application, and conducting a selection process, Sivakumar was offered appointment to the post of Research Professor, and he took charge after the appointment order was issued on 20.02.2006. The present petitioner alleged for the first time that Sivakumar was not entitled to hold the post on 19.05.2010 by a representation to the ILI. Later, on 01.02.2012, he preferred a writ petition under Article 32 of the Constitution of India, which was later withdrawn on 24.02.2012, though the Supreme Court granted liberty to him to approach this Court. Consequently, he preferred the present writ petition.

3. It is contended that Sivakumar had made a fraudulent statement while applying for the post that he had sufficient experience in post graduate teaching, (one of the essential advertised qualifications) though in reality, alleges the petitioner, the documents issued by the institutions in which Sivakumar claims to have taught at earlier clearly demonstrate that he did not have the requisite experience as stated by him.The Petitioner argues that although in Annexure I to his application, Sivakumar had stated that he had postgraduate teaching experience of 11 years and 1 month (8 years and 9 months in Kerala Law Academy College, Thiruvananthapuram, 5 months in National University of Juridical Sciences, Kolkata, and 1 year and 11 months in Hidayatullah National Law University, Raipur), he had no such teaching experience and falsely represented before the selection committee. For this, the petitioner relies on responses received from the three institutions under the Right to Information Act, 2005, which have been brought on record. As regards the National University of Juridical Sciences, the petitioner argues that Sivakumar did not teach any post-graduate course in that University, and in fact, committed a breach of contract; as regards the Hidayatullah National Law university, Raipur, the petitioner argues that Sivakumar was working

at the university only on an ad hoc basis; as regards the Kerala Law Academy, the petitioner argues that Sivakumar did not teach any postgraduate course, and the term of his employment was 6 years, 11 months and 19 days, as against his claim of 8 years and 9 months postgraduate teaching experience. In view of these facts, the petitioner argues that various fraudulent representations were made, which misled the selection committee into confirming his appointment as a Research Professor. This, at any rate, justifies disciplinary proceedings and removal from the post occupied by Sivakumar.

4. The petitioner also argues that Sivakumar is liable to be removed from his post for another reason, i.e. he was not qualified to be appointed to the post of Professor as per the UGC (Minimum Qualifications Required for the Appointment and Career Advancement of Teachers in Universities and Colleges) Regulations, 2000 (hereafter "2000 UGC Regulations"). The petitioner submits that as per these regulations, the minimum qualifications to be appointed to the post of Professor in law are that the candidate shall be/have: (i) an eminent scholar with published work of high quality, (ii) actively engaged in research; (iii) 10 years' experience in postgraduate teaching and/or (iv) experience in research at the University/National level institutions including experience of guiding research at doctoral level; or (v) an outstanding scholar with established reputation who has made a significant contribution to knowledge. The petitioner argues that Dr. Sivakumar:

> "certainly did not have any of the above qualifications at the time of his appointment and therefore, his appointment is contrary to statutory rules."

5. To substantiate this submission, it is argued that the Sivakumar's application shows that: (i) He was not an eminent scholar with published work of high quality. No document was submitted by him at the time of interview to show that he was an eminent scholar with published work of high quality; (ii) He was not actively engaged in research. No document was submitted by him at the time of interview to show that he was actively engaged in research; (iii) He had no sufficient experience in

postgraduate teaching. In fact, in the application, he made a fraudulent and misleading statement that he had 11 years and 9 months experience in postgraduate teaching; (iv) He had no experience in research at the University/National level institutions including experience of guiding research at doctoral level; (v) He was not an outstanding scholar with established reputation who has made significant contribution to knowledge. No document was produced by him to show that he was an outstanding scholar with established reputation who has made significant contributions to knowledge at the time of the interview.

6. The petitioner contends that he had also sent a representation to the Director of the ILI on 19.05.2010, on which no action has yet been taken (as is clear from the response to a query under the Right to Information Act, 2005, by the ILI dated 10.10.2011, (No. ILI/RTI/2011/4469).

7. In response to the allegations levelled by the petitioner, Sivakumar's counsel firstly urged that the present proceedings are motivated. It was submitted that the writ petition, as it claims a writ of quo warranto, cannot be maintained, because Sivakumar's selection and appointment was not to a statutory post. Without any locus standi, the petitioner cannot, it was argued, claim quashing of the appointment, since he was not a candidate. It was further argued that Sivakumar's selection was within the rules, and made after presentations from each of the five candidates regarding their teaching and research experience. Learned counsel submitted that due to the petitioner's complaints, Sivakumar was asked to submit authenticated/attested documents to prove the desired teaching/research experience as mentioned, and he did so by making the following documents available to the Selection Committee: (a) a Kerala University Order dated 03.10.1994, appointing Sivakumar as a lecturer; (b) a certificate dated 25.02.2005 issued by Dr. N. Narayanan Nair, Secretary of the Kerala Law Academy College, noting the period of service of Dr. Sivakumar from 01.08.1994 to 19.05.2003; (c) a Kerala University Order dated 01.01.2001 granting recognition to Sivakumar as a Research Guide for Ph.D. students. (d) a certificate dated 18.10.2003/19.10.2003 issued by the Registrar, WB National University of Juridical

Sciences showing Prof. Sivakumar having joined it since 20.05.2003; (e) an Office Order dated 20.10.2003 issued by the Vice-Chancellor, Hidayatullah National Law University showing the appointment of Sivakumar as an Associate Professor with effect from that date.

8. Based on these documents, learned counsel argued that the documents sought to be relied upon by the petitioner by way of an RTI application from the Kerala Law Academy is contrary to the document provided by Sivakumar to the Selection Committee, and cannot be made the basis for any decision. It is argued that these RTI responses were manipulated, and are, therefore, to be ignored. Further, learned counsel argued that the UGC has no role to play in the selection process, and as such, the selection criteria are determined by the advertisement for these posts. For this learned counsel placed reliance on a letter from the UGC dated 13.01.2010, where the UGC indicated that it would have no role to play in the process of selection. Moreover, it was argued that the 2000 UGC Regulations were adopted in May, 2006, whereas the post was filled up in 2005 itself, and thus, the question of application of those regulations does not come into the picture.

9. Finally, it was submitted that the ILI is an institute engaged in research-based teaching, which is different from other universities, and thus, norms of the UGC may have to be looked at differently when it comes to the ILI. In this light, learned counsel also submitted that the application submitted by Sivakumar clearly reveals that he was an eminent scholar with published work of high quality, and that he had an established reputation as an individual who has made a significant contribution to knowledge of law. Accordingly, given Dr. Sivakumar's track record, learned counsel submitted that his selection by the ILI as a Research Professor was not only within the terms of the advertisement issued, and the bye-laws of the ILI, but merited.

10. Before addressing the questions that arise in this writ petition, some background is important. First, it is established that the ILI was granted Deemed University status on 29.10.2004, under Section 3 of the University Grant Commission Act, 1956 (vide Government Notification No. F.9-9/2001-U.3), and hence, UGC Regulations are applicable to the ILI. The 2000 UGC Regulations were framed by the UGC under Section

26(1) of the UGC Act, 1956. These regulations prescribe the minimum qualifications required for appointment of teachers in universities and intuitions affiliated to the UGC, i.e. the ILI in this case. This is clear from Section 1(ii) of the 2000 UGC Regulations, which states that these regulations:-

> "shall apply to every university established or incorporated by or under a Central Act, Provincial Act or a State Act, every institution holding a constituent or an affiliated college recognized by the Commission, in consultation with the University concerned under Clause (f) of Section 2 of the University Grants Commission Act, 1956 and every institution deemed to be a University under Section 3 of the said Act." (emphasis supplied)

11. In 2005, by an advertisement (DAVP 1439(4) 2005), the ILI, through its Registrar, advertised for the post of Research Professor, in the following terms:

> "Applications are invited latest by 17.10.2005 in the prescribed form for filling up of the following posts in the Indian Law Institute.
>
> (1) Research Professor (2 posts) – UR: 16400-45020900-500-22400. Age limit up to 62 years. Essential Qualifications: An eminent scholar with good academic record or Doctoral degree in law or equivalent published work of high quality and master's Degree in Law with at least 55% of marks or its equivalent grade and 10 years of experience of post graduate teaching/research in universities/colleges and other institutions of higher education." (emphasis supplied).

12. In his application form, Sivakumar entered the following details as against the heading "Teaching Experience at University or Degree Colleges", in Annexure I: (1) Undergraduate and postgraduate classes taught as a permanent lecturer at the Kerala Law Academy, between 01.08.1994 and 19.05.2003, for a period of 8 years and 9 months. (2) Undergraduate and postgraduate classes taught as a permanent lecturer

at the National University of Juridical Sciences, between 20.05.2003 and 19.10.2003, for a period of 5 months. (3) Undergraduate and postgraduate classes taught as a permanent Associate Professor at the Hidayatullah National Law University, since 20.10.2003, for a period of 1 year and 11 months. Thus, the application records, under Entry 17, a total of 11 years and 2 months of teaching experience.

13. As against the heading "Research Experience", Sivakumar claimed that he worked for 4 years and 9 months as a "recognized research guide"on "Additional Duty" (i.e. the "Nature of the Assignment") at the University of Kerala; 1 year and 10 months as a "Project Coordinator"on "Additional Duty" at the Hidayatullah National Law University. Further, in his "Academic Profile" attached to his application, Sivakumar entered details of twelve research publications, four book reviews, eleven papers presented internationally, along with three papers submitted and presented (though not personally present), various papers presented nationally, a list of other publications, including four book contributions, programmes organized by him and academic assignments taken.

Points for consideration

14. Two questions arise for consideration on this case. First, whether the petitioner has the locus standi to agitate this matter, and secondly, if so, do the facts warrant the issuance of a writ of quo warranto.

15. Addressing the first question, the proposition that a writ of quo warranto lies for violation of statutory provisions/rules is no longer res integra. As the Supreme Court noted in **Hari Bansh Lal v. Sahodar Prasad Mahto and Ors.,** (2010) 9 SCC 655:

> "20. From the discussion and analysis, the following principles emerge:
>
> (a) Except for a writ of quo warranto, PIL is not maintainable in service matters.
>
> (b) For issuance of writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules.

(c) Suitability or otherwise of a candidate for appointment to a post in Government service is the function of the appointing authority and not of the Court unless the appointment is contrary to statutory provisions/rules."

Indeed, that a writ of quo warranto may be issued for appointments contrary to statutory rules is an established principle of law under Article 226 is clear from the decisions in **The Mor Modern Cooperative Transport Society Ltd. v. Financial Commissioner and Secretary to Govt. Haryana and Anr.,** (2002) 6 SCC 269 and recently in **Central Electricity Supply Utility of Odisha v. Dhobei Sahoo and Ors.,** 2013 (13) SCALE 477.

16. The rules alleged to be violated in this case, i.e. the 2000 UGC Guidelines, were framed by the UGC under its governing statute, i.e. Section 26(1) of the UGC Act, 1956, and thus, possess statutory flavour. Specifically, Section 26 states that:

"[t]he Commission may, by notification in the Official Gazette, make regulations consistent with this Act and the rules made thereunder defining the qualifications that should ordinarily be required of any person to be appointed to the teaching staff of the University, having regard to the branch of education in which he is expected to give instruction."

17. Therefore, the 2000 UGC Regulations presently under consideration strictly trace their authority to Section 26 of the UGC Act, and as the Supreme Court recognized in Co-Operative Central Bank Ltd. and Ors v. Additional Industrial Tribunal and Ors., [1970] 40 Comp Cas 206 (SC), that:

"10..... if a statute gives power to a Government or other authority to make rules, the rules so framed have the force of statute and are to be deemed to be incorporated as a part of the statute."(emphasis supplied)

18. Similar conclusions have been reached, in varying contexts, by

the Madhya Pradesh High Court, in **Kashi Prasad v. District Central Co-operative Bank Ltd., Timakgarh and Ors.,** 1992 (1) MPJR 362 ("It is well settled that where a statute authorises either the Government or any other authority to frame rules and the rules are so framed, the rules would have the force of statute....."). Further, the letter 4th of the UGC (D.O. No. F.3-1/2000(PS), dated April, 2000) introducing the 2000 Regulations specifically notes that:

"[t]he Regulations issued by the UGC are mandatory in nature and all the universities are advised to strictly comply with them. It shall be necessary for the universities and the management of colleges to make the necessary changes in their statutes, ordinances, rules, regulations etc. to incorporate these Regulations."

19. The fact that the UGC Regulations are mandatory, and not recommendatory, on the statutory authority vested in the UGC under Section 26 further lends credence to the proposition that the 2000 Regulations carry the force of statute, and are thus, liable to be enforced through a writ of quo warranto. In fact, this question of locus standi in cases of writs of quo warranto for the violation of UGC Regulations came before the Madras High Court in **D. Ganesan v. State of Tamil Nadu,** 2012 (2) CTC 177, where the petitioner questioned the appointment of an individual to the post of Principal of Dr. Ambedkar Government Law College by way of a writ of quo warranto, on the ground that the UGC Regulations applicable (i.e. the UGC Regulations on Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education 2001, which are, in principle, identical to the 2000 UGC Regulations in question in this case) were violated. In setting aside the appointment in that case, the Court held that the writ petition was maintainable:

"19. Contending that a public interest litigation does not lie in service matters, the counsel for the third respondent relied upon the decision of the Supreme Court in **Hari Bansh Lal vs. Sahodar**

Prasad Mahto 2010 (9) SCC 655. But the said decision goes against the third respondent, as seen from the principles of law summarised in para 34 of the decision, which read as follows:

> "34. From the discussion and analysis, the following principles emerge:
>
> (a) Except for a writ of quo warranto, PIL is not maintainable in service matters.
>
> (b) For issuance of a writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules.
>
> (c) Suitability or otherwise of a candidate for appointment to a post in Government Service is the function of the appointing authority and not of the Court unless the appointment is contrary to statutory provisions/rules.
>
> 20. The present writ petition is not a public interest litigation. It is filed for the issue of a Writ of Quo Warranto. The appointment of the third respondent is contrary to the UGC Regulations 2010, which has been adopted by the Tamil Nadu Dr. Ambedkar Law University and accepted by the Bar Council of India in the Rules of Legal Education, 2008. The adhoc rules framed by the Government should only be read in tune with UGC Regulations 2010. Therefore, the writ petition is maintainable and the appointment of the third respondent is liable to be set aside. Accordingly, the writ petition is allowed and the order in G.O.Ms. No. 241, Law (LS) Department, dated 17.6.2011, promoting the third respondent to the post of Principal of the Government Law College is set aside. There will be no order as to costs. Consequently, connected miscellaneous petition is closed."

20. The petitioner in the opinion of this court, despite being an outsider, possesses the necessary locus standi to question an appointment in violation of the UGC Regulations, which have the force of statute.

21. On merits, it is useful to extract the relevant portion of the 2000

UGC Regulations, i.e. Clause 1.3.1, the violation of which is alleged in this case:

> "1.3.1 HUMANITIES, SOCIAL SCIENCES, SCIENCES, COMMERCE, EDUCATION, PHYSICAL EDUCATION, FOREIGN LANGUAGES AND LAW.
>
> 1.3.1 Professor:
>
> An eminent scholar with published work of high quality, actively engaged in research, with 10 years of experience in postgraduate teaching, and/or experience in research at the University/National Level institutions, including experience of guiding research at doctoral level.
>
> OR
>
> An outstanding scholar with established reputation who has made significant contribution to knowledge."

The advertisement (DAVP 1439(4) 2005), through which the post of Research Professor was announced, followed this minimum requirement, and echoes Clause 1.3.1. Therefore, no question of an inconsistency between the requirements advertised by the ILI and the 2000 UGC Regulations arises. Nor is it disputed that the relevant clause applicable to the present case is Clause 1.3.1 that prescribes the necessary requirements for appointment as a Professor in Law. Though the post currently under consideration is titled 'Research Professor', as the ILI is a research, rather than teaching-based institution, the norms of the UGC apply uniformly across the board to all Professors in Law appointed in institutions to which the UGC Regulations apply, i.e. the ILI in this case. While a particular institution may, based upon its internal peculiarities, choose to lay a different emphasis on particular requirements inter se candidates, the fact remains that all minimum qualifications prescribed in the 2000 UGC Regulations must necessarily be complied with. Indeed, neither learned counsel for Mr. Sivakumar nor the ILI have advanced the argument that the UGC Regulations are inapplicable on this count.

22. Clause 1.3.1, which is controlling in this case, provides two parallel paths: either one is to be *"an eminent scholar with published work of high quality, actively engaged in research, with 10 years of experience in postgraduate teaching, and/or experience in research at the University/National Level institutions, including experience of guiding research at doctoral level, OR An outstanding scholar with established reputation who has made significant contribution to knowledge."* The disjunctive 'or' within Clause 1.3.1 allows for either of the two requirements to be met. While some requirements are subject to an objective inquiry (i.e. whether the minimum requirement of 10 years of experience of teaching/research), other factors (i.e. whether the candidate is an eminent scholar with published work of high quality, or an outstanding scholar with established reputation who has made significant contribution to knowledge) are subjective, in that the primary decision lies with the Selection Committee, and the scope of judicial review in this regard is limited. Thus, as the Supreme Court recognized in **Hari Bansh Lal v. Sahodar Prasad Mahto and Ors.,** 2010 (9) SCC 655, the

> "15.....suitability or otherwise of a candidate for appointment to a post is the function of the appointing authority and not of the court unless the appointment is contrary to statutory provisions/rules."

23. The limited inquiry to be conducted by the Court while considering a writ of quo warranto is not whether Sivakumar was the more qualified candidate for the post, but rather, whether he was disqualified by Clause 1.3.1, i.e. whether his credential fell below the minimum statutory bar imposed by the UGC Regulations.

24. The Court is cognizant of the fact that Sivakumar's application, under the details filed against Entry 17(A), indicates that he has a total of 11 years and 1 month of postgraduate teaching experience, and under Entry 17(B), indicates that he has research experience of 6 years and 7 months, in addition to the details of his research activities provided in Annexure II to the application, wherein various research publications and papers presented at international conferences are recorded, from 1992 till the year of the application process, i.e. 2005. 25. Under the various

responses from the institutions that Dr. Sivakumar has been employed in, under the RTI Act, the following details emerge:

a. The RTI response from West Bengal National University of Juridical Sciences, in a letter dated 03.02.2010, stated that Dr. Sivakumar did not teach any postgraduate course, and further, that he was employed as a "lecturer" from 20.05.2003 to 19.10.2003.

b. The RTI response from Hidayatullah National Law University, in a letter dated 15.02.2010, states that Dr. Sivakumar was employed as an Associate Professor on an ad hoc basis from 20.10.2003 till 18.02.2006, and did teach postgraduate courses.

c. The RTI response from Kerala Law Academy, in a letter dated 26.03.2010, states that he was employed as a "lecturer" from 01.06.1996 till 19.05.2003, and did not teach any postgraduate course.

26. These facts are contested by Dr. Sivakumar, who has produced several documents on record to contradict these facts. First, a letter from the Kerala Law Academy dated 01.08.1994, was produced before the Court stating that

> "Shri S. Sivakumar ... is appointed as a Lecturer under this Educational Agency on a pay of Rs. 2,200/-p.m. in the scale of Rs. 2200-75-2800-100-4000 in the Kerala Law Academy College, Thiruvananthapuram from 1.8.1994 ..."

27. This is corroborated by a letter, dated 01.08.1994, from the Principal of the Kerala Law Academy College to the Registrar of the University of Kerala

> "forwarding ... documents [specifically, the office order No. Staff/Approval/94, dated 15.7.1994] relating to the Lecturer appointed in this college for favour of approval of the University".

This is followed by a letter from the University of Kerala, dated

03.10.1994, No. Ac.F.I.1/3159/94, stating that:

> "XXXXXX XXXXXX XXXXX
>
> As per the recommendations of the Standing Committee on Teaching/Non-teaching staff of Private College held on 31.8.1994, sanction has been accorded for the appointment of Sri S. Sivakumar as Lecturer in the Law Academy Law College Thiruvananthapuram being approved with effect from 1.8.1994 ..."

This is also corroborated by two certificates dated 20.08.1997 and 13.03.1998, stating that Sivakumar was a full-time lecturer since 01.08.1994. Finally, Dr. Sivakumar has produced a letter dated 25.02.2005 stating that "[o]n accepting his resignation letter he has been relieved from our service with effect from 19.5.2003."

28. These letters, if accepted facially, (and the validity of which has not been impugned by the petitioner), clearly contradict the Kerala Law Academy's RTI response that Dr. Sivakumar taught from 01.06.1996 till 19.05.2003. Rather, these letters and certificates indicate that Dr. Sivakumar was appointed on 01.08.1994. Moreover, Dr. Sivakumar has produced a letter dated 15.05.1999, from the Controller of Examinations, University of Kerala addressed to him, stating:

> "I am forwarding for first valuation files nos. 1832 to 1838 answer books in Rule ___ Law ___ of II year/LLM Degree Examinations April 1999. Kindly value the answer books and forward the mark sheets to the Chairman before 2.6.99 ..."

29. Again, taking this letter to be true facially, and no reason to suspect its authenticity has been brought forward by the petitioner, this letter contradicts that statement in the RTI response from Kerala Law Academy that Sivakumar did not teach any postgraduate course, since the letter directs Sivakumar to correct LLM Degree (i.e. postgraduate) papers. The Court is aware that a precondition to working as examiner would be that the concerned member of the teaching staff would be entitled to either set the paper, or at least to teach the subject or course. Indeed, another request to mark postgraduate papers has been brought

on record in the form of a letter from the Controller of Examinations dated 10.06.2002, for the Administrative Law course for the April/May, 2002, LLM Degree Examinations. Indeed, this claim is reinforced substantially by another certificate, which has remained unchallenged in these proceedings, by Dr. V. Sobha, Former Professor and Head, Department of Environmental Sciences, University of Kerala, dated 19.06.2012, stating that:

> "Dr. S. Sivakumar, Lecturer, Kerala Law Academy Law College, Thiruvananthapuram had been engaged in teaching the paper on Environmental Legislations for M.Sc. (Environmental Sciences) and M. Phil (Environmental Sciences) courses in the Department of Environmental Sciences, University of Kerala from August, 1995 to March, 2003."

30. Furthermore, a certificate dated 24.12.2012 from Prof. S. Nagappan Nair, a Guest Faculty at the Kerala Law Academy, also confirms that he taught the paper 'Legislative Process' to LLM students at the college with Dr. Sivakumar from 1994 to 2003; a fact which is confirmed further by the Preliminary Minutes of the 9th Meeting of the Syndicate of the University of Kerala on 21.08.1996, which records in Appendix XI, as regards Item No. 75 on the Agenda (i.e. *"University Department of Environmental Science – Approval of the Panel of names on Guest Lectures and their Remuneration Regarding"*) the name of Sivakumar at Serial No. 12 for the teaching of M. Sc. and M. Phil courses, i.e. both post-graduate courses.

31. As regards Sivakumar's tenure at the National University of Juridical Sciences in Kolkata, he has brought on record a 'Certificate of Service' from Dr. Surajit C. Mukhopadhyay, dated 17.05.2012, stating:

> "This is to certify that Dr. S. Sivakumar was a teaching faculty in the West Bengal National University of Juridical Sciences, Kolkata from 20.5.2003 till 19.10.2003 as Assistant Professor in Law.
>
> He taught both LLB and LLM students of this university during his stay at this university."

32. This letter, thus, contradicts the RTI response that claim that Dr. Sivakumar did not teach any post-graduate courses.

33. As far as the tenure at Hidayatullah National Law University goes, the details entered by Sivakumar in his application, as regards his appointment from 20.10.2003 till 18.02.2006 as an Associate Professor who did teach post-graduate courses, is borne out by the RTI response itself, as also by a certificate by the Registrar of the University dated 18.02.2006, that confirms his appointment from 20.10.2003. Likewise, with respect to the details entered by Dr. Sivakumar under Entry 17(B), against the heading "Research Experience", the petitioner has produced no document to contradict the claims that Dr. Sivakumar was, for a period of 4 years and 9 months, a "recognized research guide" on "Additional Duty" at the University of Kerala, and for a period of 1 year and 10 months a "Project Coordinator"on "Additional Duty" at the Hidayatullah National Law University. Neither have any of the other details provided by Dr. Sivakumar in his "Academic Profile" attached to his application (i.e. various publications and conferences) been contradicted by the petitioner. Thus, his cumulative 6 years and 7 months of research experience at those two universities remains established.

34. Having regard to the above background and the documentary proof available before the Court, the limitations upon the Court's authority to review such actions is important and requires to be recollected. In its Article 226 jurisdiction, the Court must not become the "primary decision maker"(**Union of India and Another v. G. Ganayutham (Dead) by LRs,** AIR 1997 SC 3387), but rather, remain deferential in its assessment. In **Rajesh Awasthi v. Nand Lal Jaiswal and Ors.** 2013 (1) SCC 501 it was reiterated that the Court is concerned only with eligibility and legality of appointments to public offices, not suitability of individual candidates, in proceedings under Article 226 of the Constitution of India. Other decisions (**R.K. Jain v. Union of India & Ors.** 1993 (4) SCC 119; **Dr. Duryodhan Sahu & Ors. Etc. Etc. v. Jitendra Kumar Mishra & Ors.** 1998 (7) SCC 273, **Dattaraj Nathuji Thaware v. State of Maharashtra & Ors.,** 2005 (1) SCC 590, and **Ashok Kumar Pandey v. The State of West Bengal and Ors.,** 2004 (3) SCC 349) have declared that there can be no public interest litigation in service matters.

Thus, barring clear cases where a writ of quo warranto can be issued, Courts cannot take upon themselves the task of a "merits review" of appointments to public or such like offices (**Centre for Public Interest Litigation and Anr. v. Union of India (UOI) & Anr.,** 2011 (4) SCC 1.

35. In this case, the Selection Committee constituted under the byelaws of the ILI was properly seized of the matter, and tasked to fill the position of a Research Professor. In doing so, the Committee requested for various details (as were submitted by Sivakumar and four other candidates), and the candidates appeared before the Committee in order to make their presentations on their research and teaching experience. Based on this, and on an appreciation of the evidence before the Committee, the decision was taken to appoint Sivakumar as a Research Professor. Indeed, the petitioner does not claim, nor is there any material on record, to indicate that the Selection Committee did not apply its mind to the facts present before it, or that any extraneous or irrelevant considerations played a part in the decision-making process, such that the interference of this Court is warranted under Article 226. Rather, the claim is that the facts presented before the Selection Committee were false, and that the minimum statutory requirements, or more accurately, the requirements in the UGC Regulations, were not met. This point was recognized by the Supreme Court in **Centre for Public Interest Litigation and Anr.** (supra) where the Court noted that:

> "42.....judicial review is concerned with whether the incumbent possessed qualifications for the appointment and the manner in which the appointment came to be made or whether the procedure adopted was fair, just and reasonable.....
>
> XXXXXX XXXXX XXXXXX
>
> 45. ..... We reiterate that the Government is not accountable to the courts for the choice made but the Government is accountable to the courts in respect of the lawfulness/legality of its decision when impugned under the judicial review jurisdiction."(emphasis supplied).

36. The question, thus, is whether Dr. Sivakumar satisfied the basic minimum requirements specified under Clause 1.3.1. If the documentary proof provided by the petitioner is to be believed, Dr. Sivakumar did not have the cumulative ten years' teaching or research experience required under the 2000 Regulations, whilst if Dr. Sivakumar's documentary proof is considered, that requirement is clearly satisfied. Specifically, as in this case, when questions of fact come before the Court, and contradicting versions of fact are presented, the Court must tread with caution. This was considered by the Supreme Court in **M/s. Shri Sitaram Sugar Co. Ltd. and Another v. Union of India and Others,** 1990 (3) SCC 223:

> "47. Where a question of law is at issue, the Court may determine the tightness of the impugned decision on its own independent judgment. If the decision of the authority does not agree with that which the Court considers to be the right one, the finding of law by the authority is liable to be upset. Where it is a finding of fact, the Court examines only the reasonableness of the finding. When that finding is found to be rational and reasonably based on evidence, in the sense that all relevant material has been taken into account and no irrelevant material has influenced the decision, and the decision is one which any reasonably minded person acting on such evidence, would have come to, then judicial review is exhausted even though the finding may not necessarily be what the Court would have come to as a trier of fact."

37. The primary decision making authority in this case was the Selection Committee, which considered the certificates and other documentary evidence presented by Dr. Sivakumar, and reached the conclusion that he met the basic minimum requirements. While undoubtedly proceedings under Article 226 relax the rules of evidence and pleadings, and the Court may consider the evidence liberally, and despite the limits on judicial review observed above, the question of lack of eligibility undoubtedly lies within the realm of judicial review, the rigours attached to reaching a correct finding of fact cannot be washed away by not considering the details of the documentary evidence produced before the Court. Indeed, the limitations inherent is considering disputed questions

of fact, under an Article 226 petition, stems not only from the limited nature of judicial review as regards findings of fact, but equally, and as importantly, from the fact that the:

> "12.....issuance of a writ of quo warranto is discretionary and such a writ should be issued only upon a clear finding that the appointment to a public office was contrary to the statute." (**Arun Singh @ Arun Kumar Singh v. State of Bihar and Ors.,** (2006) 9 SCC 375)

38. At best, the present case represents a dispute as to whether the teaching/research experience detailed by Sivakumar in his application is correct, and thus, meets the basic minimum requirements under Clause 1.3.1. Facially, and given that no reason to disbelief the documents produced by Sivakumar has been brought to light, as also the fact that a majority of the documents are contemporaneous with his appointment at the respective institutions, a clear and convincing finding that Dr. Sivakumar did in fact not possess the necessary qualifications does not appear from the record. The contradicting documents in the present case were sourced by the Petitioner much after the selection committee's recommendations and appointment of Sivakumar. Indeed, the nature of certificates issued and filed, by the Kerala Law Academy in 2010 in the present proceedings in some measure contradict the letters and certificates issued by it earlier. While there is no dispute that the said Academy issued the earlier letters which Sivakumar relies on much prior to the present case, and in the early 2000s and late 1999, the documents (supported by its affidavit of 17.02.2013) now seem to suggest that Sivakumar was working as a Guest Faculty. The Court no doubt had issued notice to the said Academy and it has filed its affidavit. However, the Court is conscious of the fact that subsequent explanations, in respect of previous documents issued in Sivakumar's favour, particularly in the course of proceedings, would not present an accurate picture. The Academy's equivocating documents, particularly the materials sought to be placed (perhaps with a view to discredit Sivakumar) should not be considered, because doing so would be needlessly entering into the arena of merits review, a prohibited zone. Not only does this Court, in the present proceedings, not have the benefit of testing the veracity of these documents through cross-examination, but as importantly, the findings