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VOLUME-3, PART-II

(CONTAINS GENERAL INDEX)

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Lt. Mrs. C. Reethama Joseph v. *Union of*

— Article 226—Son of petitioner, aged about 10 years, died due to collapse of shade/chajja at a house situated in DESU Colony—Victim playing in the park, took shelter under the shed to protect himself from rain—House was constructed 10 years back—Poorly maintained by respondent—Deceased only son, studying in 5th—A meritorious student—Petitioner making efforts to make his son software engineer—Respondent owed the duty to maintain the structure so as to keep them from harming those who rightfully assumed that they would not collapse only on account of rain——Principle of strict liability claimed—Further contended—State failed to protect fundamental right of the petitioner's son to Life—Public law remedy available to them for compensation—Per-contra-not denied the occurrence—Registration of FIR—Not stated death occurred due to some other reasons—Contended—Present case involved disputed question of facts—Can only be settled by leading evidence—Proper remedy was to file civil suit and Writ not maintainable—Both respondents BSES Rajdhani Power Ltd. & Delhi Transco Ltd. sought to shift claim on each other for not maintaining flat—Held—Writ to claim compensation maintainable under Article 226—There can be no quarrel that flat should have been maintained so that no part of it fell suddenly on its own only on account of rain—Falling of shade case of negligence—Principle of Strict Liability applied.

— Standard compensation awarded taking income of parents—Monthly salary of father was Rs. 10,000/- at the time of incident and at the time of filing of affidavit it was Rs. 30,000/- per month—Multiplicant of 90,000/- was taken; compensation of Rs. 15,26,000/- awarded with interest 9% per annum by applying multiplier of 15 in terms of Second Schedule of Motor Vehicle Act, 1988.

Varinder Prasad v. *B.S.E.S. Rajdhani Power*

— Article 226—Writ Petition impugning the selection process, for short listing students for Elementary Teacher Education (ETE) Diploma course for the session 2010-12, as prescribed in the prospectus published by the respondent No. 2 State Council of Educational Research & Training (SCERT), particularly Clause 5 of Chapter-IV and Clause 6 of Chapter-XII—Petitioners axiomatically also seek quashing of the selection and direction for inclusion of their own names in the shortlist and admission to the course—Two petitioners claim to be belonging to OBC category and applied for admission in the said category for which 15% reservation was prescribed—The challenge is to the admission process predicated on the fact that they had 78% and 76% marks respectively in their Senior Secondary School Examination—Applicants with lower marks in the Senior Secondary School Examination were admitted to unreserved category—Petitioners admittedly filed up only one form claiming admission in the OBC category—They did not fill up a separate application form for admission in the unreserved category—Hence, were not considered for admission in the unreserved category—Students with lower marks than the petitioners were admitted in the OBC category, the last student admitted had marks higher than the petitioners. Held—It thus, could not ex facie be said that action of respondent SCERT in requiring candidates to fill up separate forms for consideration in separate categories was bad—However, having observed so, Court still constrained to observe that law as enunciated under various dicta appear to sway in favour of candidate applying in reserved category not forfeiting his right for consideration in unreserved category—Better course for respondents to follow in future thus, appeared to be in not requiring separate applications to be filled up for reserved and unreserved category even if such procedure were to serve

administrative convenience of respondents better—Reservation was benefit in addition to already existing right including Fundamental Right of equality—If any scheme of reservation or procedure evolved with view to give effect to such scheme was made to depend upon condition of truncating fundamental or any right of individual, such scheme of reservation would be contrary to constitutional provisions and law and to extent it curtails fundamental right or any other right of person belonging to such category would be liable to be declared illegal—Hence, petition allowed partly.

— Article 226—Writ Petition—Judicial Review—Bachelor of Ayurvedic Medicine and Surgery Course—Petitioner qualified Class 12 examination—Secured aggregate mark 59.67% in physics, chemistry and biology—Sat for Common Enterence Test for admission to BAMS Course on the basis of admission brochure circulated by the university—Eligibility criteria passed 12th class under 10+2 scheme in physics, chemistry and biology, English individually must have obtained minimum of 60% mark in aggregate in physics, chemistry and biology (50% in case of SC/ST candidate)—No rounding off percentage of the qualifying examination—Petitioner did not qualify in terms of eligibility—But the college had granted her provisional admission subject to approval of competent authority—Deposited her fees—Respondent no.2/college requested University to consider the case of petitioner alongwith 19 other similarly placed students for a one time relaxation on the ground that there were existing vacancies of 20 seats in the session—Contended, despite the representation made by the college, University illegally turned down the request—Issued impugned refusal letter dated 05.12.2011—Also, ignored the recommendation in favour of filling of available seats—Respondent no.1/University opposed the petition being misconceived in view of the earlier law—Held—Provisional

admission to an Institute does not in itself create a vested right in the petitioner to claim admission—Petitioner aware at the time of taking provisional admission that it was subject to approval of competent authority—Object of prescribing eligibility criteria is to ensure maintenance of excellence in standards of education and not to fill up all the seats—Reducing the standard to fill seats a dangerous trend which would lead to destruction of quality of education—It would also adversely effect those candidates who stay away because they did not meet the minimum eligibility standard laid down by the respondent and are not before the Court—It is also well settled that policy decision regarding the admission in affiliated institution lies in the domain of University in question—The decision making power of University cannot be interfered with under the judicial review unless the petitioner able to show some patent malafides on the part of the university or point out instances of discrimination or can make out a case that criteria laid down was so perverse that it cannot be sustained—Writ Petition Dismissed.

— Article 226—Delhi Co-Operative Societies Rules, 1973—Clause 25 (1) C (i)—Petitioner acquired membership of respondent no.2 society on transfer from original membership of his brother—Transfer approved on 4.4.1976—Petitioner on wait list for a plot since then—In the year 2004, came to know respondent no.3 obtained allotment of plot fraudulently as he was disqualified as owning other property—Society did not pay heed to his representation—Made complaint to Registrar Co-Operative Society—Ownership of another property by respondent no.3 confirmed on enquiry—Registrar passed order—Case of respondent no.3 covered under the exemption of proviso to the Clause 25 (1) (c) (i) of Delhi Co-Operative Society Rules, 1973—As per proviso disqualification of a

membership on account of ownership of other property at Delhi shall not be applicable in case of Co-sharer of other property where the share less than 66.72 sq. meters of land (80 sq. yards)—Revision petition against the order dismissed—Contended before the Court—Proviso did not apply to respondent no.3 as he was single owner of property measuring less than 66.72 sq. meter, not a co-sharer—Held—The expression 'co-sharer' is to include co-owner, non difficulty in extending the expression to individually owner of stand alone property measuring less than 67.72 sq. meter—Object of Rules appears to be to keep person outside the disqualification criteria as long as what they owned by way of share is really not of much significance—Further Held—Property purchased on Power of Attorney cannot dis-entitle for allotment—Writ Petition dismissed.

— Article 226—Petition challenging order dated 11.02.2011 passed by Central Administrative Tribunal, Principal Bench, whereby OA of the petitioner was dismissed—On 28/29.01.2005 Yameen complained to Joint Commissioner of Police about dispossession from a plot and the complaints to the police yielded no results—Enquiry conducted by DCP—Petitioner, in-charge of Police Post Burari and Inspector Bir Singh SHO Police Station Timar Pur were prima facie involved in facilitating the dispossession of the complainant—Two other police officials namely Head Constable Virender Singh and Head Constable Mahabir Singh were also found prima facie guilty—Departmental enquiry held—After enquiry, penalty of forfeiture of one year's approved service temporarily entailing proportionate reduction in pay for a period of one year awarded to the petitioner—Same penalty awarded to Head Constables—Inspector Bir Singh was let off after giving warning on the ground that he was going to retire from service next year—

Petitioner challenged the order of punishment by O.A. which was dismissed—Petition—Challenging the order on the ground of discrimination alleged to have been given to him in the matter of award of punishment—Though the charges were identical, lesser punishment was awarded to Inspector Bir Singh—Held—Primarily it was for the petitioner, he being in-charge of Police Post Burari, to initiate appropriate legal action on the complaint of Shri Yameen—The role of SHO Police Station Timar Pur which was more of a supervisory role comes later and in fact there would have been no occasion for the complainant to approach the SHO, had the petitioner, being in-charge of the Police Post taken prompt action on receipt of complaint from him—Therefore, it cannot be said that the degree of delinquency on the part of the petitioner was the same as on the part of Inspector Bir Singh—In these circumstances, when the degree of delinquency on the part of the petitioner was higher as compared to Inspector Bir Singh, the Disciplinary Authority, was not unjustified in not giving same treatment to him, as was given to the petitioner, particularly when he was going to retire from service next year.

— Article 226—The private respondents are pump operators, malis and chowkidars, who were hitherto employed in Delhi Development Authority (DDA)-By an order dated 02.12.1994, certain colonies had been transferred from DDA to Municipal Corporation of Delhi (MCD)—As a result, the private respondents also stood transferred to MCD—The terms and conditions of their transfer included clause 6, which is as follows:- Every employee shall on and form the date of his transfer to the Corporation, shall become an employee of the Corporation with such designation as the Commissioner may determine and shall hold office by the same tenure,

remuneration and on the same terms and conditions of service as he would have held, if he had continued to be in the DDA unless and until such tenure, remuneration and terms and conditions are duly altered by the Corporation. However, the same shall not be to his disadvantage without the previous sanction of the Corporation—The Private respondents claimed the ACP pay scale as was applicable in DDA whereas they had been given ACP scale as applicable with MCD—Respondents urged that clause 6 clearly saved their future benefits which they would have got had they continued in DDA—Petitioner contend that the benefits that were available to the respondents ought to be reckoned only on the date of the transfer and should not extend to future benefits—Held—However, on construing and considering the provisions of clause 6 of the terms and conditions of transfer, it is apparent that the private respondents were entitled to the same terms and conditions of service as they would have had if they had continued with the DDA unless and until such tenure, remuneration and terms and conditions were duly altered by MCD—Admittedly, there has been no such alteration of the terms and conditions of service—Consequently, the private respondents would be entitled to be treated as if they had continued with the DDA and, therefore, all the benefits that would have been derived by them had they continued with the DDA, would be available to them.

— Article 226 and 227—The Delhi Entertainment and Betting Tax Act, 1996—Section 2(a), (j), (m), (i), 3, 4, 7, 6(6)(1) & 45—Petitioner filed writ of certiorari challenging rejection of request of petitioner for 100% exemption from entertainment tax on fashion shows and assessment orders passed by Additional Entertainment Tax Officer (A.E.T.O.)—Plea taken, power to levy entertainment tax cannot be delegated by

government to any other person or authority subordinate to it and therefore, assessment orders passed by AETO have to be struck down as being without authority of law—Sponsorship amounts collected by petitioner cannot be considered as "payment for admission"—Held—There is a well marked distinction between levy or charge of tax on one hand and assessment or quantification there of, on other—What AETO has done by passing assessment orders is only to quantify entertainment tax payable by petitioner—It is not disputed that power to pass assessment order and quantify entertainment tax can be delegated—Contention that order passed by AETO be struck down fails and is rejected—Second, unless terms and conditions of sponsorship agreement are examined it may not be possible to ascertain nature of payment and decide about applicability of relevant provisions of Act—AETO has not carried out this exercise and has rested his conclusion merely on statutory provisions without ascertaining basic facts or examining terms and Conditions of sponsorship agreement—Impugned orders passed by AETO have to be quashed—It is open to AETO to examine relevant facts including terms and conditions of sponsorship agreements and thereafter consider applicability of provisions of Act and decide whether petitioner is liable to pay entertainment tax or not by passing fresh orders of assessment after hearing petitioner—So far as order granting 50% exemption to petitioner from entertainment tax is concerned, power vested in Government of NCT of Delhi to grant exemption is based on several criteria—Before passing 50% exemption from payment of entertainment tax as against claim of 100% exemption made by petitioner, a personal hearing was given to petitioner and there is no violation of rules of natural justice—All points raised by petitioner in support of claim for exemption have been duly noted in impugned order and taken into consideration by competent authority—Petitioner has been treated fairly and objectively and we therefore decline to interfere with the order of Government of NCT of Delhi

granting only 50% exemption from entertainment tax.

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CONSUMER PROTECTION ACT, 1986—Section 2 (d)—District Consumer Forum dismissed as withdrawn petition of appellant/plaintiff because appellant/plaintiff was not found to be a Consumer under Consumer Protection Act, 1986—Suit filed by appellant/plaintiff for declaration, challenging electricity bill issued by respondent/ defendant—Trial Court rejected plaint holding that suit was barred by limitation—Trial Court refused to give benefit of period spent by appellant/plaintiff in pursuing proceedings for similarly relief in consumer forum, Delhi—Order challenged before High Court—Held—Impression with respect to definition of a person being or not being a consumer is a legal issue and if there is a particular opinion of a legal issue there can not be said to be any lack of bonafides for denying benefit of section 14 of Limitation Act, to appellant/plaintiff—Once a plaintiff pursues, in bonafide manner, a claim in wrong forum which did not have jurisdiction, such a plaintiff is entitled to benefit of exclusion of period under section 14 of Limitation Act, spent in wrong forum—Once this period is excluded, suit will be within limitation—Appeal accepted—Impugned judgment set aside.

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DELHI CO-OPERATIVE SOCIETIES RULES, 1973—Clause 25 (1) C (i)—Petitioner acquired membership of respondent no.2 society on transfer from original membership of his brother—Transfer approved on 4.4.1976—Petitioner on wait list for a plot since then—In the year 2004, came to know respondent no.3 obtained allotment of plot fraudulently as he was disqualified as owning other property—Society did not pay heed to his representation—Made complaint to Registrar Co-Operative Society—Ownership of another property by

his Company and couple came back to India and started living in Defence Colony, New Delhi—During this period, Respondent no.2 come in contact with another woman and fell in love with her which spoiled relationship between petitioner and Respondent no.2—As a well planned act, sometimes in July, 2009 Respondent no.2 left tenanted premises and abandoned petitioner and he in connivance with landlord got an ex-parte eviction order in petition filed against him as well as against petitioner—Accordingly, petitioner was forced to leave the shared household—Around July 2009, Respondent no.2 after abandoning petitioner, filed divorce petition—Petitioner was constrained to file complaint under Section 12 of Domestic Violence Act and she also sough various interim measures and interim relief—Subsequently petitioner came to know that Respondent no.2 had taken another premises, on rent in Defence Colony—Accordingly, she entered into the said new premises being her matrimonial home with the help of Protection Officer who handed over keys of front door, bedroom door and balcony door to her—Thereafter petitioner moved another application in court of learned Metropolitan Magistrate seeking protection against her removal from said shared household—An interim order was passed in favour of petitioner which was subsequently vacated by the learned Metropolitan Magistrate holding that present premises was not shared house hold—Aggrieved petitioner, preferred appeal which was dismissed, thus she preferred a CRL M.C.—According to petitioner, she was entitled to reside in new tenanted premises in Defence Colony being "shared household" under Act—Held:- A shared household includes any household owned or tenanted by either of the parties in respect of which either the aggrieved person/wife or the respondent or both jointly or singly have any right, therefore, the petitioner being legally wedded wife has a right to live with the husband, whether he lives in an ancestral house or own acquired house or rented house.

LIMITATION ACT, 1963—Section 14—Consumer Protection Act, 1986—Section 2 (d)—District Consumer Forum dismissed as withdrawn petition of appellant/plaintiff because appellant/plaintiff was not found to be a Consumer under Consumer Protection Act, 1986—Suit filed by appellant/ plaintiff for declaration, challenging electricity bill issued by respondent/ defendant—Trial Court rejected plaint holding that suit was barred by limitation—Trial Court refused to give benefit of period spent by appellant/plaintiff in pursuing proceedings for similarly relief in consumer forum, Delhi—Order challenged before High Court—Held—Impression with respect to definition of a person being or not being a consumer is a legal issue and if there is a particular opinion of a legal issue there can not be said to be any lack of bonafides for denying benefit of section 14 of Limitation Act, to appellant/ plaintiff—Once a plaintiff pursues, in bonafide manner, a claim in wrong forum which did not have jurisdiction, such a plaintiff is entitled to benefit of exclusion of period under section 14 of Limitation Act, spent in wrong forum—Once this period is excluded, suit will be within limitation—Appeal accepted—Impugned judgment set aside.

— Claims Tribunal awarded compensation to parents of deceased, aged 27 years who was working as Management Trainee—Order challenged by appellant before High Court—Respondents filed cross objections seeking enhancement of award amount—Respondents permitted to lead additional evidence of General Manager of employer and batch mate of deceased—Plea taken by appellant, deceased was contributorily negligent to extent of 50% and compensation is liable to be reduced on that account and future prospects

Devision Bench of judgment of this Court in *Delhi Transport Corporation and Anr.* vs. *Kumari Lalita* 22 (1982) DLT 170 (DB) and *Rattan Lal Mehta* vs. *Rajinder Kapoor & Anr.* II (1996) ACCI (DB) increase towards inflation be granted, particularly when loss of dependency is to be assessed according to minimum wages?"—Contentions raised on behalf of Insurers, grant of compensation is based on liability of tortfeaser to pay damages to victim—Damages suffered must be proved by victim or his LRs as case may be—Court cannot take judicial notice of increase in future inflation as nobody knows what is in store in future—Damages are to be assessed on date of incident—Benefit of inflation is inbuilt in multiplier and if further addition is made, it would mean increase in multiplier and punishing tortfeaser beyond his liability—Per contra, plea taken on behalf of claimants, although benefit on account of inflation is not akin to future prospects, yet, court cannot be oblivious to trend over last six decades since independence—In case of minimum wages, claimants are entitled to benefit of 50% increase-Held-Compensation which is awarded on basis of multiplier method is such that as years go by, some amount should be taken out from principal sum so that time dependency comes to end, principal as well as interest earned on principal amount are exhausted-Compensation awarded in Indian perspective with a high inflation is unable to provide for full life expectancy even if some discount is made towards imponderables in life—Almost everybody working in govt. department gets at least 4 to 5 promotions during their tenure, in private sectors pastures are much greener for some and not so rosy for others-Compensation provided by court is far less than just compensation as envisaged under Act mainly on account of inflationary trend in this country—Though multiplier method does take care of future inflation yet on account of inflation which remains in double digits in our country most of times, even after increase granted on account of future prospects

compensation is not able to take care of actual loss of dependency—This court is bound by Division Bench judgment in *Rattan Lal Mehta* (Supra) which on aspect of multiplier taking care of future inflation was not brought to notice of this court earlier—Increase in minimum wages on account of inflation was not permissible-If benefit of inflation has to be given, everybody is entitled to that benefit and not person getting minimum wages, unless they are treated as a class by themselves—No addition in minimum wages can be made on account of inflation for computation of compensation.

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NATIONAL INVESTIGATING AGENCY ACT, 2008—Section 3—Code of Criminal Procedure, 1973—Section 160-Petitioner challenged notice under Section 160 of Code issued to him by officials of National Investigating Agency (NIA)—Petitioner averred he was asked to join investigation without serving notice under Section 160 on 04.01.2011 by officials of NIA which amounted to his illegal restrain—On said date, he was handed over notice to join investigation on 05.01.2011—During investigation, he was threatened and coerced to extent that he attempted to commit suicide and was taken to hospital—Also, even by giving notice under Section 160 a person cannot be called at a place which does not fall within jurisdiction of police station where he resided—Petitioner was stationed at Uttarkhand and in case officials of NIA wanted to interrogate him they could come to Uttarkhand whereas he was asked to join investigation in Delhi—Held—Officer of the NIA has jurisdiction to investigate and arrest any person relating to scheduled offences anywhere in India coupled with all the powers, duties, privileges and liabilities of a Police Officer—Provisions under NIA Act will override provisions of Code of Criminal Procedure, 1973.

Anant Brahmachari v. *UOI & Ors.* *682*

— Section 3— Code of Criminal Procedure, 1973—Section 160-Petitioner challenged notice under Section 160 Cr. P.C. issued to him by officials of National Investigating Agency (NIA)—He also prayed for permission of two lawyers to accompany him at all time as and when he would be issued notice under Section 160 Cr. P.C. recording his statement—Held—When a person is not called for interrogation as an accused the Constitutional protections entitled to the accused will not be available to him—Petitioner has no right to be accompanied by a counsel when he is called to know facts relevant to investigation of offence.

Anant Brahmachari v. *UOI & Ors.* *682*

PREVENTION OF CORRUPTION ACT, 1988—Sections 7 and 13 (1)(d), 13(2) and 19—Criminal Procedure Code, 1973—Section 227—Quashing of proceedings u/s 7 and u/s 13 (1)(d) r/w Section 13 (2)—Petitioner arrested in trap case—Contention of petitioner that sanction was granted by authority which was not competent to grant the same—Direct sanctioning authority was Delhi Development Authority (DDA) and not Finance Member of DDA u/s. 19—Trial Court acquitted petitioner on ground that sanction order invalid, with liberty to CBI to take further legal action, if any, as deemed fit—After petitioner retired, CBI filed charge-sheet on same grounds without sanction—Petitioner filed application u/s 227 Cr.P.C. seeking dropping of proceedings on ground that fresh charge without sanction after retirement of petitioner bad in law—Trial Judge had not decided application, hence petition for quashing summoning order and proceedings filed—Held, issue to be decided is whether petitioner having been acquitted earlier in same proceedings for want of sanction by competent authority, could be tried again without sanction since he had retired and whether the proceedings should be quashed in view of protracted trial (16 years) faced by Petitioner—Proceedings against petitioner terminated in earlier trial on account of

sanction having been granted by incompetent authority—In present case, proceedings initiated without sanction, since petitioner had retired, no infirmity—No period of limitation can be prescribed in which trial of criminal case must be closed mandatorily—So protracted trial no ground for quashing petition—Petition dismissed.

Jiwan Ram Gupta v. *State Thr. CBI* *524*

— Section 4(2)—Section 13—Territorial jurisdiction to entertain application for bail—FIR registered on the directions of the Hon'ble High Court of Allahabad to make inquiries into the matter of execution and implementation of National Rural Health Mission (NRHM) Scheme and utilization of founds in entire State of Uttar Pradesh and to also register a case against persons who are found to have committed prima facie cognizable offence—Five separate preliminary inquiries were registered in different branches of CBI in New Delhi—Though the funds were provided by the Central Government but they were entrusted for disposal to the Directorate Mission NRHM, U.P.—Embezzlement of fund was not at the level of Central Government but at the level of Directorate of Mission NRHM, U.P—Anticipatory Bail application filed before Special Judge, Delhi—Dismissed on the ground of territorial jurisdiction—Order challenged—Held, misappropriation, embezzlement an offence under Section 13 PC Act were committed in the State of Uttar Pradesh—Offence committed in the State of Uttar Pradesh in terms Section 4(2) of the P.C. Act—Special Judge, Ghaziabad at Uttar Pradesh competent to try the offence—No error committed in the dismissal of application for anticipatory bail for want of territorial jurisdiction.

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— Sections 7 and 13 (1)(d), 13(2) and 19—Criminal Procedure Code, 1973—Section 227—Quashing of proceedings u/s 7 and u/s 13 (1)(d) r/w Section 13 (2)—Petitioner arrested in trap

case—Contention of petitioner that sanction was granted by authority which was not competent to grant the same—Direct sanctioning authority was Delhi Development Authority (DDA) and not Finance Member of DDA u/s. 19—Trial Court acquitted petitioner on ground that sanction order invalid, with liberty to CBI to take further legal action, if any, as deemed fit—After petitioner retired, CBI filed charge-sheet on same grounds without sanction—Petitioner filed application u/s 227 Cr.P.C. seeking dropping of proceedings on ground that fresh charge without sanction after retirement of petitioner bad in law—Trial Judge had not decided application, hence petition for quashing summoning order and proceedings filed—Held, issue to be decided is whether petitioner having been acquitted earlier in same proceedings for want of sanction by competent authority, could be tried again without sanction since he had retired and whether the proceedings should be quashed in view of protracted trial (16 years) faced by Petitioner—Proceedings against petitioner terminated in earlier trial on account of sanction having been granted by incompetent authority—In present case, proceedings initiated without sanction, since petitioner had retired, no infirmity—No period of limitation can be prescribed in which trial of criminal case must be closed mandatorily—So protracted trial no ground for quashing petition—Petition dismissed.

Jiwan Ram Gupta v. *State Thr. CBI* *524*

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005—Section 12—Indian Penal Code—1860—Section—448—Petitioner sought quashing of FIR under Section 448 IPC registered in Police Station Defence Colony, New Delhi, against her as well as setting aside of order passed by learned Additional Sessions Judge, New Delhi—Petitioner urged, she got married to Respondent no.2 in Delhi and after marriage, they lived together in Sri Lanka and Australia as husband and wife for 12 long years—Two sons were born

from their wedlock—Their elder son was married and settled in London, while younger son was living in Delhi—In the year 1992, Respondent no.2 acquired licence to start his Company and couple came back to India and started living in Defence Colony, New Delhi—During this period, Respondent no.2 come in contact with another woman and fell in love with her which spoiled relationship between petitioner and Respondent no.2—As a well planned act, sometimes in July, 2009 Respondent no.2 left tenanted premises and abandoned petitioner and he in connivance with landlord got an ex-parte eviction order in petition filed against him as well as against petitioner—Accordingly, petitioner was forced to leave the shared household—Around July 2009, Respondent no.2 after abandoning petitioner, filed divorce petition—Petitioner was constrained to file complaint under Section 12 of Domestic Violence Act and she also sough various interim measures and interim relief—Subsequently petitioner came to know that Respondent no.2 had taken another premises, on rent in Defence Colony—Accordingly, she entered into the said new premises being her matrimonial home with the help of Protection Officer who handed over keys of front door, bedroom door and balcony door to her—Thereafter petitioner moved another application in court of learned Metropolitan Magistrate seeking protection against her removal from said shared household—An interim order was passed in favour of petitioner which was subsequently vacated by the learned Metropolitan Magistrate holding that present premises was not shared house hold—Aggrieved petitioner, preferred appeal which was dismissed, thus she preferred a CRL M.C.—According to petitioner, she was entitled to reside in new tenanted premises in Defence Colony being "shared household" under Act—Held:- A shared household includes any household owned or tenanted by either of the parties in respect of which either the aggrieved person/wife or the respondent or both jointly or singly have any right, therefore, the petitioner being

ILR (2012) III DELHI 455
W.P. (C)

LT. MRS. C. REETHAMA JOSEPH ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(ANIL KUMAR & J.R. MIDHA, JJ.)

W.P. (C) NO. : 4132/1999 DATE OF DECISION: 05.01.2012

Constitution of India, 1950—Article 227—Writ Petition—Military Nursing Service Ordinance, 1949—Section 5 & 6—President of India Order dated 16.01.1968—The petitioner selected for probational nurses course in the year 1979—On completion of 3 years training, granted commission on 28.12.1982—Married on August, 1986 informed the authority—Allowed to continue service for two years—Released from service on the ground of marriage on 3.10.1988—Certificate issued to her showing her services to be satisfactory—Sought quashing of order of release and declaration of the rules/orders providing for release of woman commissioned officer of the military nursing service on the ground of their marriage as unconstitutional—Sought reinstatement in service without break and payment of arrears—Also contended discrimination as number of other military nursing officer who got married have been retained in the service—Respondent asserted that the petitioner was employed on contract basis for two years—Performance below average—Failed to satisfy the stipulated criteria—Her contract not renewed—Petitioner acquiesced to the terms and conditions—Estopped from challenging the validity—Petition liable to be dismissed on account of delay and latches—Court observed the hon'ble

Supreme Court had upheld the constitutional validity of the Rule and Order—The Rule entails that as per clause III of the President's Order, the Military Nursing Service (Regular Officer) to be permitted to remain in service even after the marriage at the discretion of Director General Arms Forces Medical Service for a period of two years at a time—To be reviewed periodically after every two years—The plea of delay and latches found to have merit—The petitioner was released from the service in the year 1988—She filed writ petition in Supreme Court in 1989 which was disposed of by order dated 1st April, 1997—She filed representation to be Authorities after unexplained delay of 10 months—There was further unexplained delay of 17 months in filing the writ petition—Writ petition dismissed.

The plea of the respondents that the petition is liable to be dismissed on account of delay and latches, also has merit. The petitioner was released in the year 1988 and she had filed the writ petition before the Supreme Court in the year 1989 which was disposed of by order dated 1st April, 1997. The petitioner had thereafter, filed a representation dated 22nd February, 1998, however, the petitioner has not disclosed as to why she had to wait for almost 10 months for making a representation on 22nd February, 1998 and for another 17 months to file the present writ petition. The petitioner has not given any satisfactory reason for the delay in filing the present writ petition after she was permitted to challenge her release order on dismissal of the writ petition by order dated 1st April, 1997. **(Para 21)**

It has been held in a number of cases by the Supreme Court as also this Court that stale claims should not be entertained by the Courts and failure to make out grounds to condone the delay in seeking remedy in law is sufficient in itself to oust the petitioner. In this connection, reference can be made to the following precedents:

(i) **Rajalakshmiah v. State of Mysore** AIR 1967 SC 993

(ii) **J.N. Maltiar v. State of Bihar** MANU/SC/0382/1973

(iii) **C.B.S.E. v. B.R. Uppal and Ors.** MANU/DE/8142/2006

(iv) **Savitri Sahni v. Lt. Governor, NCT of Delhi and Ors.** MANU/DE/8673/2006

The writ petition is therefore, also liable to be dismissed on the ground of delay and latches. **(Para 22)**

Important Issue Involved: Stale claim should not be entertained by the Courts; failure to make out grounds to condone the delay in seeking remedy in law is sufficient in itself to oust the petitioner.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. E.J. Varghese, Advocate.

FOR THE RESPONDENTS : Mr. Ankur Chhibber, Advocate.

CASES REFERRED TO:

1. *C.B.S.E.* vs. *B.R. Uppal and Ors.* MANU/DE/8142/2006.
2. *Savitri Sahni* vs. *Lt. Governor, NCT of Delhi and Ors.* MANU/DE/8673/2006.
3. *Lt.(Mrs.) Indra Kumari Kartiayani* vs. *The Maha Nideshak, Raksha Mantralaya,* Civil Appeal No.5025 of 1990.
4. *Lt.Mrs.C.Reethama Joseph* vs. *Union of India & Ors.,* W.P.(C) 416 of 1989.
5. *J.N. Maltiar* vs. *State of Bihar* MANU/SC/0382/1973.
6. *Rajalakshmiah* vs. *State of Mysore* AIR 1967 SC 993.

RESULT: Writ Petition Dismissed.

ANIL KUMAR, J.

1. The petitioner has sought the issuance of an appropriate writ for quashing the order of releasing the petitioner from the Military Nursing Service on the alleged ground of her marriage and also for declaring that the Rule/Order which provides for the release of the female commissioned officers of the Military Nursing Service on the ground of their marriage as unconstitutional, invalid and void. The petitioner has also sought for directions to the respondents to reinstate her in the Military Nursing Service without any break in service and to pay her the arrears of salary and allowances from the date of her release till the date of her reinstatement.

2. The brief facts to comprehend the dispute between the parties are that the petitioner was selected for probationer Nurses Course in the year 1979 and on completion of three years training, she was granted commission w.e.f. 28th December, 1982. The petitioner was posted at the Military Hospital, Jalandhar on 28th December, 1982 where she worked for 3 years and thereafter, she was transferred to the Military Hospital, Ranikhet.

3. On 17th August, 1986, the petitioner got married to Sh. M.K.Joy which, according to the petitioner, was duly informed by her to the concerned authorities. The petitioner alleged that she was allowed to continue in the service for two years and thereafter, after the expiry of the extended period from 17th August, 1986 to 16th August, 1988, she was released from the Military Nursing Service, on the ground of her marriage, on 3rd October, 1988. A certificate dated 17th November, 1988 was also issued to her and in that certificate her services were shown to be satisfactory.

4. The movement order releasing the petitioner from the service is reproduced as under:-

> "1. NR-17600 Y Lieut (Mrs.) Reethama Joseph, MNS of this hospital, has been relieved from Military duties w.e.f 03 October, 1988 (03 Oct, 88 (AN) for release from service.
>
> 2. She will leave this hospital on 03 Oct. 88 (AN) and will be SOS/SORS w.e.f. 04 Oct. 88 (FN).
>
> 3. Provision of AI 2/S/74 regarding acceptance of Civil employment after release have been explained to her.

4. In case of change of address after release, she will inform the same to Army HQ. Med Date/MPRS (O) DGHS-4 CDA (O) Phe and this office also.]

5. Her address after release will be as under:-

REETA JOY
C/O.MRS.C.D.JOSEPH
CHITTETHAZHATHU HOUSE
S.AMBALLOOR P.O.
ERNAKULAM (DIST)
KERALA-682 315

Auth: RAKSHA MANTRALAYA KARYALAYAM MAHA NIDESHAK, SASSTHRA SENAL CHIKITSA SEVA, NEW DELHI-110001.

Letter No.17600/DGAFMS/MNS Dated 05 Sep.88.

Sd/-
(P.M.Velankar)
Lt.Col.
Offg.Commanding Officer"

5. According to the petitioner, her release from the service was on account of her marriage. She contended that there was no Court Martial or any other proceedings initiated against her and she had an excellent service record. She further asserted that neither was any warning given to her nor was any adverse report made in the Annual Confidential Reports. The petitioner asserted that the age of retirement in respect of officers of the Military Nursing Officers is 55 years up to the rank of Lieutenant Colonel and thereafter, the age of retirement varies depending on the rank.

6. The Military Nursing Service was constituted under the provisions of the Military Nursing Service Ordinance, 1949. Under Section 5 & 6 of the said Ordinance, any citizen of India, any woman above the age of 21 years is eligible for appointment as an officer in the said service. The provisions of the said Ordinance also contemplate that all the members of India Military Nursing Service shall be commissioned and shall be appointed as officers of the Indian Nursing Service by the Central Government by Notification in the Official Gazette. The provisions of the Indian Army are applicable to the Military Nursing Service by virtue of

Section 9 of the said Ordinance.

7. The plea of the petitioner is that after her marriage, she had applied for extension of the service by two years which was granted. After expiry of the two years extension period granted to her, she applied again in July, 1988 but further extension was rejected and she was discharged from the service on the ground of marriage.

8. The petitioner contended that the Rules/Orders issued by the Director General of Armed Forces contemplating the termination or release of a female officer from the Medical Nursing Service on the ground of marriage has no rationale, as marriage does not incapacitate an officer from discharging her duty. According to the petitioner, releasing her from the Military Nursing Service on the ground of her marriage is unconstitutional and offend her fundamental rights under Article 14, 15, 19 and 21 of the Constitution of India.

9. The petitioner also alleged discrimination on the ground that a number of other Military Nursing Officers who got married and had children after their marriage have been retained in the service. The petitioner gave the instances of Capt. Sathi Kumari; Capt. Pareira; Maj. Leelavathi; Capt. B.Bhattacharya and Capt. S. Chakravarty. The petitioner asserted that she has been discriminated in the facts and circumstances. The petitioner also referred to the Defence Services Regulations (Revised Edition), 1962. Regulations No.102 contemplates as follows:-

> "An Officer will not be permitted to remain in the service, if at any time during the first three years form the date of his commission, his retention is considered to be undesirable."

10. The petitioner further asserted that she could not have been released after having served for almost six years after her commission under Regulation No.102 of the Defence Service Regulations. Reliance was also placed on Rule 14 & 15 of the Army Act, 1950.

11. The petitioner contended that she was never informed of any adverse entry made against her in her ACR and that the reason given in her discharge-release order is marriage and also that no entry regarding the same was ever communicated to her, nor was any warning given to her informing her regarding areas in which she was required to improve. The petitioner also referred to an un-starred question No.1408 raised in

the Parliament on 21st November, 1988 in answer to which it was stated that out of 45 married nurses whose tenure was not extended due to their unsatisfactory record, 16 of them had continued on account of stay orders granted by the Court.

12. According to the petitioner, even though marriage was not given as reason for her release, there could have been no other reason for the petitioner's release except her marriage, since the Army Service Certificate issued on 17th November, 1988 categorically stipulated that the service of the petitioner which included the two years of extension period was satisfactory. She pleaded that she had married in the year 1986 and that the concerned authorities were duly intimated about it and even Part-II orders were published by the Military Authorities. It is urged that there is no justifiable ground to release the petitioner after two years of her marriage. The petitioner also relied on the decision of the Supreme Court in the case of **Lt.(Mrs.) Indra Kumari Kartiayani v. The Maha Nideshak, Raksha Mantralaya,** Civil Appeal No.5025 of 1990, decided by order dated 30th October, 1990. The petitioner further disclosed that she had also filed a writ petition being W.P.(C) 416 of 1989, titled as **Lt.Mrs.C.Reethama Joseph v. Union of India & Ors.,** in the Supreme Court of India, which was dismissed by order dated 1st April, 1997, however, the petitioner was given the right to challenge the order of release before the appropriate authority in accordance with the law. The order passed by the Supreme Court on the writ petition of the petitioner is as under:-

> "The petitioner, in this writ petition challenges the impugned order of release from service of the respondent on October, 1988. This writ petition was filed under Article 32 of the Constitution of India challenging the vires of rules which enable the respondent to release the petitioner from service after marriage in accordance with the order of the President of India dated January 16, 1968. Clause III of the said order of President reads as follows:-
>
> "The MNS (Regular) officers may be permitted to remain in service even after marriage at the discretion of the DG AFMS for a period of 2 years at a time. The cases of such married officers as are retained will also be reviewed by the DG AFMS periodically after every two years. This relaxation of the normal

> rules will be a temporary measure and the position will be reviewed by 1st January, 1970."
>
> Though the constitutional validity of this rule/order is challenged, we do not think that argument can be accepted in the light of the earlier order of this Court under identical circumstances in C.A No.5025/90 **Lt. (Mrs.) Indira Kumari Kartiayoni vs. The Maha Nideshak, Raksha Mantralaya,** Shastra Sena Chikitsa Seva, New Delhi dated October 30, 1990.
>
> However, the learned counsel seeks permission to challenge the order of release in accordance with the law before the appropriate authority.
>
> Accordingly, we are dismissing the writ petition and we reserve the right of the petitioner to challenge the order of release dated October 1988 before the appropriate authority in accordance with law.
>
> The writ petition is dismissed with no costs."

13. After the writ petition of the petitioner was dismissed by the Supreme Court by order dated 1st April, 1997, the petitioner filed the present writ petition on 2th July, 1999. The respondents have contested the writ petition contending, inter-alia that the writ petition should be dismissed on the ground of delay and latches as the petitioner was released from the service in the year 1988, whereas the present writ petition was filed in July, 1999. The respondents asserted that no explanation has been given for the delay of two years even after the dismissal of her writ petition by the Supreme Court, granting her right to challenge her release before the appropriate authority.

14. The respondents categorically asserted that the petitioner was employed after her marriage on a contractual basis and that her contract was for two years. The respondents were at liberty to renew or enter into a fresh contract with the petitioner based on their requirement and her past performance. The contractual service of the petitioner came to an end in the year 1988. It was noticed that the performance of the petitioner was below average and that the petitioner had not satisfied the stipulated criteria. Therefore, her contract was not renewed and she was released from service on 3rd October, 1988. On 17th August, 1986, the

petitioner had submitted her willingness for retention in the service for a period of two years on contractual basis. The petitioner had been graded as below average by her superior officers, and therefore, she was released from the service on expiry of her contract in October, 1988. Since the petitioner had acquiesced to the terms and conditions stipulated during the period of initial engagement and also during her extension period after August, 1986, therefore, the petitioner is estopped from challenging the validity of the Rules/Clauses permitting the said termination.

15. The respondents also relied on the criteria for retention/further retention of the officers of the Military Nursing Service. The relevant criteria as stipulated in the notification dated 6th March, 1987 is as under:-

"(a) Should have put in a minimum of two years. service after commission at the time of marriage (applicable only for cases of initial retention).

(b) Should have had a consistent high average (6) performance as reflected in the ACRs for the three years preceding the year in which the officer gets married or due for review for further retention in service on marriage ground.

(c) Should have been graded average or above in all the following essential qualities in the ACRs rendered on the officer during the three years preceding the year in which the officer gets married or due for review for further retention in service on marriage ground:-

(i) Integrity

(ii) Sense of duty

(iii) Discipline

(iv) Patient care

(v) Administrative ability

(vi) Loyalty

(vii) Professional ethics

(viii) Professional knowledge

(ix) Initiative

(x) Self-confidence

(xi) Delegation of responsibility

(d) Should have been recommended by all the officers in the chain of reporting for retention/further retention. Provided that where an officer fulfils all other criteria except under this sub para, such a negative recommendation must be accompanied by detailed reasons for the same supported by solid evidence like repeated written warning etc.

(e) Should not have been placed on 'Adverse Report' in accordance with the provisions of Paras 15 to 19 of AO 121/78.

(f) Should be in Med Category not lower than S1H2A2P2E2. (g) Should not be undergoing a course of instruction at the time of getting married.

5. The above may kindly be brought to the notice of all nursing officers and be given wide publicity.

6. The above provision will become effective with immediate effect.

7. Kindly acknowledge."

16. The respondents had filed the counter affidavit dated 1st December, 1999 of Maj. Uma, raising the pleas and contentions as stipulated hereinabove. The petitioner did not file any rejoinder to the counter affidavit filed on behalf of the respondents and did not refute the plea of delay and latches and some other pleas which has been raised in the counter affidavit and which had not been dealt with in the petition. The petitioner had, however, filed the copy of the counter affidavit filed by the respondents dated September, 1994 to her writ petition being W.P.(C) No.416/1990 before the Supreme Court and a copy of the representation dated 22nd February, 1998 made by the petitioner to the Secretary, Ministry of Defense, South Block.

17. This Court has heard the learned counsel for the parties in detail and has also perused the writ petition and the counter affidavit filed on behalf of the respondents before this Court and the copy of the counter

affidavit filed by the respondents before the Supreme Court to the writ petition of the petitioner which was dismissed by order dated 1st April, 1997. 18. The Supreme Court while dismissing the writ petition of the petitioner had held that the constitutional validity of the Rule and Order challenged by the petitioner cannot be accepted in the light of the order of the Supreme Court in the case of Lt.(Mrs.) Indra Kumari Kartiayani. From the order dated 1st April, 1997 dismissing the writ petition of the petitioner before the Supreme Court, it is apparent that the validity of the order of the President of India dated 16th January, 1968 was upheld which entailed that as per Clauses III of the said President's order, the Military Nursing Service (Regular Officers) could be permitted to remain in service even after marriage at the discretion of the Director General, Armed Force Medical Service for a period of two years at a time. The said order also contemplated that the cases of married officers would be reviewed by the Director General periodically after every two years.

19. In **Indra Kumari Kartiayani** (supra) the Nursing officer was relieved on account of her marriage. After taking into consideration her record of performance, it was held that her performance was sufficiently good and she was entitled to be retained in the service. The Supreme Court had, therefore, directed that the respondents should have given the said Nursing officer the chance to prove her ability in the two years following the marriage and in case, if she succeeded in proving that she was good enough to remain in service, notwithstanding the marriage, she was entitled to be retained in the service in terms of the President's order. As no opportunity was given to the Nursing Officer Indra Kumari, her petition was allowed and the respondents were directed to reinstate her for a period of two years and at the end of two years or during that period if the respondents were to find, that she was qualified, then she was to be retained permanently and she would have been entitled to the benefit of continuity of service. However, the arrears of salary from 7th October, 1988 till her reinstatement were not granted. The case of the petitioner is apparently distinguishable as the petitioner got married on 17th August, 1986 and after considering her case in accordance with the criteria for further extension in service after marriage, she was granted extension for the period of two years from 17th August, 1986 to 16th August, 1988. After the expiry of the extension period of two years, since her performance was found to be below average, she was released from 3rd October, 1988 which is inconsonance with the ratio of the

Supreme Court judgment relied on by the petitioner.

20. The petitioner pleaded that she has been released solely on the ground of her marriage, therefore, the release order cannot be sustained. However, since the performance of the petitioner was found to be below average during the period of extension of two years from 17th August, 1986 to 16th August, 1988, the respondents were justified in not extending her extension any further. Consequently, the order of the respondents releasing the petitioner from the service is not liable to be set aside as has been prayed for by the petitioner. It cannot be inferred from the facts and circumstances that she has been released from the service solely on the ground of her marriage, nor can it be held that the Presidential order and other orders referred to the petitioner are unconstitutional, invalid or illegal. The petitioner is not entitled to be reinstated in the Military Nursing Service nor is she entitled for payment of salary and allowances as has been claimed by her.

21. The plea of the respondents that the petition is liable to be dismissed on account of delay and latches, also has merit. The petitioner was released in the year 1988 and she had filed the writ petition before the Supreme Court in the year 1989 which was disposed of by order dated 1st April, 1997. The petitioner had thereafter, filed a representation dated 22nd February, 1998, however, the petitioner has not disclosed as to why she had to wait for almost 10 months for making a representation on 22nd February, 1998 and for another 17 months to file the present writ petition. The petitioner has not given any satisfactory reason for the delay in filing the present writ petition after she was permitted to challenge her release order on dismissal of the writ petition by order dated 1st April, 1997.

22. It has been held in a number of cases by the Supreme Court as also this Court that stale claims should not be entertained by the Courts and failure to make out grounds to condone the delay in seeking remedy in law is sufficient in itself to oust the petitioner. In this connection, reference can be made to the following precedents:

(i) **Rajalakshmiah v. State of Mysore** AIR 1967 SC 993

(ii) **J.N. Maltiar v. State of Bihar** MANU/SC/0382/1973

(iii) **C.B.S.E. v. B.R. Uppal and Ors.** MANU/DE/8142/2006

(iv) **Savitri Sahni v. Lt. Governor, NCT of Delhi and Ors.** MANU/DE/8673/2006

The writ petition is therefore, also liable to be dismissed on the ground of delay and latches.

23. In the facts and circumstances the writ petition, is, therefore, without any merit, and it is dismissed. The parties are, however, left to bear their own costs.

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W.P. (C)

VARINDER PRASAD ....PETITIONER

VERSUS

B.S.E.S. RAJDHANI POWER LIMITED & ORS. ....RESPONDENTS

(VIPIN SANGHI, J.)

W.P. (C) NO. : 8924/2007 DATE OF DECISION: 18.01.2012

(A) Constitution of India, 1950—Article 226—Son of petitioner, aged about 10 years, died due to collapse of shade/chajja at a house situated in DESU Colony—Victim playing in the park, took shelter under the shed to protect himself from rain—House was constructed 10 years back—Poorly maintained by respondent—Deceased only son, studying in 5th—A meritorious student—Petitioner making efforts to make his son software engineer—Respondent owed the duty to maintain the structure so as to keep them from harming those who rightfully assumed that they would not collapse only on account of rain——Principle of strict liability claimed—Further contended—State failed to protect fundamental right of the petitioner's son to Life—Public law remedy available to them for compensation—Per-contra-not denied the occurrence—Registration of FIR—Not stated death occurred due to some other reasons—Contended—Present case involved disputed question of facts—Can only be settled by leading evidence—Proper remedy was to file civil suit and Writ not maintainable—Both respondents BSES Rajdhani Power Ltd. & Delhi Transco Ltd. sought to shift claim on each other for not maintaining flat—Held—Writ to claim compensation maintainable under Article 226—There can be no quarrel that flat should have been maintained so that no part of it fell suddenly on its own only on account of rain—Falling of shade case of negligence—Principle of Strict Liability applied.

(B) Standard compensation awarded taking income of parents—Monthly salary of father was Rs. 10,000/- at the time of incident and at the time of filing of affidavit it was Rs. 30,000/- per month—Multiplicant of 90,000/- was taken; compensation of Rs. 15,26,000/- awarded with interest 9% per annum by applying multiplier of 15 in terms of Second Schedule of Motor Vehicle Act, 1988.

Now coming to present case, the incident in question has not been disputed by the respondents, nor the factum of death of Master Ajay Kumar due to the falling of the chajja upon him is in dispute. The occurrence of the said incidence has been recorded in the FIR and the cause of the death has also been verified by the post mortem report. Though respondent nos.1 and 2 are shifting the liability for the maintenance of the said flat on each other, they do not dispute that one or the other of them is indeed responsible for acting negligently in not maintaining the said flat. There can be no dispute or denying the fact that one of them, if not both the respondents, owed a duty of care to the

general public, so that no action or inaction of theirs causes harm to the public at large. There can be no quarrel that the flat should have been maintained, so that no part of it fell suddenly on its own, only on account of some rain. The falling of the shed (chajja) is prima facie evidence of negligence. Nothing has been brought out by the respondents, to suggest that the shed fell despite the respondents taking proper care of the flat, or for some other cogent reason. Therefore, in my view, the principle of strict liability will be squarely applicable in this case, and the irresistible conclusion is that the respondent nos.1 and 2 were negligent in the maintenance of the said flat, due to which the chajja fell on the deceased, and he died.

(Para 29)

Consequently, I have no hesitation in concluding that the present being a case of glaring and evident negligence, to which the maxim *Res Ipsa Loquitor* applies, the present writ petition under Article 226 of the Constitution of India is maintainable as the said negligence has led to complete infraction of the fundamental right to life of the deceased. The inter se dispute between the two respondents, i.e. respondent nos.1 and 2, would not come in the way of the petitioners for claiming compensation for breach of the fundamental rights of the deceased Ajay Kumar. The tendency of the public authorities, when more than one of them is involved, to shift the burden on each other is not new. Same was the position in **Darshan** (supra), and **Ram Kishore** (supra) and **Swarn Singh** (supra). The said inter se dispute was held, not be disentitle the petitioner from claiming relief under Article 226 of the Constitution of India, as negligence, resulting in breach of fundamental rights was held to have been established in each of these cases. The Court shall, however, *prima facie* examine the aspect of responsibility, only with a view to fix the responsibility of one of the respondents to pay the awarded compensation, leaving it open to the respondents to battle out and settle their inter se liability in appropriate proceedings.**(Para 31)**

As far as pecuniary compensation is concerned, as already explained in **Kamla Devi** (supra) the income of the parents can be taken as a standard measure for arriving at the expected annual income of the children. The method of calculating the compensation for pecuniary loss of dependency depends upon the potential earning capacity of the deceased Ajay Kumar, had he attained adulthood. As per the affidavit of the petitioner no.1 dated 15.12.2011, his monthly salary at the time of this incident was Rs. 10,000. At the time of filing of the affidavit, the earnings of petitioner no.1 were Rs.30,000/- per month approximately. The petitioners have applied a multiplication factor of 1.5 to counter inflation and erosion of the value of money. Considering the fact that in a span of about four years, there has been a threefold increase in the earnings of petitioner no.1 from Rs.10,000/- p.m. to Rs.30,000/- p.m., in my view, the multiplicand factor of 1.5, to off set the effects of inflation and erosion of the value of money should be adopted. It can be assumed that Ajay Kumar would have, at least, earned what his father was earning, if not more. Therefore, the multiplicand would be the expected annual income, less what he required for himself. As Ajay would have grown up, his personal expenses would have only risen. The contribution to the household would not have exceeded half of the income. Thus the multiplicand work out to be Rs.90,000/- i.e. (1,80,000/2). This multiplicand is to be multiplied by the multiplier of 15, in terms of the second Schedule to the Motor Vehciles Act, 1988. This comes out to be a figure of Rs. 13,50,000. **(Para 36)**

Important Issue Involved: (i) Writ petition under Article 226 is maintainable in case of negligence for infraction of fundamental right to life of deceased. (ii) In order to award standard compensation in case of death of child, the income of parents can be taken into consideration for arriving at expected income of child.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Ms. Aruna Mehta, Advocate.

FOR THE RESPONDENT : Mr. Sumeet Pushkarna and Jitendra Kumar, Advocates for DTL Mr. Samrat Nigam for R-2 Mr. Sachin Chopra and Shashi Mohan For R-4.

CASES REFERRED TO:

1. *Munna Singh & ors.* vs. *GNCT of Delhi & ors* W.P. (C) 3230/2010.
2. *Swarn Singh* vs. *Union of India& others* Manu/DE/0791/2010.
3. *Ram Kishore* vs. *Municipal Corporation of Delhi* 2007(97) DRJ 445.
4. *New India Assurance Co. Ltd* vs. *Satender & Others,* (2006) 13 SCC 60.
5. *Duli Chand & Anr.* vs. *State NCT of Delhi & Anr.* W.P. (C) 12457-58/2006.
6. *SDO, Grid Corporation of Orissa Ltd & Others* vs. *Timudu Oram,* (2005) 6 SCC 156.
7. *Lata Wadhwa & othrs* vs. *State of Bihar & othrs* (2001) 8 SCC 197.
8. *Darshan and others* vs. *Union of India and others* 2000 ACJ 578.
9. *Chairman, Grid Corporation of Orissa ltd. & others* vs. *Sukamani Das and Anr.* (1999) 7 SCC 298.
10. *D K Basu* vs. *Union of India* (1997) 1 SCC 416.
11. *Nilabati Behera* vs. *State of Orissa* (1993) 2 SCC 746.
12. *Rudal Shah* vs. *State of Bihar*(1983) 3 SCR 508.
13. *Pushpabhai Purshottam Udeshi & Others* vs. *M/s. Ranjit Ginning & Pressing Co. (P) Ltd. & Anr.,* (1977) 2 SCC 745.
14. *MCD* vs. *Subhagwati & Ors.,* AIR 1966 SC 1750.
15. *Taff Vale Rly.* vs. *Jenkins* (1913) AC 1.

RESULT: Writ Petition allowed.

VIPIN SANGHI, J.

1. The present writ petition under Article 226 of the constitution of India has been preferred for issuance of an appropriate writ, order or direction, inter alia, to direct the respondents to pay a sum of Rs. 26 lacs as compensation to the petitioners.

2. The petitioners are the parents of an unfortunate boy named Ajay Kumar, who died on 16.06.2007 when he was only about 10 years of age, due to the collapsing of the shed (chajja) of a house situated at DESU colony, Najafgarh.

3. The petitioner No.1 claims to be an electrician, working with Delhi Transco Ltd., i.e. respondent no.3. His family consisted of his wife (petitioner No.2), two daughters, namely Nisha (17 years) and Neha (15 years), and one son Ajay Kumar (now deceased).

4. The case of the petitioners is that their son along with his friend Mohit Sharma were playing in the park of DESU colony, Najafgarh in the morning of 16.06.2007. Suddenly, at about 6:30 am, it started to rain and in order to protect themselves from the rain, both the children took shelter under the shed of House no. 1, Type-5 in DESU colony, Najafgarh. Suddenly the said shed collapsed and their son Ajay got buried under the debris that rained. One lady Smt. Kamlesh, who was doing her morning walk in the area rushed to the spot and picked up the boy Ajay from the debris. But the boy had already succumbed to the injuries.

5. The petitioners submit that the said house was constructed about 8-10 years back and was poorly maintained by the officials of respondent BSES Rajdhani Power Ltd.. Petitioners also submits that the said flat was in a dilapidated condition, and due to this reason the shed (chajja) collapsed. The petitioners also complain that the flats are poorly maintained by respondent no.1, despite huge funds being allocated for the maintenance of the colony.

6. The FIR of the incident was registered in P.S. Najafgarh vide FIR No. 558/2007 under section 304A/288 IPC against unknown officials responsible for the maintenance of the said building. The Post mortem of the deceased was done and the report is also filed with the petition, which shows the cause of the death as shock following blunt force,

likely to occur in the manner as alleged i.e. on account of falling of the shed (chajja).

7. The petitioners claim that their only son was studying in Ring Midways Sr. Secondary Public School, Palam More, New Delhi in class V and was an extra- ordinary student. The petitioners were having very high hopes from their son. The petitioners have placed on record his certificates of merit issued to him on his standing first in the Art competition held in 2004 at Mt. St. Garjiya School. His report card for class III and class IV have also been filed, which show that he was a meritorious student.

8. The petitioners state that they were making all endeavors so that their son could become a software engineer some day in the hope that he will become the support system for their old age. They state that they have suffered immense mental pain and agony, due to the sudden demise of their only son.

9. The petitioners also state that the investigation in the said FIR has been going on very slowly and at a snail's pace, and till date no arrest has been made by the police in the said case. They also seek that the police authorities complete the investigation expeditiously, and arrest the persons who were responsible for the said mishap. They also complain that the police officials are not discharging their duty effectively and they have also refused to give the site plan, photographs, inquest report and other documents to the petitioners.

10. Earlier, the petitioners had made Govt. of NCT of Delhi as respondent No. 1, which was deleted from array of respondents by this court vide order dated 09.08.2010, as no relief is claimed against them. The petitioners have also filed the amended memo of parties which arrays BSES Rajdhani Power Ltd. as respondent no.1, M/s Delhi Transco Ltd. as respondent No. 2 and the Commissioner of police as respondent No. 3.The respondents will be refereed in this judgment according to their description in the amended memo of parties.

11. The petitioners submit that this is a clear case of negligence on the part of respondents, as they owed a duty to maintain the structures, so as to keep them from harming those who rightfully assume that they would not collapse, only on account of rain. The respondent nos.1 and 2 failed to discharge their said duty. The petitioners submit the maxim

Res ipsa *loquiter* is squarely applicable in this case, and the petitioners are entitled for compensation due to the irretrievable loss suffered by them on account of the respondents negligence. Petitioners also submit that the State has failed to protect the fundamental rights of the petitioner's son, and this public law remedy is available to them to claim compensation. The petitioners submit that strict liability principles are attracted in this situation.

12. Upon issuance of notice, the Respondents have filed their counter affidavits in which they have not denied the occurrence of the aforesaid incident, or the registration of the FIR. The respondents have not denied that the death of the child Ajay Kumar occurred due to falling of the shed. It is not their case that his death occurred due to some other reason.

13. The case of the respondents is that the present case involves disputed questions of fact, which can only be settled by leading evidence and thus the proper remedy for the petitioners is to file a civil suit and this writ is not maintainable. Both the respondents i.e. BSES Rajdhani Power Ltd. and Delhi Transco Ltd. have sought to shift the blame on each other for not maintaining the aforesaid flat, of which the shed/ canopy/ chajja collapsed resulting in the death of Master Ajay Kumar.

14. The stand taken by respondent no.1 is that they were not responsible for the maintenance of the said flat at the relevant time, and it was the duty of respondent no. 2 i.e. Delhi Transco Ltd. to maintain the said flats. The respondent no.1 with its counter affidavit has placed on record an office order dated 12.11.2001 issued by Department of Power, Govt. of NCT of Delhi, in which the maintenance of the colonies/ residential quarters was declared to be the responsibility of the transferee company. So the respondent No. 1 contends that the overall responsibility for the maintenance in the said colony was that of the Delhi Transco Ltd., and not of respondent no.1.

15. On the other hand, the Delhi Transco Ltd. i.e. respondent No.2, has stated that the said flat had been placed under the supervision of the respondent no.1. Vide letter dated 29.01.2003 respondent no.1 asked its officials to take the possession of the said flat. So the stand of respondent no.2 is that they were in no way involved in maintenance, repair and upkeep of the said flat.

16. Respondent no.3 i.e. commissioner of police has stated in his counter affidavit that the investigation in the said FIR is still pending and the complete responsibility for maintenance of the said flat will be fixed thereafter. The police has also filed a status report dated 12.05.2010 regarding the progress of the case wherein, interalia, it is mentioned that the responsibility of either respondent no.1 or respondent no.2 couldn't be fixed and the matter requires further investigation.

17. The questions which arise for consideration are : Whether the present writ petition to claim compensation is maintainable ; (ii) If so, whether the death of the child Ajay Kumar occurred due to the negligence of one or the other, or both of the respondent nos.1 and 2, and if yes; (iii) What compensation is to be awarded to the petitioners.

18. Learned counsel for the petitioner has relied upon the judgment of this court in **Ram Kishore Vs. Municipal Corporation of Delhi** 2007(97) DRJ 445, to contend that a writ petition to claim compensation is maintainable where it involves infraction of the fundamental rights of citizens. The Court in **Ram Kishore** (supra), after taking note of decisions of supreme court in **Rudal Shah v. State of Bihar**(1983) 3 SCR 508, **Nilabati Behera v. State of Orissa** (1993) 2 SCC 746 and **D K Basu v. Union of India**(1997) 1 SCC 416, held that a writ petition to claim compensation is maintainable under Article 226 of the Constitution of India, in case there is violation of fundamental rights.

19. Learned counsel for the petitioners has also relied upon various judgments to contend that the principle of strict liability will apply, and the negligence of the respondents is writ large in the face of the falling of the shed. He placed reliance on **MCD v. Subhagwati & Ors.,** AIR 1966 SC 1750, in which the Supreme Court held that the mere fact, that there was a collapse of the clock tower, told its own story in raising the inference of negligence so as to establish a prima facie case against the corporation.

20. The petitioner has also placed reliance on the decisions of this court in **Darshan and others v. Union of India and others** 2000 ACJ 578 and **Swarn Singh v. Union of India& others** Manu/DE/0791/2010 and **Ram Kishore** (supra).

21. In **Darshan** (supra) the deceased had died of drowning after falling into an open manhole. The Division Bench of this court held as follows -

> "Coming to instant case. It is one of res ipsa loquiter, where the negligence of the instrumentalities of the State and dereliction of duty is writ large on the Red Fort in leaving the manhole uncovered. The dereliction of duty on their part in leaving a death trap on a public road led to untimely death of Skatter singh. It deprived him of his fundamental right under Article 21 of the constitution of India. The scope and ambit of Article 21 is wide and far reaching. It would, undoubtedly, cover a case where the state or its instrumentality failed to discharge its duty of care cast upon it, resulting in derivation of life or limb of a person. Accordingly, Article 21 of the constitution is attracted and the petitioners are entitled to invoke Article 226 to claim monetary compensation as such a remedy is available in public law, based on strict liability for breach of fundamental rights."

22. In **Swarn Singh** (supra) ten persons were buried under the debris due to the collapse of a wall. The court held the falling of the wall was a negligent act on the part of the authorities, as it was in a dilapidated condition and thus this court awarded compensation to the victims.

23. In the case of **Ram Kishore** (supra), the death of the child Mahesh had been caused due to falling of the wall of a municipal lavatory maintained by the MCD. The court applied the strict liability principle and held the MCD liable for the up-keep of the public lavatory so that it did not endanger the life and safety of its users.

24. On the other hand, counsel for the respondent no.2 has placed reliance on **Chairman, Grid Corporation of Orissa ltd. & others v. Sukamani Das and Anr.** (1999) 7 SCC 298, to contend that the present claim should not be considered under Article 226 of the Constitution, as disputed questions of fact arise for determination. In this case, the deceased had come in contact with a live wire which had been lying on the road, after it snapped from the overhead electric line. The defence of the Grid Corporation was that the wire had got snapped because of thunderbolt and lightening, and immediately after learning of it, the power in the line was disconnected. The Supreme Court held that such a case was not a fit one to be entertained under Article 226 of the Constitution of India, as the same was an action in tort, and the negligence of the authorities must first be established. Mere ownership of the electric transmission line by the corporation was not sufficient to award compensation in such

a case. This decision has been followed in **SDO, Grid Corporation of Orissa Ltd & Others v. Timudu Oram,** (2005) 6 SCC 156.

25. He has also placed reliance on the two decisions of this court in **Munna Singh & ors. V. GNCT of Delhi & ors** W.P. (C) 3230/2010, and in **Duli Chand & Anr. V. State NCT of Delhi & Anr.** W.P. (C) 12457-58/2006. In both these cases this court has refused to invoke the jurisdiction of this court under Article 226 for award of compensation.

26. In **Munna Singh** (supra), the petitioner had claimed that the deceased had died due to electrocution, when he was doing some work for a private party - respondent no.3, under the supervision and control of the Delhi Jal Board - respondent no.2. The court found that the petitioner had not taken steps to serve the private party. The stand of DJB was that there was no record relating to the engagement of the private party, i.e. respondent no.3 as a contractor with respondent no.2 DJB. By a short order, the writ remedy was not found appropriate. In this set of circumstances, the writ petition for claiming compensation was held to be not maintainable.

27. In **Duli Chand** (supra) a minor boy had died due to electrocution, when he had come into contact with an electricity line of 66,000 KV. The stand of Delhi Transco Ltd. was that such class of cables and wires do not exist, and are used by the distribution companies, such as NDPL, if at all, which mans the area. NDPL, the other respondent also disputed its liability. By relying upon the two judgments of the Supreme Court in the cases of Grid Corporation, referred to above, the court held that proper remedy for the petitioners was to seek civil remedies, and a writ petition was held to be not maintainable.

28. In **Pushpabhai Purshottam Udeshi & Others v. M/s. Ranjit Ginning & Pressing Co. (P) Ltd. & Anr.,** (1977) 2 SCC 745, the Supreme Court explained the doctrine of Res Ipsa Loquitor in the following words:

> "6. The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant.

> This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Salmond on the Law of Torts (15th Ed.) at p. 306 states : "The maxim res ipsa loquitur applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused". In Halsbury's Laws of England, 3rd Ed., Vol. 28, at page 77, the position is stated thus : "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence 'tells its own story' of negligence on the part of the defendant, the story so told being clear and unambiguous". Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. ...."

29. Now coming to present case, the incident in question has not been disputed by the respondents, nor the factum of death of Master Ajay Kumar due to the falling of the chajja upon him is in dispute. The occurrence of the said incidence has been recorded in the FIR and the cause of the death has also been verified by the post mortem report. Though respondent nos.1 and 2 are shifting the liability for the maintenance of the said flat on each other, they do not dispute that one or the other of them is indeed responsible for acting negligently in not maintaining the said flat. There can be no dispute or denying the fact that one of them, if not both the respondents, owed a duty of care to the general public, so that no action or inaction of theirs causes harm to the public at large. There can be no quarrel that the flat should have been maintained, so that no part of it fell suddenly on its own, only on account of some rain. The

falling of the shed (chajja) is prima facie evidence of negligence. Nothing has been brought out by the respondents, to suggest that the shed fell despite the respondents taking proper care of the flat, or for some other cogent reason. Therefore, in my view, the principle of strict liability will be squarely applicable in this case, and the irresistible conclusion is that the respondent nos.1 and 2 were negligent in the maintenance of the said flat, due to which the chajja fell on the deceased, and he died.

30. As far as the two cases Grid Corporation of Orissa Ltd. are concerned, in those cases the negligence on the part of the corporation had still to be proved - whether the wire snapped due to the negligence of the corporation, or due to some other reason, such as lightening, was required to be established. Thus those cases are distinguishable on facts. Also the cases of **Munna Singh** (supra) and **Duli Chand** (supra) are distinguished from the present case, as they are not the cases of *Res ispa Loquiter,* as is evident from the facts of those cases.

31. Consequently, I have no hesitation in concluding that the present being a case of glaring and evident negligence, to which the maxim *Res Ipsa Loquitor* applies, the present writ petition under Article 226 of the Constitution of India is maintainable as the said negligence has led to complete infraction of the fundamental right to life of the deceased. The inter se dispute between the two respondents, i.e. respondent nos.1 and 2, would not come in the way of the petitioners for claiming compensation for breach of the fundamental rights of the deceased Ajay Kumar. The tendency of the public authorities, when more than one of them is involved, to shift the burden on each other is not new. Same was the position in **Darshan** (supra), and **Ram Kishore** (supra) and **Swarn Singh** (supra). The said inter se dispute was held, not be disentitle the petitioner from claiming relief under Article 226 of the Constitution of India, as negligence, resulting in breach of fundamental rights was held to have been established in each of these cases. The Court shall, however, *prima facie* examine the aspect of responsibility, only with a view to fix the responsibility of one of the respondents to pay the awarded compensation, leaving it open to the respondents to battle out and settle their inter se liability in appropriate proceedings.

32. Now, as far as the quantification of compensation is concerned, the Supreme court has observed in **New India Assurance Co. Ltd v. Satender & Others,** (2006) 13 SCC 60 and in **Lata Wadhwa & othrs**

v. State of Bihar & othrs (2001) 8 SCC 197 that the compensation should be quantified, in case of death of an infant child, on the following principles:

> "In case of the death of an infant, there may have been no actual pecuniary benefit derived by its parents during the child's life-time. But this will not necessarily bar the parent's claim and prospective loss will find a valid claim provided that the parents' establish that they had a reasonable expectation of pecuniary benefit if the child had lived. This principle was laid down by the House of Lords in the famous case of **Taff Vale Rly. V. Jenkins** (1913) AC 1, and Lord Atkinson said thus:
>
> > ".....all that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues. It is quite true that the existence of this expectation is an inference of fact - there must be a basis of fact from which the inference can reasonably be drawn; but I wish to express my emphatic dissent from the proposition that it is necessary that two of the facts without which the inference cannot be drawn are, first that the deceased earned money in the past, and, second, that he or she contributed to the support of the plaintiff. These are, no doubt, pregnant pieces of evidence, but they are only pieces of evidence; and the necessary inference can I think, be drawn from circumstances other than and different from them." "

33. The courts have evolved a two tier compensation mechanism. It has two components, i.e. the conventional sum, and pecuniary compensation, in such cases. The court in **Kamala Devi** (supra) held as follows-

> "5. The compensation to be awarded by the Courts, based on international norms and previous decisions of the Supreme Court, comprises of two parts:
>
> (a) "standard compensation" or the so-called "conventional amount" (or sum) for non-pecuniary losses such as loss of consortium, loss of parent, pain and suffering and loss of amenities; and

(b) Compensation for pecuniary loss of dependency.

6. The "standard compensation" or the "conventional amount" has to be revised from time to time to counter inflation and the consequent erosion of the value of the rupee. Keeping this in mind, in case of death, the standard compensation in 1996 is worked out at Rs. 97,700/-. This needs to be updated for subsequent years; on the basis of the Consumer Price Index for Industrial Workers (CPI-IW) brought out by the Labour Bureau, Government of India.

7. Compensation of pecuniary loss of dependency is to be computed on the basis of loss of earnings for which the multiplier method is to be employed. The table given in Schedule II of the MV Act, 1988 cannot be relied upon, however, the appropriate multiplier can be taken there from. The multiplic and is the yearly income of the deceased less the amount he would have spent upon himself. This is calculated by dividing the family into units-2 for each adult member and 1 for each minor. The yearly income is then to be divided by the total number of units to get the value of each unit. The annual dependency loss is then calculated by multiplying the value of each adult member. This becomes the multiplicand and is multiplied by the appropriate multiplier to arrive at the figure for compensation of pecuniary loss of dependency.

8. The total amount paid under 6 and 7 above is to be awarded by the Court along with simple interest thereon calculated on the basis of the inflation rate based on the Consumer Prices as disclosed by the Government of India for the period commencing from the date of death of the deceased till the date of payment by the State.

9. The amount paid by the State as indicated above would be liable to be adjusted against any amount which may be awarded to the worked out a pattern, and they keep it in line with the changes in the value of money."

34. This principle has been taken note of in **Ram Kishore** (supra). The petitioners have filed an affidavit, calculating the compensation claimed by them as per the method provided in **Kamla Devi** (supra).

35. The standard compensation has to be awarded by taking the base amount as Rs. 50,000 in 1989, as mentioned in **Kamla Devi** (supra). The said amount would require to be adjusted for June 2007, when Ajay Kumar's death occurred, based on the consumer Price Index for industrial workers(CPI-IW), published by Labour Bureau, Government Of India. With the base year as 1982, when the index is taken as 100, the average CPI(IW) for the month of June 2007 works out to 602. Thus the standard compensation, as per inflation corrected value, comes out to 50,000 x 602/171 Rs.1,76,023.39. Thus the standard compensation to be awarded in this case should be Rs.1,76,023.

36. As far as pecuniary compensation is concerned, as already explained in **Kamla Devi** (supra) the income of the parents can be taken as a standard measure for arriving at the expected annual income of the children. The method of calculating the compensation for pecuniary loss of dependency depends upon the potential earning capacity of the deceased Ajay Kumar, had he attained adulthood. As per the affidavit of the petitioner no.1 dated 15.12.2011, his monthly salary at the time of this incident was Rs. 10,000. At the time of filing of the affidavit, the earnings of petitioner no.1 were Rs.30,000/- per month approximately. The petitioners have applied a multiplication factor of 1.5 to counter inflation and erosion of the value of money. Considering the fact that in a span of about four years, there has been a threefold increase in the earnings of petitioner no.1 from Rs.10,000/- p.m. to Rs.30,000/- p.m., in my view, the multiplicand factor of 1.5, to off set the effects of inflation and erosion of the value of money should be adopted. It can be assumed that Ajay Kumar would have, at least, earned what his father was earning, if not more. Therefore, the multiplicand would be the expected annual income, less what he required for himself. As Ajay would have grown up, his personal expenses would have only risen. The contribution to the household would not have exceeded half of the income. Thus the multiplicand work out to be Rs.90,000/- i.e. (1,80,000/2). This multiplicand is to be multiplied by the multiplier of 15, in terms of the second Schedule to the Motor Vehciles Act, 1988. This comes out to be a figure of Rs. 13,50,000.

37. Taking the above calculation into account the total compensation to which the petitioners are entitled works out to be Rs. 1,76,023 + Rs.13,50,000 = Rs.15,26,000/-.

38. Since the liability of maintenance of the said flat is being disputed

by both respondent no.1 and respondent no.2, it would not be appropriate to decide the inter se liability of maintenance of the flat in this petition. Without deciding this issue, it is deemed appropriate that respondent no.1 i.e BSES Rajdhani Power Ltd. should pay the aforesaid amount of compensation to the petitioners, as the possession of the flat in question had been delivered to respondent no.1 BSES Rajdhani Power Ltd. The amount shall carry simple interest at the rate of 9% per annum from the date of filing of this petition till the date of payment. Respondent no.1 may, it is so advised, stake its claim against respondent no.2. If such a claim is made, the same shall be independently adjudicated, without being influenced, in any manner, by this decision.

39. So far as the relief against respondent no.3 is concerned, in my view, the grievance of the petitioner that respondent no.3 Delhi Police is not proceeding with the investigation of the case with any seriousness, and is acting with lethargy, is clearly made out in the facts of this case. Though the incident in question is of 16.06.2007 and the FIR was registered on the same date, the police has not been able to complete the investigation and fix the responsibility of the concerned officers of respondent nos.1 and/or 2. As per the status report dated 12.05.2010, the case has been sent as untraced on 01.10.2009 with the comment that it would be reopened for further investigation if any evidence would come on record in future. The status report is wholly unsatisfactory. It is too much for the Delhi Police to expect that evidence would surface on its own. It is for the police to gather the evidence and proceed further in the matter, upon identification of the officers who were responsible for maintenance of the flat in question at the relevant time. Consequently, I direct respondent no.3, i.e. the Commissioner of Police to expedite further investigation into the matter, and to take the case to its logical conclusion. In case the Delhi Police does not take any further action in the matter within a reasonable period, or within three months at the most, it shall be open to the petitioner to seek further directions in this respect.

40. This writ petition is allowed in the aforesaid terms with costs quantified at Rs.50,000/- to be shared equally by respondent nos.1 and 2.

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MAC. APP.

TATA AIG GENERAL INSURANCE CO. LTD. ....APPELLANT

VERSUS

KAUSHLYA DEVI & ORS. ....RESPONDENT

(G.P. MITTAL, J.)

MAC. APP. NO. : 297/2011 DATE OF DECISION: 23.01.2012

Motor Vehicle Act, 1988—The Appellant impugns the award passed by the Motor Accident Claims Tribunal, (the Tribunal) wherein the Claimants (Respondents No. 1 to 5 herein) were awarded a compensation of Rs.7,82,564/- for the death of Raghunandan Yadav (hereinafter referred to as the 'deceased') who was 41 years of age at the time of the accident—The contentions raised on behalf of the Appellant are:- (i) That there was no proof of negligence on the offending vehicle and therefore, the Respondents were not entitled for any compensation—(ii) That the deceased was not entitled for any increase in income as his income was computed according to the Minimum Wages—To prove the negligence on the part of the driver of the offending vehicle, the Respondents examined PW-2 (sole eye witness), who testified that the motorcycle was being driven by the deceased on the left side of the road and the offending vehicle came from the opposite direction and hit the motorcycle. The certified copy of the site plan also shows that the motorcycle was lying on the extreme left of the road after the accident. In claim petition, the claimant are required to prove negligence only on the touchstone of preponderance of probability, which has been successfully proved in this case—In these

circumstances, the finding of the Tribunal, cannot be faulted with—A perusal of the Notifications issued under the Minimum Wages Act would show that the minimum wages of a nonmatriculate were revised from Rs. 3876/- on 01.08.2008 to Rs. 5850/- on 01.02.2010. Thus, it has to be noticed that there was increase of about 50% in the minimum wages just in a year and a half. This was not only on account of inflation but also to provide a better standard of living to the people of the lower strata of the society—Therefore, the Tribunal rightly took the minimum wages of a non-matriculate (as the deceased produced his school certificate proving that he had passed 8th Class) which were Rs. 3876/- per month at the time of the accident and then added 50% towards the increase in minimum wages.

Therefore, the Tribunal rightly took the minimum wages of a non-matriculate (as the deceased produced his school certificate proving that he had passed 8th Class) which were Rs. 3876/- per month at the time of the accident and then added 50% towards the increase in minimum wages.

(Para 9)

Important Issue Involved: In claim petition the claimant are required to prove negligence only on the touchstone of preponderance of probability.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. Sameer Nandwani, Advocate.

FOR THE RESPONDENTS : Mr. Navneet Goyal, Advocate with Ms. Suman N. Rawat, Advocate.

CASES REFERRED TO:

1. *The New India Assurance Co. Ltd.* vs. *Smt. Nirmala Devi and Ors.,* [2007] VI AD (Delhi) 730.

2. *Sh. Narinder Bishal and Anr.* vs. *Sh. Rambir Singh and Ors.,* MAC App. 1007-08/2006.

RESULT: Disposed of.

G. P. MITTAL, J.

1. The Appellant Tata AIG General Insurance Company Limited impugns the award passed by the Motor Accident Claims Tribunal, (the Tribunal) wherein the Claimants (Respondents No. 1 to 5 herein) were awarded a compensation of Rs. 7,82,564/- for the death of Raghunandan Yadav (hereinafter referred to as the 'deceased') who was 41 years of age at the time of the accident.

2. On 26.10.2008, the deceased and Manoj Kumar were travelling on a motorcycle bearing the Registration No. DL-1SQ-0403. At about 9.15 p.m. when they reached at Bhorgarh Alipur Main road, near Petrol Pump Narela, a truck bearing No. HR-55G-9676 came from Bhorgarh's side and hit the vehicle of the deceased as a result of which he (deceased) sustained grievous injuries, which resulted in his death.

3. The contentions raised on behalf of the Appellant are :-

(i) That there was no proof of negligence on the offending vehicle and therefore the Respondents were not entitled for any compensation.

(ii) That the deceased was not entitled for any increase in income as his income was computed according to the Minimum Wages.

CONTENTION (i):

4. To prove the negligence on the part of the driver of the offending vehicle, the Respondents examined PW-2 (sole eye witness), who testified that the motorcycle was being driven by the deceased on the left side of the road and the offending vehicle came from the opposite direction and hit the motorcycle. The certified copy of the site plan also shows that the motorcycle was lying on the extreme left of the road after the accident. In claim petition the claimant are required to prove negligence only on the touchstone of preponderance of probability, which has been successfully proved in this case.

5. Additionally, the driver or the owner did not enter the witness

box to contradict the version as put forth by PW-2 nor cross examined him. In these circumstances, the finding of the Tribunal, cannot be faulted with.

CONTENTION (ii) :

6. It is urged by the learned counsel for Appellant that the tribunal had erred in adding 50% increase to the Minimum wages for computing the loss of dependency. In **National Insurance Company Ltd. v. Renu Devi & Ors.,** III (2008) ACC 134, this Court held that the increase in the minimum wages is not on account of promotion of a unskilled worker or on account of advancement in his career but the same is due to increase in the price index and cost of living. It has also to be borne in mind that the minimum wages are revised not only to meet the inflation but also to improve the standard of living of the lowest paid workers and to give the benefit of growth in GDP.

7. A perusal of the Notifications issued under the Minimum Wages Act would show that the minimum wages of a non-matriculate were revised from Rs. 3876/- on 01.08.2008 to Rs. 5850/- on 01.02.2010. Thus, it has to be noticed that there was increase of about 50% in the minimum wages just in a year and a half. This was not only on account of inflation but also to provide a better standard of living to the people of the lower strata of the society.

8. In **Renu Devi & Ors.** (supra) it was held as under:-

> "9. In a recent decision of this Court **Sh. Narinder Bishal and Anr. v. Sh. Rambir Singh and Ors.,** MAC App. 1007-08/2006, decided on 20.02.08 by Kailash Gambhir, J., it has been observed as under:-
>
> > "For determining the earning of the deceased or victim of the accident, the claimants are supposed to prove the exact income of the deceased by leading some cogent and reliable documentary evidence as to the nature of his employment or trade or business or in any other activity he was involved in and then the said income can be taken into consideration for determining the quantum of compensation and if in such a case, the claimants are further able to establish the future prospects as well, then

the criteria laid down in Sarla Dixit's case would get attracted. There can be another category of cases where the claimants are able to establish the future prospects of the deceased by quantifying the amount to be earned by the deceased in future with the help of cogent, reliable and convincing evidence and in all such cases the tribunal can take into consideration such future increase as has been established by the claimants on record. The difficulty however, would arise in all those cases where although the claimants are able to sufficiently establish on record the educational qualification of the deceased or the nature of his employment whether skilled, semi-skilled or unskilled but fail to establish by any reliable evidence to prove the exact income of the deceased. In such cases, question arises whether the Tribunal can take into consideration the minimum wages and the periodical revision of minimum wages as are fixed by the Government under the Minimum Wages Act. To examine this question, it will have to be considered whether the revision which takes place under the Minimum Wages Act can be equated with the future prospects of a deceased. As would be evident from catena of judgments of the Supreme Court, the future prospects have no correlation with the price index, inflation or denunciation of currency value.

The future prospects would necessarily mean advancement in future career, earnings and progression in one's life. It could be considered by seeing, from which post a person began his career, what avenues or prospects he has while being in a particular avocation and what targets he/she would finally achieve at the end of his career. The promotional avenues, career progression, grant of selection grades etc. are some of the broad features for considering one's future prospects in one's career.

The minimum wage, in the very context of economy has a correlation with the growth and development of the nation's economy, postulating increase in the price index, reduction of purchasing power with the denunciation of

currency value and consequent fixation of minimum wages giving some periodical increase so as to ensure sustenance and survival of the workman class. Keeping this in view, under no circumstance the revision of minimum wages can be treated on the same footing with the factor of future prospects."

10. In **The New India Assurance Co. Ltd. v. Smt. Nirmala Devi and Ors.,** [2007] VI AD (Delhi) 730, this Court held:-

"A perusal of the minimum wages notified under the Minimum Wages Act show that the minimum wages gets increased by nearly 150% in 10 years."

11. The Court further observed:- "Noting that minimum wages virtually double after every 10 years to neutralise increase in inflation, cost of living, purchasing power of rupee....."

12. Since the minimum wages have doubled in the past 10 years as per the Minimum Wages Act, therefore, safely the said increase at least can be taken in view as a future increase of double Minimum Wages under the Minimum Wages Act. Applying the said criteria, the income of the deceased as assessed in the year 2005 would increase to Rs. 4,800/- and taking an average of the same, the Tribunal rightly assessed the income of deceased at Rs. 3,200/- per month."

9. Therefore, the Tribunal rightly took the minimum wages of a non-matriculate (as the deceased produced his school certificate proving that he had passed 8th Class) which were Rs. 3876/- per month at the time of the accident and then added 50% towards the increase in minimum wages.

10. I do not find any infirmity in the award passed by the Tribunal. The Appeal is without any merit. No costs.

11. Pending applications also stand disposed of.

ILR (2012) III DELHI 490
W.P.(C)

FEDERATION OF PUBLIC SCHOOLS ....PETITIONER

VERSUS

GOVERNMENT OF NCT OF DELHI ....RESPONDENT

(A.K. SIKRI, ACJ. & RAJIV SAHAI ENDLAW, J.)

W.P.(C) NO. : 636/2012 & 40/2012 **DATE OF DECISION: 31.01.2012**

The Right of Children to Free and Compulsory Education Act, 2009 (RTE Act)—Section 35 and 38 of RTE Act & Sub-Rule 3 of Rule 10 of Delhi RTE Rules—W.P.(C) No.636/2012 preferred on behalf of approximately 326 private unaided recognized schools functioning in Delhi impugning the Notification No.F.15(172)/DE/ACT/2011/7290-7304 dated 27.01.2012 issued by the Lieutenant Governor of Delhi in exercise of powers conferred under Section 35 and 38 of the RTE Act read with Sub-Rule 3 of Rule 10 of Delhi RTE Rules—In W.P.(C) 40/2012 impugned order passed by Director of Education which mandated extending limits of neighbourhood for children belonging to EWS and disadvantaged groups, challenged—Alternatively claimed that this Court should lay down Guidelines and pre-conditions for exercise of power under Rule 10(3) of the Delhi RTE Rules for extending the limits/ area of "neighbourhood" as defined under the RTE Act and the Delhi RTE Rules. Held—RTE Act did not define word neighbourhood—Delhi RTE Rules prescribed limits of neighbourhood as radial distance of 1 km. from residence of child in Classes I to V and radial distance of 3 Kms. from residence of child in Classes VI to VIII—Thus, private unaided schools

members of Petitioner under Act and Rules were required to admit children belonging to EWS and disadvantaged groups in Class I to extent of 25% of strength and resident of within limits of neighbourhood aforesaid—Impugned Notification had been issued extending limit of neighbourhood—Said Notification issued to get over challenge in W.P.(C) No. 40/2012 on ground of Director of Education being not entitled to extend limits of neighbourhood by an executive order—Private unaided schools under Act and Rules were obliged to fill up 25% of seats in Class I and / or at entry level if below Class I, from children belonging to EWS and disadvantaged groups—Paramount purpose was to provide access to education—Whether for that access, child was to travel within 1 Km. or more, was secondary—If obligation on private unaided schools to admit children belonging to EWS and disadvantaged groups was limited to those children only who were residing within a distance of 1 Km. from school same might result in a large number of such children even though willing for sake of acquiring education to travel more than 1 Km. being deprived thereof for reason of there being no seats in school within their neighbourhood—Private unaided schools were not found to be aggrieved from Notification—This Court not inclined to entertain W.P.(C) No. 636/2012 challenging same notification—Criteria devised by Division Bench in *Social Jurist v. Govt of NCT of Delhi* could be adopted for purpose of admission under RTE Act and Rules—Clarification/guidelines issued—Upon issuance of Notification challenged in W.P.(C) No.636/2012, W.P.(C) No.40/2012 became infructuous.

We are however of the view that the paramount purpose is to provide access to education. Whether for that access, the child is to travel within 1 Km. or more is secondary. It is apparent from the executive order of the Director of Education and the Notification aforesaid that if the obligation on the private unaided schools to admit children belonging to EWS

and disadvantaged groups is limited to those children only, who are residing within a distance of 1 Km. from the school, the same may result in a large number of such children even though willing for the sake of acquiring education to travel more than 1 Km. being deprived thereof for the reason of there being no seats in the school within their neighbourhood. It may also result in several of the private unaided schools who do not have sufficient number of such children within their defined neighbourhood allocating the seats so remaining unfilled to the general category students.

(Para 10)

We are of the opinion that the criteria aforesaid can be adopted for the purpose of admission under the RTE Act and the Rules aforesaid. The petitioner also, as aforesaid in the alternative has sought guidelines from this Court. We are also of the view that the RTE Act being comparatively recent, and hiccups being faced in implementation thereof, considering the laudable objective thereof, it becomes the bounden duty of this Court to ensure that such hiccups do not defeat the purpose of its enactment. After hearing the counsel for the respondent GNCTD, we direct as under:

(i) Admission shall first be offered to eligible students belonging to EWS and disadvantaged group residing within 1 Km. of the specific schools;

(ii) In case the vacancies remain unfilled, students residing within 3 kms. of the schools shall be admitted;

(iii) If there are still vacancies, then the admission shall be offered to other students residing within 6 kms. of the institutions;

(iv) Students residing beyond 6 kms. shall be admitted only in case vacancies remain unfilled even after considering all the students within 6 kms. area.

(Para 13)

The senior counsel for the petitioner has stated that as per

the Schedule for admission announced earlier, the admission process is to close soon. He seeks extension thereof, to enable the private unaided schools to make admission in accordance with the guidelines aforesaid. **(Para 14)**

Important Issue Involved: Paramount purpose of the RTE Act was to provide access to education—Whether for that access, child was to travel within 1 Km. or more was secondary—If obligation on private unaided schools to admit children belonging to EWS and disadvantaged groups was limited to those children only, who were residing within a distance of 1Km. from school, same might result in a large number of such children even though willing for sake of acquiring education to travel more than 1 Km. being deprived thereof for reason of there being no seats in school within their neighbourhood.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. N.K. Kaul, Sr. Advocate with Mr. P.D. Gupta & Mr. Kamal Gupta, Advocates.

FOR THE RESPONDENT : Ms. Purnima Maheshwari, Advocate for GNCTD. Mr. Ashok Agarwal, Advocate as Intervener.

RESULT: Writ Petition Disposed.

A.K. SIKRI, THE ACTING CHIEF JUSTICE

1. W.P.(C) No.636/2012 is preferred on behalf of approximately 326 private unaided recognized schools functioning in Delhi impugning the Notification No.F.15(172)/DE/ACT/2011/7290-7304 dated 27.01.2012 issued by the Lieutenant Governor of Delhi in exercise of powers conferred under Section 35 and 38 of the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) read with Sub-Rule 3 of Rule 10 of Delhi Right of Children to Free and Compulsory Education Rules, 2011 (hereinafter called Delhi RTE Rules). The petition also impugns Rule

10(3) of the Delhi RTE Rules. The petitioner alternatively has claimed that this Court should lay down Guidelines and pre-conditions for exercise of power under Rule 10(3) of the Delhi RTE Rules for extending the limits / area of "neighbourhood" as defined under the RTE Act and the Delhi RTE Rules.

2. The RTE Act was enacted in implementation of the mandate and spirit of Article 21A of the Constitution of India inserted vide 86th Amendment Act, 2002. Article 21A provides for free and compulsory education of all children in the age group of 6 to 14 years as a Fundamental Right. To achieve this goal, Section 12(1)(c) requires private unaided schools, some of which in Delhi are represented by the petitioner to admit in Class-I , to the extent of at least 25% of the strength of that class, children belonging to Economically Weaker Sections (EWS) and disadvantaged groups in the neighbourhood and provide free and compulsory elementary education till its completion. Such Schools, under Section 12(2) of the RTE Act shall be reimbursed expenditure so incurred by them to the extent of per child expenditure incurred by the State or the actual amount charged from the child whichever is less. Since some Schools were already under obligation (as per the term of allotment of land to them) to provide free education to a specified number of children, the second proviso to Section 12 (2) provides that the Schools shall be not entitled to reimburse to the extent of the said obligation.

3. Though the RTE Act in Section 12 (supra) and also elsewhere uses the word "neighbourhood" but does not define the same. Such definition is however to be found in the Right of Children to Free and Compulsory Education Rules, 2010 (RTE Rules) which prescribe the limit of neighbourhood in respect of children in Classes-I to V as within walking distance of 1 Km. and in respect of children in Classes VI to VIII as within 3 Kms. The Delhi RTE Rules also similarly prescribe the limits of neighbourhood as radial distance of 1 Km. from the residence of child in Classes I to V and radial distance of 3 Kms. from the residence of the child in Classes VI to VIII. Thus the private unaided schools members of the petitioner under the Act and the Rules aforesaid are required to admit children belonging to the EWS and disadvantaged groups in Class I to the extent of 25% of the strength and resident of within the limits of neighbourhood aforesaid.

4. The respondent through Director of Education, however vide order dated 16.12.2011 directed as follows:

> "All schools shall ensure that no child under economically weaker sections and disadvantaged group is denied admission on neighbourhood / distance basis so long as the locality of the child's residence falls within the distance criteria devised by the schools for the general category children."

It being a common ground that the private unaided schools while admitting general category children does not follow the limits of neighbourhood as prescribed for the children from EWS and disadvantaged groups, the aforesaid order mandated extending the limits of neighbourhood for the children belonging to EWS and disadvantaged groups.

5. The petitioner filed W.P.(C) 40/2012 impugning the said order and the learned Single Judge of this Court while issuing notice of the said writ petition, on the contention of the petitioner that the Director of Education could not have vide order aforesaid extended the limits of neighbourhood as prescribed in the Rules, as an ad interim measure stayed the operation of the same. The said writ petition is listed next before the learned Single Judge on 10.02.2012.

6. However, now the Notification dated 27.01.2012 (impugned in this petition) has been issued extending the limit of neighbourhood. Apparently, the said Notification has been issued to get over the challenge in W.P.(C) No.40/2012 on the ground of the Director of Education being not entitled to extend the limits of neighbourhood by an executive order.

7. Mr. N.K. Kaul, Senior counsel for the petitioner has contended that once the definition of neighourhood is to be understood in the same manner as applicable to students of general category, it would mean that there is no distance prescribed at all and even the children belonging to the EWS and disadvantaged group who are residing at far away places would have to be admitted by the private unaided schools. He contends that the same is not only violative of the Rules aforesaid but also goes against the very scheme of the Act. Our attention is drawn to the report of April, 2010 of the Committee on Implementation of the RTE Act and to the 213th Report on the RTE Bill of the department related Parliament Standing Committee of Human Resource Development and which report

was presented to the Rajya Sabha. Therefrom, it is pointed out that concerns and apprehensions were expressed about the distance / time for commutation and need was felt to define neighbourhood appropriately to also ensure access to education within reasonable reach of children. It is also contended that admission in far way schools may lead to high dropout rate. The senior counsel for the petitioner contends that the Notification aforesaid and Rule 10(3) of the Delhi RTE Rules (which enables the Government to for the purposes of filling up the requisite percentage of seats reserved for children of EWS and disadvantaged groups extend the limits of neighbourhood from time to time) in exercise of powers whereunder the same has been issued are ultra vires the RTE Act, the RTE Rules as well as the Delhi RTE Rules and the spirit of neighbourhood school.

8. We have at the outset enquired as to what is the cause of action or the reason for the private unaided schools to be aggrieved from the Notification aforesaid or the extension of the limits of neighbourhood; it is not in dispute that the said private unaided schools under the Act and the Rules aforesaid are obliged to fill up 25% of the seats in Class I and / or at the entry level if below Class I from children belonging to EWS and disadvantaged groups - it should not matter to the School whether such children are residing within a distance of one kilometer or more. The grievance if any should be of the children and/ or their parents for the inability of the Government, inspite of legislation, being unable to provide schools within the neighbourhood as defined.

9. Though the senior counsel for the petitioner has been unable to show as to how the private unaided schools are affected, he has contended that being a stakeholder, they are interested in compliance of the laws. It is argued that the Notification and the exercise of power under Rule 10(3) of the Delhi RTE Rules to the extent of doing away rather than extending the limits of neighbourhood is bad.

10. We are however of the view that the paramount purpose is to provide access to education. Whether for that access, the child is to travel within 1 Km. or more is secondary. It is apparent from the executive order of the Director of Education and the Notification aforesaid that if the obligation on the private unaided schools to admit children belonging to EWS and disadvantaged groups is limited to those children only, who are residing within a distance of 1 Km. from the school, the same may

result in a large number of such children even though willing for the sake of acquiring education to travel more than 1 Km. being deprived thereof for the reason of there being no seats in the school within their neighbourhood. It may also result in several of the private unaided schools who do not have sufficient number of such children within their defined neighbourhood allocating the seats so remaining unfilled to the general category students.

11. In the circumstances, we at the instance of the private unaided schools who are not found to be aggrieved from the Notification aforesaid not inclined to entertain W.P.(C) No.636/2012 challenging the same.

12. We also find that the problem already stands answered by a formula devised by the Division Bench of this Court in its judgment dated 30.05.2007 in W.P.(C) No.3156/2002 titled **Social Jurist Vs. Govt. of NCT of Delhi.** No doubt that writ petition was filed before the RTE Act had been enacted. However, the issue was almost identical in nature. The said judgment was rendered in a public interest litigation mandating the Schools who had been allotted land on concessional rates to give admission to children belonging to EWS. The issue of distance / neighbourhood had also arisen for consideration while dealing with the said aspect and the following solution was devised:

> "Admission shall be first offered to eligible students from poorer sections residing within 3 kilometers of the institutions. In case vacancies remain unfilled, students residing within 6 kilometers of the institutions shall be admitted. Students residing beyond 6 kilometers shall be offered admission only in case the vacancies remain unfilled even after considering all students within 6 kilometers area."

13. We are of the opinion that the criteria aforesaid can be adopted for the purpose of admission under the RTE Act and the Rules aforesaid. The petitioner also, as aforesaid in the alternative has sought guidelines from this Court. We are also of the view that the RTE Act being comparatively recent, and hiccups being faced in implementation thereof, considering the laudable objective thereof, it becomes the bounden duty of this Court to ensure that such hiccups do not defeat the purpose of its enactment. After hearing the counsel for the respondent GNCTD, we direct as under:

(i) Admission shall first be offered to eligible students belonging to EWS and disadvantaged group residing within 1 Km. of the specific schools;

(ii) In case the vacancies remain unfilled, students residing within 3 kms. of the schools shall be admitted;

(iii) If there are still vacancies, then the admission shall be offered to other students residing within 6 kms. of the institutions;

(iv) Students residing beyond 6 kms. shall be admitted only in case vacancies remain unfilled even after considering all the students within 6 kms. area.

14. The senior counsel for the petitioner has stated that as per the Schedule for admission announced earlier, the admission process is to close soon. He seeks extension thereof, to enable the private unaided schools to make admission in accordance with the guidelines aforesaid.

15. We find merit in the aforesaid contention. Since the clarification / guidelines aforesaid has been issued now we are confident that further two weeks time shall be allowed to the schools to complete the admission process.

16. However, finding that the executive order dated 16.12.2011 earlier issued and which has been stayed in W.P.(C) No.40/2012, we have with the consent of the counsels taken that writ petition also on our board today. The counsel for the petitioner admits that upon issuance of the Notification challenged in W.P.(C) No.636/2012, W.P.(C) No.40/2012 has become infructuous.

17. Accordingly, W.P.(C) No.636/2012 is disposed of in terms of above and W.P.(C) No.40/2012 is disposed of as infructuous.

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

JYOTI YADAV & ANR. ....PETITIONERS

VERSUS

GNCTD AND ANR. ....RESPONDENTS

(A.K. SIKRI, ACJ. & RAJIV SAHAI ENDLAW, J.)

W.P. (C) NO. : 7093/2010 DATE OF DECISION: 01.02.2012

Constitution of India, 1950—Article 226—Writ Petition impugning the selection process, for short listing students for Elementary Teacher Education (ETE) Diploma course for the session 2010-12, as prescribed in the prospectus published by the respondent No. 2 State Council of Educational Research & Training (SCERT), particularly Clause 5 of Chapter-IV and Clause 6 of Chapter-XII—Petitioners axiomatically also seek quashing of the selection and direction for inclusion of their own names in the shortlist and admission to the course—Two petitioners claim to be belonging to OBC category and applied for admission in the said category for which 15% reservation was prescribed—The challenge is to the admission process predicated on the fact that they had 78% and 76% marks respectively in their Senior Secondary School Examination—Applicants with lower marks in the Senior Secondary School Examination were admitted to unreserved category—Petitioners admittedly filed up only one form claiming admission in the OBC category—They did not fill up a separate application form for admission in the unreserved category—Hence, were not considered for admission in the unreserved category—Students with lower marks than the petitioners were admitted in the OBC category, the last student admitted had marks higher than the petitioners. Held—It thus, could not ex facie be said that action of respondent SCERT in requiring candidates to fill up separate forms for consideration in separate categories was bad—However, having observed so, Court still constrained to observe that law as enunciated under various dicta appear to sway in favour of candidate applying in reserved category not forfeiting his right for consideration in unreserved category—Better course for respondents to follow in future thus, appeared to be in not requiring separate applications to be filled up for reserved and unreserved category even if such procedure were to serve administrative convenience of respondents better—Reservation was benefit in addition to already existing right including Fundamental Right of equality—If any scheme of reservation or procedure evolved with view to give effect to such scheme was made to depend upon condition of truncating fundamental or any right of individual, such scheme of reservation would be contrary to constitutional provisions and law and to extent it curtails fundamental right or any other right of person belonging to such category would be liable to be declared illegal—Hence, petition allowed partly.

It thus cannot ex facie be said that the action of the respondent SCERT in requiring the candidates to fill up separate forms for consideration in separate categories is bad. However having observed so, we are still constrained to observe that the law as enunciated under various dicta and summed up in para 11 above does appear to sway in favour of a candidate applying in the reserved category not forfeiting his right for consideration in the unreserved category. A better course for the respondents to follow in future thus appears to be in not requiring separate applications to be filled up for the reserved and unreserved category even if such procedure were to serve the administrative convenience of the respondents better.

Reservation is a benefit in addition to the already existing right including the Fundamental Right of equality. If any scheme of reservation or the procedure evolved with a view to give effect to such scheme is made to depend upon the condition of truncating the fundamental or any right of an individual, such scheme of reservation would be contrary to the constitutional provisions and the law and to the extent it curtails fundamental right or any other right of a person belonging to such category would be liable to be declared illegal. The Apex Court in **Jitendra Kumar Singh Vs. State of U.P.** (2010) 3 SCC 119 also held that a reserved category candidate cannot be deprived of his right to be considered against general vacancy on the basis of merit. The practice of preparing category wise list was also deprecated in para 43 of **A.P. Public Service Commission Vs. Baloji Badhavath** (2009) 5 SCC 1 as being detrimental to the interest of meritorious candidates belonging to the reserved category. **(Para 14)**

The petition is therefore partly allowed. The respondent No.2 SCERT is directed to, in future, consider the candidates applying for admission in the reserved categories in the unreserved category also, on the basis of merit without requiring them to fill up and irrespective of whether they have filled up or not, a separate application form. It is further declared that the reserved category candidates admitted to the unreserved category on the basis of merit shall not be counted in the reserved category so as to reduce the number of seats prescribed for the reserved category. No order as to costs. **(Para 17)**

Important Issue Involved: Requiring candidates to fill up separate forms for consideration in separate categories was not bad however better, course would be to follow in not requiring separate applications to be filled up for reserved and unreserved category even if such procedure were to serve administrative convenience.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Ms. Deepali Gupta, Advocate.

FOR THE RESPONDENTS : Mr. A.K. Singh, Advocate for Ms. Sujata Kashyap, Advocate for R-1. Ms. Latika Chaudhary, Advocate for Mrs. Avnish Ahlawat,. Advocate for R-2.

CASES REFERRED TO:

1. *Vijendra Kumar Verma* vs. *Public Service Commission,* Uttarakhand (2011) 1 SCC 150.
2. *Rajat Goel* vs. *Ministry of Human Resource and Development (Government of India)* LPA No.1069/2011.
3. *Jitendra Kumar Singh* vs. *State of U.P.* (2010) 3 SCC 119.
4. *Tej Pal Yadav* vs. *UOI* 174 (2010) DLT 510.
5. *UOI* vs. *Ramesh Ram* AIR 2010 SC 2691.
6. *UOI* vs. *Dalbir Singh* AIR 2009 SC 2438.
7. *A.P. Public Service Commission* vs. *Baloji Badhavath* (2009) 5 SCC 1.
8. *UOI* vs. *Satya Prakash* (2006) 4 SCC 500.
9. *Anand Lal Yadav* vs. *NCT of Delhi* MANU/DE/1758/2002.
10. *Ritesh R. Sah* vs. *Dr. Y.L. Yamul* (1996) 3 SCC 253.
11. *UOI* vs. *Virpal Singh Chauhan* (1995) 6 SCC 684.
12. *Indra Sawhney* vs. *UOI* 1992 Supp. (3) SCC 217.

RESULT: Writ Petition Partly Allowed.

RAJIV SAHAI ENDLAW, J.

1. The two petitioners have filed this writ petition impugning the selection process, for shortlisting students for Elementary Teacher Education (ETE) Diploma course for the session 2010-12, as prescribed in the prospectus published by the respondent No.2 State Council of Educational Research & Training (SCERT), particularly Clause 5 of

Chapter-IV and Clause 6 of Chapter-XII thereof; the petitioners axiomatically also seek quashing of the selection and direction for inclusion of their own names in the shortlist and admission to the course.

2. Though, the prospectus aforesaid was made available and the applications were to be submitted from 28.05.2010 to 08.06.2010; the applications were scrutinized and rejected on 18.06.2010; the candidates were to report on 21st or 22nd June, 2010; the first list of admission was published on 25.06.2010, the second list on 07.07.2010 and the waitlist on 17.07.2010; admissions made from 20.07.2010 to 23.07.2010 and the academic session commenced from 26.07.2010, this writ petition was filed only in or about October, 2010 and came up before the Court first on 25.10.2010 when notice thereof was issued. Counter affidavit was filed by the respondents. No rejoinder has been filed by the petitioners inspite of opportunity. The counsels have been heard.

3. The two petitioners claim to be belonging to OBC category and applied for admission in the said category for which 15% reservation was prescribed. The challenge by the petitioners in this petition to the admission process is predicated on the fact that they had 78% and 76% marks respectively in their Senior Secondary School Examination and which marks were the primary criterion for shortlisting, while they were not admitted, applicants with lower marks in the Senior Secondary School Examination were admitted to unreserved category.

4. Clause 5 of Chapter-IV and Clause 6 of Chapter-XII of the prospectus for admission for the year 2010-12 were as under:

> "5. Column 5. Candidate is required to select only one category, best suitable to him / her in one application form and fill up separate application form for each category. Write the abbreviation of category and the applicable code of the category in the boxes. The abbreviation and code number specified to different categories are given in CHAPTER-III (4) Reservation Provision. Candidate is also required to darken only one corresponding circle for his / her category. If a candidate belongs to more than one category may fill-up separate application form for each category belongs.
>
> The candidate who leaves category column blank, shall be treated under general category. No request for change in category will be entertained.
>
> An eligible candidate of a particular category will be considered for admission in that category only, in order of merit and subject to availability of vacant seat."
>
> "6. One candidate shall submit separate application form for one admission process (ETE course of Govt. DIETs or ETE course of Self Financing Private Institute or ECCE course of SFS Private Institute). However, if a candidate is willing to apply for all the 3 admission processes, he / she has to fill up three separate application forms for each admission process."

5. The petitioners admittedly filled up only one form claiming admission in the OBC category. They did not fill up a separate application form for admission in the unreserved category and hence were not considered for admission in the unreserved category where students with lower marks than the petitioners were admitted; in the OBC category, the last student admitted had marks higher than the petitioners.

6. The contention of the petitioners is that in the prospectus for admission for the previous academic year 2009-11, there was no such requirement for filling up of separate application forms for being considered in separate categories; on the contrary, as per the prospectus of the previous year, a reserved category candidate was to be considered for admission under the general merit if qualifies for the same, in addition to the category opted by the candidate and a reserved category candidate selected under general merit was to be counted as general category candidate, though for allotment of institute, the reserved category standing in general merit was to be given priority over the candidate having lower merit order of the respective reserved category. It is the contention of the petitioners that there was no basis whatsoever for the respondent No.2 SCERT to change the procedure for selection by requiring the applicants to apply separately for unreserved and reserved category. It is contended that the same has resulted in applicants from the reserved category though higher in the order of merit losing out to the candidates belonging to the unreserved category with lower merit. It is yet further contended that the petitioners were not aware of the requirement to fill separate forms and the Clauses aforesaid in the prospectus inadvertently escaped their attention since the advertisement published in the newspapers only required filling up of separate application forms for District Institutes of Education and Training (DIETs), for ETE recognized private institutes

and for ECCE recognized private institutes and did not specify that separate applications had to be filled up for being considered under separate categories. It is argued that the procedure adopted by the respondents has resulted in reverse discrimination against the petitioners. As far as the delay in filing of this petition is concerned, the petitioners claim that they had earlier filed W.P.(C) No.5536/2010 which was dismissed vide judgment dated 16.08.2010; that they had preferred intra court appeal being LPA No.643/2010 thereagainst but which was withdrawn with liberty to challenge the validity of the Clauses aforesaid in the prospectus and whereafter the present writ petition has been filed. The petitioners in the writ petition itself rely on **Indra Sawhney Vs. UOI** 1992 Supp. (3) SCC 217, **UOI Vs. Virpal Singh Chauhan** (1995) 6 SCC 684, **Ritesh R. Sah Vs. Dr. Y.L. Yamul** (1996) 3 SCC 253 and **UOI Vs. Satya Prakash** (2006) 4 SCC 500. They also contend that though the seats to be reserved for the OBC category are to be 27% as per the Policy of the government and also as per the Central Educational Institutions (Reservation in Admission) Act, 2006 but the respondent No.2 SCERT is reserving only 15% of the seats for OBCs.

7. The respondent No.2 SCERT in its counter affidavit has pleaded, that the petitioners having participated in the selection procedure, upon being unsuccessful are not entitled to challenge the same and reliance in this regard is placed on **Vijendra Kumar Verma Vs. Public Service Commission,** Uttarakhand (2011) 1 SCC 150; that SCERT is an autonomous body of the Government of NCT of Delhi (GNCTD) established in 1988 and is the nodal agency recognized by National Council of Teacher Education (NCTE) for admission, curriculum construction, course conduct, guidance, examination and certification of the pre-service training programme for elementary school teachers; that SCERT runs a two year diploma in ETE which is offered in nine DIETs and eighteen recognized private institutes in Delhi; that as per the provisions of the National Council for Teacher Education Act, 1993, the State Government is empowered to frame its own policy for reservation for admission of candidates in Elementary Education course; that the prospectus under challenge is as per the provisions of NCTE Act and approved by the GNCTD; that reservation procedure incorporated in the said prospectus is as per the reservation policy of the GNCTD; that if a candidate wanted to be considered in more than one category, he / she was required to fill up separate form for each category; that the said procedure was prescribed

to ensure that no seat in any category remains unutilized; that reservation for OBC category was kept at 15% to ensure that the total reservation did not exceed 50%; that the petitioners have themselves to blame for not reading the prospectus and not filling up separate form for consideration in the unreserved category.

8. The counsel for the petitioners during the hearing also referred to judgment of the Division Bench of this Court in **Tej Pal Yadav Vs. UOI** 174 (2010) DLT 510 and to **UOI Vs. Ramesh Ram** AIR 2010 SC 2691.

9. At the outset it may be noted that the petitioners, neither at the time of filing of this writ petition (by that time the academic session to which admission was claimed was more than three months through) nor now could / can be granted the relief of admission to the course which commenced on 26.07.2010 and must be now nearing completion and the writ petition qua the said relief is now infructuous. We have recently in judgment dated 20.12.2011 in LPA No.1069/2011 titled **Rajat Goel Vs. Ministry of Human Resource and Development (Government of India)** held that in such cases, even if the petitioners are found to have been wrongfully denied admission, no direction for admission in the next academic year can be issued since the same would be to the prejudice of the aspirants for admission in the next academic session, the seats available for admission for whom will stand so reduced. It was held that to succeed in the race in the next year, one is required to participate therein and cannot succeed on the basis of the result of the previous year.

10. However, since challenge has been made to the procedure for admission as well as to the reservation policy of the respondents and which is likely to be repeated year after year, need is felt to adjudicate on the said aspect also rather than merely dismiss the petition as infructuous.

11. As far as the legal position is concerned, neither has any contest been raised by the respondents nor is there any scope for ambiguity. The candidates selected in General (unreserved) category on their own merit, even if belonging to the reserved category cannot be counted in the reserved category so as to reduce the number of seats prescribed for the reserved category. Reserved category candidates can compete for

unreserved category seats. An unreserved seat is available to all the candidates but a reserved seat is confined for candidates of that particular category. In an open competition, while the general category candidates are entitled to compete only against unreserved seats but a reserved category candidate in addition to his right to be considered against the reserved seat is also entitled to be considered against unreserved seats. His option in the application, for consideration of his candidature for a reserved seat is only a declaration of his intention to be considered against reserved seats without depriving himself of the right to be considered against an unreserved seat. Articles 15 and 16 of the Constitution of India confer certain benefits on the persons belonging to these categories but which benefits are not in substitution of any other right which may otherwise be available to them as citizens of the country. Members belonging to the reserved category cannot be asked to occupy only the reserved seats; they are free to occupy any seat including unreserved seats; however the requirement of law is that while claiming selection against unreserved seats, they should prove their merit like any other citizen who is not entitled to the benefit of reservation.

12. The respondent No.2 SCERT in its prospectus under challenge also did not seek to confine the reserved category candidates to the reserved seats only. The only difference was that to be entitled to be considered for the unreserved seats they were required to fill up a separate application form. What thus falls for consideration is, whether the requirement of filling up of a separate application form can be said to be contrary to the law as recorded above.

13. We find that W.P.(C) No.5536/2010 earlier preferred by the petitioners (and intra court appeal whereagainst was withdrawn as aforesaid) was dismissed relying on **UOI Vs. Dalbir Singh** AIR 2009 SC 2438 and the judgment of the Division Bench of this Court in **Anand Lal Yadav Vs. NCT of Delhi** MANU/DE/1758/2002 laying down that having opted to have his/her case considered only under the OBC category, a candidate thereafter cannot claim that his/her case requires to be considered in the general merit, only because he/she had secured better percentage of marks than the last selected candidate in the general category list and that candidates cannot be permitted to change the category under which they originally applied after the last date fixed for receipt of applications.

14. It thus cannot ex facie be said that the action of the respondent SCERT in requiring the candidates to fill up separate forms for consideration in separate categories is bad. However having observed so, we are still constrained to observe that the law as enunciated under various dicta and summed up in para 11 above does appear to sway in favour of a candidate applying in the reserved category not forfeiting his right for consideration in the unreserved category. A better course for the respondents to follow in future thus appears to be in not requiring separate applications to be filled up for the reserved and unreserved category even if such procedure were to serve the administrative convenience of the respondents better. Reservation is a benefit in addition to the already existing right including the Fundamental Right of equality. If any scheme of reservation or the procedure evolved with a view to give effect to such scheme is made to depend upon the condition of truncating the fundamental or any right of an individual, such scheme of reservation would be contrary to the constitutional provisions and the law and to the extent it curtails fundamental right or any other right of a person belonging to such category would be liable to be declared illegal. The Apex Court in **Jitendra Kumar Singh Vs. State of U.P.** (2010) 3 SCC 119 also held that a reserved category candidate cannot be deprived of his right to be considered against general vacancy on the basis of merit. The practice of preparing category wise list was also deprecated in para 43 of **A.P. Public Service Commission Vs. Baloji Badhavath** (2009) 5 SCC 1 as being detrimental to the interest of meritorious candidates belonging to the reserved category.

15. The challenge thus by the petitioners to the Clauses aforesaid of the prospectus published by the respondents for admission to the academic year 2010-12 succeeds.

16. As far as the second aspect of the challenge, of the reservation for the OBC category being required to be 27% instead of 15% as prevalent is concerned, the petitioners rely on the Office Memorandum No.36012/22/93-Estt. (SCT) dated 08.09.1993 of the Ministry of Personnel, Public Grievances & Pensions (Department of Personnel & Training), Government of India. However, the respondents are Institutions of the GNCTD and not of the Central Government. It is the categorical stand of the respondents that they are not bound by the Policy of the Government of India of reservation for OBC category to the extent of 27%. Similarly, Central Educational Institutions (Reservation in Admission)

Act, 2006 also pertains to the Institutions of the Central Government only and would have no application to the respondents. The petitioners have thus been unable to make out a case for issuance of any directions to the respondents to reserve 27% seats for the OBC category.

17. The petition is therefore partly allowed. The respondent No.2 SCERT is directed to, in future, consider the candidates applying for admission in the reserved categories in the unreserved category also, on the basis of merit without requiring them to fill up and irrespective of whether they have filled up or not, a separate application form. It is further declared that the reserved category candidates admitted to the unreserved category on the basis of merit shall not be counted in the reserved category so as to reduce the number of seats prescribed for the reserved category. No order as to costs.

ILR (2012) III DELHI 509
W.P. (C)

PRAGYA CHAUDHARY ....PETITIONER

VERSUS

GURU GOBIND SINGH INDRAPRASTHA UNIVERSITY AND ORS. ....RESPONDENTS

(HIMA KOHLI, J.)

W.P. (C) NO. : 740/2012 DATE OF DECISION: 06.02.2012
AND CM NO. : 1615/2012

Constitution of India, 1950—Article 226—Writ Petition—Judicial Review—Bachelor of Ayurvedic Medicine and Surgery Course—Petitioner qualified Class 12 examination—Secured aggregate mark 59.67% in physics, chemistry and biology—Sat for Common Enterence Test for admission to BAMS Course on the

basis of admission brochure circulated by the university—Eligibility criteria passed 12th class under 10+2 scheme in physics, chemistry and biology, English individually must have obtained minimum of 60% mark in aggregate in physics, chemistry and biology (50% in case of SC/ST candidate)—No rounding off percentage of the qualifying examination—Petitioner did not qualify in terms of eligibility—But the college had granted her provisional admission subject to approval of competent authority—Deposited her fees—Respondent no.2/ college requested University to consider the case of petitioner alongwith 19 other similarly placed students for a one time relaxation on the ground that there were existing vacancies of 20 seats in the session—Contended, despite the representation made by the college, University illegally turned down the request—Issued impugned refusal letter dated 05.12.2011—Also, ignored the recommendation in favour of filling of available seats—Respondent no.1/University opposed the petition being misconceived in view of the earlier law—Held—Provisional admission to an Institute does not in itself create a vested right in the petitioner to claim admission—Petitioner aware at the time of taking provisional admission that it was subject to approval of competent authority—Object of prescribing eligibility criteria is to ensure maintenance of excellence in standards of education and not to fill up all the seats—Reducing the standard to fill seats a dangerous trend which would lead to destruction of quality of education—It would also adversely effect those candidates who stay away because they did not meet the minimum eligibility standard laid down by the respondent and are not before the Court—It is also well settled that policy decision regarding the admission in affiliated institution lies in the domain of University in question—The decision making power of University cannot be interfered with under the judicial review unless the petitioner able to show some patent

malafides on the part of the university or point out instances of discrimination or can make out a case that criteria laid down was so perverse that it cannot be sustained—Writ Petition Dismissed.

There is force in the submission made by learned counsel for respondent No.1/University that any such attempt on the part of respondent No.1/University to accommodate the petitioner and 19 other students at the request of respondent No.2/College would amount to interference and that too at a very belated stage for the reason that, granting relaxation in the eligibility criteria would cause serious prejudice to other candidates, who are not before the Court and were desirous of taking admission in the BAMS course in respondent No.1/ University but stayed away in the light of the eligibility criteria laid down in the brochure. Merely because respondent No.1/ University has extended an assurance to respondent No.2/ college that for the academic year 2012-13, the minimum eligibility condition regarding percentage of aggregate marks in Physics, Chemistry and Biology in XII class cannot be a ground for this Court to direct respondent No.1/University to accept the request of respondent No.2/College to admit the petitioner and 19 other students in the academic year 2011-12. The Court is also mindful of the fact that in matters relating to education, where time is of essence, the parties who choose to approach the Court belatedly cannot be granted relief, more so when the academic year is half way through and other similarly placed students, who had not applied for admission to the aforesaid course in respondent No.2/college on the basis of the eligibility criteria laid down by respondent No.1/University and had accepted the same as their fate, are not before the Court. **(Para 9)**

Important Issue Involved: The Court under the powers of judicial review cannot interfere in the policy decision.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. Dilip Singh, Advocate with Mr. Govind Sharma, Mr. Mritunjye Kumar and Mr. Jolly Sharma, Advocates.

FOR THE RESPONDENTS : Mr. Mukul Talwar, Advocate with Mr. Rajesh Kumar, Advocate for R-1/GGSIPU. Ms. Ferida Satarawala, Advocate with Ms. Rachna Saxena, Advocate for R-2/college.

CASES REFERRED TO:

1. *Visveswaraiah Technological University* vs. *Krishnendu Halder* reported as (2011) 4 SCC 606.
2. *Vrinda Gaur & Ors.* vs. *Guru Gobind Singh Indraprastha University & Ors.* W.P.(C) 8138/2011.

RESULT: Writ Petition Dismissed.

HIMA KOHLI, J. (Oral)

1. The petitioner has filed the present petition praying inter alia for directions to respondent No.1/University to confirm her admission in Bachelor of Ayurvedic Medicine and Surgery (in short 'BAMS') course for the academic year 2011-12 in respondent No.2/college which is affiliated to respondent No.1/University. The petitioner also seeks quashing of the letter dated 05.12.2011 issued by respondent No.1/University to respondent No.2/college declining the request to lower the minimum eligibility as prescribed in the admission brochure for the academic session 2011-12, as being illegal. Lastly, directions are sought to respondent No.1/University and respondent No.2/college to relax the minimum eligibility criteria in terms of the letter dated 28.11.2011 addressed by respondent No.3/CCIM to respondent No.1/University.

2. The brief facts of the present case are that in the year 2009, the petitioner had passed her class XII examination and she had secured an aggregate percentage of 59.67% in three subjects, i.e., Physics, Chemistry and Biology. In the year 2011, she sat for the Common Entrance Test (in short 'CET') for admission to BAMS course on the basis of the

admission brochure circulated by respondent No.1/University. In the brochure for admission to BAMS course, the eligibility criteria for admission was laid down in clauses 5.3 and 5.4. The essential qualifications for eligibility for admission to the aforesaid course was stipulated in clause 5.3 as below:-

"5.3 Essential Qualifications

Candidate must studied 11th and 12 class regularly and passed the 12th class under the 10+2 scheme/senior school certificate examination or an equivalent examination of the recognized University/Board of any Indian state with Physics, Chemistry, Biology and English (core or elective or functional)."

The minimum aggregate stipulated under the brochure was set out in clause 5.4, which is as below:-

"5.4 Minimum Aggregate

Candidate must have passed in the subject of Physics, Chemistry, Biology and English (core or elective or functional) individually and must have obtained a minimum of 60% marks together in Physics, Chemistry, Biology (50% in case of S.C./S.T. candidates)."

3. It was further stipulated in clause (C) of the Important Notes for BDS/BAMS Programme (Code 02) in the brochure, that while deciding the basic eligibility of any candidate for admission there would be no rounding-off of the percentage of marks of the qualifying examination. It is an admitted case that though the petitioner did not qualify in terms of the eligibility criteria laid down in the aforesaid brochure for the BAMS course for the academic session 2011-12, respondent No.2/college had granted her provisional admission on 31.10.2011, subject to approval of the competent authority (Annexure P-4). Thereafter, the petitioner had deposited the fee with respondent No.2/college on the basis of her provisional admission in the BAMS course.

4. On 18.10.2011, respondent No.2/college informed respondent No.1/University that during the course of counselling, a few students did not fulfill the eligibility criteria of having scored a minimum of 60% marks and, therefore, could not be permitted to take admission, although,

call letters were issued to them as well on the basis of a revised merit list issued by respondent No.1/University. In the said communication, the name of the petitioner had featured at Sr. No.7 and was shown under the general category with 59.67% marks in PCB. Respondent No.2/college requested respondent No.1/University to consider the case of the petitioner alongwith 19 other similarly placed students for a one time relaxation on the ground that there was an existing vacancy of 20 seats during the said session.

5. Counsel for the petitioner states that despite the aforesaid representation made by respondent No.2/college, respondent No.1/University illegally turned down the aforesaid request made by respondent No.2/college by issuing the impugned refusal letter dated 05.12.2011. He relies on the letter dated 28.11.2011 addressed by respondent No.3/CCIM to respondent No.2/college wherein, it was stated that under the relevant regulations prescribed by CCIM, the qualification for admission in BAMS course was prescribed as 12th Standard with Science with at least 50% marks in aggregate in the subjects of Physics, Chemistry and Biology and that fixing 60% marks for admission would amount to debarring the students for admission falling between 50% to 60%. It is stated by learned counsel that though a copy of the aforesaid letter was forwarded by respondent No.3/CCIM to respondent No.1/University, the same was ignored while issuing the impugned rejection letter dated 05.12.2011.

6. Counsel for respondent No.1/University opposes the present petition as being misconceived and states that the same is liable to be rejected. He submits that a similar case as that of the petitioner herein was considered by this Court in W.P.(C) 8138/2011 entitled **Vrinda Gaur & Ors. vs. Guru Gobind Singh Indraprastha University & Ors.** decided on 14.12.2011, whereunder it had upheld the stand of respondent No.1/University that decisions regarding fixing of admission criteria rests with an expert body like the University and the Court ought not to interfere with the same unless some perversity, patent illegality of discrimination is demonstrated by the petitioner. He further states that just as in the aforesaid case, even in the present case, the petitioner has not challenged the vires of the relevant provisions of the admission brochure that has laid down the minimum eligibility criteria. Nor has she claimed that the respondent No.1/University has acted in a malafide

manner. A copy of the aforesaid decision in the case of **Vrinda Gaur** (Supra) is handed over by the counsel for respondent No.1/University. While disposing of the aforesaid writ petition, it had been observed as below:-

"8. The Court has heard the counsels for the parties and has perused the judgments relied upon by them. **First and foremost, the fact that provisional admission had been granted to them cannot be the basis for the petitioners to canvas that they are entitled to claim relaxation of the eligibility criteria for their admission to the course in question for the reason that being granted provisional admission to an Institute, does not in itself create a vested right in the petitioners to claim admission to the Institute.** It cannot be overlooked that at the time of taking admission and depositing their fee, the petitioners were well aware of the fact that their admission was subject to approval by the competent authority. Therefore they took a calculated risk in taking provisional admission to the said Institute. Furthermore, a plea of the seats going abegging can also not be taken, as the petitioners as well as respondent No.3/ Institute were aware of the fact that the petitioners, admission was provisional, and respondent No.3/Institute had the option to conduct another round of counseling and admit students who could meet the eligibility criteria. In not having done so, it was the choice of the Institute to let its seats remain vacant. **Furthermore, as held by the Supreme Court in the case of Visveswaraiah Technological University vs. Krishnendu Halder reported as (2011) 4 SCC 606, the object of prescribing eligibility criteria is to ensure maintenance of excellence in standards of education and not to fill up all the seats. Reducing the standards to fill the seats was held to be a dangerous trend which would lead to destruction of the quality of education.** A warning was sounded of the creeping commercialization of education and it was reiterated that determination of such standards being part of an academic policy of the University, are beyond the purview of judicial review.

9.**The contention of the counsel for the petitioners that if the Court permits lowering of minimum eligibility criteria,**

no student would be prejudiced, appears attractive at first blush but when examined closely is untenable, as the said argument does not take into consideration those students who fell within the ranks and were called for counseling by respondent No.3/Institute but stayed away because they did not meet the minimum eligibility standards laid down by respondent No.1/University, and who are not before the Court and would be adversely affected if such a plea of the petitioners is accepted. Therefore, the ground taken by the respondent No.1/University in its letter dated 5.12.2011, denying relaxation of the eligibility criteria on the ground that it would prejudice the other students, is found to be a reasonable and valid ground."

10. xxx

11. **Lastly, the contention of the counsel for the petitioner that respondent No.3/Institute had no objection to the lowering of the criteria and even respondent No.1/University had permitted the same for the next academic year, is also of no avail to the petitioners. It is settled law that policy decisions regarding the admissions in affiliated Institutes lies in the domain of the University in question. The decision-making power of the University cannot be interfered with under judicial review unless the petitioner is able to show some patent malafides on the part of the University, or point out instances of discrimination, or can make out a case that the criteria laid down is so perverse that it cannot be sustained.** In the case of **Siddhartha Kaul & Ors. v. GGSIU** (Supra), the Division Bench has categorically held that merely because certain conditions imposed are inconvenient to some students, they cannot be said to be arbitrary. In the said decision, notice was also taken of a decision of the Supreme Court in the case of **Visveswaraiah Technological University v. Krishnendu Haldar** reported as (2011) 4 SCC 606, wherein it had been held that the object of prescribing minimum standards is to ensure maintenance of excellence in standards of education and not to fill up seats, and lowering of such standards would result in destruction of the quality of education. In the present case, while

the Court can sympathize with the predicament of the petitioners, it cannot help but observe that they have not been able to point out any such arbitrariness, illegality or perversity in the criteria laid down by respondent No.1/University for interference in judicial review. The petitioners are seeking relief purely on the grounds of equity, which ought not to be exercised in their favour, given the facts of the case. **The powers of judicial review of this court under Article 226 of the Constitution of India are well-defined, and a petition filed purely on the grounds of equity ought not to be ordinarily entertained, especially in the absence of any challenge laid in the petition to the vires of the relevant provisions of the applicable Rules."** ***(emphasis added)***

7. Counsel for the petitioner states that the petitioner does not seek any relaxation from the court for rounding off the aggregate percentage obtained by her in view of the bar contained in clause (C) of the admission brochure. He only states that respondent No.1/University could not have ignored the letter dated 28.11.2011 addressed by respondent No.3/CCIM to it.

8. In the present case, the emphasis laid by the counsel for the petitioner on the correspondence resting between respondent No.3/CCIM and respondent No.2/college cannot be of much assistance to the petitioner, inasmuch as the eligibility criteria prescribed for admission to the BAMS Course had been clearly laid down in the admission brochure and respondent No.2/College was required to strictly adhere to the same. The aforesaid eligibility criteria was admittedly in public domain as long back as on 15.03.2011. In the present case, the petitioner had passed her XII class in the year 2009. Therefore, when she had applied for admission to the BAMS course, she was well aware of her aggregate PCB percentage in class XII. Despite the same, the petitioner took a chance, which can only be termed as a calculated risk to apply for admission to the aforesaid course in respondent No.1/University. Thereafter, respondent No.2/college gave provisional admission to the petitioner. But, merely because the admission granted to the petitioner was provisional in nature and thereafter she has been studying in respondent No.2/college since November 2011, cannot be a ground to sustain her admission in the light of the terms and conditions of eligibility prescribed in the Brochure and reiterated in the

impugned letter dated 05.12.2011 issued by respondent No.1/University, wherein the request of respondent No.2/college to lower the minimum eligibility criteria prescribed in the admission brochure for 20 students was declined.

9. There is force in the submission made by learned counsel for respondent No.1/University that any such attempt on the part of respondent No.1/University to accommodate the petitioner and 19 other students at the request of respondent No.2/College would amount to interference and that too at a very belated stage for the reason that, granting relaxation in the eligibility criteria would cause serious prejudice to other candidates, who are not before the Court and were desirous of taking admission in the BAMS course in respondent No.1/University but stayed away in the light of the eligibility criteria laid down in the brochure. Merely because respondent No.1/University has extended an assurance to respondent No.2/college that for the academic year 2012-13, the minimum eligibility condition regarding percentage of aggregate marks in Physics, Chemistry and Biology in XII class cannot be a ground for this Court to direct respondent No.1/University to accept the request of respondent No.2/College to admit the petitioner and 19 other students in the academic year 2011-12. The Court is also mindful of the fact that in matters relating to education, where time is of essence, the parties who choose to approach the Court belatedly cannot be granted relief, more so when the academic year is half way through and other similarly placed students, who had not applied for admission to the aforesaid course in respondent No.2/college on the basis of the eligibility criteria laid down by respondent No.1/University and had accepted the same as their fate, are not before the Court.

10. The petition is, therefore, dismissed in limine alongwith the pending application, as being devoid of merits.

ILR (2012) III DELHI 519
W.P. (C)

KALU RAM SHARMA ....PETITIONER

VERSUS

THE FINANCIAL COMMISSIONER AND ORS. ....RESPONDENTS

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

W.P. (C) NO. : 794/2012 & CM NO. : 1777/2012 **DATE OF DECISION: 08.02.2012**

Constitution of India, 1950—Article 226—Delhi Co-Operative Societies Rules, 1973—Clause 25 (1) C (i)—Petitioner acquired membership of respondent no.2 society on transfer from original membership of his brother—Transfer approved on 4.4.1976—Petitioner on wait list for a plot since then—In the year 2004, came to know respondent no.3 obtained allotment of plot fraudulently as he was disqualified as owning other property—Society did not pay heed to his representation—Made complaint to Registrar Co-Operative Society—Ownership of another property by respondent no.3 confirmed on enquiry—Registrar passed order—Case of respondent no.3 covered under the exemption of proviso to the Clause 25 (1) (c) (i) of Delhi Co-Operative Society Rules, 1973—As per proviso disqualification of a membership on account of ownership of other property at Delhi shall not be applicable in case of Co-sharer of other property where the share less than 66.72 sq. meters of land (80 sq. yards)—Revision petition against the order dismissed—Contended before the Court—Proviso did not apply to respondent no.3 as he was single owner of property measuring less than 66.72 sq. meter, not a co-sharer—Held—The expression 'co-sharer' is to include co-owner, non difficulty in extending the expression to individually owner of stand alone property measuring less than 67.72 sq. meter—Object of Rules appears to be to keep person outside the disqualification criteria as long as what they owned by way of share is really not of much significance—Further Held—Property purchased on Power of Attorney cannot dis-entitle for allotment—Writ Petition dismissed.

On a parity of reasoning if the expression co-sharer is to include co-owner [see **DDA vs Jintender Pal Bhardwaj** (supra)], we see no difficulty in extending the expression to an individual owner who has standalone property admeasuring less than 66.72 sq. mtrs. This is for the reason: if in a multi-storeyed building each person's proportionate share **in the land** is to be calculated to determine as to whether or not he falls within the exclusion carved out in the first proviso, we see no reason why an owner of standalone property cannot take recourse to exclusion carved out in the said Rule. The object of the rule appears to be to keep persons outside the disqualification criteria as long as: what they own by way of share is really not of much significance. In our view any other interpretation would lead to absurd and unfair result, when seen in the light of the supreme judgment. To wit it would be untenable to say that a person who owns a flat in a multi-storey building admeasuring a couple of thousand square feet would fall within the exclusionary portion of the Rule as his proportionate share in the land is less than 66.72 sq. mtrs, whereas a person of meagre means holding a standalone property admeasuring less than 66.72 sq. mtrs cannot avail of the benefit accorded by the exclusion engrafted in the said Rule. **(Para 6)**

Important Issue Involved: The expression co-sharer also apply to individual owner in S. 25 of DCS Rules.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. Aftab Rasheed, Advocate.

FOR THE RESPONDENTS : Ms. Sweta, Advocate for Mr. Dhanesh Relan, Advocate.

CASES REFERRED TO:

1. *Bindya Agarwal* vs. *Registrar of Co-operative Societies & Anr.* WP (C) No.2550/2011.
2. *DDA* vs. *Jintender Pal Bhardwaj* (2010) 1 SCC 146.

RESULT: Writ Petition Dismissed.

SANJAY KISHAN KAUL, J. (ORAL)

1. The petitioner acquired membership of respondent No.2-Society on transfer from the original membership of his brother. The transfer was approved on 4.4.1976 and the petitioner claims to have been waiting for a plot since then as he was on the waitlist.

2. The petitioner claimed that it is in the year 2004, that he came to know that respondent No.3 had obtained an allotment of a plot fraudulently as he was disqualified on account of owning another property. The Society, however, did not heed to the representation of the petitioner and the petitioner made a complaint to the Office of the Registrar, Co-operative Societies (for short 'RCS')/respondent No.4. The Assistant RCS was appointed to verify the ownership of property No.1/11274, Subhash Park, Naveen Shahdara, Delhi on account of which the petitioner alleged that respondent No.3 was disentitled. The ownership of this property is stated to have been confirmed through the inquiry process. However, the RCS in terms of its order dated 2.6.2010 found that respondent No.3 fell within the exception clause provided under Clause 25 (1) (c) (i) of the Delhi Co-operative Societies Rules, 1973 (hereinafter referred to as the 'DCS Rules'). The petitioner aggrieved by this decision filed a Revision Petition under Section 116 of the Delhi Co-operative Societies Act, 2003, which has been dismissed vide impugned order dated 7.7.2011.

3. Learned counsel for the petitioner has, in the writ petition, reproduced the relevant portion of Rule 25 of the DCS Rules, which reads as under:

"25. Disqualification of Membership

1. No person shall be eligible for admission as a member of a co-operative society if he...

....

(c) in the case of membership of a housing society:-

(i) owns a residential house or a plot of land for the construction of a residential house in any of the approved or un-approved colonies or other localities in the National Capital Territory of Delhi, in his own name or in the name of his spouse or any of his dependent children, on lease hold or free-hold basis or on power of attorney or on agreement for sale;

Provided that disqualification of membership as laid down in sub-rule (l)(c)(i) shall not be applicable in case of co-sharers of property whose share is less than 66.72 sq. metres of land;

Provided further that the said disqualification shall not be applicable in case of a person who has acquired property on power of attorney or through agreement for sale and on conversion of the property from leasehold to freehold on execution of conveyance deed for it, if such person applies for the membership of the housing society concerned;"

4. It is the say of the learned counsel for the petitioner that the first proviso does not apply to respondent No.3 as it would be applicable only in the case of a co-sharer of the property where the share is less than 66.72 sq.mtrs. (approx. 80 sq.yds.). Respondent No.3 has been held to be exempted on account of the fact that the property already in his ownership was measuring 72 sq.yds. He, thus, submits that the proviso is not applicable to a single owner.

5. We are unimpressed with this argument as this issue has been dealt with by us in WP (C) No.2550/2011 titled **Bindya Agarwal Vs. Registrar of Co-operative Societies & Anr.** decided on 30.5.2011.

Supreme Court in **DDA vs Jintender Pal Bhardwaj** (2010) 1 SCC 146, held:

"When a person acquires a flat in a multi-storeyed building, what

he gets is co-ownership of the land on which the building is constructed and exclusive ownership/long-term lease of the residential flat. As per Clause i(ii), where the individual share in the land on which the building stands, held by the allottee is less than 65 sq. m, he is not barred from securing allotment from DDA. The other interpretation is that if the measurement of the flat is less than 65 sq. m and the allottee owns only an undivided share in the land, corresponding to such flat, the benefit of exemption would be available to the applicant."

6. On a parity of reasoning if the expression co-sharer is to include co-owner [see **DDA vs Jintender Pal Bhardwaj** (supra)], we see no difficulty in extending the expression to an individual owner who has standalone property admeasuring less than 66.72 sq. mtrs. This is for the reason: if in a multi-storeyed building each person's proportionate share **in the land** is to be calculated to determine as to whether or not he falls within the exclusion carved out in the first proviso, we see no reason why an owner of standalone property cannot take recourse to exclusion carved out in the said Rule. The object of the rule appears to be to keep persons outside the disqualification criteria as long as: what they own by way of share is really not of much significance. In our view any other interpretation would lead to absurd and unfair result, when seen in the light of the supreme judgment. To wit it would be untenable to say that a person who owns a flat in a multi-storey building admeasuring a couple of thousand square feet would fall within the exclusionary portion of the Rule as his proportionate share in the land is less than 66.72 sq. mtrs, whereas a person of meagre means holding a standalone property admeasuring less than 66.72 sq. mtrs cannot avail of the benefit accorded by the exclusion engrafted in the said Rule.

7. A further important factor which we have to take note of is the second proviso which has been reproduced hereinabove. The admitted fact of the present case on account of the impugned order is that the alternative property had been purchased by respondent No.3 on Power of Attorney basis. Thus, the second proviso in any case applies in respect of the alternative property and, thus, respondent No.3 cannot be held disentitled when the plot was allotted to him. The property at Subhash Park, Naveen Shahdara, Delhi, which is the alternative property measuring 72 sq.yds. was purchased through a GPA registered on 10.1.1980.

8. We see no reason to interfere with the impugned order under Article 226 of the Constitution of India.

9. Dismissed.

ILR (2012) III DELHI 524
CRL. M.C.

JIWAN RAM GUPTA ....PETITIONER

VERSUS

STATE THR. CBI ....RESPONDENTS

(MUKTA GUPTA, J.)

CRL. M.C. NO. : 2183/2011 DATE OF DECISION: 08.02.2012

Prevention of Corruption Act, 1988—Sections 7 and 13 (1)(d), 13(2) and 19—Criminal Procedure Code, 1973—Section 227—Quashing of proceedings u/s 7 and u/s 13 (1)(d) r/w Section 13 (2)—Petitioner arrested in trap case—Contention of petitioner that sanction was granted by authority which was not competent to grant the same—Direct sanctioning authority was Delhi Development Authority (DDA) and not Finance Member of DDA u/s. 19—Trial Court acquitted petitioner on ground that sanction order invalid, with liberty to CBI to take further legal action, if any, as deemed fit—After petitioner retired, CBI filed charge-sheet on same grounds without sanction—Petitioner filed application u/s 227 Cr.P.C. seeking dropping of proceedings on ground that fresh charge without sanction after retirement of petitioner bad in law—Trial Judge had not decided application, hence petition for quashing summoning order and proceedings filed—

Held, issue to be decided is whether petitioner having been acquitted earlier in same proceedings for want of sanction by competent authority, could be tried again without sanction since he had retired and whether the proceedings should be quashed in view of protracted trial (16 years) faced by Petitioner—Proceedings against petitioner terminated in earlier trial on account of sanction having been granted by incompetent authority—In present case, proceedings initiated without sanction, since petitioner had retired, no infirmity—No period of limitation can be prescribed in which trial of criminal case must be closed mandatorily—So protracted trial no ground for quashing petition—Petition dismissed.

In view of the law laid down by the Hon'ble Supreme Court since in the present case the proceedings against the Petitioner terminated on account of the fact that the sanction against him was granted by an incompetent authority and the same have now been initiated without sanction as the Petitioner has retired, I find no merit in the petition. Further the pronouncement of the Supreme Court in **P. Ramachandra Rao v. State of Karnataka** (2002) 4 SCC 578 holds that no period of limitation can be prescribed in which the trial of a criminal case must be closed mandatorily. Thus, I find no reason to quash the summoning order and the proceedings arising therefrom. **(Para 8)**

Important Issue Involved: Where a person has been acquitted earlier under the Prevention of Corruption Act, 1988 for want of sanction by competent authority, he can be tried again for the same case without sanction since he had retired.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajinder Mathur, Mr. Ajeet Kumar, Advocates.

FOR THE RESPONDENTS : Mr. Narender Mann, Spl. P.P. for CBI with Mr. Manoj Pant, Advocate.

CASES REFERRED TO:

1. *Chittaranjan Das* vs. *State of Orissa* (2011) 7 SCC 167.
2. *Vakil Prasad Singh* vs. *State of Bihar* 2009 LawSuit (SC) 53.
3. *S.K. Mitttal* vs. *CBI* Crl.M.C. 2215/2004 decided by this Court on 13th September, 2007.
4. *Dharam Vir Singh* vs. *CBI* Crl.M.C. 3554/2007.
5. *State of Karnataka* vs. *C. Nagarajaswamy* (2005) 8 SCC 370.
6. *Mahendra Lal Das* vs. *State of Bihar and Ors.* (2002) 1 SCC 149.
7. *P. Ramachandra Rao* vs. *State of Karnataka,* (2002) 4 SCC 578.
8. *Raj Deo Sharma (I)* vs. *State of Bihar,* (1999) 7 SCC 507.
9. *Mansukhlal Vithaldas Chauhan* vs. *State of Gujarat* (1997) 7 SCC 622.
10. *'Common Cause'A Registered Society* vs. *Union of India,* (1996) 4 SCC 33.
11. *S.G. Nain* vs. *Union of India* 1995 Supp (4) SCC 552.
12. *The State* vs. *Bharat Chandra Rout* 1993 Crl.L.J. 2499.
13. *Manguesh Jaiwant Sinai* vs. *State* AIR 1969 Goa, Daman & Diu 106.

RESULT: Petition dismissed.

MUKTA GUPTA, J.

1. By this petition the Petitioner seeks quashing of proceedings initiated by the Respondent in RC-104(A)/95SPE/CBI/ACB/New Delhi under Section 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act (in short PC Act). The facts giving rise to the filing of the present petition are that the Petitioner was arrested in a trap case

on 24th November, 1995. The grievance of the Petitioner is that he was falsely implicated by the then Commissioner, Land Management, DDA as the Petitioner while working as Manager, Land Management, DDA pointed out to the Vice Chairman, DDA wrong allotment of Petrol Pump Site at Pitampura in the name of Smt. Rashmi Choudhary which was subsequently cancelled. On 12th August, 1996 the CBI obtained sanction for prosecution under Section 19 PC Act from the Finance Member, DDA and filed the charge-sheet. The Petitioner agitated that the sanction was granted by an authority not competent to grant the same and thus he could not be prosecuted. After framing of the charge, the Petitioner filed an application before the Learned Trial Court contending that the prosecution could be initiated against him only after grant of valid and legal sanction i.e. by the Delhi Development Authority (DDA) and the Finance Member, DDA was not the competent authority to accord sanction under Section 19 of the PC Act. The Learned Trial Court vide order dated 27th January, 2010 acquitted the Petitioner on the ground that the sanction order passed by PW1, the then Finance Member, DDA was invalid in the eyes of law. However, the CBI was given liberty to take further legal action, if any, as deemed fit under law. In the meantime the Petitioner had retired on 29th February, 2004. Since the Petitioner had retired on 29th February, 2004 the Respondent again filed the charge-sheet dated 7th April, 2010 vide CC No. 2/2010 without obtaining any sanction against the Petitioner on the same grounds. The contention of the Respondent was that since the Petitioner had retired, no sanction was now required to be obtained. The Petitioner filed an application dated 3rd December, 2010 under Section 227 of the Cr.P.C. seeking dropping of the proceedings pleading therein that a fresh charge without the sanction after retirement of the Petitioner is bad in law. However, the Learned Trial Judge has not decided the said application and hence the present petition.

2. Learned counsel for the Petitioner contends that the Petitioner has already faced an ordeal of trial for 16 years. The Petitioner is a senior citizen and in view of the delay which is not attributable to the Petitioner the proceedings against him are liable to be quashed. Reliance in this regard is placed on **S.G. Nain Vs. Union of India** 1995 Supp (4) SCC 552; **Mansukhlal Vithaldas Chauhan Vs. State of Gujarat** (1997) 7 SCC 622; **Mahendra Lal Das Vs. State of Bihar and Ors.** (2002) 1 SCC 149; **Vakil Prasad Singh Vs. State of Bihar** 2009 LawSuit (SC) 53; **S.K. Mitttal Vs. CBI Crl.M.C.** 2215/2004 decided by this Court on

13th September, 2007 and **Dharam Vir Singh Vs. CBI** Crl.M.C. 3554/2007 decided by this Court on 7th March, 2008.

3. Learned counsel for the Respondent/CBI on the other hand contends that the decisions relied upon by the learned counsel for the Petitioner have no applicability. In the abovementioned decisions, the proceedings were quashed because there was enormous delay during trial and the delay was not on account of the accused. In the present case a charge-sheet was filed against the Petitioner, however the Learned Trial Court held that the sanction was not granted by the competent authority and thus acquitted the Respondent with liberty to take action in accordance with law. Since the Petitioner has retired, the proceedings against him can now be initiated without the sanction and hence there is no ground for quashing of the proceedings. Reliance is placed on **State of Karnataka Vs. C. Nagarajaswamy** (2005) 8 SCC 370; **Chittaranjan Das Vs. State of Orissa** (2011) 7 SCC 167; **Manguesh Jaiwant Sinai Vs. State** AIR 1969 Goa, Daman & Diu 106 and **The State Vs. Bharat Chandra Rout** 1993 Crl.L.J. 2499. Thus the present petition is liable to be dismissed.

4. I have heard learned counsel for the parties. The short issue that arises for consideration is that the Petitioner having been acquitted earlier in the same proceedings for want of sanction by the competent authority whether is liable to be tried again without sanction since he is retired and whether the proceedings should not be quashed in view of the protracted trial faced by the Petitioner.

5. In **S.G. Nain** (supra) the Hon'ble Supreme Court quashed the proceedings under Section 409 IPC in view of the fact that the prosecution was pending for 14 years out of which 11 years were spent in the Supreme Court. It was held that the Petitioner had suffered mental agony, had an adverse affect on his service career and there was impossibility to ensure a fair trial after such a long lapse of time. Thus, the trial was held to be sheer wastage of public time and money apart from causing harassment to the Appellant therein. In **Mansukhlal Vithaldas Chauhan** (supra) the Hon'ble Supreme Court observed that normally when the sanction order is held to be bad, the case is remitted back to the authority for re-consideration of the matter and to pass a fresh order of sanction in accordance with law. But in the said case the incident was of the year 1983 and it was held that after a lapse of 14 years it would not be fair

and just to direct that the proceedings be initiated from the stage of sanction so as to expose the Appellant to another innings of litigation and keep him on trial for an indefinitely long period contrary to the mandate of Article 21 of the Constitution. In **Vakil Prasad Singh** (supra) their Lordships quashed the proceedings on account of the fact that there was a callous and inordinate delay of more than two decades in investigation and trial. In **S.K. Mittal and Dharam Vir Singh** (supra) this Court quashed the proceedings under Section 7 and 13(2) read with 13(1)(d) of the PC Act on the ground of inordinate delay. The proceedings were quashed because the complaint was filed in the year 1981 and till the year 2007 even pre-charge evidence had not been recorded.

6. However the issue whether in a case where trial proceedings terminates for want of sanction, whether the public servant be again directed to undergo the rigmarole of the prosecution was considered by the Supreme Court in **Chittaranjan Das** (supra). It was held:

> "8. We do not find any substance in the submission of Mr. Tripathy and the decision relied on is clearly distinguishable. Sanction is a devise provided by law to safeguard public servants from vexatious and frivolous prosecution. It is to give them freedom and liberty to perform their duty without fear or favour and not succumb to the pressure of unscrupulous elements. It is a weapon at the hands of the sanctioning authority to protect the innocent public servants from uncalled for prosecution but not intended to shield the guilty. Here in the present case while the Appellant was in service sanction sought for his prosecution was declined by the State Government. Vigilance Department did not challenge the same and allowed the Appellant to retire from service. After the retirement, Vigilance Department requested the State Government to reconsider its decision, which was not only refused but the State Government while doing so clearly observed that no prima-facie case of disproportionate assets against the Appellant is made out. Notwithstanding that Vigilance Department chose to file charge-sheet after the retirement of the Appellant and on that Special Judge had taken cognizance and issued process. We are of the opinion that in a case in which sanction sought is refused by the competent authority, while the public servant is in service, he cannot be prosecuted later after

> retirement, notwithstanding the fact that no sanction for prosecution under the Prevention of Corruption Act is necessary after the retirement of Public Servant. Any other view will render the protection illusory. Situation may be different when sanction is refused by the competent authority after the retirement of the public servant as in that case sanction is not at all necessary and any exercise in this regard would be action in futility."

7. In **State of Karnataka** (supra) their Lordships considering the factum of more than 13 years in granting the sanction for prosecution of the Appellants for possessing disproportionate assets of about Rs. 50,600/- directed the Trial Court to dispose of the matter at an early date preferably within six months. It was held:

> "17. It is true that in terms of clause (2) of Article 20 of the Constitution no person can be prosecuted and punished for the same offence more than once. Section 300 of the Code was enacted having regard to the said provision. Sub-section (1) of Section 300 of the Code reads as under:
>
> *"300. Persons once convicted or acquitted not to be tried for same offence.*-(1) A person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of Section 221, or for which he might have been convicted under sub-section (2) thereof."
>
> 18. The essential conditions for invoking the bar under the said provision are:
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> (i) the court had requisite jurisdiction to take cognizance and tried the accused; and
>
> (ii) the court has recorded an order of conviction or acquittal, and such conviction/acquittal remains in force.
>
> 19. The question came up for consideration before the Federal Court in **Basdeo Agarwalla v. King Emperor,** AIR 1945 FC 16 wherein it was held that if a proceeding is initiated without

sanction, the same would be null and void.

25. In view of the aforementioned authoritative pronouncements, it is not possible to agree with the decision of the High Court that the trial court was bound to record either a judgment of conviction or acquittal, even after holding that the sanction was not valid. We have noticed hereinbefore that even if a judgment of conviction or acquittal was recorded, the same would not make any distinction for the purpose of invoking the provisions of Section 300 of the Code as, even then, it would be held to have been rendered illegally and without jurisdiction.

30. Yet again in **P. Ramachandra Rao v. State of Karnataka,** (2002) 4 SCC 578 this Court while categorically holding that no period of limitation can be prescribed on which the trial of a criminal case or criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused observed: (SCC p. 603, para 29)

"29. (4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in **'Common Cause'A Registered Society v. Union of India,** (1996) 4 SCC 33, **Raj Deo Sharma (I) v. State of Bihar,** (1999) 7 SCC 507 and **Raj Deo Sharma (II) v. State of Bihar,** (1997) 7 SCC 604 could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in Common Cause case (I), **Raj Deo Sharma cases** (I) and (II). At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in **A.R. Antulay** case, (1992) 1 SCC 225 and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any court as a bar to further

continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused."

31. Keeping in view the aforementioned principles and having regard to the facts and circumstances of this case, however, we are of the opinion that the interest of justice shall be subserved if while allowing these appeals and setting aside the judgments of the High Court, the trial court is requested to dispose of the matters at an early date preferably within six months from the date of communication of this order, subject, of course, to rendition of all cooperation of the respondents herein. In the event the trial is not completed within the aforementioned period it would be open to the respondents to approach the High Court again. These appeals are disposed of with the aforementioned directions. No costs."

8. In view of the law laid down by the Hon'ble Supreme Court since in the present case the proceedings against the Petitioner terminated on account of the fact that the sanction against him was granted by an incompetent authority and the same have now been initiated without sanction as the Petitioner has retired, I find no merit in the petition. Further the pronouncement of the Supreme Court in **P. Ramachandra Rao v. State of Karnataka** (2002) 4 SCC 578 holds that no period of limitation can be prescribed in which the trial of a criminal case must be closed mandatorily. Thus, I find no reason to quash the summoning order and the proceedings arising therefrom.

ILR (2012) III DELHI 533
C.R.P.

GLOBAL AGRI SYSTEM PVT. LTD. ....PETITIONER

VERSUS

BIMLA SACHDEV ....RESPONDENT

(INDERMEET KAUR, J.)

C.R.P. NO. : 22/2012 DATE OF DECISION: 10.02.2012

Code of Civil Procedure, 1908—Section 115, Order VII Rule 11—Arbitration and Conciliation Act, 1996—Section 8—Suit for possession, mesne profits and damages filed in respect of suit premises let out to defendant in terms of registered lease deed dated 13.03.2006—Defendant moved application that clause 20 of the lease deed contains an arbitration clause—Dispute having arisen between the parties it be referred for arbitration—Application dismissed—Petition—Held—The word 'may' appearing herein giving an option to both the parties to get an arbitrator appointed jointly, largely discloses the intent of the parties that it was not a mandate upon the parties to refer their dispute to an arbitrator; in the eventually that the parties cannot settle their dispute by discussion or by negotiations, they as an alternate 'may' get their disputes settled through the forum of arbitration and the word may having been supplanted by the sentence that the parties will get arbitrator jointly appointed in fact, shows that the parties have to view this as an option only and not mandatorily go for arbitration.

The arbitration clause which is a part of this lease deed has been noted. Tenor of this clause clearly stipulates that if there is any dispute between the parties relating to this agreement, attempt in good faith to resolve this dispute from

a discussion would be made; further an alternate of negotiations is also contained in the said clause; as a third condition, the parties may refer their dispute to a single arbitrator to be jointly appointed by the parties. The word 'may' appearing herein as also giving an option to both the parties to get an arbitrator appointed jointly largely deciphers the intent of the parties which in the instant case is not a mandate upon the parties to refer their dispute to an arbitrator; in the eventuality that the parties cannot settle their dispute by discussion or by negotiations, they as an alternate 'may' i.e. as a third alternate given to the parties to get their disputes settled through the forum of arbitration and the word may having been supplanted by the sentence that the parties will get arbitrator jointly appointed in fact shows that the parties have to view this is an option only and not mandatorily go for arbitration. **(Para 6)**

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Sandeep Sethi, Sr. Advocate with Mr. Harunesh Tandon, Advocate.

FOR THE RESPONDENT : Mr. Vikas Mehta, Advocate.

CASE REFERRED TO:

1. *Wellington Associates Ltd.* vs. *Mr. Kirit Mehta* AIR 2000 SC 1379.

RESULT: Petition Dismissed.

INDERMEET KAUR, J. (Oral)

1. Order impugned before this Court is the order dated 28.01.2012 whereby the two applications filed by the defendant i.e. the first application under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'said Act') and the second application under Order 7 Rule 11 of the Code of Civil Procedure (hereinafter referred to as the 'Code') had been dismissed.

2. Record shows that the present suit is a suit for possession, mesne profits and damages filed by the plaintiff against the sole defendant; suit premises are property No. K-13A, Hauz Khas Enclave, New Delhi which had been let out to the defendant in terms of a registered lease deed dated 13.03.2006. Contention of the plaintiff is that Clause 20 of the said lease deed contains an arbitration clause and in terms thereof, the disputes having arisen between the parties in view of the mandate of Section 8 of the said Act they had to be referred for arbitration.

3. Relevant would it be at this stage to reproduce the arbitration clause which is a part of the lease deed and which reads herein as under:-

> "If there should be a dispute among the parties or any of them arising out of or relating to this agreement, they will attempt in good faith to resolve the dispute promptly through discussions. If the dispute cannot be resolved through negotiation, then it may be referred to arbitration by a single arbitrator appointed jointly by the parties. This arbitration agreement and the proceedings thereunder shall be governed by (Indian) Arbitration and Conciliation Act, 1996 or any statutory amendment or reenactment thereof. The venue of arbitration shall be New Delhi, India."

4. Learned counsel for the respondent while refuting the prayer sought for by the plaintiff has placed reliance upon a judgment of the Apex Court reported in AIR 2000 SC 1379 **Wellington Associates Ltd. Vs. Mr. Kirit Mehta** to support his submission that the word 'may' as appearing in the present arbitration clause in fact has been construed in the similar circumstances in the judgment of **Wellington Associates** (Supra) as a directory condition and distinct from the word 'shall' and as such by applying the ratio of the aforenoted judgment, there was no mandate upon the Court for reference of disputes to arbitration.

5. Learned counsel for the petitioner has refuted this submission; it is not denied that there were twin clauses which were the subject matter of dispute in the case of **Wellington Associates** and the Court had noted that the preceding clause 4 which when read with the subsequent clause 5 had led to the conclusion that the word 'may' is only directory and not mandatory.

6. The arbitration clause which is a part of this lease deed has been

noted. Tenor of this clause clearly stipulates that if there is any dispute between the parties relating to this agreement, attempt in good faith to resolve this dispute from a discussion would be made; further an alternate of negotiations is also contained in the said clause; as a third condition, the parties may refer their dispute to a single arbitrator to be jointly appointed by the parties. The word 'may' appearing herein as also giving an option to both the parties to get an arbitrator appointed jointly largely deciphers the intent of the parties which in the instant case is not a mandate upon the parties to refer their dispute to an arbitrator; in the eventuality that the parties cannot settle their dispute by discussion or by negotiations, they as an alternate 'may' i.e. as a third alternate given to the parties to get their disputes settled through the forum of arbitration and the word may having been supplanted by the sentence that the parties will get arbitrator jointly appointed in fact shows that the parties have to view this is an option only and not mandatorily go for arbitration.

7. In fact a similar situation had arisen in the case of **B. Gopal Das Vs. Kota Straw Board** MANU/RH/0064/1971. In that case the clause read as follows:-

> "That in case of any dispute arising between us, the matter may be referred to arbitrator mutually agreed upon and acceptable to you and us."

8. In this case, it was held that a fresh consent for arbitration was necessary; the clause in the present case is in fact clearer and more happily worded; thus it cannot be said that the parties had agreed to mandatorily opt for arbitration in case of a dispute between the parties. The trial Court had rightly noted this clause to be vague and not binding.

9. The prayer made in the application under Section 8 of the said Act has also been perused. It seeks a prayer for dismissal of the suit and not for a reference to arbitration. That apart, the conduct of the petitioner is also relevant. Learned counsel for the respondent has pointed out that the rent has not been paid by the tenant/petitioner since March, 2008 and inspite of specific directions of the trial Court dated 02.12.2010 and 15.12.2010, rent was not paid; in fact the order of 15.12.2010 specifically postulates that the arrears of rent be cleared within a period of three weeks. It is not in dispute that the clearance has not been effected till date.

10. The petitioner has thus not come to the Court with clean hands. Dismissal of the application under Section 8 of the said Act in this scenario calls for no interference.

11. The second application under Order 7 Rule 11 of the Code was also rightly dismissed. Contention before this Court has been that the Court did not have the pecuniary jurisdiction to deal with the present suit as the mesne profits have been claimed for an amount of Rs. 16 lacs which were not within the pecuniary jurisdiction of the Civil Judge; this submission now urged does not form a part of the pleadings of the application under Order 7 Rule 11 of the Code; in fact the averments made in the said application are largely the defences sought to be set up by the defendant which cannot be adhered to while dealing with an application under Order 7 Rule 11 of the Code. It is a well settled position of law that the averments made in the plaint alone have to be looked into to decide an application under Order 7 Rule 11 of the Code. The averments made in the plaint clearly disclose a cause of action qua the plaintiff and against the defendant. Dismissal of application under Order 7 Rule 11 of the Code also calls for no interference.

12. Petition is without any merit. Dismissed.

ILR (2012) III DELHI 538
WP(C)

BALRAJ SINGH MALIK ....PETITIONER

VERSUS

SUPREME COURT OF INDIA ....RESPONDENT
THROUGH ITS REGISTRAR GENERAL

(A.K. SIKRI, ACJ. & RAJIV SAHAI ENDLAW, J.)

WP(C) NO. : 8327/2011 DATE OF DECISION: 13.02.2012

Advocates Act, 1961—Section 30, 52—Supreme Court Rules, 1966—Order IV Rules 2, 4, 6(b) challenged as ultra vires—Petitioner pleaded for prohibiting the creation of classification of advocates into AOR and non-AOR and restricting only AOR to file cases in the Supreme Court—Petitioner contended that the impugned classification has resulted into denial of right to practice under Sec.30, Advocates Act—Held, Sec. 30 has to be read harmoniously with Sec. 52 of the Act, which states that nothing in the Act shall be deemed to effect Art. 145 of the Constitution that lays down rule making power of the Supreme Court—Further held, the impugned rules are based on intelligible differentia with objective sought to be achieved.

Section 30 of the Act entitles every advocate, as of right, to practice throughout the territories to which this Act extends and specifically mentions all Courts including the Supreme Court. Thus, no doubt, right to practice in the Supreme Court is conferred. Section 52 however, categorically states that nothing in this Act shall be deemed to effect the power of the Supreme Court to make rules under Article 145 of the Constitution. This means that notwithstanding what is contained in the Advocates Act Section 52 of the Act keeps

the powers of the Supreme Court under Article 145 of the Constitution intact. Reading these two provisions in harmonious way as mentioned above, an inescapable conclusion would be that the Apex Court has the power to lay down the rules about the entitlement of persons not only to act but also to plead before it. It, thus, clearly follows that amendment of Section 30 has not altered the position which was prevailing earlier and explained by the Supreme Court in **Lily Isabel Thomas** (supra).We are not oblivious of the situation, as highlighted by the petitioner, that there are some noises that AOR system is not working satisfactorily. There may be some truth in the same. However, if some anomalies and unhealthy practices have crept in the AOR system, the proper remedy is to find solution to rectify the same. That may not be a cause for dispensing with the system of AOR altogether. **(Para 26)**

In this case, we are to answer the question raised and, therefore, the entire issue is to be examined from that perspective alone. When the Parliament in the provisions made in the Advocates Act have not touched upon the power of the Supreme Court to frame rules by limiting the category of persons who can act or plead and not, exercise of that power under which the rules are framed, prescribing the eligibility conditions before an advocate could act or plead and nomenclature of .Advocate On Record. is given to those who fulfilled those conditions, it cannot be treated as discriminatory or violative of article 14 of the Constitution. The rule is based on intelligible differentia with objective sought to be achieved, as highlighted by the learned Solicitor General namely it is in the interest of litigating public that the practice before the Apex Court is regulated by way of prescribing such qualification/eligibility conditions for advocates to become 'Advocate on Record' and to be entitled to act or plead. The Court system being pyramidal in structure makes the Supreme Court as the Court of last resort so it is helpful to have someone who is equipped to deal with all kinds of matters where the litigant is not able to afford the Senior Counsel or some other counsel. No doubt,

AOR can engage a counsel other than a Senior Counsel and in that sense every advocate has right to argue before the Supreme Court. However, with this system, the other advocates who may be authorized by AOR would be an advocate who has experience and confidence of the litigant. Furthermore, there are various responsibilities cast upon the AOR who files the case on behalf of his client and such an AOR has to have necessary qualification to act in that capacity. Prescription of these qualifications which include passing of exam therefore is not a mere formality and has laudable objective behind it. **(Para 29)**

Important Issue Involved: Classification of AOR and non-AOR in the Supreme Court Rules upheld.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Md. Izhar Alam and Mr. M.P. Singh, Advocates with Petitioner in person.

FOR THE RESPONDENT : Mr. R.F. Nariman, Solicitor General of India with Mr. Sushil Kr. Jain, President (SCAORA), Mr. Shivaji M. Jadhav, V.P. (SCAORA), Mrs. Sunita B. Rao, Secretary (SCAORA) and Mr. Atulesh Kumar Executive member (SCAORA) [All appeal as per order dated 25.11.11 of this Court] Mr. Triparari Ray, Advocate with Mr. Ravi Shankar Kumar, Mr. Vishal Malik, Mr. B.K. Chaudhary, Mr. Sudhir Bista and Mr. Arun Kumar, Advocates for SCAA (Non-AOR) Dr. J.C. Batra, Sr. Advocate with Dr. Ranjit Singh, Advocate for Senior Advocate Association of Inida. Mr. Bankey Bihari Sharma,

Advocate-on-Record (Affected Party).

CASE REFERRED TO:

1. *Vijay Dhanji Chaudhary* vs. *Suhas Jayant Natawadkar* SLP(C) No. 18481 of 2009.

RESULT: Petition Dismissed.

A.K. SIKRI, ACTING CHIEF JUSTICE:

1. This petition is filed by the Petitioner, who has appeared in person before us, praying for the declaration of rule 2, 4 and 6 (b) of Order IV of the Supreme Court Rules, 1966 (hereinafter referred to as '1966 Rules') as null and void and for allowing the filing of cases by the Petitioner and other Non Advocates on Record (AOR) advocates in the Hon'ble Supreme Court of India. To put it otherwise, the petitioner pleads for prohibiting the creation of further classification of advocates into AOR and non-AOR and restricting only AOR to file cases in the Hon'ble Supreme Court. Thus, it is prayed that category of AOR be dispensed with.

2. Amongst others, the main grievance raised by the Petitioner is that at present the role played by an AOR is merely of a name lender for filing cases without being responsible for the conduct of the case, thereby the very purpose of having the system is defeated and after the notifying of section 30 of the Advocates Act, 1961 (hereinafter referred to as '1961 Act') on 15th June, 2011 nothing is left to continue the system of AOR, to hold exam for AOR and allot exclusive facilities to AOR.

3. The subject of constitution, organization, jurisdiction and powers of the Supreme Court (including contempt of such court), and the fees taken therein; persons entitled to practice before the Supreme court falls under List-I which is the Union List. Therefore, the Parliament is competent to pass legislations for this very purpose.

4. The Advocates Act, 1961 which is the law relating to legal practitioners in India was enacted by the Parliament under Article 246 of the Constitution of India. One of the objects and purpose of the enactment was to empower the Supreme Court to make rules for determining the persons who shall be entitled to plead before that court.

5. Article 145 of the Constitution grants power to the Supreme Court to make rules for regulating generally the practice and procedure of the court subject to the provisions of any law made by the Parliament with the approval of the President of India. Article 145 of the Constitution of India reads as under:-

> Rules of Court, etc.- (1) **Subject to the provisions of any law made by the Parliament, the Supreme Court from time to time, with the approval of the President may make** rules for regulating generally the practice and procedure of the Court including -
>
> (a) Rules as to the persons practicing before the Court;
>
> (b) Rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;
>
> (c) Rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;
>
> (cc) Rules as to the proceedings in the Court under Article 139A;
>
> (d) Rules as to the entertainment of appeals under sub clause (c) of clause (1) of Article 134;
>
> (e) Rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entertained;
>
> (f) Rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged I respect of proceedings therein;
>
> (g) Rules as to granting of bail;
>
> (h) Rules as to stay of proceedings;
>
> (i) Rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;
>
> (j) Rules as to the procedure for inquiries referred to in

clause (1) of Article 317.

6. Under Article 145 of the Constitution of India Supreme Court framed .The Supreme Court Rules, 1966.. The relevant provisions which are under consideration are reproduced below.

Rule 6(b) of Order IV of the Supreme Court Rules, 1966

"6(b). No advocate other than an advocate on record shall be entitled to file an appearance or act for a party in the Court..

Rule 10 of Order IV of the 1966 Rules

"10. No advocate other than an advocate on record shall appear and plead in any matter unless he is instructed by an advocate on record..

Explanation to Order IV Rule 2 states that - (i) 'acting' means filing an appearance or any pleadings or applications in any Court or Tribunal in India, or any act (other than pleading) required or authorized by law to be done by a party in such Court or Tribunal either in person or by his recognized agent or by an advocate or attorney on his behalf.

7. At this juncture let us take note of the important provisions of the Advocates Act which are 1961 Act are as follows

Section 30 of the Advocates Act:

Subject to the provisions of this Act, every advocate whose name is entered in the state roll shall be entitled as of right to practice throughout the territories to which the Act extends,-

(i) In all courts including the Supreme Court;

(ii) Before any tribunal or person legally authorized to take evidence;

(iii) Before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice.

Section 16 of the Advocates Act, 1961 states:

16. Senior and other advocates,-

(1) There shall be two classes of advocates, namely , senior advocates and other advocates.

(2) An advocate may, with his consent, be designated as senior advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability [standing at the Bar or special knowledge or experience in law] he is deserving of such distinction.

(3) Senior advocates, shall in the matter of their practice, be subject to such restrictions as the Bar Council of India may, in the interest of the legal profession, prescribe.

(4) An advocate of the Supreme Court who was senior advocate of that Court immediately before the appointed day shall, for the purposes of this section, be deemed to be a senior advocate; Section 52 of the Advocates Act, 1961:

52. Saving- Nothing in this Act shall be deemed to affect the power for the Supreme Court to make rules under Article 145 of the Constitution-

a. for laying down the conditions subject to which a senior advocate shall be entitled to practice in that Court.

b. For determining the persons who shall be entitled to act or plead in that Court.

8. As mentioned above, the petitioner who is a practicing advocate appeared in person. However, in addition, Mohd. Izhar Alam and Mr. M.P.Singh Advocates also argued for him. Dr. J.C. Batra, Sr. Advocate with Dr. Ranjit Singh appeared for the intervener .Senior Advocate Association of India. and few other advocates representing SCAA (non-AOR) supported the cause in this petition by advancing various submissions as well.

9. All these counsels have argued that the 1961 Act was passed under Article 246 of the Constitution of India and Section 16 of the Advocates Act in chapter III has provisions for only two types of advocates in the country namely Senior and other Advocates. So there is no purpose or object to continue AOR system and it should be abolished.

10. It is contended that the power granted under Article 145 of the Constitution of India is to supplement and not supplant the spirit of the

Constitution and/or the Advocates Act, 1961. The power of the Supreme Court under Article 145 of the Constitution is subject to the provisions of any law made by the Parliament, hence Supreme Court has no power to continue the AOR system in light of the Advocates Act. Supreme Court under Article 145 has only the power to regulate the persons who can practice before it but not restrict anyone from practicing before the Apex Court.

11. In brief the argument of the petitioner is that the right to practice under section 30 of the Advocates Act, 1961is being denied by virtue of rule 6 and 10 of Order IV of the 1966 Rules. It is brought to the notice of this court that this discrimination not only stops them from filing the cases in their name but also stop them from getting facilities like chambers and registration of their clerks etc.

12. It is also contended that the classification between Non AOR Advocates and Advocates on record created by the 1966 Rules is violative of Article 14 and 19(1) (g) of the Constitution of India. Such classification is creating a creamy layer of advocates who want to grab the Apex Judicial system of the country.

13. We had requested Mr. R.F. Nariman, Solicitor General of India to assist us in the matter. He appeared and defended the system of AOR. Mr. Sushil Kumar Jain, President, Supreme Court Advocates on Record Association and some other office bearers also appeared and opposed the prayers made in this petition.

14. Mr. Nariman, leading the opposition, drew our attention to Section 52 of the Advocates Act, 1961 which was a saving provision and argued that in no uncertain term the said provision saves the powers of the Supreme Court to make rule under Article 145 of the Constitution and, therefore, the power of the Supreme Court had to be given supremacy. He argued that Clause (b) of Section 52 of the Advocates Act clearly vests jurisdiction in the Supreme Court to make rule for determining the persons who shall be entitled to act or plead in that Court and this was not subject to the provision of the Advocates Act. On the contrary, the provisions of Advocates Act, (which would include Section 30 as well) were subject to this power of the Supreme Court. His submission was that the expression "persons" appearing in Section 52 would include even advocates and rebutting the contention of the petitioners that under the

aforesaid provision the Supreme Court could only regulate the persons other than advocates. Mr. Nariman painstakingly narrated the history of the provisions relating to Advocates Act viz-a -viz Supreme Court Rules and the creation of AOR system. He heavily relied upon the judgment of Supreme Court in re: **Lily Isabel Thomas** 1964 SCR (6) 229 to corroborate his aforesaid submission.

15. By relying on Section 52 the Respondents has tried to forward an argument that the rule making power regarding the determination of persons who shall be entitled to act or plead in the Supreme Court is not subject to the provisions of the Advocates Act, 1961. In order to nullify the effect of section 52 the petitioner has contended that "persons" in section 52 does not include advocates and it is also contended that section 52 only saves the constitutional power but does not empower to put a blanket ban on the right of majority of advocates.

16. As regards the submission of the petitioner regarding classification under Article 14 of the Constitution is concerned the Respondents has put forth his argument that the saving clause under section 52(b) itself provides for creation of a category and therefore this classification cannot be treated as discriminatory.

17. The Respondents have also referred to Rule 5 (ii)(b) Order IV of the 1966 Rules which states that under some circumstances the Chief Justice may give away the requirement of the training period for an AOR. The relevant provision of the section is as follows:

> 5. No advocate shall be qualified to be registered as an advocate on record unless: -
>
> (b) the Chief Justice may, in appropriate cases, grant exemption-
>
> (1) from the requirement of training under this clause in the case of an advocate, whose name is borne on the roll of any State Bar Council and has been borne on such roll for a period of not less than ten years:
>
> (2) from the requirement of clause (i) and from training under this clause in the case of an advocate having special knowledge or experience in law.

18. Learned Solicitor General also put forth that it is in the interest

of the litigating public that the practice before the Apex Court is regulated by way of introduction of the provision of Advocate on Record. The court system being pyramidal in structure makes the Supreme Court as the Court of last resort so it is helpful to have someone who is equipped to deal with all kinds of matters. It is also of some substance that in all cases senior counsel cannot be engaged so having someone experienced advocate like an AOR will ensure the proper dispensation of justice.

OUR ANALYSIS:

19. We have given our due and thoughtful consideration to the contentions urged by counsel on either side. In the first instance, we would like to take note of the discussion contained in **Lily Isabel Thomas** (supra) simply because of the reason that this very aspect was dealt with in the said judgment in all its length and breadth. In that case, the petitioner had challenged the validity of Rule 16 of Order IV (which is akin to Rule 4 and 5 of the present Rules) of the Supreme Court Rules on identical ground namely she was entitled to practice in the Supreme Court as a right not merely to plead but to act and the aforesaid Rules prescribing qualification before she could be permitted to act was, therefore, invalid. The position as per the provisions (which prevails under the amended rule as well) is that, though every advocate whose name is maintained in the common roll of Advocates prepared under Section 20 of the Advocates' Act is entitled to plead, only those advocates who are registered as "Advocates on Record" are entitled to act as well. The contention of the petitioner was predicated on Section 58 (3) of the Advocates Act, which was a transitory provision and was to the following effect:

> .58.(3) Notwithstanding anything in this Act, every person who, immediately before the 1st day of December, 1961, was an advocate on the roll of any High Court under the Indian Bar Councils Act, 1926 or who has been enrolled as an advocate under this Act shall, until Chapter IV comes into force, be entitled as of right to practice in the Supreme Court, subject to the rules made by the Supreme Court in this behalf..

20. The petitioner's argument was that she had the "right to practice" in the Apex Court and right to practice would not merely include right to plead but also right to act as well. The Court, agreed that it would be

the position if there was no rules made by the Supreme Court or the rules which were made now were invalid. Since the rules had been made, in this context, the Supreme Court examined as to whether rules in question were valid and pointed out that answer to this would depend upon the proper construction of Article 145(1)(a) of the Constitution in exercise of which the impugned rule had been framed. The interpretation which ensued explaining the scope and extent of Article 145 goes as under:-

> 'As regards this Article there are two matters to which attention might be directed. By the opening words of the Article the rules made by this Court are subject to the provision of any law made by Parliament, so that if there is any provision in a law made by parliament by which either the right to make the rule is restricted or which contains provisions contrary to the rules, it is beyond dispute that the law made by parliament would prevail'.

21. The Court then dealt with the submission of the petitioner that Section 58(3) of the Advocates Act was such a law made by the Parliament which had granted absolute right to persons in position of the petitioner (i.e. the advocate) to practice as a right and it cannot be controlled by rules made by the Supreme Court. This contention, however, was not accepted by the Supreme Court pointing out that Section 58 (3) of the Act which confers right on the advocate to practice in Supreme Court was itself subject to rules made by the Supreme Court. The Court ruled that this position was reinforced by Section 52 of the Act which was a saving provision and specifically save the powers of the Supreme Court to make such rules under Article 145 of the Constitution. The Court held that these provisions namely Section 58 read with Section 52 of the Act clearly provided the answer that there was no question of rule restricting the right to act to certain class of advocates as being contrary to law made by the Parliament.

22. After giving this answer namely rule making power of the Supreme Court under Article 145 of the Constitution could be restricted by the Parliament and it was not a case here, the Court thereafter dealt with the pivotal issue namely whether Article 145 (1)(a) is sufficient to empower the Apex Court to frame the impugned rules ? In order to give answer to this question, the Court considered the meaning of the word .rules as to the persons practicing before the Court. occurring in Clause (a) of the sub Article (1) of Article 145 of the Act. In this behalf, the

Court proceeded to note the argument of the petitioner that entry 77 of the Union List in Schedule-VII the last portion of which reads .Persons entitled to practice before the Supreme Court.. And .persons practicing. occurring in Article 145 (1)(a) were different expression and contrast between the two meant that Article 145 (a) gave the Supreme Court the power only to determine the manner in which persons who obtained right to practice in a law made by the Parliament by virtue of power under entry 77 could exercise that right. The Court noted the contention of the petitioner that the persons entitled to practice is exclusive domain of the Parliament as per entry 77. This argument was, however, rejected by the Apex Court in the following manner:-

> .We feel unable to accept this argument. We do not agree that the words "persons practising before the Court" is narrower than the words "persons entitled to practise before the Court". The learned Additional Solicitor-General was well-founded in his submission that if, for instance, there was no law made by Parliament entitling any person to practise before this Court, the construction suggested by the applicant would mean that this Court could not make a rule prescribing qualifications for persons to practise in this Court. In this connection it is interesting to notice that the words used in Art. 145(1)(a) have been taken substantially from s. 214(1) of the Government of India Act, 1935. That section ran, to quote the material words :
>
> > "The Federal Court may from time to time, with the approval of the Governor-General in his discretion make rules of Court for regulating generally the practice and procedure of the Court including rules as to the persons practising before the Court....."
>
> The Government of India Act, 1935 did not in its legislative lists have a provision like as we have in entry 77 of List I (vide entry 53 of List I). The Federal Court immediately on its formation made rules and under Order IV of those rules provision was made prescribing qualifications for the enrolment as Advocates of the Federal Court. Advocates entitled to practise in the High Courts with a standing of 5 years on the rolls of High Court and who satisfied certain requisite conditions were entitled to be enrolled as Advocates, while for enrolment as Senior Advocates

> a standing of 10 years as an Advocates a of a High Court Bar was prescribed. We are pointing this out only for the purpose of showing that the words "as to the persons practising before the Court" were then used in a comprehensive sense so as to include a rule not merely as to the manner of practice to but also of the right to practise or the entitlement to practice. Those words which are repeated in Art. 145(1)(a) have still the same content. We ought to add that there is no anomaly involved in the construction that this Court can by its rules make provision prescribing qualifications entitling persons to practise before it, and that Parliament can do likewise. There is no question of a conflict between the legislative power of Parliament and the rule-making power of this Court, because by reason of the opening words of Art. 145, any rule made by this Court would have operation only subject to laws made by Parliament on the subject of the entitlement to practise. We are, therefore, clearly of the opinion that on the express terms of Art. 145(1)(a) the impugned rules 16 and 17 are valid and within the rule-making power.

23. The aforesaid ruling clearly lays down that the words "as to the persons practicing before a Court" appearing in Article 145 (i) (a) of the Constitution are comprehensive enough to include a rule not merely as to the manner of practice but also of the right to practice or the entitlement to practice and, therefore, there was no question of conflict between the legislative power of the Parliament and rule making power of the Supreme Court given under Article 145. This Constitution Bench judgment of the Supreme Court explaining the extent and scope of rule making power conferred upon it under Article 145 of the Constitution is the law of the land and has the binding effect even today.

24. Keeping this position in law in mind, we have to answer as to whether amendment in Section 30 of the Advocate (Amendment) Act, 1993 has made any difference. Various provisions of the Advocates Act, 1961 were amended by Act no.70 of 1993. This was done on the basis of the proposals made by the Bar Council of India and certain other bodies and the experience gained in the administration of Advocates Act. The State of objects and Reasons attached to the amendment bill made, interalia, the following stipulation:-

> .(vi) empower the Supreme Court of India to make rules for

determining the persons who shall be entitled to plead before that Court..

25. As a consequence, apart from amending Section 30, Section 52 of the Advocates Act was also amended and for the word "act." the words "act or plead" has been substituted. Keeping in view this position, let us have a look at Section 30 and 52 of the Act as they stand now:

'30.**Right of advocates to practice-** Subject to provisions of this Act, every advocate whose name is entered in the (State roll) shall be entitled as of right to practice throughout the territories to which this Act extends,-

(i) In all Courts including the Supreme Court;

(ii) Before any tribunal or person legally authorized to take evidence; and

(iii) Before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practice.

52. **Saving-** Nothing in this Act shall be deemed to affect the power for the Supreme Court to make rules under Article 145 of the Constitution- (a) for laying down the conditions subject to which a senior advocate shall be entitled to practice in that Court; (b) for determining the persons who shall be entitled to [act or plead] in that Court.'

26. Section 30 of the Act entitles every advocate, as of right, to practice throughout the territories to which this Act extends and specifically mentions all Courts including the Supreme Court. Thus, no doubt, right to practice in the Supreme Court is conferred. Section 52 however, categorically states that nothing in this Act shall be deemed to effect the power of the Supreme Court to make rules under Article 145 of the Constitution. This means that notwithstanding what is contained in the Advocates Act Section 52 of the Act keeps the powers of the Supreme Court under Article 145 of the Constitution intact. Reading these two provisions in harmonious way as mentioned above, an inescapable conclusion would be that the Apex Court has the power to lay down the rules about the entitlement of persons not only to act but also to plead before it. It, thus, clearly follows that amendment of Section 30 has not

altered the position which was prevailing earlier and explained by the Supreme Court in **Lily Isabel Thomas** (supra).We are not oblivious of the situation, as highlighted by the petitioner, that there are some noises that AOR system is not working satisfactorily. There may be some truth in the same. However, if some anomalies and unhealthy practices have crept in the AOR system, the proper remedy is to find solution to rectify the same. That may not be a cause for dispensing with the system of AOR altogether.

27. But would it not be unfair to say that merely because a provision is not properly implemented, it should be done away with? The answer has to be in the negative. Despite of holding a provision, in such conditions, to be unconstitutional it would be more appropriate that the present practice of the AOR is regulated to ensure that they play a constructive role in justice delivery system.

28. Once we find that the provisions under challenge are not unconstitutional then the question regarding the regulation of the practice of AORs need not be gone into by us as precisely this very issue is pending in the Supreme Court namely **Vijay Dhanji Chaudhary Vs. Suhas Jayant Natawadkar** SLP(C) No. 18481 of 2009.

29. In this case, we are to answer the question raised and, therefore, the entire issue is to be examined from that perspective alone. When the Parliament in the provisions made in the Advocates Act have not touched upon the power of the Supreme Court to frame rules by limiting the category of persons who can act or plead and not, exercise of that power under which the rules are framed, prescribing the eligibility conditions before an advocate could act or plead and nomenclature of "Advocate On Record" is given to those who fulfilled those conditions, it cannot be treated as discriminatory or violative of article 14 of the Constitution. The rule is based on intelligible differentia with objective sought to be achieved, as highlighted by the learned Solicitor General namely it is in the interest of litigating public that the practice before the Apex Court is regulated by way of prescribing such qualification/eligibility conditions for advocates to become =Advocate on Record' and to be entitled to act or plead. The Court system being pyramidal in structure makes the Supreme Court as the Court of last resort so it is helpful to have someone who is equipped to deal with all kinds of matters where the litigant is not able to afford the Senior Counsel or some other counsel.

No doubt, AOR can engage a counsel other than a Senior Counsel and in that sense every advocate has right to argue before the Supreme Court. However, with this system, the other advocates who may be authorized by AOR would be an advocate who has experience and confidence of the litigant. Furthermore, there are various responsibilities cast upon the AOR who files the case on behalf of his client and such an AOR has to have necessary qualification to act in that capacity. Prescription of these qualifications which include passing of exam therefore is not a mere formality and has laudable objective behind it.

30. We are also not in agreement with the argument of the petitioner that expression "persons" occurring in 145(1)(a) of the Act would mean litigant or persons other than the advocates.

31. We, thus, do not find any merit in this petition which is accordingly dismissed. The pending application also stands dismissed.

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W.P. (C)

SUB INSPECTOR RAJINDER KHATRI ....PETITIONER

VERSUS

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

(BADAR DURREZ AHMED & V.K. JAIN, JJ.)

W.P. (C) NO. : 4961/2011 DATE OF DECISION: 29.02.2012

Constitution of India, 1950—Article 226—Petition challenging order dated 11.02.2011 passed by Central Administrative Tribunal, Principal Bench, whereby OA of the petitioner was dismissed—On 28/29.01.2005 Yameen complained to Joint Commissioner of Police about dispossession from a plot and the complaints to the police yielded no results—Enquiry conducted by

DCP—Petitioner, in-charge of Police Post Burari and Inspector Bir Singh SHO Police Station Timar Pur were prima facie involved in facilitating the dispossession of the complainant—Two other police officials namely Head Constable Virender Singh and Head Constable Mahabir Singh were also found prima facie guilty—Departmental enquiry held—After enquiry, penalty of forfeiture of one year's approved service temporarily entailing proportionate reduction in pay for a period of one year awarded to the petitioner—Same penalty awarded to Head Constables—Inspector Bir Singh was let off after giving warning on the ground that he was going to retire from service next year—Petitioner challenged the order of punishment by O.A. which was dismissed—Petition—Challenging the order on the ground of discrimination alleged to have been given to him in the matter of award of punishment—Though the charges were identical, lesser punishment was awarded to Inspector Bir Singh—Held—Primarily it was for the petitioner, he being in-charge of Police Post Burari, to initiate appropriate legal action on the complaint of Shri Yameen—The role of SHO Police Station Timar Pur which was more of a supervisory role comes later and in fact there would have been no occasion for the complainant to approach the SHO, had the petitioner, being in-charge of the Police Post taken prompt action on receipt of complaint from him—Therefore, it cannot be said that the degree of delinquency on the part of the petitioner was the same as on the part of Inspector Bir Singh—In these circumstances, when the degree of delinquency on the part of the petitioner was higher as compared to Inspector Bir Singh, the Disciplinary Authority, was not unjustified in not giving same treatment to him, as was given to the petitioner, particularly when he was going to retire from service next year.

It is an admitted position that the petitioner was the in-charge of the Police Post Burari when the complainant

Yameen was dispossessed from the plot measuring 850 square yards in Khasra No.519, Burari Garhi, Delhi, occupied by him in village Burari. Admittedly, the area within the jurisdiction of Police Station Timar Pur was much larger than the area within the jurisdiction of Police Post Burari though it did include the area under the jurisdiction of the Police Post. It can thus be hardly disputed that being in-charge of the Police Post, the petitioner was nearer to the place of incident as compared to Police Station Timar Pur. The Police Post being nearer to the place of incident, the complainant obviously must have first approached the Police post for lodging complaint, besides calling Police Control Room. Therefore, primarily it was for the petitioner, he being in-charge of Police Post Burari, to initiate appropriate legal action on the complaint of Shri Yameen. The role of SHO Police Station Timar Pur which was more of a supervisory role comes later and in fact there would have been no occasion for the complainant to approach the SHO, had the petitioner, being in-charge of the Police Post taken prompt action on receipt of complaint from him. Therefore, in our opinion, it cannot be said that the degree of delinquency on the part of the petitioner was the same as on the part of the Inspector Bir Singh. Being in-charge of the Police Post, the petitioner was the first point of contact for the complainant and, therefore, the degree of negligence/misconduct on the part of the petitioner would also be more, though it cannot be disputed that the SHO also would be responsible in the matter since he also did not take any action despite coming to know of the incident. **(Para 4)**

Important Issue Involved: Awarding different punishments to different officials, who were served charge sheet on the same allegations, would not amount to discrimination.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Shankar Raju.

FOR THE RESPONDENT : Ms. Shobhana Takiar.

CASES REFERRED TO:

1. *State of Uttar Pradesh And Others* vs. *Raj Pal Singh :* 2010(5) SCC 783.
2. *Union Territory of Dadra and Nagar Haveli* vs. *Gulabhia M. Lad:* (2010) 5 SCC 775.
3. *Man Singh* vs. *State of Haryana And Others* : 2008 (12) SCC 331.
4. *Chanderpal* vs. *NCT of Delhi & Ors.:* 2002 VIII AD (Delhi) 252.

RESULT: Petition Dismissed.

V.K. JAIN, J.

1. This writ petition is directed against the order dated 11.02.2011 passed by the Central Administrative Tribunal, Principal Bench, New Delhi, whereby OA No.2191/2010 filed by the petitioner was dismissed. The facts giving rise to the filing of the OA can be summarized as under:-

2. One Mr Yameen complained to Joint Commissioner of Police that on 28/29.01.2005, he was dispossessed from a plot which he owned and occupied in village Burari and that his complaints to the local police had yielded no result. On an enquiry conducted by DCP, it was found that the complainant was in possession of the aforesaid plot till 28.01.2005. It was also revealed during enquiry that the petitioner Sub-Inspector Rajinder Khatri, who was in-charge of Police Post Burari and Inspector Bir Singh, SHO, Police Station Timar Pur, were prima facie involved in facilitating the dispossession of the complainant from the aforesaid property. Two other police officials, namely, Head Constable Virender Singh and Head Constable Mahabir Singh were also found prima facie guilty in the matter. A departmental enquiry was, therefore, held against four police officials, i.e. the petitioner, Inspector Bir Singh, Head Constable Virender Singh and Head Constable Mahabir Singh. After enquiry, penalty of forfeiture of one year's approved service temporarily entailing proportionate reduction in pay for a period of one year was awarded to the petitioner. Same penalty was awarded to the Head Constables. Inspector Bir Singh was, however, let off after giving warning to him on the ground that he

was going to retire from service next year. The appeal filed by the petitioner was dismissed.

3. The order of punishment was challenged by the petitioner by way of O.A. No.2191/2010, which came to be dismissed by the Tribunal. Vide order dated 29.11.2011, this Court recorded that the only submission of the learned counsel for the petitioner was that though the charges against the petitioner and Inspector Bir Singh were identical, lesser punishment was awarded to Inspector Bir Singh. Thus, the challenge of the petitioner to the impugned order is based only on the discrimination alleged to have been mitted out to him in the matter of award of punishment. The Tribunal dealt with this plea in paragraph 15 of its order, which reads as under:-

> "15. It is open to the disciplinary authority to award different punishment to persons involved in a given case depending upon their role and extant of their involvement and other mitigating circumstances. There is thus no infirmity in the disciplinary authority taking a lenient view in respect of Inspector Bir Singh in view of his early retirement from service which is not the case of the applicant. The primary responsibility in the case was that the applicant being Incharge of P.P. Burari, Inspector Bir Singh was concerned mere as a supervising officer. The lapse attributed to him is reporting on the complaint that there was no altercation, which did not find support from the D.D. entries. The applicant's position is thus not comparable with that of the Inspector. We do not find any infirmity in the respondents' action in this regard. His plea of discrimination is thus devoid of substance."

4. It is an admitted position that the petitioner was the in-charge of the Police Post Burari when the complainant Yameen was dispossessed from the plot measuring 850 square yards in Khasra No.519, Burari Garhi, Delhi, occupied by him in village Burari. Admittedly, the area within the jurisdiction of Police Station Timar Pur was much larger than the area within the jurisdiction of Police Post Burari though it did include the area under the jurisdiction of the Police Post. It can thus be hardly disputed that being in-charge of the Police Post, the petitioner was nearer to the place of incident as compared to Police Station Timar Pur. The Police Post being nearer to the place of incident, the complainant obviously

must have first approached the Police post for lodging complaint, besides calling Police Control Room. Therefore, primarily it was for the petitioner, he being in-charge of Police Post Burari, to initiate appropriate legal action on the complaint of Shri Yameen. The role of SHO Police Station Timar Pur which was more of a supervisory role comes later and in fact there would have been no occasion for the complainant to approach the SHO, had the petitioner, being in-charge of the Police Post taken prompt action on receipt of complaint from him. Therefore, in our opinion, it cannot be said that the degree of delinquency on the part of the petitioner was the same as on the part of the Inspector Bir Singh. Being in-charge of the Police Post, the petitioner was the first point of contact for the complainant and, therefore, the degree of negligence/misconduct on the part of the petitioner would also be more, though it cannot be disputed that the SHO also would be responsible in the matter since he also did not take any action despite coming to know of the incident.

5. In these circumstances, when the degree of delinquency on the part of the petitioner was higher as compared to Inspector Bir Singh, the Disciplinary Authority, in our view, was not unjustified in not giving same treatment to him, as was given to the petitioner, particularly when he was going to retire from service next year.

6. The learned counsel for the petitioner has relied upon **State of Uttar Pradesh And Others v. Raj Pal Singh** : 2010(5) SCC 783 and **Man Singh v. State of Haryana And Others** : 2008 (12) SCC 331. In the case of **Raj Pal Singh** (supra), the allegation against the respondent was that he along with four other Assistant Warders had beaten one Shivdan Singh. The respondent was dismissed from service whereas the penalty awarded to the remaining four was stoppage of five increments. The High Court set aside the order of dismissal in case of the respondent and directed stoppage of five increments on the ground that all the five had been served with same sets of charges and, therefore, there were no justified reasons to pass different decisions. The appeal filed by the State was dismissed observing that the reasoning given by the High Court could not be faulted with since the State was not able to indicate as to any difference in the delinquency of these employees. In **Man Singh's** case (supra), the allegations were that the appellant and the one Head Constable working under him were deputed from Chandigarh to Hyderabad in connection with repair of two Government vehicles. The Head Constable,

who was driving one of the vehicles, purchased 12 bottles of Indian-Made Foreign Liquor and concealed them in the dickey of the car without appellant's consent. Liquor was detected by the excise staff of Andhra Pradesh, which registered a criminal case against Head Constable. Departmental proceedings were also initiated against the appellant as well as the Head Constable. The charge against the appellant was that he had failed to exercise requisite supervisory control over his subordinate. The penalty of stoppage of two increments was awarded to the appellant. The Head Constable was, however, acquitted in criminal case and thereupon the Disciplinary Authority removed the punishment imposed on him. Thus, the appellant stood punished whereas perpetrator of misconduct, i.e., Head Constable was let off both in the criminal case as well as in the departmental enquiry. In these circumstances, Supreme Court was of the opinion that the respondents could not be permitted to resort to selective treatment to the appellant and Head Constable Vijay Pal, who was involved in criminal case besides departmental proceedings. The Court also noted that after exoneration, the Head Constable Vijay Pal had also been promoted whereas the appellant had been punished on the ground that he had failed to exercise proper and effective control over the Head Constable Supreme Court, therefore, decreed the suit filed by the appellant challenging the order of dismissal from service. The facts of this case being altogether different, the judgment can be of no help to the petitioner. In the case before Supreme Court, the person let off by the respondent was the main culprit and the only charge against the appellant that he had failed to exercise control over him. Since the main culprit had been let off, the Court felt that the punishment awarded to the appellant would not be justified. However, in the case before this Court, the degree of delinquency on the part of the petitioner being higher, he cannot claim parity with Inspector Bir Singh in the matter of punishment.

7. In Administrator, **Union Territory of Dadra and Nagar Haveli v. Gulabhia M. Lad:** (2010) 5 SCC 775 there was a joint inquiry conducted against the respondent and two other delinquents and major penalty of removal from service was imposed on all of them. The appeal filed by the respondent was dismissed. The appeal filed by the other two was partly allowed and the punishment in the case of one person was modified to that of compulsory retirement whereas in case of other person it was modified to reduction of lower stage of pay by 05 stages

with cumulative effect. The OA filed by the respondent was allowed by the Tribunal holding that similarly placed persons had been treated differently and that awarding different punishments could not be sustained. The Writ Petition filed by the department having been dismissed, the matter was taken to Supreme Court. Allowing the appeal, Supreme Court inter alia held as under:

> "The exercise of discretion in imposition of punishment by the Disciplinary Authority or Appellate Authority is dependent on host of factors such as gravity of misconduct, past conduct, the nature of duties assigned to the delinquent, responsibility of the position that the delinquent holds, previous penalty, if any, and the discipline required to be maintained in the department or establishment he works. Ordinarily the Court or a Tribunal would not substitute its opinion on reappraisal of facts. In a matter of imposition of punishment where joint disciplinary enquiry is held against more than one delinquent, the same or similarity of charges is not decisive but many factors as noticed above may be vital in decision making. A single distinguishing feature in the nature of duties or degree of responsibility may make difference insofar as award of punishment is concerned. To avoid multiplicity of proceedings and overlapping adducing of evidence, a joint enquiry may be conducted against all the delinquent officers but imposition of different punishment on proved charges may not be impermissible if the responsibilities and duties of the co-delinquents differ or where distinguishing features exist. In such a case, there would not be any question of selective or invidious discrimination. (emphasis supplied)"

8. In **Chanderpal v. NCT of Delhi & Ors.:** 2002 VIII AD (Delhi) 252 a Full Bench of this Court was of the view that awarding different punishments to different officials, who were served charge-sheets on the same allegations would not amount to discrimination. The issue referred to the Full Bench in that case was as to whether an order of the Appellate Authority had to be set aside only on the ground that on purported similar charges, the Appellate Authority himself had set aside the order of punishment. After considering various judgments of Supreme Court on the subject, the Full Bench, inter alia, held as under:

> "A writ of mandamus can be sought for by a person when there

exists a legal right in himself and a corresponding legal obligation on the respondents.

Equality clauses enshrined in Articles 14 and 16 of the Constitution of India would apply only when the petitioner has been deprived of a legal right. A delinquent officer in no circumstances can based his claim invoking equality clause where its foundation is based on illegality." He cannot be permitted to urge that although he is guilty of commission of a misconduct he should not be punished only because others have been let off either by mistake or otherwise.

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Article 14 speaks of equality before law and equal protection of law. The claim of equality and the claim of equal protection thus must be claimed within the four corners of law. Furthermore, it is well settled that two wrongs do not make one right.`

9. The decision of the Full Bench was relied upon by this Court in WP(C) 4211-4213/2006 decided on 24.9.2007. In that case the charge against the respondent was that he had misappropriated money-order payments, particulars of which were mentioned in the charge-sheet. Penalty of dismissal from service was imposed upon the respondent. The appeal filed by him was dismissed. He filed OA before the Tribunal challenging the order of dismissal from service. The Tribunal interfered with the punishment on the ground that the same was discriminatory. In taking this view, the Tribunal noted that similar charge-sheets containing these very allegations were served upon two other employees, but in those cases punishment imposed was much lesser i.e. reduction of pay by 05 stages. The Tribunal accordingly quashed the penalty and remitted the case back to the Disciplinary Authority, to pass fresh order of penalty after taking into consideration the penalty imposed on Shri Biri Singh and Shri Prem Singh into consideration. The order passed by the Tribunal was challenged before this Court and it was contended on behalf of the petitioner that such comparison cannot be made in the matter of disciplinary proceedings and the Tribunal could not have held the punishment to be discriminatory only on the ground that two other persons had been given milder punishment. Accepting the contention, this Court held that the approach of the Tribunal was not correct in law. The Court was of the view that if the Disciplinary authority in case of other two officials

decided to impose a particular punishment that would not mean that same punishment is to be meted out to the respondent as well. The order passed by the Tribunal was accordingly set aside by the Court and the punishment awarded to the respondent was restored.

10. In the case before us, the petitioner being in-charge of Police Post, within jurisdiction of which the offence took place, he was directly responsible for not taking appropriate action on the complaint of Shri Yameen. The delinquency on his part, therefore, was greater as compared to delinquency on the part of Inspector Bir Singh and this, in our view, justified the differential treatment meted out to him.

For the reasons given hereinabove, we find no merit in the Writ Petition and the same is hereby dismissed without any order as to costs.

ILR (2012) III DELHI 562
W.P. (C)

MUNICIPAL CORPORATION OF DELHI ....PETITIONER

VERSUS

RAM AVTAR & ORS. RESPONDENTS

(BADAR DURREZ AHMED & V.K. JAIN, JJ.)

W.P. (C). NO. : 2621/2010, 2671/2010 & CM 5318/2012, 12003/2011 **DATE OF DECISION: 01.03.2012**

Constitution of India, 1950—Article 226—The private respondents are pump operators, malis and chowkidars, who were hitherto employed in Delhi Development Authority (DDA)-By an order dated 02.12.1994, certain colonies had been transferred from DDA to Municipal Corporation of Delhi (MCD)—As a result, the private respondents also stood transferred

to MCD—The terms and conditions of their transfer included clause 6, which is as follows:- Every employee shall on and form the date of his transfer to the Corporation, shall become an employee of the Corporation with such designation as the Commissioner may determine and shall hold office by the same tenure, remuneration and on the same terms and conditions of service as he would have held, if he had continued to be in the DDA unless and until such tenure, remuneration and terms and conditions are duly altered by the Corporation. However, the same shall not be to his disadvantage without the previous sanction of the Corporation—The Private respondents claimed the ACP pay scale as was applicable in DDA whereas they had been given ACP scale as applicable with MCD—Respondents urged that clause 6 clearly saved their future benefits which they would have got had they continued in DDA—Petitioner contend that the benefits that were available to the respondents ought to be reckoned only on the date of the transfer and should not extend to future benefits—Held—However, on construing and considering the provisions of clause 6 of the terms and conditions of transfer, it is apparent that the private respondents were entitled to the same terms and conditions of service as they would have had if they had continued with the DDA unless and until such tenure, remuneration and terms and conditions were duly altered by MCD—Admittedly, there has been no such alteration of the terms and conditions of service—Consequently, the private respondents would be entitled to be treated as if they had continued with the DDA and, therefore, all the benefits that would have been derived by them had they continued with the DDA, would be available to them.

However, on construing and considering the provisions of clause 6 of the terms and conditions of transfer, it is apparent that the private respondents were entitled to the same terms and conditions of service as they would have had if they had continued with the DDA unless and until such tenure, remuneration and terms and conditions were duly altered by the MCD. Admittedly, there has been no such alteration of the terms and conditions of service. Consequently, the private respondents would be entitled to be treated as if they had continued with the DDA and, therefore, all the benefits that would have been derived by them had they continued with the DDA, would be available to them. This is exactly what the Tribunal has decided, as would be apparent from the following extract:

> "6. On careful consideration of the rival contentions of the parties, in our considered view, on transfer of applicants from DDA to MCD what has been protected and safeguarded is not the terms and conditions, as existed but also on the premise that the same would be admissible if they had continued to be in DDA. This clearly establishes that even the future benefits are also protected in DDA. The only exception to deny is when the terms and conditions are altered by the Corporation, which have not been altered. As we find that in DDA the higher pay scale has been given to these categories as ACP pay scale, the same having been lowered down, without any alteration of service conditions, the conditions are disadvantageous to the applicants and they are altered to their detriment without any opportunity, which cannot be countenanced in law.
>
> 7. Accordingly, the TAs stand disposed of with a direction to the respondents to consider the claim of applicants for enhancing the pay scale in ACP, within a period of three months from the date of receipt of a copy of this order. No costs." **(Para 4)**

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Ms. Mini Pushkarna.

FOR THE RESPONDENTS : Ms. Rekha Palli with Ms. Punam Singh Ms. Radhika Gupta proxy for Ms. Kanika Agnihotri.

RESULT: Petition Dismissed.

BADAR DURREZ AHMED, J. (ORAL)

1. The Municipal Corporation of Delhi (MCD) has filed these writ petitions, which arise out of the common order dated 18.11.2011 passed in TA 931/2009 and TA 933/2009 by the Central Administrative Tribunal, Principal Bench, New Delhi. Earlier, the private respondents had approached this Court by way of two separate writ petitions, which were subsequently transferred to the Tribunal and were given the aforesaid TA Nos. 931/2009 and TA 933/2009.

2. The private respondents are pump operators, malis and chowkidars, who were hitherto employed in the Delhi Development Authority (DDA). By an order dated 02.12.1994, certain colonies had been transferred from the Delhi Development Authority to the Municipal Corporation of Delhi, as a result of which, the private respondents, who were DDA employees also stood transferred to MCD. The terms and conditions of their transfer, inter alia, included clause 6, which is as follows:

> "Every employee shall on and from the date of his transfer to the Corporation, shall become an employee of the Corporation with such designation as the Commissioner may determine and shall hold office by the same tenure, remuneration and on the same terms and conditions of service as he would have held, if he had continued to be in the DDA unless and until such tenure, remuneration and terms and conditions are duly altered by the Corporation. However, the same shall not be to his disadvantage without the previous sanction of the Corporation."
>
> (underlining added)

3. The private respondents had claimed the ACP pay scale as was applicable in the DDA, whereas they had been given the ACP pay scale as was applicable with the MCD. The private respondents had urged before the Tribunal that clause 6 clearly saved their future benefits which they would have got had they continued in the DDA. On the other hand,

it was argued on behalf of the petitioner that the benefits that were available to the private respondents ought to be reckoned only on the date of the transfer and should not extend to future benefits.

4. However, on construing and considering the provisions of clause 6 of the terms and conditions of transfer, it is apparent that the private respondents were entitled to the same terms and conditions of service as they would have had if they had continued with the DDA unless and until such tenure, remuneration and terms and conditions were duly altered by the MCD. Admittedly, there has been no such alteration of the terms and conditions of service. Consequently, the private respondents would be entitled to be treated as if they had continued with the DDA and, therefore, all the benefits that would have been derived by them had they continued with the DDA, would be available to them. This is exactly what the Tribunal has decided, as would be apparent from the following extract:

> "6. On careful consideration of the rival contentions of the parties, in our considered view, on transfer of applicants from DDA to MCD what has been protected and safeguarded is not the terms and conditions, as existed but also on the premise that the same would be admissible if they had continued to be in DDA. This clearly establishes that even the future benefits are also protected in DDA. The only exception to deny is when the terms and conditions are altered by the Corporation, which have not been altered. As we find that in DDA the higher pay scale has been given to these categories as ACP pay scale, the same having been lowered down, without any alteration of service conditions, the conditions are disadvantageous to the applicants and they are altered to their detriment without any opportunity, which cannot be countenanced in law.
>
> 7. Accordingly, the TAs stand disposed of with a direction to the respondents to consider the claim of applicants for enhancing the pay scale in ACP, within a period of three months from the date of receipt of a copy of this order. No costs."

5. We see no reason to interfere with the impugned order passed by the Tribunal. The writ petitions are dismissed.

ILR (2012) III DELHI 567
RFA

ANIL BHAMBRI ….PETITIONER

VERSUS

NORTH DELHI POWER LTD. ….RESPONDENT

(VALMIKI J. MEHTA, J.)

RFA. NO. : 567/2011 DATE OF DECISION: 01.03.2012

Code of Civil Procedure, 1908—Section 9—Order 7 Rule 11—Limitation Act, 1963—Section 14—Consumer Protection Act, 1986—Section 2 (d)—District Consumer Forum dismissed as withdrawn petition of appellant/plaintiff because appellant/plaintiff was not found to be a Consumer under Consumer Protection Act, 1986—Suit filed by appellant/plaintiff for declaration, challenging electricity bill issued by respondent/defendant—Trial Court rejected plaint holding that suit was barred by limitation—Trial Court refused to give benefit of period spent by appellant/plaintiff in pursuing proceedings for similarly relief in consumer forum, Delhi—Order challenged before High Court—Held—Impression with respect to definition of a person being or not being a consumer is a legal issue and if there is a particular opinion of a legal issue there can not be said to be any lack of bonafides for denying benefit of section 14 of Limitation Act, to appellant/plaintiff—Once a plaintiff pursues, in bonafide manner, a claim in wrong forum which did not have jurisdiction, such a plaintiff is entitled to benefit of exclusion of period under section 14 of Limitation Act, spent in wrong forum—Once this period is excluded, suit will be within limitation—Appeal accepted—Impugned judgment set aside.

Surely, an impression with respect to definition of a person being or not being a consumer is a legal issue and if there is a particular opinion of a legal issue there cannot be said to be any lack of bonafides for denying the benefit of Section 14 of the Limitation Act, 1963 to the appellant/plaintiff. Once a plaintiff pursues, in bonafide manner, a claim in wrong forum which did not have jurisdiction, such a plaintiff is entitled to the benefit of exclusion of the period under Section 14 of the Limitation Act, 1963 spent in the wrong forum. **(Para 4)**

Important Issue Involved: An impression with respect to definition of a person being or not being a consumer as per Consumer Protection Act, 1986 is a legal issue and if there is a particular opinion of a legal issue there can not be said to be any lack of bonafides for denying the benefit of Section 14 of the Limitation Act, 1963 to the plaintiff.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Bhagabati Prasad Padhy, Advocate.

FOR THE RESPONDENT : Mr. Manish Srivastava Advocate.

RESULT: Allowed.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 15.11.2011 rejecting the plaint under Order 7 Rule 11 CPC by holding that the suit was barred by limitation. The Trial Court refused to give the benefit of Section 14 of the Limitation Act, 1963 for the period spent by the appellant/plaintiff in pursuing the proceedings for similar relief in the Consumer Forum, Delhi. The subject suit was filed for declaration, challenging the electricity bill issued by the respondent/defendant for ‘8,27,760/- in respect of K

No. 33400951708 located at 18A/2, Industrial Area, Phase-II, Naraina, New Delhi.

2. The appellant/plaintiff had approached the District Consumer Forum in New Delhi to challenge the bill where he has deposited a sum of Rs. 2,50,000/-, however, the Consumer Forum dismissed the petition as withdrawn because the appellant/plaintiff was found not to be a 'consumer' under the Consumer Protection Act, 1986.

3. The Trial Court has observed as under for denying the benefit of Section 14 of the Limitation Act to the appellant/plaintiff:-

> "11. To get the exclusion of time u/s 14 of the Limitation Act one should be prosecuting the lis with due diligence and must be in good faith. In my considered opinion the word 'due diligence' u/s 14 of the Limitation Act covers the knowledge of relevant legal provisions. In the year 1993 and 2002, section 2 of the Consumer Protection Act was amended and by the said amendments the persons who avail goods/services for any commercial purposes were excluded from the definition of consumer. The plaintiff raised the dispute in the year 2007 before the consumer forum. Simple reading of the definition of the word 'consumer' is sufficient to understand that if a person is availing services for commercial purposes then he is not entitled to get any relief from the consumer forum. The plaintiff did not raise dispute before the forum established u/s 42(5) of the Electricity Act, which is created exclusively for the purpose of redressal of grievances pertaining to billing disputes amongst others for the reasons best known to him.
>
> 12. As discussed hereinabove, a bare reading of section 2(d) of the Consumer Protection Act makes it clear that a person who is availing services for commercial purposes is not a consumer under the Consumer Protection Act. The amendments to the section 2(d) of Consumer Protection Act were made in the year 1993 and 2002 and the complaint was filed the plaintiff in the year 2007. Plaintiff cannot plead the ignorance of law by merely saying that his complaint was entertained by the District Consumer Forum and interim relief was also granted. The contention of the plaintiff that the defendant did not prefer any appeal or revision

> against the proceedings before the District Consumer Forum is also not acceptable on simple ground that the conduct of the defendant before the forum does not change or alter the law of limitation. The compliance of interim order of the forum by the defendant can only be considered as an act of propriety by the defendant. Apart from that the word 'good faith' in section 14 of the Limitation Act is also important to get the benefit of exclusion of time under the said section. It was well within the knowledge of the plaintiff that there is a forum established u/s 4295) of the Electricity Act by notification dated 11.03.04 to resolve the billing disputes. The plaintiff did not even choose to approach the Forum under the Electricity Act despite the fact that the dispute between the plaintiff and the defendant is essentially a billing dispute. The conduct of the plaintiff in approaching the District Consumer Dispute Redressal Forum cannot therefore be termed as an act done in good faith.
>
> 13. In view of the above, I am of the considered opinion that the plaintiff is not entitled to get the benefit of exclusion of time u/s 14 of the Limitation Act. Admittedly, the dispute arose between the plaintiff and the defendant on 31.08.07 when an amount of Rs. 7,88,018.68/- was added to the bill bearing no. 0708550708 dated 31.08.07. The limitation as provided under article 58 in part III of Schedule appended to Limitation Act, 1963 to seek declaration is three years which starts when the right to sue first accrues. The plaintiff ought to have filed a suit within three years, i.e., on or before 31.08.2010. Present suit is filed on 22.07.2011 which is obviously beyond the period of 3 years which is a valid ground u/o 7 Rule 11(d) of CPC for rejection of the plaint. Even otherwise, section 3 of the Limitation Act mandates that every suit instituted after the prescribed period shall be dismissed even though expiry of limitation has not been raised as defence."

4. Surely, an impression with respect to definition of a person being or not being a consumer is a legal issue and if there is a particular opinion of a legal issue there cannot be said to be any lack of bonafides for denying the benefit of Section 14 of the Limitation Act, 1963 to the appellant/plaintiff. Once a plaintiff pursues, in bonafide manner, a claim

in wrong forum which did not have jurisdiction, such a plaintiff is entitled to the benefit of exclusion of the period under Section 14 of the Limitation Act, 1963 spent in the wrong forum.

5. In view of the aforesaid facts, counsel for the respondent/defendant did not seriously contest the setting aside of the impugned order and for giving the benefit of Section 14 of the Limitation Act, 1963 to the appellant/plaintiff.

6. In view of the above, the appeal is accepted. Impugned judgment dated 15.11.2011 is set aside. The appellant/plaintiff will be entitled to exclusion of the period spent before the Consumer Forum, Delhi under Section 14 of the Limitation Act, 1963. As admitted by both the counsel before me, once this period is excluded, the suit then will be within the limitation. It is, therefore, held that the suit filed by the appellant/plaintiff is within limitation.

7. Nothing contained in the present order is a reflection on merits of case of either of the parties, and the Trial Court will hear and dispose of the suit in accordance with law.

8. Parties to appear before the District Judge, Dwarka Courts, New Delhi on 27th March, 2012, on which date, the District Judge will mark the suit for disposal before the competent forum in accordance with law.

9. Parties are left to bear their own costs.

10. Interim order passed by this Court will continue till the disposal of the application of the appellant/plaintiff filed under Order 39 Rule 1 & 2 CPC, however, continuation of the interim order is no reflection on the entitlement or disentitlement to the interim relief as asked for by the appellant/plaintiff.

11. Appeal is disposed of with the aforesaid observations and directions. Trial Court record be sent back.

ILR (2012) III DELHI 572
CRL. M.C.

MANISH JAIN ….PETITIONER

VERSUS

STATE OF NCT OF DELHI & ORS. ….RESPONDENTS

(SURESH KAIT, J.)

CRL. M.C. NO. : 1564/2008 DATE OF DECISION: 15.03.2012

Code of Criminal Procedure, 1973—Cancellation of bail—Respondents No. 2&3 accused in FIR for offence under Sec.420/406/467/468/471/120B IPC—Respondents kept making false promises to pay the alleged outstanding amount to petitioner and kept obtaining conditional bail repeatedly and kept flouting the condition over a span of four years—Held—once bail is granted, court does not normally cancel the same unless situation warrants, but if any undertaking given by the accused before the court is flouted, concession of bail may be withdrawn, so it is fit case to cancel bail.

Respondent nos. 2 & 3 have been making false promises to the petitioner before this Court. It is not a case that respondents no. 2 & 3 failed once or twice. Perusal of the order sheets reveals that respondents no. 2 & 3 have taken the courts for granted. They do not bother what would be the consequences. Thus, they not only mislead the court also wasted the public time, as this petition has been listed on various dates for the last 4 years. Respondents no. 2 & 3 have bluffed the petitioner and the court as well and therefore they do not deserve any leniency and sympathy. **(Para 47)**

Even otherwise, granting bail is discretionary of the court,

keeping in view the total facts and circumstances of the case. Once it is granted, the court normally does not cancel it, until and unless the situation warrants. But the accused has to be vigilant and careful not to break any of the undertaking or promise given before the court. If, he does so, the courts have powers to withdraw the concession granted. Such concession is neither permanent nor absolute. It is always with observations or conditions. Therefore, if any of the undertaking given before the court found to be not complied with, then the concession granted may be withdrawn. The present case is fit into this situation. **(Para 48)**

Important Issue Involved: Once bail is granted, court does not normally cancel the same, unless situation warrants, but if any undertaking giving by the accused before the court is flouted, concession of bail may be withdrawn.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Dharmendra Priyani, Advocate.

FOR THE RESPONDENTS : Mr. Rajdipa Behura, APP for State/ R1, Mr. R.N. Mittal, Sr. Advocate with Mr. Apurb Lal, Ms. Kumari Alka and Mr. Ruchir Advocates for R-2 & R-3. Mr. Anil Kr. Agarwal.

RESULT: Petition allowed.

SURESH KAIT, J.

Crl. M.A. 8454/2011

1. Vide the instant application, applicant Sanjay Kumar @ Sanjay Goyal has prayed for intervention and to be impleaded as interested party to contest the present petition.

2. It is submitted in the instant application that applicant is engaged in manufacturing and trading of stainless steel utensils. On his visit to Dubai sometimes in the year 2003, had a meeting, by chance, with the

respondents accused brothers Vijay Choudhary and Sandeep Choudhary. They introduced themselves to the applicant as the exporters from India dealing in export of stainless steel utensils in the name M/s. Jewel Craft at B-2/3 Model Town, Part-II, Delhi.

3. The applicant and the above named accused brothers entered into an understanding, thereby the accused brothers were to procure export orders and the applicant was to supply them utensils as per the order on receiving cheque from accused brothers as security against the cost on material supplied.

4. The accused brothers were to export utensils through IIIrd Party Export House. The applicant was to raise a bill in the name of Export House identified by the accused brothers, who were to procure, within 30 days of supply of utensils by the applicant, and pass on direct payment by the Export Houses to the applicant, on release / return of their own cheque of security.

5. In case of default, the accused brothers in getting to the applicant payment from the export houses, the applicant shall encash the cheque of security issued by the accused brothers.

6. It is further stated in the instant application that at the instance of accused brothers, applicant supplied them stainless steel utensils in the name of the some of the export house concerns as details below:

1. M/s. Jain Art Jewels.
2. M/s. Uni Direction Corporation
3. M/s. Premier Rice Land.
4. M/s. MVSL Trading Company
5. M/s. Delhi Mercantile Company
6. M/s. Pathetic Engineering Works
7. M/s. Overseas Jewels Inc.
8. M/s. Inder commercial (P) Ltd.
9. M/s. Sharan International
10. M/s. Am Kay Associates.

7. It is further stated in the instant application that initially the business transactions went on smoothly. The accused brothers used to

collect the cheque payment from the exporters in time and after handing over the same to the applicant, they used to take back from the applicant, their cheque/s given as collateral advance. However, some bills raised during the financial year 2003-2004 remained pending.

8. It is further stated that after gaining the applicant's confidence in this manner accused brothers namely Vijay Chaudhary and Sandeep Chanduary issued various cheques of collateral advance amounting to Rs.1,90,17,416/- to the applicant during the financial year 2004-2005 for supply of utensils. After receiving the supply of the goods / utensils against the collateral advance / cheques from the applicant, accused brothers duo defaulted in giving cheques of actual payments from export houses to the applicant.

9. It is further submitted that whenever the applicant contacted the accused brothers to enquire about the payment due, they avoided him in one pretext or the other.

10. The Investing Officer seized the aforesaid cheques of accused, choudhary brothers from the applicant. Copy of cheque of security advance are placed on record as Annexure - A1.

11. It is further submitted that on contacting, Mr. Manish Jain, petitioner in the instant petition, the Partner of M/s. Jain Art Jewels, one of the export house to whom the utensils / goods were supplied by accused brothers, Manish Jain told him that he had already issued the cheques in the name of the applicant Firm Prime Enterprises against each of their orders and goods supplied and had handed over the same to the Chaudhary brothers and the said cheques were got encashed, but no payment whatsoever was received in the account of the applicant's firm Prime Enterprises.

12. It is further stated that the applicant was also informed by Manish Jain that Chaudhary brothers have opened a fake account in the name of the applicant's firm Prime Enterprises in another bank namely Federal Bank, Connaught Place Branch, with ulterior motives and malafide criminal intention to misappropriate the money due to the applicant. The accused brothers deposited the cheques received by them from the exporters against the goods / utensils supplied by the applicant in the said fake account and misappropriated the property / money rightfully due to the applicant.

13. It is fairly conceded by the applicant in the instant application that since he had no proof of delivery of utensils supplied during the financial year 2004-2005 to the exporters through the accused Choudhary brothers against which the payment was purportedly made by the exporters and deposited by the Chaudhary brothers in the fake account of the applicant's firm Prime Enterprises, the applicant did not institute any criminal or civil proceedings against Chaudhary brothers.

14. It is further submitted that the applicant was assured by Manish Jain (petitioner herein) and other exporters that they will initiate criminal action against Chaudhary brothers and on getting back from the accused brothers, the exporters would settle and clear all payments due to the applicant.

15. However, the applicant later on got informed that accused brothers and Manish Jain (petitioner herein) and other owners / partners of the export houses to whom utensils were supplied through the accused brothers have already shared and divided the misappropriated the money of the applicant, amongst themselves, but even before the applicant was informed about the fake account.

16. Though reply to the instant application has been filed by the non-applicant / respondent no. 2 & 3 and the petitioner, however, in the facts and circumstances as narrated by the applicant in the instant application, I am of the considered opinion that in this manner applicant cannot be allowed to be an intervener in the instant petition, as he has not initiated any civil or criminal proceedings against the petitioner or against respondent no. 2 & 3. Therefore, if he is aggrieved by any of the act or omission, which is against any law enforceable then he has liberty to take appropriate steps before the appropriate forum.

17. In the facts and circumstances, as discussed above, I find no merit in the instant application.

18. Crl. M.A. 8454/2011 is accordingly dismissed.

+ Crl. M.C.1564/2008

1. Vide the instant petition, the petitioner has sought to cancel the regular bail granted vide order dated 16.03.2007 to respondent no. 2 & 3 in Case FIR no. 283/05 registered at PS-Connaught Place for the offences punishable under Section 420/406/467/468/471/120B IPC.

2. Mr. Dharmender Priyani, ld. Counsel for petitioner submits that on the complaint of petitioner, FIR was lodged by Economic Offence Wing against respondent no. 2 & 3 for misappropriation of money by their fraudulent and dishonest misrepresentations that they were exporters for various foreign exporters and were dealing in Stainless Steel Utensils. They also claimed that they had huge orders from various parties, but they were short of funds, that is why they could not execute the same.

3. It is further submitted that in the month of January, 2004, respondent no. 2 & 3 approached the petitioner and asked for some amount to be paid to M/s. Primary Enterprise as advance. On their representation, petitioner gave Rs.77,00,000/- (Rupees Seventy Seven lacs) on various dates. All payments were made by cheques. When no utensils were given to the petitioner for some time, the petitioner became panicky and later on found that the respondent had not paid any money to M/s. Prime Enterprises and have siphoned of the money themselves.

4. After enquiry, it was found that the accused persons have opened fictitious bank account in the name of M/s. Prime Enterprise and siphoned off the money given by the petitioner for the original company and instead of handing over the cheques to that company, a fictitious account was opened with forged documents in the bank and the cheques were deposited and money accordingly misappropriated. Accordingly, a case was registered against respondent no. 2 & 3.

5. It is further submitted that respondent no. 2 & 3 were arrested on the date of FIR i.e. on 18.05.2005. Vide order dated 22.05.2005, they were granted conditional interim bail by ld. MM for 2 months, including the condition they shall make the payment to the complainant within a period of 2 months and settle their accounts.

6. On the application moved by State and petitioner under Section 439 (2) Cr.P.C., the regular bail granted to respondent no 2 & 3 was cancelled by ld. Addl. Sessions Judge, Patiala House Courts, New Delhi. Accordingly on 07.06.2005, respondent no. 2 & 3 surrendered before the ld. MM and they were sent to judicial custody.

7. Ld. Counsel has further submitted that on 17.6.2005, bail application filed by the accused persons were dismissed as withdrawn from the Court of Addl. District & Sessions Judge.

8. Thereafter again on 23.06.2005, bail application of respondent no. 2 & 3 were dismissed by ld. MM, Patiala House Courts, Delhi. The second bail application of respondents was dismissed by ld. Addl. District & Sessions Judge, vide its order dated 11.07.2005.

9. Charge-sheet was filed by the Crime Branch against both the respondents mentioned above. Thereafter another bail application filed by respondent no. 2 & 3, which was also dismissed by ld. MM, Patiala House Courts, New Delhi vide its order dated 30.08.2005.

10. Thereafter, on application being moved before the ld. Addl. District & Sessions Judge, respondent no. 2 Sandeep Chowdhury was granted interim bail for one month as respondents offered to make payment to the petitioner and also to other complainants, and matter was listed on 28.09.2005.

11. Vide order dated 10.09.2005, passed by ld. Addl. District & Sessions Judge, interim bail was granted to respondent no. 3 also. Thereafter on 17.09.2005, respondent no. 2 & 3 entered into a Memorandum of Understanding with petitioner and with other complainant. Accordingly, interim bail of both the respondents were extended till 15.12.2005 and ultimately thereafter extended up to 26.09.2006.

12. Ld. Counsel for the petitioner has pointed out that respondent no. 2 & 3 never honoured their commitments and made default in the payments to the complaints.

13. It is further submitted that on the application of respondent no. 2, ld. Addl. Sessions Judge condone the delay in payment vide order dated 14.09.2006 and directed the respondent to clear the entire payment along with interest @ 8% per annum vide 26.09.2006.

14. Vide Crl. M.C. No. 5987-88/2006 filed before this Court, respondent no. 2 and 3 sought extension of time of payment of instalments, at request their interim bail was extended till 16.10.2006.

15. During interim protection, again respondents approached this Court and vide Crl. M.C. 6594-96/2006 sought confirmation of interim bail; deletion / modifications of terms and condition imposed by Addl. District Judge, New Delhi while granting interim bail, with the directions to respondent no. 2 to make further payment from January, 2007 onwards and challanged the order.

16. Thereafter, on 18.09.2005, they entered into another MOU in continuation of the previous MOU with the petitioner wherein they acknowledge the previous MOU and again made commitment to pay.

17. Accordingly, the respondents sought extension of interim bail on the basis of the MOU with the complainants and present petitioner.

18. Ld. Counsel for the petitioner further asserted that this court dismissed the Crl. M.C. No. 6594-95/2006 of respondent no. 2 & 3 and remanded back the bail matter to ld. ASJ to decide the bail on merit of the respondents.

19. Thereafter on 02.03.2007, respondents filed Crl. MA. 1981/2007 while seeking permission to deposit the installments amount of the MOU with Registrar of this Court along with undertaking that they will deposit further instalments before 15th day of every month.

20. Vide order dated 14.03.2007, bail application of respondent o. 2 & 3 were dismissed by ld. ASJ, Patiala House Courts, after hearing on merit as per the direction of this Court.

21. They again approached this court and on 16.03.2007, this Court accordingly granted bail to respondent no 2 & 3 with directions to abide by the terms and conditions of the MOU. The bail bonds of the respondent no. 2 & 3 were accepted by ld. MM on 02.05.2007 in compliance of the order dated 16.03.2007.

22. Supplementary charge-sheet was filed by the Crime Branch, EOW 01.06.2007, thereafter on 24.02.2008, petitioner wrote a letter to respondents reminded them about the order dated 16.02.2007, passed by Coordinate Bench of this Court and also the undertaking given by them to encash the post-dated cheque of Rs.32,00,000/-. However, the respondents did not reply to the letter. The petitioner had no option but to deposit the cheque in the Bank for encashment.

23. On 19.03.2008, Cheque of Rs. 32, 00,000/- issued by Respondent no. 3 Vijay Chowdhury was dishonoured by their Bankers for the reasons "Insufficient Fund". Accordingly on 08.04.2008, petitioner issued notice informing respondent no. 2 & 3 about the dishonour of cheque and also informed them about their fraudulent and malafide intention seeking one year's time on the pretext of false undertaking. Accordingly, they were called upon to Pay Rs.32,00,000/- within 15 days of the receipt of

notice.

24. Vide their reply dated 22.04.2008, respondents no. 2 & 3 stated that they did not have any legally enforceable liability to pay Rs.32,00,000/- and further stated that the cheque shall get honoured only after the quashing of FIR.

25. Due to the violation of undertaking given before various courts including this Court, as discussed above the petitioner has filed the instant petition.

26. Mr. R.N. Mittal, Sr. Advocate appearing on behalf of the respondents no. 2 & 3 submits that FIR no. 283/2005, under Section 420/406/467/468/471/120B IPC was registered against the respondents no. 2 & 3 on the allegations that from the month of May, 2004 to July, 2004, Rs.35,61,500/- were returned by them in the account of the petitioner and still balance of Rs.41,38,500/- remained to be paid back to the petitioner. Respondent no. 3 Vijay Choudhary assured the petitioner that balance payment would be made soon, as they are getting further orders. However, one day, petitioner received a phone call from M/s Prime Enterprises for submitting ST-49 Form and on enquiries, came to know that they had never received the payment as aforesaid, nor any order was received by them for fabricating the utensils nor was the consignment was ever rejected. The petitioner had a talk with Mr. Sanjay Kumar, Proprietor of M/s. Prime Enterprises, who informed them that they did not receive Rs.77,00,000/- as mentioned above. Hence, there was no question of refund of Rs.35,61,500/-.

27. It is further recorded in the FIR that petitioner went to Federal Bank at Connaught Place, bank of respondents no. 2 & 3 and on enquiries, they told that Vijay Chaudhary, respondent no. 3 had opened an account in the name of Prime Enterprise situated at B-2/3, Model Town-II, Delhi - 110009 and the account was introduced by his brother Sandeep Chaudhary, respondent no. 2 in the same branch. All these payments as aforesaid, they received from them vide Cheques to be paid to Prime Enterprises A-103/10, Industrial Area, Wazirpur, Delhi, which were deposited for payments in their accounts.

28. It is further recorded in the aforesaid FIR that they got opened a fictitious accounts in the name of Proprietorship firm and got deposited the cheques in the said account and when they put pressure on them, to

gain time to gain confidence, they got Rs.35,61,500/- transferred to their accounts by transfer entries, however they told them that account had been refunded to them by Prime Enterprises Wazirpur Industrial Estate, Delhi. By this *Modus Operandi* both these brothers respondent no. 2 & 3 in conspiracy with each other had dishonest intentions from the beginning to cheat the petitioner for the huge amount and in the initial stage as per the plan gain confidence and subsequently cheated them, by getting the forged and fabricated accounts opened in a bank and got depositing the cheques, which were not meant for them and hand over them and caused wrongful loss to the complainant /petitioner of Rs.41, 38,500/-.

29. Mr. R.N.Mittal, Sr. Adv. has drawn the attention of this court to the order passed in Bail Appl. NO. 614/2007 & Crl. M.A. No. 409/2007 in Crl. M.C. 3247/2009 (for Extension of Bail) & Crl. Ma. 2357/2009 passed by the predecessor Court, wherein the respondents (petitioner herein) admitted that petitioners (respondent no. 2 & 3 herein) have paid the settled amount in petition mentioned above i.e Crl. M.C. 3247/2007. Therefore, petitioners will have no objection for quashing of the FIR in case any such petition filed.

30. In view of the compromise, counsel for the petitioners sought leave to withdraw the petition and accordingly the said petition was dismissed as withdrawn.

31. Ld. Counsel has further drawn the attention of this Court to the order dated 16.03.2007 passed by Coordinate Bench of this Court in Crl. M.C. 3063/2007 and Crl. M.C. 3064/2004 wherein on instruction from the petitioners (Respondent no. 2 & 3 herein) submitted as under:

> "They have settled the matter and payment will be made by the petitioners to Sh. Manish Jain and Shri Tarun Vij as per the MOU, starting from 15th April, 2007 for a sum of Rs.2 Lacs every month (Rs.1,50,000/- to Shri TarunVij) till their balance claim which is the subject matter of this FIR is exhausted.
>
> Petitioners also agreed that there is another MOU, though that does pertain to the present FIR, yet the petitioners are ready and willing to make the balance payment of Rs.32 Lacs (Rs.30 Lacs Principal + Rs. 2 Lacs interest on account of delay in payment) though a post dated cheque in terms of the said MOU as well, which will be got encashed by Shri Manish Jain after one year, subject to the quashing of the FIR bearing no. 283/2005, Police Station - Connaught Place."

32. Mr. R.N. Mittal, Sr. Adv. has further submitted that as per the MOU, starting from 15.04.2007, a sum of Rs.2 Lacs every month (Rs.1,50,000/- to Sh. Manish Jain and Rs.50,000/- to Sh. Tarun Vij) shall be paid till their balance claim, which is the subject matter of this FIR.

33. It is further submitted that respondent no. 2 & 3 also agreed that there was another MOU though that does not pertain to present FIR, yet the respondents no. 2 & 3 were ready and willing to make the balance payment of Rs.32,00,000/- (Rs.30,00,000/- in Principal + Rs.2,00,000/- as interest on account of delay in payment) though post dated cheque in terms of the said MOU as well as it will be got encashed by Sh. Manish Jain (petitioner herein) after one year subject, to the quashing of the FIR bearing no. 283/2005, police station - Connaught Place.

34. Ld. Counsel has further submitted that there is no violation of the order dated 16.03.2007 and the claim herein of the petitioner is qua another MOU as mentioned in the order dated 16.03.2007. Therefore, the instant petition cannot be allowed.

35. On perusal of the order dated 16.03.2007, it is emerged that after seeing the sincerety of respondent no. 2 & 3 and settlement / agreement including in another MOU, it is recorded in the said order that:

> "Respondents shall abide by the terms and conditions of MOU and settlement made by them herein above and shall not commit any default in the payment of the installments as offered by the complainants."

36. Vide order dated 16.03.2007 respondents no. 2 & 3 were directed not to leave the country without prior permission of the ld. trial Magistrate and shall file the affidavit to this effect before the ld. Magistrate within 2 weeks.

37. Vide the said order 3 days time for furnishing bail bonds and surety bonds, before the ld. Trial Magistrate, were granted. Accordingly, trial court accepted their bail bonds and released them on bail.

38. As per the statement of respondent no. 2 & 3, they were agreed

to make the payments as per the aforementioned MOUs mentioned above, therefore at this stage, they cannot say that they agreed to another MOU voluntarily and are not bound to make the payment.

39. The instant petition filed way back in the year 2008 and on 13.05.2008, notice issued to the respondents, and the matter was adjourned to 27.05.2008. However, they did not appear and on that day Predecessor Court directed the IO concerned, who was present in the court to ensure the presence of the respondent no. 2 & 3 / accused persons in the court.

40. Accordingly, on 17.07.2008, Counsel appeared on behalf of respondent no. 2 & 3 and sought time to file reply.

41. I note, as recorded in the order dated 01.10.2008, after some arguments, submitted by ld. Counsel for respondents, that he will seek instruction from the respondents no. 2 & 3 whether they are prepared to pay Rs.32,00,000/- to the petitioner, if some more time was to be granted. Accordingly, matter was adjourned.

42. Counsel for the petitioner was prepared to accept the offer of the respondents to pay remaining amount in instalments of Rs. 1,00,000/- per month, as is recorded in the order dated 02.02.2008.

43. I further note, it is recorded in order dated 27.01.2009 that:

> "At the outset Mr. Mittal, Ld. Sr. Counsel appearing for the respondents no. 2 & 3 states that the reply filed on behalf of respondents no. 2 & 3 in this Court on 20th August, 2008 in Crl. M.C. No. 1564 of 2008 was a mistake and he has instructions from he said two Respondents to unconditionally withdraw the entire reply and further that they apologise this Court for the inconvenience caused. The said reply dated 20th August, 2008 would therefore stand withdrawn. As regards the affidavit dated 24th November, 2008 filed by Sandeep Chaudhary enclosing a proposed payment plan, Mr.Mittal submits that as far as Tarun Vij is concerned, he is not present before this Court and his instructions are that payments have been made to Tarun Vij as per the order dated 16th March, 2007 passed by this Court granting bail to Respondents no. 2 & 3. There is no case for any grievance on behalf of Tarun Vij.
>
> As regards Manish Jain and Narinder Kumar are concerned, Mr. Mittal states that two demand drafts favouring each of them in the sum of Rs.1,50,000/- will be produced in this Court on 2nd February, 2009 without fail to demonstrate the bonafides of the respondents that they will be making the payments as per the proposed payment plan."

44. Thereafter on various dates, respondents no. 2 & 3 continued to make the payment as their wishes and used make promises to make the payments as per the agreed plan and understanding.

45. Mr. R.N. Mittal, Ld. Sr. Advocate appearing on behalf of the respondents has submitted that due to some loss in the business, they could not adhere with the promise made before the Courts on various dates and could make the payment within the stipulated period.

46. I further note that vide order dated 27.07.2010 of this Court it is clarified that if the respondent no. 2 & 3 failed to clear all the dues within the stipulated period, a contempt proceedings shall be initiated against them. Thereafter till date on one pretext or the other, respondent no. 2 & 3 has not complied the order dated 16.03.2007 in letter and spirit.

47. Respondent nos. 2 & 3 have been making false promises to the petitioner before this Court. It is not a case that respondents no. 2 & 3 failed once or twice. Perusal of the order sheets reveals that respondents no. 2 & 3 have taken the courts for granted. They do not bother what would be the consequences. Thus, they not only mislead the court also wasted the public time, as this petition has been listed on various dates for the last 4 years. Respondents no. 2 & 3 have bluffed the petitioner and the court as well and therefore they do not deserve any leniency and sympathy.

48. Even otherwise, granting bail is discretionary of the court, keeping in view the total facts and circumstances of the case. Once it is granted, the court normally does not cancel it, until and unless the situation warrants. But the accused has to be vigilant and careful not to break any of the undertaking or promise given before the court. If, he does so, the courts have powers to withdraw the concession granted. Such concession is neither permanent nor absolute. It is always with observations or conditions. Therefore, if any of the undertaking given

before the court found to be not complied with, then the concession granted may be withdrawn. The present case is fit into this situation.

49. Keeping in view the facts and circumstances as discussed above, bail granted to respondents no. 2 & 3 vide order dated 16.03.2007 in FIR no. 283/2005, registered at PS-Cannought Place, under Section mentioned above, is hereby cancelled.

50. Consequently, Crl. M.C. 1564/2008 is allowed with costs of Rs.50,000/- each on the respondents no. 2 & 3 to be paid in favour of High Court Legal Services Committed.

51. The above mentioned costs shall be deposited within three months from the date of receipt of this order. Proof of the same shall also be placed on record.

ILR (2012) III DELHI 585
MAC. APP.

DHANESHWARI & ANR. ….APPELLANTS

VERSUS

TEJESHWAR SINGH & ORS. ….RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 997/2011, 203/2006, 955/2011, 958/2011, 461/2010, 768/2010, 137/2011, 566/2010, 81/2011, 493/2011, 536/2011, 862/2011, 38/2011, 40/2011 & 39/2011

DATE OF DECISION: 19.03.2012

Motor Vehicle Act, 1988—Section 2 (30), 163 A, 166 and 168-Common question of law for determination in these appeals was Whether, in view of Devision Bench of

judgment of this Court in *Delhi Transport Corporation and Anr.* vs. *Kumari Lalita* 22 (1982) DLT 170 (DB) and *Rattan Lal Mehta* vs. *Rajinder Kapoor & Anr.* II (1996) ACCI (DB) increase towards inflation be granted, particularly when loss of dependency is to be assessed according to minimum wages?''—Contentions raised on behalf of Insurers, grant of compensation is based on liability of tortfeaser to pay damages to victim—Damages suffered must be proved by victim or his LRs as case may be—Court cannot take judicial notice of increase in future inflation as nobody knows what is in store in future—Damages are to be assessed on date of incident—Benefit of inflation is inbuilt in multiplier and if further addition is made, it would mean increase in multiplier and punishing tortfeaser beyond his liability—Per contra, plea taken on behalf of claimants, although benefit on account of inflation is not akin to future prospects, yet, court cannot be oblivious to trend over last six decades since independence—In case of minimum wages, claimants are entitled to benefit of 50% increase-Held-Compensation which is awarded on basis of multiplier method is such that as years go by, some amount should be taken out from principal sum so that time dependency comes to end, principal as well as interest earned on principal amount are exhausted-Compensation awarded in Indian perspective with a high inflation is unable to provide for full life expectancy even if some discount is made towards imponderables in life—Almost everybody working in govt. department gets at least 4 to 5 promotions during their tenure, in private sectors pastures are much greener for some and not so rosy for others-Compensation provided by court is far less than just compensation as envisaged under Act mainly on account of inflationary trend in this country—Though multiplier method does take care of future inflation yet on account of inflation which remains in double

digits in our country most of times, even after increase granted on account of future prospects compensation is not able to take care of actual loss of dependency—This court is bound by Division Bench judgment in *Rattan Lal Mehta* (Supra) which on aspect of multiplier taking care of future inflation was not brought to notice of this court earlier—Increase in minimum wages on account of inflation was not permissible-If benefit of inflation has to be given, everybody is entitled to that benefit and not person getting minimum wages, unless they are treated as a class by themselves—No addition in minimum wages can be made on account of inflation for computation of compensation.

In calculating the pecuniary loss to the dependants many imponderables enter into the calculation. Therefore, the actual extent of the pecuniary loss to the dependants may depend upon data which cannot be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. Shortly, stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained. **(Para 14)**

Important Issue Involved: (A) The compensation which is awarded on basis of multiplier method is such that as the years go by, some amount should be taken out from the principal sum so that by the time the dependency comes to an end the principal as well as interest earned on the principal amount are exhausted.

(B) No addition in the minimum wages can be made on account of inflation for computation of compensation

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Ms. Pooja Goel, Mr. R.B. Shami, Ms. Suman Bagga, Mr. Manish Maini, Mr. K.L. Nandwani, Mr. Peeush Sharma, Mr. Kanwal Choudhary, Advocates.

FOR THE RESPONDENT : Ms. Shantha Devi Raman, Mr. Charan Singh, Mr. Rupinder Pal Singh Simak, Mr. Rigasha Takkar, Mr. Sanjiv Gupta, Mr. Peeush Sharma, Mr. Anshuman Bal, Mr. Ashok Popli, Mr. Dalip Singh, Mr. Anil Kumar Shukla, Mr. F.M. Siddiqui, Advocates.

CASES REFERRED TO:

1. *Oriental Insurance Company Limited* vs. *Smt. Rajni Devi & Ors.* MAC APP.286/2011 decided on 06.01.2012.
2. *Smt. Gulabeeya Devi* vs. *Mehboob Ali & Ors.* MAC APP.463/2011 decided on 10.01.2012.
3. *IFFCO TOKIO Gen. Ins. Co. Ltd.* vs. *Rooniya Devi & Ors.* MAC APP.189/2011 decided on 30.01.2012.
4. *Laxman* vs. *Oriental Insurance Co. Ltd.,* (2011) 10 SCC 756.
5. *Sanjay Batham* vs. *Munnalal Parihar,* (2011) 10 SCC 665.
6. *Govind Yadav* vs. *New India Insurance Co. Ltd.* (2011) 10 SCC 683.
7. *Ibrahim* vs. *Raju,* (2011) 10 SCC 634.
8. *Sunil Sharma* vs. *Bachitar Singh* (2011) 11 SCC 425.
9. *Sant Singh* vs. *Sukhdev Singh,* (2011) 11 SCC 632.
10. *New India Assurance Company Limited* vs. *Rimjhim Ispat Ltd. & Ors.*. Suit No.280/2006 and 288/2006 bearing MAC APP.36/2011.
11. *New India Assurance Company Limited* vs. *Rimjhim Ispat*

Ltd. & Ors.. MAC APP.41/2011.

12. *Rubi (Chandra) Dutta* vs. *United India Insurance Co. Ltd.* (2011) 11 SCC 269.

13. *Royal Sundaram Alliance Insurance Co. Ltd.* vs. *Master Manmeet Singh & Ors.,* MAC.APP. 590/2011.

14. *Sunil Sharma* vs. *Bachitar Singh* (2011) 11 SCC 425.

15. *Raj Kumar* vs. *Ajay Kumar & Anr.,* 2011 (1) SCC 343.

16. *Arvind Kumar Mishra* vs. *New India Assurance Co. Ltd.,* (2010) 10 SCC 254.

17. *National Insurance Company Limited* vs. *Deepika & Ors.,* 2010 (4) ACJ 2221.

18. *United India Insurance Co. Ltd.* vs. *R. Vijayakumar,* (2010) 2 TN MAC 307 (Mad) (DB).

19. *Kuldeep Singh Bawa* vs. *Tika Ram,* MANU/DE/3525/2009.

20. *Ningamma & Anr.* vs. *United India Insurance Company Limited,* (2009) 13 SCC 710.

21. *United India Insurance Co. Ltd.* vs. *Bindu,* (2009) 3 SCC 705.

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

23. *Baby Radhika Gupta* vs. *Oriental Insurance Company Limited* (2009) 17 SCC 627.

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

25. *Kailash Kaur* vs. *New India Insurance Company,* MAC APP.318/2008 decided on 24.03.2009.

26. *T.O. Anthony* vs. *Karvarnani,* (2008) 3 SCC 748.

27. *Rajnaja Jain* vs. *Aditya Singh,* ILR (2008) 2 Delhi 968.

28. *New India Assurance Co. Ltd.* vs. *Ganga Devi & Ors.,* MAC APP.135/2008 dediced on 23.11.2009.

29. *New India Assurance Co. Ld.* vs. *Vijay Singh* MAC APP. 280/2008 decided on 09.05.2008.

30. *Ram Babu Tiwari* vs. *United India Insurance Co. Ltd. & Ors.,* (2008) 8 SCC 165.

31. *National Insurance Co. Ltd.* vs. *Kailash Devi,* 2008 ACC 77.

32. *Miss. Vidya Soni & Anr.* vs. *Pushpesh Dwivedi & Ors.,* AIR 2008 MP 319.

33. *National Insurance Company Ltd.* vs. *Renu Devi & Ors.,* III (2008) ACC 134.

34. *National Insurance Co. Ltd.* vs. *Pooja & Ors.,* II (2006) ACC 382 (2007 ACJ 1051).

35. *Anita Devi* vs. *Mohinder Singh,* ILR 2007 (2) Delhi 127.

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

37. *Om Kumari & Ors.* vs. *Shish Pal & Ors,* 140 (2007) DLT 62.

38. *National Insurance Co. Ltd.* vs. *Pooja & Ors.,* II (2006) ACC 382 (2007 ACJ 1051).

39. *Narinder Bishal and Anr.* vs. *Rambir Singh and Ors.* MAC. App. 1007-08/2006.

40. *P.Mathiyalagan* vs. *P. Sagunthala* (2006) 2 TN MAC 301.

41. *Bijov Kumar Dugar* vs. *Bidva Dhar Dutta and Others,* (2006) 3 SCC 242.

42. *Smt. Anari Devi* vs. *Shri Tilak Raj & Anr.,* II (2004) ACC 739; (2005 ACJ 1397).

43. *Oriental Insurance Company Limited* vs. *Paulose,* 2004 ACJ 457.

44. *Amar Singh Thukral* vs. *Sandeed Chhatwal,* ILR (2004) 2 Del 1.

45. *Abati Bezbaruah* vs. *Dy. Director General, Geological Survey of India, (*2003) 3 SCC 148.

46. *New India Assurance Co.* vs. *Kamla* (2001) 4 SCC 342.

47. *Lata Wadhwa & Ors.* vs. *State of Bihar & Ors.,* (2001) 8 SCC 197.

48. *Dr. T.V. Jose* vs. *Chacko P. M.,* AIR 2001 SC 3939.

49. *Rattan Lal Mehta* vs. *Rajinder Kapoor & Anr.* II (1996) ACC 1 (DB).

50. *General Manager, Kerala State Road Transport Corporation, Trivandrum* vs. *Susamma Thomas (Mrs.) and Ors.* (1994) 2 SCC 176.

51. *KSRTC* vs. *Susamma Thomas,* AIR 1994 SC 1631.

52. *Haji Zainullah Khan (Dead) by Lrs.* vs. *Nagar Mahapalika, Allahabad,* 1994 (5) SCC 667.

53. *Hindustan Concrete Pipe* vs. *Anjali Devi & Ors.,* 1990 ACJ 603.

54. *Naravva'* vs. *V.R. Shangde,* 1989 ACJ 715.

55. *A. Rajam* vs. *M. Manikya Reddy & Anr.,* MANU/AP/0303/1988.

56. *Bhagwandas* vs. *Mohd. Ariff,* AIR 1988 AP 99.

57. *Chairman A.P.S.R.T.C.* vs. *Shifya Khatoon,* AIR 1985 AP 83.

58. *Jones and Laughlin* vs. *Pfeifer,* 462 U.S. 523 (1983).

59. *Delhi Transport Corporation and Anr.* vs. *Kumari Lalita* 22 (1982) DLT 170 (DB).

60. *Padma Srinivasan* vs. *Premier Insurance Co. Ltd.* (1982) I SCC 613)(14).

61. *Todorovic* vs. *Waller,* (1981) 150 C.L.R. 402.

62. *Motor Owners' Insurance Co. Ltd.* vs. *J.K. Modi,* AIR 1981 SC 2059(11) (2060).

63. *Pickett* vs. *British Rail Engineering Ltd.* (1979) (I) All E.R. 774 (782) (10).

64. *Lim* vs. *Camden Health Authority* (1979) 3 WLR 44 (58) (13) (H.L.).

65. *Cookson* vs. *Koowles* (1979) AC 556(12).

66. *Moriarity* vs. *Mc'Carthy* (1978) (18) I WLR 155 (159).

67. *M.P. State Road Transport Corporation* vs. *Sudhakar* (1977) ACJ 290(17), 292 (SC).

68. *Regan* vs. *Williamson* 1977 ACJ 331 (QBD England).

69. *M/s. K. Richards & R. Kidner* in 124 New Law Journal, 1974, p.105).

70. *Mallet* vs. *Mc Monagle,* 1970 AC 166.

71. *Mallet* vs. *McMonagle,* (1970) AC 166.

72. *Yorkshire Electricity Board* vs. *Naylor* (1968) AC 529(16), 552.

73. *Morris* vs. *Rigby* (1966) 110 Sol Jo 834.

74. *Gobald Motor Service Ltd. & Anr.* vs. *R.M.K. Veluswami & Ors.,* AIR 1962 SC 1.

75. *Philips* vs. *Ward* (1956) I All E.R. 874, 877)(15).

76. *Nance* vs. *British Columbia Electric Railway Co. Ltd.,* (1951) AC 601.

77. *Davies* vs. *Powell Duffryn Associated Collieries Ltd.* (1942) 2 SCC 176.

78. *Chesapeake & Ohio Rly* vs. *Kelly* (1916) 241 U.S. 485.

79. *Economic Analysis* vs. *Court room Controversy, The Present Value of Future Earnings* : John A. Carlson Vol. 62 ABAJ 628.

RESULT: Question of law decided and each appeal decided one by one.

G.P. MITTAL, J.

1. A common question of law falls for determination in these Appeals:

2. "Whether, in view of the Division Bench judgment of this Court in **Delhi Transport Corporation and Anr. v. Kumari Lalita** 22 (1982) DLT 170 (DB) and **Rattan Lal Mehta v. Rajinder Kapoor & Anr.** II (1996) ACC 1 (DB) an increase towards inflation can be granted, particularly when the loss of dependency is to be assessed according to the minimum wages?

as such addition has been granted by this Court in catena of judgments rendered by the learned Single Judges including **Smt. Anari Devi v. Shri Tilak Raj & Anr.,** II (2004) ACC 739; (2005 ACJ 1397), **National Insurance Co. Ltd. v. Pooja & Ors.,** II (2006) ACC 382 (2007 ACJ 1051), **Om Kumari & Ors. v. Shish Pal & Ors,** 140 (2007) DLT 62, **Narinder Bishal & Anr. v. Rambir Singh & Ors.,** MAC APP. 1007-08/2006, decided on 20.02.2008, **New India Assurance Co. Ld. V. Vijay Singh** MAC APP. 280/2008 decided on 09.05.2008; **Oriental Insurance Company Limited v. Smt. Rajni Devi & Ors.** MAC APP.286/2011 decided on 06.01.2012; **Smt. Gulabeeya Devi v. Mehboob Ali & Ors.** MAC APP.463/2011 decided on 10.01.2012 and **IFFCO TOKIO Gen. Ins. Co. Ltd. v. Rooniya Devi & Ors.** MAC APP.189/2011 decided on 30.01.2012.

3. The increase in minimum wages is being granted for computation of loss of dependency primarily on the ground that minimum wages get doubled within a span of 7 to 10 years on account of inflation. Thus, protection is required to be given to the legal representatives (the Claimants) of the deceased on account of depreciation in the value of money.

4. Indubitably, grant of compensation involving an accident is within the realm of law of torts. It is based on the principle of restitution in integrum. The said principle provides that a person entitled to damages should, as nearly as possible, get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong. (**Livingstone v. Rawyards Coal Co.** (1880) 5 AC 25 (HL).

5. The first judgment of this Court, on which I could lay my hands on, where 50% increase was awarded when the deceased's income was computed according to minimum wages is **Anari Devi** (supra) where S.K. Mahajan, J. observed that on account of inflation and rise in the cost of living, minimum wages also increase from time to time. This Court held that the Claims Tribunal ought to have taken into consideration increase in the minimum wages from the date of death of the deceased during the last five years. Thus, although the minimum wages on the date of accident were ' 1784/-, the learned Single Judge assumed it to be Rs. 2700/- to compute the loss of dependency.

6. Then, there is a report of **National Insurance Co. Ltd. v. Pooja & Ors.,** II (2006) ACC 382 (2007 ACJ 1051) decided by the Learned Single Judge on 19.04.2006. Here again, increase in the minimum wages was given holding as under:-

> "15. The deceased expired in 1999. At that time he was 30 years old. Due to inflation and rapid economic progress, minimum wages have been going up. The deceased had long working life ahead of him. It was natural that his earnings in normal course would have gone up in the next about 30 years. Loss of dependency is calculated keeping in view the monetary loss suffered by the dependants in future. Therefore, ld. Tribunal was justified in not ignoring the possibility of increase in earnings/ income due to inflation, price rise, etc. of the deceased and taking this factor into consideration."

7. In **Om Kumari & Ors. v. Shish Pal & Ors,** 140 (2007) DLT 62, while giving the increase on account of minimum wages, another Learned Single Judge held as under:-

> "16. The future prospects may not be linked to promotional avenues but certainly would be linked to the inflation and increased wages over the years.
>
> 17. I have before me the minimum wages notified under the Minimum Wages Act, 1948, which show that pertaining to matriculates, minimum wages have risen from Rs. 325/- per month as on 1.1.1980 to Rs. 1,014 per month as on 1.5.1989. The same have risen to Rs. 2,796 per month as on 1.2.1999. Between 1.1.80 and 1.5.1989, the percentage increase is slightly over 200. Over the next 10 years, percentage increase is approximately 180.
>
> 18. Minimum wages are notified keeping into account the inflationary trends and cost indices. These are the minimum wages which law presumes would be required for a person to sustain himself at the minimum level of subsistence."

8. In **Narinder Bishal & Anr. v. Rambir Singh & Ors.,** MAC APP. 1007-08/2006, decided on 20.02.2008, a distinction was drawn between future prospects and increase granted on account of inflation by the learned Single Judge of this Court. It was held that minimum wages

has co-relation with the growth and development of the nation's economy, postulating increase in the price index, reduction of purchasing power and depreciation in the value of currency. This Court granted 50% increase in the minimum wages holding as under:-

> "16. The future prospects would necessarily mean advancement in future career, earnings and progression in one's life. It could be considered by seeing, from which post a person began his career, what avenues or prospects he has while being in a particular avocation and what targets he/she would finally achieve at the end of his career. The promotional avenues, career progression, grant of selection grades etc. are some of the broad features for considering one's future prospects in one's career.
>
> 17. The minimum wage, in the very context of economy has a correlation with the growth and development of the nation's economy, postulating increase in the price index, reduction of purchasing power with the denunciation of currency value and consequent fixation of minimum wages giving some periodical increase so as to ensure sustenance and survival of the workman class. Keeping this in view, under no circumstance the revision of minimum wages can be treated on the same footing with the factor of future prospects.
>
> 18. For instance, minimum wages of unskilled workman in the year 2000 were Rs. 2524/- under the Minimum Wages Act. The said minimum wages in the year 2007 for the same class of unskilled workman came to be Rs. 3470/- under the Act. This increase is not due to any promotion of unskilled workman or any kind of advancement in his career but the same are due to increase in the price index and cost of living which are the determining factors taken into consideration for increasing the wages under the Minimum Wages Act. The nature of job of unskilled workman will not change as the same shall remain unchanged. The same principle may be true even in the case of business or trade or other such allied activities where the future prospects of the deceased can be considered on the basis of his assets, income tax return, wealth tax return, balance sheet etc. But as far as the increase in the minimum wages is concerned the same takes into consideration the price indeed and the

> inflationary trends and the same have no correlation with the future prospects of a skilled, semi-skilled or an unskilled workman.
>
> 19. In the light of the above discussion, I find myself in agreement with the argument of counsel for the appellants that in the given facts and circumstances of the case, the Tribunal ought to have taken into consideration the revision in the minimum wages so as to determine just and fair compensation. In all cases where the claimants are able to sufficiently establish the income of the deceased, the benefit of granting any compensation for future prospects can be taken into consideration only when sufficient and reliable evidence is placed and proved by the claimants as per the dictum laid down in **Bijov Kumar Dugar v. Bidva Dhar Dutta and Others,** (2006) 3 SCC 242. While in other cases where in the absence of sufficient evidence, the Tribunal applied the yardstick of minimum wages, in all such cases, the Tribunals can take judicial notice of the revision of minimum wages, as laid down under the Minimum Wages Act."

9. In **New India Assurance Co. Ld. v. Vijay Singh** MAC APP. 280/2008 decided by this Court on 09.05.2008, yet another Learned Single Judge relying on **Narinder Bishal** (supra) also drew a distinction between the grant of future prospects which is given on account of advancement in career and progression in employment, on the one hand and increase in the minimum wages which is granted on account of inflation on the other hand. The learned Single Judge held as under:-

> ".. The future prospects would necessarily mean advancement in future career, earnings and progression in one's life. It could be considered by seeing, from which post a person began his career, what avenues or prospects he has while being in a particular avocation and what targets he/she would finally achieve at the end of his career. The promotional avenues, career progression, grant of selection grades etc. are some of the broad features for considering one's future prospects in one's career.
>
> The minimum wage, in the very context of economy has a correlation with the growth and development of the nation's economy, postulating increase in the price index, reduction of purchasing power with the denunciation of currency value and

consequent fixation of minimum wages giving some periodical increase so as to ensure sustenance and survival of the workman class. Keeping this in view, under no circumstance the revision of minimum wages can be treated on the same footing with the factor of future prospects.

10. In all cases where the claimants are able to sufficiently establish the income of the deceased, the benefit of granting any compensation for future prospects can be taken into consideration only when sufficient and reliable evidence is placed and proved by the claimants as per the dictum laid down in Bijov Kumar Dugar v. Bidya Dhar Dutta and Others, (2006) 3 SCC 242. While in other cases, where in the absence of sufficient evidence, the Tribunal applies the yardstick of minimum wages, in all such cases, the Tribunals can take judicial notice of the revision of minimum wages, as laid down under the Minimum Wages Act."

10. Relying on **National Insurance Company Ltd. v. Renu Devi & Ors.,** III (2008) ACC 134, **Narinder Bishal & Anr. v. Rambir Singh & Ors.,**MAC APP. 1007-08/2006, decided on 20.02.2008 and **National Insurance Co. Ltd. v. Kailash Devi,** 2008 ACC 772, I also took the view that 50% increase has to be added to the income of the deceased on account of inflation and growth of GDP, when it is computed according to the minimum wages.

11. It is important to note that the benefit of future prospects is given to the LRs of the deceased, only when there was evidence of bright future prospects (**Bijoy Kumar Dugar v. Bidya Dhar Dutta and Others,** (2006) 3 SCC 242), but, the benefit of inflation is being given only in case of minimum wages de hors the evidence of any future prospects. Perhaps, the lowest paid workers or the persons in the lowest income group were considered as a class to be given this benefit.

12. Section 168 of the Motor Vehicles Act (the Act) enjoins the Claims Tribunal to make an award determining *the amount of compensation which appears to it to be just.* However, the objective factors, which may constitute the basis of compensation appearing as just, have not been indicated in the Act. Thus, the expression "which appears to be just" vests a wide discretion in the Tribunal in the matter of determination of the compensation. Nevertheless, the wide amplitude of such power

does not empower the Tribunal to determine the compensation arbitrarily, or to ignore settled principles relating to determination of compensation. Although the Act is a beneficial legislation, it can neither be allowed to be used as a source of profit, nor as a windfall to the persons affected, nor should it be punitive to the person(s) liable to pay compensation. The determination of compensation must be based on certain data, establishing reasonable nexus between the loss incurred by the dependents of the deceased and the compensation to be awarded to them. In nutshell, the amount of compensation determined to be payable to the claimant(s) has to be fair and reasonable, by accepted legal standards.

13. In **General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs.) and Ors.** (1994) 2 SCC 176, M.N. Venkatachaliah, J. observed that the determination of the quantum must answer what contemporary society *"would deem to be a fair sum such as would allow the wrongdoer to hold up his head among his neighbours and say with their approval that he has done the fair thing". The amount awarded must not be niggardly since the "law values life and limb in a free society in generous scales?"* At the same time, a misplaced sympathy, generosity and benevolence cannot be the guiding factor for determining the compensation. The object of providing compensation is to place the claimant(s), to the extent possible, in almost the same financial position, as they were in, before the accident and not to make a fortune out of misfortune that has befallen them.

14. In calculating the pecuniary loss to the dependants many imponderables enter into the calculation. Therefore, the actual extent of the pecuniary loss to the dependants may depend upon data which cannot be ascertained accurately, but must necessarily be an estimate, or even partly a conjecture. Shortly, stated, the general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever source comes to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained.

15. Thus, in the realm of determination of damages in a motor accident claim case some speculation and guess work is permissible to award just compensation.

16. The issue of grant of increase of 50% in the minimum wages has been raised by the Insurance Companies (the Insurers) where LRs of the deceased have been granted such benefits, on the ground that the same is not permissible. Similarly, the LRs of the deceased have come in Appeals wherever this benefit has been denied to them by the Claims Tribunal. For the sake of convenience, the Insurance Companies will be referred to as Insurers and the LRs/Victims as the Claimants.

17. The contentions raised on behalf of the Insurers are:-

(i) Grant of compensation is based on the liability of the tortfeasor to pay the damages to the victim. The damages suffered must be proved by the victim or his LRs as the case may be.

(ii) The Court cannot take judicial notice of the increase in future inflation as nobody knows what is in store in future.

(iii) Damages are to be assessed on the date of the incident. Benefit of inflation is inbuilt in the multiplier and if further addition is made, it would mean increase in the multiplier and punishing the tortfeasor beyond his liability.

18. On the other hand, it is urged on behalf of the Claimants that although the benefit on account of inflation is not akin to future prospects, yet, the Court cannot be oblivious to the trend over the last six decades, since independence. Thus, it is contended that in case of minimum wages, the Claimants are entitled to the benefit of 50% increase, as granted by the learned Single Judges of this Court in various judgments.

19. I will deal with the contentions one by one.

ONUS TO PROVE DAMAGES

20. In an ordinary civil suit the burden to prove a fact lies on a party, who would fail, if no evidence at all is given by the either side. In a Claim Petition filed under Section 166 of the Act the Claims Tribunal, trained in law, which is manned by a Senior Judicial Officer is to hold an inquiry under Section 168 of the Act to award just compensation. Thus, even if a Claimant failed to adduce any evidence, the Claims Tribunal is expected to summon all relevant materials to form an opinion and award a fair and proper compensation. In **Kuldeep Singh Bawa v. Tika Ram,** MANU/DE/3525/2009 J.R. Midha, J. held as under:-

> "5. Section 168 of the Motor Vehicles Act provides that the learned Tribunal shall conduct an inquiry into the claim petition. Section 169 of the Motor Vehicles Act provides that the learned Tribunal shall follow such summary procedure as it deem fit to conduct such an inquiry. The inquiry stipulated in Section 168 of the Motor Vehicles Act is different from the civil trial. Section 168 of the Motor Vehicles Act casts a duty on the learned Tribunal to conduct an inquiry in a meaningful manner. The object of the legislature behind making this provision is that the victims of road accident are not left at their own mercy....."

21. Difficulty arises where a Claims Tribunal is unable to find any evidence to assess the loss of dependency. What should be taken as income to arrive at the loss suffered by the LRs of the deceased or the victim himself in the case of injury in a motor accident? In all such cases, a Claims Tribunal sometimes has to make some guess work objectively considering the facts and circumstances of each case.

22. At this juncture, I would refer to the Second Schedule to Section 163-A of the Act, which was inserted by way of amendment w.e.f. 14.11.1994. Clause 6 of the Second Schedule provides that even in the case of persons who had no income prior to the accident, a notional income of Rs. 15,000/- per annum is to be considered to assess the loss of dependency or for grant of compensation towards permanent disability.

23. It may be noticed that the minimum wages of an unskilled worker on 14.11.1994 (on the date of insertion of Section 163-A of the Act) were Rs. 1420/- per month or Rs. 17,040/- per annum. It can be presumed that, it must have taken sometime for the legislature in passing the Amendment Bill and bringing the amendment on the statue book. Thus, by taking notional income as Rs. 15,000/- in case of a non earning person, the legislature intended that even in Claim Petitions under Section 163-A of the Act where LRs/victims can claim compensation even without proving negligence, compensation should be awarded on a scale almost equal to the minimum wages of an unskilled worker under the Minimum Wages Act.

24. In **Ningamma & Anr.v. United India Insurance Company Limited,** (2009) 13 SCC 710, the Supreme Court held as under:-

"34. Undoubtedly, Section 166 of the MVA deals with "just compensation" and even if in the pleadings no specific claim was made under Section 166 of the MVA, in our considered opinion a party should not be deprived from getting "just compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the court is duty-bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not."

25. Section 168 of the Act enjoins upon Claims Tribunal to award "just compensation" and even if in the pleadings no specific claim is made, a party cannot be deprived of from getting just compensation in case the claimant is able to make out a case. It was held that Motor Vehicles Act is a beneficial and welfare legislation and the Court is duty bound to award "just compensation", whether any plea in that regard was raised by the Claimants or not.

26. In **Rajnaja Jain v. Aditya Singh,** ILR (2008) 2 Delhi 968, the Appellant had claimed the deceased's income to be Rs. 5,000/- per month by imparting tuitions at home. In the absence of any cogent evidence, the Claims Tribunal accepted the deceased's income to be minimum wages as per the deceased's qualification i.e. matriculation which was subsequently affirmed by the High Court.

27. In **Anita Devi v. Mohinder Singh,** ILR 2007 (2) Delhi 127, the deceased was working as a commission Agent for selling yarn. His income was claimed to be Rs. 5,000/- per month. At the time of the accident he was travelling on a two wheeler and was in possession of two cheques one for Rs. 1,00,000/- and the other for Rs. 60,000/- to pay a third party. His income was accepted to be that of a skilled person under the Minimum Wages Act.

28. In **P.Mathiyalagan v. P. Sagunthala** (2006) 2 TN MAC 301 (Mad) the deceased was an auto driver, aged 35 years. While computing the compensation payable under the Workman Compensation Act, in the absence of any evidence with regard to his income, his wages were considered to be of an skilled worker.

29. In **United India Insurance Co. Ltd. v. R. Vijayakumar,** (2010) 2 TN MAC 307 (Mad) (DB) the injured claimed his income to be

Rs. 50,000/- per film on an average. However, no document was produced to show that the Claimant was in receipt of Rs. 50,000/- per film on an average. Even the Income Tax assessment documents were not proved. In the absence of any cogent evidence with regard to proof of income, the Madras High Court held that some amount of conjecture is possible and assumed the Claimant's income to be Rs. 20,000/- per month or Rs. 2,40,000/- per annum.

30. In the case of a student pursuing a professional course, the Claims Tribunal is to consider the potential income of the deceased after completion of the course. In the case of **Haji Zainullah Khan (Dead) by Lrs. v. Nagar Mahapalika, Allahabad,** 1994 (5) SCC 667, death of a young boy, aged 20 years took place in an accident which happened in the year 1972. The deceased was a student of B.Sc (Biology) Ist year, a compensation of Rs. 1,46,900/- was increased and rounded off to Rs. 1,50,000/-.

31. This Court and other High Courts have been following the Supreme Court's judgment in **Haji Zainullah Khan** (supra) accepting the potential income of a student pursuing a professional course in medicine, management, engineering etc. to award just compensation. This Court in **New India Assurance Co. Ltd. v. Ganga Devi & Ors.,** MAC APP.135/2008 dediced on 23.11.2009, J.R. Midha, J. assumed the income of a third year student pursing a degree in medicines to be Rs. 18,000/- per month to compute the loss of dependency.

32. For instance, the Claimants may be able to prove that the deceased was working as a driver of a truck or a bus or a taxi or an auto rickshaw; the Claimants may be able to prove that the deceased was a tailor, a barber or was running a tea shop. But, they (Claimants) may not be in possession of any evidence to prove the deceased's actual income though, they may establish the profession of the deceased. In the absence of any evidence as to the deceased's actual income produced by the Claimant, the Claims Tribunal has to make an endeavor during the course of inquiry to elicit some material to make an assessment of the deceased's income or to make a guess work wherever possible or in appropriate cases, the Claims Tribunal may have to take assistance from the Minimum Wages Act to award the compensation to the Claimants.

33. The bone of contention is the grant of addition in the minimum

wages, on account of inflation. The learned counsel for the Insurers place reliance on the report in **Kumari Lalita** (supra). In that case a school going girl named Lalita, aged 8 years suffered grevious injuries in an accident, caused by a DTC bus on 05.12.1961. A compensation of Rs. 15,000/- awarded by the Claims Tribunal was increased by the learned Single Judge in the first Appeal to Rs. 50,000/-. Injured Lalita as well as the DTC were dissatisfied with the judgment of the Learned Single Judge therefore they preferred to appeal before the Division Bench. Since the accident took place in the year 1961 and lot of time had passed in the interregnum, a plea was sought to be raised on behalf of Kumari Lalita that on account of inflation the real value of the money was not able to take care of the expenses incurred by her and her sufferings on account of loss of amenities. The Division Bench of this Court declined to enhance the compensation on the ground of inflation holding that the relevant year which is to be considered, is the date of accident to the date of Award i.e. 1961 to 1964. I would extract relevant portions of the report hereunder:-

> "21. Counsel for Lalita made a passionate appeal to us that seeing the severity of the injuries we should increase the amount of damages especially in view of the fact that there has been a steep fall in the purchasing power of money in recent years. He argued that on the ground of depreciation in the value of money the award of Misra J. should be updated and brought in line with the current level of inflation. This argument we cannot accept.
>
> 22. In our inflationary times the real value of damages is dependent upon the state of the currency. The nominal value of the award must increase as the value of the rupee decreases. There will be a tendency in times of inflation for awards to increase. Otherwise the amount awarded will be contemptible. If the requirement of the law is to be met, the sum awarded must be substantial in the context of current money values where the loss is substantial and the injury grievious. Increase for inflation is designed to preserve the 'real' value of money. (**Pickett v. British Rail Engineering Ltd.** (1979) (I) All E.R. 774 (782) (10) per Lord Wilberforce). The award should keep pace with the times. The award must be reasonable and should have a relation with the changing value of money. While it is important from the point of

> view of public policy that the general level of damages should be kept moderate rather than extravagent, a judge must keep up with the times and in particular with the decline in the purchasing power of money. (Bingham's Motor Claims cases 8th ed. P. 482).
>
> 23. It would be unrealistic to disregard the present fall in the value of money. Judges cannot shut their eyes to the world outside the courts. They do not forget that inflation affects the plaintiffs as it affects them. If judges do not adjust their awards to changing conditions and rising standards of living, their assessment of damages will be unreal and illusory. In England a radical reappraisal of the law has been recommended by suggesting periodic payments and periodic reviews in personal injury actions. This has been done to mitigate the injustice of the lump sum system. (See Pearson Report).
>
> 24. It is true that "compensation demanded say ten years ago, is less than quarter of its value when it is received today." (**Motor Owners' Insurance Co. Ltd. v. J.K. Modi,** AIR 1981 SC 2059(11) (2060) per Chandrachud CJ). But the factor of future inflation cannot be taken into account in the assessment of damages. That will introduce speculation and uncertainty in the estimates. The awards will become more uncertain than before. Because of the imponderables no one can say what the future holds for us. The imponderables defy the forecasts of the economists. So future inflationary trends should not be admitted. "It would therefore be wrong for the court to increase the award of damages by attempting to make further specific allowance for future inflation" (**Cookson v. Koowles** (1979) AC 556(12). Only in exceptional cases would it be right to make some specific allowance for future inflation. In a recent case in England Lord Scarman has said :
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> > "The correct approach should be, therefore, in the first place to assess damages without regard to the risk of future inflation. If it can be demonstrated that upon the particular facts of a case, such an assessment would not result in a fair compensation (bearing in mind the investment opportunity that a lump sum award offers), some increase

is permissible. But the victims of tort who receive a lump sum award are entitled to no better protection against inflation than others who have to rely on capital for their future support. To attempt such protection would be to put them into a privileged position at the expense of the tortfeasor, and so to impose upon him an excessive burden, which might go far beyond compensation for loss."

(**Lim v. Camden Health Authority** (1979) 3 WLR 44 (58) (13) (H.L.).

25. In the present case the accident happened on 6-12-1961. In 1964 the tribunal assessed the damages after examining the medical evidence and the nature of injuries. We have to keep these years - 1961 and 1964 - in mind while assessing damages. The principle of law is that damages must be assessed as at the date when the damages occurs. The material date for ascertaining the extent of liability is the date of the accrual of the cause of action for a claim arising out of the accident, which in general would be the date of the accident. (**Padma Srinivasan v. Premier Insurance Co. Ltd.** (1982) I SCC 613)(14). Tort losses are ordinarily assessed as of the time when the cause of action accrued, but in case of personal injuries the Judgment date is justified for continuing injuries (**Philips v. Ward** (1956) I All E.R. 874, 877)(15). The award must be made in the context of the time. The computation of loss has to be made in this case with reference to early sixties. For the loss of 1962 we cannot adopt the yardstick of 1982. This will be doing injustice to the tortfeasor. Damages must not be unreasonably deficient nor a windfall to the injured. The damages "must necessarily fall to be estimated within a bracket in justice both to the sufferer and to the tortfeasor" **Yorkshire Electricity Board v. Naylor** (1968) AC 529(16), 552, Rs. 50,000 the learned judge thought was the right sum to award to Lalita "to see her through" the rest of her life. Some element of conjecture or prophecy is inevitable in assessment of damages (**M.P. State Road Transport Corporation v. Sudhakar** (1977) ACJ 290(17), 292 (SC). Unless we find that Misra J. has made an entirely erroneous estimate of damages we ought not to interfere with his award.

26. Future inflation has to be disregarded for another good reason. As has been said by **Lord Scarman in Lim's** case (supra) that the victim of the injury is not entitled to more protection than any other economic group of society. He cannot enjoy a privileged position. As another judge has put it. "In an inflationary period the plaintiffs cannot expect to find themselves in a class which is shielded from the effects of inflation which the rest of their fellow citizens battle with." (**Moriarity v. Mc'Carthy** (1978) (18) I WLR 155 (159), per O'Connor J.).

27. The truth is that judicial awards of damages follow but rarely keep pace with inflation (**Pickett** (supra) at page 800). In this case Misra J. could not have gazed into the future and predicted that some day the value of rupee will go down to less than 25 paise. Knowledge of the future was denied to him as it is denied to all of us."

34. From the observations of the Division Bench, three things can be culled out. Firstly, that the future inflation has to be kept out while making assessment of damages. On making such assessment if it is evident that the compensation is not fair, some increase may be awarded on account of inflation. Secondly, the Division Bench observed that the years to be taken into account for award of compensation were 1961 when the accident occurred and 1964 when the compensation was awarded and, thirdly, that the material date of ascertaining the compensation for damages is the accrual of the cause of action and not thereafter.

35. By the time the Division Bench decided **Kumari Lalita** (supra) the multiplier method of awarding compensation had not been firmly established nor there was any authoritative pronouncement of the Supreme Court whereby any benefit on account of bright future prospects could be given. It was in this context that the Division Bench observed that the material date for ascertaining the accident of liability is the date of accrual of the cause of action. The Division Bench was not averse to the grant of inflation up to the date of the passing of the award by the Claims Tribunal.

36. In **General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs.) and Ors.** (1994)

2 SCC 176, it was firmly established that the multiplier method was the best method to award just, fair and proper compensation. Further, it was also established that wherever there was evidence of the deceased having a bright future prospects, benefit thereof must be given to the Claimant which was against the principle laid down in English decisions, where it was observed that the damages must be assessed as on the date of the incident. On the basis of **Kumari Lalita** (supra) therefore, it cannot be said that future inflation was liable to be totally ignored.

37. The Division Bench judgment of this Court in **Rattan Lal Mehta v. Rajinder Kapoor & Anr.** II (1996) ACC 1 (DB) which is heavily relied on by the counsel for the Insurers, the question of taking future inflation into consideration was directly dealt with. The Division Bench noticed adoption of a higher multiplier of '18' as against '15' already being granted by the Claims Tribunal and the Courts. The Division Bench referred to the actuarial method of assessment of damages and relied on **Chairman A.P.S.R.T.C. v. Shifya Khatoon,** AIR 1985 AP 83 and **Bhagwandas v. Mohd. Ariff,** AIR 1988, AP 99. The Division Bench observed as under:-

> "Multiplier cannot be the difference between age at death (or age at trial of injured person) and total expected life. If does not exceed 18 or 20:
>
> This aspect does not indeed fall for consideration because Parliament has now prescribed the Table in 1994. The maximum multiplier as per the Table is only 18.
>
> Though this aspect is now not relevant still there is chance of somebody contending that the Table is not to be applied as multipliers are not above 18. With a view to clarify the position, we are dealing with this aspect.
>
> 27. A multiplier cannot be the difference between the age at the death (for age at the trial of an injured person) and his expected years of remaining life. This is because even if there is no accident, the person's expectation of life depends upon the general mortality rates applicable to him as he moves up from one birthday to the next birthday. While death is certain and men are mortal, the time of death remains a mystery. Knowledge of future is

> denied to mankind (Lord Scarman in Lim's case) 1980 A.C. 174. and that is where mortality rates play an important role in mathematics, statistics and with actuaries. Insurance premia are based on these theories and are computed by actuaries. R. Kidner & K. Richards (See The Economic Journal, 1974, p.130 at 133) point out:
>
> > "In the case of payment up to the retirement age of the husband, the probability of his living each year up to the age of retirement is less than one and diminishes as time goes on. The probability of a man aged 21 living until 50 is, for example, 0.94 and to age 60 is 0.82 and so on. These probabilities are used in calculation of the theoretically-correct amount of the award ..."
>
> The same principle was reiterated in **KSRTC v. Susamma Thomas,** AIR 1994 SC 1631, by the Supreme Court
>
> (See also J.H. Prevett "Actuarial assessment of Damages: The Thalidomide Case" (Vol.35) Mod. L. Rev. 1972 (p. 140 at p. 146); **M/s. K. Richards & R. Kidner** in 124 New Law Journal, 1974, p.105).
>
> The future chances of survival from year to year have to be added up. Present values have to be arrived at by a discount rate applicable to periods of stable currency (This is explained below).
>
> 28. The advantage of the actuarial multiplier is that it will give a sum which will exhaust the principal over the period for which the future dependency (or earnings in injury case) is to last. The amount arrived at is not like the one arrived at in the interest method where the principal remains as an additional gain while interest is consumed periodically.
>
> In fact, in the most advanced countries like U.K, Australia, Canada or U.S.A, where mortality rates are far lower as compared to India and survival rates higher, the multipliers do not generally extend beyond 18 or 20. No doubt as per the Supreme Court in **G.M.K.S.R.T.C. v. Susamma Thomas** (supra), the highest multiplier can be only 15. This stands now slightly modified by the statutory multiplier table of 1994 which shows a maximum

of 18. In fact Winfield & Jolowicz & on Torts (13th Ed. 1989) (p.618) say that in practice, the maximum multiplier is seldom more than 16: Street, on Damages (1983), 7th Ed) (p.218) puts it at 16; McGregor on Damages, (15th Ed. 1988) (para 1572) treats maximum as 18. The leading authorities which treat actuarial evidence as admissible are all set out in **Chairman A.P.S.R.T.C. v. Shifya Khartoon,** AIR 1985 AP 83 at 87-88 and in **Bhagwandas v. Mohd. Ariff,** AIR 1988 AP 99. These principles show that the difference between the age at death (or trial in case of injured person) and expected age of life cannot be the multiplier."

38. The Division Bench went on to add that multiplier takes care of inflation. In fact, when the rates of interest are high as in the Indian context, any multiplier above 15 would definitely take care of some inflation. Before demonstrating the same in a tabulated form, I would refer to the relevant portion of the report in **Rattan Lal Mehta** (supra) hereunder:-

"Multiplier takes care of inflation

The mathematical formula which is used in the law of Economics (See Prof. A Samuelson of the Massechusetts Institute of Technology in his Textbook on Economics (10th Ed. 1980 at p. 609) shows that the discount rate for discounting future payments to present value occurs in the dominator and that is why a lower interest rate would result in a higher multiplier and that is why the 'real rate' of interest enunciated by Fisher was applied by **Lord Diplock in Mallet v. Mc Monagle,** 1970 AC 166. That case has been followed by our Supreme Court in **M.P.S.R.T.C. v. Sudhakar,** AIR 1977 SC 1189 and in **KSRTC v. Susamma Thomas** (supra). The rate adopted is of a 'stable period of currency' say 4% or 5% so that multipliers will be larger and help full compensation. It must be noted here that if we adopt a higher rate of interest for reducing future payments to present values the multiplier will be very small, as the rate of interest occurs, in the formula, in the denominator. That is why a smaller rate of interest applicable to stable periods is prescribed by Economists of the highest repute like Fisher or Prof. Samuelson and in all books dealing with Economics and Insurance. This is

also the principle in pension commutations. Government of India has applied a rate of 3.5% or 4.5% only. Otherwise if higher rates of interest are applied pension commutations will get reduced to smaller figures. Superior Courts in England, Australia, Canada and USA have accepted this principle of Economics and held that rate of discount for converting future payments to present value must relate to stable periods of currency.

29. In a celebrated passage Lord Diplock said "In estimating the loss, money should be treated as retaining its value at the date of the Judgment and in calculating the present value of annual payments which would have been received in future years, interest rates appropriate to time of stable currency such as 4 per cent to 5 per cent should be adopted". That was to be the discount rate for reducing future earnings/losses to present value. In England it was to be 4% or 5%. In Australia, in **Todorovic vs. Waller,** (1981) 150 C.L.R. 402, the High Court followed Lord Diplock's judgment and advocated a discount rate of 3% for converting future payments to present value. In the Canadian trilogy of cases, referred to earlier, the Diplock theory was accepted and a rate of 7% was applied. In U.S.A. the same principles were set out in **Chesapeake & Ohio Rly vs. Kelly** (1916) 241 U.S. 485 and recently in **Jones and Laughlin vs. Pfeifer,** 462 U.S. 523 (1983), proposing 3%.

30. In **Bhagwandas** case, AIR 1988 99 after referring to the rate applied by Government of India in regard to pension commutations and the other data relating to inflation, a 'real rate' of 4% was applied in our country and a multiplier Table was worked out on that basis. The above judgment was affirmed by a Division Bench in **Naravva' vs. V.R. Shangde,** 1989 ACJ 715 by Jeevan Reddy, J. (as he then was) and V.N. Rao, J. The multipliers evolved in Bhagwanda's case compare very favourably with the statutory multiplier Table published in the amendment to the Motor Vehicles Act in 1994. A smaller discount rate relatable to a stable period of currency reduces future payments (say) of 1997,1998 and so on, by giving a higher multiplier in present and leaves it to the recipient of the money to make a proper investment today of the said monies. There is voluminous literature on this subject (See:

Inflation, Taxation & Damage Assessment (1980) Can B. Rev. 280; 1974 Economic Journal p. 130 by R. Kidner & K. Richards; Damages for Personal Injury & the Effect of Future Inflation (1982) 56 Aust L.J. 168; **Economic Analysis vs. Court room Controversy, The Present Value of Future Earnings : John A. Carlson** Vol. 62 ABAJ 628; **Tort Damages for Loss of Future Earnings** (1986) 34 Amer J. Comp. L (Supp) 141; Economic Theory & Present Value of Future Lost Earnings : Anderson & Roberts (1985) U. Miami L.R. 725); A plain English approach to loss of Future Earning Capacity (1985) 24 Washburn LJ. 253;) See also leading books, Munkman; Kemp P. Keap; MC Grregor; Warfield; John A Fleming etc.

31. After the pecuniary damages are arrived at, Courts are also awarding 12% interest generally on the sum arrived at. Together with that interest, the amount comes into the plaintiffs' hands.

No deduction is to be made from the sum arrived at by using multiplier:

32. As the statutory multiplier reduces, by means of a mathematical formula (see the formula explained in Bhagwandas' case AIR 1988 AP 99), the future amounts to present value, there is no need to further deduct 1/3 or 1/4. The multiplier takes in not only mortality and future inflation but also the fact that the claimants are receiving an accelerated payment once and for all"

39. For the purpose of an illustration, let me assume the income of the deceased, aged 26 years, to be Rs. 800/- per month who has left behind him, four dependents including a widow. If I assume actual rate of interest since the year 1990, (or even interest @ 8% per annum) the capital sum awarded towards the loss of dependency would never come to an end, if the inflation is not factored. Rather, the same would go no increasing from year to year. The table appended below would make the aforesaid observations very clear:-

S.No	Year	Capital Amount	Interest Received	Depen-dency	Rate of Interest	Excess Amount
1.	1990	1,22,400	12,240	7200	10%	5040
2.	1991	1,27,440	14,018	7200	11%	6818
3.	1992	1,34,258	16,782	7200	12.5%	9582
4.	1993	1,43,840	15,103	7200	10.5%	7903
5.	1994	1,51,743	15,174	7200	10%	7974
6.	1995	1,59,717	18527	7200	11.6%	11,327
7.	1996	1,71,044	21,551	7200	12.6%	14,351
8.	1997	1,85,395	20,949	7200	11.3%	13,749
9.	1998	1,99,144	21,905	7200	11%	14,705
10.	1999	2,13,849	22,454	7200	10.5%	15,254 and so on

40. The compensation which is awarded on basis of multiplier method is such that as the years go by, some amount should be taken out from the principal sum so that by the time the dependency comes to an end, the principal as well as interest earned on the principal amount are exhausted. The Supreme Court in a catena of judgment including in **United India Insurance Co. Ltd. v. Bindu,** (2009) 3 SCC 705, referred to **Davies v. Powell Duffryn Associated Collieries Ltd.** (1942) 2 SCC 176, **Nance v. British Columbia Electric Railway Co. Ltd.,** (1951) AC 601, **Mallet v. McMonagle,** (1970) AC 166, and **Halsbury's Laws of England,** Volume 34, Para 89, presumed the real value of money and observed as under:-

"6. There were two methods adopted to determine and for calculation of compensation in fatal accident actions. The first multiplier method was mentioned in **Davies v. Powell Duffryn Associated Collieries Ltd.** (supra) and the second in **Nance v. British Columbia Electric Railway Co. Ltd.** (supra).

7. "13. The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalising the multiplicand by an appropriate multiplier. The choice of the multiplier is determined

by the age of the deceased (or that of the claimants, whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed up over the period for which the dependency is expected to last.

14. The considerations generally relevant in the selection of multiplicand and multiplier were adverted to by Lord Diplock in his speech in **Mallet v. McMonagle** (supra) where the deceased was aged 25 and left behind his widow of about the same age and three minor children. On the question of selection of multiplicand Lord Diplock observed:

> "The starting point in any estimate of the amount of the "dependency" is the annual value of the material benefits provided for the dependants out of the earnings of the deceased at the date of his death. But ... there are many factors which might have led to variations up or down in the future. His earnings might have increased and with them the amount provided by him for his dependants. They might have diminished with a recession in trade or he might have had spells of unemployment. As his children grew up and became independent the proportion of his earnings spent on his dependants would have been likely to fall. But in considering the effect to be given in the award of damages to possible variations in the dependency there are two factors to be borne in mind. The first is that the more remote in the future is the anticipated change the less confidence there can be in the chances of its occurring and the smaller the allowance to be made for it in the assessment. The second is that as a matter of the arithmetic of the calculation of present value, the later the change takes place the less will be its effect upon the total award of damages. Thus at interest rates of 4+ per cent the present value of an annuity for 20 years, of which the first ten years are at -100 per annum and the second ten years at - 200 per annum, is about 12 years. purchase of

> the arithmetical average annuity of - 150 per annum, whereas if the first ten years are at -200 per annum and the second ten years at ú100 per annum the present value is about 14 years' purchase of the arithmetical mean of -150 per annum. If therefore the chances of variations in the "dependency" are to be reflected in the multiplicand of which the years' purchase is the multiplier, variations in the dependency which are not expected to take place until after ten years should have only a relatively small effect in increasing or diminishing the "dependency" used for the purpose of assessing the damages."

15. In regard to the choice of the multiplicand, **Halsbury's Laws of England** in Vol. 34, Para 98 states the principle thus:

> '98. Assessment of damages under the Fatal Accidents Act, 1976.-The courts have evolved a method for calculating the amount of pecuniary benefit that dependants could reasonably expect to have received from the deceased in the future. First the annual value to the dependants of those benefits (the multiplicand) is assessed. In the ordinary case of the death of a wage-earner that figure is arrived at by deducting from the wages the estimated amount of his own personal and living expenses.
>
> The assessment is split into two parts. The first part comprises damages for the period between death and trial. The multiplicand is multiplied by the number of years which have elapsed between those two dates. Interest at one-half the short-term investment rate is also awarded on that multiplicand. The second part is damages for the period from the trial onwards. For that period, the number of years which have elapsed between the death and the trial is deducted from a multiplier based on the number of years that the expectancy would probably have lasted; central to that calculation is the probable length of the deceased's working life at the date of death..

As to the multiplier, Halsbury states:-

> "However, the multiplier is a figure considerably less than

the number of years taken as the duration of the expectancy. Since the dependants can invest their damages, the lump sum award in respect of future loss must be discounted to reflect their receipt of interest on invested funds, the intention being that the dependants will each year draw interest and some capital (the interest element decreasing and the capital drawings increasing with the passage of years), so that they are compensated each year for their annual loss, and the fund will be exhausted at the age which the court assesses to be the correct age, having regard to all contingencies. The contingencies of life such as illness, disability and unemployment have to be taken into account. Actuarial evidence is admissible, but the courts do not encourage such evidence. **The calculation depends on selecting an assumed rate of interest. In practice about 4 or 5 per cent is selected, and inflation is disregarded. It is assumed that the return on fixed interest bearing securities is so much higher than 4 to 5 per cent that rough and ready allowance for inflation is thereby made.** The multiplier may be increased where the plaintiff is a high tax payer. The multiplicand is based on the rate of wages at the date of trial. No interest is allowed on the total figure."

41. I have obtained the Bank rates of interest (of Nationalized Banks) and compared it with the inflation prevailing in the country. I have attempted three tables to demonstrate whether the rate of interest in the Indian context takes care of the inflation or not.

TABLE - I

- It is assumed that the deceased who is aged 26 years dies leaving behind a widow, a mother and two minor children.
- In this Table a notional amount of Rs.800/- is taken to be the income of the deceased and therefore the capital amount is arrived at Rs.1,22,400/- (Rs. 800 - 1/4th x 12 x 17).
- The dependency is taken to be Rs. 800 p.m - 1/4th (Rs.600) x 12 = 7200 p.a. in 1990.
- Further, a notional interest and inflation rate of 8% and 4% respectively, is taken into consideration which is an assumption of 'real rate of interest' (actual inflation rate - actual interest rate) in stable economy.
- The dependency is increased according to the inflation i.e. 4% and the interest on the Capital amount is taken @ of 8%.
- The compensation lasts for over 30 years.

S. No	Year	Capital Amount	Interest Received	Dependency	Rate of Interest	Inflation	Excess Amount
1.	1990	1,22,400	9,792	=600x12 =7,200	8%	4%	2,592
2.	1991	1,24,992	9,999	=7,200+288 =7,488	8%	4%	2,511
3.	1992	1,27,503	10,200	=7,488+299 =7,787	8%	4%	2,413
4.	1993	1,29,916	10,393	=7,787+311 =8,098	8%	4%	2,295
5.	1994	1,32,211	10,576	=8,098+324 =8,421	8%	4%	2,155
6.	1995	1,34,366	10,749	=8,421+336 =8,757	8%	4%	1,992
7.	1996	1,36,358	10,908	=8,757+350 =9,107	8%	4%	1,801
8.	1997	1,38,159	11,052	=9,107+364 =9,471	8%	4%	1,581
9.	1998	1,39,740	11,179	=9,471+378 =9,849	8%	4%	1,330
10.	1999	1,41,070	11,285	=9,849+393 =10,242	8%	4%	1,043
11.	2000	1,42,113	11,369	=10,242+409 =10,651	8%	4%	718
12.	2001	1,42,831	11,426	=10,651+426 =11,077	8%	4%	349

13.	2002	1,43,180	11,454	=11,077+443 =11,520	8%	4%	-65
14.	2003	1,43,114	11,449	=11,520+460 =11,980	8%	4%	-530
15.	2004	1,42,583	11,406	=11,980+479 =12,459	8%	4%	-1,053
16.	2005	1,41,530	11,322	=12,459+49 =12,957	8%	4%	-1,634
17.	2006	1,39,895	11,191	=12,957+518 =13,475	8%	4%	-2,283
18.	2007	1,37,611	11,008	=13,475+539 =14,014	8%	4%	-3,005
19.	2008	134605	10,768	=14,014+560 =14,574	8%	4%	-3,805
20.	2009	1,30,799	10,463	=14,574+582 =15,156	8%	4%	-4,692
21.	2010	126106	10,088	=15,156+606 =15762	8%	4%	-5,673
22.	2011	1,20,432	9,634	=15,762+630 =16,392	8%	4%	-6,757
23.	2012	,13,674	9,093	=16,392+656 =17,048	8%	4%	-7,954
24.	2013	1,05,719	8,457	=17048+681 =17,729	8%	4%	-9,272
25.	2014	96,447	7,715	=17,729+710 =18,439	8%	4%	-10,723
26.	2015	85,723	6,857	=18,439+737 =19,176	8%	4%	-12,318
27.	2016	73,404	5,872	=19,176+767 =19,943	8%	4%	-14,070
28.	2017	59,333	4,746	=19,943+798 =20,741	8%	4%	-15,994
29.	2018	43,338	3,467	20,741+829 =21,570	8%	4%	-18,102

30.	2019	25,235	2,018	21,570+863 =22,433	8%	4%	-20,414
31.	2020	4,820		22,433+897 =23,330	8%	4%	

TABLE - II

- In this Table a notional amount of Rs.800/- is taken to be the income of the deceased and therefore the capital amount is arrived at Rs.1,22,400/- (Rs. 800 - 1/4th x 12 x 17).
- The dependency is taken to be Rs.800/- p.m - 1/4th (Rs.600) x 12 = 7200 in 1990. For the subsequent years the actual inflation rate is applied to increase the dependency accordingly.
- The capital amount is being increased as per the actual Bank interest rate on long term fixed deposit.
- The compensation lasts for about 21 years.

S. No	Year	Capital Amount	Interest Received	Dependency	Rate of Interest	Infl-ation	Excess Amount
1.	1990	1,22,400	12,240	=600x12 =7,200	10%	8.9%	5,040
2.	1991	1,27,440	14,018	=7,200+993 =8,193	11%	13.8%	5825
3.	1992	1,33,265	16,658	=8,193+958 =9,151	12.5%	11.7%	7,507
4.	1993	1,40,772	14,781	=9,151+576 =9,727	10.5%	6.3%	5,054
5.	1994	1,45,826	14,582	=9,727+992 =10,719	10%	10.2%	3,863
6.	1995	1,49,689	17,363	=10,719+1,093 =11,812	11.6%	10.2%	5,551
7.	1996	1,55,240	19,560	=11,812+1,051 =12,863	12.6%	8.9%	6,697

8.	1997	1,61,937	18,298	=12,863+939 =13,802	11.3%	7.3%	4,496
9.	1998	1,66,433	18,307	=13,802+1821 =15,623	11%	13.2%	2,684
10.	1999	1,69,117	17,757	=15,623+718 =16,341	10.5%	4.6%	1,416
11.	2000	1,70,533	15,689	=16,341+637 =16,978	9.2%	3.9%	-1,288
12.	2001	1,69,244	14,047	=16,978+747 =17,725	8.3%	4.4%	-3,677
13.	2002	1,65,566	11,424	=17,725+655 =18,380	6.9%	3.7%	-6,955
14.	2003	1,58,610	9,199	=18,380+698 =19,078	5.8%	3.8%	-9,878
15.	2004	1,48,731	8,180	=19,078+744 =19,822	5.5%	3.9%	-11,641
16.	2005	1,37,089	8,225	=19,822+1,228 =21,050	%	6.2%	-12,824
17.	2006	1,24,264	8,449	=21,050+1,326 =22,376	6.8%	6.3%	-13,926
18.	2007	1,10,337	9,930	=22,376+1,409 =23,785	9%	6.3%	-13,855
19.	2008	96,482	8,876	=23,785+1,974 =25,759	9.2%	8.3%	-16,882
20.	2009	79,599	6,367	=25,759+2,781 =28,540	8%	10.8%	-22,172
21.	2010	57,426	4,307	=28,540+3,396 =31,936	7.5%	11.9%	-27,628
22.	2011	29,797	2,681	=31,936+3,864 =35,800	9%	12.1%	-33,118
23.	2012	-3,321			9%	9.2%	

TABLE - III

- In this Table the minimum wages which were prevailing in the year 1990 is considered as the income of the deceased for computing the dependency and capital amount.
- Since there are two revisions in the Minimum wages every year, the average of the two (767+792 =1559/2 = 780) is considered for the calculation. This procedure is followed in all the years when the minimum wages were increased twice in a year.
- The dependency is gradually increased according to the minimum wages increased from time to time. The capital amount is being increased as per the actual Bank interest rate on long term fixed deposit.
- Therefore, the Capital amount = 780 - 1/4th x 12 x 17 = 1,19,340/-.
- The dependency = 780 -1/4th x 12 = 7020/-.
- The amount lasts for 17 years.

S. No	Year	Capital Amount	Interest Received	Dependency	Rate of Interest	Excess Amount
1.	1990	1,19,340	11,934	7,020	10%	4,914
2.	1991	1,24,254	13,667	7,836	11%	5,831
3.	1992	1,30,085	16,260	8,844	12.5%	7,416
4.	1993	1,37,501	14,437	9,876	10.5%	4,561
5.	1994	1,42,062	14,206	12,600	10%	1,606
6.	1995	1,43,668	16,665	13,680	11.6%	2,985
7.	1996	1,46,653	18,478	15,084	12.6%	3,394
8.	1997	1,50,047	16,955	16,058	11.3%	897
9.	1998	1,50,944	16,603	17,424	11%	-820
10.	1999	1,50,123	15,763	21,132	10.5%	-5,368
11.	2000	1,44,754	13,317	22,236	9.2%	-8,918

12.	2001	1,35,835	11,274	23,256	8.3%	-11,981
13.	2002	1,23,853	8,545	24,048	6.9%	-15,502
14.	2003	1,08,350	6,284	25,896	5.8%	-19,611
15.	2004	88,738	4,880	27,924	5.5%	-23,043
16.	2005	65,694	3,941	29,617	6%	-25,675
17.	2006	40,018	2,721	31,437	6.8%	-28,715

42. Thus, the compensation awarded in the Indian perspective with a high inflation is unable to provide for full life expectancy even if some discount is made towards the imponderables in life.

43. At this stage, I may refer to the inflation rate prevailing in India and other developed countries i.e. UK and USA.

Year	India	UK	USA
2011	12.1%	4.47%	3.16%
2010	11.9%	3.28%	1.64%
2009	10.8%	2.16%	-0.34%
2008	8.3%	3.61%	3.85%
2007	6.3%	2.32%	2.85%
2006	6.3%	2.33%	3.24%
2005	6.2%	2.04%	3.39%
2004	3.9%	1.34%	2.68%
2003	3.8%	1.36%	2.27%
2002	3.7%	1.25%	1.59%
2001	4.4%	1.23%	2.83%
2000	3.9%	0.78%	3.38%

1999	4.6%	1.33%	2.19%
1998	13.2%	1.58%	1.55%
1997	7.3%	1.77%	2.34%
1996	8.9%	2.48%	2.93%
1995	10.2%	2.65%	2.81%
1994	10.2%	1.97%	2.61%
1993	6.3%	2.50%	2.96%
1992	11.7%	4.26%	3.03%
1991	13.8%	7.53%	4.25%
1990	8.9%	6.97%	5.39%

44. Thus, it will be seen that in developed countries the inflation ranges between 1% to 3% most of the times. So much so that sometimes the inflation is even negative. Thus, an interest rate of 4 to 5% in those countries is sufficient to take care of inflation when the multiplier as mentioned in the Second Schedule or in **Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr.,** (2009) 6 SCC 121 is adopted.

45. At this time, the average life expectancy in India (for a male and female) is about 64 years. (Female 63.2 years and Male 64.7 years). The life expectancy takes care of the imponderables because untimely deaths on account of illness are included therein. Even if further reduction of 10 to 15% is made in the life expectancy towards the imponderables (accidental death, disability and unemployment), the dependency for the widow is to last for whole life and for the dependent children till they are settled in their life. When the children grow older a lot of amount is needed for their higher education. The condition in this country is different from the developed countries, where one can easily get education loan on nominal rate of interest and finding employment on completion of higher studies are much easier. As stated earlier, the principle for grant of compensation is that the person entitled to damages should, as nearly as possible get that sum of money as would put him in the same position

as if he had not sustained the wrong.

46. In **Susamma Thomas** (supra) some provision was made towards the bright future prospects which came to be reiterated in a catena of judgments including **Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr.,** (2009) 6 SCC 121 wherein the Supreme Court held that when the deceased's age is upto 40, years an addition of 50% is to be made in the actual income and when the deceased is aged between 40 to 50 years an addition of 30% is to be made in the same income to compute the loss of dependency.

47. I have obtained data which shows that during the last 26 years the income of the same category of employees has grown up by about 15 times on account of inflation and growth in the economy.

Sl. No.	Group of Employees	Initial salary (including allowances) as on Ist January, 1986	Initial salary (including allowances) as on Ist January, 2012
1.	Group D	930/-	14,108/-
2.	LDC	1245/-	15,480/-
3.	Section Officer	2550/-	36,650/-
4.	Under Secretary to Govt. of India	3700/-	52,714/-

48. Apart from this almost everybody working in the govt. department gets at least 4 to 5 promotions during their tenure. A Clerk at least becomes a Section Officer, an Assistant becomes a Director in the Govt. of India if not a Joint Secretary, a Civil Servant (IAS) becomes an Additional Secretary, if not a Secretary. In private sectors pastures are much greener for some and not so rosy for the others.

49. The question is whether in all cases, the Courts are providing compensation which can be said to be just and fair.

50. It will be seen that the compensation is far less than the just

compensation as envisaged under the Act mainly on account of inflationary trend in this country. Though the multiplier method does take care of future inflation as held by the Division Bench of this Court in **Rattan Lal Mehta** (supra) yet, on account of inflation which remains in double digits in our country most of the times, even after the increase granted on account of future prospects the compensation awarded is not able to take care of the actual loss of dependency.

51. It is respectfully submitted that I am bound by the Division Bench judgment of this Court in **Rattan Lal Mehta** (supra) which on the aspect of the multiplier taking care of future inflation was not brought to the notice of this Court earlier and more importantly escaped my attention. Thus, increase in minimum wages on account of inflation given by the learned Single Judges of this Court in various cases including the one which have been extracted hereinabove, was not permissible.

52. It is urged by Sh. K.L. Nandwani learned counsel for the Insurance Company that the Judgment in **Narinder Bishal and Anr. v. Rambir Singh and Ors** MAC. App. 1007-08/2006 reported as 2009ACJ1881 and many other Judgments where increase on minimum wages is granted, have been challenged by way of a Special Leave Petition before the Supreme Court. By an order dated 14.11.2008, in SLP (CC) No.11630-11631 of 2008, the SLP was admitted and the operation of the judgment of this Court was stayed subject to the deposit of 50% of the award amount.

53. There is another aspect of increase being given in the minimum wages. The increase on account of inflation is given only where the deceased or the claimant was getting the minimum wages. In other cases, the increase towards future prospects is given only when the deceased or the Claimant (in case of injury) had bright future prospects which is established by leading evidence in this behalf. Thus, the person getting minimum wages would be in advantageous position than a person earning more than the minimum wages. Take a case where a deceased is getting minimum wages of Rs. 4,000/- per month and another deceased, not entitled to future prospects, is having an income of Rs. 5,000/- per month (more than the minimum wages). There would be 50% increase in the income of the person getting minimum wages and there would not be any such increase in the income of the person who was getting more than the minimum wages (because there are no future prospects). The

loss of dependency in the case of a deceased getting minimum wages of Rs. 4,000/- would be calculated at Rs. 6,000/- per month whereas, the deceased who was earning Rs. 5,000/- per month; his LRs would end up getting a lesser compensation, even though the deceased had a better employment and more income than the deceased getting the minimum wages. This is not a hypothetical example; this Court has got umpteen cases where such a situation has arisen and I would be dealing with the specific cases at the appropriate stage. Suffice it to say that, if benefit of inflation has to be given, everybody is entitled to that benefit and not only the person getting the minimum wages unless, they are treated as a class by themselves.

54. The Supreme Court in **Reshma Kumari v. Madan Mohan** (2009) 13 SCC 422 framed following two questions in Para 10 of the report, which are extracted hereunder:-

> "10. The common questions which arise for our consideration in these appeals are:
>
> (1) Whether the multiplier specified in the Second Schedule appended to the Act should be scrupulously applied in all the cases?
>
> (2) Whether for determination of the multiplicand, the Act provides for any criterion, particularly as regards determination of future prospects?"

55. Although, the question of considering future inflation was not directly framed, yet, my Lord Hon'ble Mr. Justice S.B. Sinha (as he then was) held that, one of the incidental issues which has also to be taken into consideration while computing compensation under the Motor Vehicles Act was inflation. I would extract Para 47 to 49 of the report hereunder:-

> "47. One of the incidental issues which has also to be taken into consideration is inflation. Is the practice of taking inflation into consideration wholly incorrect? Unfortunately, unlike other developed countries in India there has been no scientific study. It is expected that with the rising inflation the rate of interest would go up. In India it does not happen. It, therefore, may be a relevant factor which may be taken into consideration for determining the actual ground reality. No hard-and-fast rule, however, can be laid down therefor.
>
> 48. A large number of English decisions have been placed before us by Mr. Nanda to contend that inflation may not be taken into consideration at all. While the reasonings adopted by the English courts and its decisions may not be of much dispute, we cannot blindly follow the same ignoring ground realities.
>
> 49. We have noticed the precedents operating in the field as also the rival contentions raised before us by the learned counsel for the parties with a view to show that law is required to be laid down in clearer terms."

56. The tables extracted in the earlier part of the judgment show that the interest rates in this country do not always rise with the inflation. In some of the years the interest rates were lower than the inflation which would show that the real value of money was depleting.

57. It may be mentioned that the judgment in **Sarla Verma** (supra) was pronounced on 15.04.2009 i.e. before **Reshma Kumari** (supra) but the same escaped attention of the learned Judges when the matter of grant of future prospects was considered and decided, but the Court was silent about the grant of any benefit towards the increase in inflation.

58. The subsequent reports of the Supreme Court in **Laxman v. Oriental Insurance Co. Ltd.,** (2011) 10 SCC 756, **Sanjay Batham v. Munnalal Parihar,** (2011) 10 SCC 665, **Govind Yadav v. New India Insurance Co. Ltd.** (2011) 10 SCC 683, and **Ibrahim v. Raju,** (2011) 10 SCC 634 also referred to Para 47 of the report in **Reshma Kumari** (supra) but did not lay any guidelines as to how and upto what extent the inflation is to be taken into account in award of just compensation.

59. The learned counsel for the Claimants place reliance on a judgment of the Patna High Court in **Hindustan Concrete Pipe v. Anjali Devi & Ors.,** 1990 ACJ 603 wherein my Lord Hon'ble Mr. Justice S.B.Sinha as a learned Single Judge of Patna High Court (as he then was) expressed his sentiments that the Tribunals while awarding compensation should also take into consideration the monetary inflation and the reduced buying power of the citizens in the present-day context. In view of **Rattan Lal Mehta** (supra) a Division Bench judgment of this Court, **Anjali Devi**

(supra) cannot be taken as a precedent.

60. In view of the foregoing discussion, I am of the view that no addition in the minimum wages cannot be made on account of inflation for computation of compensation.

61. Having decided the question of law, I proceed to deal with each cases one by one.

MAC APP.997/2011

62. The Appellants seek enhancement of compensation of Rs. 4,55,568/- on the ground that the addition of 50% to the income of the deceased Prashant Gupta, which was computed according to the minimum wages was not done.

63. The deceased Prashant Gupta was working as a Sales Executive with M/s. Marvy Outsourcing Pvt. Ltd. During inquiry before the Claims Tribunal it was claimed that the deceased was getting a salary of Rs. 7132/-. In the absence of any cogent evidence, the Claims Tribunal took the minimum wages of a Matriculate i.e. Rs. 6448/-, deducted 50% towards personal living expenses, the deceased being bachelor and adopted the multiplier of '11' as the deceased's mother was 53 years, to compute the loss of dependency as Rs. 4,25,568/-.

64. Appellant Dhaneshwari filed her Affidavit Ex.P-2/1 and entered the witness box as PW-2. She testified that her son Prashant Gupta joined M/s. Marvy Outsourcing Pvt. Ltd. in pursuance of the appointment letter Ex.PW-2/3. Clause (B) of the appointment letter shows that the deceased was offered a salary of Rs. 7139/-. In cross-examination the Appellant admitted that she had no documentary evidence to show that the deceased had joined M/s. Marvy Outsourcing Pvt. Ltd. in pursuance of the appointment letter. The genuineness of the appointment letter was not disputed. The appointment letter is dated 21.07.2008 whereas, the deceased died on 24.02.2010. As per Clause (E) of the appointment letter the deceased was entitled to bonus as per the payment of Bonus Act, 1965. As per Clause (H) the appointment could be terminated by giving one month's notice.

65. In the absence of any evidence being produced by the Appellant that the deceased was in permanent employment, obviously, the benefit of future prospects could not be given, yet considering that the deceased

was entitled to bonus, his income should have been taken as Rs. 8,000/- per month (7139/- being the salary) in addition to the medical and insurance benefits. The loss of dependency thus comes to Rs. 5,28,000/- (Rs. 8,000/- ˜2 x 12 x 11).

66. The Claims Tribunal awarded a sum of Rs. 10,000/- towards loss of love and affection. Loss of love and affection can never be measured in terms of money. Thus, uniformity has to be adopted by the Courts while granting non-pecuniary damages. The Supreme Court in **Sunil Sharma v. Bachitar Singh** (2011) 11 SCC 425 and in **Baby Radhika Gupta v. Oriental Insurance Company Limited** (2009) 17 SCC 627 granted only Rs. 25,000/- (in total to all the claimants) under the head of loss of love and affection. Thus, I would enhance the compensation under this head from Rs. 10,000/- to Rs. 25,000/-.

67. The overall compensation is re-assessed as under:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal	Awarded by this Court
1.	Loss of Dependency	Rs. 4,25,568/-	Rs.5,28,000/-
2.	Loss to Estate	Rs. 10,000/-	Rs. 10,000/-
3.	Loss of Love & Affection	Rs. 10,000/-	Rs. 25,000/-
4.	Funeral Expenses	Rs. 10,000/-	Rs. 10,000/-
	Total	**Rs. 4,55,568/-**	**Rs. 5,73,000/-**

68. The overall compensation is enhanced from Rs. 4,55,568/- to Rs. 5,73,000/-. (It may be noticed that if the compensation would have been granted on 50% addition in the minimum wages, it would have been higher than the one granted on the actual income).

69. I have earlier mentioned the rate of interest being paid by the Nationalized Banks. Higher rate of interest is payable to the senior citizens by half a percent. In **Sarla Verm** (supra) the Hon'ble Supreme Court granted rate of interest @ 7.5 % per annum.

70. Rate of interest were in double digits in 1980's and 1990's. The

interest rate started falling at the beginning of this century. They started rising and firming up since 2007. Since the rate of interest on long term deposit is now about 9% per annum, it is unreasonable to award interest @ 7.5% per annum to the victims of the motor accident.

71. In **Abati Bezbaruah v. Dy. Director General, Geological Survey of India,** (2003) 3 SCC 148, the Supreme Court culled out the factors to be taken into consideration while awarding interest in motor accident case. Para 6 and 18 of the report are extracted hereunder:-

> "6. The question as to what should be the rate of interest, in the opinion of this Court, would depend upon the facts and circumstances of each case. Award of interest would normally depend upon the bank rate prevailing at the relevant time.
>
> x x x x x x x x x x x x x x x x x x x x x x x
>
> 18. Three decisions were cited before us by Mr. A.P. Mohanty, learned counsel appearing on behalf of the appellant, in support of his contentions. No ratio has been laid down in any of the decisions in regard to the rate of interest and the rate of interest was awarded on the amount of compensation as a matter of judicial discretion. The rate of interest must be just and reasonable depending upon the facts and circumstances of each case and taking all relevant factors including inflation, change of economy, policy being adopted by Reserve Bank of India from time to time, how long the case is pending, permanent injuries suffered by the victim, enormity of suffering, loss of future income, loss of enjoyment of life etc., into consideration. No rate of interest is fixed under Section 171 of the Motor Vehicles Act, 1988. Varying rates of interest are being awarded by Tribunals, High Courts and the Supreme Court. Interest can be granted even if a claimant does not specifically plead for the same as it is consequential in the eye of law. Interest is compensation for forbearance or detention of money and that interest being awarded to a party only for being kept out of the money which ought to have been paid to him. No principle could be deducted nor can any rate of interest be fixed to have a general application in motor accident claim cases having regard to the nature of provision under Section 171 giving discretion to the Tribunal in

> such matter. In other matters, awarding of interest depends upon the statutory provisions, mercantile usage and doctrine of equity. Neither Section 34 CPC nor Section 4-A(3) of the Workmen's Compensation Act are applicable in the matter of fixing rate of interest in a claim under the Motor Vehicles Act. The courts have awarded the interest at different rates depending upon the facts and circumstances of each case. Therefore, in my opinion, there cannot be any hard-and-fast rule in awarding interest and the award of interest is solely on the discretion of the Tribunal or the High Court as indicated above."

72. In **Rubi (Chandra) Dutta v. United India Insurance Co. Ltd.** (2011) 11 SCC 269, the interest granted by the National Commission @ 9% was upheld by the Supreme Court. In **Sant Singh v. Sukhdev Singh,** (2011) 11 SCC 632, interest @ 9% per annum was awarded by the Hon'ble Supreme Court. In **Raj Kumar v. Ajay Kumar & Anr.,** 2011 (1) SCC 343, the interest @ 9% awarded by the Claims Tribunal was approved. In **Arvind Kumar Mishra v. New India Assurance Co. Ltd.,** (2010) 10 SCC 254, interest @ 9% was awarded on the enhanced amount of compensation.

73. In the circumstances, I would also follow the Bank rate of interest and would award interest @ 9% per annum on the enhanced amount.

74. The enhanced compensation of Rs. 1,17,432/- shall carry interest @ 9% per annum from the date of filing of the petition till the amount is paid. The Respondent Insurance Company is directed to deposit the enhanced amount within six weeks.

75. The first Appellant shall be getting 75% and the second Appellant shall be getting 25% of the enhanced amount. The amount shall be held in fixed deposits for a period of one year in UCO Bank, Delhi High Court Branch, New Delhi.

76. The Appeal is allowed in above terms.

MAC APP.203/2006

77. The Appellant Oriental Insurance Co. Ltd. seeks reduction of compensation of Rs. 5,67,528/- awarded for the death of Kali Charan

who died in a motor accident which occurred on 27.02.2003.

78. The contention raised on behalf of the Appellant are:-

(i) The deceased as per the postmortem report was aged about 55 years, though the Claimants averred his age to be 45 years. The multiplier of '16. adopted by the Claims Tribunal was high. The rate of interest @ 7.5% per annum awarded by the Claims Tribunal is high.

(ii) The driving licence held by the first Respondent was valid for the period from 23.12.1999 to 22.12.2002 and was renewed on 13.03.2003. The Appellant successfully proved the breach of the policy condition, yet it was made liable to pay the compensation even the recovery rights were not granted.

79. The first Respondent Ram Ratti in her Affidavit Ex.PW-3 testified the deceased's age to be 45 years, which was not challenged in cross-examination. In the absence of rebuttal the deceased's age was rightly taken as 45 years. The number of dependents was 7 and thus the deduction towards the personal living expenses as per Sarla Verma (supra) was required to be one-fifth instead of one-third. Although, the multiplier of '16' adopted by the Claims Tribunal was on the higher side. The appropriate multiplier as per **Sarla Verma** (supra) was '14'.

80. On re-computation and deduction of one-fifth towards personal living expenses, the compensation would work out as Rs. 5,61,254/- (Rs. 4167/- x 4/5 x 12 x 14) as against Rs. 5,34,528/- calculated by the Claims Tribunal.

81. In the absence of any Appeal for enhancement of compensation, I cannot interfere with the same.

82. Although the rate of interest @ 7.5% is averred to be on the higher side in the memorandum of Appeal this point was not raised during the hearing of the Appeal. Otherwise also, grant of interest @ 7.5% per annum cannot be said to be exorbitant or excessive.

83. On the question of liability, the Claims Tribunal held as under:-

"Here one contention of R-3 needs to be discussed. By examining R3W1 and R3W2, R-3 has proved that the licence of R-1 was

valid only from 23-12-1999 to 22.12.2002 and R-1 got the licence renewed only on 13.3.2003. Counsel for R-3 submitted that R-1 had no valid and effective licence on the date of the accident and so recovery rights be granted. I have carefully considered this submission of the Ld. Counsel for R-3. The fact that R-1 had a valid driving licence till 22.12.2002 shows that he was not disqualified from holding the licence or from getting this licence renewed after 22.12.2002. There is a grace period for renewal of the expired licence and on such renewal the licence regains its effectiveness. The insurer can avoid liability if the vehicle was driven by a person who is not duly licenced or by any person who had been disqualified for holding or obtaining a licence. In fact R-1 had a driving licence valid till 23.12.1999 and there is no material on record to infer that R-2 and R-2A had a knowledge that the driving licence of R-1 had expired on 23.12.1999. There is no evidence of R-3 that on the date of the accident i.e. 27.2.2003 R-1 had been disqualified from getting his expired licence renewed. In this regard, reference can be made to an authority reported 2004 ACJ 457 wherein it has been held that licence inspite of expiry of its validity period continues to exists unless the licensee had been disqualified to hold it. In view of this I hold that there is no merit in the submission of the counsel for R-3 for grant of recovery rights against R-2 and R-2A. Accordingly, I hold that the amount of compensation is to be paid by R-3. This issue stands decided accordingly."

84. Thus, it may be seen that the Claims Tribunal made the Insurer liable to pay the compensation merely on the ground that no material was produced on record to infer that the Eighth Respondent and Ninth Respondent had any knowledge that the driving licence of the Seventh Respondent (the First Respondent before the Claims Tribunal) had expired. It is expected of the owner of every vehicle to at least check the validity of the driving licence of the driver while engaging him. Once it was established that the driving licence had expired much before the accident it was for the owner to have shown the circumstances under which the vehicle was entrusted to the Seventh Respondent. It can very well be said that the owner failed to exercise reasonable care to ensure that there is no breach of the terms of policy. Thus, the owner would be guilty of the conscious and willful breach of the condition of policy.

85. The other ground on which the Insurer was made liable was that in spite of the expiry of the validity period the driving licence of the driver had not been disqualified to hold the same. The Claims Tribunal relied on **Oriental Insurance Company Limited v. Paulose,** 2004 ACJ 457 to fasten the liability on the Insurance Company.

86. This is no longer good law in view of the judgment of the Supreme Court in **National Insurance Company Limited v. Jarnail Singh & Ors.,** (2007) 15 SCC 28, **Ram Babu Tiwari v. United India Insurance Co. Ltd. & Ors.,** (2008) 8 SCC 165 and **New India Assurance Company Ltd. v. Suresh Chandra Aggarwal,** (2009) 15 SCC 761.

87. In **Jarnail Singh** (supra) the driver had a driving licence which expired on 18.05.1994. The accident took place on 20.10.1994. The licence was renewed with effect from 28.10.1996. While referring to Section 15 (1) of the Act, the Supreme Court held that the driver had no licence to drive the vehicle on the date of the accident i.e. 20.10.1994 and recovery rights were granted to the Insurance Company. The relevant para of the report are extracted hereunder:-

> "7. There is no dispute that the policy stipulated a condition that the vehicle would not be driven by a person without a valid driving licence. It means that the policy condition had been violated.
>
> 8. This Court held in **New India Assurance Co. v. Kamla** (2001) 4 SCC 342 that the insurance company is nonetheless liable to pay the compensation to the third party on the strength of the valid insurance policy issued in respect of a vehicle, but the remedy of the insurer when there was breach or violation of the policy condition was to recover the amount from the insured..."

88. In para 18 of the report in **Ram Babu Tiwari** (supra) it was held as under:-

> "18. It is beyond any doubt or dispute that only in the event an application for renewal of licence is filed within a period 30 days from the date of expiry thereof, the same would be renewed automatically which means that even if an accident had taken place within the aforementioned period, the driver may be held to be possessing a valid licence. The proviso appended to Sub-

> section (1) of Section 15, however, clearly states that the driving licence shall be renewed with effect from the date of its renewal in the event the application for renewal of a licence is made more than 30 days after the date of its expiry. It is, therefore, evident that as, on renewal of the licence on such terms, the driver of the vehicle cannot be said to be holding a valid licence, the insurer would not be liable to indemnify the insured. The second proviso appended to Sub-section (4) of Section 15 is of no assistance to the appellant. It merely enables the licensing authority to take a further test of competent driving and passing thereof to its satisfaction within the meaning of Sub-section (3) of Section 9. It does not say that the renewal would be automatic. ..."

89. Similarly, in **Suresh Chandra Aggarwal** (supra), the driving licence of the driver had expired on 25.10.1991 i.e. four months prior to the date of accident which occurred on 29.02.1992. The driving licence was renewed w.e.f. 23.03.1992. Since the renewal of the licence was not within 30 days of the expiry, it was held that the driver did not possess any effective driving licence and there was breach of the terms of the policy.

90. Thus, the owner cannot escape the liability.

91. Initially, the Claim Petition was filed against Satish Kumar being the driver of the offending vehicle and Smt. Surjit Kaur as owner of the offending vehicle. Surjit Kaur did not dispute the ownership in the written statement filed by her. Later on, an application under Order 1 Rule 10 CPC, moved by the Respondents No.1 to 5 was allowed and Joginder Singh was impleaded as Respondent No.2A, being registered owner of the vehicle.

92. The terms "owner" is defined under Section 2 (30) of the Act means "a person in whose name a motor vehicle stands registered". Thus, although the actual owner (Respondent No.8) in law remains vicariously liable for the acts of his servant, the registered owner (Respondent No.9) also cannot escape the liability. (**Dr. T.V. Jose v. Chacko P. M.,** AIR 2001 SC 3939).

93. Since the Seventh Respondent also had an expired licence, resulting into breach of the condition of policy, the Appellant was entitled

to be granted recovery rights.

94. I accordingly hold that the Appellant is entitled to recover the amount of compensation paid from the Respondents Nos. 7,8 and 9 who were jointly and severally liable to pay the same along with the driver of the vehicle.

95. The Appeal is allowed in above terms.

MAC APP.955/2011

96. The Appeal is for reduction of compensation of Rs. 10,21,200/- awarded for the death of Shoorbir Singh. He was aged about 39 years at the time of the accident and had studied upto 12th class. It was claimed that he was working as a 'Field Executive' with M/s. Zetetic House Keeping since 09.03.2009 and was posted at Jas India Forwarding Pvt. Ltd.; he was getting a salary of Rs. 6500/- per month.

97. PW-1 Meera, the deceased's widow testified about the deceased's employment and proved the salary certificate Ex.PW-1/D. PW-2 Umed Singh also deposed that the deceased was working with M/s. Zetetic and was drawing a salary of Rs. 6500/- per month. In the absence of any evidence from the employer, the Claims Tribunal rejected the salary certificate Ex.PW-1/D, took the deceased's income according to the minimum wages and added 50% towards the future inflation. Although, a suggestion was given to PW-1 Meera, who was the deceased's widow that the salary certificate was not genuine, no such suggestion was given to PW-2 who corroborated PW-1's testimony on the aspect of deceased's salary. Moreover, The Appellant could have produced some evidence to rebut the salary certificate through its investigator. In the circumstances, the Claims Tribunal erred in disbelieving the salary certificate Ex.PW-1/D. Relying on the same, the loss of dependency works out as Rs. 8,77,500/- (6500/- x 3/4 x 12 x 15) as against the loss of dependency of Rs. 8,91,200/- worked out by the Claims Tribunal.

98. Relying on **Kailash Kaur v. New India Insurance Company,** MAC APP.318/2008 decided on 24.03.2009, the Claims Tribunal awarded a sum of Rs. 1,00,000/- i.e. Rs. 25,000/- each to the four legal representatives towards loss of love and affection.

99. The loss of love and affection can never be measured in terms of money. Thus, uniformity has to be adopted by the Courts while

granting non-pecuniary damages. The Supreme Court in **Sunil Sharma v. Bachitar Singh** (2011) 11 SCC 425 and in **Baby Radhika Gupta v. Oriental Insurance Company Limited** (2009) 17 SCC 627 granted only Rs. 25,000/- (in total to all the claimants) under the head of loss of love and affection. Thus, I would reduce the compensation under this head from Rs. 1,00,000/- to Rs. 25,000/- only.

100. The overall compensation is re-assessed as under:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal	Awarded by this Court
1.	Loss of Dependency	Rs.8,91,200/-	Rs.8,77,500/-
2.	Loss of Love & Affection	Rs. 1,00,000/-	Rs. 25,000/-
3.	Loss of Consortium	Rs. 10,000/-	Rs. 10,000/-
4.	Funeral Expenses	Rs. 10,000/-	Rs. 10,000/-
5.	Loss to Estate	Rs. 10,000/-	Rs. 10,000/-
	Total	**Rs. 10,21,200/-**	**Rs. 9,32,500/-**

101. The overall compensation is thus reduced from Rs. 10,21,200/- to Rs. 9,32,500/-.

102. The excess amount of Rs. 88,700/- alongwith proportionate interest and the interest, if any, accrued during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.

103. The compensation held payable to Respondents No.1 to 4 shall be paid in the same proportion as directed by the Claims Tribunal.

104. The Appeal is allowed in above terms.

MAC.APP. 958/2011

105. The Appellant seeks reduction of compensation of Rs. 12,18,800/- awarded for the death of Monu Gupta, who was aged about 23 years at the time of the accident which occurred on 26.12.2009.

106. The quantum of compensation is challenged on the following

grounds:-

(i) 50% addition in the minimum wages was not justified. The loss of dependency ought to have been calculated on the minimum wages.

(ii) Award of compensation under the head of loss of love and affection is on the higher side.

(iii) Interest awarded @ 9% per annum is on the higher side.

107. During inquiry before the Claims Tribunal, it was claimed that the deceased was working as a cook with Mama Hotel, D-137/7, Gautam Nagar, New Delhi and was getting a salary of Rs. 5700/- per month in addition he was also driving an auto rickshaw (TSR) during night time and was earning Rs. 5,000/- per month.

108. Although, the accident took place with the offending vehicle No.HR-47A-9095 while the deceased Monu Gupta was driving TSR No.DL-1RG-1115, the Claims Tribunal disbelieved the deceased to be working either as a cook or even driving TSR in the absence of any documentary evidence. A salary certificate from Mama Hotel was placed on record but it was not proved in accordance with law. A suggestion was given to the deceased's widow that the deceased was not working in the said hotel. Since the salary certificate was not proved, it was rightly discarded by the Claims Tribunal. Permit of TSR No.DL-1RD-1115 dated 16.04.2007 in deceased's name was placed on the record. Moreover, the accident took place with this very TSR. The income of the TSR driver owning his own TSR can be presumed atleast Rs. 200/- per day. On working for 25 days, his income from driving the TSR should be alteast Rs. 5,000/- per month. The Respondents No.1 to 5 were entitled to loss of dependency on the income of Rs. 5,000/- per month instead of the income of minimum wages. The loss of dependency thus works out as Rs. 8,10,000/- (5,000/- x 3/4 x 12 x 18).

109. The Claims Tribunal awarded a sum of Rs. 1,25,000/- towards loss of love and affection which for the reasons stated by me hereinabove while dealing with MAC APP.955/2011 is reduced from Rs. 1,25,000/- to Rs. 25,000/- only.

110. The overall compensation is re-assessed as under:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal	Awarded by this Court
1.	Loss of Dependency	Rs.10,63,800/-	Rs.8,10,000/-
2.	Loss of Love & Affection	Rs. 1,25,000/-	Rs. 25,000/-
3.	Loss of Consortium	Rs. 10,000/-	Rs. 10,000/-
4.	Funeral Expenses	Rs. 10,000/-	Rs. 10,000/-
5.	Loss to Estate	Rs. 10,000/-	Rs. 10,000/-
	Total	**Rs. 12,18,800/-**	**Rs. 8,65,000/-**

111. The overall compensation is thus reduced from Rs. 12,18,800/- to Rs. 8,65,000/-.

112. The excess amount of Rs. 3,53,800/- alongwith proportionate interest and the interest, if any, accrued during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.

113. Certain amounts were released in favour of Respondents Nos.1, 4 and 5 by the order dated 01.11.2011. Rest of the amount shall be disbursed in the same proportion/held in the fixed deposits as directed by the Claims Tribunal.

114. The Appeal is allowed in above terms.

MAC.APP. 461/2010

115. The Appellants who are the parents of deceased Manoj seek enhancement of compensation of Rs. 2,27,000/-. It was claimed that the deceased was doing a private job and was earning Rs. 6,000/- per month. He was also pursuing the Graduation from Delhi University. The Claims Tribunal, in the absence of any evidence took the deceased's income to be Rs. 3,000/- per month, deducted 50% towards his personal and living expenses and adopted the multiplier of 14, as per the age of the deceased's mother to compute the loss of dependency as Rs. 2,52,000/-.

116. The Appellants did not disclose the name of the employer nor

presented any evidence to show that the deceased was employed and was earning Rs. 6,000/- per month. In the circumstances, the Claims Tribunal rightly did not take into consideration the deceased's income of Rs. 6,000/- per month.

117. The minimum wages of a Matriculate on the date of the accident were Rs. 3964/- or say Rs. 4,000/- per month. The loss of dependency thus works out as Rs. 3,36,000/- (Rs. 4,000/- - 50% x 12 x 14).

118. Other pecuniary and non-pecuniary damages and the overall compensation is re-assessed as under:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal	Awarded by this Court
1.	Loss of Dependency	Rs.2,52,000/-	Rs.3,36,000/-
2.	Loss of Love & Affection	Rs. 10,000/-	Rs. 25,000/-
3.	Funeral Expenses	Rs. 10,000/-	Rs. 10,000/-
4.	Loss to Estate	—	Rs. 10,000/-
	Total	**Rs. 2,72,000/-**	**Rs. 3,81,000/-**

119. The overall compensation is thus enhanced from Rs. 2,72,000/- to Rs. 3,81,000/- which shall carry interest @ 9% per annum from the date of filing of the petition till the date of payment.

120. The enhanced compensation along with proportionate interest shall be deposited within 30 days which shall be equally shared in favour of the Appellants and shall be held in fixed deposits for a period of one year with UCO Bank, Delhi High Court Branch, New Delhi.

121. The Appeal is allowed in above terms.

MAC.APP. 768/2010

122. The Appeal is for reduction of compensation of Rs. 9,85,500/- awarded for the death of Devendra Kumar who died in an accident which occurred on 07.04.2009.

123. It was claimed that the deceased was pursuing job of a driver with the owner of the offending bus and his salary was claimed to be Rs. 6,000/- per month. The Claims Tribunal, in the absence of any documentary evidence, disbelieved the deceased's salary, took the minimum wages of a skilled worker as Rs. 4400/- per month, added 50% towards inflation to compute the loss of dependency as Rs. 9,50,400/-.

124. The averments made in Para 23 of the Claim Petition that the deceased was working as a driver were not controverted though the factum of the deceased's salary as Rs. 6,000/- per month was disputed by the Appellant Insurance Company.

125. The accident took place in year 2009. Since the factum of deceased's employment as a bus driver is not disputed, I would assume his income to be Rs. 6,000/- per month i.e. Rs. 200/- per day. In my view, the Respondents No.1 to 6 were entitled to loss of dependency on the income of Rs. 6,000/- per month. The dependents were deceased's widow, three children and his mother. The Claims Tribunal rightly deducted one-fourth of the deceased's income towards his personal and living expenses. The loss of dependency thus works out as Rs. 8,64,000/- (Rs. 6,000/- x 3/4 x 12 x 16).

126. The overall compensation is re-assessed as under:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal	Awarded by this Court
1.	Loss of Dependency	Rs.9,50,400/-	Rs.8,64,000/-
2.	Loss of Love & Affection	Rs. 10,000/-	Rs. 25,000/-
3.	Loss of Consortium	Rs. 10,000/-	Rs. 10,000/-
4.	Funeral Expenses	Rs. 5,000/-	Rs. 10,000/-
5.	Loss to Estate	Rs. 10,000/-	Rs. 10,000/-
	Total **Round off**	**Rs. 9,85,400/-** **Rs. 9,85,500/-**	**Rs. 9,19,000/-**

127. The overall compensation is thus reduced from Rs. 9,85,500/- to Rs. 9,19,000/-.

128. The excess amount of Rs. 66,500/- alongwith proportionate interest and the interest, if any, accrued during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.

129. The Appeal is allowed in above terms.

MAC.APP. 137/2011

130. The Appellant ICICI Lombard General Insurance Company Limited seeks reduction of compensation of Rs. 9,72,215/- awarded for the death of Ashok Kumar, who was aged 30 years at the time of the accident which occurred on 08.11.2009.

131. Respondents No.1 to 4 claimed that the deceased was looking after business of his father, the fourth Respondent who was not keeping in good health. He was earning Rs. 25,000/- per month from the business of selling automobile parts. A Bank statement Ex.PX-7 was placed on record in support of the financial transaction. The Claims Tribunal did not consider it as substantial evidence to conclude that the deceased was in business and was earning Rs. 25,000/- per month. The Claims Tribunal, therefore, accepted the minimum wages of an unskilled worker as Rs. 3953/-, added 50% towards the inflation to compute the loss of dependency as Rs. 9,07,215/-.

132. The deceased's widow Smt. Rajni filed her Affidavit Ex.PW-1/1 in support of the averments that the deceased was looking after all the affairs and management of the business and was earning Rs. 25,000/- per month. In cross-examination, PW-1 admitted that the deceased was not filing any Income Tax Return. She testified that her husband was running a shop at Mayapuri and had opened a current account in his own name. Copy of the pass book of saving bank account was proved as Ex.PX7.

133. There is no Appeal for enhancement of compensation by legal representatives of the deceased. There are number of entries in the deceased's saving bank account No.20009734251 which shows that more than a sum of Rs. 25,000/- was being credited every month in his

account. The deceased owned a motor cycle. His only son was admitted in a public school, namely, Royal Indian Public School. He paid school fee of Rs. 8938/- in the year 2009-10.

134. In the circumstances, the deceased's income could have been assumed to be atleast Rs. 6,000/- per month, whereas the Claims Tribunal assumed it to be Rs. 3953/- + 50% i.e. Rs. 5929/- per month. The loss of dependency on the income of Rs. 6,000/- works out as Rs. 9,18,000/- as against 9,07,215/- assessed by the Claims Tribunal.

135. The overall compensation of Rs. 9,72,215/- awarded by the Claims Tribunal, in the facts and circumstances cannot be said to be exorbitant or excessive.

136. Some of the compensation amount has already been be released. The balance amount of compensation shall be deposited/released in terms of the Claims Tribunal's order.

137. The Appeal is devoid of any merit. The same is accordingly dismissed.

MAC.APP. 566/2010 and MAC.APP. 51/2012

138. These are two cross Appeals. MAC APP.566/2010 is filed by Daya Malik and Manish Sharma, owner and the driver of the offending vehicle which was a Lancer Car No.DL-1CF-7624, seeking exoneration on the ground that the second Appellant was not driving the offending vehicle i.e. Lancer Car, rather her husband RW-3 Ram Nath Malik was driving the car at the aforesaid time.

139. In MAC APP.51/2012 preferred by the Claimants by way of Cross-Objections, the grounds set up is that the deceased's future prospects were not considered and no compensation was awarded towards loss of love and affection.

140. For the sake of convenience, the Appellants in MAC APP.566/2010 shall be referred to as the Appellants and the Objectors in MAC APP.51/2012 shall be referred as the Claimants.

141. As per the averments made in the Claim Petition, on 27.04.2008 at about 11:23 PM, the deceased was returning from Majnu Ka Tila and

was proceeding to his house in Pul Bangash, Subzi Mandi on his motor cycle No.DL-3SZ-8996. When he reached opposite Bara Hindu Rao Hospital, a Lancer Car No.DL-1CF-7624 which was being driven in a rash and negligent manner came from Barafkhana's side. The Lancer car came on the wrong side and ran over the motorcycle.

142. In the written statement filed by Daya Malik, owner of the Lancer car, the manner of accident was disputed. It was stated that the Lancer Car was parked alongside the pavement in between Bara Hindu Rao Hospital and Barafkhana. There was no divider in between. The car was parked and the indicators were functioning. It was stated that the Claimants cooked up a false story in collusion with the police to falsely implicate the owner and her son-in-law.

143. The second Appellant filed a separate written statement raising a plea that he was not driving the Lancer Car at the time of the accident. It was claimed that in reply to a notice under Section 133 of the Act, the IO was informed that it was not the second Appellant but Ram Nath Malik, RW-3 who was the driver of the Lancer Car.

144. The contentions raised on behalf of the Appellants are :-

(i) There was no negligence on the part of the driver of the Lancer car, rather, there was negligence on the part of the deceased as he was over speeding. The driver of the said car was not the second Appellant but Ram Nath Malik, the husband of its owner.

(ii) The deceased's income was not proved and the compensation should have been awarded on the basis of minimum wages.

145. On the other hand, the contentions raised on behalf of the Claimants are :-

(i) There was no negligence on the part of the deceased. The Claims Tribunal rightly held that the driver of Lancer Car was negligent.

(ii) Although the deceased was in a suitable job, no benefit of future prospects was given.

(iii) No compensation has been awarded towards loss of love and affection.

(iv) The compensation awarded towards loss to estate and loss of consortium are on the lower side.

146. In view of the contentions raised by the parties, the question of negligence assumes importance.

147. The Claims Tribunal while dealing with the issue of negligence, held as under:-

6. Issue no. 1:-

PW1 has stated that the deceased was traveling on his motorcycle and was hit by the offending vehicle driven by respondent no. 2 in rash and negligent manner. She has however admitted that she was not an eye witness. Medical record relating to admission, postmortem MLC and certified copies of the challan filed by the Police against respondent no. 2 as Ex. PW1/10 are filed on record. As per postmortem report and M.L.C. deceased had received vertebral damage due to blunt force impact on his neck which was possible in a road traffic accident. It is also stated that the injuries were antemortem in nature which were consistent with vehicular accident. As per Police investigation a case against respondent no. 2 for rash and negligent driving was made out. Respondent no. 2 had been arrested and released on Bail and was facing trial. IO of the criminal case had repeatedly been summoned but did not appear in the court as it was stated that due to severe diabetic condition for past one year the witness was unable to walk and was taking treatment at Meerut.

R1W1 i.e. respondent no. 1 reiterated her stand taken in the reply. In cross-examination she stated that she has not disclosed in her written statement that her husband was driving the vehicle at the time of accident. She stated that she was owner of the vehicle and her vehicle was not insured. She also stated that she has not lodged any compliant to the higher authorities in regard to falsely being implicated in the case.

Respondent no. 2, R1W2 stated that he has wrongly been implicated in the case and was not driving the offending vehicle at the time of the accident. In cross-examination he admitted that he was facing trial in the criminal case and that he had not

lodged any written compliant to higher authorities for falsely implicating him in the criminal case. He stated that he had seen the vehicle standing at the Patri when he reached at 10:30-11:00 p.m.

The mechanical inspection report of the offending vehicle is on record which shows that the Engine Bonnet was damaged, front bumper, front glass were broken, right side mud guard damaged, front right head light broken, front right and left inductor broken. The motorcycle was also found to be damaged as per mechanical inspection report. This clearly shows that the offending vehicle was involved in the accident in question. The spot map of the criminal case also shows the position of the offending car on the wrong side of the road. As per the map, it appears that the offending vehicle was turned on the wrong side of the road and had hit the vehicle of the deceased coming on his right side thereby causing accident. In view of the documents available on record it is reasonably established that deceased died due to injuries in the accident by the offending vehicle driven in rash and negligent manner by respondent no. 2.

Accordingly, issue no. 1 is decided in favour of the petitioners."

148. The Appellants claimed that Ram Nath Malik (RW-3) was present with the Lancer car at the time of the accident which was parked on the fourth electrical pole leading from Bara Hindu Rao to Barafkhana as shown in the site plan Ex.RW-3/1. Neither of the two Appellants nor RW-3 Ram Nath Malik have stated the purpose of parking the car beside the pavement late into the night at 11:23 P.M. The mechanical inspection report of the two vehicles reveals that there was extensive damage on the front right side of the car - its bonnet was damaged, bumper broken, front glass broken, front right head light was also broken. The deceased's two wheeler also had extensive damage on its front. Had the Lancer Car been parked on the left side of the road, close to the pavement, there would not have been such an extensive damage to the same. The site plan prepared by the IO filed along with the Challan Ex.PW-1/10 reveals that the Lancer car was parked at Point A after the accident whereas, the two wheeler was lying at Point B. It shows that the Lancer car had travelled on the right side on the road which is not very wide. The negligence on the part of the driver of the Lancer car was writ large and

in the absence of any explanation, presumption of negligence can be drawn on the basis of principle of res ipsa loquitur. The Claimants were not present at the time of the accident and no eye witness has been produced. The owner claims that it was her husband and not her son-in-law, the second Appellant, who was driving the Lancer Car. Although, the first Appellant took the plea that the second Appellant was falsely implication in collusion with the police, no reason has been given for false implication. Why would the police involve the son-in-law of the owner of a vehicle? The police would not even know as to who was the son-in-law. No complaint was made to the senior police officers that Ram Nath Malik was the driver at the Lancer Car at the time of the accident and not the second Appellant. It appears that the plea that the vehicle was being driven by Ram Nath Malik has been taken to avoid the criminal case filed against the second Appellant. As far as the Claim Petition is concerned, even if the identity of the driver is not established, the owner cannot escape the liability.

149. Therefore, I agree with the conclusion reached by the Claims Tribunal that it was the second Appellant who was the driving the Lancer Car at the time of the accident and that the accident was caused on account of rash and negligent driving.

QUANTUM OF COMPENSATION

150. During inquiry before the Claims Tribunal, it was claimed that the deceased was working as an Accountant-cum-Sales Manager with M/s. Amar Enterprises and was getting a salary of Rs. 7,000/- per month. Photocopy of the salary certificate Ex.PW-1/9 was produced by Smt. Sanna, the deceased's widow. Rakesh Kumar Garg, the deceased's employer and Proprietor of M/s. Amar Enterprises was examined as PW-2. Although, he testified that the deceased was working with him since September, 2008, yet his testimony was completely shaken in cross-examination.

151. This accident took place in April, 2008. The deceased therefore could not have joined M/s. Amar Enterprises in September, 2008, he being already dead. PW-2 disowned the Certificate Ex.PW-1/9 which was claimed by Respondent Sanna to have been issued by PW-2. The witness was not even aware of the deceased's qualification. In the absence of the same, it was difficult to believe that the deceased would be

employed as an Accountant by PW-2. The Claims Tribunal in the circumstances, erred in relying on the salary certificate Ex.PW-1/9. In the absence of any proof with regard to the deceased's qualification, he could have been awarded compensation only on the basis of minimum wages of an unskilled worker. The deceased's age was 39 years and there were five dependents.

152. The loss of dependency comes to Rs. 4,90,455/- (3633/- x 3/4 x 12 x 15).

153. On adding notional sum of Rs. 25,000/- towards loss of love and affection and Rs. 10,000/- each towards loss of Consortium, loss of Estate and funeral Expenses, the overall compensation comes to Rs. 5,45,455/-.

154. The compensation payable is accordingly reduced from Rs. 9,81,000/- to Rs. 5,45,455/-.

155. The excess amount of Rs.4,35,545/- alongwith proportionate interest and the interest accrued if any, during the pendency of the Appeal shall be refunded to the Insurance Company.

MAC. APP. No.81/2011

156. The Appellant Royal Sundram Alliance Insurance Co. Ltd. seeks reduction of compensation of Rs.11,44,700/- awarded for the death of Mahender Singh who was aged 29 years and died in an accident which occurred on 14.09.2009. The deceased was survived by his widow, two sons, a daughter and aged parents.

157. During inquiry before the Claims Tribunal it was claimed that the deceased was working as a driver with Mahavir Traders and was earning Rs.8,000/- per month. The Claims Tribunal did not rely on the said certificate, took minimum wages of an unskilled worker, added 50% thereto to compute the loss of dependency as Rs. 10,04,070/-. The Claims Tribunal added a sum of Rs.1,00,000/- towards loss of love and affection, Rs. 25,000/- towards funeral expenses, '10,000/- towards consortium and Rs. 5,000/- towards loss to estate.

158. The contentions raised on behalf of the Appellant are:

(i) The deceased was not wearing a helmet at the time of the accident. He, therefore, by himself contributed to the

accident.

(ii) No addition to the minimum wages was permissible.

(iii) The compensation of Rs. 1,00,000/- awarded towards loss of love and affection and Rs. 25,000/- towards funeral expenses was excessive.

159. The Appellant Insurance Company claims that the deceased contributed to the accident as no helmet was recovered from the spot. Puneet Gupta's affidavit Ex.R3W1/A to the effect that the deceased was not wearing a helmet as it was not seized from the spot cannot be relied upon, to hold that the deceased was not wearing a helmet. The IO was not summoned to depose on this aspect. In the circumstances, I am not inclined to believe the version as put forth by Puneet Gupta, an employee of the Appellant Insurance Company. Moreover, even if it is assumed that the deceased was not wearing a helmet, he cannot be said to have contributed to the accident. Reference is made to a Division Bench judgment of M.P. High Court in **Miss. Vidya Soni & Anr. v. Pushpesh Dwivedi & Ors.,** AIR 2008 MP 319 wherein it was held that if a motorcyclist did not wear a helmet at the time of the accident, he cannot be said to have contributed to the accident.

160. During inquiry before the Claims Tribunal, Santosh, the deceased's widow filed an Affidavit Ex.PW-1/A by way of her evidence. She testified that her husband was employed as a driver and was getting a salary of Rs. 8,000/- per month.

161. In cross-examination, the witness deposed that her husband was employed with M/s. Mahavir Traders for the last 10-12 years. He used to ferry the owner in the small vehicle. The driving licence of the deceased was proved as Ex.PW-1/3.

162. The wages of a skilled worker on the date of the accident were Rs. 4377/- per month. The Respondent's testimony that the deceased was working as a driver and the proof of his driving licence was sufficient to conclude that the deceased was employed as a driver. I would assume his income to be about Rs. 5,000/- per month in the later part of the year 2009 when this accident occurred.

163. The loss of dependency would come as Rs. 7,65,000/- (5000/- x 3/4 x 12 x 17).

164. Since, normally a compensation of Rs. 25,000/- is granted towards loss of love and affection (**Sunil Sharma v. Bachitar Singh** (2011) 11 SCC 425 and **Baby Radhika Gupta v. Oriental Insurance Company Limited** (2009) 17 SCC 627), the same has to be reduced to Rs. 25,000/- from Rs. 1,00,000/- awarded by the Claims Tribunal. Funeral expenses are also granted to the extent of Rs.10,000/- unless there is specific evidence to the contrary.

165. The compensation is recomputed as under:-

S. No.	Head of Compensation	Granted by the Claims Tribunal	Granted by this Court
1.	Loss of Dependency	Rs. 10,04,700/-	Rs. 7,65,000/-
2.	Loss of Love and Affection	Rs. 1,00,000/-	Rs. 25,000/-
3.	Loss of Consortium	Rs. 10,000/-	Rs. 10,000/-
4.	Funeral Expenses	Rs. 25,000/-	Rs. 10,000/-
5.	Loss to Estate	Rs. 5,000/-	Rs. 10,000/-
	Total	**Rs. 11,44,700/-**	**Rs. 8,20,000/-**

166. The overall compensation is reduced from Rs. 11,44,700/- to Rs. 8,20,000/-.

167. The excess amount of Rs. 3,24,700/- along with the proportionate interest and the interest, if any, accrued during the pendency of the Appeal shall be refunded to the Appellant Insurance Company immediately.

168. The Appeal is allowed in above terms.

MAC. APP. No.493/2011

169. The Appeal is for reduction of compensation of Rs. 5,57,160/-

awarded, for the death of Rajesh, a bachelor aged 18 years who died in an accident on 01.10.2008.

170. During inquiry before the Claims Tribunal, it was claimed that the deceased was working as an 'Assistant/Clerk' with Mr. Santosh r/o C-50, Raja Garden and was drawing a salary of Rs. 5,000/- per month. The name of the employer was not mentioned in the Claim Petition. The factum of the deceased's employment as a Clerk was disputed in the written statement filed by the Appellant and Respondents No.2 & 3. In the absence of any cogent evidence, the Claims Tribunal, in my view, rightly disbelieved the Respondents plea that the deceased was working as a Clerk with one Santosh and earning Rs. 5,000/- per month. No evidence was led as to the deceased's qualification. In view of my observations above, no addition was permissible towards inflation. The loss of dependency comes to Rs. 3,31,470/-(3683 X 1/2 X 12 X 15).

171. The compensation is recomputed as under:

S. No.	Head of Compensation	Granted by the Claims Tribunal	Granted by this Court
1.	Loss of Dependency	Rs. 4,97,160/-	Rs. 3,31,470/-
2.	Loss of Love and Affection	Rs. 40,000/-	Rs. 25,000/-
3.	Funeral Expenses	Rs. 20,000/-	Rs. 10,000/-
5.	Loss to Estate	-	Rs. 10,000/-
	Total	**Rs. 5,57,160/-**	**Rs. 3,76,470/-**

172. The overall compensation is reduced from Rs. 5,57,160/- to Rs. 3,76,470/-

173. The excess amount of Rs. 1,80,690/- alongwith proportionate interest and the interest, if any, accrued during the pendency of the appeal shall be refunded to the Appellant Insurance Company immediately.

174. The Appeal is allowed in above terms.

MAC. APP. No.536/2011

175. The Appeal is for reduction of compensation of '9,89,738/- awarded for the death of Subhash Chand who was aged 30 years on the date of the accident which occurred on 06.01.2008. The deceased left behind five dependents i.e. the widow, three children and a mother.

176. During inquiry before the Claims Tribunal, it was claimed that the deceased was working as a Nakedar with M/s. Banas Sands Company and getting a salary of Rs. 5,000/- per month.

177. In the absence of any documentary evidence, the Claims Tribunal declined to believe the Claimants version about the deceased's salary and adopted minimum wages, made addition of 50% to compute the loss of dependency.

178. Before the Claims Tribunal, it was stated that the deceased was getting a salary of Rs. 3670/- plus overtime and the deceased's approximate income was Rs. 5,000/- per month. The name of the employer was also mentioned in the Claim Petition. The averments made in paras 5 and 6 were not specifically traversed. In her affidavit Ex.P1, the First Respondent testified that the deceased was getting a salary of Rs. 5,000/- per month and was contributing the entire income to the family. The First Respondent denied the suggestion that her husband was not employed and was not earning any amount. In view of non traversal, the averments made in the Claim Petition on the deceased's income of Rs. 5,000/- and considering his qualification of 12th Standard, from the Board of Secondary Education Rajasthan, I am inclined to accept his income to be Rs. 5,000/- per month. On the basis of the principles laid down earlier, the loss of dependency comes to Rs. 7,65,000/-(5000 X 12 X 3/4 X 17).

179. The compensation is recomputed as under:

S. No.	Head of Compensation	Granted by the Claims Tribunal	Granted by this Court
1.	Loss of Dependency	Rs. 9,09,738/-	Rs. 7,65,000/-
2.	Loss of Love and Affection	Rs. 50,000/-	Rs. 25,000/-

3.	Loss of Consortium	Rs. 10,000/-	Rs. 10,000/-
4.	Funeral Expenses	Rs. 10,000/-	Rs. 10,000/-
5.	Loss to Estate	Rs. 10,000/-	Rs. 10,000/-
	Total	**Rs. 9,89,738/-**	**Rs. 8,20,000/-**

180. The overall compensation is reduced from Rs. 9,89,738/- to Rs. 8,20,000/-

181. The excess amount of Rs. 1,69,738/- along with interest, if any accrued during the pendency of the appeal shall be refunded to the Appellant Insurance Company immediately.

182. The Appeal is allowed in above terms.

MAC. APP. No.862/2011

183. The Appeal is for reduction of compensation of Rs. 12,32,000/- awarded for the death of Bhimsen who was aged 45 years who died in an accident which occurred on 10.03.2010.

184. The Motor Accident Claims Tribunal (the Claims Tribunal) by a judgment dated 05.07.2011 disbelieved the Respondents case that the deceased was carrying out private job with a caterer and earning Rs. 12,000/- per month. The Claims Tribunal took the minimum wages of a skilled worker, added 50% towards inflation to compute the loss of dependency.

185. There was no evidence with regard to the deceased's income or his qualification. His income could have been taken only on the basis of minimum wages payable to an unskilled worker. The addition of 50% was not permissible for the reasons as stated earlier. The loss of dependency comes to Rs. 5,91,138/-(Rs. 5278 - 1/3 X 12 X 14). The compensation on account of loss of love and affection is also required to be reduced to Rs. 25,000/- from Rs. 75,000/-.(**Sunil Sharma v. Bachitar Singh** (2011) 11 SCC 425 and **Baby Radhika Gupta v. Oriental Insurance Company Limited** (2009) 17 SCC 627).

186. The compensation is recomputed as under:

S. No.	Head of Compensation	Granted by the Claims Tribunal	Granted by this Court
1.	Loss of Dependency	Rs. 10,92,000/-	Rs. 5,91,138/-
2.	Loss of Love and Affection	Rs. 75,000/-	Rs. 25,000/-
3.	Loss of Consortium	Rs. 10,000/-	Rs. 10,000/-
4.	Funeral Expenses	Rs. 10,000/-	Rs. 10,000/-
5.	Loss to Estate	Rs. 10,000/-	Rs. 10,000/-
6.	Medicines &Treatment	Rs. 35,000/-	-
	Total	**Rs. 12,32,000/-**	**Rs. 6,46,138/-**

187. The overall compensation is reduced from Rs. 12,32,000/- to Rs. 6,46,138/-

188. The excess amount of Rs. 5,85,862/- alongwith proportionate interest and the interest, if any, accrued during the pendency of the appeal shall be refunded to the Appellant Insurance Company immediately.

189. The compensation held payable to the Respondents No.1 to 3 shall be disbursed/held in Fixed Deposit in the proportion and the manner as directed by the Claims Tribunal. The deposit shall be held in UCO Bank, Delhi High Court Branch.

190. The Appeal is allowed in above terms.

MAC. APP. No.38/2011

191. The Appellant New India Assurance Company Limited impugns a judgment dated 11.08.2010 whereby, a compensation of Rs. 7,93,780/- was granted to the Respondents (Claimants) for the death of Daya Ram who was aged 27 years on the date of the accident which occurred on 05.05.2006.

192. During inquiry before the Claims Tribunal, it was claimed that the deceased was working as a driver with M/s. Sonu Tours & Travels and was getting a salary of Rs. 6,000/- per month. In the absence of any

cogent evidence with regard to the deceased's employment, the Claims Tribunal took the minimum wages of a skilled worker, added 50% on account of inflation and computed the loss of dependency as Rs. 7,53,780/-.

193. Following contentions are raised on behalf of the Appellant:-

(i) The Tata Sumo vehicle No.DL-6CA-8077 was being driven by the deceased in a rash and negligent manner. He himself was responsible or in any case contributed to the accident and the Insured or the Appellant Insurance Company were not liable to pay any compensation.

(ii) The compensation awarded on the basis of wages of a skilled worker and making addition of 50% in minimum wages was not permissible. Thus, the compensation awarded was exorbitant or excessive.

194. Claim Petition bearing Suit No.289/2006 was being tried with Claim Petition bearing Suit No.280/2006, 282/2006, 288/2006 and 281/2006.

195. Claim Petition bearing Suit No.280/2006 and 288/2006 bearing MAC APP.36/2011 titled **'New India Assurance Company Limited v. Rimjhim Ispat Ltd. & Ors.'** and MAC APP.41/2011 titled **'New India Assurance Company Limited v. Rimjhim Ispat Ltd. & Ors.'** arising out of this very accident were decided by the Claims Tribunal. The Appeals were decided by this Court by a common judgment dated 21.02.2012. In the said Appeals, the only ground of challenge was the negligence on the part of Tata Sumo's driver i.e. the deceased herein. Para 4 to Para 10 of the judgment in MAC APP.36/2011 are extracted hereunder:-

> "4. The only ground of challenge common in both the Appeals is that the Tata Sumo vehicle hit the truck from the rear. Unless and until the Tata Sumo was being driven at a very fast speed the accident could have been avoided by the driver of the Tata Sumo. It is thus pleaded that the accident was caused on account of rash and negligent driving of the driver of the Tata Sumo or in the alternative it is submitted that there was contributory negligence of the driver of Tata Sumo. Both these Claim Petition Bearing Suit No. 280/2006 and 288/2006 were tried jointly. The

Claimants examined several witnesses including four eye witnesses to the accident.

5. PW 4 Sunil Kumar filed his Affidavit Ex. P-25 by way of evidence. He deposed that the Tata Sumo Car was being driven by Daya Ram at a very slow speed. At about 4.30 A.M. the Tata Sumo reached near Chand Filling Petrol Pump at G.T.Road, Arnia, Police Station Khurja, Bullandshahar, UP. A truck bearing No.UP 7080 9758 was going ahead of the Tata Sumo Car. The truck was being driven by Gautam Kumar Tiwari at a very fast speed rashly and negligently. The driver of the truck suddenly applied brakes in the middle of the road as a result of which the Tata Sumo Car which was following the truck dashed into the truck. In the cross-examination it was suggested to this witness that the driver was drowsy or that he was drunk. The witness showed his ignorance about the same.

6. The second witness examined by the claimants was Keshav Dutt. He corroborated Sunil Kumar's testimony in his Affidavit Ex.P-16. In the cross-examination, the witness deposed that the speed of the truck was about 80 km per hour. The Tata Sumo was following it at a distance of about 40 feet almost at the same speed. The witness denied the suggestion that the driver was drunk or that he was sleepy.

7. The third witness is PW-6 Narendra Bhatt who in his Affidavit Ex.P-20 corroborated the version as given by PWs 4 and 5. In cross-examination, a suggestion was given to him that the truck gave an indication to take left turn and the accident took place because of negligence of the driver of Tata Sumo which was denied by the witness. The witness also denied the suggestion that the driver of the Tata Sumo was drunk or was sleepy. Thus, a new case was tried to be set up by this witness that the truck driver took a left turn after due indication and that the driver of Tata Sumo on account of his own negligence dashed his vehicle into the truck.

8. The fourth witness is PW 7 Shambhu Sharma. He corroborates the three earlier witnesses in his examination-in-chief by way of an Affidavit (Ex.P-35). In cross-examination the witness deposed

that the truck was going at the speed of 70-80 kmph whereas the Tata Sumo was going at the speed of 60 kmph. He denied that the Tata Sumo driver was drunk or was feeling sleepy. PW 4, PW 5 and PW 7's testimony that the truck driver suddenly applied brakes in the middle of the road was not challenged in cross-examination. A contrary stand was taken on behalf of the insurance company in PW6's cross-examination when suggestion was given to this witness that the truck driver took a left turn after due signal and that on account of rash and negligent driving by the driver of Tata Sumo the accident occurred. It is important to note that driver of Truck No.UP-78T-9758 preferred not to contest the proceedings who was ordered to be proceeded ex parte.

9. The owner of the truck M/s. Rimjhim Ispat Ltd. took a contrary stand in the WS and completely denied the involvement of the truck in the accident. The driver of the vehicle was not produced to give his version as to how the accident occurred. Thus I am inclined to accept the version as given by the four witnesses mentioned earlier that the accident was caused on account of the sudden application of brakes by the driver of the truck in the middle of the road.

10. It may be noticed that the accident took place at 4.30 A.M. It was the duty of the truck driver not to apply the brakes while he was driving the truck at a very fast speed. It cannot be said that there was any negligence on the part of the driver of the Tata Sumo Car."

196. In this view of the matter, it cannot be said that there was any contributory negligence on the part of deceased Daya Ram. The driver and owner of the offending truck No.UP-78T-9758 and the Appellant were rightly held liable to pay the compensation.

197. As far as quantum of compensation is concerned, the deceased's salary was claimed to be Rs. 5,000/- per month. The same was disbelieved as no documentary evidence was placed on record. The deceased's driving licence to drive LMV (taxi) was, however proved during the inquiry before the Claims Tribunal.

198. Gopal, the deceased's father filed his Affidavit Ex.P-10 by way of his examination-in-chief and testified that the deceased was working as a driver with M/s. Sonu Tours & Travels and was getting a salary of Rs. 5,000/- per month. In the absence of any documentary evidence with regard to the deceased's employment with M/s. Sonu Tours & Travels, the Claims Tribunal rightly declined to believe Gopal's evidence with regard to the deceased's employment, yet the factum of the deceased's working as a driver was not disputed. This coupled with the fact that the deceased was driving the Tata Sumo at the time of the accident and possessed a licence to drive taxi was sufficient to conclude that the deceased was a professional driver. His income in the year 2006 should have been taken at least Rs. 150/- per day or Rs. 4500/- per month. The Claims Tribunal erred in awarding compensation on assuming the salary to be Rs. 5542/- per month although, the salary was claimed to be only Rs.5,000/- per month. The loss of dependency on the income of Rs. 4500/- per month would come to Rs. 6,12,000/- (4500/- x 2/3 x 12 x 17).

199. On adding notional sum of Rs. 25,000/- towards loss of love and affection and Rs. 10,000/- each towards loss of Consortium, loss of Estate and funeral Expenses, the overall compensation comes to Rs. 6,67,000/-.

200. The compensation payable is reduced from Rs. 7,93,780/- to Rs. 6,67,000/-.

201. The excess amount of Rs. 1,26,780/- alongwith proportionate interest and the interest accrued, if any, during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.

202. The Appeal is allowed in above terms.

MAC. APP. No.40/2011

203. The Appeal is for reduction of compensation of Rs. 8,13,952/- for the death of Kamla who was aged 32 years on the date of the accident. During inquiry before the Claims Tribunal it was claimed that the deceased was B.A. (Hons.) and was working with M/s. Fast Track India and was getting a salary of ' 6,000/- per month.

204. Respondent Sunil Kumar appeared as PW-4 and proved the

Certificate Ex.P-14 regarding deceased's qualification and the Salary Certificate Ex.P-13 in the absence of any witness from the deceased's employer, the same was not believed by the Claims Tribunal. The Claims Tribunal took the minimum wages of a Graduate i.e. Rs. 4031/-, added 50% towards the inflation and computed the loss of dependency on the income of Rs. 6046/- amounting to Rs. 7,73,952/-.

205. Following contentions are raised on behalf of the Appellant:-

(i) The Tata Sumo vehicle No.DL-6CA-8077 was being driven by the deceased in a rash and negligent manner. He himself was responsible or in any case contributed to the accident and the Insured or the Appellant Insurance Company was not liable to pay any compensation.

(ii) The compensation awarded on the basis of wages of a skilled worker and making addition of 50% in minimum wages was not permissible. Thus, the compensation awarded was exorbitant or excessive.

206. The Claim Petition bearing Suit No.281/2006 out of which the present Appeal arises was tried along with five Claim Petitions including Claim Petition bearing Suit No.289/2006, 280/2006, 282/2006 and 288/2006.

207. I have already held above that there was no negligence on the part of the driver of the Tata Sumo. Even if, it is assumed (as far as this case is concerned), that there was some negligence on the part of Tata Sumo's driver, it was not a case of contributory negligence. While disposing of connected MAC APP.36/2011 titled **'New India Assurance Company Limited v. Rimjhim Ispat Ltd. & Ors.'** and MAC APP.41/2011 titled **'New India Assurance Company Limited v. Rimjhim Ispat Ltd. & Ors.,** this Court held as under:-

> "11. Otherwise also even if it is assumed that there was some negligence on the part of the Tata Sumo Driver it was not a case of contributory negligence but of the composite negligence and the claimants were entitled to sue all or any of the wrong doer to claim compensation. In **T.O. Anthony v. Karvarnani,** (2008) 3 SCC 748, which is relied on by the Appellants it was held as under: -

"6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured perso has choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence."

12. Thus although I have already held earlier that there was negligence on the part of the truck driver and he was responsible for causing the accident, even if it is assumed that there was some negligence on the part of the Tata Sumo driver it does not affect the claim petition filed by the claimants. In case of composite negligence a victim can sue all or any of the tortfeasors to claim compensation for the wrongful act of the joint tortfeasors."

208. As far as deceased's income is concerned, even if it is assumed that the deceased was a housewife and was to be granted compensation on the basis of the judgment of this Court in **Royal Sundaram Alliance Insurance Co. Ltd. v. Master Manmeet Singh & Ors.,** MAC.APP. 590/2011, decided on 30th January, 2012 the same would be more than the compensation awarded by the Claims Tribunal. In **Master Manmeet**

Singh (supra), this Court noticed the following judgments of the Supreme Court:-

(i) **General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs.) and Ors.** (1994) 2 SCC 176,

(ii) **National Insurance Company Limited v. Deepika & Ors.,** 2010 (4) ACJ 2221,

(iii) **Amar Singh Thukral v. Sandeed Chhatwal,** ILR (2004) 2 Del 1,

(iv) **Lata Wadhwa & Ors. v. State of Bihar & Ors.,** (2001) 8 SCC 197,

(v) **Gobald Motor Service Ltd. & Anr. v. R.M.K. Veluswami & Ors.,** AIR 1962 SC 1,

(vi) **A. Rajam v. M. Manikya Reddy & Anr.,** MANU/AP/0303/1988,

(vii) **Morris v. Rigby** (1966) 110 Sol Jo 834 and

(viii) **Regan v. Williamson** 1977 ACJ 331 (QBD England),

and laid down the principle for determination of loss of dependency on account of gratuitous services rendered by a housewife. Para 34 of the judgment in **Master Manmeet Singh** (supra) is extracted hereunder:-

"34. To sum up, the loss of dependency on account of gratuitous services rendered by a housewife shall be:-

(i) Minimum salary of a Graduate where she is a Graduate.

(ii) Minimum salary of a Matriculate where she is a Matriculate.

(iii) Minimum salary of a non-Matriculate in other cases.

(iv) There will be an addition of 25% in the assumed income in (i), (ii) and (iii) where the age of the homemaker is upto 40 years; the increase will be restricted to 15% where her age is above 40 years but less than 50 years; there will not be any addition in the assumed salary where the age is more than 50 years.

(v) When the deceased home maker is above 55 years but

less than 60 years; there will be deduction of 25%; and when the deceased home maker is above 60 years there will be deduction of 50% in the assumed income as the services rendered decrease substantially. Normally, the value of gratuitous services rendered will be NIL (unless there is evidence to the contrary) when the home maker is above 65 years.

(vi) If a housewife dies issueless, the contribution towards the gratuitous services is much less, as there are greater chances of the husband's re-marriage. In such cases, the loss of dependency shall be 50% of the income as per the qualification stated in (i), (ii) and (iii) above and addition and deduction thereon as per (iv) and (v) above.

(vii) There shall not be any deduction towards the personal and living expenses.

(viii) As an attempt has been made to compensate the loss of dependency, only a notional sum which may be upto Rs.25,000/- (on present scale of the money value) towards loss of love and affection and Rs. 10,000/- towards loss of consortium, if the husband is alive, may be awarded.

(ix) Since a homemaker is not working and thus not earning, no amount should be awarded towards loss of estate."

209. Thus, taking the deceased Kamla's salary of a Graduate of Rs. 4031/-, adding 25% on the principles stated above, the loss of dependency of a gratuitous services rendered by deceased Kamla would come to Rs. 9,67,440/- (4031/- + 25% x 12 x 16).

210. The compensation payable would be more than 8,13,952/- as awarded by the Claims Tribunal. Consequently, the Appeal is devoid of merit; the same is accordingly dismissed.

MAC.APP. 39/2011

211. This is another Appeal connected with MAC APP.38/2011 and 40/2011.

212. The Appellant New India Assurance Company Limited seeks reduction of compensation of Rs. 4,29,168/- awarded for the death of Usha Bhatt, an unmarried girl aged about 22 years.

213. Sidhi Devi, the deceased's mother filed a Petition claiming compensation of Rs. 10,00,000/-.

214. During inquiry before the Claims Tribunal, it was claimed that the deceased was working in ICICI Bank, Mayur Vihar and was getting a salary of Rs. 5,000/- per month. No documentary evidence was produced by the Respondent (the Claimant) nor any witness from the ICICI Bank, Mayur Vihar was summoned to testify that the deceased was employed there. Factum of deceased's employment was disputed in cross-examination of the Respondent Sidhi Devi. The Claims Tribunal, in the absence of any evidence with regard to the deceased's employment, strangely increased the deceased's income to Rs. 6046/- per month (as against claim of Rs. 5,000/-) to compute the loss of dependency as Rs. 3,99,168/-.

215. Following contentions are raised on behalf of the Appellant:-

(i) The Tata Sumo vehicle No.DL-6CA-8077 was being driven by the deceased in a rash and negligent manner. He himself was responsible or in any case contributed to the accident and the Insured or the Appellant Insurance Company was not liable to pay any compensation.

(ii) The compensation awarded on the basis of wages of a Graduate and making addition of 50% in minimum wages was not permissible. Thus, the compensation awarded was exorbitant or excessive.

216. The first contention is covered by my observations in MAC APP.38/2011 and 40/2011 above.

217. As far as quantum of compensation is concerned, there is no evidence that the deceased was a Graduate. Rather, the Respondent (the Claimant) proved the Senior Secondary School Certificate and the Identification Card Ex.P-4 that she was a student of School of Open Learning.

218. I have already held above that addition on account of inflation cannot be given. The Respondent (the Claimant) was entitled to compensation on the basis of the minimum wages of a Matriculate. The loss of dependency come to Rs. 2,45,454/- (3719/- x 1/2 x 12 x 11).

219. On adding notional sum of Rs. 25,000/- towards loss of love and affection and Rs. 10,000/- each towards loss of Estate and funeral Expenses, the overall compensation comes to Rs. 2,90,454/-.

220. The compensation payable is reduced from Rs. 4,29,168/- to Rs. 2,90,454/-.

221. The excess amount of Rs.1,38,714/- alongwith proportionate interest and the interest accrued if any, during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.

222. The Appeal is allowed in above terms.

23.03.2012

File taken up today.

It has come to my notice that there is a clerical mistake in Para 60 at Page 50 of the judgment where instead of word 'can' 'cannot' has been typed. Now Para 60 shall be read as under:-

> "60. In view of the foregoing discussion, I am of the view that no addition in the minimum wages can be made on account of inflation for computation of compensation."

Let a Corrigendum to this effect may be issued.

ILR (2012) III DELHI 664
CRL. A.

JAI SINGH RAWAT ….PETITIONER

VERSUS

STATE (NCT OF DELHI) ….RESPONDENT

(S. RAVINDRA BHAT & S.P. GARG, JJ.)

CRL. A. NO. : 401/1997 DATE OF DECISION: 19.03.2012

Indian Penal Code, 1860—Sections 302, 307, 34—Appellant preferred appeal against his conviction under Section 302, 307, 34 IPC—Appellant urged that case of prosecution was unconvincing and no test identification parade was conducted—Therefore, his identity could not be established—On behalf of State it was urged appellant had earlier visited house of injured witness, month prior to occurrence who had ample opportunity to see and identify accused—Thus, failure of police to conduct TIP was not fatal—Held—As a general rule, the substantive evidence of a witness is statement made in court—Evidence of mere identification of accused person at trial for first time is from its very nature inherently of a weak character-Purpose of a prior test identification, therefore, is to test and strengthen trustworthiness of that evidence—It is accordingly considered a safe rule of prudence to generally look for corroboration of sworn testimony of witness in court as to identity of accused who are strangers to them, in form of earlier identification proceedings—In appropriate cases it may accept evidence of identification even without insisting on corroboration.

Counsel faulted the impugned judgment primarily on the ground that it did not take notice that identification of

accused before the Court was of no evidentiary value in the absence of test identification proceedings. Undoubtedly, the prosecution failed to move any application for conducting TIP proceedings after the arrest of the accused. But that circumstance itself is not fatal and ipso facto does not bring discredit to the claim of witness. The accused was not a stranger to PW-1 Sudan Singh and had even visited him about a month earlier along with co-accused Manohar. In his statement as PW-1, he categorically stated about his acquaintance with the accused and elaborated that both had paid a visit to him in the house; and had interaction with him and he offered them water and meals. These facts remained unchallenged in the cross-examination. Since the accused had visited him about a month earlier, the witness had sufficient opportunity to see and observe his distinctive features. Again, on the date of occurrence itself, the accused stayed in the house for sufficiently long and had direct confrontation with him. Identification of the accused before the Court, thus, cannot be faulted due to omission to hold TIP. PW-1 elaborated that since he knew the accused by face only, he could not name him in Ex.PW-1/A. The crime was perpetrated in broad day-light. It is not a case that the witness had only a fleeting glimpse of the accused on a dark night or that the accused had covered his face.**(Para 16)**

Important Issue Involved: As a general rule, the substantive evidence of a witness is statement made in court-Evidence of mere identification of accused person at trial for first time is from its very nature inherently of a weak character—Purpose of a prior test identification, therefore, is to test and strengthen trustworthiness of that evidence—It is accordingly considered a safe rule of prudence to generally look for corroboration of sworn testimony of witness in court as to identity of accused who are strangers to them, in form of earlier identification proceedings—In appropriate cases it may accept evidence of identification even without insisting on corroboration.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajesh Khanna, Advocate

FOR THE RESPONDENT : Mr. Sanjay Lao, APP.

CASES REFERRED TO:

1. *State of Uttar Pradesh* vs. *Naresh and ors.* (2011) 4 Supreme Court Cases 324.
2. *Abdul Sayed* vs. *State of Madhya Pradesh* (2010) 10 Supreme Court Cases 259.
3. *Ram Udgar Singh* vs. *State of Bihar* (2004) 10 SCC 443.
4. *Chittar Lal* vs. *State of Rajasthan* (2003) 6 SCC 397.
5. *Malkhansingh and ors.* vs. *State of M.P.* (2003) 5 Supreme Court Cases 746.
6. *Anil Rai* vs. *State of Bihar* JT 2001(6) SC 515.
7. *Munshi Prasad and ors.* vs. *State of Bihar* AIR 2001 SC 3031.
8. *Shiv Ram and another* vs. *State of U.P.* MANU/SC/0813/1998 : 1998CriLJ76 : 1998 CriLJ 76.
9. *State of Karnataka* vs. *Moin Patel and others* MANU/SC/0796/1996 : [1996] 2 SCR919 : [1996] 2 SCR 919.
10. *Sarwan Singh and Ors.* vs. *State of Punjab* MANU/SC/0169/1976 : AIR 1976 SC 2304.
11. *Pala Singh and Anr.* vs. *State of Punjab* MANU/SC/0199/1972 : AIR 1972 SC 2679.

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Appellant Jai Singh Rawat has preferred the present appeal against the judgement dated 30.08.1997 of Ld.Addl.Sessions Judge in SC No.33/1996 whereby he was convicted for committing offences punishable under Sections 302/307/34 IPC and was sentenced to undergo imprisonment for life for committing murder under Section 302 IPC. He was further sentenced to undergo imprisonment for life for attempt to commit murder under Section 307 IPC. Both the sentences were ordered

to operate concurrently.

2. Criminal law was set into motion at around 12.55 P.M. on 03.06.1991 when DD No.12-A (Ex.PW-9/B) was recorded by SI Jeet Singh at police station Rajinder Nagar on the information of SI Wason Singh of PCR, received from one Vijay about a quarrel going on in house No. R-866, New Rajinder Nagar.

3. Investigation was assigned to SI Daryao Singh who along with Const.Fateh Singh, Const.Ramesh Chand and ASI Dhan Singh reached the spot. Soon thereafter, Insp.B.R.Sharma along with his staff also reached there. They noticed the lifeless body of Baby Kumar lying on the double bed in the drawing room. After coming to know that an injured (PW-1 Sudan Singh) had already been taken to RML Hospital in a PCR van, Insp.B.R.Sharma with his staff rushed there and recorded his statement. PW-1 disclosed that he was a domestic servant at the house of the deceased for the last about four months. On that day at about 1.00 P.M. two individuals aged 22/23 years knocked the door and Baby Kumar opened it. After entering, they talked to her and thereafter, started stabbing her with a sharp edged weapon. When he intervened, they also stabbed him; as a result he fell down there. He further said that the two assailants had visited the house earlier also along with one Manohar Lal 'Garwali' who used to work at United Coffee House, Connaught Place. He described the assailants who fled from the spot and claimed that he could indentify them if they were shown to him.

4. Insp. B.R. Sharma made an endorsement on the statement and sent the rukka through ASI Dhan Singh for registering the case. He seized the clothes of the injured at the hospital by seizure memo (Ex.PW-18/A). On return to the spot, he summoned the crime team and got the scene photographed. IO prepared the site plan; he lifted blood samples from various places i.e. the main entrance, bed room, drawing room etc.; seized bed-sheets, beds/mattresses; two pillows, two bed-sheets from the double bed and one chuni; one razor lying at the spot. The IO conducted inquest proceedings; he recorded statements of the concerned witnesses; prepared brief facts and sent the dead body for post-mortem. From the room of the injured, one glass tumbler was also seized. IO sent the exhibits to CFSL and subsequently, collected its report. Since the injured had indicted the accused, the police set out to apprehend them and succeeded in arresting Manohar and Jai Singh on 07.06.1991. Pursuant

to the disclosure statement (Ex.PW-7/A), the accused got recovered Rs.8,000/- from his rented house at 9, Karawal Nagar, Delhi. During police remand, on 13.06.1991, the accused led the police team to another house at Karawal Nagar and got recovered Rs. 32,000/- cash along with other articles. Efforts were made to apprehend co-accused Suresh; however, the police were unsuccessful and after initiating proceedings under Section 82/83 Cr.P.C. he was declared proclaimed offender (PO). On completion of the investigation, a charge-sheet was filed against Jai Singh, Manohar and Suresh (PO) for committing offences punishable under Section 120B IPC; 302/392/307/394 read with Section 397 IPC, 120B IPC. The accused who had been arrested, were charged and were brought to trial.

5. To prove the charges, the prosecution examined twenty witnesses in all. Statements of the accused were recorded under Section 313 Cr.P.C. to afford them an opportunity to explain the incriminating circumstances. They denied their complicity in the crime and pleaded their false implication. The accused examined DW-1 S.K. Sobhti and DW-2 R.K.Gauba in defence.

6. After considering the evidence and rival contentions of the parties, Addl.Sessions Judge convicted the accused (Jai Singh) only for committing the offences punishable under Sections 302/307/34 IPC and acquitted of all other charges. The co-accused Manohar was acquitted of all the charges. Aggrieved by the said orders, the accused (Jai Singh) has filed the present appeal.

7. Learned counsel for the appellant assailed the findings of the Trial Court and strenuously urged that it did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the uncorroborated testimony of PW-1 with whom the accused had no acquaintance. The accused is the victim of conspiracy hatched by PW-2 Vijay Handa, who is real perpetrator of crime and is the kinpin at whose behest the deceased was eliminated. Counsel urged that his conduct was unnatural and needle of suspicion pointed to him. The police failed to investigate this aspect. It failed to consider accused's specific plea that 'Jai Singh' working at United Coffee House was the real offender and his implication was due to mistaken identity. Counsel further argued that, in the absence of any test identification proceedings, identity of the assailants, particularly of the accused had not been established. The

accused was not named in the FIR. It was imperative for the police to hold TIP proceedings for the accused's identification. Counsel further urged that on the same set of evidence, the Trial Court acquitted co-accused Manohar rejecting the police theory that he had ulterior motive to rob the deceased. Counsel further pointed out that Trial Court failed to consider vital improvements made by the prosecution witnesses. Though the accused was arrested on 05.06.1991 from Dehradun, alleged counsel, he was shown to have been arrested on 07.06.1991. No independent public witness was associated in the investigation.

8. On the other hand, Ld.Addl.PP supported the findings of the Trial Court and urged that testimony of an injured witness (Sudan Singh) was categorical to prove the guilt of the accused. There was no reason for the Trial Court to disbelieve him as he sustained dangerous injuries and had no axe to grind to falsely implicate the accused. The accused had earlier visited him in the house one month prior to the occurrence and he had an ample opportunity to see and identify him. Failure of the police to conduct TIP was not fatal. Despite lengthy cross-examination, the accused failed to elicit any material contradiction in the testimonies of the prosecution witnesses for the Court to disbelieve them. The accused did not lead any reliable evidence to prove his arrest from Dehradun on 05.06.1991.

9. We have considered the submissions of the parties and have scrutinized the trial court record.

10. Before we proceed on merits, it is desirable to highlight that the homicidal death of the deceased Baby Kumar is not under challenge. The alleged co-conspirator Manohar was acquitted and the State did not challenge the acquittal. The accused (Jai Singh) was acquitted of charges under Secitons 392/394 read with Section 397 IPC. The deceased was a partner in United Coffee House, Connaught Place and resided at house No.R-866, New Rajinder Nagar, New Delhi with her minor son PW-4 Akash Kalra. PW-2 Vijay Kumar Handa was the Manager in the restaurant. PW-1 was domestic servant for doing household chores in the house.

11. The Trial Court heavily relied upon the testimony of PW-1 to base its conviction. We find no cogent reasons to deviate from this approach. Presence of PW-1 Sudan Singh at the deceased's residence was quite natural and probable (being a domestic servant of the deceased).

PW-4 Akash Kalra's assertion that on the day of incident, he left his mother and servant PW-1 (Sudan Singh) in the house while going to college at 9.30 A.M. remained unchallenged. PW-1 proved the version given to the police in Ex.PW-1/A about his employment as a domestic servant in house No.866, New Rajinder Nagar and elaborated that accused Manohar had brought him for employment through one Jai Singh (an employee at United Coffee House). PW-2 Vijay Handa corroborated PW-1 and PW-4 that PW-1 was a domestic servant at the deceased's house.

12. PW-1 suffered dangerous injuries in the incident and was taken from the spot after the incident at 1.00 P.M. to RML Hospital at about 1.15 P.M. by HC Mohar Singh in a PCR van. PW-19 Dr.Rajeev Sood medically examined him and prepared the MLC Ex.PW-19/A. On local examination, three injuries detailed in the MLC were seen on his body. The shirt of the injured having corresponding cuts and smeared in blood was sealed and handed over to the local police. In the cross-examination, PW-19 stated that the details, particulars in the MLC were told to him by the injured as he was well oriented at that time. He fairly admitted that injured did not tell him the name of the assailant. PW-27 Dr. Shiv Kumar declared the injured fit for statement vide Ex.PW-27/A. On the MLC, PW-24 Dr. R.K. Jain described the injuries as 'dangerous' (Ex.PW-19/A at point 'A'). The injuries on his person lend assurance to his presence at the time and place of occurrence.

13. In the statement Ex.PW-1/A, PW-1 narrated graphic details how the incident occurred and the assailants inflicted injuries on the deceased and to him. He gave their detailed description and features of assailants numbering two and claimed to identify them, if shown to him. Since the rukka was sent at about 3.30 P.M. from the hospital without undue delay, there was no time gap for any kind of manipulation.

14. PW-1 proved the version given to the police (Ex.PW-1/A), assigning specific role to the accused who along with co-accused Suresh (since PO) entered into the deceased's house and stabbed her. He further deposed that the accused Suresh stabbed him on his abdomen, neck, left arm, right side of the chest, both hands and ear with a razor blade (ustra-type) in the drawing room and Jai Singh stabbed on his abdomen with a knife. In the cross-examination, he reiterated that the police had met him at the hospital and his statement Ex.PW-1/A was recorded on his way there. He denied the suggestion that no such incident took place or

that he concocted the statement at the instance of PW-2 Vijay Kumar Handa. In the cross-examination, it was not suggested that he had not sustained the injuries at the deceased's residence or they were self-inflicted. No motive was attributed to PW-1 by the accused for his false implication, in the absence of prior enmity or animosity. The injuries suffered by the deceased (Baby Kumar) were also not controverted in the cross. The witness was, however, confronted with his statement Ex.PW-1/A where he did not narrate certain facts deposed by him in his examination-in-chief. It is not unoften that improvements in an earlier version are made at the trial in order to give boost to the prosecution case. But that does detract from the essentially truthful and consistent account of the witness.

15. There are no cogent reasons to disbelieve the ocular testimony of this most natural star witness whose presence at the spot was not in doubt. The witness had sustained injuries at the hands of the accused in the occurrence; his testimony thus inspires confidence. In a criminal trial, the testimony of an injured witness corroborated by the medical evidence by itself is a sufficient and sound basis, for convicting the accused. Certain improvements made by the witness in the Court are not fatal to reject the entire version given by him. The witness did not deviate from the core facts and named the accused causing fatal injuries to the deceased Baby Kumar and dangerous injuries to him. The improvements referred by the counsel are minor in nature and their exclusion would not affect the prosecution case based upon the unclinching eye-witness account.

16. Counsel faulted the impugned judgment primarily on the ground that it did not take notice that identification of accused before the Court was of no evidentiary value in the absence of test identification proceedings. Undoubtedly, the prosecution failed to move any application for conducting TIP proceedings after the arrest of the accused. But that circumstance itself is not fatal and ipso facto does not bring discredit to the claim of witness. The accused was not a stranger to PW-1 Sudan Singh and had even visited him about a month earlier along with co-accused Manohar. In his statement as PW-1, he categorically stated about his acquaintance with the accused and elaborated that both had paid a visit to him in the house; and had interaction with him and he offered them water and meals. These facts remained unchallenged in the cross-examination. Since

the accused had visited him about a month earlier, the witness had sufficient opportunity to see and observe his distinctive features. Again, on the date of occurrence itself, the accused stayed in the house for sufficiently long and had direct confrontation with him. Identification of the accused before the Court, thus, cannot be faulted due to omission to hold TIP. PW-1 elaborated that since he knew the accused by face only, he could not name him in Ex.PW-1/A. The crime was perpetrated in broad day-light. It is not a case that the witness had only a fleeting glimpse of the accused on a dark night or that the accused had covered his face.

17. In the case of **Malkhansingh and ors. vs. State of M.P.** (2003)5 Supreme Court Cases 746, The Supreme Court observed :

> "7. It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure. Failure to hold a test identification parade would not make inadmissible the

evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.

8. In **Jadunath Singh v. State of U.P.** the submission that absence of test identification parade in all cases is fatal, was repelled by this Court after exhaustive consideration of the authorities on the subject. That was a case where the witnesses had seen the accused over a period of time. The High Court had found that the witnesses were independent witnesses having no affinity with the deceased and entertained no animosity towards the appellant. They had claimed to have known the appellants for the last 6-7 years as they had been frequently visiting the town of Bewar. This Court noticed the observations in an earlier unreported decision of this Court in **Parkash Chand Sogani v. State of Rajasthan** wherein it was observed: (SCC pp. 522-23, para 11) "It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of PW 7 it seems to us clear that Shiv Lal knew the appellant by sight. Though he made a mistake about his name by referring to him as Kailash Chandra, it was within the knowledge of Shiv Lal that the appellant was a brother of Manak Chand and he identified him as such. These circumstances are quite enough to show that the absence of the identification parade would not vitiate the evidence. A person, who is well known by sight as the brother of Manak Chand, even before the commission of the occurrence, need not be put before an identification parade in order to be marked out. We do not think that there is any justification for the contention that the absence of the identification parade or a mistake made as to his name, would be necessarily fatal to the prosecution case in the circumstances."

The Court concluded: (SCC pp. 523-24, para 15)

"15. It seems to us that it has been clearly laid down by this Court in **Parkash Chand Sogani v. State of Rajasthan** that the absence of test identification in all cases is not fatal and if the accused person is well known by sight it would be waste of time to put him up for identification. Of course if the prosecution fails

to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case."

18. The evidence of an injured witness cannot be disbelieved without assigning cogent reasons. Mere contradictions/improvements on trivial matters cannot render an injured witness's deposition untrustworthy. The law on this aspect has been detailed in the latest judgment **State of Uttar Pradesh vs. Naresh and ors.** (2011) 4 Supreme Court Cases 324 as under :

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

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

"28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court.

Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with

a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." [Vide **Ramlagan Singh v. State of Bihar, Malkhan Singh v. State of U.P., Machhi Singh v. State of Punjab, Appabhai v. State of Gujarat, Bonkya v. State of Maharashtra, Bhag Singh, Mohar v. State of U.P**. (SCC p. 606b-c), **Dinesh Kumar v. State of Rajasthan, Vishnu v. State of Rajasthan, Annareddy Sambasiva Reddy v. State of A.P.** and **Balraje v. State of Maharashtra.**]

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

"28. Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. In **Shivalingappa Kallayanappa v. State of Karnataka** this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

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

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

20. PW-2 Vijay Handa attempted to establish certain facts. However, comments of the Trial Court on his conduct are relevant to exclude his deposition from consideration. The Trial Court did not believe his testimony commenting :

"At the same time, in so far PW Vijay Handa is concerned, I am constrained to record that there are obvious grey areas about his role on the day of the incident. I do not propose to say more about him than to say that his conduct on the day of the incident has not been above board and has not been natural as would have been expected from a person who claims to be more than a mere employee at the Coffee House and himself admits of having a close proximity to the house of the deceased. What prevented him from knocking the door of the immediate neighbours for a telephone call? There is no evidence collected by the police that the telephone at the house of the deceased was out of order despite the explanation coming from the statement of PW Vijay Handa in the manner volunteered by him of his own. If PW Vijay Handa had seen the assailants escaping then his conduct at the crucial moments after the incident is such that he wanted the assailants to have a free run. As regards his professed presence at the house of the deceased soon after the incident and his alleged claim that he had seen the assailants escaping from the rear wall. PW1 Saudan Singh does not speak of the presence of Vijay Handa in his statement Ex.PW1/A. He has been introduced by the police and, in fact, the higher probability is that he wanted himself to be introduced in the manner claimed by him to gloss over his unusual and unnatural conduct at the crucial moment.

In so far as the identity of the accused Jai Singh or for that matter Suresh (PO) is concerned, the same cannot be fastened by relying upon the deposition of PW Vijay Handa. I am not inclined to accept PW2 Vijay Handa as an eye witness qua the assailants and trust his deposition as being reliable and trustworthy. However, excluding the deposition of PW2 as to the identity of the assailants the identity of the accused Jai Singh alone stands proved from the deposition of PW1."

21. PW-4 Akash Kalra corroborated PW-1 and testified that he was their domestic servant in the house and had sustained injuries in the incident. He did not raise any accusing finger against the conduct of PW-2 Vijay Handa and did not suspect his involvement in the incident.

22. Ocular version (of injured PW-1) is in consonance with medical evidence as well and there is no conflict between the two. MLC Ex.PW-19/A was prepared at about 1.15 P.M. by PW-19 Dr. Rajeev Sood when injured Sudan Singh was brought at RML Hospital by HC Mohar Singh of PCR with the alleged history of multiple stab wounds. On local examination, PW-19 found the following apparent injuries :

(1) One CIW over neck approximately 10 c.m. in size with active bleeding.

(2) There was one CIW 2 c.m. in size approximately and penetrating. (2 c.m. above right costal margine front of chest)

(3) There was CIW on right side of chest approximately 15 c.m. in size below clavical and was obliquely placed. This wound was so deep that lung covering i.e. plura was exposed and bulging.

23. The Court cannot ignore the medical evidence which is also very vital in this case.

24. Counsel highlighted material irregularity in the trial itself as there was delay in delivering the special report to concerned Magistrate under Section 157 Cr.P.C. and the FIR was ante-timed. The accused, to buttress his plea examined DW-2 Mr.R.K.Gauba, the then Magistrate who recorded 10.13 hours time on the FIR seen by him (Ex.DW-2/A on the carbon copy of DW1/A). Apparently, there is delay in delivering the report to the

concerned Magistrate after the case was registered at 3.45 P.M. by PW-9 SI Jeet Singh. The delay has not been explained by the prosecution. The Trial Court also commented on this aspect :

"From the preceding discussion and appraisal of the evidence before the court, I am inclined to hold that even if the IO were to be believed that there has been no delay in recording the FIR, there has been considerable and unexplained delay in the despatch of special report to the Ilaqua Magistrate and, although, the papers to the Autopsy Surgeon had been sent by 9 A.M. on 4.6.1991 but the story of the missing of Rs. 80,000/- have been introduced much later. Similarly, there is non compliance with the Rule 24 of Punjab Police Rules relating to the mode and manner of the registration of the cases. But, at the same time, I am of the considered view that the triple safeguards emanating from the provisions of Section 154, 157 and 174 of the Criminal Procedure Code and the provisions of Chapter 24 of the Police Rules are not to be used as exit routes for an otherwise unjustifiable acquittal."

25. We approve the observation of the Trial Court and are of the view that delay in sending the special report to the area Magistrate in the absence of any prejudice should not adversely affect the prosecution case.

In the case of **Anil Rai vs. State of Bihar** JT 2001 (6) SC 515, Supreme Court observed:

"30. This provision is designed to keep the Magistrate informed of the investigation of such cognizable offence so as to be able to control the investigation and, if necessary, to give appropriate direction under Section 159 of the Code of Criminal Procedure. But where the F.I.R. is shown to have actually been recorded without delay and investigation started on the basis of the F.I.R., the delay in sending the copy of the report to the Magistrate cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable **Pala Singh and Anr. v. State of Punjab** MANU/SC/0199/1972 : AIR 1972 SC 2679. Extraordinary delay in sending the copy of the F.I.R. to the Magistrate can be a circumstance to provide a legitimate basis

for suspecting that the first information report was recorded at much later day than the stated day affording sufficient time to the prosecution to introduce improvement and embellishment by setting up a distorted version of the occurrence. The delay contemplated under Section157 of the Code of Criminal Procedure for doubting the authenticity of the F.I.R. is not every delay but only extraordinary and unexplained delay. However, in the absence of prejudice to the accused the omission by the police to submit the report does not vitiate the trial. This Court in **Sarwan Singh and Ors. v. State of Punjab** MANU/SC/0169/1976 : AIR 1976 SC 2304, held that delay in despatch of first information report by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly when it is found on facts that the prosecution had given a very cogent and reasonable explanation for the delay in despatch of the F.I.R."

26. Similar are the observations in another case **Munshi Prasad and ors. vs. State of Bihar** AIR2001SC3031:

"14. In support of the appeal, a further submission has been made pertaining to the First Information Report (FIR). On this score the appellants contended that delayed receipt of the FIR in the Court of the Chief Judicial Magistrate cannot but be viewed with suspicion. While it is true that Section 157 of the Code makes it obligator on the Officer Incharge of the Police Station to send a report of the information received to a Magistrate forthwith, but that does not mean an imply to denounce and discard an otherwise positive and trustworthy evidence on record. Technicality ought not to outweigh the course of justice - if the Court is otherwise convinced and has come to a conclusion as regards the truthfulness of the prosecution case, mere delay, which can otherwise be ascribed to be reasonable, would not by itself demolish the prosecution case. The decision of this Court in **Shiv Ram and another vs. State of U.P.**MANU/SC/0813/1998 : 1998 CriLJ 76 : 1998 CriLJ 76 lends support to the observations as above.

15. This Court further in **State of Karnataka vs. Moin Patel and others** MANU/SC/0796/1996 : [1996] 2 SCR 919 : [1996] 2 SCR 919 stated vis-a-vis the issue of delay in despatch of FIR

as below:

"The matter can be viewed from another angle also. It has already been found by us that the prosecution case is that the FIR was promptly lodged at or about 1.30 AM and that the investigation started on the basis thereof is wholly reliable and acceptable. Judged in the context of the above facts the mere delay in despatch of the FIR - and for that matter in receipt thereof by the Magistrate - would not make the prosecution case suspect for as has been pointed out by a three Judge Bench of this Court in **Pala Singh V. State of Punjab** MANU/SC/0199/1972 : 1973CriLJ59, the relevant provision contained in Section 157 Cr.P.C. regarding forthwith dispatch of the report (FIR) is really designed to keep the Magistrate informed of the investigation of a cognizable offence so as to be able to control the investigation and if necessary to give proper direction under section 159 Cr.P.C. and therefore if in a given case it is found that FIR was recorded without delay and the investigation started on that FIR then however, improper or objectionable the delayed receipt of the report by the Magistrate concerned, it cannot by itself justify the conclusion that the investigation was tainted and the prosecution unsupportable".

27. The accused had suspected Vijay Kumar Handa and his associates of complicity in the deceased's murder. However, no cogent evidence emerged from the record to arrive at such a conclusion. At whose behest the accused committed the heinous offence has remained a mystery and the Trial Court's observation is that 'the police failed to investigate this aspect'. But that does not absolve guilt of the accused. The Supreme Court in the case of **'Ram Udgar Singh vs. State of Bihar'** (2004) 10 SCC 443 held as under :

"That even if a major portion of evidence of a witness is found to be deficient, in case the residual is sufficient to prove the guilt of an accused, notwithstanding acquittal of a number of other co-accused persons, conviction can be maintained. It is a duty of the Court to separate grain from chaff and appreciate in each case, as to what extent, the evidence is worthy of acceptance."

28. The accused did not attribute any motive to PW-1 Sudan Singh

for identifying him as one of the participants in the infliction of the injuries to the deceased as well as to himself. He did not adduce any evidence to prove his presence at Dehradun on 05.06.1991. The accused failed to explain how and under what circumstances, he went to Dehradun and from which particular place, he was arrested and by whom. He did not show that on the day of incident, he was not present in Delhi. In the absence of any reliable evidence, the plea of alibi by the accused in his statement under Section 313 Cr.P.C. cannot be taken on its face value.

29. It has been consistently held that as a general rule the Court can and may act on a testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness.

30. In the case of **Chittar Lal vs. State of Rajasthan** (2003) 6 SCC 397 Supreme Court has observed that :

> "....The legislative recognition of the fact that no particular number of witnesses can be insisted upon is amply reflected in Section 134 of the Indian Evidence Act, 1872 (in short "the Evidence Act"). Administration of justice can be affected and hampered if number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of one witness, leaving aside those cases which are not of unknown occurrence where determination of guilt depends entirely on circumstantial evidence. If plurality of witnesses would have been the legislative intent, cases where the testimony of a single witness only could be available, in number of crimes the offender would have gone unpunished. It is the quality of evidence of the single witness whose testimony has to be tested on the touchstone of credibility and reliability. If the testimony is found to be reliable, there is no legal impediment to convict the accused on such proof. It is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. This position has been settled by a series of decisions. The first decision which has become locus classicus is **Mohd. Sugal Esa Mamasan Rer Alalah v. R.2 The Privy Council focused** on the difference between English law where a number of statutes make conviction impermissible for certain categories of offences on the testimony of a single witness and Section 134 of the Evidence Act...."

31. In the present case, statement of PW-1 Sudan Singh was recorded on the day of incident without any delay, immediately after the investigation process was set into motion. He had no vengeance or grudge against the accused to falsely implicate him. Therefore, the plea that PW-1's testimony is doubtful has no merit. Since the occurrence was witnessed by PW-1 only there is no legal impediment to convict the accused on his testimony.

32. In the light of above discussion, we find no infirmity in the well reasoned judgment by which only the appellant was found guilty for committing the murder of the deceased Baby Kumar and attempting to murder of PW-1 Sudan Singh. The appellant is directed to surrender and serve the remainder of his sentence. For this purpose he shall appear before the Trial Court on 3rd April, 2012. The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment. The appeal is dismissed, subject to compliance with above directions. The appeal lacks merit and consequently, is dismissed.

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W.P. (CRL)

ANANT BRAHMACHARI ….PETITIONER

VERSUS

UOI & ORS. ….RESPONDENTS

(MUKTA GUPTA, J.)

W.P. (CRL). NO. : 55/2011 DATE OF DECISION: 20.03.2012

(A) The National Investigating Agency Act, 2008—Section 3—Code of Criminal Procedure, 1973—Section 160- Petitioner challenged notice under Section 160 of Code issued to him by officials of National Investigating Agency (NIA)—Petitioner averred he was asked to join

investigation without serving notice under Section 160 on 04.01.2011 by officials of NIA which amounted to his illegal restrain—On said date, he was handed over notice to join investigation on 05.01.2011—During investigation, he was threatened and coerced to extent that he attempted to commit suicide and was taken to hospital—Also, even by giving notice under Section 160 a person cannot be called at a place which does not fall within jurisdiction of police station where he resided—Petitioner was stationed at Uttarkhand and in case officials of NIA wanted to interrogate him they could come to Uttarkhand whereas he was asked to join investigation in Delhi—Held—Officer of the NIA has jurisdiction to investigate and arrest any person relating to scheduled offences anywhere in India coupled with all the powers, duties, privileges and liabilities of a Police Officer—Provisions under NIA Act will override provisions of Code of Criminal Procedure, 1973.

Section 3(1) of the NIA Act starts with a non-obstante clause providing that notwithstanding anything in the Police Act, 1861, the Central Government may constitute a special agency for investigation and prosecution of offences under the Act specified in the schedule. Further, subject to any orders which the Central Government may make in this behalf, officers of the agency shall have throughout India in relation to the investigation of scheduled offences and arrest of the person concerned in such offences, all powers, duties, privileges and liabilities which Police officers have in connection with the investigation of the offences committed therein. Thus, an officer of the NIA has jurisdiction to investigate and arrest any person relating to scheduled offences anywhere in India coupled with all the powers, duties, privileges and liabilities of a Police Officer. Sub-Section (3) of Section 3, NIA Act does not restrict the power of the Police Officer to investigate beyond the jurisdictional area where he is present and he can exercise any of the

powers of a Police Officer of the Police Station in the area in which he is present for the time being and he would be deemed to be an officer in-charge of the Police Station discharging the functions of such an officer within the limits of the Station. Sub-Section 3 supplements Sub-Section (2) by permitting any place where officer of the NIA is investigating to be treated as a Police Station and the investigating Officer the officer in-charge of the said Police Station. Sub-Section (3) does not override or restrict the powers of an officer of the agency to investigate in relation to the scheduled offences and exercises all powers, duties, privileges and liabilities of a Police officer throughout India in relation to the investigation of the said offence. Further, NIA Act is a special enactment. The provisions under the NIA Act will override the provisions of the Code of Criminal Procedure, 1973. **(Para 12)**

(B) The National Investigating Agency, 2008—Section 3—Code of Criminal Procedure, 1973—Section 160-Petitioner challenged notice under Section 160 Cr. P.C. issued to him by officials of National Investigating Agency (NIA)—He also prayed for permission of two lawyers to accompany him at all time as and when he would be issued notice under Section 160 Cr. P.C. recording his statement—Held—When a person is not called for interrogation as an accused the Constitutional protections entitled to the accused will not be available to him—Petitioner has no right to be accompanied by a counsel when he is called to know facts relevant to investigation of offence.

Thus, as held by their Lordships, when a person is not called for interrogation as an accused the Constitutional protections entitled to the accused will not be available to him, the Petitioner has no right to be accompanied by a counsel when he is called to know the facts relevant to the investigation of the offence. **(Para 16)**

Important Issue Involved: (A) An officer of the NIA has jurisdiction to investigate and arrest any person relating to scheduled offences anywhere in India coupled with all the powers, duties, privileges and liabilities of a Police Officer—Provisions under NIA Act will override provisions of Code of Criminal Procedure, 1973.

(B) When a person is not called for interrogation as an accused the Constitutional Protections entitled to the accused will not be available to him.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. G.Tushar Rao and Mr. Atanu Mukherjee, Advocates.

FOR THE RESPONDENT : Mr. Baldev Malik, Advocate for Respondent no.1. Mr. Hiren P. Raval, Additional Solicitor General with Mr. Amit Sharma and Mr. Ahmed Khan, Advocates for Respondent Nos 2 to 5. Mr. Dayan Krishnan, Additional Standing Counsel for the State with Mr. Nikhil A. Menon, Advocate with ASI Nanak Chand, PS Hazrat Nizamuddin

CASES REFERRED TO:

1. *Akhilesh* vs. *State of U.P. & Anr.* 2011 (2) Crimes 602 (All.).
2. *Senior Intelligence Officer* vs. *Jugal Kishore Sharma* CRL.A. No. 1266/2011.
3. *M/s. Pusma Investment Pvt. Ltd. & Ors.* vs. *State of Meghalaya & Ors.* 2010 Crl.L.J. 56.
4. *Rajesh @ Unni S/o of Rajagopalan Nair* vs. *State of Kerala* DGP and CB-CID MANU/KE/0529/2010.

5. *Pragya Singh Chandrapal Singh Thakur* vs. *State of Maharastra SLP* Crl. No. 5908/2010.
6. *Director CBI and Ors.* vs. *Niyamavedi* (2009) 10 SCC 488.
7. *Dr. Rajinder B. Lal* vs. *State of U.P.,* MANU/UP/0754/2006.
8. *Anirudha S. Bhagat* vs. *Ramnivas Meena & Anr.,* MANU/MH/0699/2005.
9. *State NCT of Delhi* vs. *Navjot Sandhu @ Afsan Guru* (2005) 11 SCC 600.
10. *Pulavar B.M. Senguttuvan, Panneerselvam* vs. *State,* 2004 CrlLj 558.
11. *State* vs. *N.M.T. Joy Immaculate,* (2004) 5 SCC 729.
12. *Union of India* vs. *Prakash P. Hinduja and Anr.* AIR 2003 SC 2612.
13. *Mathews Peter* vs. *Asst. Police Inspector & Ors.* 2002 Crl.L.J. 1588.
14. *Punjab & Haryana; Deepak Mishra and Anr.* vs. *State of U.P. And Anr.* 1999 Crl.L.J. 4123.
15. *D.K. Basu* vs. *State of West Bengal* (1997) 1 SCC 416.
16. *Poolpandi & Ors* vs. *Superintendent, Central Excise & Ors.,* (1992) 3 SCC 259.
17. *Tar Balbir Singh* vs. *Union of India and Anr.* 1992 (2) Crimes 394.
18. *Nandini Satpathy* vs. *P.L. Dani,* (1978) 2 SCC 424.
19. *Krishan Bans Bhadur and Anr.* vs. *State of Himachal Pradesh* 1975 Crl.L.J. 620 (H.P.).
20. *Ramesh Chandra Mehta* vs. *State of W.B.,* (1969) 2 SCR 461.
21. *Illias* vs. *Collector of Customs, Madras,* (1969) 2 SCR 613.

RESULT: Petition dismissed.

MUKTA GUPTA, J.

1. In this petition vide order dated 11th May, 2011 after addressing arguments at some length, learned counsel for the Petitioner submitted that he was confining his petition limited to the reliefs sought in prayers 'c', 'e', 'f' and 'h' of the present petition, which are as under:

> "c. Issue a writ, order or direction directing the respondent No.2 NIA to be guided by the principles of laid down in D K Basu's case even in the case of summoning witnesses under Section 160 Cr.P.C. for recording statements;
>
> e. Issue an order or direction permitting the petitioner to be accompanied at all times by two lawyers as and when the petitioner is issued notice under Section 160 Cr.P.C. for recording his statement;
>
> f. Issue a writ, order or direction or pass necessary order for conducting judicial enquiry into the atrocities and third degree methods resorted to by the respondent No.2 NIA against the Petitioner as also the illegal detention and wrongful confinement by the NIA officers on 4/1/2011; and appropriate legal action be initiated against officers responsible for the same;
>
> h. Issue appropriate order/directions to the UOI and other respondents to jointly and severely compensate the Petitioner for the illegal detention, wrongful confinement and for the uncalled for unconstitutional atrocities committed upon the petitioner by the officers of the respondent No.2 NIA;"

2. Learned counsel for the Petitioner contends that calling the Petitioner to join the investigation without serving a notice under Section 160 Cr.P.C. amounts to illegal restrain. Further, when the Petitioner came to join the investigation on 4th January, 2011 he was handed over a notice to join the investigation on the 5th January, 2011. The Petitioner was threatened and coerced to the extent that the Petitioner attempted to commit suicide and had been taken to the hospital and on being declared fit he alleged that the officials of National Investigating Agency (in short 'NIA') were threatening and harassing/ torturing him physically and mentally because of which he tried to end his life.

3. It is further contended that the Petitioner was at Mumbai when he was served with a notice under Section 160 Cr.P.C. to appear before the Investigating Agency on 5th January, 2011 at 10.00 AM at NIA Camp, Moginand, Panchkula, Haryana. Thereafter, without serving any notice the Petitioner was illegally detained and made to join the investigating on 4th January, 2011 when he was harassed and tortured mentally and physically. Though a notice under Section 160 Cr.P.C. can be given for calling a witness to give the statement, however the said notice can only be given to a person who resides within the jurisdiction of said Police station or any adjoining Police station. The NIA Police officer does not have the jurisdiction to serve a notice to a person beyond the territorial jurisdiction of the Police Station he is appointed for. The National Investigating Agency Act, 2008 clothes the Police officers with the powers under Criminal Procedure Code and they are bound to act in accordance with the procedure laid therein. Thus, extra Constitutional methods were employed by the Respondents for recording the statement of the Petitioner.

4. Referring to **D.K. Basu Vs. State of West Bengal** (1997) 1 SCC 416 it is contended that even the arrestee has the right to meet the lawyer during interrogation and the right of the Petitioner, who was not even a suspect at the time when he was summoned, stands on a higher pedestal. Relying upon **Nandini Satpathy Vs. P.L. Dani and Anr.**(1978) 2 SCC 424; **State v. N.M.T. Joy Immaculate,** (2004) 5 SCC 729 and **State NCT of Delhi Vs. Navjot Sandhu @ Afsan Guru** (2005) 11 SCC 600 it is contended that a person who is an arrestee enjoys a Constitutional benefit of the presence of a lawyer and an atmosphere free from coercion. The Petitioner, who is not even a suspect at this stage, is on a better footing and is entitled to the Constitutional right as enshrined in Articles 21 & 22 of the Constitution of India. Even by giving a notice under Section 160 Cr.P.C. a person cannot be called at a place which does not fall within the jurisdiction of the Police Station where he resides. There is no dispute that in view of Section 3 of the NIA Act, a Police officer under the NIA discharges functions throughout India, however, wherever he exercises the jurisdiction he can only exercise jurisdiction in his Police Station or the adjoining Police station in view of Section 3(2) of the NIA Act. Reference is made to 2(1)(b) and (i) of the NIA Act to contend that the meaning of the expression would be as per the Criminal Procedure Code. The Petitioner is stationed at Uttarakhand and in case the Respondents want to interrogate him, they can come to Uttarakhand. No doubt the

Petitioner is a monk moving here and there, however he has his ordinary place of residence which he has revealed in the petition.

5. As regards prayers 'f' and 'h', learned counsel for the Petitioner contends that the Respondents in their affidavit have admitted that Inspector Prabhat Bajpayee called the Petitioner on telephone and thus admittedly no notice under Section 160 Cr.P.C. was given when he was made to join the investigation on 4th January, 2011. Even if the Petitioner attended the proceedings, the same were without issuance of notice under Section 160 Cr.P.C., wherein the Petitioner was coerced and tortured, which amounts to illegal detention. In view of the torture meted out to the Petitioner and the fact that another notice was issued for appearance on 5th morning, the Petitioner attempted suicide which fortifies the claim of the Petitioner. In view of the guidelines laid in **D.K. Basu** (supra), a judicial enquiry be directed and contempt proceedings be initiated against the Respondents. Reliance is placed on **Tar Balbir Singh Vs. Union of India and Anr.** 1992 (2) Crimes 394 **Punjab & Haryana; Deepak Mishra and Anr. Vs. State of U.P. And Anr.** 1999 Crl.L.J. 4123; **Krishan Bans Bhadur and Anr. Vs. State of Himachal Pradesh** 1975 Crl.L.J. 620 (H.P.); **Mathews Peter Vs. Asst. Police Inspector & Ors.** 2002 Crl.L.J. 1588; **Akhilesh Vs. State of U.P. & Anr.** 2011 (2) Crimes 602 (All.) and **M/s. Pusma Investment Pvt. Ltd. & Ors. Vs. State of Meghalaya & Ors.** 2010 Crl.L.J. 56 to contend that notice under Section 160 Cr.P.C. cannot be given beyond territorial jurisdiction of the Police Station or the adjoining Police Station.

6. Learned Additional Solicitor General appearing for Respondent No.2 to 5 contends that the issue whether a person has a right of counsel when his statement under Section 160 Cr.P.C. is being recorded is no more res-integra in view of the decision of Hon'ble Supreme Court in **Senior Intelligence Officer Vs. Jugal Kishore Sharma** CRL.A. No. 1266/2011 decided on 5th July, 2011 wherein the Hon'ble Supreme Court considered all earlier decisions including that in the case of **Nandini Satpathy** (supra). It was held that the law laid down in **Nandini Satpathy** (supra) was not good law in view of the fact that it did not consider the earlier Constitution Bench decisions and the decision in **Nandani Satpathy** (supra) has not been followed in the later decisions of the Hon'ble Supreme Court. Thus, the observations made by the Hon'ble Supreme Court in **Nandani Satpathy** (supra) cannot be used to allow prayer 'e'

of the Petitioner.

7. As regards prayer 'c' is concerned, it is contended that the NIA Act entitles its officers to summon any person, who is in a jurisdiction outside the territorial jurisdiction where the officer is stationed and there is no mandate that the person can be called to give statement only in the territorial jurisdiction of the police station in which the person resides or in the adjoining Police Station. When the present petition was filed, the Petitioner had already complied with the first summon. He did not take any steps to challenge the same and thus now the Petitioner cannot challenge the said summon which has already been complied with. Further, the documents on record itself show that though initially a notice was served at Mumbai to the Petitioner to join the investigation at Panchkula on 5th January, 2011, however since the Petitioner was on his way at Delhi, as per his convenience, he was made to join the investigation at the NIA Headquarter, Delhi on 4th January, 2011. The Petitioner was accompanied by a lawyer. The Petitioner was at Delhi and thus asked to come at Delhi. The questioning took place in two sessions and the Petitioner was permitted to go for lunch. Thus, the contention regarding the illegal restrain and thus illegal custody is wholly unfounded. The second summon for appearance on 5th January, 2011 was issued to the Petitioner on 4th January, 2011 when he came to join the investigation at NIA Headquarter and was admittedly in Delhi. The Petitioner in the petition at different places has stated that he is residing at Surat, Uttarakhand though he was found at Mumbai. The investigation also reveals that the Petitioner is a resident of Gomti Nagar, Lucknow on the basis of Cell I.D.

8. Section 3, NIA Act starts with a non-obstante clause and confers the powers on the Police officials to conduct investigation in any part of India in terms of Section 3(2) of the Act. Section 3(3) of the NIA Act has been added as an abundant caution. Section 3(2) is a complete answer to the queries raised by the Petitioner. Different High Courts have taken the view and have not accepted the contention that a notice under Section 160 Cr.P.C. can be given to a person who resides in the territorial jurisdiction of the concerned Police Station or the adjoining Police station. Reliance in this regard is placed on **Dr. Rajinder B. Lal Vs. State of U.P.,** MANU/UP/0754/2006; **Anirudha S. Bhagat Vs. Ramnivas Meena & Anr.,** MANU/MH/0699/2005; **Rajesh @ Unni S/o of Rajagopalan**

Nair Vs. State of Kerala DGP and CB-CID MANU/KE/0529/2010 and **Pulavar B.M. Senguttuvan, Panneerselvam Vs. State,** 2004 CrlLj 558. In fact, the Respondents even offered the Petitioner reimbursement of the expenses which he stated that he would take later. Relying upon **Director CBI and Ors. Vs. Niyamavedi** (2009) 10 SCC 488 and **Union of India Vs. Prakash P. Hinduja and Anr.** AIR 2003 SC 2612 it is contended that this Court should not interfere in the investigation and permit the same to be carried out by the authorities concerned.

9. As regards the prayer for 'f' and 'h', it is contended that the status report filed by the Delhi Police shows that no poison was detected in the gastric lavage of the Petitioner and thus the act of the Petitioner was a well-planned, well-thought measure to suppress NIA to carry out investigation fearlessly and properly. A perusal of the facts as stated in the reply affidavit by the Respondent clearly shows that the Petitioner was accompanied by a lawyer and no protest for the harassment was lodged at that time. Further, the Petitioner was examined at two time periods and was permitted to go for lunch which itself shows that there was no illegal detention. The photographs of the register wherein the Petitioner and his lawyer have signed have been enclosed along with the reply affidavit which has not been denied in the rejoinder. Hence, there is no merit in the contention that the Petitioner was illegally detained and thus coerced to make statement. Hence the writ petition be dismissed being devoid of merit.

10. Heard learned counsels for the parties. The issues that arise for consideration in the present petition are:

(i) Whether the Respondents on the facts and in law were competent to examine the Petitioner at Delhi by serving a notice under Section 160 Cr.P.C. on him?

(ii) Whether the Petitioner has a right of being accompanied by an advocate at the time of recording of statement?

(iii) Whether the act of the Respondents calling the Petitioner without serving the notice under Section 160 Cr.P.C. and thereafter harassing/coercing him to make a statement amounted to illegal detention, thus calling for a judicial enquiry and compensation?

11. While dealing with the issue No. (i), it is relevant to note Section 160 Cr.P.C. and Section 3 of the NIA Act which provide:

"160. Police Officer's power to require attendance of witnesses.

(1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who from, the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required:

Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides.

(2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence."

"3. Constitution of National Investigation Agency.

(1) Notwithstanding anything in the Police Act. 1861 (5 of 1861.), the Central Government may constitute a special agency to be called the National Investigation Agency for investigation and prosecution of offences under the Acts specified in the Schedule.

(2) Subject to any orders which the Central Government may make in this behalf, officers of the Agency shall have throughout India in relation to the investigation of Scheduled Offences and arrest of persons concerned in such offences, all the powers, duties, privileges and liabilities which police officers have in connection with the investigation of offences committed therein.

(3) Any officer of the Agency of, or above, the rank of Sub-Inspector may, subject to any orders which the Central Government may make in this behalf, exercise throughout India, any of the powers of the officer-in-charge of a police station in the area in which he is present for the time being and when so exercising such powers shall, subject to any such orders as

aforesaid, be deemed to be an officer-in-charge of a police station discharging the functions of such an officer within the limits of his station."

12. Section 3(1) of the NIA Act starts with a non-obstante clause providing that notwithstanding anything in the Police Act, 1861, the Central Government may constitute a special agency for investigation and prosecution of offences under the Act specified in the schedule. Further, subject to any orders which the Central Government may make in this behalf, officers of the agency shall have throughout India in relation to the investigation of scheduled offences and arrest of the person concerned in such offences, all powers, duties, privileges and liabilities which Police officers have in connection with the investigation of the offences committed therein. Thus, an officer of the NIA has jurisdiction to investigate and arrest any person relating to scheduled offences anywhere in India coupled with all the powers, duties, privileges and liabilities of a Police Officer. Sub-Section (3) of Section 3, NIA Act does not restrict the power of the Police Officer to investigate beyond the jurisdictional area where he is present and he can exercise any of the powers of a Police Officer of the Police Station in the area in which he is present for the time being and he would be deemed to be an officer in-charge of the Police Station discharging the functions of such an officer within the limits of the Station. Sub-Section 3 supplements Sub-Section (2) by permitting any place where officer of the NIA is investigating to be treated as a Police Station and the investigating Officer the officer in-charge of the said Police Station. Sub-Section (3) does not override or restrict the powers of an officer of the agency to investigate in relation to the scheduled offences and exercises all powers, duties, privileges and liabilities of a Police officer throughout India in relation to the investigation of the said offence. Further, NIA Act is a special enactment. The provisions under the NIA Act will override the provisions of the Code of Criminal Procedure, 1973.

13. No doubt, different High Courts have taken different views that Police Officer by an order in writing can require the attendance before himself of any person within the limits of his own or adjoining station, who appears to be acquainted with the facts and circumstances of the case. When a Police officer is investigating an offence, he has to investigate all the facets thereof. The power of investigation cannot be fettered by

directing a Police officer to be able to call only persons acquainted with the facts of the case who resides either under the jurisdiction of the Police station or adjoining thereto. Further, there can be no limit prescribed to an adjoining station. Section 160(1) Cr.PC does not restrict the power of a Police Officer to examine only a person who is residing within the limits of such Police Station or adjoining Police Station. The qualifying words are 'summons to a person who appears to be acquainted with the facts of the case'. The purpose of investigation is to collect material evidence. The same cannot be restricted by limiting the scope of Section 160(1) Cr.P.C. to persons who are residing within the limits of the said Police station or adjoining Police Station. The contention of the Petitioner is also fallacious on the count that in a case where statements of number of witnesses or persons are required to be recorded who reside within jurisdictions of different Police Stations and are required to be confronted with each other to find out the true facts, the same would not be possible if they cannot be called to a Police Station beyond the jurisdiction in which they live or adjoining police station.

14. Even on facts, in the present case admittedly the first notice was issued at Mumbai to appear at Panchkula on 5th January, 2011. However, on speaking to the Petitioner on phone it was found that the Petitioner was in Delhi and thus subject to his convenience the investigation was conducted at Delhi. Even as per the Petitioner from 3rd to 6th January, 2011 he was admittedly in Delhi. Further though the Petitioner has stated that he ordinarily resides at Dandi Aashram, Uttarkashi, Uttarkhand, but this fact is disputed by the Respondents. According to Respondents, the Petitioner is a resident of Lucknow as per the address available in the subscriber detail report of his mobile number 9021738177, however, no notice could be served on the Petitioner at Lucknow as he was not found there. Since Petitioner was traced at Mumbai, a notice under Section 160 Cr.P.C. was sent by ASP, NIA on 30th December, 2010 for being served upon the Petitioner at Mumbai through ACP, ATS, Mumbai. On 3rd January, 2010, the Petitioner was contacted over his cell phone to ascertain his location when he informed that he was at Delhi. Since the entire NIA team which was camping at Panchkula (Haryana) was going to Gujarat for investigation, the Petitioner was requested if he could come to the Headquarters of Respondent No.2, located at New Delhi. The Petitioner accepted the request again without any protest and it was with his concurrence that the questioning was

advanced to 4th January, 2011 at the Headquarter of Respondent No.2 at New Delhi. This arrangement was made keeping the interest of the Petitioner in mind. It was convenient for the Petitioner as it saved him from travelling all the way to Panchkula (Haryana), which was about 250 Km from Delhi. The Respondent No.2 did not threaten the Petitioner at any point during the telephonic conversation, as alleged by him. It is the admitted case of the Petitioner that he is a monk and he keeps travelling throughout the country. Thus, I find no merit in the contention that the Petitioner was served by a notice beyond the jurisdiction of a Police Station of the officer in-charge of the investigating team and thus no notice under Section 160 Cr.P.C. could be given to the Petitioner to join investigation at Delhi.

15. Dealing with the issue No. (ii) it would be relevant to take note of the decision in **Senior Intelligence Officer Vs. Jugal Kishore** (supra). Their Lordships after considering the decisions held as under:

> "17. It may be mentioned here that in holding, "the prohibitive sweep of Article 20(3) goes back to the stage of police interrogation-not, as contended, commencing in court only" the decision in Nandini Satpathy apparently went against two earlier constitution bench decisions of this Court in **Ramesh Chandra Mehta v. State of West Bengal,** 1969 (2) SCR 461 and **Illias v. Collector of Customs, Madras,** 1969 (2) SCR 613.
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> 18. In **Nandini Satpathy,** the Court proceeded further, and though the issue neither arose in the facts of the case nor it was one of the issues framed in paragraph 10 of the judgment, proceeded to dwell upon the need for the presence of the advocate at the time of interrogation of a person in connection with a case. In paragraphs 61-65 of the judgment, the Court made the following observations:
>
> > "61. It may not be sufficient merely to state the rules of jurisprudence in a branch like this. The man who has to work it is the average police head constable in the Indian countryside. The man who has to defend himself with the constitutional shield is the little individual, by and large. The place where these principles have to have play is the unpleasant police station, unused to constitutional nuances

> and habituated to other strategies. Naturally, practical points which lend themselves to adoption without much sophistication must be indicated if this judgment is to have full social relevance. In this perspective we address ourselves to the further task of concretising guidelines.
>
> 62. Right at the beginning we must notice Article 22(1) of the Constitution, which reads:
>
> No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a-legal practitioner of his choice.
>
> 63. Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3), is an assurance of awareness and observance of the right to silence. The **Miranda decision** has insisted that if an accused person asks for lawyer's assistance, at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Overreaching Article 20(3) and Section 161(2) will be obviated by this requirement. We do not lay down that the police must secure the services of a lawyer. That will lead to 'police-station-lawyer' system, an abuse which breeds other vices. But

all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project.

64. Not that a lawyer's presence is a panacea for all problems of involuntary self-crimination, for he cannot supply answers or whisper hints or otherwise interfere with the course of questioning except to intercept where intimidatory tactics are tried, caution his client where incrimination is attempted and insist on questions and answers being noted where objections are not otherwise fully appreciated. He cannot harangue the police but may help his client and complain on his behalf, although his very presence will ordinarily remove the implicit menace of a police station.

65. We realize that the presence of a lawyer is asking for the moon in many cases until a public defender system becomes ubiquitous. The police need not wait for more than for a reasonable while for an advocate's arrival. But they must invariably warn and record that fact- about the right to silence against self-incrimination; and where the accused is literate take his written acknowledgment."

19. It is on these passages in Nandini Satpathy that Mr. Tulsi heavily relies and which practically forms the sheet-anchor of his case.

20. The difficulty, however, is that Nandini Satpathy was not followed by the Court in later decisions. In **Poolpandi & Ors v. Superintendent, Central Excise & Ors.,** (1992) 3 SCC 259, the question before a three judge bench of this Court was directly whether a person called for interrogation is entitled to the presence of his lawyer when he is questioned during the investigation under the provisions of the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973. On behalf of the persons summoned for interrogation, strong reliance was placed on Nandini Satpathy. The Court rejected the submission tersely

observing in paragraph of 4 of the judgment as follows:

"4. Both Mr. Salve and Mr. Lalit strongly relied on the observations in **Nandini Satpathy v. P.L. Dani,** (1978) 2 SCC 424. We are afraid, in view of two judgments of the Constitution Bench of this Court in **Ramesh Chandra Mehta v. State of W.B.,** (1969) 2 SCR 461, and **Illias v. Collector of Customs, Madras,** (1969) 2 SCR 613, the stand of the appellant cannot be accepted. The learned counsel urged that since Nandini Satpathy case was decided later, the observations therein must be given effect to by this Court now. There is no force in this argument."

21. Further, in paragraph 6 of the judgment, the Court referred to the Constitution Bench decision in Ramesh Chandra Mehta and observed as follows:

"6. Clause (3) of Article 20 declares that no person accused of any offence shall be compelled to be a witness against himself. It does not refer to the hypothetical person who may in the future be discovered to have been guilty of some offence. In Ramesh Chandra Mehta case, the appellant was searched at the Calcutta Airport and diamonds and jewelleries of substantial value were found on his person as also currency notes in a suitcase with him, and in pursuance to a statement made by him more pearls and jewellery were recovered from different places. He was charged with offences under the Sea Customs Act. During the trial, reliance was placed on his confessional statements made before the Customs authorities, which was objected to on the ground that the same were inadmissible in evidence inter alia in view of the provisions of Article 20(3). While rejecting the objection, the Supreme Court held that in order that the guarantee against testimonial compulsion incorporated in Article 20(3) may be claimed by a person, it has to be established that when he made the statement in question, he was a person accused of an offence. Pointing out to the similar provisions of the Sea Customs Act as in the present Act and referring to the power of a Customs Officer, in an inquiry in connection with the smuggling of goods, to summon any person whose attendance he considers necessary to give evidence or to produce a particular document the Supreme

Court observed thus: (pp.469-70)

> "The expression `any person' includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a Customs Officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling is not when called upon by the Customs Officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20(3) of the Constitution. The steps taken by the Customs Officer are for the purpose of holding an enquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The Customs Officer does not at that stage accuse the person suspected or infringing the provisions of the Sea Customs Act with the commission of any offence. His primary duty is to prevent smuggling and to recover duties of Customs when collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Sea Customs Act, he is not accusing the person of any offence punishable at a trial before a Magistrate."

The above conclusion was reached after consideration of several relevant decisions and deep deliberation on the issue, and cannot be ignored on the strength of certain observations in the judgment by three learned Judges in Nandini Satpathy case which is, as will be pointed out hereinafter, clearly distinguishable."

22. An argument in support of the right of the persons called for interrogation was advanced on the basis of Article 21 of the Constitution. The Court rejected that submission also observing in paragraph 9 of the judgment as follows:

> "9. Mr. Salve has, next, contended that the appellant is within his right to insist on the presence of his lawyer on the basis of Article 21 of the Constitution. He has urged that by way of ensuring protection to his life and liberty he is entitled to demand that he shall not be asked any question in the absence of his lawyer. The argument

> proceeds to suggest that although strictly the questioning by the Revenue authorities does not amount to custodial interrogation, it must be treated as near custodial interrogation, and if the same is continued for a long period it may amount to mental third degree. It was submitted by both Mr. Salve and Mr. Lalit that the present issue should be resolved only by applying the 'just, fair and reasonable test', and Mr. Lalit further added that the point has to be decided in the light of the facts and circumstances obtaining in a particular case and a general rule should not be laid down one way or the other. Mr. Salve urged that when a person is called by the Customs authorities to their office or to any place away from his house, and is subjected to intensive interrogation without the presence of somebody who can aid and advise him, he is bound to get upset, which by itself amounts to loss of liberty. Reference was made by the learned counsel to the minority view in Re Groban, 352 US 330, 1 L Ed 2d 376, declaring that it violates the protection guaranteed by the Constitution for the State to compel a person to appear alone before any law enforcement officer and give testimony in secret against his will."

23. Referring to the facts in Re Groban and the view taken in the minority judgment in the case the decision in Poolpandi observed in paragraph 10 as follows:

> "10.....We do not share the apprehension as expressed above in the minority judgment in connection with enquiry and investigation under the Customs Act and other similar statutes of our country. There is no question of whisking away the persons concerned in these cases before us for secret interrogation, and there is no reason for us to impute the motive of preparing the groundwork of false cases for securing conviction of innocent persons, to the officers of the state duly engaged in performing their duty of prevention and detection of economic crimes and recovering misappropriated money justly belonging to the public. Reference was also made to the observation in the

judgment in **Carlos Garza De Luna, Appt. v. United States,** American Law Reports 3d 969, setting out the historical background of the right of silence of an accused in a criminal case. Mr. Salve has relied upon the opinion of Wisdom, Circuit Judge, that the history of development of the right of silence is a history of accretions, not of an avulsion and the line of growth in the course of time discloses the expanding conception of the right than its restricted application. The Judge was fair enough to discuss the other point of view espoused by the great jurists of both sides of Atlantic before expressing his opinion. In any event we are not concerned with the right of an accused in a criminal case and the decision is, therefore, not relevant at all. The facts as emerging from the judgment indicate that narcotics were thrown from a car carrying the two persons accused in the case. One of the accused persons testified at the trial and his counsel in argument to the jury made adverse comments on the failure of the other accused to go to the witness box. The first accused was acquitted and the second accused was convicted. The question of the right of silence of the accused came up for consideration in this set up. In the cases before us the persons concerned are not accused and we do not find any justification for "expanding" the right reserved by the Constitution of India in favour of accused persons to be enjoyed by others."

24. In the end, the Court allowed the appeal filed by the Revenue authorities in the case in which the High Court had directed for interrogation to take place in presence of the advocate and dismissed all the other appeals in the batch on behalf of the individuals in whose cases the High Court had declined to give any such direction.

25. It is seen above that the respondent applied for and got anticipatory bail on the premise that he was not an accused in the case. There was no change in his position or status since the grant of bail till he was summoned to appear before the DRI officers. On the facts of the case, therefore, it is futile to contend

that the respondent is entitled, as of right, to the presence of his lawyer at the time of his interrogation in connection with the case. Moreover, the respondent's plea for the presence of his lawyer at the time of his interrogation clearly appears to be in teeth of the decision in **Poolpandi**. Nonetheless, Mr. Tulsi contended that the respondent's right was recognized by this Court and preserved in **Nandini Satpathy** and the decision in **Poolpandi** has no application to the present case. According to Mr. Tulsi, the respondent is summoned for interrogation in connection with a case registered under the NDPS Act, which Mr. Tulsi called a "regular criminal" case, while Poolpandi was a case under the Customs Act and so were the two cases before the constitution bench in **Ramesh Chandra Mehta** and in Illias that formed the basis of the decision in **Poolpandi**. In our view, the distinction sought to be drawn by Mr. Tulsi is illusory and non-existent. The decision in **Poolpandi** was in cases under the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973. Both these Acts have stringent provisions regarding search, seizure and arrest and some of the offences under each of these two Acts carry a punishment of imprisonment up to 7 years. We, therefore, fail to see, how a case registered under NDPS Act can be said to be a "regular criminal" case and the cases under the Customs Act and the Foreign Exchange Regulation Act, not as criminal cases.

26. In view of the clear and direct decision in Poolpandi, we find the order of the High Court, affirming the direction given by the Sessions Judge clearly unsustainable."

16. Thus, as held by their Lordships, when a person is not called for interrogation as an accused the Constitutional protections entitled to the accused will not be available to him, the Petitioner has no right to be accompanied by a counsel when he is called to know the facts relevant to the investigation of the offence.

17. As regards prayer 'f' and 'h', it may be noted that the primary contention of the Petitioner is that on 4th January, 2011 the Petitioner was called without a notice under Section 160 Cr.P.C. and coerced to make a statement which amounted to illegal detention. As per the Petitioner he received a notice on 1st January, 2011 at Mumbai for appearing in

person on 5th January, 2011 at 10.00 AM at NIA camp office, Haryana Police complex, Moginand, Panchkula, Haryana. In pursuance to the aforesaid notice under Section 160 Cr.P.C. the Petitioner left Mumbai on 2nd January, 2011 and reached Delhi on 3rd January, 2011 when the Petitioner received a call from one Shri Malviya claiming himself as Inspector NIA who according to the Petitioner in a threatening tone directed the Petitioner to meet him at the Delhi office of NIA on 4th January, 2011 at 10.00 AM failing which the Petitioner was threatened to be implicated in false cases. According to the Petitioner he reached office of NIA at 9.45 AM on 4th January, 2011 along with his advocate Shri Neeraj, however the officers of the NIA did not let the advocate accompany the Petitioner and was taken to the room alone. Inside the room the Petitioner was tortured mentally and physically and pressurized. The interrogation went on for many hours without break. Thereafter, the Petitioner was let off with a direction to be present on the next date i.e. 5th January, 2011 at 11.00 AM and a formal notice under Section 160 Cr.P.C. was handed over to him. According to the Petitioner he got scared and consumed some poison at around 6.00 AM on 5th January, 2011. He was taken to AIIMS hospital at 3.34 PM where he was treated. When the Petitioner was discharged from AIIMS on 6th January, 2011 he lodged complaint with the SHO PS Hazrat Nizamuddin giving the details of the physical and mental torture coupled with the threats of the extended encounter by the NIA officials.

18. It may be noted that in the affidavits filed by the Respondents photocopies of the register has been enclosed. As per the register the Petitioner entered the NIA office at 11.10 AM and left at 13:01 PM along with Shri Neeraj Shrotriya, an advocate. The Petitioner again came at 3.15 PM and left at 4.25 PM. This register is a continuous register mentioning the time of the arrival and departure of each person and there can be no tampering. In the rejoinder filed by the Petitioner the Petitioner has not disputed this fact nor denied the entries in the register. From the entries in the register, it is evident that the Petitioner was accompanied by an advocate and had gone out at the lunch time as well. Thus, I find no merit in the contention of the Petitioner that the Petitioner was continuously harassed.

19. The Petitioner claims that he took poisonous substance at around 6.00 AM on 5th January, 2011, however the first PCR call in this regard

was received by Police post Jangpura at 12.55 PM on 5th January, 2011 stating that one Mahatma ji who has come in Sham Sher Hotel Jangpura Extn., his condition was not well. Since the address was incomplete, the place could not be located by the local Police as per the PCR Van. At 2.40 PM another PCR call was received at P.P. Jangpura that one person had consumed poison at Sham Sher Hotel near Mother Dairy Jangpura. The Police staff reached there and one Anant Brahamchari was lying unconscious in room No.102. One empty tablet strip of ZEPOSE and one bottle of Mortein cockroach killer (Empty) were found on his bed. He was rushed to AIIMS where he was declared unfit for statement. From his possession, notice under Section 160 Cr.P.C. in his name by Shri Vishal Garg, ASP NIA, an election card, a copy of the application given to Police Station Mumbai, copy of SLP filed before the Hon'ble Supreme Court being SLP Crl. No. 5908/2010 titled as **Pragya Singh Chandrapal Singh Thakur Vs. State of Maharastra** and one khaki envelope torn from one side was found. On the khaki envelope it was written "NIA aur bharat sarkar ke karan ishwar ke samukh aatam samarparan kar raha hui, mujhe nayay chahiye" On 6th the statement of the Petitioner was recorded wherein he alleged harassment and physical and mental torture. It may be noted that there is no record to show that the Petitioner had injuries when he was taken to AIIMS. Further, the CFSL report with regard to gastric lavage of the Petitioner has been received which has been filed by the Station House Officer, PS Hazrat Nizamuddin. As per the report "on chemical, TLC, GC-HS & GC-MS examination, metallic poisons, ethyl and methyl alcohol, cyanide, phosphide, alkaloids, barbiturates, tranquilizers and pesticides could not be detected in exhibits '1', '2', '3' & '4'." Thus it is apparent that though poison was allegedly consumed at around 6.00 AM on 5th January, 2011 the intimation was sent in the afternoon and no poison was detected. In view of the facts surfacing on record, I do not find any merit in the contention of the learned counsel for the Petitioner that the Petitioner was tortured to such an extent that the Petitioner attempted to commit suicide.

20. In the facts of the case and in view of the aforesaid discussion, I find no merit in the present petition. The petition is dismissed. Since the Petitioner has knowledge of all the facts, he is alleging, he would be at liberty to file a criminal complaint if so advised.

ILR (2012) III DELHI 705
RFA

SATISH CHANDRA SANWALKA & ORS. ….APPELLANTS

VERSUS

TINPLATE DEALERS ASSOCIATION PVT. LTD. & ORS. ….RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA. NO. : 520-27/2005 DATE OF DECISION: 27.03.2012

Code of Civil Procedure, 1908—Section 9 Companies Act, 1956—Section 111 Suit for declaration and mandatory injunction-Redeemable preference shares issued to petitioner to be redeemed in 10 years' time—Notice floated by defendant for passing of resolution for issue of certain number of cumulative redeemable preference shares—On issue of which unredeemed redeemable shares issued to petitioner to be redeemed-petitioners pleaded that defendants wrongly considered their securities to exist—To declare right of petitioners for recovery of debt—Defendents pleaded that compromise has been struck—Petitioners had locus standi as they were no longer shareholders—Suit dismissed by Trial Court on lack of jurisdiction—Held—While jurisdiction of Civil Court under Section 9 of Code and that of the Company Law Board under Section 111 of Companies Act is concurrent, it is preferable that disputed questions of fact be decided by a Civil Court.

While dealing with the provision of Section 155, the Supreme Court in the case of **Claude-Lila Parulekar (Smt) Vs. Sakal Papers (P) Ltd. and Ors.** (2005) 11 SCC 73 had held that the jurisdiction of the Company Court under Section 155 of the Act and of the Civil Court under Section

9 of CPC is concurrent. I may also refer to the judgment of the Supreme Court in the case of **Ammonia Supplies Corporation (P) Ltd. Vs. Modern Plastic Containers Pvt. Ltd. and Ors.** (1998) 7 SCC 105 which holds that highly disputed questions of fact in fact ought to be decided by the Civil Court and not by the Company Law Board. Thus, looking at the issue from any angle i.e. whether of the fact that jurisdiction of the Civil Court is concurrent with the Company Law Board or the fact that it is preferable that highly disputed questions of fact such as those in the present case, ought to be decided by the Civil Court, the impugned judgment, therefore, dismissing the suit of the appellants/plaintiffs was not correct and is accordingly set aside. **(Para 6)**

Important Issue Involved: Although the jurisdiction of the Company Court under Section 155 of the Companies Act and that Civil Court under Section 9 of CPC is concurrent, but it is preferable that highly disputed questions of fact ought to be decided by the Civil Court

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. B.K. Sood, Advocate

FOR THE RESPONDENTS : None.

CASES REFERRED TO:

1. *Claude-Lila Parulekar (Smt)* vs. *Sakal Papers (P) Ltd. and Ors.* (2005) 11 SCC 73.
2. *Ammonia Supplies Corporation (P) Ltd.* vs. *Modern Plastic Containers Pvt. Ltd. and Ors.* (1998) 7 SCC 105.

RESULT: Appeal allowed.

VALMIKI J. MEHTA, J. (ORAL)

1. This case is on the Regular Board of this Court since 19.3.2012. No one appears for the respondents although it is 3.20 P.M. I have

therefore heard the learned counsel for the appellants and perused the record. I am consequently proceeding to dispose of the appeal.

2. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 4.4.2005 rejecting the plaint under Order 7 Rule 11 CPC on the ground that disputes which were subject matter of the suit under the Companies Act, 1956 (hereinafter referred to as 'the Act') had to be decided by the Company Law Board by virtue of Section 111 of the Act.

3. The facts of the case are that the plaintiffs filed the subject suit for declaration and mandatory injunction on the pleading that the shareholding of defendant Nos.3 and 6 to 9 of the defendant No.1 was of Redeemable Preference Shares issued in the year 1957 for a term of 10 years redeemable in the year 1967; that the defendant No.1-company issued a notice dated 12.10.1996 for holding of an Extraordinary General Meeting on 9.11.1996 for passing of a resolution subject to the consent of the Company Law Board for issuing of 7172 10% Tax Free Cumulative Redeemable Preference Shares of Rs. 100/- each redeemable on 31.10.2006 to the shareholders and on the issue of which 7172 preference shares, unredeemed redeemable cumulative preference shares issued in the year 1957 shall be deemed to have been redeemed. Another notice to the same effect dated 17.10.1996 was also said to have been received by the plaintiffs. It was contended by the plaintiffs that the redeemable preference shares of the year 1967 should have been redeemed in the year 1967 itself and after the due date of redemption, the shares would have ceased to exist. It was pleaded that the defendants were wrongly considering the redeemable cumulative preference shares issued in the year 1957 to exist. Declaration was sought that the right of the preference shareholders of the year 1957 would only be for recovery of debt and which also in any case had become time barred.

4. Defendant No.1 filed its written statement wherein it was claimed that shares which were the subject matter of the suit were subject matter of the compromise pending before the Company Law Board and which compromise was arrived at on 30.10.1996 and that the plaintiffs were not the shareholders of the company and therefore had no locus standi to file the suit. It was denied that defendants were issued preference shares for 10 years period and which were due for redemption in the

year 1967. The trial Court has dismissed the suit by making the following observations:-

> "9. It is true that for deciding an application U/O 7 Rule 11, the averments made in the plaint are to be considered. Defence of the defendant in the Written Statement has to be ignored. In the suit plaintiff prayed for decree of declaration declaring that 3065 6% Tax Free Cumulative Redeemable Preference Share cannot be substituted by fresh issuance of shares. The second declaration sought was that after due date of redemption of 3065 Preference Shares the right of shareholders was only to recover the share money. Since 29 years had passed, the debt had become time barred. The third prayer was for decree of mandatory (sic) injunction restraining the defendant from holding Extraordinary General Meeting on 09.11.1996. Though in the application U/O 7 Rule 11 many grounds were taken by the defendant. To my mind ground no.1 and 6 are sufficient to dispose of the present suit. Even if we ignore the averments regarding compromise being effected before Company Law Board, we find that the relief sought by the plaintiff otherwise cannot be granted.
>
> 10. **Section 111 (4) & (5) of Companies Act reads as under:-**
>
> **(4)** if:- (a) the name of any person-
>
> (i) is, without sufficient cause, entered in the register of members of a company, or
>
> (ii) after having been entered in the register, is, without sufficient cause, omitted therefrom: or
>
> (b) default is made, or unnecessary delay takes place, in entering in the register the fact of any person having become, or ceased to be, a member (including a refusal under sub-section (1)),
>
> the person aggrieved, or any member of the company, or the company, may apply to the (Tribunal) for rectification of the register.
>
> (5) The (Tribunal), while dealing with an appeal preferred under sub-section (2) or an application made under sub-section (4) may, after defendant. To my mind ground no.1 and 6 are

sufficient to dispose of the present suit. Even if we ignore the averments regarding compromise being effected before Company Law Board, we find that the relief sought by the plaintiff otherwise cannot be granted."

5. A reading of the aforesaid paras shows that the trial Court held that the jurisdiction of the Civil Court was barred as the Company Law Board has jurisdiction under Section 111 of the Act. In my opinion, the trial Court has misdirected itself in holding that the jurisdiction of the Civil Court is barred. Section 111, sub-sections (4) and (5) of the Act are in fact reproduction of the erstwhile Section 155 of the Act. The repealed Section 155 of the Act reads as under:-

"155. Power of Court to rectify register of members. - (1) If -

(a) the name of any person -

(i) is without sufficient cause, entered in the register of members of a company, or

(ii) after having been entered in the register, is, without sufficient cause, omitted therefrom; or

(b) default is made, or unnecessary delay takes place, in entering on the register the fact of any person having become, or ceased to be, a member;

the person aggrieved, or any member of the company, or the company, may apply to the Court for rectification of the register.

(2) The Court may either reject the application or order rectification of the register; and in the latter case, may direct the company to pay the damages, if any, sustained by any party aggrieved. In either case, the Court in its discretion may make such order as to costs as it thinks fit.

(3) On an application under this section, the Court -

(a) may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged

members on the one hand and the company on the other hand; and

(b) generally, may decide any question which it is necessary or expedient to decide in connection with the application for rectification.

(4) From any order passed by the Court on the application, or on any issue raised therein and tried separately, any appeal shall lie on the grounds mentioned in Section 100 of the Code of Civil Procedure, 1908:

(a) if the order be passed by a District Court, to the High Court;

(b) if the order be passed by a single Judge of a High Court consisting of three or more Judges, to the Bench of that High Court.

(5) The provisions of sub-sections (1) to (4) shall apply in relation to the rectification of the register of debenture holders as they apply in relation to the rectification of the register of members."

6. While dealing with the provision of Section 155, the Supreme Court in the case of **Claude-Lila Parulekar (Smt) Vs. Sakal Papers (P) Ltd. and Ors.** (2005) 11 SCC 73 had held that the jurisdiction of the Company Court under Section 155 of the Act and of the Civil Court under Section 9 of CPC is concurrent. I may also refer to the judgment of the Supreme Court in the case of **Ammonia Supplies Corporation (P) Ltd. Vs. Modern Plastic Containers Pvt. Ltd. and Ors.** (1998) 7 SCC 105 which holds that highly disputed questions of fact in fact ought to be decided by the Civil Court and not by the Company Law Board. Thus, looking at the issue from any angle i.e. whether of the fact that jurisdiction of the Civil Court is concurrent with the Company Law Board or the fact that it is preferable that highly disputed questions of fact such as those in the present case, ought to be decided by the Civil Court, the impugned judgment, therefore, dismissing the suit of the appellants/plaintiffs was not correct and is accordingly set aside.

7. In view of the above, the appeal is accepted. Impugned judgment dated 4.4.2005 is set aside. It is held that the Civil Court has jurisdiction to try and determine the disputes which were the subject matter of the

suit. 8. Let the parties appear before the District & Sessions Judge, Delhi on 1st May, 2012, and on which date the District & Sessions Judge, Delhi will mark the suit for disposal to a competent Court in accordance with law. The Court, to whom the suit will be marked, will issue notice to the defendants in the suit before proceeding ahead in the matter. Trial Court record be sent back so as to be available before the District & Sessions Judge on the date fixed.

ILR (2012) III DELHI 711
CRL. M.C.

BIMAL BHARTHWAL ….PETITIONER

VERSUS

STATE THROUGH CBI & ORS. ….RESPONDENTS

(M.L. MEHTA, J.)

CRL. M.C. NO. : 2150/2008 & 2603/2008 DATE OF DECISION: 29.03.2012

Code of Criminal Procedure, 1973—Section 319 and 190—Whether Magistrate has power to take cognizance against a person at the pre charge stage against whom incriminating material is on record though he has been cited as a witness by prosecution—In the charge sheet filed by the CBI the Petitioners, were cited as prosecution witnesses—Ld. M.M took cognizance on 28.11.2000 and issued summons to the accused persons—A supplementary charge sheet was filed on 19.03.2002—The case was listed for hearing arguments on charge on 21.04.2006—On 21.04.2006 itself there was application filed on behalf of three accused to Summon petitioners as accused in the case on the ground that as per their

own statement recorded under Section 161 Cr. P.C. their involvement was made out in the conspiracy for which they had been charge sheeted—It was pleaded on behalf of CBI that Petitioners had no role to pay and they were victims of the conspiracy—Ld. M.M. however passed the orders for summoning them—It was submitted on behalf of Petitioners that cognizance in this case had already been taken on 28.11.2000 and without any additional material, no cognizance could have been taken against them—It was further submitted that since the case had already been fixed for hearing arguments on charge Ld. M.M was empowered to take recourse to only Section 319 Cr. P.C only after some incriminating evidence had been adduced during inquiry/trial—It was also stated that the accused persons could not have dictated to the Court who should be arrayed as accused in the case and who should be summoned as witnesses—It was pointed out from the other side that the case was merely fixed for hearing arguments on the point of charge but no argument could be heard as by that time the Accused had already filed application for summoning petitioners as accused in this case—It was also submitted from the other side that the case was still at the stage of supplying the copies to Accused under Section 207 IPC as even on 12.03.2012 the case was still being fixed for supplying copies to Accused—Held, Magistrate takes cognizance of an offence and not the offender under Section 190 Cr. P.C.—At the time of issuing the process under Section 204 Cr. P.C, the Magistrate is to decide whether the process should be issued against the person (s) named in the charge sheet and also not mentioned in the charge sheet—Present case was still at the stage of supply of deficient copies under Section 207 Cr. P.C, Ld. Magistrate was within his powers to issue summons against Petitioners after taking note of role of petitioners—The contention that Petitioners were victims of conspiracy and not

accomplices could not be raised at the stage of summoning but it was possible to raise it at the stage of framing of charge.

The law is trite that the Magistrate takes cognizance of an offence and not the offender. At the stage of cognizance the Magistrate takes into consideration the police report, the statement of witnesses and any other evidence available on record. The power of the Magistrate is unfettered and unrestricted in that it is his prerogative to appreciate the available evidence to see if, prima facie an offence is made out. The Hon'ble Apex Court has held in **SWIL India Ltd.** (supra) that it is clear that at the stage of taking cognizance of the offence, provisions of Section 190 Cr.PC would be applicable. Section 190 inter alia provides that "The Magistrate may take cognizance of any offence upon a police report of such facts which constitute an offence". As per this provision, Magistrate takes cognizance of an offence and not the offender. After taking cognizance of the offence, the Magistrate under Section 204 Cr.PC is empowered to issue process to the accused. At the stage of issuing process, it is for the Magistrate to decide whether process should be issued against a particular person/ persons named in the charge-sheet and also not named therein. For that purpose, he is required to consider the FIR, the chargesheet and the statements recorded by the police officer and other documents tendered along with the charge-sheet. Further, upon receipt of police report under Section 173(2) Cr.PC, the Magistrate is entitled to take cognizance of an offence under Section 190 (1) (b) even if the police report is to the effect that no case is made out against the accused by ignoring the conclusion arrived at by the IO and independently applying his mind to the facts emerging from the investigation by taking into account the statements of the witnesses examined by the police. At this stage, there is no question of application of Section 319 Cr.PC.

13A. In **Jitender Singh** (supra), the Magistrate had taken cognizance on 16.2.1995 and issued summons

to the accused for 7.6.1996. The said accused appeared before the Court and was granted bail. Thereafter, the case was adjourned for hearing on question of charge on few days. The Magistrate passed an order for issuance of summons to other accused named in the complaint observing that they were equally involved in commission of offence. Those persons challenged the said order on the ground that the Magistrate could not revert back to the first stage of taking cognizance to summon additional persons as accused and that the only provision under which he could have exercised the power of issuing summons to additional accused was after recording of evidence under Section 319 Cr.PC. This Court in **Jitender Singh** (supra) held that there was no bar in the power of Magistrate to summon other accused persons who in his view were also involved in commission of the offence. **(Para 13)**

At the stage of summoning, all that the magistrate has to see is whether or not there is "sufficient ground for proceeding against the accused". At this stage, the Magistrate is not to weigh the evidence meticulously. The standard to be adopted by the Magistrate in scrutinizing the evidence is not the same as the one which is to be kept in view at the later stage of framing charges. **(Para 19)**

Important Issue Involved: Ld. Magistrate under Section 190 Cr. P.C. takes cognizance of the offense and not the offender. A Magistrate is empowered to summon an accused not named in the charge sheet after taking the cognizance of the offence who may not have been summoned at the first instance, where the stage of framing of charge has not reached.

[La Ga]

APPEARANCES:

FOR THE PETITIONER : Mr. Arvind Nayyar, Mr. Narendera Singh Bisht and Ms. Mamta, Advocates

FOR THE RESPONDENT : Ms. Sonia Mathur with Mr. Sushil Kumar Dubey, Advocates for CBI along with SI R.P. Sharma Mr. B.S. Sharma, Advocate for R-2, 3 and 7.

CASES REFERRED TO:

1. *Anirudh Sen* vs. *State (NCT of Delhi)* 2006 {3} JCC 2081.
2. *M/s SWIL Ltd.* vs. *State of Delhi & Ors* JT 2001 (6) SC 405.
3. *Jitender Singh* vs. *Govt. of NCT* 2003 (1) JCC 66.
4. *Jagdish Sahai Mathur and others* vs. *State* {1991 Crl.L.J 1069}.
5. *Raghubans Dubey* vs. *State of Bihar* [AIR 1967 SC 1167].

M.L. MEHTA, J.

1. The petitioners herein are aggrieved by the order of the Ld. MM dated 06.10.2007 wherein, the Ld. MM was pleased to issue summons to the petitioners as accused, whereas in the charge sheet the petitioners were cited as prosecution witnesses.

2. The brief facts necessitating the present petition are that, on the complaint of one D.R. Singh, Sr. Manager, Vigilance NR (Indian Airline Ltd. Safdurjung Airport), the CBI registered a case RC 4 (s)/ 2000- SIU-I, on 16.05.2000. Thereafter the charge sheet of the offence was submitted in the court of Ld. MM on 17.11.2000 wherein the petitioners were cited as prosecution witnesses. Thereafter, vide order dated 28.11.2000, the Ld. MM was pleased to take cognizance of the offence and issue summons to the accused persons named in column one of the charge-sheet. A supplementary charge sheet was filed by the CBI on 19.03.2002. The matter was fixed for argument on charge on 21.04.2006 vide order dated 23.01.2006. On 21.04.2006, the accused persons, namely F. George, Brijesh Kumar and Pradeep Kumar moved an application before the Ld.

MM to summon the petitioners as accused in the case on the premise that as per statements of the petitioners under Section 161 Cr.PC, their involvement was made out in the alleged conspiracy, but they had been cited as witnesses and not accused by the CBI in the chargesheet. A reply was filed by the CBI to the said application contending that the petitioners had no role to play in the alleged conspiracy. On the contrary, they were victims of the conspiracy hatched by the accused persons/ respondents no.3 to 7. Rejecting the contentions of the CBI, the Ld. MM was pleased to summon the petitioners vide impugned order dated 06.10.2007. Hence the present petition praying for quashing of the summoning order qua the petitioners.

3. The learned counsel for the petitioners submitted that the petitioners have been victims of a conspiracy hatched by the other accused persons and were not accomplices in the conspiracy. The petitioners were mentioned in column 4 of the chargesheet as witnesses. The cognizance of the offence was already taken by the LD. MM on 28.11.2000 against the accused persons and a second cognizance qua the petitioners without revelation of any new material evidence incriminating the petitioners in the offence is bad in law. It is submitted that the application to array the petitioners as accused was filed by the respondents no.3 to 7/ accused persons in the trial court and not by the CBI. On the contrary, the investigation agency has submitted a reply opposing the application of the accused persons to summon the petitioners contending that the petitioners were victims and not accomplices to the alleged conspiracy. It is further submitted that the case was already fixed for arguments on charge. The Magistrate was empowered to take recourse to section 319 CrPC and summon the petitioners only if any incriminating evidence is adduced during inquiry/trial, but cannot at this stage take cognizance under Section 190 Cr.PC qua the petitioners. Reliance is placed on the judgment of this court in **Anirudh Sen v. State (NCT of Delhi)** 2006 {3} JCC 2081.

4. It is submitted that it is not for the accused persons to dictate as to who should be arrayed as an accused and who be made a witness. Also the charge-sheet was filed in the year 2000 and the supplementary charge-sheet in 2002, however, the application, to array the petitioners as accused was filed in 2006, i.e. 4 years after the filing of the supplementary charge-sheet and thus cannot be allowed.

5. Per Contra, the learned counsel for the respondents no. 2 to 7 submitted that incriminating evidence has been recorded against the petitioners in their own statements to the CBI. The statements of the petitioners clearly project the role played by them in the alleged conspiracy. The chargesheet also acknowledges and categorically states the specific role played by the petitioners in the conspiracy, however, instead of citing them as accused, the petitioners have been cited as witnesses in the charge-sheet. It is submitted that the handwriting of the present petitioners on the forged and fabricated documents has also been confirmed by the prosecution.

6. It is further submitted that vide order dated 23.01.2006 the Ld. MM had merely fixed the matter for argument on charge, however, an application was moved by the accused persons for impleading the petitioners as accused, as a result of which arguments on charge could not be heard. It is further submitted that, even as late as 12.03.2012, the prosecution was directed to supply deficient copies to the accused person under section 207 CrPC and the arguments on charge are yet to be heard. Order dated 12.03.2012 states

> "To come up for supply of deficient copies and otherwise to file a column-wise list of witnesses along with nature of documents as well as purpose of examination on 29.05.2012."

7. The learned counsel for the respondents contended that the relevant procedure for grant of pardon by the prosecution is provided under section 306 CrPC, wherein the prosecution is allowed to grant pardon to an accomplice for his turning into an approver, however, the CBI on its own discretion cannot allow an accomplice to be a prosecution witness. 8. Distinguishing the judgment of **Anirudh Sen** (Supra), it is submitted, that case was at the stage of framing of charge and the stage of section 207 had been crossed by the trial court. However, the present case is still at the stage of supply of deficient copies under section 207 CrPC which is prior to stage of framing of charge.

9. It is submitted that the plea of the petitioners can be considered by the trial court at the stage of charge when the trial court would be within its power to discharge the petitioners if prima facie no case is made out qua them. It is contended that the Ld. MM was within his powers to summon the petitioners at the pre-charge stage, on the basis

of the evidence available on record, if he is prima facie satisfied with the role of the petitioners in the alleged conspiracy. Reliance is placed on the judgments of the Hon'ble Supreme Court in **M/s SWIL Ltd. v. State of Delhi & Ors.** JT 2001 (6) SC 405 and this court in **Jitender Singh v. Govt. of NCT** 2003 (1) JCC 66.

10. I have heard learned counsel for the petitioners and the learned counsel for the respondents and learned APP and perused the records.

11. A short proposition of law arises for adjudication in the present petition, being, whether the magistrate is clothed with the power to take cognizance against a person at the pre-charge stage, against whom incriminating material is available on record, although he has been cited as a witness by the prosecution.

12. A detailed perusal of the chargesheet and the statements of the petitioners as given to the CBI clearly establishes the role played by the petitioners in the alleged conspiracy. The act of the petitioners finds acknowledgment in the chargesheet and reveals the modus operandi followed by the accused persons in the alleged conspiracy. The factum of the role played by the petitioners in the alleged conspiracy cannot be ignored by the Ld. MM even though they have not been made accused in the chargesheet.

13. The law is trite that the Magistrate takes cognizance of an offence and not the offender. At the stage of cognizance the Magistrate takes into consideration the police report, the statement of witnesses and any other evidence available on record. The power of the Magistrate is unfettered and unrestricted in that it is his prerogative to appreciate the available evidence to see if, prima facie an offence is made out. The Hon'ble Apex Court has held in **SWIL India Ltd.** (supra) that it is clear that at the stage of taking cognizance of the offence, provisions of Section 190 Cr.PC would be applicable. Section 190 inter alia provides that "The Magistrate may take cognizance of any offence upon a police report of such facts which constitute an offence". As per this provision, Magistrate takes cognizance of an offence and not the offender. After taking cognizance of the offence, the Magistrate under Section 204 Cr.PC is empowered to issue process to the accused. At the stage of issuing process, it is for the Magistrate to decide whether process should be issued against a particular person/ persons named in the charge-sheet and

also not named therein. For that purpose, he is required to consider the FIR, the chargesheet and the statements recorded by the police officer and other documents tendered along with the charge-sheet. Further, upon receipt of police report under Section 173(2) Cr.PC, the Magistrate is entitled to take cognizance of an offence under Section 190 (1) (b) even if the police report is to the effect that no case is made out against the accused by ignoring the conclusion arrived at by the IO and independently applying his mind to the facts emerging from the investigation by taking into account the statements of the witnesses examined by the police. At this stage, there is no question of application of Section 319 Cr.PC.

13A. In **Jitender Singh** (supra), the Magistrate had taken cognizance on 16.2.1995 and issued summons to the accused for 7.6.1996. The said accused appeared before the Court and was granted bail. Thereafter, the case was adjourned for hearing on question of charge on few days. The Magistrate passed an order for issuance of summons to other accused named in the complaint observing that they were equally involved in commission of offence. Those persons challenged the said order on the ground that the Magistrate could not revert back to the first stage of taking cognizance to summon additional persons as accused and that the only provision under which he could have exercised the power of issuing summons to additional accused was after recording of evidence under Section 319 Cr.PC. This Court in **Jitender Singh** (supra) held that there was no bar in the power of Magistrate to summon other accused persons who in his view were also involved in commission of the offence.

14. In case titled **Raghubans Dubey v State of Bihar** [AIR 1967 SC 1167], the Hon'ble Apex Court has held that

"In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of the offence and not the offender. Once he takes cognizance of an offence, it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceedings initiated by his taking cognizance of an offence.

15. In a Division Bench judgment of this Court titled **Jagdish Sahai Mathur and others v State** {1991 Crl.L.J 1069}, the scope of Section 190 Cr.PC has been discussed.

"The language of Section 190 of the Code is loaded with significance. It talks of cognizance and that too of the "offence" and not the "offender". The Magistrate first takes cognizance of the offence and thereafter only proceeds to find out who the offenders are. The steps though appear to be intertwined are distinct".

16. The judgment of **Anirudh Sen** (supra) is clearly distinguishable from the present case on facts as well as law. The petitioner in that case had been summoned subsequently at the stage of charge, although previously his name was mentioned in Column No.2 of the Charge-sheet. Moreover, it was observed by the Court that there was no material present to link the petitioner with the alleged conspiracy. In the present case, arguments have not been heard on charge. The same could have been done only after the supply of deficient copies under Section 207 Cr.PC to the accused persons. Also the learned MM was prima facie satisfied with the role of the petitioners in the alleged conspiracy at the time of issuing summons to the petitioners.

17. In view of the law laid down by the Hon'ble Supreme Court as discussed above, there is no doubt that the magistrate was well within his powers to issue summons against the petitioners after taking note of the role of the petitioners in the alleged conspiracy. Hence, the contention of the petitioners that the cognizance taken by the Ld. MM was bad, is untenable and cannot be sustained.

18. The petitioners had further submitted that they were the victims of the conspiracy and not accomplices. This argument of the petitioners drives strength from the contentions of the CBI advanced at the time of opposing the summoning application qua the petitioners. This contention cannot be raised at the stage of summoning, however, such contentions may be raised at the stage of framing charges.

19. At the stage of summoning, all that the magistrate has to see is whether or not there is "sufficient ground for proceeding against the accused". At this stage, the Magistrate is not to weigh the evidence meticulously. The standard to be adopted by the Magistrate in scrutinizing

the evidence is not the same as the one which is to be kept in view at the later stage of framing charges.

20. Therefore, the contention of the petitioners that they were victims and accomplice cannot be looked into at the stage of summoning. At the stage of summoning the factum of the involvement or participation of the petitioners in the alleged conspiracy is sufficient enough for the Magistrate to take cognizance and summon them.

21. In view of the above observations, I find no infirmity in the order of the Ld. MM.

22. The petition is dismissed.

ILR (2012) III DELHI 721
O.M.P

IJM-GAYATRI JOINT VENTURE ….PETITIONER

VERSUS

NATIONAL HIGHWAYS AUTHORITY OF INDIA ....RESPONDENT

(S. MURALIDHAR, J.)

O.M.P. NO. :147/2006 DATE OF DECISION: 09.04.2012

Arbitration and Conciliation Act, 1996—Section 34—challenge of Award on the ground of bias—Award related to work of Four—Laning of Ongole—Chilakaluripet Section on NH5, Andhra Pradesh, rejecting the claimed of Petitioner by majority—Arbitral Tribunal comprised of three Members, Mr. Jagdish Panda (Presiding Arbitrator S.S Sodhi (Co-Arbitrator and a nominee of Petitioner) and Mr. L.R. Gupta (Nominee of NHAI)—Alleged that Mr. Jagdish Panda was engaged as a consultant by NHAI and in another

project for package OR-VII and also that proceedings of the Dispute Resolution Board (DRB) held on 13.12.2004 relating to the said package were chaired by Sh. L.R. Gupta who had been representing NHAI before the Arbitral Tribunal and Sh. Panda who was the Presiding Arbitrator in these proceedings was appearing as a Consultant during the said DRB proceedings—Held, there was a conflict of interest in both Sh. L.R. Gupta and Sh. Jagdish Panda—It was incumbent on them to disclose at the outset the parties above facts and inquire if parties had any objection in continuing in the Arbitral Tribunal—Section 12 permits a party to challenge an Arbitrator when there are justifiable doubts as to his independence or impartiality which is premised on the mandatory requirement under Section 12(2) of the Act which requires an Arbitrator to mandatorily disclose any circumstance which may give rise to justifiable doubts as to his independence or impartiality—Since there was no such disclosure made as required under Section 12(2), Petitioner was deprived of an opportunity under Section 12 read with Section 13 to challenge the appointment of either of them—Non disclosure of conflict of interest by them vitiates the majority Award.

Section 12 of the Act permits a party to challenge the appointment of an arbitrator when there are justifiable doubts as to his independence or impartiality. However, this is premised on the mandatory requirement under Section 12(2) of the Act that "an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him". It is mandatory for an arbitrator to disclose "without delay" to the parties and in writing "any circumstances" that are "likely to give rise to justifiable doubts as to his independence or impartiality". A perusal of the minutes of the arbitral proceedings in the present matter indicates that there was indeed no such

disclosure by either Mr. Gupta or Mr. Panda as required by Section 12(2) of the Act. In the circumstances, the Petitioner was deprived of an opportunity under Section 12 read with Section 13 to challenge the appointment of either of them. The failure by both Mr. Gupta and Mr. Panda to disclose their likely conflict of interest at the commencement of the arbitral proceedings in the present case vitiates the majority Award. It is, therefore, liable to be set aside on this ground alone. **(Para 11)**

Important Issue Involved: It is mandatory for an Arbitrator under Section 12(2) to disclose to the parties in writing any circumstances which may give rise to justifiable doubts as his independence and impartiality. Failure to do so would deprive a party often opportunity under Section 12 read with Section 13 to challenge the appointment of the Arbitrator Such failure to disclose conflict of interest at the commencement of the Arbitral proceedings would also vitiate the Award.

[La Ga]

APPEARANCES:

FOR THE PETITIONER : Mr. Arun Kathpalia with Mr. Angad Mehta, Mr. Samaksh S. Goyal and Mr. Vivek Malik, Advocates.

FOR THE RESPONDENTS : Ms. Tanu Priya Gupta, Advocate.

S. MURALIDHAR, J.

1. The challenge in this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') is to the majority Award dated 24th December 2005 of the Arbitral Tribunal whereby the claims of the Petitioner arising out of the award of the work of Four-Laning of the Ongole - Chilakaluripet section on NH -5 in the State of Andhra Pradesh by an Agreement dated 25th May 2001 were rejected.

2. Since one of the principal grounds of challenge to the impugned majority Award is on the ground of bias, other facts are not being

detailed in this order.

3. The three-member Arbitral Tribunal comprised of Mr. Jagdish Panda, the Presiding Arbitrator, Justice S.S. Sodhi, Co-arbitrator (a nominee of the Petitioner) and Mr. L.R. Gupta, Co-arbitrator [a nominee of the Respondent National Highways Authority of India (NHAI)]. Mr. Jagdish Panda was appointed as Presiding Arbitrator by a letter dated 29th December 2004 of the Indian Roads Congress ('IRC') in keeping with the procedure outlined in the contract for constitution of the Arbitral Tribunal.

4. One Prof. (Dr.) J. Purshottam, a nominee of the Petitioner, participated as co-arbitrator in two hearings of the Arbitral Tribunal but resigned and in his place Justice S.S. Sodhi was appointed as the co-arbitrator.

5. There were four meetings of the Arbitral Tribunal held in Delhi. The arguments were heard finally on 17th September 2005 and thereafter the impugned Award came to be passed. While on 24th December 2005 the majority Award was passed by the Presiding Arbitrator, Mr. Jagdish Panda and Mr. L.R. Gupta (the co-arbitrator) rejecting the Petitioner's claim, Justice S.S. Sodhi gave the minority dissenting award on 31st December 2005, allowing the claims of the Petitioner together with interest at 10% per annum compounded monthly.

6. In para 20 of the present petition, the Petitioner has averred as under:

> "20. The impugned award, apart from being contrary to the express terms of the contract as also the substantive law of the country, also suffers from another serious infirmities. At the time of appointment, each arbitrator is required and obliged to disclose in writing any and all circumstances which could rise to justifiable doubts as to his independence and impartiality. It now transpires that Shri Jagdish Panda, the Presiding Arbitrator was working as an employee of the Consultant of the Respondent with regard to Packages OR-VI, OR-VII and ORVIII and in that capacity was interacting extensively with the Respondent. However, Shri Jagdish Panda, never disclosed this fact to the Applicant herein at any stage of the arbitration proceedings. In essence the employment of Shri Panda was dependent upon the

Respondent. Further, even otherwise the Respondent was in a position to dictate to Shri Jagdish Panda. It is submitted that under and in terms of Section 12 of the Act of 1996, Shri Jagdish Panda was required and obliged to disclose this fact in writing to the parties, which he failed to do. It is respectfully submitted that this failure alone vitiates the Award."

7. In reply to the petition, NHAI has stated in para 20 as under:

"20. That the contents of para no.20 are absolutely wrong and incorrect, hence denied. It is denied that the impugned award, apart from being contrary to the express terms of the contract as also the substantive law of the country, also suffers from another serious infirmities. It is further denied that Sh. Jagdish Panda, the Presiding Arbitrator never disclosed the fact of his being an employee of the Respondent to the Applicant herein at any stage of the arbitration proceedings. It is further denied that the employment of Sh. Panda was dependent upon the Respondent. It is further denied that the Respondent was even otherwise in a position to dictate to Sh. Jagdish Panda. It is also denied that Sh. Jagdish Panda failed to disclose this fact to the Applicant and this failure alone vitiates the award."

8. When the petition was heard by this Court finally on 16th March 2012, Mr. Arun Kathpalia, learned counsel appearing for the Petitioner specifically raised the above objection and this Court passed the following order on that date:

"1. In para 20 of the present petition it is stated by the Petitioner that Mr. Jagdish Panda, who was the Presiding Arbitrator, was engaged as a Consultant by the National Highways Authority of India ('NHAI') in another project which concerned package OR-VII and that this fact was not disclosed by Mr. Jagdish Panda in the present arbitral proceedings.

2. The proceedings of the Disputes Resolution Board ('DRB') held on 13th December 2004 for package OR-VII has been filed. It shows that the said DRB was chaired by Mr. L.R. Gupta and Mr. Jagdish Panda appeared in the said proceedings, with the attendance sheet describing him as 'Senior Project Engineer' of 'DHB Consultant', who were consultants in the said project

appointed by NHAI. Incidentally in the Arbitral Tribunal which passed the impugned Award by a majority of 2:1, Mr. J. Panda was the presiding member and Mr. L.R. Gupta, a member nominated by NHAI and both of them constituted the majority.

3. In reply to para 20 while the NHAI does not deny that Mr. Panda acted as its Consultant. NHAI's stand is: "it is further denied that Mr. Panda, the Presiding Arbitrator never disclosed the fact of his being an employee of the Respondent to the applicant herein at any stage of the arbitration proceedings".

4. This Court had by orders dated 5th December 2008 and 17th April 2009 called for the arbitral record. In response to the letter written by the Registry, Mr. Jagdish Panda has on 8th May 2009 sent a letter stating that since the Award was pronounced more than three years earlier, he did not retain any document with himself and that the records may be called from the NHAI.

5. Consequently, this Court does not have a copy of the orders passed in the arbitral proceedings or the complete arbitral record.

6. Counsel for both the parties state that they will produce on the next date copies of the orders passed in the arbitral proceedings. In addition, counsel for NHAI states that the arbitral record will be traced out and brought to the Court on the next date."

9. Copies of the arbitral proceedings have thereafter been placed on record. It contains the minutes of the proceedings of the Arbitral Tribunal held on 12th February 2005, 9th April 2005, 2nd July 2005 and 17th September 2005. These minutes do not reflect that either Mr. Panda or Mr. Gupta disclosed to the parties of there being any conflict of interest in their acting as Presiding Arbitrator and Co-arbitrator respectively in the matter. Therefore, the denial by the NHAI in para 20 of its reply that Mr. Panda did not disclose the fact of his being an employee of the Respondent NHAI at any stage of the arbitration proceedings, is actually both misleading and incorrect. The averment by the Petitioner in para 20 of the petition was that Mr. Panda was an employee of the DHB Consultants who were engaged by the NHAI in its projects particularly with regard to the package OR-VII and VIII. There is in fact no denial of this fact by the NHAI. Further, the proceedings of the first Disputes Review Board ('DRB') held on 13th December 2004 shows that Mr. L.R. Gupta

was the Chairman of that DRB and Mr. J. Panda represented on the side of the NHAI as Senior Project Engineer of DHB Consultants. There is no denial of this fact either by the NHAI.

10. Clearly, there was a conflict of interest in both Mr. L.R. Gupta acting as Co-arbitrator and Mr. J. Panda acting as Presiding Arbitrator of the Arbitral Tribunal constituted to adjudicate the disputes between the Petitioner and NHAI. It was incumbent on both Mr. Panda and Mr. Gupta to have disclosed, at the very outset to the parties, of the above facts and enquire if parties had any objection in their continuing in the Arbitral Tribunal. While NHAI certainly would have been aware of the fact that Mr. Panda and Mr. Gupta were associated with disputes concerning the NHAI arising out of other contracts, it is unlikely that the Petitioner would have been in a position to discern this fact without either of them disclosing it at the very commencement of the arbitral proceedings. Therefore, the contention of the NHAI that the Petitioner ought to have raised this objection at the very beginning is without merit.

11. Section 12 of the Act permits a party to challenge the appointment of an arbitrator when there are justifiable doubts as to his independence or impartiality. However, this is premised on the mandatory requirement under Section 12(2) of the Act that "an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall, without delay, disclose to the parties in writing any circumstances referred to in sub-section (1) unless they have already been informed of them by him". It is mandatory for an arbitrator to disclose "without delay" to the parties and in writing "any circumstances" that are "likely to give rise to justifiable doubts as to his independence or impartiality". A perusal of the minutes of the arbitral proceedings in the present matter indicates that there was indeed no such disclosure by either Mr. Gupta or Mr. Panda as required by Section 12(2) of the Act. In the circumstances, the Petitioner was deprived of an opportunity under Section 12 read with Section 13 to challenge the appointment of either of them. The failure by both Mr. Gupta and Mr. Panda to disclose their likely conflict of interest at the commencement of the arbitral proceedings in the present case vitiates the majority Award. It is, therefore, liable to be set aside on this ground alone.

12. For the aforementioned reasons, the impugned majority Award dated 24th December 2005 of Mr. Jagdish Panda, the Presiding Arbitrator

and Mr. L.R. Gupta, the Co-arbitrator is hereby set aside.

13. Consequently, the disputes will have to be adjudicated afresh by an arbitral Tribunal comprising a fresh nominee of the NHAI to replace Mr. L.R. Gupta. Thereafter, if there is no agreement between the fresh nominee and Justice S.S. Sodhi as to the appointment of a Presiding Arbitrator (other than Mr. Jagdish Panda), it will be open to the IRC to nominate a Presiding Arbitrator in terms of the procedure outlined in the contract.

14. The NHAI will within a period of four weeks from today, nominate another co-arbitrator to replace Mr. L.R. Gupta and forthwith inform both the Petitioner as well as Justice S.S. Sodhi of such appointment. Within a period of thirty days thereafter, the nominee arbitrator of the NHAI and Justice Sodhi will take a decision as to the Presiding Arbitrator failing which within a further period of two weeks, the IRC will be requested by the NHAI to nominate the Presiding Arbitrator. The IRC will nominate the Presiding Arbitrator within a period of two weeks after receipt by it of the request from the NHAI. The IRC will forthwith communicate the said decision to the parties as well as the co-arbitrators. The Arbitral Tribunal so constituted will hear the parties on the basis of the existing pleadings on record and endeavour to pass a fresh Award within a period of six months after its first sitting.

15. The petition is allowed in the above terms but, in the circumstances with no order as to costs.

ILR (2012) III DELHI 729
BAIL APPLN.

SUMIT TANDON ….PETITIONER

VERSUS

CBI ….RESPONDENT

(MUKTA GUPTA, J.)

BAIL APPLN. NO. : 444/2012 DATE OF DECISION: 10.04.2012

Prevention of Corruption Act, 1988—Section 4(2)—Section 13—Territorial jurisdiction to entertain application for bail—FIR registered on the directions of the Hon'ble High Court of Allahabad to make inquiries into the matter of execution and implementation of National Rural Health Mission (NRHM) Scheme and utilization of founds in entire State of Uttar Pradesh and to also register a case against persons who are found to have committed prima facie cognizable offence—Five separate preliminary inquiries were registered in different branches of CBI in New Delhi—Though the funds were provided by the Central Government but they were entrusted for disposal to the Directorate Mission NRHM, U.P.—Embezzlement of fund was not at the level of Central Government but at the level of Directorate of Mission NRHM, U.P—Anticipatory Bail application filed before Special Judge, Delhi—Dismissed on the ground of territorial jurisdiction—Order challenged—Held, misappropriation, embezzlement an offence under Section 13 PC Act were committed in the State of Uttar Pradesh—Offence committed in the State of Uttar Pradesh in terms Section 4(2) of the P.C. Act—Special Judge, Ghaziabad at Uttar Pradesh competent to try the offence—No error committed in the dismissal of application for anticipatory bail for want of territorial jurisdiction.

It would be thus evident that in the present case, the misappropriation, embezzlement and the offence under Section 13 PC Act were committed in the State of Uttar Pradesh. The offence having been committed in the State of Uttar Pradesh, in terms of Section 4(2) of the PC Act, the Special Judge, Gaziabad at Uttar Pradesh is competent to try the same and the learned Special Judge, Delhi has committed no error in dismissing the application of the Petitioner for anticipatory bail for want of territorial jurisdiction. **(Para 7)**

Important Issue Involved: The Court where the cause of action arose under Section 4(2) of the Prevention of Corruption Act will have the territorial jurisdiction to entertain application for bail/anticipatory bail.

[La Ga]

APPEARANCES:

FOR THE PETITIONER : Mr. Ajay Burman, Advocate.

FOR THE RESPONDENT : Mr.P.K. Sharma, Standing Counsel.

CASES REFERRED TO:

1. *Sanjay Tripathi* vs. *CBI* 2012 (1) JCC 767.
2. *CBI* vs. *Braj Bhushan Prasad & Ors.* AIR 2001 SC 4014.

MUKTA GUPTA, J.

1. The Petitioner seeks anticipatory bail in RC No. 220 2012 E 0001 under Section 420/465/468/471/ IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act (in short the PC Act) registered by the CBI.

2. The grievance of the Petitioner is that the Petitioner applied for an anticipatory bail before the Learned Special Judge, Delhi but the same was dismissed on the ground that the Court had no territorial jurisdiction

to entertain the anticipatory bail application. According to the learned counsel for the Petitioner, the Court at Delhi only has jurisdiction to try the offence and thus the learned Special Judge erred in rejecting the anticipatory bail application for want of territorial jurisdiction. The FIR by CBI has been registered at Delhi. The Petitioner has been asked to produce documents at Delhi and the treasury from which the money has been embezzled is also at Delhi. Hence, even though the copy of the FIR has been filed by the CBI and the accused are produced for remand before the learned Special Judge, Gaziabad, the only Court which is competent to try the matter is the Court of learned Special Judge, CBI at Delhi. Reliance in this regard is placed on **CBI Vs. Braj Bhushan Prasad & Ors.** AIR 2001 SC 4014 and **Sanjay Tripathi Vs. CBI** 2012 (1) JCC 767.

3. Learned counsel for the Respondent on the other hand contends that the abovementioned FIR was registered on the direction of Hon'ble High Court at Allahabad. After registration of FIR, the copy of the FIR was sent to and all the accused are being produced for remand before the learned Special Judge, Gaziabad as the corruption and embezzlement of Government funds has taken place in Uttar Pradesh.

4. I have heard learned counsel for the parties. The facts as set out in the abovementioned FIR are that the Hon'ble High Court of Judicature at Allahabad vide order dated 15th November, 2011 passed in Writ Petition No. 3611/2011 (PIL) and other connected writ petitions directed the CBI to conduct preliminary enquiry into the matter of execution and implementation of National Rural Health Mission (NRHM) Scheme and utilization of funds at various levels during such implementation in the entire State of Uttar Pradesh, register regular case in case of persons against whom prima facie cognizable offence is made out and proceed in accordance with law. The said enquiry was directed to be conducted from the period 2005-2006 till date. On the basis of the said direction, 5 separate preliminary enquiries were registered in different branches of CBI at New Delhi in respect of alleged irregularities in the utilization of funds of Government of India allocated for civil construction and upgradation of various hospitals in Uttar Pradesh under NRHM Scheme during the period 2005-2006 till date. NRHM was launched by Government of India on 12th April, 2005 with a view to provide accessible, adequate, affordable, accountable and reliable health care to all persons particularly

the vulnerable sections of society residing in remote areas and in this regard a MOU was entered into between the Government of India and the Govt. of Uttar Pradesh on 22nd November, 2006 which governs the implementation of the Mission in the State. The Mission Directorate (NRHM) Uttar Pradesh received huge funds running into crores of rupees from Ministry of Health and Family Welfare (MOHFW) Govt. of India during the period 2009-2010 for improvement of Entrance Zone and facility of District Level hospitals. It was decided to improve 134 hospitals of the State for which Rs. 13.40 crores was allotted to Construction & Design Services (C&US) U.P. Jal Nigam, Lucknow in July, 2009 by the Executive Body of NRHM Uttar Pradesh. During the period 2009-2010 M/s. Surgicoin Mediquip Pvt. Ltd., Mohan Nagar, Ghaziabad through its Directors and representatives entered into a criminal conspiracy with M/s Modern Interiors, Lucknow and Ramesh Bhati of M/s. Ankur Goods & Parcel Services at Gaziabad with the illegal object to cheat the Central Government funded NRHM funds placed at the disposal of office of Director General Family Welfare, Uttar Pradesh in the matter of upgradation of 134 hospitals in Uttar Pradesh. The various accused including the then Minister of Family Welfare, Uttar Pradesh and the officials by abusing their official position as public servants, in collusion with the Directors/ representatives of the above said private firms and in order to give undue favour to the said firms, identified 27 items to be supplied to 134 hospitals for upgradation work without consulting the concerned District Hospital authorities and used forged rate estimates without making any comparison with the then DGS&D, CPWD, PWD rates or actually conducting any market survey for getting approval of the competent authority. The estimates of the aforesaid 27 items were prepared and given by representatives of M/s. Surgicoin Mediquip Pvt. Ltd., Gaziabad to the officials of C&DS Gaziabad and the rates of items in terms of other firms were collected in such a way that M/s. Surgicoin may get the tender for supply of abovementioned items. Subsequently the work relating to upgradation work was allotted to M/s. Surgicoin Mediquip Pvt. Ltd., Gaziabad for 114 hospitals and M/s. Modern Interiors, Lucknow for 20 hospitals. These firms supplied the items at exorbitant rates to the extent of 5 times more than the existing market rates, thus causing wrongful loss to the extent of Rs. 5.36 crores to the Government exchequer. It is thus alleged that the accused along with unknown persons committed offence under Section 120-B IPC read with 420/467/468/471 IPC and

section 13(2) read with 13(1)(d) of the PC Act and substantive offence thereof.

5. Thus, the cause of action in terms of Section 4(2) of PC Act took place in Uttar Pradesh as the fund was not embezzled at the level of Central Government but after the fund was entrusted for disposal to the Directorate Mission NRHM, U.P. , the same was embezzled. Section 4(2) of the PC Act reads as under:

> **"4. Cases triable by special Judges.**
>
> (2) Every offence specified in sub-Section (1) of Section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the Special Judge appointed for the case, or, where there was more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government."

6. In the **CBI Vs. Braj Bhushan Prasad & Ors.** AIR 2001 SC 4014 it was held:

> "34. What is the main offence in the charges involved in all these 36 cases? It is undisputed that the main offence is under Section 13(1)(c) and also Section 13(1)(d) of the PC Act. The first among them is described thus:
>
> "A public servant is said to commit the offence of criminal misconduct,-
>
> (c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person to do so."
>
> The next offence is described like this:
>
> "A public servant is said to commit the offence of criminal misconduct,-
>
> (d) if he,-
>
> (i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

> (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
>
> (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest."
>
> 35. We have no doubt in our mind that the hub of the act envisaged in first of those two offences is "dishonestly or fraudulently misappropriates". Similarly the hinge of the act envisaged in the second section is "obtains" for himself or for any other person, any valuable thing or pecuniary advantage by corrupt or illegal means.
>
> 36. The above acts were complete in the present cases when the money has gone out of the public treasuries and reached the hands of any one of the persons involved. Hence, so far as the offences under Section 13(1)(c) and Section 13(1)(d) are concerned the place where the offences were committed could easily be identified as the place where the treasury concerned was situated. It is an undisputed fact that in all these cases the treasuries were situated within the territories of Jharkhand State."

7. It would be thus evident that in the present case, the misappropriation, embezzlement and the offence under Section 13 PC Act were committed in the State of Uttar Pradesh. The offence having been committed in the State of Uttar Pradesh, in terms of Section 4(2) of the PC Act, the Special Judge, Gaziabad at Uttar Pradesh is competent to try the same and the learned Special Judge, Delhi has committed no error in dismissing the application of the Petitioner for anticipatory bail for want of territorial jurisdiction.

8. Petition is dismissed.

ILR (2012) III DELHI 735
CRL. A.

VIRENDER SINGH @ PODHA @ TICKET ….APPELLANT

VERSUS

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

(S. RAVINDRA BHAT & S.P. GARG, JJ.)

CRL. A. NO. : 322/2011, DATE OF DECISION: 13.04.2012
CRL. M. (BAIL) 432/2011

Indian Penal Code, 1860—Section 302—Petitioner challenged his conviction under Section 302 averring recovery of articles relied upon by prosecution were planted and unbelievable and last seen evidence alleged by prosecution also failed—Percontra, learned APP urged, failure to give any explanation as to why appellant absconded was sufficient to prove his guilt—Held:- If there are special circumstances which the accused is aware of, in respect of aspects or facts which tend to incriminate him, the onus of explaining those features or circumstances is upon him—Recovery of large amount of cash as well as valuables at behest of appellant are undeniably incriminating circumstances.

Similarly, where the accused had taken away valuables after committing murder, and the stolen articles were recovered, the Court held that the presumption under Section 114 (a) of the Evidence Act had to be drawn, in **State of UP v. Sukhbasi** AIR 1985 SC 1224, in the following observations:

> "Undoubtedly, this was a case where murder and robbery are proved to have been the integral parts of one and the same transaction. As held by us in **Earabhadrappa v. State of Karnataka** [(1983) 2 SCC 330 : 1983 SCC (Cri) 447] in somewhat similar circumstances where the servant betraying the trust of his employer strangulated the mistress of the house and decamped with her gold and silver ornaments which were later recovered, the presumption arising under Illustration (a) to Section 114 of the Evidence Act, 1872 is that not only the accused if their complicity is proved committed the murder of the deceased Bhagwat Dayal and his wife Ramwati Devi but also committed robbery of the gold and silver ornaments which formed part of the same transaction."
>
> **(Para 20)**

Important Issue Involved: If there are special circumstances which the accused is aware of, in respect of aspects or facts which tend to incriminate him, the onus of explaining those features or circumstances is upon him.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Ms. Saahila Lamba, Advocate.

FOR THE RESPONDENT : Sh. Sanjay Lao, APP.

CASES REFERRED TO:

1. *Bipin Kumar Mondal* vs. *State of West Bengal,* AIR 2010 SC 3638).
2. *Namdeo* vs. *State of Maharashtra,* (2007) 14 SCC 150.
3. *Sunil Kumar* vs. *State Govt. of NCT of Delhi,* (2003) 11 SCC 367.
4. *Pandappa Hanumappa Hanamar And Another, Appellants* vs. *State Of Karnataka* 1997 (10) SCC 197.
5. *State of UP* vs. *Sukhbasi* AIR 1985 SC 1224.
6. *Earabhadrappa* vs. *State of Karnataka* [(1983) 2 SCC 330 : 1983 SCC (Cri) 447].

7. *Vadivelu Thevar* vs. *The State of Madras,* AIR 1957 SC 614.

RESULT: Appeal dismissed.

S. RAVINDRA BHAT, J.

1. The Appellant impugns the judgment and order dated 09.09.2010 in S.C. No. 132/2008 by which he was convicted for the offence punishable under Section 302 IPC. He was sentenced to undergo life imprisonment and to pay a fine of Rs. 5000/- and in default to further undergo simple imprisonment for six months.

2. The case prosecution case, in brief, is that on 14.01.2006 at about 08:08 AM Insp. Satish Kumar Sharma (PW-22), received information through a wireless operator about the murder of one Vinod, in Gali No. 13 Ashok Nagar. On receipt of information, PW-22 and Constable Ashok Pathak (PW-4) and the driver reached House No. D-1/589, Gali No.13, Ashok Nagar. SI Jaswant Singh (PW-17) and Const. Devender Kumar (PW-15) too reached the spot on receipt of DD No. 2-A. On reaching the spot IO, PW-22 found Pramod Verma (PW-3), Ravinder Verma (PW-1), SI Jaswant Singh (PW-17), Const. Devender Kumar (PW-15) and some neighbors present in the house. The body of Vinod was lying in a room in the house; it was identified by Pramod Verma and Ravinder Verma. A light pink colored shirt was lying near the deceased's neck.

3. PW-22 recorded the statement of Ravinder Verma (Ex.PW-1/A) who said that Vinod was working in his photo studio and had gone to his village on 11.01.2006. He returned on 13.01.2006 along with Virender (the accused). PW-1 further stated that on 13.01.2006 at about 8/8:30 PM, he with his friends Arvind and Amit went for dinner to the deceased Vinod's house. They left Vinod's house at about 09:30/09:45 PM. At that time, Vinod, Virender and the driver Dinesh were in the premises. On 14.01.2006 i.e. the next day, Dinesh went to his house at about 7/7:30 AM and told him that a pink coloured shirt was wrapped around Vinod's neck and that he was not waking up. PW-1 also told the IO that he went to Vinod's house and saw him lying on the cot and the pink coloured shirt was lying near his neck. He noticed that the golden chain and rings the deceased used to wear, were missing; he also observed that ' 50,000/ -were missing. He informed the IO that he suspected that Virender had committed Vinod's murder and had absconded from the spot, after robbing

the golden chain, rings and cash. On the basis of PW-1's statement, a rukka was prepared (Ex.PW-22/A) and the case was registered through Const. Ashok Pathak; the prosecution relied on FIR No.15/2006 (Ex. PW12/ A). On 26.01.2006 Virender was arrested from Shamli Railway Station on being pointing out by Ravinder Verma. The arrest memo Ex.PW-1/G was prepared. Virender's disclosure statement, led to recovery of two gold rings and from his personal search Rs. 21,365/-cash, an election card and the deceased's driving license along with a few visiting cards were recovered. After completion of the investigations, PW-22 filed a charge-sheet. The Appellant pleaded not guilty and claimed trial.

4. The learned counsel for the accused submitted that on the night of 13.01.2006 at about 09:30 PM when PW-1 left Vinod's house along with Amit and Arvind, Virender and driver Dinesh were still at Vinod's house; Dinesh and Virender both stayed the night at the deceased's house. The Counsel further submitted that the whereabouts of Dinesh are not known and he also did not appear before this court which clearly raises a doubt upon the conduct of Dinesh who has not been produced before this court despite repeated efforts and therefore it cannot be said with reasonable doubt that accused Virender committed the murder of the deceased Vinod.

5. Counsel for the Appellant urged that it was the prosecution case that the recovery of the purse containing Rs. 21,265 on 26.01.2006 from the accused proves that he had stolen Rs. 50,000/-from the deceased. This, submitted the counsel, cannot be believed as there is no way of proving that the notes recovered from the accused were the same as those which the deceased had possessed. Furthermore the recovery of the deceased's driving license and election card from the accused after 12 days of the incident is also unbelievable. There is no reason why the accused should have held onto the deceased's driving license and election card after 12 days of the incident.

6. As far as the recovery of the two golden rings at the instance of the accused is concerned, counsel for the accused submitted that the recoveries have not been proved. PW5 Atul Kumar during his examination in chief clearly stated that he could not identify the accused; he had gone along with the police to his shop; he stated that he could not even identify the ring. He further stated that one Munshi (court clerk) of an Advocate of Muzaffarnagar Courts went to his shop and sold the ring to him.

During his cross-examination by Ld. APP for the State, he denied the suggestion that accused present in the court had sold the ring to him. He further denied stating to the police that the Appellant sold the ring to him and he gave him the market value of the ring. PW-8 Kapil Verma proprietor of Verma Jewellers during his cross examination specifically stated that when the accused sold the ring in question, he was accompanied by a person namely Babli but Babli was not examined or made a witness to the case by the prosecution. PW8 further stated that he had not issued any receipt to the accused. He also stated that he did not make any entry in his record/diary for purchasing the ring from accused Virender. The appellant's counsel therefore submitted that the recovery of the two golden rings at his alleged instance was doubtful and therefore unbelievable.

7. The Learned Counsel for the appellant submitted that the prosecution failed to prove its case beyond reasonable doubt. Counsel submitted that the present case was registered on the basis of statement of PW-1. He stated (in Ex. PW1/A) that on the day of the incident, at about 7/7:30 AM Dinesh went to his house and told him that Vinod was not waking up and that a pink coloured shirt was wrapped (tied) on Vinod's neck, which he removed. On hearing this, PW-1 reached Vinod's house and found him dead on the cot and a pink coloured shirt was found there. The Counsel submitted that Dinesh was the first witness at the spot and not PW-1 and the facts deposed by PW-1 regarding Vinod not waking up were on the basis of information given by Dinesh Kumar. However Dinesh was not examined in this case and without his examination the testimony of PW-1 Ravinder Verma cannot be taken into consideration to decide the case. The Counsel urged that Dinesh informed PW-1 about the murder of Vinod at about 7/7:30 AM and the police officials reached the spot at about 8/8:30 AM. However the dead body was taken to GTB hospital only at about 11:00 AM i.e. after a gap of four hours which on the face of it appears to be impossible.

8. Learned counsel urged that even the testimony of prosecution witnesses proved the fact that the deceased was not alone in the company of the Appellant; Dinesh was with them. Such being the case, the prosecution could not train its guns upon the Appellant, and fix him with sole criminal responsibility to the exclusion of others. It was argued that the "last seen" theory could be applied when the Court is convinced that having regard to all the established facts and circumstances, it was the

accused alone, and none else, who committed the offence, and after satisfactorily ruling out the possibility of the accused's innocence. Here, that could hardly be said to arise, since the accused, i.e the appellant was, even according to the prosecution, seen last with the deceased and another, i.e Dinesh.

9. The Learned APP submitted that the prosecution had proved its case against the accused Virender beyond reasonable doubt. The prosecution had proved the complete chain of circumstances and succeeded in proving its case. The testimony of PW-1 established that the deceased was last seen alive with accused Virender and driver Dinesh. Driver Dinesh is the one who informed PW-1 about the murder of Vinod whereas the accused Virender was absconding. Thereafter on 26.01.2006 when the accused was arrested, a gold ring, one election card and driving license belonging to the deceased were recovered from his possession. Further two gold rings belonging to the deceased, sold to jewelers PW-5 and PW-8, were also recovered from their shops. PW-8 specifically deposed that the accused had sold him the ring on 24.01.2006; it was taken into possession by seizure memo Ex.PW8/ A. PW-8 identified the ring in court as the same article seized by the police from his shop. Further the accused Virender was unable to explain the reason for his absconding from the house of the deceased.

10. The Learned APP submitted that failure to give any explanation as to why the appellant absconded is sufficient to prove the guilt of the accused. Therefore, submitted the Learned APP, recovery of election card and driving license, belonging to the deceased, from the accused and recovery of two golden rings which he sold combined with his conduct in absconding proves the Appellant's guilt.

11. It was also argued by the APP that PW-7 Dr. Arvind Kumar who conducted the post-mortem examination in his subsequent opinion dated 31.01.2006, Ex.PW7/ B, stated,

> "That ligature mark present over the neck could be possible by ligature material (shirt) under examination."

PW-7 also deposed that he saw FSL Report No. 2006/C-046, dated 12.07.2007 and on the basis of the report he was of the opinion that the cause of death in this case was due to asphyxia as a result of ante mortem ligature strangulation.

12. In the course of the trial the prosecution examined 22 witnesses. The testimony of PW-1 Ravinder Verma, the complainant is crucial to the prosecution case. He deposed that he and his brother Pramod Verma (PW-3) were running a shop-cum photo studio in the name of Sawan Properties and Sawan Photo Studio on the ground floor of House no. D1/12 Ashok Nagar and that Vinod (deceased) was working with him in his studio. On 11.01.2006 the deceased had gone to his native village and had returned to his studio on 13.01.2006 along with Virender @ Podha @ Ticket. He correctly identified the accused present in the court. He further deposed that during the whole day the accused remained with Vinod at his photo studio and at about 7:00 PM the accused demanded Rs. 200/-from Vinod as he did not have money for dinner. The deceased asked PW-1 to give Rs. 200/-to the accused; the accused, and Dinesh went out for dinner. He (the Appellant) and Dinesh returned to his shop and both were under the influence of liquor. On being asked they said that they had only taken liquor and did not have dinner. Thereafter both of them went for dinner. He further deposed that after shutting the shop he, Vinod, Amit and Arvind went to Vinod's house, had some liquor and their dinner. At about 09:30 PM the accused Virender and Dinesh reached Vinod's house after their dinner; the accused brought one liter milk in a polythene bag. Thereafter he, Amit and Arvind left Vinod's house. Virender and Dinesh were left behind with Vinod in his room.

13. PW-1 also deposed that next morning at about 7/7:30 AM Dinesh came to him saying that Vinod lay on the floor after falling from the cot and that a pink coloured shirt was tied around his neck which he had untied. On hearing this, he rushed with Dinesh to Vinod's house and saw that the latter had died. He informed his elder brother Pramod (PW-3) on the telephone. PW-3 reached the deceased's house with four-five neighbours. The Police was informed and his statement was recorded. Three gold rings and one gold chain which the deceased used to wear were missing. The money, which the deceased had brought with him from his in-laws house (i.e. cash to the extent of Rs. 50,000/-) was also missing. The wrist watch which the deceased used to wear was taken into possession by seizure memo Ex. PW1/B. Three steel glasses, one *patila/bhagona,* one half bottle of country made liquor (Shokeen brand) having a small quantity of rum were all taken in possession by seizure memos Ex.PW1/C. The pink coloured shirt and 14 tablets of Eptoin were

also taken into possession by seizure memos Ex. PW1/E and Ex.PW-1/F.

14. PW-1 also deposed that on 26.01.2006 he again joined the investigation of this case with the IO; that day the accused was arrested near the parking area in Shamli Railway Station. He identified the accused in the court. He further deposed that he had seen the arrest memo of the accused Ex. PW-1/G, personal search memo Ex.PW-1/H and the disclosure statement of the accused Ex. PW-1/J. He deposed that one purse containing Rs. 21,365/-, some Ativon 2mg tablets; one election identity card, driving license and one ring belonging to deceased Vinod, were also recovered during the personal search of the accused.

15. During the cross examination, PW-1 deposed that Dinesh went to his house at about 7 AM and told him that Vinod was lying unconscious and he had vomited and a shirt was tied around his neck. He went to the house and informed the neighbours, PW-3 and the police. The police took Vinod to the hospital at about 11 AM. He also admitted that in the night of 13.01.2006 the Appellant, the deceased and Dinesh had slept in that room. He further stated Dinesh was with him when the police reached the room and thereafter the police recorded his statement. First, at about 8/9:00 AM and thereafter the statement of Dinesh was recorded. He also stated that the articles were sealed in pullandas but he did not know the initial of the seal and also did not know to whom the seal was handed over after use. He also admitted that there was some material lying on the floor of the room but he did not know whether that was the material of vomiting or feces. He further stated that he had seen Rs. 50,000/-in the possession of Vinod, which he had brought from his inlaw. place to purchase a TSR, on 13.01.2006 at about 2:00 PM.

16. According to the doctor, PW-7, who conducted the post-mortem, the cause of death was ligature strangulation; death had occurred about one and a half days before the commencement of post-mortem. PW-2, brother of the deceased, claimed to have identified the rings seized and marked Ex. P-13 and Ex. P-15. One of them was engraved 'VK' the deceased's initials. The other had some nugs. Both these were identified by the witness; according to his deposition, they belonged to the deceased Vinod. PW-2 further testified that when he had gone to the village, he took Rs. 50,000/-. That was missing when the body was discovered.

17. The first one to see the deceased was Dinesh Pal. The appellant's main argument is that the most crucial witness was Dinesh Pal, the driver of PW-1; he was not examined during trial. PW-1 stated in his deposition that Dinesh's statement was recorded after the police recorded his statement under Section 161 Cr. PC. The Trial Court record reveals that Dinesh's statement was recorded; his name was also reflected in the list of witnesses. However, the list also scored off his name, with the remark "Died". It is no doubt a settled proposition that the prosecution has to examine all the material witnesses, and not merely those who further its case. At the same time, it is the quality, rather than the quantity of evidence which is material in a criminal trial. Therefore, a finding of guilt can be sustained even on the basis of ocular testimony of a single eyewitness (Ref. **Vadivelu Thevar v. The State of Madras,** AIR 1957 SC 614; **Sunil Kumar v. State Govt. of NCT of Delhi,** (2003) 11 SCC 367; **Namdeo v. State of Maharashtra,** (2007) 14 SCC 150; and **Bipin Kumar Mondal v. State of West Bengal,** AIR 2010 SC 3638).

18. It is important to also see, in this context that the testimony of the witness which the Court relies on to rest a conviction, should be credible and trustworthy (Ref. **Pandappa Hanumappa Hanamar And Another, Appellants V. State Of Karnataka** 1997 (10) SCC 197, where it was held that):

> "One of the tests to judge the credibility of a witness is the intrinsic quality and worth of his evidence, independent of other evidence and if such evidence measures up to the Court's satisfaction it can itself form the basis of conviction. It is only when such evidence does not pass muster that the Court seeks corroboration to draw its conclusion therefrom..."

19. The unavailability of Dinesh Pal, in the opinion of the Court is no bar to examining whether the testimony of PW-1 is trustworthy. Here, no motive was ascribed to the witness, to falsely implicate the accused. Vinod, the deceased, was in fact his employee. He mentioned about the events that took place the previous evening, when all of them were together, after which Dinesh, Vinod and the appellant left late night. PW-1 significantly, was aware that the deceased had come back from his native place with a large amount of cash. He mentioned this to the police, in the statement recorded soon after the crime was detected. He

was not challenged in cross examination on this score. In fact, when the accused was arrested later, Rs. 21,365/-were recovered at his behest. This aspect is important, because the robbery of a large amount of money was not known to the police, but for the information given by the witness; this fact was also found pursuant to the disclosure statement recorded by the accused; that portion of the statement, was clearly admissible under Section 27 of the Evidence Act. Similarly, the witness mentioned - in the course of his statement during investigation - about the missing rings and the golden chain that the deceased Vinod used to wear. One of the rings bore the monogram "VK" (presumably the deceased's initials). It was identified by his brother, PW-2. Furthermore, even though there is some doubt about the testimony of PW-5 and the recovery of articles said to have been sold to him, there can be no doubt about the testimony of PW-8, who clearly stated that the appellant had sold him the ring Ex. P-15 engraved with the initials VK.

20. Another important aspect which cannot be ignored in this case is that the deceased did not have any cogent explanation for the Rs. 21,365/-cash recovered from him, at the time of his arrest. It is settled law that the prosecution always labours under the burden of proving the case alleged against the accused; however, if there are special circumstances which the accused is aware of, in respect of aspects or facts which tend to incriminate him, the onus of explaining those features or circumstances is upon him. If the amount genuinely belonged to the accused, nothing prevented him from saying so and leading evidence about its origin. The recovery of the amount, fairly proximate in point of time, along with the recovery of the ring, which belonged to the deceased, are clinching incriminating circumstances. In **Earabhadrappa v State of Karnataka** AIR 1983 SC 1, the Supreme Court held that:

> "This is a case where **murder** and robbery are proved to have been integral parts of one and the same transaction and therefore the presumption arising under Illustration (a) to Section 114 of the Evidence Act is that not only the appellant committed the **murder** of the deceased but also committed robbery of her gold ornaments which form part of the same transaction. The prosecution has led sufficient evidence to connect the appellant with the commission of the crime. The sudden disappearance of the appellant from the house of PW 3 on the morning of March

22, 1979 when it was destroyed that the deceased had been strangulated to death and relieved of her gold ornaments coupled with the circumstance that he was absconding for a period of over one year till he was apprehended by PW 26 at village Hosahally on March 29, 1980, taken with the circumstance that he made the statement EX. P-35 immediately upon his arrest leading to the discovery of the stolen articles, must necessarily raise the inference that the appellant alone and no one else guilty of having committed the **murder** of the deceased and robbery of her ornaments. The appellant had no satisfactory explanation to offer for his possession of the stolen property. On the contrary, he denied that the stolen property was recovered from him. The false denial by itself is an incriminating circumstance. The nature of presumption under Illustration (a) to Section 114 must depend upon the nature of the evidence adduced. No fixed limit can be laid down to determine whether possession is recent or otherwise and each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according as the stolen article is or is not calculated to pass readily from hand to hand. If the stolen articles were such as were such were not likely to pass readily from hand to hand, the period of one year that elapsed cannot be said to be too long particularly when the appellant had been absconding during that period. There was no lapse of time between the date of his arrest and the stolen property."

Similarly, where the accused had taken away valuables after committing murder, and the stolen articles were recovered, the Court held that the presumption under Section 114 (a) of the Evidence Act had to be drawn, in **State of UP v Sukhbasi** AIR 1985 SC 1224, in the following observations:

"Undoubtedly, this was a case where murder and robbery are proved to have been the integral parts of one and the same transaction. As held by us in **Earabhadrappa v. State of Karnataka** [(1983) 2 SCC 330 : 1983 SCC (Cri) 447] in somewhat similar circumstances where the servant betraying the trust of his employer strangulated the mistress of the house and decamped with her gold and silver ornaments which were later

recovered, the presumption arising under Illustration (a) to Section 114 of the Evidence Act, 1872 is that not only the accused if their complicity is proved committed the murder of the deceased Bhagwat Dayal and his wife Ramwati Devi but also committed robbery of the gold and silver ornaments which formed part of the same transaction."

21. In this case, the accused's disappearance, his being seen last with the deceased (although Dinesh Pal too was with him), recovery of a large amount of cash from him, as well as recovery of valuables at his behest, are undeniably very incriminating circumstances. Even if the testimony of PW-5 is of little use, the deposition of PW-8, the other jeweler, is damaging to the appellant; he was able to say that the appellant visited him, and sold some of the jewelry. Taken together with the testimony of PW-1, the reporting of missing articles which belonged to the deceased, even before they were recovered by the police after the arrest of the accused, the latter disappearing around the time of the crime, establish, beyond any doubt that he was present at the time of the crime, with the deceased. The appellant's silence as to what happened to Dinesh, assuming the latter was for some reason culpable, or that why should Dinesh implicate him, and his lack of explanation how he came to possess a huge amount in cash, fortify to the point of certainty his involvement in the crime. In this case, the prosecution had been able to prove the "last seen" circumstance, and also establish beyond doubt that all the circumstances pointed to the accused's guilt, and ruled out every hypothesis of his innocence, and at the same time ruled out the involvement of others in the crime.

22. In view of the above discussion, this court does not find any infirmity in the impugned judgment. The appeal is accordingly devoid of merit, and therefore dismissed.

ILR (2012) III DELHI 747
CRL. M.C.

KAVITA DASS ….PETITIONER

VERSUS

NCT OF DELHI & ANR. ….RESPONDENTS

(SURESH KAIT, J.)

CRL. M.C. NO. : 4282/2011, 4283/2011 & CRL. M.A. NO. : 19670/2011, 19672/2011(STAY) **DATE OF DECISION: 17.04.2012**

Protection of Women from Domestic Violence Act, 2005—Section 12—Indian Penal Code—1860—Section—448—Petitioner sought quashing of FIR under Section 448 IPC registered in Police Station Defence Colony, New Delhi, against her as well as setting aside of order passed by learned Additional Sessions Judge, New Delhi—Petitioner urged, she got married to Respondent no.2 in Delhi and after marriage, they lived together in Sri Lanka and Australia as husband and wife for 12 long years—Two sons were born from their wedlock—Their elder son was married and settled in London, while younger son was living in Delhi—In the year 1992, Respondent no.2 acquired licence to start his Company and couple came back to India and started living in Defence Colony, New Delhi—During this period, Respondent no.2 come in contact with another woman and fell in love with her which spoiled relationship between petitioner and Respondent no.2—As a well planned act, sometimes in July, 2009 Respondent no.2 left tenanted premises and abandoned petitioner and he in connivance with landlord got an ex-parte eviction order in petition filed against him as well as against petitioner—

Accordingly, petitioner was forced to leave the shared household—Around July 2009, Respondent no.2 after abandoning petitioner, filed divorce petition—Petitioner was constrained to file complaint under Section 12 of Domestic Violence Act and she also sough various interim measures and interim relief—Subsequently petitioner came to know that Respondent no.2 had taken another premises, on rent in Defence Colony—Accordingly, she entered into the said new premises being her matrimonial home with the help of Protection Officer who handed over keys of front door, bedroom door and balcony door to her—Thereafter petitioner moved another application in court of learned Metropolitan Magistrate seeking protection against her removal from said shared household—An interim order was passed in favour of petitioner which was subsequently vacated by the learned Metropolitan Magistrate holding that present premises was not shared house hold—Aggrieved petitioner, preferred appeal which was dismissed, thus she preferred a CRL M.C.—According to petitioner, she was entitled to reside in new tenanted premises in Defence Colony being "shared household" under Act—Held:- A shared household includes any household owned or tenanted by either of the parties in respect of which either the aggrieved person/wife or the respondent or both jointly or singly have any right, therefore, the petitioner being legally wedded wife has a right to live with the husband, whether he lives in an ancestral house or own acquired house or rented house.

On perusal of aforesaid provisions and laws laid down by Hon'ble Supreme court, it includes any household owned or tenanted by either of the parties in respect of which either the aggrieved person/wife or the respondent or both jointly or singly have any right, therefore, the petitioner being legally wedded wife has a right to live with the husband,

whether he lives in an ancestral house or own acquired house or rented house. Therefore, if the respondent does not allow the aggrieved person then by taking shelter of the court, the Magistrate may pass the order so that she may enter in the house or she would not be thrown out from the house of his husband without due process of law. Certainly, not otherwise, as directed by the Ld. MM and upheld by the appellate court. **(Para 30)**

Important Issue Involved: A shared household includes any household owned or tenanted by either of the parties in respect of which either the aggrieved person/wife or the respondent or both jointly or singly have any right, therefore, the petitioner being legally wedded wife has a right to live with the husband, whether he lives in an ancestral house or own acquired house or rented house.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Vikash Pahwa, Sr. Advocate with Mr. Rohan Garg, Mr. Samarjit Pathwal and Mr. Arjun Mahajan, Advocates.

FOR THE RESPONDENTS : Ms. Rajdipa Behura, APP for the Respondent no.1/State with SI Rampal Singh, PS Defence Colony Mr. K.K. Manan, Mr. Nipun Bhardwaj, Mr. Navender and Mr. N. Gautam, Advocates for Respondents no.2.

CASES REFERRED TO:

1. *Vimlaben Ajitbhai Patel* vs. *Vatslaben Ashokbhai Patel* reported in (2008) 4 SCC 649.
2. *S R Batra and Anr.* vs. *Smt.Taruna Batra* reported in (2007) 3 SCC 169.

3. *Smt. Kanwal Sood* vs. *Nawal Kishore and Anr.* (1983) 3 SCC 25.

RESULT: Petition allowed.

SURESH KAIT, J.

1. Vide this common judgment, I shall dispose of both the above mentioned petitions.

2. The petitioner has sought to quash FIR No.157 dated 07.12.2011 registered under Section 448 Indian Penal Code, 1860 at PS. Defence Colony, New Delhi against petitioner/wife and to set aside order dated 28.11.2011 passed by learned Additional Sessions Judge, Saket District Courts, New Delhi in Appeal CA No.35/11 in case titled **'Kavita Dass Vs Ranjit Dass'**.

3. Brief facts of the case are that the petitioner got married to respondent No.2 on 26.12.1975 at Delhi. After marriage, the petitioner and respondent No.2 lived together in abroad (Sri Lanka and Australia) as husband and wife for 12 long years. Two sons were born out of the said wedlock in 1978 and 1981 respectively. The elder son Rajad Das is married and settled in London while the younger son has been living in Delhi.

4. In 1992, the respondent No.2 acquired a license to start his own company in the name & style of 'Forex Company'. Accordingly, the couple came back to India and started living in a rented accommodation bearing address C-293, Defence Colony, New Delhi. During their stay in India, the respondent No.2 came in contact with another woman, a spinster and fell in love with her. This was a flash point in the relationship. All efforts were made by the petitioner to convince the respondent No.2 to give up the illicit liaison with another woman, however, failed.

5. The situation further became worst. The respondent No.2 as a part of a well planned act, sometime in July, 2009 left the premises C-293, Defence Colony, New Delhi and abandoned the petitioner/wife. Thereafter, respondent No.2 in connivance with the then landlord, got an eviction order in a suit filed against himself as well as the petitioner/wife. The aforesaid suit for eviction was decided ex parte in favour of the then landlord, accordingly, petitioner was forced to leave the shared household, i.e. C-293, Defence Colony, New Delhi on 25.08.2010.

6. After the eviction, the petitioner was literally came on road and was forced to take shelter at her brother-in-law's house at C-52, Defence Colony, New Delhi. Petitioner stayed there from 25.08.2011 till 16.04.2011. Around July, 2009, the respondent No.2 after abandoning the petitioner, filed a divorce petition bearing No.1079/2009 against her which is pending before Ld. Additional District Judge, Saket District Courts, New Delhi.

7. In addition to the divorce petition, the respondent No. 2, around September, 2009 coerced and virtually cajoled the petitioner to sign an out of court memorandum of understanding (MOU) by absolutely fraudulent means of representation, wherein, the respondent No. 2 had stated that he would pay the permanent alimony of Rs.45lacs to the petitioner against a divorce by mutual consent.

8. Accordingly, on the basis of the aforesaid MOU, the respondent No. 2 filed a petition for divorce and dissolution of marriage on the basis of mutual consent, however, till date not even the first motion has taken place as the petitioner realized that her signatures on the MOU were obtained by fraudulent representations. As such she did not act upon the said MOU being well within her rights to do so.

9. The petitioner was compelled and constrained to approach trial court with complaint filed under section 12 of the Domestic Violence Act, seeking interim measures and interim relief in accordance with provisions of the said Act and in the facts and circumstances of the case, the trial court vide interim order dated 10.09.2010 directed the respondent No. 2 to pay an amount of Rs.10,000/- to the petitioner as an interim maintenance, as well as monthly rent of Rs.25,000/- from the date of petitioner's eviction from the then shared household.

10. Subsequently, the petitioner in the month of April, 2011 came to know that the respondent No. 2 had taken another premises bearing address D-12, Defence Colony, New Delhi on rent. Accordingly, on 17.04.2011, she entered in to her new matrimonial home D-12, Defence Colony, New Delhi with the help of Protection Officer Ms.Preeti Saxena, who handed over to her the keys of the front door, bedroom door and balcony door from the respondent. Since then, the petitioner has been residing with respondent No.2 at the aforesaid rented shared accommodation.

11. Thereafter, the petitioner on 18.04.2011, moved an application in the court of Ld. MM, Ms. Pooja Talwar, Saket District court seeking protection against her removal from the aforesaid shared household i.e D-12 Defence Colony, New Delhi. An interim order dated 19.04.2011 u/s 17 and 19 of the D.V. Act was passed by the above named Ld. Magistrate, whereby the petitioner was granted right to live with the respondent No.2 in above mentioned shared household. However, subsequently, Ld. MM vide order dated 28.04.2011 vacated the earlier order dated 19.04.2011.

12. In the order dated 28.04.2011, Ld. MM observed that the present premises was not a shared household. The petitioner while signing the MOU was fully aware that she had to vacate the said premises, therefore, there was no reason for the petitioner to enter the house of respondent No.2 forcefully, accordingly, the Ld. MM directed that the petitioner may be removed from the premises by taking due recourse of law.

13. Mr. Vikas Pahwa, Ld. Senior Advocate appearing on behalf of the petitioner submitted that the petitioner was forced to give an out of court undertaking on 05.06.2011 stating that she will vacate the premises as directed by the Ld. Trial court. Subsequently, the petitioner, against order dated 28.04.2011, filed an Appeal under Section 29 of the Protection of Women from Domestic Violence Act, 2005 before Ld. Sessions Court, Saket District Court, New Delhi. Smt.Raj Rani Mitra, Ld. ASJ, Saket Courts, New Delhi, granted an ex-parte stay on order of Ld. MM dated 28.04.2011, which was subsequently vacated vide order dated 09.06.2011 passed by the Ld. Additional Sessions Judge on an application of respondent No.2, and the matter was transferred to Sh. A.K. Garg, Ld. ADJ, Saket District Courts, New Delhi, which court was in seize of a connected appeal in the same matter.

14. Sh. A.K. Garg, Ld. ASJ, Saket Courts heard the arguments in Appeal No.35/11 and reserved for order on 12.10.2011. Thereafter, Ld. ASJ adjourned the pronouncement on 13 occasions before finally dismissing the appeal and upheld the Ld. MM's order dated 28.04.2011, whereby, the petitioner was directed to be removed from Respondent No.2/husband's rented premises on the ground that the said premises was not a shared household and the petitioner had no right to enter the said premises forcefully.

15. Ld. counsel for the petitioner further submitted that FIR No.157 dated 07.12.2011 registered at P.S. Defence colony, is legally and factually unsustainable in law. Ld. ASJ has committed a serious error in ignoring the fact that the house in question was a matrimonial home and shared household. Moreover, no evidentiary value can be given to out of court settlement deed entered into between the parties, which MOU was signed by the petitioner under duress.

16. Further submitted that no divorce has taken place between the parties, therefore, the petitioner has legal right to stay with her husband, it being her matrimonial home.

17. Further Ld. Counsel for the petitioner refers to a judgment passed by Hon'ble Supreme Court in a case titled as **"S R Batra and Anr. Vs. Smt.Taruna Batra"** reported in (2007) 3 SCC 169, wherein, it was held as under:-

> "....a 'shared household' would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member....
>
> ".....the definition of 'shared household' in Section 2(s) of the Act is not very happily worded, and appears to be the result of clumsy drafting, but we have to give it an interpretation which is sensible and which does not lead to chaos in society".

18. Further refers to a case decided by Hon'ble Supreme Court in **Vimlaben Ajitbhai Patel Vs. Vatslaben Ashokbhai Patel** reported in (2008) 4 SCC 649, wherein, it was observed as under :-

> "....The Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also thereunder acquires a right of residence. The right of residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share..."

19. On perusal of the impugned order, ld. Judge was of the view that in no circumstances, D-12, Defence Colony can be said to be shared household. In addition to that since both the parties never resided together in the said house, therefore, that house cannot be termed as shared household as per provision of Section 2(f), 2(s) r.w.S. 17 of PWDV Act. When the order was being dictated, counsel for the appellant had appeared

and stated that though the MOU was executed between the parties but the complainant did not wish to abide by the same for the reasons known to the appellant. It was mentioned in the order dated 18.04.2011, that the respondent was fully aware that she had to vacate the earlier premises, therefore, there was no reason for her to enter the house of the respondent forcefully, since the said house cannot be said to a 'shared household', therefore, she may be removed from the premises by taking recourse to due process of law.

20. It was further observed in the order passed by Ld. Additional Sessions Judge, Saket courts, New Delhi, while deciding the appeals of the appellant that the appellant's main grievance is that the order has been passed for registration of the FIR u/s 31 of the Act which the magistrate is not empowered under the Act because the word 'respondent' is specifically defined in the Act. Under the Act respondent means an adult male person and it is very clear that the respondent would be a person from the family of the husband only in the case the applicant is a wife.

21. Protection order was obtained u/s 18. It is true that D.V. Act has been enacted to provide for more effective protection of the right of women guaranteed under the constitution who are victim of the violence of any kind. Section 2(a) of the Act defines the aggrieved person. Aggrieved person means any women who is or has been in a domestic relationship with the respondent and who alleges to have been subjected to any act of violence by the respondent.

22. It was further observed by Ld. Additional Sessions Judge that the appellant had entered in the house of the respondent without having any right, therefore, in these circumstances, order passed by Ld. MM on 10.06.2011 is deemed to be an order passed u/s 448 Indian Penal Code, 1860 for the offence of house trespass. In view of that, both the appeals of the appellant was dismissed with direction to register an FIR u/S 448 Indian Penal Code, 1860 against the appellant.

23. Mr. K.K. Manan, learned counsel appearing on behalf of respondent No. 2 submits that respondent No. 2 and the petitioner entered in MOU and the respondent No.2/husband agreed to pay a sum of Rs.45 lacs to the appellant with the condition that she agreed to grant divorce by mutual consent. However, she did not come forward for the same and the present house, which is on rent is not shared household. She had

neither complied with the conditions of MOU nor had she complied with order passed by learned trial court.

24. Further submitted that the impugned order does not suffer from any illegality and therefore, the instant petitions may be dismissed with exemplary costs.

25. Ld. Senior Counsel for petitioner on rebuttal submitted that the courts below have wrongly passed the orders by directing SHO concerned to lodge FIR under Section 448 Indian Penal Code, 1860. 26. Ld. Counsel further refers to Section 441 of Indian Penal Code, 1860 according to which the trespass should be with intention to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence. 27. The petitioner herein did not entered in anybody's property, but it was the house of her husband and entered with the help of Protection Officer under the protection of Domestic Violence Act. Therefore, she rightly entered the house which is her matrimonial house.

28. Therefore, he submitted that the case against the petitioner cannot be lodged for the criminal trespass. In Section 442 of IPC, the definition of house trespass is given, which reads as under:-

> "Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

29. In the instant case, the petitioner is legally wedded wife of respondent No. 2, there is no divorce taken place, she entered into the house of respondent No.2 with no intention of committing offence and the petitioner has not committed any offence. Therefore, both the court i.e. Trial and appellate court have gone wrong by directing her to vacate the house which was taken on rent by her husband/respondent No.2 and to lodge an FIR against her.

30. Presently, where a woman is subjected to cruelty by her husband or his relative, it is an offence committed under Section 498A of Indian Penal Code, 1860. The Civil Law does not further address this phenomenal

in its entirety. Therefore, it is by virtue of Protection of women against Domestic Violence Act, which interalia seeks to provide as under :-

> (s) " shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;"

31. I have noted that in the judgment delivered by Hon'ble Supreme Court in the matter of **Smt. Kanwal Sood Vs. Nawal Kishore and Anr.** (1983) 3 SCC 25, referred to by learned counsel for the petitioner, it has been observed as under :-

> "10 It may be pointed out that the appellant was allowed to occupy the premises in 1967 by Shri R.C. Sood. Under the terms of gift-deed Shri Sood was entitled to remain in occupation of the premises during his life time. He could as well grant, leave and licence to p the appellant to occupy the premises along with him. Now the question arises about her status after the death of Shri R.C. Sood. At the most, it can be said that after the death of Shri Sood the leave and license granted by Shri Sood came to an end and if she stayed in the premises after the death of Shri Sood, her possession may be that of a trespasser but every trespass does not amount to criminal trespass within the meaning of section 141 of the Indian Penal Code. In order to satisfy the conditions of section 441 it must be established that the appellant entered in possession over the premises with intent to commit an offence. A bare persual of the complaint filed by Respondent No. I makes it abundantly clear that there is absolutely no allegation about the intention of the appellant to commit any offence or to intimidate, insult or annoy any person in possession, as will be evident from three material paragraphs which are quoted below:

"2. That the late Shri R.C. Sood was occupying the said premises in accordance with clause No. I of a gift-deed executed by him in favour of Shri Anand Mayee Sangh and after his demise the said premises had to be delivered to Shri Anand Mayee Sangh.

3. That after the demise of Shri R.". Sood, the accused was repeatedly requested to voluntarily vacate and deliver the possession of the said premises to the Sangh but the accused paid no heed and hence a notice dated 13.11.1973, copy of which enclosed, was sent to the accused as required by U.P. Amendment of Section 448 I.P.C. the said notice was served upon accused on 14.11.73 as per postal A.D. receipt attached herewith.

4. That the accused was required to quit and vacate the said premises by the 20th day of November, 1973 but instead of vacating the premises the accused has been making unusual pretext and has thus committed an offence under section 448 I.P.C."

11 The appellant may be fondly thinking that she had a right to occupy the premises even after the death of Shri R.C. Sood. If a suit for eviction is filed in Civil Court she might be in a position to vindicate her right and justify her possession. This is essentially a civil matter which could be properly adjudicated upon by a competent Civil Court. To initiate criminal proceedings in the circumstances appears to be only an abuse of the process of the Court."

32. On perusal of aforesaid provisions and laws laid down by Hon'ble Supreme court, it includes any household owned or tenanted by either of the parties in respect of which either the aggrieved person/wife or the respondent or both jointly or singly have any right, therefore, the petitioner being legally wedded wife has a right to live with the husband, whether he lives in an ancestral house or own acquired house or rented house. Therefore, if the respondent does not allow the aggrieved person then by taking shelter of the court, the Magistrate may pass the order so that she may enter in the house or she would not be thrown out from the house of his husband without due process of law. Certainly, not otherwise, as directed by the Ld. MM and upheld by the appellate court.

33. In my opinion, the court cannot ask the aggrieved person to vacate the house, even though, may be on rent. However, she cannot be directed to vacate the same without due process of law. The second direction of the court to register a case against the aggrieved person on not vacating the house of her husband is not only bad in law but is also against the mandate of the Act. The issue on shared household has already been decided by the Apex Court in case of **S.R. Batra** (supra).

34. The impugned orders passed by the two courts below i.e the court of Ld. MM and court of Ld. Additional Sessions Judge have defeated the very purpose of Act, and therefore, the instant petitions are allowed and the impugned order mentioned above are set aside.

35. Accordingly, the FIR No.157 dated 07.12.2011 registered under Section 448 Indian Penal Code, 1860 at PS. Defence Colony, New Delhi against petitioner/wife is quashed along with all the emanating proceedings there from.

36. Both the petitions are allowed and disposed of on above terms.

37. The applications for stay in both the petitions are disposed of being infructous.

38. No order as to costs.

ILR (2012) III DELHI 759
FAO

N.D.M.C. & ORS. ….APPELLANTS

VERSUS

I.C. MALHOTRA & ANR. ….RESPONDENTS

(J.R. MIDHA, J.)

FAO NO. : 30/2003 DATE OF DECISION: 27.04.2012

Motor Vehicles Act, 1988—Claims Tribunal awarded compensation to parents of deceased, aged 27 years who was working as Management Trainee—Order challenged by appellant before High Court—Respondents filed cross objections seeking enhancement of award amount—Respondents permitted to lead additional evidence of General Manager of employer and batch mate of deceased—Plea taken by appellant, deceased was contributorily negligent to extent of 50% and compensation is liable to be reduced on that account and future prospects be reduced—Per contra plea taken by respondents that multiplier be enhanced from 11 to 17, compensation for loss of love and affection and loss of estate be granted and income of deceased be taken as Rs. 1 lakh per month—Held—Although offending truck was parked on wrong side, accident would not have occurred if deceased had exercised due care and caution—Deceased was contributorily negligent to extent of 25% and compensation is liable to be reduced to extent of 25%—Since deceased was unmarried, multiplier has to be according to age parents—Claims Tribunal has applied correct multiplier of 11 and it does not warrant any enhancement—In cases of death of professionals, earning capacity of professional has to be taken into consideration depending upon professional degrees held by him—Deceased had future prospects of becoming a General Manager—It would be appropriate to take income of deceased as Rs. 35,000/- per month on basis of his earning capacity and professional degrees held by him—Appeal and cross objections partially allowed—Awarded amount enhanced.

Important Issue Involved: In the cases death of professionals, the earning Capacity of the professional has to be taken into consideration depending upon the professional degrees held by him.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Arjun Pant, Advocate.

FOR THE RESPONDENT : Mr. Ashok Bhasin, Sr. Adv. with Mr. Bhagwan Sharma, Mr. Sunklan Porwal and Ms. Anuradha Anand Advocates.

CASES REFERRED TO:

1. *K.R. Madhusudhan* vs. *The Administrative Officer,* I (2011) ACC 700 (SC).
2. *Ganga Devi* vs. *New India Assurance Co. Ltd.,* III (2010) ACC 6.
3. *Ramesh Chand Joshi* vs. *New India Assurance Co. Ltd.,* MAC.APP.No.212/2006 decided on 20th January, 2010.
4. *Sarla Varma (Smt.) and Ors.* vs. *Delhi Transport Corporation and Anr.* VI (2009) SLT 663 = 162 (2009) DLT 278 (SC) = III (2009) ACC 708 (sc) = (2009) 6 SCC 121.

RESULT: Appeal and cross objections partially allowed.

J.R. MIDHA, J.

1. The appellant has challenged the judgment of the Claims Tribunal whereby compensation of Rs.8,31,816/- has been awarded to the respondents. The respondents have filed cross-objections seeking enhancement of the award amount.

2. The accident dated 9th January, 1997 resulted in the death of Arvind Malhotra. The deceased was aged 27 years and survived by his parents who filed the claim petition. The deceased was working as Management Trainee with Ballarpur Industries Limited earning Rs.9,750/- per month. The Claims Tribunal took the income of the deceased as Rs.8,250/- per month, added 50% towards future prospects, deducted 50% towards the personal expenses and applied the multiplier of 11 to compute the loss of dependency to Rs.8,16,816/-. Rs.10,000/- has been awarded towards pain and suffering and Rs.5,000/- has been awarded towards funeral expenses. The total compensation awarded by the Claims Tribunal is Rs.8,31,816/-.

3. The learned counsel for the appellant has urged at the time of hearing of this appeal that the deceased was contributory negligent to the extent of 50% and, therefore, the compensation is liable to be reduced on that account. It is further submitted that the future prospects awarded to the respondents be reduced.

4. The learned counsel for the respondents have filed cross-objections seeking enhancement of the award amount on the following grounds:-

(i) The income of the deceased be taken as Rs.1,00,000/- per month.

(ii) The multiplier be enhanced from 11 to 17.

(iii) The compensation be awarded for loss of love and affection and loss of estate.

5. With respect to the issue of rashness and negligence, it is noted that the accident occurred at Shanker Road on 9th January, 1997 at 10AM. The offending truck bearing No. DL-1LB-0495 was wrongly parked at the right side of the road along with the divider and the deceased, who was driving his motorcycle, hit against the stationary

truck. The claimants examined the eye-witness PW1, who deposed that the truck was un-manned and un-attended at the time of the accident. PW1 further deposed that the parking lights were not on and the accident occurred due to the wrong parking of the offending truck. The defendant examined the driver and holder of truck as RW1 and RW2. The Claims Tribunal found serious discrepancies in their statements. The Claims Tribunal held that the accident occurred due to the negligent parking of the offending truck by the driver in the peak hours.

6. After considering the testimonies of the witnesses, this court is of the view that although the offending truck was parked on the wrong side, the accident would not have occurred if the deceased had exercised due care and caution. The deceased was contributory negligent to the extent of 25% and therefore, the compensation to the deceased is liable to be reduced to the extent of 25%.

7. The deceased was aged 27 years at the time of the accident. Since the deceased was unmarried at that time, the multiplier has to be taken according to the age of the parents. The mother of the deceased was 53 years at the time of the accident. The proper multiplier according to the age of mother is 11 as per the judgment of Supreme Court in **Sarla Verma v. DTC,** AIR 2009 SC 3104. The Claims Tribunal has applied the correct multiplier of 11 and it does not warrant any enhancement.

8. The deceased was holding a Degree of Engineering as well as Post Graduate Diploma in Business Management and was working as a Management Trainee with Balarpur Industries Limited drawing a salary of Rs.9,750/- per month besides LTA, medical, PF and superannuation.

9. The claimants have filed cross-objections seeking enhancement of the award amount. Along with cross-objections, the claimants filed CM No.1106/2003 to lead additional evidence to prove the future prospects of the deceased. Vide order dated 6th March, 2009, the claimants/respondents No.1 and 2 were permitted to lead additional evidence. The claimants/respondents No.1 and 2 examined two witnesses. RW1-Chiranjeev Singh, General Manager, Ballarpur Industries Limited proved the certificate dated 18th March, 2009 issued by M/s Ballarpur Industries Limited. The contents of Ex. RW1/A are reproduced herein under:-

"To Whomsoever it may concern.

This is to certify that Late Arvind Malhotra was employed in our organization with effect from June 1996. He was an engineer and a MBA and his gross emoluments at the start of the career was Rs.1.50 lacs per annum, besides Medical Insurance and benefit of encashment of Privilege Leave up to 30 days a year.

Had he remained in our employment till date and under normal circumstance, one could expect such a profile to grow up to a level of Deputy General Manager and his annual cost to the company could have risen in the range of Rs.10 to 12 lacs per annum."

10. RW2-Ravinder Singh Negi, batch-mate of the deceased in Fore School of Management, New Delhi, is working with Bharti Airtel Ltd. as Vice-President, Sales & Marketing, Delhi Circle drawing a salary Rs.41 lacs per annum. He has proved the salary slip of February, 2009 as Ex. RW2/A. He further deposed that the deceased held a Degree of Engineering and Post Graduate Diploma in Business Management. In cross-examination, RW 2 deposed that all his other batch mates would be getting similar salary packages.

11. From the testimony of RW1 and RW2, it has been proved that the deceased, who was working as a Management Trainee at a salary of Rs.12,500/- per month had the future prospects of becoming Deputy General Manager with a salary of Rs.10 lakhs to Rs.12 lakhs per annum.

12. It is well settled that in the cases of death of professionals, the earning capacity of the professional has to be taken into consideration depending upon the professional degrees held by him. The following judgments may be referred in this regard :-

(i) **Ganga Devi v. New India Assurance Co. Ltd.,** III (2010) ACC 6.

(ii) **Ramesh Chand Joshi v. New India Assurance Co. Ltd.,** MAC.APP.No.212/2006 decided on 20th January, 2010.

13. It is also well-settled that future prospects beyond 50% can be awarded in rare and exceptional cases involving special circumstances.

In **K.R. Madhusudhan v. The Administrative Officer,** I (2011) ACC 700 (SC), the Supreme Court awarded future prospects in respect of the deceased aged more than 50 years on the ground that the judgment of **Sarla Verma v. DTC** (supra) permits the future prospects to be awarded in respect of deceased aged more than 50 years in rare and exceptional cases involving special circumstances. The relevant portion of the judgment of the Supreme Court in **K.R. Madhusudhan vs. The Administrative Officer** (supra) is as under:-

"8. The law regarding addition in income for future prospects has been clearly laid down in **Sarla Varma (Smt.) and Ors. v. Delhi Transport Corporation and Anr.** VI (2009) SLT 663 = 162 (2009) DLT 278 (SC) = III (2009) ACC 708 (sc) = (2009) 6 SCC 121 and the relevant portion reads as follows:

> In Susamma Thomas this Court increased the income by nearly 100%, in Sarla Dixit the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. [Where the annual income is in the taxable range, the words "actual salary" should be read as "actual salary less tax"]. The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances.

9. In the **Sarla Verma** (supra) judgment the Court has held that there should be no addition to income for future prospects where

the age of the deceased is more than 50 years. The learned Bench called it a rule of thumb and it was developed so as to avoid uncertainties in the outcomes of litigation. However, the Bench held that a departure can be made in rare and exceptional cases involving special circumstances. We are of the opinion that the rule of thumb evolved in **Sarla Verma** (supra) is to be applied to those cases where there was no concrete evidence on record of definite rise in income due to future prospects. Obviously, the said rule was based on assumption and to avoid uncertainties and inconsistencies in the interpretation of different courts, and to overcome the same.

10. The present case stands on different factual basis where there is clear and incontrovertible evidence on record that the deceased was entitled and in fact bound to get a rise in income in the future, a fact which was corroborated by evidence on record. Thus, we are of the view that the present case comes within the 'exceptional circumstances' and not within the purview of rule of thumb laid down by the Sarla Verma (supra) judgment. Hence, even though the deceased was above 50 years of age, he shall be entitled to increase in income due to future prospects."

14. In the present case, deceased was holding the Degree of Engineering and Post Graduate Diploma in Business Management. He was working as Management Trainee with Ballarpur Industries Limited at a salary of Rs. 12,500/- per month and had the future prospects of becoming a General Manager at a salary of Rs. 1,00,000/- per month. This case, therefore, falls within the 'exceptional circumstances' and is squarely covered by the judgment of the Supreme Court in **K.R. Madhusudan** (supra). Following the aforesaid judgments, this Court is of the view that it would be appropriate to take the income of the deceased as Rs.35,000/- per month on the basis of his earning capacity, professional degrees held by him and certificate Ex. RW1/A.

15. The Claims Tribunal has not awarded any compensation towards loss of love and affection and loss of estate. Rs.10,000/- is awarded as compensation towards loss of love and affection and Rs.10,000/- is awarded towards loss of estate. The Claims Tribunal awarded Rs.10,000/- as pain and suffering which is not a permissible head in death cases and, therefore, Rs.10,000/- is treated as compensation for funeral expenses

and is added to the head of funeral expenses. Taking the monthly income of the deceased as Rs.35,000/- per month, deducting Rs.10,000/- towards Income Tax, deducting 50% towards his personal expenses, applying the multiplier of 11, the loss of dependency is computed to Rs.16,50,000/-. The total compensation is computed to be Rs.12,72,500/- as per break-up given hereinbelow:-

Income of the deceased	:	Rs.35,000/-
Income Tax (less)	:	Rs.10,000/-
Personal Expenses(less)	:	Rs.12,500/-
Loss of dependency (Rs.12,500/- x 11 x 12)	:	Rs.16,50,000/-
25% towards contributory negligence(less)	:	Rs.4,12,500/-
Compensation for loss of love and affection	:	Rs.10,000/-
Compensation for loss of estate	:	Rs.10,000/-
Funeral Expenses	:	Rs.15,000/-
Total	**:**	**Rs.12,72,500/-**

16. For the reason as aforesaid, the appeal as well as the cross-objections are partially allowed. The awarded amount is enhanced from Rs.8,31,816/- to Rs.12,72,500/- along with interest @ 9% per annum from the date of filing of the claim petition till realization.

17. The appellant has deposited the entire award amount as awarded by the Claim Tribunal out of which 50% of the amount have been released to the claimants and the remaining 50% is lying in Fixed Deposit. The Registrar General is directed to release the amount lying in fixed deposit to the claimants in terms of the award to the Claims Tribunal.

18. The enhanced award amount be deposited by the appellant with UCO Bank, Delhi High Court Branch, by means of a cheque drawn in the name of UCO Bank A/c I.C. Malhotra within a period of 30 days. On the aforesaid amount being deposited, UCO Bank is directed to release 50% of the said amount to the respondents 1 and 2 by transferring the same to their savings bank account and the remaining amount to be kept in fixed deposit for three years.

19. The interest on the aforesaid fixed deposits shall be paid monthly

by automatic credit of interest in the respective Savings Account of the beneficiaries.

20. Withdrawal from the aforesaid account shall be permitted to the beneficiaries after due verification and the Bank shall issue photo Identity Card to the beneficiaries to facilitate identity.

21. No cheque book be issued to the beneficiaries without the permission of this Court.

22. The original fixed deposit receipts shall be retained by the Bank in the safe custody. However, the original Pass Book shall be given to the beneficiaries along with the photocopy of the FDRs. Upon the expiry of the period of each FDR, the Bank shall automatically credit the maturity amount in the Savings Account of the beneficiaries.

23. No loan, advance or withdrawal shall be allowed on the said fixed deposit receipts without the permission of this Court.

24. Half yearly statement of account be filed by the Bank in this Court.

25. On the request of the beneficiaries, Bank shall transfer the Savings Account to any other branch according to their convenience.

26. The beneficiaries shall furnish all the relevant documents for opening of the Saving Bank Account and Fixed Deposit Account to Mr. M.S. Rao, AGM, UCO Bank, Delhi High Court Branch, New Delhi (Mobile No. 09871129345).

27. Copy of this judgment be sent to Mr. M.S. Rao, AGM, UCO Bank, Delhi High Court Branch, New Delhi (Mobile No.09871129345).

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W.P.(C)

FASHION DESIGN COUNCIL OF INDIA ….PETITIONER

VERSUS

GNCT AND ORS. ….RESPONDENTS

(SANJIV KHANNA & R.V. EASWAR, JJ.)

W.P. (C). NO. : 1145/2010, 3199/2011, 3200/2011, 3201/2011, 6564/2011, 7505/2011, 7506/2011, 1169/2010 & 4728/2010

DATE OF DECISION: 30.04.2012

Constitution of India, 1950—Article 226 and 227—The Delhi Entertainment and Betting Tax Act, 1996—Section 2(a), (j), (m), (i), 3, 4, 7, 6(6)(1) & 45—Petitioner filed writ of certiorari challenging rejection of request of petitioner for 100% exemption from entertainment tax on fashion shows and assessment orders passed by Additional Entertainment Tax Officer (A.E.T.O.)—Plea taken, power to levy entertainment tax cannot be delegated by government to any other person or authority subordinate to it and therefore, assessment orders passed by AETO have to be struck down as being without authority of law—Sponsorship amounts collected by petitioner cannot be considered as "payment for admission"—Held—There is a well marked distinction between levy or charge of tax on one hand and assessment or quantification there of, on other—What AETO has done by passing assessment orders is only to quantify entertainment tax payable by petitioner—It is not disputed that power to pass assessment order and quantify entertainment tax can be delegated—Contention that order passed by AETO be struck down fails and is rejected—Second, unless

terms and conditions of sponsorship agreement are examined it may not be possible to ascertain nature of payment and decide about applicability of relevant provisions of Act—AETO has not carried out this exercise and has rested his conclusion merely on statutory provisions without ascertaining basic facts or examining terms and Conditions of sponsorship agreement—Impugned orders passed by AETO have to be quashed—It is open to AETO to examine relevant facts including terms and conditions of sponsorship agreements and thereafter consider applicability of provisions of Act and decide whether petitioner is liable to pay entertainment tax or not by passing fresh orders of assessment after hearing petitioner—So far as order granting 50% exemption to petitioner from entertainment tax is concerned, power vested in Government of NCT of Delhi to grant exemption is based on several criteria—Before passing 50% exemption from payment of entertainment tax as against claim of 100% exemption made by petitioner, a personal hearing was given to petitioner and there is no violation of rules of natural justice—All points raised by petitioner in support of claim for exemption have been duly noted in impugned order and taken into consideration by competent authority—Petitioner has been treated fairly and objectively and we therefore decline to interfere with the order of Government of NCT of Delhi granting only 50% exemption from entertainment tax.

All tax legislation, whether Central or State, generally contain similar provisions relating to the charge of the tax and the quantification thereof. They also contain separate provisions for recovery or collection. The charging section does not require a separate order by any authority to charge the tax. It stands by itself and is triggered the moment the taxable event takes place. In the case of income tax, the taxable event is the earning of income. In the case of sales tax, the

taxable event is the sale. In the case of excise duty the dutiable event is the manufacture of goods. In the case of income tax, the annual Finance Acts prescribe the rates of tax. However, the computation of the income has to take place separately by an order of assessment. These orders have to be passed by the officers executing the Income Tax Act. They merely give effect to the charge of the tax. If these principles are borne in mind it will be clear that Section 4(1) of the Act with which we are concerned cannot, in the very nature of things, enable the government to delegate its powers under Section 6. Despite the section, it is impossible to conceive of a delegation of the charge of tax because, as already pointed out, the charge is created by the statutory provision itself and it does not require any separate agency or order to create it. It is only to quantify the charge of tax that an order may have to be passed. It may be that Section 4(1) of the Act, when it also refers to Section 6, amongst other sections, was quite redundant but that is no reason to say that the AETO who merely quantified the charge of tax by passing an assessment order was a delegate of the charge of entertainment tax. What the AETO has done by passing the assessment orders is only to quantify the entertainment tax payable by the petitioner. It is not disputed that the power to pass the assessment order and quantify the entertainment tax can be delegated and there is no prohibition under Section 4(1) of the Act. The contention, therefore, fails and is rejected. **(Para 14)**

Important Issue Involved: (A) There is a well marked distinction between the levy or charge of the tax on the one hand and the assessment or quantification thereof, on the other. The power to pass the assessment order and quantify the entertainment tax can be delegated and there is no prohibition under Section 4(1) of the Delhi Entertainment and Betting Tax Act, 1996.

(B) To grant exemption to the Fashion events from entertainment tax or not is a discretionary power and is a matter which within the domain of the executive and judicial review is limited to examining whether the relevant criteria have been kept in view and whether the decision making process has been just and fair. It is not for court to examine the correctness of the decision of the executive. The court can examine only the decision making process.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Neeraj K. Kaul, Sr. Advocate with Mr. Jitendra Singh, Advocate, Mr. Rajiv Bansal, Advocate, Mr. Saurabh S. Sinha, Advocate, Ms. Swati and Mr. Rahul, Advocates.

FOR THE RESPONDENTS : Mr. Parag P. Tripathi, Sr. Advocate with Ms. Avanish Ahlavat, Advocate Ms. Monisha Handa, Advocate Ms. Shubham Mahajn, Advocate and Ms. Urvashi Malhotra, Advocate.

CASES REFERRED TO:

1. *Ahmed Ibrahim Sahigra Dhoraji* vs. *CWT,* (1981) 129 ITR 314.
2. *K.S.Venkataraman & Co.* vs. *State of Madras,* (1966) 60 ITR 112.
3. *Kalwa Devadattam* vs. *Union of India* [1963] 49 ITR (SC) 165; [1964] 3 SCR 191.
4. *Neptune Assurance Company Ltd.* vs. *LIC of India,* (1963) 48 ITR 144.
5. *Wallace Bros. & Co. Ltd.* vs. *CIT,* (1948) 16 ITR 240.
6. *Chatturam* vs. *CIT, Bihar* (1947) 15 ITR 302.
7. *Whitney* vs. *Commissioners of Inland Revenue* (1926) A.C. 37.

RESULT: W.P.(C) 1145/2010 and 1169/2010 are allowed and all other writ petitions are dismissed.

R.V. EASWAR, J.:

1. These are nine connected writ petitions filed by Fashion Design Council of India (hereinafter referred to as "petitioner") under Article 226 and 227 of the Constitution of India. The matter pertains to the Delhi Entertainment and Betting Tax Act, 1996 (Delhi Act No.8 of 1997) (hereinafter referred to as 'Act').

2. Writ Petition No.1145/2010 is taken as a lead matter since the facts in all these writ petitions are somewhat common. The petitioner is a society registered under the Societies Registration Act, 1860, established solely for the purpose of promoting and fostering the growth and development of the Indian Fashion industry. It organizes the India Fashion week, business-to-business interaction events and other Fashion shows. It is claimed that these are not ticketed events and that entry to the Fashion shows/ Fashion weeks is exclusively by invitation, both for domestic and international buyers, associated professionals and media. It was granted 100% exemption from the liability to pay entertainment tax under the Act in respect of the events held from the year 2002 to the year 2004; the exemption was reduced to 50% in respect of the events held in the years 2008 and 2009. Thereafter the Government of NCT, Delhi refused the grant of exemption from entertainment tax for all subsequent Fashion events conducted or organized by the petitioner.

3. The petitioner applied for exemption from payment of entertainment tax under Section 14 of the Act regarding Fashion weeks organized by it for the periods from 18.03.2009 to 23.03.2009 and from 15.10.2008 to 19.10.2008 in Delhi. Under Section 14 of the Act the exemption is to be granted by the government having regard to the criteria mentioned in the various sub-sections of the Section. By order dated 10.09.2009, which is impugned in the writ petition, the Joint Secretary (Finance), acting for the Government of NCT of Delhi, rejected the request of the petitioner for 100% exemption from entertainment tax on Fashion shows. However, considering the recession in the industrial and export sector and to project Delhi as a world class city, exemption was granted from payment of entertainment tax to the extent of 50% of the tax payable by the petitioner, "as a special case". This exemption was

granted in respect of the Fashion shows which were held between 15.10.2008 and 19.10.2008 and between 18.03.2009 and 23.03.2009 and also in respect of the Van Heus en India Men's Fashion Week to be held from 11th to 13th September, 2009. It was clarified that the exemption was not being extended to future events planned by the petitioner.

4. Before the aforesaid order granting 50% exemption from entertainment tax was passed, the Additional Entertainment Tax Officer (AETO) had passed two assessment orders on 11.06.2009, one in respect of the Fashion show organized between 15.10.2008 and 19.10.2008 and another in respect of the Fashion show organized between 18.03.2009 and 23.03.2009. It would appear that before these assessment orders were passed the assessee had approached this Court through writ petitions for issue of 'no objection certificates' for holding the events subject to deposit of monies. The AETO referred to orders passed by this Court in those writ petitions and thereafter proceeded to examine the details furnished by the petitioner in order to ascertain whether there was any liability to pay entertainment tax under the Act. A perusal of the assessment orders shows that the principal contentions raised by the petitioners before the AETO were these. The first contention was that the Fashion show was not an "entertainment" under the Act. This contention was rejected by the AETO who held that it is an exhibition of designs and clothing and would also amount to a performance by the models on the ramp and thus the Fashion show amounts to an "entertainment". The other contention raised by the petitioner was that the sponsorship amount received in respect of the Wills Lifestyle India Fashion Week was not "payment for admission to the entertainment" and therefore not chargeable to entertainment tax. This contention was also rejected by the AETO, relying upon the inclusive definition of the term "payment for admission" in Section 2 (m) of the Act. According to him under Section 2 (m) (i), any payment made by a person for seats or other accommodation in any form in a place of entertainment was chargeable to entertainment tax. He also referred to definition of the term "admission to entertainment " in Section 2 (a) of the Act. According to him Section 2 (m) (i) read with Section 2 (a) of the Act covered the case of the petitioner and therefore it was liable to pay entertainment tax in respect of the Fashion show. The AETO also referred to and relied upon sub-sections (1) and (6) of Section 6 of the Act. Sub-section (1) of Section 6 is the charging Section, which charges tax on an entertainment. Sub-section (6) says

that where the payment for admission to an entertainment is made wholly or partly by means of a lump sum paid as subscription, contribution, donation or otherwise, the entertainment tax shall be paid on the amount of the lump sum and on the amount of payment made for admission, if any, made otherwise. These two sub-sections were also relied upon by the AETO to assess the sponsorship amount received by the petitioner to entertainment tax. Ultimately, he brought the following sponsorship amounts to tax under the Act, observing as under: -

"Particulars		**Amount**
ITC Ltd.		25500000.00
Essenza D.Wills		13500000.00
Pernord Ricard India (P) Ltd.		3000000.00
Audi India		3000000.00
HP		4500000.00
Redbull India Pvt. Ltd.		500000.00
	Total	50000000.00

The Entertainment Tax on the above sponsorship money is calculated @ 15% on Rs.5.00 crores which comes to Rs.75 lacs. Since, the Applicant has paid Rs.36.9 lacs, the tax yet to be deposited by the Applicant is Rs.3810000.00 as under:

Amount of Sponsorship	Total Assessed (In Rupees)	D.D. furnished by the Applicant (In Rupees)	Balance Tax to be deposited by the Applicant (In Rupees)
50000000.00	7500000.00	3690000.00	3810000.00

The Applicant is directed to pay the said amount of Rs.3810000.00 (Rupees thirty eight lacs ten thousand only) within a period of 15 days from the date of receipt of this order.

(A.K. Gupta)

ADDL. ENTERTAINMENT TAX OFFICER"

5. Similar order was passed on the same day (i.e. 11.06.2009) in respect of the Fashion show held between 18.03.2009 and 23.03.2009. The sponsorship money of Rs.5,79,76,138/- received by the petitioner was taxed @ 15% which came to Rs.86,96,421/-. The amount assessed as entertainment tax by the aforesaid orders, both passed on 11.06.2009,

were directed to be paid by the petitioner within 15 days from the date of receipt of the orders.

6. The petitioner has prayed for issue of a writ of certiorari or any other appropriate writ, order or direction quashing the assessment orders passed by the AETO on 11.06.2009 and the order passed by the Government of NCT of Delhi on 10.09.2009.

7. Two contentions have been put forward before us on behalf of the petitioner. The first contention is based on the powers of delegation given under Section 4 of the Act to the government. According to Section 2 (j), "Government" means the Government of the National Capital Territory of Delhi. Section 4 is couched in the following words: -

> "4. **Delegation**
>
> (1) The government may, by notification, delegate all or any of its powers under this Act, except those under sections 3, 6, 7 and 45 to any person or authority subordinate to it.
>
> (2) The exercise of any powers delegated under sub-section (1) shall be subject to such restrictions, limitations or conditions as may be laid down by the government from time to time and shall also be subject to control and revision by government at any time."

8. Section 6 is the charging section and it provides for levy of entertainment tax in respect of all payments for admission to any entertainment, other than an entertainment to which Section 7 applies, at such rate not exceeding 100% of the payment as the government may notify from time to time. The sub-section further says that the tax shall be collected by the proprietor of the entertainment from the person making the payment for admission and paid to the government in the prescribed manner. We are not referring to Sections 3, 7 and 45 as they are not relevant in dealing with the argument. The argument of the petitioner is that the power to levy entertainment tax cannot be delegated by the government to any other person or authority subordinate to it and, therefore, the assessment orders passed by the AETO on 11.06.2009 have to be struck down as being without the authority of law. The fallacy in this argument, if we may say so with respect, is that it fails

to take note of the distinction between levy or charge of the tax, the quantification thereof in the assessment and recovery/ collection of the tax. There is a well-marked distinction between the levy or charge of the tax on the one hand and the assessment or quantification thereof, on the other. In the context of similar provisions under the Income Tax Act, this distinction has been brought out in several decisions, which we may briefly note.

9. In **Wallace Bros. & Co. Ltd. v. CIT,** (1948) 16 ITR 240 the Privy Council observed thus: -

> "The rate of tax for the year of assessment may be fixed after the close of the previous order and the assessment will necessarily be made after the close of that order. But the liability to tax arises by virtue of the charging section alone, and it arises not later than the close of the previous year, though quantification of the amount payable is postponed." (underlining ours)

10. In **Chatturam v. CIT, Bihar** (1947) 15 ITR 302, the Federal Court, quoting from the judgment of Lord Dunedin in **Whitney v. Commissioners of Inland Revenue** (1926) A.C. 37, brought out the distinction between different stages in the imposition of a tax in the following words: -

> "There are three stages in the imposition of a tax: There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex-hypothesi, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."
>
> (underlining ours)

11. These observations of the Federal Court were adopted by the Supreme Court in **Neptune Assurance Company Ltd. v. LIC of India,** (1963) 48 ITR 144. In this decision it was observed that the assessment only particularised the amount of tax payable as per the rates fixed by the Finance Act and that it did not create a right to refund for the first time since that right had already come into existence as soon as according

to the relative Finance Act it became ascertainable that the tax paid in advance had exceeded the tax payable.

12. In **K.S.Venkataraman & Co. v. State of Madras,** (1966) 60 ITR 112 the Supreme Court pithily observed as under: -

> "Let us now scrutinize the said machinery to ascertain its scope and ambit. Section 3 of the Income-tax Act is the charging section; it imposes a tax upon a person in respect of his income. As a learned author pithily puts it, "section 3 charges total income; section 4 defines its range; section 6 qualifies it; and sections 7 to 12B quantify it."

13. In **Ahmed Ibrahim Sahigra Dhoraji v. CWT,** (1981) 129 ITR 314, the Supreme Court summed up the position in the following manner: -

> "Section 3 of the Indian I.T. Act, 1922 and s. 4 of the I.T. Act, 1961, which are couched more or less in the same language state that where any Central Act enacts that income-tax shall be charged for any year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with and subject to the provisions of the relevant Act in respect of the total income of the previous year or previous years, as the case may be, of every person. Now it is well settled by a series of judicial decisions that the liability to income-tax arises by virtue of the charging section in the relevant I.T. Act and it arises not later than the close of the previous year, even though the rate of tax for the year of assessment may be fixed after the close of the previous year and the assessment has necessarily to be made after the previous year.
>
> The quality of chargeability of any income to tax is not dependent upon the passing of the Finance Act though its quantification may be governed by the provisions of the Finance Act in respect of any assessment year (vide **Wallace Brothers and Co. LTd. v. CIT** [1948] 16 ITR 240 (PC), **Chatturam Horilram Ltd. v. CIT** [1955] 27 ITR 709; [1955] 2 SCR 290 AND **Kalwa Devadattam v. Union of India** [1963] 49 ITR (SC) 165; [1964] 3 SCR 191.)"

(underlining ours)

The aforesaid decisions bring out the distinction between the charging Section and the other provisions relating to the quantification of the income and the tax payable thereon by way of an assessment order and the provisions relating to collection or recovery of the income tax.

14. All tax legislation, whether Central or State, generally contain similar provisions relating to the charge of the tax and the quantification thereof. They also contain separate provisions for recovery or collection. The charging section does not require a separate order by any authority to charge the tax. It stands by itself and is triggered the moment the taxable event takes place. In the case of income tax, the taxable event is the earning of income. In the case of sales tax, the taxable event is the sale. In the case of excise duty the dutiable event is the manufacture of goods. In the case of income tax, the annual Finance Acts prescribe the rates of tax. However, the computation of the income has to take place separately by an order of assessment. These orders have to be passed by the officers executing the Income Tax Act. They merely give effect to the charge of the tax. If these principles are borne in mind it will be clear that Section 4(1) of the Act with which we are concerned cannot, in the very nature of things, enable the government to delegate its powers under Section 6. Despite the section, it is impossible to conceive of a delegation of the charge of tax because, as already pointed out, the charge is created by the statutory provision itself and it does not require any separate agency or order to create it. It is only to quantify the charge of tax that an order may have to be passed. It may be that Section 4(1) of the Act, when it also refers to Section 6, amongst other sections, was quite redundant but that is no reason to say that the AETO who merely quantified the charge of tax by passing an assessment order was a delegate of the charge of entertainment tax. What the AETO has done by passing the assessment orders is only to quantify the entertainment tax payable by the petitioner. It is not disputed that the power to pass the assessment order and quantify the entertainment tax can be delegated and there is no prohibition under Section 4(1) of the Act. The contention, therefore, fails and is rejected.

15. The second contention put forth before us is that the sponsorship amounts collected by the petitioner cannot be considered as "payment for admission" within the meaning of Section 2 (m) or Section 6 (6) of the

Act. It is stated that sponsors make payment of the amounts to the petitioner for sponsoring the Fashion show and there is no stipulation that the amounts are received by the petitioner on condition that some persons will be allowed admission to the Fashion shows without any separate payment for the same. This contention was put forward before the AETO. But he has not chosen to examine the same on the basis of the facts, the agreements between the petitioner and the sponsors. He has examined the question whether the Fashion shows are "entertainment" within the meaning of the Act, an aspect about which there is now no dispute. The AETO has referred to the question whether the sponsorship amount collected by the petitioner represented payment for admission to an entertainment in para 17 of his order dated 11.06.2009, which is an assessment order for the period 15.10.2008 to 19.10.2009. He has merely referred to Section 2(m) of the Act, and particularly to clause (i) of the provision. He has noted that the definition of the expression "payment for admission" is an inclusive definition and, therefore, should be construed liberally. He has also referred to Section 2(a) of the Act which defines the term "admission to the entertainment". From this provision he has drawn the inference that even if the payment received by the petitioner is not in consideration of allotment of seats to the sponsor, it would still fall for being considered as payment for admission because of the inclusive definition which is wide enough to cover participation in any Fashion show. In support of his conclusion the AETO merely referred to Section 6(6) of the Act in paras 24 and 25 of the impugned order.

16. We are of the view that unless the terms and conditions of the sponsorship agreement are examined it may not be possible to ascertain the true nature of the payment and decide about the applicability of the relevant provisions of the Act. The AETO, as noted above, has not carried out this exercise and has rested his conclusion merely on the statutory provisions without ascertaining the basic facts or examining the terms and conditions of the sponsorship agreement. The entire exercise seems to us to be meaningless, if the factual background and the agreement between the parties have not been examined. The provisions of the Act have to be applied only to the facts gathered and governing the case and not in vacuo. We are therefore of the opinion that the impugned orders passed by the AETO have to be quashed. We accordingly issue a writ of certiorari quashing them. It is open to the AETO to examine the relevant facts including the terms and conditions of the sponsorship

agreements and thereafter consider the applicability of the provisions of the Act and decide whether the petitioner is liable to pay entertainment tax or not, by passing fresh orders of assessment after hearing the petitioner.

17. So far as the contention of the petitioner against the order dated 10.09.2009 passed by the Government of NCT of Delhi, granting 50% exemption to the petitioner from entertainment tax is concerned, we do not find any strong grounds to quash the same. The power vested in the Government of NCT of Delhi under Section 14 of the Act to grant exemption is based on several criteria. The section is re-produced below for a better understanding of the rationale behind the same: -

> "14. Exemption
>
> (1) The government may, for promotion of arts, culture or sports, by general or special order, exempt any individual entertainment programme or class or entertainments from liability to pay tax under this Act.
>
> (2) The government may, by general or special order, exempt in public interest any class of audience or spectators from liability to pay tax under this Act.
>
> (3) Without prejudice to the generality of the provisions of sub-section (1) where the government is satisfied that any entertainment,
>
> (a) is wholly of an educational character, or
>
> (b) is provided partly for educational or partly for scientific purposes by a society not conducted or established for profit; or
>
> (c) is provided by a society not conducted for profit and established solely for the purpose of promoting public health or the interests of agriculture, or a manufacturing industry, and consists solely of an exhibition of articles which are of material interest in connection with questions relating to public health or agriculture or are the products of the industry for promoting the interest whereof the society exists, or the materials, machinery appliances or foodstuff used in the production of such products;

it may, subject to such terms and conditions as it may deem fit to impose, grant exemption to such entertainment from payment of tax under this Act:

PROVIDED that the government may cancel such exemption if it is satisfied that the exemption was obtained through fraud or misrepresentation, or that the proprietor of such entertainment has failed to comply with any of the terms or conditions imposed or directions issued in this behalf and thereafter the proprietor shall be liable to pay the tax which would have been payable had not the entertainment been so exempted.

(4) Where the government is satisfied that the entertainment programme is not conducted for profit and the entire gross proceeds from payment for admission as defined in clause (1) of section 2 of an entertainment are to be devoted to philanthropic, religious or charitable purposes, without any deductions whatsoever on account of the expenses of the entertainment, it may, subject to the rules made under this Act, grant exemption to such entertainment from payment of tax under this Act on such terms and conditions as it may deem fit to impose.

(5) Where any exemption from payment of tax is granted under sub-section (4), the proprietor of such entertainment shall furnish to the Commissioner such documents and records and in such manner as may be prescribed.

(6) If the proprietor of an entertainment exempted under sub-section (4) fails to furnish the documents and records required under sub-section (5), or fails to comply with any conditions imposed or directions issued in this behalf, or if the government is not satisfied with the correctness of such documents or records, the government may cancel he (sic.) exemption so granted and thereupon the proprietor shall be liable to pay the tax which would have been payable had not the entertainment been so exempted.

(7) The government may for reasons to be recorded in writing grant export facto exemption from payment of entertainment tax is respect of any programme."

18. Before passing the impugned order granting 50% exemption from payment of entertainment tax as against the claim of 100% exemption made by the petitioner, a personal hearing was given on 18.08.2009. There is, therefore, no violation of the rules of natural justice. The petitioner had pointed out that it is a non-profit organization conducting Fashion shows which are not ticketed and for which entry is restricted by invitation only for domestic and international buyers and the media. Material in the form of the web prints have been produced by the petitioner to show the support extended by the governments in UK and France for the various Fashion Weeks. It was pointed out that the Fashion Weeks contribute to the economy of Delhi by way of Hotel bookings, opening of Fashion Restaurants, Seminar Centres, etc. and ultimately the tourism industry benefits from the same. It was claimed that in the past the petitioner was granted exemption for similar events for many years and that since the facts and circumstances remained unchanged, the same considerations should apply. It was also submitted that there is no change in the legal position to justify any change in the stance of the government.

19. The above submissions of the petitioner were considered in detail by the Government of NCT of Delhi and the following order was passed: -

> "The only issue before the Government is whether to grant exemption from payment of entertainment tax for the fashion shows organized by Fashion Design Council of India under Section 14 of the Act. Though the arguments put forward by the FDCI that such events contribute to the economy of the city cannot be discounted, yet the Government is required to assess the overall situation taking into consideration the requirement of funds for the socio-economic development of the State and the benefits that may arise by giving exemption to such entertainment events/ fashion shows.
>
> The argument of the FDCI that since similar exemption have been granted in the past, it is entitled to exemption from payment of tax as a matter of right is not supported by law, hence not accepted. For the first few years exemption from payment of entertainment tax was granted to FDCI for fashion weeks as the Government was of the opinion to support nascent fashion

industry in Delhi to enable it to strengthen and to make Delhi a popular center for fashion. Its spin-of benefits to textiles industry, artisans/handicrafts and tourism sector was also taken into consideration.

However, it was never intended that such exemptions will be granted perpetually. From the audit report and balance sheet submitted by FDCI, it is noted that the net current assets as on 31.3.2009 was Rs.8.89 crores which includes cash and bank balances of Rs.7.48 crores. Since the financial health of the organization is satisfactory, there is no convincing reason as to why exemption from payment of entertainment tax on fashion shows organized by it should be continued at the cost of Government revenue. However, considering the current scenario of recession in industrial and export sector and to protect Delhi as world class city in view of the forthcoming Commonwealth Games, the Government accepts the plea of the FDCI to grant exemption from payment of entertainment tax only to an extent of 50% of the tax amount as a special case. This exemption from payment of tax upto 50% of the tax amount is allowed on the two events i.e. 15.10.2008 to 19.10.2008 and 18.03.2009 to 23.03.2009 which have already been held and the forthcoming Van-Heusen India Men's Fashion Week to be held from 11th - 13th September, 2009. It is clarified that this exemption is not extended to future events being planned by FDCI. The Commissioner, Excise, Entertainment & Betting Tax may initiate necessary action as per law.

This issues with the approval of Hon'ble Finance Minister, Govt. of NCT of Delhi."

20. Whether to grant exemption to the Fashion events from entertainment tax or not is a discretionary power granted to the Government of NCT of Delhi. However, the discretion is controlled by the criteria mentioned in the section. Even if the criteria stands satisfied, it is for the government to decide whether full exemption or part exemption is to be given to the petitioner from entertainment tax. The exemption, whether full or part, may also be granted subject to such terms and conditions as the government may deem fit to impose. It appears that essentially it is a matter which is within the domain of the executive and

judicial review is limited to examining whether the relevant criteria have been kept in view and whether the decision making process has been just and fair. It is not for Court to examine the correctness of the decision of the executive. The Court can examine only the decision making process. On a perusal of the order passed by the Government of NCT of Delhi on 10.09.2009 and on a fair reading thereof we find that the petitioner has been given a personal hearing to explain its petition for exemption from entertainment tax and thus the rules of natural justice have been adhered to, though Section 14 of the Act does not specifically refer to the grant of a personal hearing. Secondly, all the points raised by the petitioner in support of the claim for exemption have been duly noted in the impugned order and taken into consideration by the competent authority. After taking into account all the relevant criteria and the submissions made by the petitioner, the competent authority has taken a decision to grant exemption to the petitioner from payment of entertainment tax only to the extent of 50% of the tax amount as a special case. In coming to this decision it seems to us that there is no flaw, irregularity or irrationality in the decision of the competent authority justifying interference under Article 226 of the Constitution of India. The relevant part of the impugned order which has been extracted by us hereinabove bear out the reasons for not accepting the claim of the petitioner in full. The petitioner has been treated fairly and objectively and we, therefore, decline to interfere.

21. In respect of the other writ petitions relevant to the other Fashion events the position is like this. In respect of the W.P. (C) 1169/2010, it is against the assessment order passed by the AETO on 10.09.2009 bringing to tax the sponsorship amount collected by the petitioner in respect of the Van Heusen India Men's Week, a Fashion show to be held from 11th to 13th September, 2009. For the reasons stated by us in W.P. (C) 1145/2010 the assessment order is quashed with the same directions. For this Fashion show also the Government of NCT of Delhi has granted only 50% exemption from entertainment tax vide order dated 10.09.2009. For the reasons stated by us W.P. (C) 1145/2010 we refrain from interfering with this order.

22. In respect of the other writ petitions, no assessment orders have been passed by the AETO levying entertainment tax on sponsorship amounts collected by the petitioner. However, those writ petitions challenge the orders passed by the Government of NCT of Delhi rejecting the

application for exemption from entertainment tax. In line with our decision in W.P.(C) 1145/2010 on this point we uphold these orders and dismiss the writ petitions. We may however add that in case assessment orders are proposed to be passed, the AETO will have to afford adequate and reasonable opportunity of being heard to the petitioner. He should also examine the facts and the sponsorship agreements before passing orders, keeping in view our observations in paragraph 16 above.

23. In these writ petitions, interim directions were issued for deposit of tax as condition for issue of NOC for holding the events. The events were permitted to be held as the petitioners deposited the tax as directed by this Court. In the assessment orders to be passed under Section 15 of the Act, pursuant to the disposal of the writ petitions, the AETO may raise demands including interest, subject to appropriate/ suitable adjustments for tax already deposited, and subject to the petitioner being given reasonable opportunity of being heard.

24. In the result W.P.(C) 1145/2010 and 1169/2010 are allowed to the extent indicated above and all other writ petitions are dismissed. There shall be no order as to costs.

ILR (2012) III DELHI 785
MAC. APP.

SATRAM DASS & ANR. ….APPELLANTS

VERSUS

CHARANJIT SINGH & ORS. ….RESPONDENTS

(J.R. MIDHA, J.)

MAC. APP. NO. : 29/2005 DATE OF DECISION: 04.05.2012
CM NO. : 768/2005

Motor Vehicles Act, 1988—Section 133 and 168—Section 165—Indian Evidence Act, 1872—Claims

Tribunal dismissed claim petition holding that involvement of bus in question has not been proved by appellant—Reliance was placed on a letter written by Investigating Officer (IO) to Transport Authority in which he had mentioned two numbers—Order challenged before High Court—Plea taken, Claims Tribunal has not conducted any inquiry and has overlooked principles of preponderance of probabilities and instead applied principle of proof beyond reasonable doubt applicable to criminal cases—Per contra, plea taken that involvement of offending vehicle has not been sufficiently proved by appellants—Held—It has been time and again held that Claims Tribunal has to conduct inquiry which is different from a trial—It is duty of Claims Tribunal to ascertain truth to do complete justice—If Claims Tribunal had any doubt about involvement of bus in question, it ought to have examined IO and other eye witness instead of drawing adverse inference—Status report of SHO of PS concerned and evidence on record shows IO may be in doubt at initial stage but after recording evidence of two witnesses, there was no doubt about bus in question being involved in accident—Police filed chargesheet after satisfying that accident was caused by driver of bus in question—Appeal allowed—Compensation Granted.

From the testimony of the eye-witness, PW-2, the documents - Ex.PW1/4 to Ex.PW1/11 and the status report of the SHO, P.S. Shalimar Bagh, this Court is satisfied that the deceased Prem Kumar died in the road accident dated 17th November, 1997 by the rash and negligent driving of the bus bearing No.DEP-5933. The reasons for arriving at the above finding are as under:-

(i) On 17th November, 1997 at about 5:25 a.m., the PCR call was received whereupon DD No.39 was registered at P.S. Shalimar Bagh which was marked to S.I. Ram Kumar who along with Constable Kishan Lal

reached the spot and found the scooter No.DL-8SG-0145 in accidental position.

(ii) The police recorded the statement of two witnesses namely, Prem Pal Singh and Rohit Sharma who deposed that the deceased was hit by bus bearing No.DEP-5933 whereupon the Investigating Officer issued notice under Section 133 of the Motor Vehicles Act to Hans Raj, owner of the offending vehicle.

(iii) Notice under Section 133 of the Motor Vehicles Act was proved as Ex.PW1/5. The reply of the owner, Hans Raj is also recorded in Ex.PW1/5 in which he disclosed that the offending vehicle was driven by Charanjit Singh and he produced the offending vehicle as well as driver before the police.

(iv) The offending vehicle was sent for mechanical inspection by the police. The mechanical inspection report is proved as Ex.PW1/6.

(v) The Investigating Officer may be in doubt at the initial stage but after recording the evidence of the two witnesses, there was no doubt about the bus bearing No.DEP-5933 being involved in the accident and, therefore, the police filed the chargesheet after satisfying that the accident was caused by the driver of bus No.DEP-5933.

(vi) If the Claims Tribunal had any doubt about the involvement of bus bearing No.DEP-5933, the Claims Tribunal ought to have examined the Investigating Officer and the other eye-witness, namely, Prem Pal Singh under Section 165 of the Indian Evidence Act instead of drawing adverse inference. **(Para 12)**

Important Issue Involved: The Claims Tribunal has to conduct an inquiry which is different from a trial. It is the duty of the Claims Tribunal to ascertain the truth to do complete justice. If Claims Tribunal had any doubt about the involvement of vehicle in question, the Claims Tribunal ought to have examined the Investigating Officer under Section 165 of the Indian Evidence Act instead of drawing adverse inference.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANTS : Mr. S.K. Chachra, Advocate with Ms. Gaganpreet Chawla, Advocate.

FOR THE RESPONDENTS : Ms. Shantha Devi Raman, Advocate for R-3.

CASES REFERRED TO:

1. *Bhupathi Prameela* vs. *Superintendent of Police,* Vizianagaram, 2011 ACJ 861.
2. *Mayur Arora* vs. *Amit,* (2011) 1 TAC 878.
3. *Bimla Devi* vs. *Himachal Road Transport Corporation,* 2009 ACJ 1725.

RESULT: Appeal allowed.

J.R. MIDHA, J.

1. The appellants have challenged the award of the Claims Tribunal whereby their claim petition has been dismissed by the Claims Tribunal.

2. On 17th November, 1997 at about 05:30 A.M., the deceased, Prem Kumar is alleged to have left his house for bringing milk on his two wheeler scooter bearing No.DL-8SG-0145. When the deceased reached JP Market T-Junction at Pitampura, he has alleged to have been hit by bus No.DEP-5399. A PCR van reached the spot and took the deceased to Hindu Rao Hospital but he succumbed to the injuries on the way and was declared dead by the doctor on duty in the hospital. The deceased was survived by his parents who filed the claim petition against the

driver, owner and insurance company of the bus bearing No.DEP-5933.

3. The father of the deceased appeared in the witness box as PW-1 and deposed that the deceased was aged 20 years at the time of the accident. He proved the Senior Secondary certificate of the deceased as Ex.PW1/1. He further deposed that the deceased was having his own shop of general merchandise from which he was earning Rs.4,000/- per month. He tendered the certified copies of the chargesheet, notice under Section 133 of the Motor Vehicles Act, mechanical inspection report, site plan, letter written by the Investigating Officer to the transport authority, MLC, postmortem report and FIR which were marked as Ex.PW1/4 to Ex.PW1/11.

4. Mr. Rohit Sharma, eye-witness of the accident appeared in the witness box as PW-2 and deposed that he witnessed the accident on 17th November, 1997 at about 05:30 A.M. He deposed that bus bearing No.DEP-5933 hit the deceased who was riding his own scooter at JP Market T-Junction due to which the deceased was thrown of the scooter and suffered injuries all over his body. He further deposed that the bus was driven at a very high speed and the bus driver was negligent and the scooterist became unconscious due to the accident. A PCR van reached at the spot and took the scooterist to Hindu Rao Hospital. The scooterist died on the way. He further deposed that his statement was recorded by the police and he could identify the driver.

5. The Claims Tribunal held that the involvement of bus bearing No.DEP-5933 has not been proved by the appellant. The Claims Tribunal relied on a letter written by the Investigating Officer to the transport authority in which he has mentioned two numbers, namely, DBP-5955 and DEP-5933. The Claims Tribunal inferred from this document that the Investigating Officer was not sure about the vehicle number and, therefore, the Claims Tribunal held that bus bearing No.DEP-5933 was not involved in the accident.

6. The learned counsel for the appellants has urged at the time of hearing of this appeal that the findings of the Claims Tribunal are perverse and contrary to the evidence on record. It is further submitted that the Claims Tribunal has not conducted any inquiry as envisaged under Section 168 of the Motor Vehicles Act. It is further submitted that the Claims Tribunal has completely overlooked the principles of preponderance of

probabilities and it appears that the Claims Tribunal has applied the principle of proof beyond reasonable doubt applicable to criminal cases. The learned counsel refers to and relies upon the following judgments:-

(i) **Bimla Devi v. Himachal Road Transport Corporation,** 2009 ACJ 1725.

(ii) **Bhupathi Prameela v. Superintendent of Police, Vizianagaram,** 2011 ACJ 861.

7. The learned counsel for the appellants has further submitted that the deceased was aged 20 years at the time of the accident and was running a shop of general merchandise in the name of Prem General Store earning Rs.4,000/- per month and was survived by his parents aged 50 and 55 years respectively. The minimum wages for a matriculate at the relevant time was Rs.2,232/- per month. It is further submitted that the compensation be awarded to the appellants taking the income of the deceased to be Rs.4,000/- per month, deducting 50% towards personal expenses and applying the multiplier of 13 according to the age of the mother.

8. The learned counsel for respondent No.3 supports the finding of the Claims Tribunal that the offending vehicle No.DEP-5933 was not involved in the accident. It is further submitted that the involvement of offending vehicle has not been sufficiently proved by the appellants. It is further submitted that the Investigating Officer has himself issued notice to the Transport Authority to give the particulars with respect to vehicle Nos.DBP-5955 and DEP-5933.

9. It has been time and again held by this Court that the Claims Tribunal has to conduct an inquiry which is different from a trial. It is the duty of the Claims Tribunal to ascertain the truth to do complete justice. In **Mayur Arora v. Amit,** (2011) 1 TAC 878, this Court has held that the Claims Tribunal has to conduct an inquiry to find out the truth. The findings of this Court are reproduced hereunder:-

> "10.1. The inquiry contemplated under Section 168 of the Motor Vehicles Act, 1988 is different from a trial. The inquiry contemplated under Section 168 of the Motor Vehicles Act arises out of a complaint filed by a victim of the road accident or an AIR filed by the police under Section 158(6) of the Motor Vehicles Act which is treated as a claim petition under Section 166(4) of

the Motor Vehicles Act. These provisions are in the nature of social welfare legislation. Most of the victims of the road accident belong to the lowest strata of the society and, therefore, duty has been cast upon the police to report the accident to the Claims Tribunal and the Claims Tribunal is required by law to treat the Accident Information Report filed by Police as a claim petition. Upon receipt of report from the police or a claim petition from the victim, the Claims Tribunal has to ascertain the facts which are necessary for passing the award. To illustrate, in the case of death of a victim in a road accident, the Tribunal has to ascertain the factum of the accident; accident having being caused due to rash and negligent driving; age, occupation and income of the deceased; number of legal representatives and their age. If the claimants have not produced copies of the record of the criminal case before the Claims Tribunal, the Claims Tribunal is not absolved from the duty to ascertain the truth to do justice and the Claims Tribunal can summon the investigating officer along with the police record."

10. Vide order dated 14th January, 2010, this Court directed the SHO, P.S. Shalimar Bagh to conduct an inquiry and submit a report to this Court as to whether the deceased, Prem Kumar was hit by bus bearing No.DEP-5933 in the road accident dated 17th November, 1997. The relevant portion of the order dated 14th January, 2010 is reproduced hereunder:-

"1. The appellants have challenged the award of the learned Tribunal whereby their claim petition has been dismissed.

2. The accident dated 17th November, 1997 resulted in the death of Prem Kumar. The deceased was survived by his parents who filed the claim petition before the learned Tribunal.

3. The deceased was aged 20 years at the time of the accident and had gone to take milk from the milk booth at JP Market, T-Junction, Pitampura when he was hit by Bus No.DEP-5933 driven in rash and negligent manner.

4. The learned Tribunal dismissed the claim petition on the ground that it was doubtful whether the deceased has been killed by bus No.DEP-5933 or DBP-5955 or DBP-5933.

5. Section 168 of the Motor Vehicles Act provides that the Tribunal shall conduct an inquiry into the claim petition. Section 169 of the Motor Vehicles Act provides that the Tribunal shall follow such summary procedure as it deems fit to conduct such an inquiry. The inquiry stipulated in Section 168 of the Motor Vehicles Act is different from the civil trial. If the Tribunal had any doubt about the involvement of the bus No.DEP-5933, the Tribunal should have examined the Investigating Officer to ascertain the truth. However, no such attempt has been made by the Claims Tribunal.

6. Be that as it may, this Court in appellate jurisdiction would like to conduct an inquiry and for that purpose, the SHO, PS Shalimar Bagh, Delhi, is directed to conduct an inquiry and report to this Court as to whether the deceased Prem Kumar was hit by bus No.DEP-5933 in the road accident dated 17th November, 1997. The report be submitted before this Court within a period of four weeks."

11. In compliance of the order dated 14th January, 2010, SHO, P.S. Shalimar Bagh conducted an inquiry and submitted the report that the deceased was hit by bus No.DEP-5933 in the accident dated 17th November, 1997. The relevant portion of the report is reproduced hereunder:-

"Briefly stated that on 17-11-97 at 5.25 AM a PCR call regarding accident was received DD No-39 in PP Pitampura and the said DD was marked to SI Ram Kumar along with Claims Tribunal. Kishan lal No-1444/NW reached at the spot JP market where scooter No-DL-8SG-0145 was found in accidental position and it was came to notice that some unknown vehicle hit the said scooter and fled away from the spot. SI Ram Kumar asked Ct. Kishan lal at the spot to preserve the place of occurrence and reached Hindu Rao Hospital where on MLC no-16887/97 Prem Kumar S/O-Satram Ram Das R/O-MP-190A, Pitam Pura Delhi was found brought dead. No eye witness was found either in the Hindu Rao Hospital or on the spot and the FIR No-756/97, Dt-17.11.97, U/S-279/304A IPC was registered in P.S. Shalimar Bagh, Delhi on DD Entry.

During investigation on 17.11.1997 IO SI Ram Kumar had given request to Transport authority to provide address of owner of vehicle No-DBP-5933 and DBP-5955 and transport authority had given remarks that records of both above said vehicles is not available. It cannot be said on which ground the IO of the case SI Ram Singh sent a request to Transport Authority for details of above mentioned two vehicle as the police file of the case is traceable. The search for police file of the case has been done and in the concerned court, prosecution branch, record room of the police station and DCP office but the said case file could not be traced out.

On 21-11-97, IO SI Ram Kumar recorded the statement of eye witness Sh. Prem Pal S/O-Sh. Sobran Singh R/O-NP-14B, Pitam Pura Delhi. Sh. Prem Pal stated that he is TSR driver and on 17-11-97, he was present in JP Market then one bus white colour bearing No-DEP-5933 being driven in a rash and negligent manner recklessly came from double tanki side and hit the scooter and fled away from the spot. Sh. Prem Pal went behind the bus on his TSR towards britania chowk and noted down the number of the offending bus.

On 25-11-97 other eye witness Sh. Rohit Sharma stated that on 17-11-97 he was going for purchasing milk then one bus white colour bearing No-DEP-5933 being driven in a rash and negligent manner recklessly came from double tanki side and hit the scooter and fled away from the spot. One TSR driver went behind the bus. A PCR van also came at the spot and took away the injured Prem Kumar to the hospital. After that he went to Rajasthan for an emergency work and after coming to Delhi on 25.11.97 he went to Police Chowki and got his statement recorded identifying the driver of the offending vehicle Charanjeet Singh. The IO SI Ram Kumar gave notice U/S-133 M.V.Act to Sh. Hansraj, the owner of the offending vehicle.

The bus driver Charanjeet Singh S/O-Gajjan Singh R/O-H.No-491, Sardar Colony, Sector-16, Pocket-J, Rohini, Delhi was arrested in the said case on the identification of eye witness Rohit Sharma and the offending bus number DEP-5933 was also taken into police possession and the bus was got mechanically

inspected. After completion of investigation of the case the charge-sheet against the accused Charanjeet Singh was filed in the court for judicial verdict. During the trial of the case both the eye-witness Sh. Prem Pal and Sh. Rohit Sharma could not be examined as both the witnesses were reportedly not traceable."

12. From the testimony of the eye-witness, PW-2, the documents - Ex.PW1/4 to Ex.PW1/11 and the status report of the SHO, P.S. Shalimar Bagh, this Court is satisfied that the deceased Prem Kumar died in the road accident dated 17th November, 1997 by the rash and negligent driving of the bus bearing No.DEP-5933. The reasons for arriving at the above finding are as under:-

(i) On 17th November, 1997 at about 5:25 a.m., the PCR call was received whereupon DD No.39 was registered at P.S. Shalimar Bagh which was marked to S.I. Ram Kumar who along with Constable Kishan Lal reached the spot and found the scooter No.DL-8SG-0145 in accidental position.

(ii) The police recorded the statement of two witnesses namely, Prem Pal Singh and Rohit Sharma who deposed that the deceased was hit by bus bearing No.DEP-5933 whereupon the Investigating Officer issued notice under Section 133 of the Motor Vehicles Act to Hans Raj, owner of the offending vehicle.

(iii) Notice under Section 133 of the Motor Vehicles Act was proved as Ex.PW1/5. The reply of the owner, Hans Raj is also recorded in Ex.PW1/5 in which he disclosed that the offending vehicle was driven by Charanjit Singh and he produced the offending vehicle as well as driver before the police.

(iv) The offending vehicle was sent for mechanical inspection by the police. The mechanical inspection report is proved as Ex.PW1/6.

(v) The Investigating Officer may be in doubt at the initial stage but after recording the evidence of the two witnesses, there was no doubt about the bus bearing No.DEP-5933 being involved in the accident and, therefore, the police filed the chargesheet after satisfying that the accident was caused by the driver of bus No.DEP-5933.

(vi) If the Claims Tribunal had any doubt about the involvement of bus bearing No.DEP-5933, the Claims Tribunal ought to have examined the Investigating Officer and the other eye-witness, namely, Prem Pal Singh under Section 165 of the Indian Evidence Act instead of drawing adverse inference.

13. The deceased was aged 20 years at the time of the accident. The deceased was running a shop of general merchandise in the name of Prem General Store. The income of the deceased is taken to be Rs.3,000/- per month, 50% is deducted towards his personal expenses and the multiplier of 13 is applied according to the age of the mother to compute the loss of dependency at Rs.2,34,000/- [(Rs.3,000 - 50% of Rs.3,000) x 12 x13]. Rs.10,000 is awarded towards loss of love and affection, Rs.10,000/- towards loss of estate and Rs.6,000/- towards funeral expenses. The total compensation is computed to be Rs.2,60,000/- along with interest @9% per annum from the date of filing of the claim petition till realization.

14. The appeal is allowed and '2,60,000/- along with interest @9% per annum from the date of filing of the claim petition till realization is awarded to the claimants against the respondents. Respondent No.3 is directed to deposit the entire award amount along with up to date interest with with UCO Bank, Delhi High Court Branch by means of cheque drawn in the name of UCO Bank A/c Satram Dass within 30 days.

15. Upon the aforesaid amount being deposited, UCO Bank is directed to release 10% of the said amount to the appellants by transferring the same to their Saving Bank Account. Upon the aforesaid amount being deposited, the UCO Bank is directed to release 10% of the amount to the appellants by transferring the same to their Saving Bank Account. The remaining amount be kept in fixed deposit in the name of the appellants in the following manner:-

(i) Fixed deposit in respect of 10% for a period of one year.

(ii) Fixed deposit in respect of 10% for a period of two years.

(iii) Fixed deposit in respect of 10% for a period of three years.

(iv) Fixed deposit in respect of 10% for a period of four years.

(v) Fixed deposit in respect of 10% for a period of five years.

(vi) Fixed deposit in respect of 10% for a period of six years.

(vii) Fixed deposit in respect of 10% for a period of seven years.

(viii) Fixed deposit in respect of 10% for a period of eight years.

(ix) Fixed deposit in respect of 10% for a period of nine years.

16. The interest on the aforesaid fixed deposits shall be paid monthly by automatic credit of interest in the respective Savings Account of the beneficiaries.

17. Withdrawal from the aforesaid account shall be permitted to the beneficiary after due verification and the Bank shall issue photo Identity Card to the beneficiaries to facilitate identity.

18. No cheque book be issued to the beneficiaries without the permission of this Court.

19. The original fixed deposit receipts shall be retained by the Bank in the safe custody. However, the original Pass Book shall be given to the beneficiaries along with the photocopy of the FDRs. Upon the expiry of the period of each FDR, the Bank shall automatically credit the maturity amount in the Savings Account of the beneficiaries.

20. No loan, advance or withdrawal shall be allowed on the said fixed deposit receipts without the permission of this Court.

21. Half yearly statement of account be filed by the Bank in this Court.

22. On the request of the beneficiaries, Bank shall transfer the Savings Account to any other branch according to their convenience.

23. The beneficiaries shall furnish all the relevant documents for opening of the Saving Bank Account and Fixed Deposit Account to Mr. M.S. Rao, AGM, UCO Bank, Delhi High Court Branch, New Delhi (Mobile No. 09871129345).

24. The pending application is disposed of.

25. Copy of this judgment be sent to Mr. M.S. Rao, AGM, UCO Bank, Delhi High Court Branch, New Delhi (Mobile No.09871129345).

ILR (2012) III DELHI 797
FAO (OS)

MEDIA ASIA PRIVATE LIMITED ....APPELLANT

VERSUS

PRASAR BHARTI & ANR. ....RESPONDENTS

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

FAO (OS) NO. : 318/2008 DATE OF DECISION: 10.05.2012

Arbitration and Conciliation Act, 1996—Section 11 & 34—Parties entered into agreement whereby appellant was granted status of accredited advertising agent—Appellant failed to pay bills raised by Respondent from time to time—As against total bill amount raised by Respondent, appellant paid some amount leaving unpaid outstanding balance which was not paid despite repeated requests including legal notice—There was no response to legal notice, dispute thus, arose between parties and as agreement entered into between parties contained an Arbitration Clause, matter was referred to Arbitrator—Arbitration proceedings concluded and resulted in passing of award directing appellant to pay award amount with interest—Appellant filed objections against award which were dismissed by learned Single Judge—Aggrieved, appellant filed appeal to challenge impugned order—Appellant reiterated in his objection in appeal regarding plea of jurisdiction not taken before learned Arbitrator—It was urged that such plea could be raised for the first time while filing objections to Award—Held:- If plea of jurisdiction is not taken before Arbitrator as provided in Section 16 of said Act, such a plea cannot be permitted to be raised in proceedings under section 34 of Act for setting aside award, unless good reasons are shown.

A distinction has been carved out between a plea of validity of an arbitration agreement and the lack of jurisdiction of an Arbitrator in the absence of an arbitration clause, which is the relevant question even in the present appeal as it was never the plea of the appellant before the arbitrator of there being lack of jurisdiction on the ground of absence of an arbitration agreement nor, was such a plea urged before the learned single Judge, though it was contained in one of the grounds. The conduct of the appellant in filing counter claims qua subject matter of both the agreements itself shows that the parties understood that they would get their disputes qua both the agreements resolved through the mode of arbitration. There was, thus, consent of the parties to the adoption of arbitral process to adjudicate the disputes inter se the parties arising from the two agreements.

(Para 5.8)

Important Issue Involved: If plea of jurisdiction is not taken before Arbitrator as provided in Section 16 of said Act, such a plea cannot be permitted to be raised in proceedings under section 34 of Act for setting aside award, unless good reasons are shown.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Rahul Gupta, Mr. Pinnaky Addy, Mr. Shekhar Gupta and Mr. Pulkit Sachdeva, Advocates.

FOR THE RESPONDENTS : Mr. Rajeev Sharma and Mr. Sahil Bhalaik, Advocate.

CASES REFERRED TO:

1. *Municipal Corporation of Delhi* vs. *Natraj Construction Company* FAO (OS) 185/2011.
2. *Krishna Bhagya Jala Nigam Ltd.* vs. *G. Harischandra Reddy and Anr.,* (2007) 2 SCC 720.
3. *Gas Authority of India Ltd. and Anr.* vs. *Keti Construction (I) Ltd. and Ors.,* (2007) 5 SCC 38 in paragraph 19.
4. *Olympus Superstructures Pvt. Ltd.* vs. *Meena Vijay Khetan And Ors.,* (1999) 5 SCC 651.
5. *State of Maharashtra* vs. *Ramdas Shrinivas Nayak and Anr.*, (1982) 2 SCC 463.
6. *Per Lord Atkinson in Somasundaram Chetty* vs. *Subramanian Chetty,* AIR 1926 PC 136 : 99 IC 742.
7. *King-Emperor* vs. *Barendra Kumar Ghose* (28 Cal WN 170: AIR 1924 Cal 257: 38Cal LJ 411: 25 Crl. LJ 817).
8. *Sarat Chandra Maiti* vs. *Bibhabati Debi* (34 Cal LJ 302 : AIR 1921 Cal 584: 66 IC 433).
9. *Madhu Sudan Chowdhri* vs. *Chandrabati Chowdhrain,* AIR 1917 PC 30 : 42 IC 527.
10. *R* vs. *Mellor* [(1858) 7 Cox 454: 6 WR 322: 169 ER 1084].

RESULT: Appeal dismissed.

SANJAY KISHAN KAUL, J. (ORAL)

1. The respondent filed an application under section 11(6)(c) of the Arbitration and Conciliation Act, 1996 on the original side of this court which was registered as AA No.203/2000. The said application makes a reference to an agreement dated 13.01.1995 entered inter se the parties giving the appellant a status of accredited advertising agent w.e.f. 01.02.1995. It is also the say in the application that from January, 1995

to October, 1997, the appellants' programme 'Ek Se Bad Kar Ek' was telecast on the National network of DD-1. The appellant failed to pay the bills raised by the respondent form time to time. As against the total billing amount of Rs.12,37,15,132/-, the appellant paid only a sum of Rs.11,14,73,075/- leaving an outstanding balance of amount of Rs.1,22,42,057/-, which has not been paid despite repeated request, including a legal notice. There was no response to the legal notice.

2. Disputes having arisen between the parties, by virtue of the agreement dated 13.01.1995 containing an arbitration clause, the matter was required to be referred to arbitration. The arbitration clause reads as under :-

> .In the event of any question, dispute or difference arising under these presents or in connection therewith (except as to any matters the decision of which is specially provided for by these presents), the same shall be referred to the sole arbitration of an officer appointed to be the arbitrator by the Director, General, Doordarshan. It will be no objection that the arbitrator is a Government servant, that he has to deal with the matters to which these presents relate or that in the course of his duties as a Government servant, he has expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties to these presents.
>
> In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, it shall be lawful for the Director General, Doordarshan to appoint another arbitrator in place of the outgoing, arbitrator in the manner aforesaid.
>
> The arbitrator may, from time to time, with the consent of the parties to these presents enlarge time for making and publishing the award.
>
> Upon every and any such reference, the assessment of the costs of and incidental to the references and the award respectively shall be in the discretion of the arbitrator. Subject as aforesaid, the Arbitration Act, 1940 and the rules thereunder and any statutory modifications thereof for the time being in force shall be deemed

to apply to the arbitration proceedings under this clause..

2.1 In terms of the arbitration clause, the Director General, Doordarshan was the designated authority to appoint the arbitrator but that post was lying vacant since 1998, it compelled the respondent to file the application. The appellant was given numerous opportunities to file reply to the application on 28.09.2000, 17.11.2000, 29.11.2000, and the last opportunity on 30.01.2001 but, to no avail. Thus, on 23.04.2001, the learned Single Judge passed an order appointing Justice J.B. Goel (Retired) as the Sole Arbitrator to look into the disputes between the parties. 2.2 The Arbitrator thereafter commenced proceedings and a statement of claim was filed on behalf of the respondent. The appellant filed its defence statement-cum-counter claim and, the case was listed for admission / denial of documents on 30.04.2003. The appellant, however, did not complete the admission / denial of documents and the proceedings were adjourned to 30.05.2003. In the interregnum period, the appellant filed an application dated 06.05.2003 seeking to raise certain jurisdictional issues; which are enumerated in the application as under :-

'(1) Whether reference made in the case is barred by limitation?

(2) Whether Art. 299 of the Constitution of India is attracted to the case and if so, its effect?

(3) Whether there is any valid arbitration agreement between the parties and if so, its scope.'

2.3 In view of the aforesaid application, the pleadings were directed to be completed qua the application on 30.05.2003. However, on 23.08.2003, the learned Arbitrator opined that the application would be considered after the parties have led their evidence in the case.

2.4 The arbitration proceedings thereafter concluded and resulted in an award dated 03.05.2008. The awarded amount including pendente lite interest awarded is Rs.3,33,13,290/- alongwith cost totaling to Rs.3,37,10,000/- alongwith future interest at 18% p.a. on the principal amount.

2.5 The question raised as to lack of jurisdiction of the Tribunal has been dealt with in paragraph 31 of the award, which reads as under :-

.31. This plea raises a dispute about the lack of jurisdiction of

this Tribunal but was not taken in reply to Section 11 (6) (c) of the Arbitration Act. The order passed on that application is final under section 11 (7) thereof. Hence, this plea does not lie before this Tribunal. In any case, this plea ought to have been taken before or at the time of submission of the statement of defence and could not be taken later on. It is barred under section 16 (2) of the Arbitration Act, 1996. This plea is disallowed..

2.6 It is relevant to note that the aforesaid paragraph is prefaced by para 29, which reads as under :-

.29. In the written submissions dated 2.9.2004, various other new pleas have been taken on behalf of Respondent. These pleas are belated, afterthought, beyond pleading and are not tenable and liable to be disallowed at the outset..

2.7 The appellant thereafter filed objections under section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act), which came to be dismissed by the impugned order dated 30.05.2008.

2.8 The appeal was admitted on 29.07.2008, and on the interim application for stay, orders were passed on the same day directing the appellant to deposit the principal amount and 25% of the interest as awarded under the award within eight weeks. The respondent was permitted to withdraw the amount on furnishing an undertaking to this court to refund the amount with interest at 9% p.a. and / or on such terms as may be ordered by the court at the time of disposal of the appeal. It was observed that in case the amount is not deposited within the prescribed time, the stay will stand vacated. This order was assailed in SLP (C) 26007-08/2008 by the appellant but was dismissed on 10.11.2008. The admitted position is that this amount was not deposited. The respondent, however, did not take out execution proceedings, the reason for which are noted in the latter part of judgment.

3. We have heard learned counsels for parties and perused the record including the compilation of the record sought to be handed over to us for the first time today in court. As to what was urged before the learned Single Judge is set out in paragraph 3 of the impugned order, which reads as under :-

.3. The award has been challenged by the petitioner on the ground that the agreement dated 13th January, 2005 entered into between Doordarshan Commercial Services, the predecessor of claimant and the petitioner was a standardized adhesion contract and this agreement was subject to unilateral changes by the claimant. Clauses 3 and 6 of the agreement gave authority to Doordarshan Commercial Services to suspend or cancel agencies' accredition (respondent's accredition) without assigning any reason and also gave to the claimant a right to amend and alter the rules governing grant of accredition and therefore, these clauses were unconscionable. It is further submitted that clause 5 of the agreement was also inconsistent with the provisions of Sub-Section 3 of Section 12 of the Arbitration and Conciliation Act as it gave an authority to the claimant to appoint any of its officials as an Arbitrator (even if he was interested in the matter). It is submitted that Clause 5 was not a valid clause resulting into a no arbitration agreement between the parties and the award was therefore vitiated. It is also submitted that the Arbitrator should have held that it has no jurisdiction on the basis of Clause 5 of the agreement and hence the award was not tenable in the eyes of law..

3.1 The learned Single Judge thereafter proceeded to deal with these objections. We have consciously extracted the pleas urged before the learned Single Judge as recorded in paragraph 3, as the learned counsel for the appellant before us, seeks to urge aspects different from what was urged before the learned Single Judge, on the ground that, the objections filed under section 34 of the said Act incorporate the said pleas. We may note that the objections run from A to Z and AA to YY numbering more than 50. We thus put to learned counsel for the appellant that the learned Single Judge is hardly expected to go through more than 50 objections filed unless it is specifically urged in court. The aspects urged before the learned Single Judge have been recorded and have been dealt with. If the appellant was of the view that other aspects had been urged and had not been dealt with by the learned Single Judge then the remedy was to file a review application before the learned Single Judge inviting findings on those aspects so that the appellate court would have the benefit of the view of the learned Single Judge. Our aforesaid conclusion

is fortified by the judgment of the Supreme Court in **State of Maharashtra Vs. Ramdas Shrinivas Nayak and Anr.,** (1982) 2 SCC 463 which has been relied upon by us in a recent judgment in FAO (OS) 185/2011, **Municipal Corporation of Delhi VS. Natraj Construction Company** decided on 01.05.2012. We extract relevant part of paragraph 10 of the said judgment as under :-

> 10. We may usefully refer to the observation of the Supreme Court in **State of Maharashtra Vs. Ramdas Shrinivas Nayak and Anr.,** (1982) 2 SCC 463 **in this behalf while dealing with the issue of express concessions made in the High Court. It was sought to be portrayed in that case that the concession was wrongly recorded, being contrary to written submissions filed in the High Court. Despite this, the Supreme Court refused to accept such a plea. The Supreme court observed that it would not launch an enquiry into what transpired in the High Court. It was observed in paras 4 to 9 of the said judgment as under** :-
>
> "4. When we drew the attention of the learned Attorney-General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. .Judgments cannot be treated as mere counters in the game of litigation." (**Per Lord Atkinson in Somasundaram Chetty V. Subramanian Chetty,** AIR 1926 PC 136 : 99 IC 742). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word

on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. (Per Lord Buckmaster in **Madhu Sudan Chowdhri V. Chandrabati Chowdhrain,** AIR 1917 PC 30 : 42 IC 527). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. In **R v. Mellor** [(1858) 7 Cox 454: 6 WR 322: 169 ER 1084] Martin, B. was reported to have said:

.We must consider the statement of the learned Judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity..

6. In **King-Emperor v. Barendra Kumar Ghose** (28 Cal WN 170: AIR 1924 Cal 257: 38Cal LJ 411: 25 Crl. LJ 817). Page, J. said:

.... these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive : It is not to be criticized or circumvented; much less is it to be exposed to animadversion..

7. In **Sarat Chandra Maiti v. Bibhabati Debi** (34 Cal LJ 302

: AIR 1921 Cal 584: 66 IC 433). Sir Asutosh Mookerjee explained what had to be done:

.... It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment....

8. So the Judges' record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the Judge himself, but nowhere else.

(emphasis supplied)

4. We may notice that the plea of the learned counsel for the appellant before us is that there were two agreements inter se the parties - the first one dated 01.05.1994 and the second one dated 13.01.1995. The first agreement is stated to contains no arbitration clause while, the second one contains an arbitration clause. The first agreement is stated to be related to a particular serial .Ek Se Bad Kar Ek.. It has thus been contended that these were two separate agreements and the cause of action qua the amount due under the two agreements could not have been clubbed together. It has also been urged that a substantive part of the claims of the respondent related to the first agreement dated 01.11.1994 and that a specific plea qua this issue has been raised in ground W of the application under section 34 of the said Act.

4.1 We put a specific query to learned counsel for the appellant that since the appellant had itself filed the counter claim, whether the counter claim will relate to both the agreements or to only the subsequent agreement dated 13.01.1995 containing the arbitration clause. Learned counsel for the appellant fairly concedes that even the counter claims relate to both the agreements.

4.2 We are thus faced with the situation where the application filed by the respondent under section 11(6) of the said Act containing the averments remained unrebutted by the appellant despite various opportunities granted. Resultantly, as prayed by the respondent in the said application an arbitrator was appointed. Even before the arbitrator,

on the claim being filed by the respondent, the appellant neither in the response to the claim nor in the counter claim adverted to the objection pertaining to the absence of an arbitration agreement in respect of part of the claims (as noticed above even counter claims pertains to that agreement, i.e., agreement dated 01.11.1994). The application seeking to raise the jurisdictional issue was filed subsequently in the arbitration proceedings where also the question raised was about the 'valid arbitration agreement' between the parties and its scope. There is, to our mind, a subtle but clear distinction between the challenge to the validity of an arbitration agreement and the absence of the arbitration agreement. There is no averment made in the application whatsoever qua the issue of absence of an arbitration agreement in respect of part of the claims which purportedly arose from agreement dated 01.11.1994. This aspect was sought to be raised for the first time in the objections filed by the appellant under section 34 of the said Act. It appears that may have been precisely for the reason that the aspect of absence of arbitration agreement was never pressed before the learned Single Judge. Since it does not form a part of the pleas advanced on behalf of the appellant, before the learned Single Judge, it cannot be considered at this stage. If we may elaborate this aspect, what was sought to be advanced before the learned Single Judge was that clause 5 of the agreement dated 13.01.1995, was not a valid clause as it permitted the Director General of Doordarshan to appoint government servant as an arbitrator irrespective of his status or the fact that he may have dealt with matter before him in the past or expressed an opinion on the issue which required his view as an arbitrator. This clause was challenged as being contrary to section 12 of the Act. Therefore, according to the appellant award was vitiated as the arbitrator had failed to decide this issue. This, according to us, is a plea completely different from what is sought to be urged before us.

4.3 It is ground 'D' of the application under section 34 of the said Act, where this plea has been urged before the learned Single Judge i.e., the provisions of clause 5 of the agreement dated 13.01.1995 cannot be categorized as an arbitration clause as, under the said clause, the Director General, Doordarshan was given the power to appoint an officer including a government servant who has dealt with the matters relating to the disputes and / or in the course of duties as the government servant has expressed views on all or any of the matters in dispute or difference. 4.4

It is in this context that the learned Single Judge observed that, it was not a government servant who had been appointed as the Arbitrator in the present case but a retired Judge of this court who has been so appointed. The Arbitrator, as well as, the learned Single Judge had taken note of the provisions of the said Act to come to the conclusion that such a objection could not have been raised by the appellant and that to, at the stage at which it was sought to be raised. In this behalf, reliance has been placed on section 11(7) of the said Act. Section 11 deals with the appointment of the Arbitrators and sub section (7) provides that the decision of the Chief Justice or his nominee qua the appointment of an Arbitrator would be **.final.**.

4.5 Learned counsel for the appellant did seek to contend that as per the legal position prevalent at the relevant stage of time, the order of the Chief Justice had been held to be administrative in character and not judicial. This aspect, however, stands clarified by the judgment of the Supreme Court in **Gas Authority of India Ltd. and Anr. Vs. Keti Construction (I) Ltd. and Ors.,** (2007) 5 SCC 38 in paragraph 19, which reads as under :-

> 19. Respondent 1 did not at all appear before the arbitrator appointed by Appellant 1. Respondent 1 neither filed any statement of claim nor raised any plea of jurisdiction before the arbitrator. Section 16 of the Act says that the Arbitral Tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. In **Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd.** in para 21 a Constitution Bench of 5 learned Judges has ruled that if the Arbitral Tribunal has been improperly constituted, it would be open to the aggrieved party to require the Arbitral Tribunal to rule on its own jurisdiction in view of Section 16 of the Act. It was also observed that the expression used in sub-section (1) that the 'Arbitral Tribunal may rule on any objections with respect to the existence or validity of the arbitration agreement. shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, but goes to the very root of its jurisdiction and there is no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted. This decision has been partly overruled on another point by a larger

Bench of 7 learned Judges in **SBP & Co. v. Patel Engg. Ltd.** but the aforesaid view has not been dissented from or reversed. This will be evident from the conclusions arrived at by the larger Bench which have been summarised in para 47 of the Report and sub-para (ix) thereof reads as under: (SCC p. 664)

.(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act..

(emphasis supplied)

5. The other aspect emanating from the provisions of the said Act is the effect of sub sections (2) and (4) of section 16 of the said Act. The said sections read as under :-

"16. Competence of arbitral tribunal to rule on its jurisdiction - (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, -

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

xxxx

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.....

5.1 Sub-section (1) of section 16 makes a distinction between the existence and validity of an arbitration agreement and provides for the

Arbitral Tribunal to rule on its own jurisdiction. Sub-section (2) provides that a plea qua the lack of jurisdiction of the arbitral tribunal has to be raised not later than the submission of statement of defence. Sub-section(4), however, provides that such a plea may be admitted at a later stage if, the arbitral tribunal considers the delay justified.

5.2 It is not disputed that the appellant failed to take this plea in the statement of defence but on the other hand filed simultaneously a counter claim. Thus, the plea was not taken as per sub-section (2) of section 16 of the said Act. Learned counsel for the appellant, however, seeks to utilize the gateway provided by sub-section (4) of section 16 of the said Act and further contends that the Arbitrator has not given a finding on this aspect.

5.3 It appears that other than the manner in which the jurisdiction issue was sought to be raised in the application filed subsequently (which aspect we have dealt hereinabove), there was no such specific plea raised which is also apparent from paragraph 29 of the award stating that some aspects were sought to be raised only by filing written submission post oral submissions, which would not be permissible, but in any case had been dealt with. Even if we analyse this plea now, we find there can hardly be any excuse for the delay in taking such a plea. In fact in the application, there is no averment to show as to why the said plea was not taken earlier and, what is the reason for which it was being taken subsequently. The preliminary objections as taken by the appellant before the Arbitral Tribunal have been set out in paragraph 26 of the award.

5.4 Learned counsel for the appellant faced with the aforesaid position seeks to contend that such a plea can always be raised even for the first time under section 34 of the said Act and relies on the judgment of the Supreme court in **Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan And Ors.,** (1999) 5 SCC 651. We, however, find that the paras relied upon by learned counsel for the appellant itself show that this question has been left open and a finding has been arrived at assuming there is no such prohibition. The discussion on this aspect is contained in paragraphs 20 to 24 of the said judgment. It is noticed in paragraph 23 that the matter was being dealt with on the assumptions that the appellant was not precluded from raising any question at the stage of section 34 though these issues have not been raised before the Arbitrator

as per sub-sections (2) and (3) of section 16. In paragraph 24 it has been clearly stated that the Supreme Court was not deciding the question whether the appellant is precluded at the stage of section 34 from raising the question relating to the scope of reference.

5.5 On the other hand, the matter in issue has been squarely dealt in **Gas Authority of India Ltd. and Anr.** (supra) even on this aspect. The discussion and the conclusions are contained in paragraphs 21 to 25 which read as under :-

> 21. The Preamble to the Act makes it amply clear that Parliament has enacted the Arbitration and Conciliation Act, 1996 almost on the same lines as the Model Law, which was drafted by the United Nations Commission on International Trade Law. In **Sundaram Finance Ltd. v. NEPC India Ltd.** it has been observed that the provisions of the Arbitration and Conciliation Act, 1996 should be interpreted keeping in mind the Model Law as the concept under the present Act has undergone a complete change. It will, therefore, be useful to take note of the corresponding provisions of the UNCITRAL Model Law. Article 16 of the Model Law, which corresponds to Section 16 of the Act, is being reproduced below:
>
> UNCITRAL Model Law
>
> .16. **Competence to rule on own jurisdiction.** - (1) The Arbitral Tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For the purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Arbitral Tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> (2) A plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than in the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised promptly after the Arbitral Tribunal has

> indicated its intention to decide on the matter alleged to be beyond the scope of its authority. The Arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified. (3) The Arbitral Tribunal may rule on a plea referred to in clause (2) of this article either as a preliminary question or in an award on the merits. In either case, a ruling by the Arbitral Tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award..
>
> 22. The commentary on the three clauses of the Model Law has been given under Headings A, B, C and D. Note 1 under Heading A and Note 11 under Heading D, which are relevant for the controversy in hand, are being reproduced below: 'A' 'Kompetenz-kompetenz' and separability doctrine, clause (1). Note 1. Article 16 adopts the important principle that it is initially and primarily for the Arbitral Tribunal itself to determine whether it has jurisdiction, subject to ultimate court control (see below paras 12-14). Clause (1) grants the Arbitral Tribunal the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. This power, often referred to as 'kompetenz-kompetenz', is an essential and widely accepted feature of modern international arbitration but, at present is not yet recognised in all national laws.
>
> * * *
>
> D. Ruling by the Arbitral Tribunal and judicial control, clause (3) [Corr. to Sections 16(5), (6)].
>
> Note 11. Objections to the Arbitral Tribunal's jurisdiction go to the very foundation of the arbitration. Jurisdictional questions are, thus, antecedent to matters of substance and usually ruled upon first in a separate decision, in order to avoid possible waste of time and costs. However, in some cases, in particular, where the question of jurisdiction is intertwined with the substantive issue, it may be appropriate to combine the ruling on jurisdiction with partial or complete decision on the merits of the case. Article 16(3), therefore, grants the Arbitral Tribunal discretion to rule on a plea referred to in clause (2) either as a preliminary

question or in an award on the merits. 23. So, the commentary on the Model Law which was drafted by UNCITRAL and has been adopted by many countries including India, shows that where a party asserts that the Arbitral Tribunal has not been properly constituted or it has no jurisdiction, then such a plea must be raised before the Arbitral Tribunal right at the beginning and normally not later than in the statement of defence.

24. The whole object and scheme of the Act is to secure an expeditious resolution of disputes. Therefore, where a party raises a plea that the Arbitral Tribunal has not been properly constituted or has no jurisdiction, it must do so at the threshold before the Arbitral Tribunal so that remedial measures may be immediately taken and time and expense involved in hearing of the matter before the Arbitral Tribunal which may ultimately be found to be either not properly constituted or lacking in jurisdiction, in proceedings for setting aside the award, may be avoided. The commentary on Model Law clearly illustrates the aforesaid legal position.

25. Where a party has received notice and he does not raise a plea of lack of jurisdiction before the Arbitral Tribunal, he must make out a strong case why he did not do so if he chooses to move a petition for setting aside the award under Section 34(2)(a)(v) of the Act on the ground that the composition of the Arbitral Tribunal was not in accordance with the agreement of the parties. If plea of jurisdiction is not taken before the arbitrator as provided in Section 16 of the Act, such a plea cannot be permitted to be raised in proceedings under Section 34 of the Act for setting aside the award, unless good reasons are shown..

(emphasis supplied)

5.6 The conclusion is thus clear that if the plea of jurisdiction is not taken before the Arbitrator as provided in section 16 of the said Act, such a plea cannot be permitted to be raised in proceedings under section 34 of the said Act for setting aside the award, unless good reasons are shown.

5.7 A similar view has also been taken by the Supreme Court in

Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Anr., (2007) 2 SCC 720 in paragraph 9 reads as under :-

> .9. We do not find any merit in the above arguments. The plea of "no arbitration clause" was not raised in the written statement filed by Jala Nigam before the arbitrator. The said plea was not advanced before the civil court in Arbitration Case No. 1 of 2001. On the contrary, both the courts below on facts have found that Jala Nigam had consented to the arbitration of the disputes by the Chief Engineer. Jala Nigam had participated in the arbitration proceedings. It submitted itself to the authority of the arbitrator. It gave consent to the appointment of the Chief Engineer as an arbitrator. It filed its written statements to the additional claims made by the contractor. The Executive Engineer who appeared on behalf of Jala Nigam did not invoke Section 16 of the Arbitration Act. He did not challenge the competence of the Arbitral Tribunal. He did not call upon the Arbitral Tribunal to rule on its jurisdiction. On the contrary, it submitted to the jurisdiction of the Arbitral Tribunal. It also filed written arguments. It did not challenge the order of the High Court dated 10-9-1999 passed in CMP No. 26 of 1999. Suffice it to say that both the parties accepted that there was an arbitration agreement, they proceeded on that basis and, therefore, Jala Nigam cannot be now be allowed to contend that clause 29 of the contract did not constitute an arbitration agreement..

5.8 A distinction has been carved out between a plea of validity of an arbitration agreement and the lack of jurisdiction of an Arbitrator in the absence of an arbitration clause, which is the relevant question even in the present appeal as it was never the plea of the appellant before the arbitrator of there being lack of jurisdiction on the ground of absence of an arbitration agreement nor, was such a plea urged before the learned single Judge, though it was contained in one of the grounds. The conduct of the appellant in filing counter claims qua subject matter of both the agreements itself shows that the parties understood that they would get their disputes qua both the agreements resolved through the mode of arbitration. There was, thus, consent of the parties to the adoption of arbitral process to adjudicate the disputes inter se the parties arising from the two agreements.

5.9 We may note the submission of learned counsel for the respondent, which is relevant qua the issue of jurisdiction, that while the first agreement dated 1.11.1994 gave rights of telecast, it is through the second agreement that the credit facility was made available to the appellant qua advertising facility. In other words the second agreement provide credit facility even in respect of that which was subject matter of the first agreement dated 1.11.1994. It was submitted discounts in the second agreement were made available qua the first agreement. The agreements, thus, are intertwined and that is how, both the parties appear to have understood the agreements. Therefore, it is evident that they had no hesitation in subjecting themselves to the jurisdiction of the Arbitrator by filing the claims and counter claims qua both the agreements.

6. The only other aspect urged by learned counsel for the appellant is qua the purported failure on the part of the arbitrator to decide its counter claims. The learned arbitrator in paragraph 55 of the award has referred to the fact that the appellant had not sought the appointment of an arbitrator qua counter claims raised before him. In other words the disputes qua counter claims were not referred to him. The arbitrator, however, went on to say that in any case all the claims encapsulated in the counter claims were time barred and were thus disallowed. Learned counsel for the appellant contends that the counter claims could not have been dealt with in this manner and ought to have been specifically adjudicated. He further submits that though specific grounds were raised qua the non consideration of the counter claims before the learned single Judge, the same do not form a part of the adjudication before the learned single Judge.

6.1 To our minds, the position is, once again, the same, i.e., the aspect of counter claim was never urged as one of the pleas before the learned single Judge as is apparent from para 3 of the impugned order which records all the pleas which were urged by the appellant.

6.2 The aforesaid being the only pleas we find no merit in the appeal.

7. In the end we may note that as per the respondent execution proceedings were not taken out because the appellant is apparently a shell company having no assets. The appellant on the other hand has spent money to contest the respondent's claim before the arbitrator and proceeded

to suffer an award, the objections having been dismissed and yet failed to pay up the amount or deposit the amount in this Court as per interim orders passed by the Division Bench. The appellant's endeavour to get the interim orders of the Division Bench set aside though having failed before the Supreme Court, yet no amount has been deposited towards the satisfaction of the award. As to how the respondent would recover the amount is a moot point as it may at the end be only a paper decree.

8. The appeal is completely devoid of merits and is, accordingly, dismissed with costs of Rs.1 lakh.

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ADVOCATES ACT, 1961—Section 30, 52—Supreme Court Rules, 1966—Order IV Rules 2, 4, 6(b) challenged as ultra vires—Petitioner pleaded for prohibiting the creation of classification of advocates into AOR and non-AOR and restricting only AOR to file cases in the Supreme Court—Petitioner contended that the impugned classification has resulted into denial of right to practice under Sec.30, Advocates Act—Held, Sec. 30 has to be read harmoniously with Sec. 52 of the Act, which states that nothing in the Act shall be deemed to effect Art. 145 of the Constitution that lays down rule making power of the Supreme Court—Further held, the impugned rules are based on intelligible differentia with objective sought to be achieved.

Balraj Singh Malik v. *Supreme Court of India Through Its Registrar General* *538*

ARBITRATION AND CONCILIATION ACT, 1996—Section 9—Suit for declaration and perpetual injunction instituted by Plaintiff to restrain Defendant from pursuing the claim in the High Court of Justice, Queen's Bench Division, Commercial Court, London in relation to the issue and matter already finally determined by the Hon'ble Supreme Court of India—Union of India, the Plaintiff, as the owner of natural resources including petroleum in the territorial waters of India, entered into a Production Sharing Contract (PSC) on October 28, 1994 at New Delhi—PSC executed between the UOI on the one hand and a consortium of four companies—PSC contained a stipulation in Article 33.1 that the contract shall be governed and interpreted in accordance with the Laws of India subject to Article 34.12, which, inter alia, provided that the seat of arbitration shall be Kuala Lumpur and the Arbitration Agreement as contained in Article 34 shall be governed by the

Laws of England—In the year 2000, disputes arose pertaining to the correctness of certain cost recoveries and profit, which along with a few other disputes was referred to an Arbitral Tribunal—Arbitration case registered before the Tribunal at Kuala Lumpur, Malaysia—Malaysia hit by the outbreak of the epidemic SARS—Parties agreed to shift the seat of arbitration to London—Done, according to the plaintiff, without affecting the contractual and jurisdictional venue of Kuala Lumpur and without amendment of the arbitration agreement as contemplated in the PSC—Arbitral Tribunal passed a partial award dated 31.03.2005—Plaintiff on 10.05.2005 challenged this partial award before the Malaysian High Court at Kuala Lumpur—Defendant herein on 20.05.2006 questioned the jurisdiction of the Malaysian High Court on the ground that seat had shifted to London—Plaintiff requested the Arbitral Tribunal to hold its further sittings at Kuala Lumpur, the jurisdictional seat of arbitration—Opposed by the Defendant/ Videocon—Arbitral Tribunal decided that further sittings be held at London from 30th June, 2006 to 2nd July, 2006—Aggrieved, the Plaintiff on 30.05.2006 filed OMP No. 255 of 2006 under Section 9 of the Arbitration and Conciliation Act, 1996, in Delhi High Court seeking a declaration that the seat arbitration is Kuala Lumpur—Defendant raised objection to the maintainability of the petition on the ground of jurisdiction—Single Judge of this Court decided in favour of the Plaintiff, rejecting the objection of the Defendant and proceeded to fix dates for hearing on the merits of OMP No. 255 of 2006—Defendant filed a Special Leave Petition subsequently converted to a Civil Appeal—On 05.08.2009, while the Special Leave Petition before the Supreme Court of India was pending, the High Court of Malaysia dismissed the Plaintiffs challenge to the Partial Award on the Ground that the seat of arbitration had been shifted to London—The Plaintiff filed a Memorandum of Appeal—On 09.10.2009, the Defendant brought the decision of the Malaysian Court on the record of the Special

Leave Petition pending before the Supreme Court—On 13.10.2009, while the matter was pending before the Supreme Court, the Defendant filed a Claim petition before the High Court of Justice, Queens Bench Division, Commercial Court, London—Defendant did not disclose the above filing to the Supreme Court or to the Plaintiff—On 10th August, 2010, the Plaintiff moved the Supreme Court by filing IA No. 4/2010 in Civil Appeal No. 4269/2011 pleading, inter alia, that the Supreme Court was seized of the matter including the question as to whether the seat of arbitration continued to be at Kuala Lumpur or the same had shifted to London—Simultaneously, on 12th August, 2010, an application was filed by the Plaintiff before the London Court stating that the juridical seat was not London and the issue of juridical seat was being contested in the Supreme Court of India—In the light of these facts, it was prayed that the London Court did not have the jurisdiction to hear the claim of juridical seat—After considering the matter, the Supreme Court by a consent order of the same date, i.e. 06.09.2010 disposed of the said application by recording that subject to completion of pleadings in the proceedings pending in the Courts in England as well as in Malaysia, neither the petitioner nor the respondent will proceed/take any pro-active steps for hearing in the proceedings/applications pending in the Court in England as well as in the Court in Malaysia, till the disposal of the present SLP—On 11.05.2011, the Supreme Court delivered its judgment holding that mere change in the physical venue of hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration and negated the contention of the defendant that the seat of arbitration had shifted to London—Further held by the Supreme Court that in view of the specific exclusion of Part I of the Arbitration and Conciliation Act, 1996, the Delhi High Court did not have the jurisdiction to entertain OMP No. 255/2006 and the said petition was liable to be dismissed—Consequently, on 30.05.2011, OMP No. 255/2006 was

formally dismissed by the High Court in view of the judgment of the Supreme Court rendered on 11.05.2011—Plaintiff requested the Defendant to withdraw the proceedings before the Queens Bench Division, Commercial Court, London—London Court issued orders fixing the dates for hearing and prior thereto dates for evidence by way of witness statements and expert evidence to be filed by both the parties on the status and effect in Indian law of the judgment of the Supreme Court of India dated 11th May, 2011 and in particular whether the decision of the Supreme Court of India as to the seat of the First and third arbitrations are res judicata or are otherwise binding on the parties—Aggrieved, present suit has been preferred by the Plaintiff seeking declaration and perpetual injunction to restrain the Defendant from pursuing the aforesaid claim in London predicated on its stand that the matter had already been finally adjudicated upon by the judgment of the Supreme Court rendered on 11.05.2011—Plaintiff contended that attempt on part of defendant to re-litigate the issue of juridical seat of arbitration before English Court after having it settled/decided by the Supreme Court of India is in breach of PSC and barred by res judicata/issue estoppel—London Court which does not have jurisdiction to go into the issue of "juridical seat" cannot assume jurisdiction—Indian Courts have personal, subject matter and territorial jurisdiction—Thus determination on the seat issue, to decide applicability of Part I of the Act, was within competence of the Supreme Court—Plaintiff contend also defendant had suppressed material facts regarding Supreme Court proceedings, London proceedings and proceedings relating to the present suit—Defendant contended that to grant the said anti-suit injunction the court must be satisfied that defendant is amenable to the personal jurisdiction of the court; that ends of justice will be defeated and injustice will be perpetuated, if injunction is declined and the principle of comity must be borne in mind—Forum non-conveniens—

Court has to decide the jurisdiction of a court in regard to exclusive or non-exclusive jurisdiction invoked on the basis of jurisdiction clause is done on a true interpretation of the contract on the facts and circumstances of case—Court of natural Jurisdiction will not grant anti-suit injunction against a defendant where parties have agreed to submit to the exclusive jurisdiction of a Court, a forum of their choice for continuance of proceedings—Principle of Comity of Nations precludes grant of anti-suit injunctions barring the rarest of rare cases—Such Injunctions cannot be granted where a party has already challenged a foreign Courts jurisdiction until such party has failed in such challenge—Held:- A look at the judgment of the Supreme Court would suffice to show that the issue of seat of arbitration stood adjudicated by the judgment of the Supreme Court and the Supreme Court intended the said adjudication to be final and binding between the Parties said issue was addressed before the Supreme Court by both the parties and decided upon by the Supreme Court as the first question raised before it—Re-agitation of the question of seat of arbitration authoritatively pronounced upon by the Supreme Court would constitute abuse of the process of law and undoubtedly render the foreign proceedings vexatious and oppressive due to the attendant consequences—In PSC between the parties, the Indian Law has been given primacy and it has been specifically laid down in Article 33.2—Contract clearly lays down that contravention of the laws of India is wholly impermissible—Res judicata which encompasses within its fold the principle of issue estoppel is an intrinsic part of the laws of India and its public policy—Conversely, the underlying object behind the doctrine of res judicata and issue estoppel is the public policy of India—Due regard to the laws of India and its public policy must, therefore, be held to be of paramount importance an anti-suit injunction should be granted only if there is an impending risk of conflicting judgments and if the proceedings in the Court

of foreign jurisdiction would perpetuate injustice—While granting anti-suit injunction, it must tread cautiously having regard to all the facts and circumstances of the case, and be also mindful of the fact that an anti-suit injunction operates against the party concerned and not against the Court of foreign jurisdiction—Court cannot turn a blind eye to the vexation and oppression which would be caused to the plaintiff by compelling it to re-litigate on an issue upon which the Supreme Court has given its final and conclusive determination—To compel it to do so would constitute the worst imaginable case of abuse of the process of the Court, besides giving a complete go-by to the principle of res judicata and issue estoppel which govern the public policy of India—An injunction is granted as an ancillary to the main relief and flows out of a cause of action which has accrued to the plaintiff and even quia timet injunctions are granted by Courts on the plaintiff's establishing to the satisfaction of the Court that some threatened action by the defendant will constitute an actionable civil wrong, in contrast in an anti-suit injunction action the plaintiff does not have to establish either accrual of a cause of action or apprehension of an actionable wrong—An anti-suit injunction is unique in its conception and there is no denying that the equitable power to grant an anti-suit injunction in restraint of litigation in foreign soil exists only to serve equity and shut out unconscionability—The grant or non-grant of such an injunction wholly depends upon whether the assumption of jurisdiction by a foreign court in the facts and circumstances of a particular case, taken in their entirety and viewed holistically, would be oppressive or vexatious or an abuse of the process or would amount to the loss of juridical or other advantage, in the context of all other factors, to one or the other party or an injustice would be perpetuated thereby—Present case prima facie appears to this Court to be one which could justify the passing of such an injunction order—Prima facie the initiation of proceedings by the

defendant at London during the pendency of the Special Leave Petition before the Supreme Court of India was unconscionable, vexatious and oppressive and an abuse of the process of Law—It would be unduly harsh on the plaintiff to put the plaintiff through the inconvenience and uncertainty of litigating more than once on the same issue at a prohibitively high cost in a foreign land—The balance of convenience also tilts in favour of the plaintiff, as a necessary outcome of multiplicity of proceedings could be potentially conflicting decisions—Preservation of the integrity of the proceedings before the Hon'ble Supreme Court of India, Which culminated in the final judgment and order dated 11.05.2011, must necessarily be protected—Resultantly, an order of temporary injunction passed restraining the defendant from pursuing Claim No. 2009, Folio 1382 filed in the High Court of Justice, Queen's Bench Division, Commercial Court, London against the plaintiff—IA No. 21069/2011 is allowed accordingly.

Union of India v. *Videocon Industries Ltd.* *168*

— Section 11 & 34—Parties entered into agreement whereby appellant was granted status of accredited advertising agent—Appellant failed to pay bills raised by Respondent from time to time—As against total bill amount raised by Respondent, appellant paid some amount leaving unpaid outstanding balance which was not paid despite repeated requests including legal notice—There was no response to legal notice, dispute thus, arose between parties and as agreement entered into between parties contained an Arbitration Clause, matter was referred to Arbitrator—Arbitration proceedings concluded and resulted in passing of award directing appellant to pay award amount with interest—Appellant filed objections against award which were dismissed by learned Single Judge—Aggrieved, appellant filed appeal to challenge impugned order—Appellant reiterated in his objection in appeal regarding plea of jurisdiction not taken before learned Arbitrator—It was urged that such plea

could be raised for the first time while filing objections to Award—Held:- If plea of jurisdiction is not taken before Arbitrator as provided in Section 16 of said Act, such a plea cannot be permitted to be raised in proceedings under section 34 of Act for setting aside award, unless good reasons are shown.

Media Asia Private Limited v. *Prasar Bharti & Anr.* *797*

— Section 34—challenge of Award on the ground of bias—Award related to work of Four—Laning of Ongole—Chilakaluripet Section on NH5, Andhra Pradesh, rejecting the claimed of Petitioner by majority—Arbitral Tribunal comprised of three Members, Mr. Jagdish Panda (Presiding Arbitrator S.S Sodhi (Co-Arbitrator and a nominee of Petitioner) and Mr. L.R. Gupta (Nominee of NHAI)—Alleged that Mr. Jagdish Panda was engaged as a consultant by NHAI and in another project for package OR-VII and also that proceedings of the Dispute Resolution Board (DRB) held on 13.12.2004 relating to the said package were chaired by Sh. L.R. Gupta who had been representing NHAI before the Arbitral Tribunal and Sh. Panda who was the Presiding Arbitrator in these proceedings was appearing as a Consultant during the said DRB proceedings—Held, there was a conflict of interest in both Sh. L.R. Gupta and Sh. Jagdish Panda—It was incumbent on them to disclose at the outset the parties above facts and inquire if parties had any objection in continuing in the Arbitral Tribunal—Section 12 permits a party to challenge an Arbitrator when there are justifiable doubts as to his independence or impartiality which is premised on the mandatory requirement under Section 12(2) of the Act which requires an Arbitrator to mandatorily disclose any circumstance which may give rise to justifiable doubts as to his independence or impartiality—Since there was no such disclosure made as required under Section 12(2), Petitioner was deprived of an opportunity under Section 12 read with Section 13 to challenge

the appointment of either of them—Non disclosure of conflict of interest by them vitiates the majority Award.

IJM-Gayatri Joint venture v. *National Highways Authority of India.* *721*

CENTRAL EXCISE TARIFF ACT, 1985—Petitioner, manufacturer at Banglore of poultry equipment like poultry cages, welded wire mesh for poultry industry claimed exemption from payment of Excise duty under heading 84.36 of the Act—Assistant Collector of Central Excise, Banglore observed goods, manufactured by petitioners do not form part and do not go into making of machines of rearing and laying units or batteries and merited classification under heading 7314—While said issue was pending consideration, Trade Notice dated 19.11.1990 was issued clarifying, heading 84.36 covers only 'Poultry Keeping Machinery' but not equipment which does not have any mechanical functions—Said Trade Notification was challenged by petitioner urging, while Excise Authorities at Bangalore were treating goods of petitioner under heading 7314 of but Excise Authorities at Ahmedabad and Maharashtra were treating said goods as exempt under heading 84.36 of the Act—Petitioner was thus, being discriminated—Held:- Machinery includes all appliances and instruments whereby energy or force is transmitted and transformed from one point to another—Wire mesh manufactured by petitioner even if sold to a poultry farmer for assembling of cages for poultry or battery of such cages cannot qualify as machinery under heading 84.36 and would be an article of iron and steel wire within meaning of 7314.

Azra Poultry Equipments v. *Union of India & Others* *393*

CODE OF CIVIL PROCEDURE, 1908—Indian Contract Act, 1872**—**Section 182, 186, 187 and 188—Suit for recovery of Rs. 4,99,500/- with interest—Supply of 417 Golden Rocker

Sprayer and 100 knapsack sprayers—Respondent/plaintiff raised bill for Rs. 8,48,053/-—Appellant/defendant paid Rs. 4 lacs only leaving balance of Rs. 4,48,053/-—Letters written by respondent/plaintiff asking for payment—Payment not made—Suit filed—Appellant/defendant took the plea that 195 rocker sprayers and 45 knapsack sprayers taken back by the representative of respondent/plaintiff—Respondent/plaintiff denied the person who has taken back the sprayers to be its representative—Held—The representative was not the agent of respondent/plaintiff for receiving back the goods—Suit decreed—Aggrieved by the judgment appellant/defendant filed the regular first appeal—Held—The correspondence refers the representative as 'Sales Executive', 'our representative, he received payments—Working as commission agent, was an agent of the respondent/plaintiff—His authority was not specifically restricted in any manner—Had general authority as is clear from the course of dealing between the parties—Respondent/plaintiff is estopped from denying the existence of his actual authority—Goods taken back by him—Appeal allowed—Suit dismissed.

The Kerala Agro Industries Corporation Ltd. & Anr. v. *Beta Engineers* *1*

— Order 2 Rule 2—Transfer of Property Act, 1882—Section 53A—Indian Contract Act, 1882—Section 202—Limitation Act, 1963—Section 27—Suit for possession and mesne profits—Respondents/plaintiffs claim to be owner of property having got the same under a Will from their mother—Mother purchased the same through registered power of attorney, receipt, agreement to sell dated 17.04.1986 from Sh. Birender Kumar Jain—Sh. Birender Kumar Jain purchased the same vide registered Sale Deed dated 11.07.1966 from Smt. Raj Kumari Bhatnagar who purchased it from Delhi Housing Company vide registered sale deed dated 20.08.1959—Respondents/plaintiffs employed a chowkidar to look after the property—Committed

breach of trust and forged documents—Executed document, power of attorney etc. in favour of appellants/defendants and gave possession—Suit for injunction filed by the mother of respondent/plaintiffs against the appellants/defendants—During pendency of suit for injunctions, filed another suit for possession and mesne profits—Made statement through advocate not to dispossess the appellants/defendants without due process of law—Suit withdrawn with liberty to claim relief sought in the suit for possession and mesne profits already filed—Appellants/defendants pleaded themselves to be owners having purchased the same from Sh. Shafiq Raja vide agreement to sell, general power of attorney etc. dated 09.03.1994—Suit barred by Order 2 Rule 2 CPC—Held—Suit not barred by Order 2 Rule 2—Appellants/defendants have not proved the complete chain of title documents—Suit decreed—Aggrieved appellants/defendants filed the regular first appeal—Held—Earlier suit withdrawn with liberty to seek the relief claimed in that suit in the second Suit—Result in consolidation of two suits—The relief claimed in earlier suit got merged in the second Suit, not hit be Order 2 Rule 2—Appellants/defendants cannot be the owner unless the complete chain of title documents is proved—Complete chain of documents not proved—Respondents/plaintiffs have proved the complete chain of title documents—Appeal dismissed.

Vimla Gautam & Ors. v. *Mohini Jain & Anr.* *41*

— Order XXII Rule 10—Application for substitution in place of plaintiff filed by the petitioners, dismissed—Another application filed by three applicants—Contended that earlier purchasers sold their interest and right in the disputed property in their favour—Required to be impleaded in place of the plaintiff—This application dated 05.04.2004 had been dismissed on 13.12.2004 by the Civil Judge—First appellate Court reaffirmed the order of the trial Court and dismissed the application vide the impugned order dated 14.08.2006 holding

that the suit had abated on the death of the plaintiff and the present application not having been filed during the pendency of suit, is not maintainable. Held—Even the first applicants never impleaded in place of the plaintiff—Their application dated 24.04.1996 was filed but not pursued—Substitution of the second category of persons did not arise as they were admittedly claiming their rights only through first applicants who themselves had not been allowed to be substituted in place of the original plaintiff—Present petitioners had no right or interest in the suit property—They could in no manner be termed as 'necessary' or 'proper' parties—Provisions of Order XXII Rule 10 of the Code would apply only when the suit was pending—Present suit had been disposed of as having been abated on 27.01.2003 and as such the application filed by the present petitioners on 05.04.2004 which was admittedly much after the date of abatement; the question of applicability of order XXII Rule 10 of the Code did not apply—No application under Order XXII Rule 9 of the Code seeking setting aside of the abatement order dated 27.01.2003 was also ever filed—Present application filed under Order XXII Rule 10 (even presuming it to be an application under Order XXII Rule 9 of the Code) on 05.04.2004 is also much beyond the prescribed period of limitation—Impugned order suffers from no illegality, dismissed.

Suresh Kumar Agarwal & Ors. v. *Veer Bala Aggarwal* *424*

— Sec.89—Mediation—On 07.06.08 settlement arrived at before the mediator and terms of settlement signed by parties and their counsel and matter referred back to the referral court—On 11.08.08 both sides through their counsel appeared before the Court and the Court recorded a positive finding that the parties had settled their disputes—Till 29.08.08 there was no dispute as regards settlement—On 29.08.08 the court allowed petitioner's application for reconsideration of mediation

settlement and referred the parties back to mediation—But on 04.09.08, the Judge-In-Charge, Mediation Cell remanded the matter back to court for disposal on merits, observing that no useful purpose would be served by mediation efforts—Challenged—Held, there being no dispute about the settlement till 29.08.08, there was a mandate of law upon the Court to pass a settlement decree and Court could not have relegated the parties to regular trial.

Naresh Chand Jain & Anr. v. *KM Tayal* *133*

— Order XXXIX Rule 2 Arbitration and Conciliation Act, 1996—Section 9—Suit for declaration and perpetual injunction instituted by Plaintiff to restrain Defendant from pursuing the claim in the High Court of Justice, Queen's Bench Division, Commercial Court, London in relation to the issue and matter already finally determined by the Hon'ble Supreme Court of India—Union of India, the Plaintiff, as the owner of natural resources including petroleum in the territorial waters of India, entered into a Production Sharing Contract (PSC) on October 28, 1994 at New Delhi—PSC executed between the UOI on the one hand and a consortium of four companies—PSC contained a stipulation in Article 33.1 that the contract shall be governed and interpreted in accordance with the Laws of India subject to Article 34.12, which, inter alia, provided that the seat of arbitration shall be Kuala Lumpur and the Arbitration Agreement as contained in Article 34 shall be governed by the Laws of England—In the year 2000, disputes arose pertaining to the correctness of certain cost recoveries and profit, which along with a few other disputes was referred to an Arbitral Tribunal—Arbitration case registered before the Tribunal at Kuala Lumpur, Malaysia—Malaysia hit by the outbreak of the epidemic SARS—Parties agreed to shift the seat of arbitration to London—Done, according to the plaintiff, without affecting the contractual and jurisdictional venue of Kuala Lumpur and without amendment of the arbitration agreement as

contemplated in the PSC—Arbitral Tribunal passed a partial award dated 31.03.2005—Plaintiff on 10.05.2005 challenged this partial award before the Malaysian High Court at Kuala Lumpur—Defendant herein on 20.05.2006 questioned the jurisdiction of the Malaysian High Court on the ground that seat had shifted to London—Plaintiff requested the Arbitral Tribunal to hold its further sittings at Kuala Lumpur, the jurisdictional seat of arbitration—Opposed by the Defendant/Videocon—Arbitral Tribunal decided that further sittings be held at London from 30th June, 2006 to 2nd July, 2006—Aggrieved, the Plaintiff on 30.05.2006 filed OMP No. 255 of 2006 under Section 9 of the Arbitration and Conciliation Act, 1996, in Delhi High Court seeking a declaration that the seat arbitration is Kuala Lumpur—Defendant raised objection to the maintainability of the petition on the ground of jurisdiction—Single Judge of this Court decided in favour of the Plaintiff, rejecting the objection of the Defendant and proceeded to fix dates for hearing on the merits of OMP No. 255 of 2006—Defendant filed a Special Leave Petition subsequently converted to a Civil Appeal—On 05.08.2009, while the Special Leave Petition before the Supreme Court of India was pending, the High Court of Malaysia dismissed the Plaintiffs challenge to the Partial Award on the Ground that the seat of arbitration had been shifted to London—The Plaintiff filed a Memorandum of Appeal—On 09.10.2009, the Defendant brought the decision of the Malaysian Court on the record of the Special Leave Petition pending before the Supreme Court—On 13.10.2009, while the matter was pending before the Supreme Court, the Defendant filed a Claim petition before the High Court of Justice, Queens Bench Division, Commercial Court, London—Defendant did not disclose the above filing to the Supreme Court or to the Plaintiff—On 10th August, 2010, the Plaintiff moved the Supreme Court by filing IA No. 4/2010 in Civil Appeal No. 4269/2011 pleading, inter alia, that the Supreme Court was seized of the matter including the question

as to whether the seat of arbitration continued to be at Kuala Lumpur or the same had shifted to London—Simultaneously, on 12th August, 2010, an application was filed by the Plaintiff before the London Court stating that the juridical seat was not London and the issue of juridical seat was being contested in the Supreme Court of India—In the light of these facts, it was prayed that the London Court did not have the jurisdiction to hear the claim of juridical seat—After considering the matter, the Supreme Court by a consent order of the same date, i.e. 06.09.2010 disposed of the said application by recording that subject to completion of pleadings in the proceedings pending in the Courts in England as well as in Malaysia, neither the petitioner nor the respondent will proceed/take any pro-active steps for hearing in the proceedings/applications pending in the Court in England as well as in the Court in Malaysia, till the disposal of the present SLP—On 11.05.2011, the Supreme Court delivered its judgment holding that mere change in the physical venue of hearing from Kuala Lumpur to Amsterdam and London did not amount to change in the juridical seat of arbitration and negated the contention of the defendant that the seat of arbitration had shifted to London—Further held by the Supreme Court that in view of the specific exclusion of Part I of the Arbitration and Conciliation Act, 1996, the Delhi High Court did not have the jurisdiction to entertain OMP No. 255/2006 and the said petition was liable to be dismissed—Consequently, on 30.05.2011, OMP No. 255/2006 was formally dismissed by the High Court in view of the judgment of the Supreme Court rendered on 11.05.2011—Plaintiff requested the Defendant to withdraw the proceedings before the Queens Bench Division, Commercial Court, London—London Court issued orders fixing the dates for hearing and prior thereto dates for evidence by way of witness statements and expert evidence to be filed by both the parties on the status and effect in Indian law of the judgment of the Supreme Court of India dated 11th May, 2011 and in particular whether the

decision of the Supreme Court of India as to the seat of the First and third arbitrations are res judicata or are otherwise binding on the parties—Aggrieved, present suit has been preferred by the Plaintiff seeking declaration and perpetual injunction to restrain the Defendant from pursuing the aforesaid claim in London predicated on its stand that the matter had already been finally adjudicated upon by the judgment of the Supreme Court rendered on 11.05.2011—Plaintiff contended that attempt on part of defendant to re-litigate the issue of juridical seat of arbitration before English Court after having it settled/decided by the Supreme Court of India is in breach of PSC and barred by res judicata/issue estoppel—London Court which does not have jurisdiction to go into the issue of "juridical seat" cannot assume jurisdiction—Indian Courts have personal, subject matter and territorial jurisdiction—Thus determination on the seat issue, to decide applicability of Part I of the Act, was within competence of the Supreme Court—Plaintiff contend also defendant had suppressed material facts regarding Supreme Court proceedings, London proceedings and proceedings relating to the present suit—Defendant contended that to grant the said anti-suit injunction the court must be satisfied that defendant is amenable to the personal jurisdiction of the court; that ends of justice will be defeated and injustice will be perpetuated, if injunction is declined and the principle of comity must be borne in mind—Forum non-conveniens—Court has to decide the jurisdiction of a court in regard to exclusive or non-exclusive jurisdiction invoked on the basis of jurisdiction clause is done on a true interpretation of the contract on the facts and circumstances of case—Court of natural Jurisdiction will not grant anti-suit injunction against a defendant where parties have agreed to submit to the exclusive jurisdiction of a Court, a forum of their choice for continuance of proceedings—Principle of Comity of Nations precludes grant of anti-suit injunctions barring the rarest of

rare cases—Such Injunctions cannot be granted where a party has already challenged a foreign Courts jurisdiction until such party has failed in such challenge—Held:- A look at the judgment of the Supreme Court would suffice to show that the issue of seat of arbitration stood adjudicated by the judgment of the Supreme Court and the Supreme Court intended the said adjudication to be final and binding between the Parties said issue was addressed before the Supreme Court by both the parties and decided upon by the Supreme Court as the first question raised before it—Re-agitation of the question of seat of arbitration authoritatively pronounced upon by the Supreme Court would constitute abuse of the process of law and undoubtedly render the foreign proceedings vexatious and oppressive due to the attendant consequences—In PSC between the parties, the Indian Law has been given primacy and it has been specifically laid down in Article 33.2—Contract clearly lays down that contravention of the laws of India is wholly impermissible—Res judicata which encompasses within its fold the principle of issue estoppel is an intrinsic part of the laws of India and its public policy—Conversely, the underlying object behind the doctrine of res judicata and issue estoppel is the public policy of India—Due regard to the laws of India and its public policy must, therefore, be held to be of paramount importance an anti-suit injunction should be granted only if there is an impending risk of conflicting judgments and if the proceedings in the Court of foreign jurisdiction would perpetuate injustice—While granting anti-suit injunction, it must tread cautiously having regard to all the facts and circumstances of the case, and be also mindful of the fact that an anti-suit injunction operates against the party concerned and not against the Court of foreign jurisdiction—Court cannot turn a blind eye to the vexation and oppression which would be caused to the plaintiff by compelling it to re-litigate on an issue upon which the Supreme Court has given its final and conclusive

determination—To compel it to do so would constitute the worst imaginable case of abuse of the process of the Court, besides giving a complete go-by to the principle of res judicata and issue estoppel which govern the public policy of India—An injunction is granted as an ancillary to the main relief and flows out of a cause of action which has accrued to the plaintiff and even quia timet injunctions are granted by Courts on the plaintiff's establishing to the satisfaction of the Court that some threatened action by the defendant will constitute an actionable civil wrong, in contrast in an anti-suit injunction action the plaintiff does not have to establish either accrual of a cause of action or apprehension of an actionable wrong—An anti-suit injunction is unique in its conception and there is no denying that the equitable power to grant an anti-suit injunction in restraint of litigation in foreign soil exists only to serve equity and shut out unconscionability—The grant or non-grant of such an injunction wholly depends upon whether the assumption of jurisdiction by a foreign court in the facts and circumstances of a particular case, taken in their entirety and viewed holistically, would be oppressive or vexatious or an abuse of the process or would amount to the loss of juridical or other advantage, in the context of all other factors, to one or the other party or an injustice would be perpetuated thereby—Present case prima facie appears to this Court to be one which could justify the passing of such an injunction order—Prima facie the initiation of proceedings by the defendant at London during the pendency of the Special Leave Petition before the Supreme Court of India was unconscionable, vexatious and oppressive and an abuse of the process of Law—It would be unduly harsh on the plaintiff to put the plaintiff through the inconvenience and uncertainty of litigating more than once on the same issue at a prohibitively high cost in a foreign land—The balance of convenience also tilts in favour of the plaintiff, as a necessary outcome of multiplicity of proceedings could be potentially conflicting

decisions—Preservation of the integrity of the proceedings before the Hon'ble Supreme Court of India, Which culminated in the final judgment and order dated 11.05.2011, must necessarily be protected—Resultantly, an order of temporary injunction passed restraining the defendant from pursuing Claim No. 2009, Folio 1382 filed in the High Court of Justice, Queen's Bench Division, Commercial Court, London against the plaintiff—IA No. 21069/2011 is allowed accordingly.

Union of India v. *Videocon Industries Ltd.* *168*

— Suit relates to land, being subject matter of litigation in various suits for long—Plaintiff, a registered society, came into existence for conversion of erstwhile Hospital of Mental Diseases to a an institute to look after all aspects of mental health of citizens—A gazette notification was published in the official gazette on 30th December, 1993 issued by the Lieutenant Governor of Delhi transferring the management of the existing Hospital for Mental Diseases, Shahdara, Delhi from the Govt. of NCT of Delhi to the plaintiff.

Institute of Human Behaviour & Allied Sciences v. *Govt. of NCT of Delhi & Ors.* *247*

— Parties to the suit—Suit filed by Institute of Human Behaviour & Allied Sciences (IHBAS) against the Government of NCT of Delhi—Delhi Development Authority and Land & Development Department, Office of the Ministry of Works & Housing as defendant nos. 1, 2 and 3 respectively other defendants in respect of land being Khasra nos. 317/17 and 318/17 min admeasuring 16.98 acres in Village Tahrpur, which has been the subject matter of various litigation and claims by Het Ram (defendant no.4 herein); deceased Kewal Ram @ Kewal (represented by legal heirs defendant nos. 5 (i) to (iii); Ganga Sahai ad Inderraj. Complaint was made by the Medical Superintendent, Hospital for Mental Diseases, Shahdara against Sh. Het Ram, Sh. Kewal; Sh. Ganga Ram

Sahai and Sh. Inder Raj. Consequently notice dated 16th September, 1972 under section 4 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971—Estate Officer passed a detailed order of eviction dated 19th November, 1973 arriving at a conclusion that there was no valid lease in favour of the notices including Het Ram the defendant no. 4 as well as Kewal Ram; and therefore they had no right to occupy the disputed land and their possession was unauthorized. The order of eviction was jointly assailed by the four notices Het Ram; deceased Kewal; Inder Raj and Ganga Sahai by way of an appeal bearing PPA No. 88/1973 before the learned Add. District Judge. This appeal was rejected by a detailed judgment dated 28th March, 1974 passed by Justice G.R. Luthra, granting time up to 30th April, 1974 to the appellants to vacate the land and to deliver possession. Het Ram, Kewal, Inder Raj and Ganga Sahai carried a joint challenge against the order of the Estate Officer on the plea of tenancy and the judgment of the learned ADJ to Hon'ble High Court by way of Civil Writ No. 550/1972, which was dismissed. LPA was dismissed vide order dated 10th April, 1980. Petition under Order 21 Rule 32(5) of the CPC was filed by Shri Het Ram on 15th September, 1982 seeking execution of the aforesaid judgment. FAO. No. 391/2000: Order dated 16th February, 2004 was passed with the agreement of both parties that the trial Court should expedite disposal of the pending suit proceedings within a period of six months.

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Plaintiff prayed for interim orders against the defendants from causing any further wrongful interference in the peaceful possession of the suit property and also for restraining them from creating third party interest by sale, loss or damage, trespassing, demolishing, additions, alterations, construction

and eviction on the suit property. Also prayer made for restraining defendant nos. 1 to 3 from executing any deed or documents creating right, title or interest in the suit property in favour of defendant no. 4 and legal heirs of defendant no.5 or any other third party.

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Contention of the Plaintiff—That the favourable orders were procured by defendants 4 and 5 (i.e. Het Ram and Kewal Ram) by committing fraud on the Court and utilising the shield there of to occupy public land—Plaintiff also argued that it was not party to previous litigations initiated by the defendant no. 4 and 5, and was not bound by any adjudication therein. It was also contended that defendant 4 and 5 set up plea of tenancy in the initial cases against the government—Also the aforesaid defendants concealed this plea and judgments of Courts thereof—Re-agitated the matter again on plea of adverse possession—Present defendants despite the knowledge of the true owner of the property did not impead it—They set up false claim of cultivator possession.

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Contention of the Defendants—That the possession of the suit property was derived from forefathers of the defendants and hence acquired title by adverse possession—Also argued that any objection to the previous judgements were barred by limitation as plaintiff was not a statutory authority and window of 30 years vide Art. 65 of Limitation Act is inapplicable—Also the plaintiff had indulged in forum shopping by virtue of several remedies invoked by it.

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It is well settled that a judgment in a civil suit is inter partes and is not a judgment in rem. Given the claim of Het Ram and Kewal Ram against the defendants in Suit No. 293/1998, the claim of ownership by adverse possession can bind only the defendants in the said suit. The judgment dated 8th April, 1999 thus has to bind only the Union of India and the Land and Development Office who were the defendants in the suit (CS 298/1998). The judgment cannot bind IHBAS which was not a party to those proceedings. Het Ram-defendant nos. 4 also states this legal position in their written submissions dated 21st April, 2010 filed in the present case. The facts placed before this court also do not render it possible for this Court to hold these proceedings that Het Ram and Kewal Ram (or his successors) were in settled, exclusive, continuous, open and hostile possession of the suit land or any portion thereof or had ever asserted title of the property to support a finding that they had acquired title by adverse possession. Plaintiff has made out a prima facie case for grant of ad interim injuction. Balance of convenience is in favour of the plaintiff. Grave and irreparable loss and damage shall enure not only to the plaintiff but to the wider public at large which would be utilising the services available in the mental hospital which are certainly in short supply in the suit. Balance of convenience and interests of justice are also in favour of the plaintiff and against the defendants. Interim injunction granted. Since the land claimed by Het Ram in Suit No. 47/2000 is the subject matter of the present suit wherein Het Ram is also a party—The issues in the previous suits are directly and substantially in issue in the first suit. It also appears that the parties would be relying on the same evidence in support of their contentions in both the suits and relying on the case of *Chitivalasa Jute Mills vs. Jaypee Rewa Cement,* consolidated both the suits.

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complaint to Commissioner of Police—Inquiry conducted by Additional DCP who submitted vide report that Laxmi Devi had sold property through registered sale deed to Nishit and that there was inaction on the part of local police in not registering complaint of Nishit—Accordingly on statement of Nishit FIR u/s 448/506/34 IPC lodged—On 22.01.09, petitioners visited premises and gave possession of premises to Nishit—Writ Petition filed by Chand Rani for quashing of FIR dismissed—Civil Suit filed by Chand Rani against Nishit dismissed—Criminal Writ Petition filed by Chand Rani against Nishit dismissed—Not being satisfied, Chand Rani filed criminal complaint before MM against Nishit and his wife u/s 200 Cr.P.C. read with Section 190 Cr.P.C.—In this complaint MM passed impugned order u/s 156 (3) Cr.P.C. directing SHO to register a case—Held, complainant/Nishit prima facie bonafide purchaser of property—Chand Rani filed suit before ADJ which was dismissed and she has not been able to prove any right, title or interest in premises—All authorities, including Commissioner of Police endorsed vigilance report that it was because of inaction of local police that no action taken against tress passers Chand Rani, Bhim Singh and others—Since Nishit had been dispossessed from premises legally owned by him, by Chand Rani and others, the act of the petitioners (Om Prakash and others) in getting the same restored to them, could not be said to be exceeding their jurisdiction or powers, but in compliance of the order of Commissioner of Police—In complaint u/s 200 Cr.P.C. Chand Rani did not disclose about filing of Criminal Writ before High Court—In Court the litigant is expected to disclose all relevant facts against his plea—Courts of law depend on parties who put correct facts as there is no other means to ascertain true facts—There is an obligation on the complainant to disclose all correct facts since summoning of accused is based on evidence which has not been subjected to cross-examination—Intentional concealment of material

facts in given facts and circumstances would entail quashing of criminal complaint—No reason given by MM while directing registration of FIR—Also, not stated against whom and under what provisions of law FIR was to be registered—Complaint against police officer time barred u/s 140 Delhi Police Act—Allegations taken at the face value, do not constitute any offence against the petitioners—Impugned order set aside—Petition allowed.

Om Prakash & Ors. v. *State & Anr.* *21*

— Section 304—As per prosecution case, accused was habitual drunkard—On day of incident, accused harassing deceased who tried to pacify him—Accused was adamant and deceased slapped him after which accused strauqulated deceased—Incident witnessed by wife of deceased, PW5—Trial Court convicted accused u/s 302—Main contention of accused that he was denied benefit of legal counsel before trial Court—Held, accused initially provided legal aid by trial Court when accused produced from J/C—However subsequently his counsel was absent—Trial Court queried about whether accused wanted lawyer and he apparently refused—Thereafter trial Court proceeded to record testimony of prosecution witnesses and appointed Amicus Curiae subequently—Trial Court convicted accused u/s 302—Held, legal aid for poor resulted in poor legal aid—No material witnesses including IO cross-examined—Amicus only later moved application to recall PW5, however, even that not followed up—Absence of effective representation by accused resulted in denial of fair trial and infringed right of accused under Article 21 of the Constitution—Impugned conviction set aside—Matter remitted to trial court for conducting proceedings from stage when legal counsel of accused absented himself—Accused permitted to cross-examine all prosecution witnesses unless he expressly gave up right through an affidavit or appropriate application—In view of peculiar facts accused released on

bail—Trial Court requested to conclude trial expeditiously preferably within four months.

Sudhakar Tiwari v. *State* *34*

— Sections 397, 399 & 401—Audi Alteram Partem—Respondent filed revision petition against order of ACMM—Revision Petition disposed off without issuing notice to respondent or hearing him—Held ASJ while dealing with revision should have issued notice and heard petitioner. Impugned order set aside.

Chander Kant Pandit v. Dapinder Pal Singh *130*

— Section 482—Petition for quashing FIR for offence under Section 452/387/323/34 IPC on the grounds of compromise opposed by the State on the grounds that offences under Section 452 and 387 IPC are not compoundable—Held, till the decisions of the cited cases referred to the larger bench of the Supreme Court are altered or set aside, the said cited decisions operate as binding precedent and in view of statement of the complainant that he is no more interested to pursue the case, trial would be wasteful exercise by the trial Court, as such FIR liable to be quashed.

Irfan & Ors. v. *State & Anr.* *420*

— Section—366, 433 A—Petitioner convicted for offence punishable under Section 302 IPC and awarded death sentence by learned Additional Sessions Judge—High Court answered reference for confirmation of death sentence in negative and awarded life sentence to petitioner—Special Leave Petition filed by petitioner dismissed by Supreme Court—On 12.07.2000, Government of NCT brought out notification framing guidelines for premature release of convicts under section 433 A Cr. P.C. by Sentencing Reviewing Board (SRB)—Petitioner filed writ petition before Delhi High Court seeking reference of his name to SRB for grant of premature release—His petition was disposed of with direction to treat his writ as

representation and to be disposed of within a period of four weeks in terms of Sentence Reviewing Board Guidelines—Superintendent, Central Jail wrote letter submitting, petitioner not eligible for premature release as convicts whose death sentence was commuted to life imprisonment would be eligible for premature release after completing 20 years of imprisonment with remission—Petitioner had completed actual imprisonment of 14 years, 7 Months and 11 days but with remission his total imprisonment came to be 16 years, 9 months and 16 days, and thus, he was not considered eligible—On the other hand, it was urged on behalf of petitioner that he was not awarded death sentence, as learned Additional Sessions Judge had only pronounced death sentence which was subject to confirmation by the High Court—Since High Court did not confirm said sentence it could not be said that petitioner was awarded death sentence—Held:- A death sentence cannot be awarded by the Sessions Judge and the same is awarded only on confirmation in a reference by the High Court under Sections 366 Cr. P.C.—In absence of confirmation by High Court no death sentence was awarded on the Petitioner.

Sikander Mohd. Sahfi v. *State NCT of Delhi & Ors.* *159*

— Section 160-Petitioner challenged notice under Section 160 of Code issued to him by officials of National Investigating Agency (NIA)—Petitioner averred he was asked to join investigation without serving notice under Section 160 on 04.01.2011 by officials of NIA which amounted to his illegal restrain—On said date, he was handed over notice to join investigation on 05.01.2011—During investigation, he was threatened and coerced to extent that he attempted to commit suicide and was taken to hospital—Also, even by giving notice under Section 160 a person cannot be called at a place which does not fall within jurisdiction of police station where he

resided—Petitioner was stationed at Uttarkhand and in case officials of NIA wanted to interrogate him they could come to Uttarkhand whereas he was asked to join investigation in Delhi—Held—Officer of the NIA has jurisdiction to investigate and arrest any person relating to scheduled offences anywhere in India coupled with all the powers, duties, privileges and liabilities of a Police Officer—Provisions under NIA Act will override provisions of Code of Criminal Procedure, 1973.

Anant Brahmachari v. *UOI & Ors.* *682*

— Section 160-Petitioner challenged notice under Section 160 Cr. P.C. issued to him by officials of National Investigating Agency (NIA)—He also prayed for permission of two lawyers to accompany him at all time as and when he would be issued notice under Section 160 Cr. P.C. recording his statement—Held—When a person is not called for interrogation as an accused the Constitutional protections entitled to the accused will not be available to him—Petitioner has no right to be accompanied by a counsel when he is called to know facts relevant to investigation of offence.

Anant Brahmachari v. *UOI & Ors.* *682*

— Section 227—Quashing of proceedings u/s 7 and u/s 13 (1)(d) r/w Section 13 (2)—Petitioner arrested in trap case—Contention of petitioner that sanction was granted by authority which was not competent to grant the same—Direct sanctioning authority was Delhi Development Authority (DDA) and not Finance Member of DDA u/s. 19—Trial Court acquitted petitioner on ground that sanction order invalid, with liberty to CBI to take further legal action, if any, as deemed fit—After petitioner retired, CBI filed charge-sheet on same grounds without sanction—Petitioner filed application u/s 227 Cr.P.C. seeking dropping of proceedings on ground that fresh charge without sanction after retirement of petitioner bad in law—Trial Judge had not decided application, hence petition

for quashing summoning order and proceedings filed—Held, issue to be decided is whether petitioner having been acquitted earlier in same proceedings for want of sanction by competent authority, could be tried again without sanction since he had retired and whether the proceedings should be quashed in view of protracted trial (16 years) faced by Petitioner—Proceedings against petitioner terminated in earlier trial on account of sanction having been granted by incompetent authority—In present case, proceedings initiated without sanction, since petitioner had retired, no infirmity—No period of limitation can be prescribed in which trial of criminal case must be closed mandatorily—So protracted trial no ground for quashing petition—Petition dismissed.

Jiwan Ram Gupta v. *State Thr. CBI* *524*

— Cancellation of bail—Respondents No. 2&3 accused in FIR for offence under Sec.420/406/467/468/471/120B IPC—Respondents kept making false promises to pay the alleged outstanding amount to petitioner and kept obtaining conditional bail repeatedly and kept flouting the condition over a span of four years—Held—once bail is granted, court does not normally cancel the same unless situation warrants, but if any undertaking given by the accused before the court is flouted, concession of bail may be withdrawn, so it is fit case to cancel bail.

Manish Jain v. *State of NCT of Delhi & Ors.* *572*

— Section 319 and 190—Whether Magistrate has power to take cognizance against a person at the pre charge stage against whom incriminating material is on record though he has been cited as a witness by prosecution—In the charge sheet filed by the CBI the Petitioners, were cited as prosecution witnesses—Ld. M.M took cognizance on 28.11.2000 and issued summons to the accused persons—A supplementary charge sheet was filed on 19.03.2002—The case was listed

for hearing arguments on charge on 21.04.2006—On 21.04.2006 itself there was application filed on behalf of three accused to Summon petitioners as accused in the case on the ground that as per their own statement recorded under Section 161 Cr. P.C. their involvement was made out in the conspiracy for which they had been charge sheeted—It was pleaded on behalf of CBI that Petitioners had no role to pay and they were victims of the conspiracy—Ld. M.M. however passed the orders for summoning them—It was submitted on behalf of Petitioners that cognizance in this case had already been taken on 28.11.2000 and without any additional material, no cognizance could have been taken against them—It was further submitted that since the case had already been fixed for hearing arguments on charge Ld. M.M was empowered to take recourse to only Section 319 Cr. P.C only after some incriminating evidence had been adduced during inquiry/trial—It was also stated that the accused persons could not have dictated to the Court who should be arrayed as accused in the case and who should be summoned as witnesses—It was pointed out from the other side that the case was merely fixed for hearing arguments on the point of charge but no argument could be heard as by that time the Accused had already filed application for summoning petitioners as accused in this case—It was also submitted from the other side that the case was still at the stage of supplying the copies to Accused under Section 207 IPC as even on 12.03.2012 the case was still being fixed for supplying copies to Accused—Held, Magistrate takes cognizance of an offence and not the offender under Section 190 Cr. P.C.—At the time of issuing the process under Section 204 Cr. P.C, the Magistrate is to decide whether the process should be issued against the person (s) named in the charge sheet and also not mentioned in the charge sheet—Present case was still at the stage of supply of deficient copies under Section 207 Cr. P.C, Ld. Magistrate was within his powers to issue summons against Petitioners after taking note

of role of petitioners—The contention that Petitioners were victims of conspiracy and not accomplices could not be raised at the stage of summoning but it was possible to raise it at the stage of framing of charge.

Bimal Bharthwal v. *State through CBI & Ors.*..... *711*

COMPANIES ACT, 1956—Section 111 Suit for declaration and mandatory injunction-Redeemable preference shares issued to petitioner to be redeemed in 10 years' time—Notice floated by defendant for passing of resolution for issue of certain number of cumulative redeemable preference shares—On issue of which unredeemed redeemable shares issued to petitioner to be redeemed-petitioners pleaded that defendants wrongly considered their securities to exist—To declare right of petitioners for recovery of debt—Defendents pleaded that compromise has been struck—Petitioners had locus standi as they were no longer shareholders—Suit dismissed by Trial Court on lack of jurisdiction—Held—While jurisdiction of Civil Court under Section 9 of Code and that of the Company Law Board under Section 111 of Companies Act is concurrent, it is preferable that disputed questions of fact be decided by a Civil Court.

Satish Chandra Sanwalka & Ors. v. *Tinplate Dealers Association Pvt. Ltd. & Ors.*..... *705*

CONSTITUTION OF INDIA, 1950—Article 226—Petition for directions to respondent No.2/College to issue a migration certificate in her favour to enable her to migrate from respondent No. 2/College to Vivekanand College, Vivek Vihar, Delhi by getting admission in the B.Com (Pass) Course in the second year (Academic Session 2011-12)—Directions have also been sought to be issued to respondent No.1/ University to verify from all colleges affiliated to it as to whether migration certificates are being issued to students in a timely manner—Brief facts—Petitioner, a resident of

Ghaziabad U.P., completed her schooling in the year 2009-10 and thereafter in July 2010, applied to respondent No.2/College situated near Najafgarh, Delhi seeking admission in the B.Com (Pass) Course, which was duly granted to her—Petitioner continued her studies in the respondent No. 2/College and was declared as having passed the first year in July 2011—In the second session (i.e. the second academic year) of the aforesaid approached Vivekanand College, Delhi University with a request for grant of permission to migrate from respondent No.2/College to the said college—Upon receiving consent from the proposed transferee college, the petitioner submitted a representation dated 29.08.2011 to respondent No.1/University stating *inter alia* that though she had obtained a no objection from the Principal of Vivekanand College for her migration to the same course in the second year, respondent No.2/College had failed to issue a migration certificate to her—It is stated that, in the meantime, Vivekanand College issued a circular dated 21.09.2011, confirming the migration of the petitioner from respondent No.2/College to the course of B.Com. (Pass) in the second year—Despite the issuance of the said circular, as respondent No. 2/College refused to issued a migration certificate to the petitioner, she had to approach this Court by filing the present petition. Petitioner contended that respondent No.2/College has been arbitrarily withholding her migration certificate and it has adopted a pick and chose policy for issuing migration certificates—Held:- Division Bench in *Aman Ichhpuniani* has held that to migrate from one college to another is not a vested right—The welfare of the student and the institution have both to be kept in view and weighed—If there be conflict between the two—A student has a right to choose an educational Institution of his choice while seeking an admission, but such right cannot be exercised with the same vigour and vitality while seeking migration—Petitioner had been shifting her stand

from time to time with regard to the reasons given by her for seeking migration—Representation filed by the Petitioner reveals that while initially, the petitioner took a plea of "distance from college to home" as a ground for seeking migration from respondent No.2/College to Vivekanand College, Vivek Vihar, subsequently, she took the plea of financial hardship of her father as a ground for seeking migration—The Petition is accordingly dismissed.

Apurva v. *University of Delhi & Anr.* *67*

— Article 227—Writ Petition—Military Nursing Service Ordinance, 1949—Section 5 & 6—President of India Order dated 16.01.1968—The petitioner selected for probational nurses course in the year 1979—On completion of 3 years training, granted commission on 28.12.1982—Married on August, 1986 informed the authority—Allowed to continue service for two years—Released from service on the ground of marriage on 3.10.1988—Certificate issued to her showing her services to be satisfactory—Sought quashing of order of release and declaration of the rules/orders providing for release of woman commissioned officer of the military nursing service on the ground of their marriage as unconstitutional—Sought reinstatement in service without break and payment of arrears—Also contended discrimination as number of other military nursing officer who got married have been retained in the service—Respondent asserted that the petitioner was employed on contract basis for two years—Performance below average—Failed to satisfy the stipulated criteria—Her contract not renewed—Petitioner acquiesced to the terms and conditions—Estopped from challenging the validity—Petition liable to be dismissed on account of delay and latches—Court observed the hon'ble Supreme Court had upheld the constitutional validity of the Rule and Order—The Rule entails that as per clause III of the President's Order, the Military Nursing Service (Regular Officer) to be permitted to remain

in service even after the marriage at the discretion of Director General Arms Forces Medical Service for a period of two years at a time—To be reviewed periodically after every two years—The plea of delay and latches found to have merit—The petitioner was released from the service in the year 1988—She filed writ petition in Supreme Court in 1989 which was disposed of by order dated 1st April, 1997—She filed representation to be Authorities after unexplained delay of 10 months—There was further unexplained delay of 17 months in filing the writ petition—Writ petition dismissed.

— Article 226—Son of petitioner, aged about 10 years, died due to collapse of shade/chajja at a house situated in DESU Colony—Victim playing in the park, took shelter under the shed to protect himself from rain—House was constructed 10 years back—Poorly maintained by respondent—Deceased only son, studying in 5th—A meritorious student—Petitioner making efforts to make his son software engineer—Respondent owed the duty to maintain the structure so as to keep them from harming those who rightfully assumed that they would not collapse only on account of rain——Principle of strict liability claimed—Further contended—State failed to protect fundamental right of the petitioner's son to Life—Public law remedy available to them for compensation—Per-contra-not denied the occurrence—Registration of FIR—Not stated death occurred due to some other reasons—Contended—Present case involved disputed question of facts—Can only be settled by leading evidence—Proper remedy was to file civil suit and Writ not maintainable—Both respondents BSES Rajdhani Power Ltd. & Delhi Transco Ltd. sought to shift claim on each other for not maintaining flat—Held—Writ to claim compensation maintainable under Article 226—There can be no quarrel that flat should have been

maintained so that no part of it fell suddenly on its own only on account of rain—Falling of shade case of negligence—Principle of Strict Liability applied.

— Standard compensation awarded taking income of parents—Monthly salary of father was Rs. 10,000/- at the time of incident and at the time of filing of affidavit it was Rs. 30,000/- per month—Multiplicant of 90,000/- was taken; compensation of Rs. 15,26,000/- awarded with interest 9% per annum by applying multiplier of 15 in terms of Second Schedule of Motor Vehicle Act, 1988.

— Article 226—Writ Petition impugning the selection process, for short listing students for Elementary Teacher Education (ETE) Diploma course for the session 2010-12, as prescribed in the prospectus published by the respondent No. 2 State Council of Educational Research & Training (SCERT), particularly Clause 5 of Chapter-IV and Clause 6 of Chapter-XII—Petitioners axiomatically also seek quashing of the selection and direction for inclusion of their own names in the shortlist and admission to the course—Two petitioners claim to be belonging to OBC category and applied for admission in the said category for which 15% reservation was prescribed—The challenge is to the admission process predicated on the fact that they had 78% and 76% marks respectively in their Senior Secondary School Examination—Applicants with lower marks in the Senior Secondary School Examination were admitted to unreserved category—Petitioners admittedly filed up only one form claiming admission in the OBC category—They did not fill up a separate application form for admission in the unreserved category—Hence, were not considered for admission in the unreserved category—Students with lower marks than the petitioners were admitted in the OBC category, the last student

admitted had marks higher than the petitioners. Held—It thus, could not ex facie be said that action of respondent SCERT in requiring candidates to fill up separate forms for consideration in separate categories was bad—However, having observed so, Court still constrained to observe that law as enunciated under various dicta appear to sway in favour of candidate applying in reserved category not forfeiting his right for consideration in unreserved category—Better course for respondents to follow in future thus, appeared to be in not requiring separate applications to be filled up for reserved and unreserved category even if such procedure were to serve administrative convenience of respondents better—Reservation was benefit in addition to already existing right including Fundamental Right of equality—If any scheme of reservation or procedure evolved with view to give effect to such scheme was made to depend upon condition of truncating fundamental or any right of individual, such scheme of reservation would be contrary to constitutional provisions and law and to extent it curtails fundamental right or any other right of person belonging to such category would be liable to be declared illegal—Hence, petition allowed partly.

Jyoti Yadav & Anr. v. *GNCTD and Anr.* *499*

— Article 226—Writ Petition—Judicial Review—Bachelor of Ayurvedic Medicine and Surgery Course—Petitioner qualified Class 12 examination—Secured aggregate mark 59.67% in physics, chemistry and biology—Sat for Common Enterence Test for admission to BAMS Course on the basis of admission brochure circulated by the university—Eligibility criteria passed 12th class under 10+2 scheme in physics, chemistry and biology, English individually must have obtained minimum of 60% mark in aggregate in physics, chemistry and biology (50% in case of SC/ST candidate)—No rounding off percentage of the qualifying examination—Petitioner did not qualify in terms of eligibility—But the college had granted her provisional

admission subject to approval of competent authority—Deposited her fees—Respondent no.2/college requested University to consider the case of petitioner alongwith 19 other similarly placed students for a one time relaxation on the ground that there were existing vacancies of 20 seats in the session—Contended, despite the representation made by the college, University illegally turned down the request—Issued impugned refusal letter dated 05.12.2011—Also, ignored the recommendation in favour of filling of available seats—Respondent no.1/University opposed the petition being misconceived in view of the earlier law—Held—Provisional admission to an Institute does not in itself create a vested right in the petitioner to claim admission—Petitioner aware at the time of taking provisional admission that it was subject to approval of competent authority—Object of prescribing eligibility criteria is to ensure maintenance of excellence in standards of education and not to fill up all the seats—Reducing the standard to fill seats a dangerous trend which would lead to destruction of quality of education—It would also adversely effect those candidates who stay away because they did not meet the minimum eligibility standard laid down by the respondent and are not before the Court—It is also well settled that policy decision regarding the admission in affiliated institution lies in the domain of University in question—The decision making power of University cannot be interfered with under the judicial review unless the petitioner able to show some patent malafides on the part of the university or point out instances of discrimination or can make out a case that criteria laid down was so perverse that it cannot be sustained—Writ Petition Dismissed.

Pragya Chaudhary v. *Guru Gobind Singh Indraprastha University and Ors.* *509*

— Article 226—Delhi Co-Operative Societies Rules, 1973—Clause 25 (1) C (i)—Petitioner acquired membership of

respondent no.2 society on transfer from original membership of his brother—Transfer approved on 4.4.1976—Petitioner on wait list for a plot since then—In the year 2004, came to know respondent no.3 obtained allotment of plot fraudulently as he was disqualified as owning other property—Society did not pay heed to his representation—Made complaint to Registrar Co-Operative Society—Ownership of another property by respondent no.3 confirmed on enquiry—Registrar passed order—Case of respondent no.3 covered under the exemption of proviso to the Clause 25 (1) (c) (i) of Delhi Co-Operative Society Rules, 1973—As per proviso disqualification of a membership on account of ownership of other property at Delhi shall not be applicable in case of Co-sharer of other property where the share less than 66.72 sq. meters of land (80 sq. yards)—Revision petition against the order dismissed—Contended before the Court—Proviso did not apply to respondent no.3 as he was single owner of property measuring less than 66.72 sq. meter, not a co-sharer—Held—The expression 'co-sharer' is to include co-owner, non difficulty in extending the expression to individually owner of stand alone property measuring less than 67.72 sq. meter—Object of Rules appears to be to keep person outside the disqualification criteria as long as what they owned by way of share is really not of much significance—Further Held—Property purchased on Power of Attorney cannot dis-entitle for allotment—Writ Petition dismissed.

Kalu Ram Sharma v. *The Financial Commissioner and Ors.* *519*

— Article 226—Petition challenging order dated 11.02.2011 passed by Central Administrative Tribunal, Principal Bench, whereby OA of the petitioner was dismissed—On 28/29.01.2005 Yameen complained to Joint Commissioner of Police about dispossession from a plot and the complaints to the police yielded no results—Enquiry conducted by DCP—

Petitioner, in-charge of Police Post Burari and Inspector Bir Singh SHO Police Station Timar Pur were prima facie involved in facilitating the dispossession of the complainant—Two other police officials namely Head Constable Virender Singh and Head Constable Mahabir Singh were also found prima facie guilty—Departmental enquiry held—After enquiry, penalty of forfeiture of one year's approved service temporarily entailing proportionate reduction in pay for a period of one year awarded to the petitioner—Same penalty awarded to Head Constables—Inspector Bir Singh was let off after giving warning on the ground that he was going to retire from service next year—Petitioner challenged the order of punishment by O.A. which was dismissed—Petition—Challenging the order on the ground of discrimination alleged to have been given to him in the matter of award of punishment—Though the charges were identical, lesser punishment was awarded to Inspector Bir Singh—Held—Primarily it was for the petitioner, he being in-charge of Police Post Burari, to initiate appropriate legal action on the complaint of Shri Yameen—The role of SHO Police Station Timar Pur which was more of a supervisory role comes later and in fact there would have been no occasion for the complainant to approach the SHO, had the petitioner, being in-charge of the Police Post taken prompt action on receipt of complaint from him—Therefore, it cannot be said that the degree of delinquency on the part of the petitioner was the same as on the part of Inspector Bir Singh—In these circumstances, when the degree of delinquency on the part of the petitioner was higher as compared to Inspector Bir Singh, the Disciplinary Authority, was not unjustified in not giving same treatment to him, as was given to the petitioner, particularly when he was going to retire from service next year.

Sub Inspector Rajinder Khatri v. *Govt. of NCT of Delhi & Ors.* *553*

— Article 226—The private respondents are pump operators, malis and chowkidars, who were hitherto employed in Delhi Development Authority (DDA)-By an order dated 02.12.1994, certain colonies had been transferred from DDA to Municipal Corporation of Delhi (MCD)—As a result, the private respondents also stood transferred to MCD—The terms and conditions of their transfer included clause 6, which is as follows:- Every employee shall on and form the date of his transfer to the Corporation, shall become an employee of the Corporation with such designation as the Commissioner may determine and shall hold office by the same tenure, remuneration and on the same terms and conditions of service as he would have held, if he had continued to be in the DDA unless and until such tenure, remuneration and terms and conditions are duly altered by the Corporation. However, the same shall not be to his disadvantage without the previous sanction of the Corporation—The Private respondents claimed the ACP pay scale as was applicable in DDA whereas they had been given ACP scale as applicable with MCD—Respondents urged that clause 6 clearly saved their future benefits which they would have got had they continued in DDA—Petitioner contend that the benefits that were available to the respondents ought to be reckoned only on the date of the transfer and should not extend to future benefits—Held—However, on construing and considering the provisions of clause 6 of the terms and conditions of transfer, it is apparent that the private respondents were entitled to the same terms and conditions of service as they would have had if they had continued with the DDA unless and until such tenure, remuneration and terms and conditions were duly altered by MCD—Admittedly, there has been no such alteration of the terms and conditions of service—Consequently, the private respondents would be entitled to be treated as if they had continued with the DDA and, therefore, all the benefits that

would have been derived by them had they continued with the DDA, would be available to them.

Municipal Corporation of Delhi v. *Ram Avtar & Ors.* *562*

— Article 226 and 227—The Delhi Entertainment and Betting Tax Act, 1996—Section 2(a), (j), (m), (i), 3, 4, 7, 6(6)(1) & 45—Petitioner filed writ of certiorari challenging rejection of request of petitioner for 100% exemption from entertainment tax on fashion shows and assessment orders passed by Additional Entertainment Tax Officer (A.E.T.O.)—Plea taken, power to levy entertainment tax cannot be delegated by government to any other person or authority subordinate to it and therefore, assessment orders passed by AETO have to be struck down as being without authority of law—Sponsorship amounts collected by petitioner cannot be considered as "payment for admission"—Held—There is a well marked distinction between levy or charge of tax on one hand and assessment or quantification there of, on other—What AETO has done by passing assessment orders is only to quantify entertainment tax payable by petitioner—It is not disputed that power to pass assessment order and quantify entertainment tax can be delegated—Contention that order passed by AETO be struck down fails and is rejected—Second, unless terms and conditions of sponsorship agreement are examined it may not be possible to ascertain nature of payment and decide about applicability of relevant provisions of Act—AETO has not carried out this exercise and has rested his conclusion merely on statutory provisions without ascertaining basic facts or examining terms and Conditions of sponsorship agreement—Impugned orders passed by AETO have to be quashed—It is open to AETO to examine relevant facts including terms and conditions of sponsorship agreements and thereafter consider applicability of provisions of Act and decide whether petitioner is liable to pay entertainment tax or not by passing fresh orders of assessment

after hearing petitioner—So far as order granting 50% exemption to petitioner from entertainment tax is concerned, power vested in Government of NCT of Delhi to grant exemption is based on several criteria—Before passing 50% exemption from payment of entertainment tax as against claim of 100% exemption made by petitioner, a personal hearing was given to petitioner and there is no violation of rules of natural justice—All points raised by petitioner in support of claim for exemption have been duly noted in impugned order and taken into consideration by competent authority—Petitioner has been treated fairly and objectively and we therefore decline to interfere with the order of Government of NCT of Delhi granting only 50% exemption from entertainment tax.

Fashion Design Council of India v. *GNCT and Ors.* *768*

CONSUMER PROTECTION ACT, 1986—Section 2 (d)—District Consumer Forum dismissed as withdrawn petition of appellant/plaintiff because appellant/plaintiff was not found to be a Consumer under Consumer Protection Act, 1986—Suit filed by appellant/plaintiff for declaration, challenging electricity bill issued by respondent/ defendant—Trial Court rejected plaint holding that suit was barred by limitation—Trial Court refused to give benefit of period spent by appellant/plaintiff in pursuing proceedings for similarly relief in consumer forum, Delhi—Order challenged before High Court—Held—Impression with respect to definition of a person being or not being a consumer is a legal issue and if there is a particular opinion of a legal issue there can not be said to be any lack of bonafides for denying benefit of section 14 of Limitation Act, to appellant/plaintiff—Once a plaintiff pursues, in bonafide manner, a claim in wrong forum which did not have jurisdiction, such a plaintiff is entitled to benefit of exclusion of period under section 14 of Limitation Act, spent in wrong forum—Once this period is excluded, suit will be within

limitation—Appeal accepted—Impugned judgment set aside.

Anil Bhambri v. *North Delhi Power Ltd.* *567*

CONTEMPT OF COURTS ACT, 1971—Sec.19—Hon'ble Single Judge refused to issue notice and dismissed the Contempt Application—Appeal—Appellants contended that the Appeal is not under Sec. 19 but under the Letter Patent of High Court—Held, since under Sec.19, Contempt of Courts Act, appeal is maintainable against only an order of punishment and not order of dismissal of contempt application, and the Act does not provide for an intra Court appeal, Provisions of Letter Patent cannot be invoked to negate the statute to maintain such appeal—Further held, since an order refusing to exercise contempt jurisdiction does not determine any right, it is not a judgment, so not appealable under Letters Patent.

Dolly Kapoor & Anr. v. *Sher Singh Yadav & Ors.* *151*

DELHI CO-OPERATIVE SOCIETIES RULES, 1973—Clause 25 (1) C (i)—Petitioner acquired membership of respondent no.2 society on transfer from original membership of his brother—Transfer approved on 4.4.1976—Petitioner on wait list for a plot since then—In the year 2004, came to know respondent no.3 obtained allotment of plot fraudulently as he was disqualified as owning other property—Society did not pay heed to his representation—Made complaint to Registrar Co-Operative Society—Ownership of another property by respondent no.3 confirmed on enquiry—Registrar passed order—Case of respondent no.3 covered under the exemption of proviso to the Clause 25 (1) (c) (i) of Delhi Co-Operative Society Rules, 1973—As per proviso disqualification of a membership on account of ownership of other property at Delhi shall not be applicable in case of Co-sharer of other property where the share less than 66.72 sq. meters of land (80 sq. yards)—Revision petition against the order dismissed—

Contended before the Court—Proviso did not apply to respondent no.3 as he was single owner of property measuring less than 66.72 sq. meter, not a co-sharer—Held—The expression 'co-sharer' is to include co-owner, non difficulty in extending the expression to individually owner of stand alone property measuring less than 67.72 sq. meter—Object of Rules appears to be to keep person outside the disqualification criteria as long as what they owned by way of share is really not of much significance—Further Held—Property purchased on Power of Attorney cannot dis-entitle for allotment—Writ Petition dismissed.

Kalu Ram Sharma v. *The Financial Commissioner and Ors.* *519*

DELHI ENTERTAINMENT AND BETTING TAX ACT, 1996—Section 2(a), (j), (m), (i), 3, 4, 7, 6(6)(1) & 45—Petitioner filed writ of certiorari challenging rejection of request of petitioner for 100% exemption from entertainment tax on fashion shows and assessment orders passed by Additional Entertainment Tax Officer (A.E.T.O.)—Plea taken, power to levy entertainment tax cannot be delegated by government to any other person or authority subordinate to it and therefore, assessment orders passed by AETO have to be struck down as being without authority of law—Sponsorship amounts collected by petitioner cannot be considered as "payment for admission''—Held—There is a well marked distinction between levy or charge of tax on one hand and assessment or quantification there of, on other—What AETO has done by passing assessment orders is only to quantify entertainment tax payable by petitioner—It is not disputed that power to pass assessment order and quantify entertainment tax can be delegated—Contention that order passed by AETO be struck down fails and is rejected—Second, unless terms and conditions of sponsorship agreement are examined it may not be possible to ascertain nature of payment and decide about

applicability of relevant provisions of Act—AETO has not carried out this exercise and has rested his conclusion merely on statutory provisions without ascertaining basic facts or examining terms and Conditions of sponsorship agreement—Impugned orders passed by AETO have to be quashed—It is open to AETO to examine relevant facts including terms and conditions of sponsorship agreements and thereafter consider applicability of provisions of Act and decide whether petitioner is liable to pay entertainment tax or not by passing fresh orders of assessment after hearing petitioner—So far as order granting 50% exemption to petitioner from entertainment tax is concerned, power vested in Government of NCT of Delhi to grant exemption is based on several criteria—Before passing 50% exemption from payment of entertainment tax as against claim of 100% exemption made by petitioner, a personal hearing was given to petitioner and there is no violation of rules of natural justice—All points raised by petitioner in support of claim for exemption have been duly noted in impugned order and taken into consideration by competent authority—Petitioner has been treated fairly and objectively and we therefore decline to interfere with the order of Government of NCT of Delhi granting only 50% exemption from entertainment tax.

Fashion Design Council of India v. *GNCT and Ors.* *768*

DELHI MUNICIPAL CORPORATION ACT, 1957—Sec. 15 & 17—Election Petition—Respondent No.1 filed election petition challenging the election of appellant on the ground of corrupt practices including the appellant's act of appointing a permanent employee of MCD as polling agent—Trial Court on the basis of evidence dismissed the petition—Challenged by way of writ petition—Hon'ble Single Judge, by impugned judgment, reversed the findings of trial court and allowed the petition—Letters Patent Appeal—After analysis of evidence on record, findings of Hon'ble Single Judge set aside and petition

dismissed—Held, standard of proof required to establish a charge of corrupt practice alleged in an election petition is same as that of criminal charge; in election disputes it is unsafe to accept oral evidence on its face value unless backed by incontrovertible documentary evidence; and while exercising writ jurisdiction, as against appeal, unless some perversity could be shown, the judgment of trial court should not be disturbed.

Balbir Tyagi v. *A. Dhanwanti Chandela & Anr.* *113*

DELHI POLICE ACT, 1978—Section 140—Petitioners police officers—Nishit Aggarwal/complainant made complaint in police station that he was owner of premises purchased from Laxmi Devi and that Chand Rani, Siani Devi and Bhim Singh had been threatening him and had put lock over his lock—Complaint made by Chand Rani alleging execution of sale deed in favour of Nishit to be fraudulent and that she was owner—When no action taken on complaint of Nishit, he made complaint to Commissioner of Police—Inquiry conducted by Additional DCP who submitted vide report that Laxmi Devi had sold property through registered sale deed to Nishit and that there was inaction on the part of local police in not registering complaint of Nishit—Accordingly on statement of Nishit FIR u/s 448/506/34 IPC lodged—On 22.01.09, petitioners visited premises and gave possession of premises to Nishit—Writ Petition filed by Chand Rani for quashing of FIR dismissed—Civil Suit filed by Chand Rani against Nishit dismissed—Criminal Writ Petition filed by Chand Rani against Nishit dismissed—Not being satisfied, Chand Rani filed criminal complaint before MM against Nishit and his wife u/s 200 Cr.P.C. read with Section 190 Cr.P.C.—In this complaint MM passed impugned order u/s 156 (3) Cr.P.C. directing SHO to register a case—Held, complainant/Nishit prima facie bonafide purchaser of property—Chand Rani filed suit before ADJ which was dismissed and she has not been

able to prove any right, title or interest in premises—All authorities, including Commissioner of Police endorsed vigilance report that it was because of inaction of local police that no action taken against tress passers Chand Rani, Bhim Singh and others—Since Nishit had been dispossessed from premises legally owned by him, by Chand Rani and others, the act of the petitioners (Om Prakash and others) in getting the same restored to them, could not be said to be exceeding their jurisdiction or powers, but in compliance of the order of Commissioner of Police—In complaint u/s 200 Cr.P.C. Chand Rani did not disclose about filing of Criminal Writ before High Court—In Court the litigant is expected to disclose all relevant facts against his plea—Courts of law depend on parties who put correct facts as there is no other means to ascertain true facts—There is an obligation on the complainant to disclose all correct facts since summoning of accused is based on evidence which has not been subjected to cross-examination—Intentional concealment of material facts in given facts and circumstances would entail quashing of criminal complaint—No reason given by MM while directing registration of FIR—Also, not stated against whom and under what provisions of law FIR was to be registered—Complaint against police officer time barred u/s 140 Delhi Police Act—Allegations taken at the face value, do not constitute any offence against the petitioners—Impugned order set aside—Petition allowed.

Om prakash & Ors. v. *State & Anr.* *21*

DELHI RENT CONTROL ACT, 1955—Section 14 (1) (e) & 25 B—Summary Eviction Petition on the ground of bonafide requirement—Petition filed by the landlords (six in number) against the tenant contending they are the owners of the suit premises, a shop Chehlpuri, Kinari Bazar, Delhi; monthly rent is Rs. 45/-—Petitioners inherited this property from Sham Sher Singh who had executed a registered Will dated

07.08.1976 in favour of his wife and two sons—Premises required bonafide for commercial use—Petitioner aged 75 years and fully dependent upon her children i.e. petitioners No. 2 to 6; she is a house wife and has no source of income—Petitioner No. 2 (Rajender Kumar) is her elder son and is married; his son is also married. Petitioner No. 3 has two married daughters and one married son Sidharth who is presently unemployed; he has experience in business; he needs the aforenoted shop to carry on his business. Petitioner No. 3 is the widow of predeceased son; she has also got experience of boutique business as also of running a beauty parlour and she also requires the aforenoted suit premises to carry on commercial trade; petitioners No. 4 to 6 are the unmarried children of deceased Vijay Kumar; they are also not doing anything because of lack of space; they also require aforenoted shop. In fact, the requirement of the present petitioners is of at least six shops of which four are tenanted out to four persons; present eviction is qua one shop—Leave to defend filed contending Will of Sham Sher Singh does not disclose as to which property has been bequeathed to whom—No document of title of deceased or of Sham Sher Singh which would enable them to bequeath this property—Ownership denied on this count—Admitted petitioner No. 1 has been collecting rent from the respondent—Rent being paid to petitioner No. 1 under impression of the tenant that she was the owner/landlady but there is no such relationship between the parties as the petitioners are not the owners—Premises are not required petition filed malafide only to extract a higher rate of rent—Hence present second appeal. Held:-Petitioners claimed ownership of the suit premises by virtue of a registered Will—Tenants regularly paying rent to petitioner—While dealing with an eviction petition under Section 14 (1)(e) of the Act which is not a title suit, it is only a prima-facie title which has to be established by the owner—Registered Will of the deceased cannot be subject matter of

challenge in such an eviction proceedings—This objection is clearly without any merit—As to the bonafide requirement—Many people start new businesses even if they do not have experience in the new business, and sometimes they are successful in the new business also—Unless and until a triable issue arises, leave to defend should not be granted in a routine and mechanical manner—If this is allowed, the very purpose and import of the summary procedure as contained in Section 25 B of the Act shall be defeated and this was not the intention of the legislature—Impugned order thus decreeing the eviction petition of the landlord suffers from no infirmity. Petition is without any merit. Dismissed.

Anil Kumar Verma v. *Shiv Rani & Ors.* *404*

INDIAN CONTRACT ACT, 1872—Section 182, 186, 187 and 188—Suit for recovery of Rs. 4,99,500/- with interest—Supply of 417 Golden Rocker Sprayer and 100 knapsack sprayers—Respondent/plaintiff raised bill for Rs. 8,48,053/-—Appellant/defendant paid Rs. 4 lacs only leaving balance of Rs. 4,48,053/-—Letters written by respondent/plaintiff asking for payment—Payment not made—Suit filed—Appellant/defendant took the plea that 195 rocker sprayers and 45 knapsack sprayers taken back by the representative of respondent/plaintiff—Respondent/plaintiff denied the person who has taken back the sprayers to be its representative—Held—The representative was not the agent of respondent/plaintiff for receiving back the goods—Suit decreed—Aggrieved by the judgment appellant/defendant filed the regular first appeal—Held—The correspondence refers the representative as 'Sales Executive', 'our representative, he received payments—Working as commission agent, was an agent of the respondent/plaintiff—His authority was not specifically restricted in any manner—Had general authority as is clear from the course of dealing between the parties—Respondent/plaintiff is estopped from denying the existence

of his actual authority—Goods taken back by him—Appeal allowed—Suit dismissed.

The Kerala Agro Industries Corporation Ltd. & Anr. v. *Beta Engineers* *1*

— Section 202—Limitation Act, 1963—Section 27—Suit for possession and mesne profits—Respondents/plaintiffs claim to be owner of property having got the same under a Will from their mother—Mother purchased the same through registered power of attorney, receipt, agreement to sell dated 17.04.1986 from Sh. Birender Kumar Jain—Sh. Birender Kumar Jain purchased the same vide registered Sale Deed dated 11.07.1966 from Smt. Raj Kumari Bhatnagar who purchased it from Delhi Housing Company vide registered sale deed dated 20.08.1959—Respondents/plaintiffs employed a chowkidar to look after the property—Committed breach of trust and forged documents—Executed document, power of attorney etc. in favour of appellants/defendants and gave possession—Suit for injunction filed by the mother of respondent/plaintiffs against the appellants/defendants—During pendency of suit for injunctions, filed another suit for possession and mesne profits—Made statement through advocate not to dispossess the appellants/defendants without due process of law—Suit withdrawn with liberty to claim relief sought in the suit for possession and mesne profits already filed—Appellants/defendants pleaded themselves to be owners having purchased the same from Sh. Shafiq Raja vide agreement to sell, general power of attorney etc. dated 09.03.1994—Suit barred by Order 2 Rule 2 CPC—Held—Suit not barred by Order 2 Rule 2—Appellants/defendants have not proved the complete chain of title documents—Suit decreed—Aggrieved appellants/defendants filed the regular first appeal—Held—Earlier suit withdrawn with liberty to seek the relief claimed in that suit in the second Suit—Result in consolidation of two suits—The relief claimed in earlier suit got merged in

the second Suit, not hit be Order 2 Rule 2—Appellants/defendants cannot be the owner unless the complete chain of title documents is proved—Complete chain of documents not proved—Respondents/plaintiffs have proved the complete chain of title documents—Appeal dismissed.

Vimla Gautam & Ors. v. *Mohini Jain & Anr.* *41*

INDIAN EVIDENCE ACT, 1872—Claims Tribunal dismissed claim petition holding that involvement of bus in question has not been proved by appellant—Reliance was placed on a letter written by Investigating Officer (IO) to Transport Authority in which he had mentioned two numbers—Order challenged before High Court—Plea taken, Claims Tribunal has not conducted any inquiry and has overlooked principles of preponderance of probabilities and instead applied principle of proof beyond reasonable doubt applicable to criminal cases—Per contra, plea taken that involvement of offending vehicle has not been sufficiently proved by appellants—Held—It has been time and again held that Claims Tribunal has to conduct inquiry which is different from a trial—It is duty of Claims Tribunal to ascertain truth to do complete justice—If Claims Tribunal had any doubt about involvement of bus in question, it ought to have examined IO and other eye witness instead of drawing adverse inference—Status report of SHO of PS concerned and evidence on record shows IO may be in doubt at initial stage but after recording evidence of two witnesses, there was no doubt about bus in question being involved in accident—Police filed chargesheet after satisfying that accident was caused by driver of bus in question—Appeal allowed—Compensation Granted.

Satram Dass & Anr. v. *Charanjit Singh & Ors.*..... *785*

INDIAN PENAL CODE, 1860—Section 376—Petitioner was arrested under Section 376 IPC—He raised plea of being juvenile as per School Leaving Certificate and Birth Certificate

issued by MCD—His school records were got verified but his MCD certificate was not found available in MCD records—Thus, petitioner moved application under Section 7A of Act conducting ossification test to determine his juvenility—As per ossification test report his estimated age was between 19 to 20 years and on the basis of said report, learned trial Court held petitioner was not juvenile—Aggrieved by order, petitioner preferred revision urging learned Trial Court ought to have relied upon verified school certificate and should not have got conducted ossification test—Held:- Trial Court while holding age enquiry should summon and examine the Principal or the investigation officer who conducted the verification to ascertain the truth than from merely getting the school certificate verified from school—No enquiry regarding school certificate conducted by learned trial Court under Rule 12 of Rules.

Deepak Kumar v. *State* *413*

— Section 302—Criminal Procedure Code, 1973—Section 304—As per prosecution case, accused was habitual drunkard—On day of incident, accused harassing deceased who tried to pacify him—Accused was adamant and deceased slapped him after which accused strauqulated deceased—Incident witnessed by wife of deceased, PW5—Trial Court convicted accused u/s 302—Main contention of accused that he was denied benefit of legal counsel before trial Court—Held, accused initially provided legal aid by trial Court when accused produced from J/C—However subsequently his counsel was absent—Trial Court queried about whether accused wanted lawyer and he apparently refused—Thereafter trial Court proceeded to record testimony of prosecution witnesses and appointed Amicus Curiae subequently—Trial Court convicted accused u/s 302—Held, legal aid for poor resulted in poor legal aid—No material witnesses including IO cross-examined—Amicus only later moved application to recall

PW5, however, even that not followed up—Absence of effective representation by accused resulted in denial of fair trial and infringed right of accused under Article 21 of the Constitution—Impugned conviction set aside—Matter remitted to trial court for conducting proceedings from stage when legal counsel of accused absented himself—Accused permitted to cross-examine all prosecution witnesses unless he expressly gave up right through an affidavit or appropriate application—In view of peculiar facts accused released on bail—Trial Court requested to conclude trial expeditiously preferably within four months.

Sudhakar Tiwari v. *State* *34*

— Sections 279 and 304A—As per prosecution, petitioner driving DTC bus in rash and negligent manner so as to endanger human life and safety of others—While doing so, bus hit stationery tempo and crushed deceased in between both vehicles—MM convicted appellant u/s 279 and 304-A—ASJ upheld judgment of MM—PW3/12 eye-witness to incident—Held, no witness identified petitioner as person on whose negligence accident took place—Tempo with which bus stated to have collided had no marks or any fresh damage on body as per mechanical inspector—If bus collided with tempo and crushed deceased as alleged by prosecution, there would have been marks on the body of the tempo—Further nothing placed on record by prosecution to prove that vehicle driven in rash and negligent manner—Neither any passenger of bus nor owner of filling station where eye-witness was said to be standing, examined by prosecution—Chain of evidence connecting petitioner to alleged accident not complete—Only basis on which prosecution tried to implicate petitioner is because he was driving offending vehicle as per duty slip—Driving offending vehicle not denied by petitioner—However, same does not prove that accident took place due to his negligent or rash driving—Essential ingredients u/s 279 is that

there must be rash and negligent driving on public way and act must be so as to endanger human life or be likely to cause hurt or injury to any person—For offence u/s 304A, act of accused must be rash and negligent which should be responsible for death which does not amount to culpable homicide—Prosecution failed to prove how act of petitioner was rash or negligent to bring under purview of Sections 279/ 304A—Accused acquitted—Appeal allowed.

Ishwar Singh v. *State* *107*

— Sections 302, 307, 34—Appellant preferred appeal against his conviction under Section 302, 307, 34 IPC—Appellant urged that case of prosecution was unconvincing and no test identification parade was conducted—Therefore, his identity could not be established—On behalf of State it was urged appellant had earlier visited house of injured witness, month prior to occurrence who had ample opportunity to see and identify accused—Thus, failure of police to conduct TIP was not fatal—Held—As a general rule, the substantive evidence of a witness is statement made in court—Evidence of mere identification of accused person at trial for first time is from its very nature inherently of a weak character-Purpose of a prior test identification, therefore, is to test and strengthen trustworthiness of that evidence—It is accordingly considered a safe rule of prudence to generally look for corroboration of sworn testimony of witness in court as to identity of accused who are strangers to them, in form of earlier identification proceedings—In appropriate cases it may accept evidence of identification even without insisting on corroboration.

Jai Singh Rawat v. *State (NCT of Delhi)* *664*

— Section 302—Petitioner challenged his conviction under Section 302 averring recovery of articles relied upon by prosecution were planted and unbelievable and last seen evidence alleged by prosecution also failed—Percontra, learned

APP urged, failure to give any explanation as to why appellant absconded was sufficient to prove his guilt—Held:- If there are special circumstances which the accused is aware of, in respect of aspects or facts which tend to incriminate him, the onus of explaining those features or circumstances is upon him—Recovery of large amount of cash as well as valuables at behest of appellant are undeniably incriminating circumstances.

Virender Singh @ Podha @ Ticket v. *State (Govt. of NCT) of Delhi* *735*

— 1860—Section—448—Petitioner sought quashing of FIR under Section 448 IPC registered in Police Station Defence Colony, New Delhi, against her as well as setting aside of order passed by learned Additional Sessions Judge, New Delhi—Petitioner urged, she got married to Respondent no.2 in Delhi and after marriage, they lived together in Sri Lanka and Australia as husband and wife for 12 long years—Two sons were born from their wedlock—Their elder son was married and settled in London, while younger son was living in Delhi—In the year 1992, Respondent no.2 acquired licence to start his Company and couple came back to India and started living in Defence Colony, New Delhi—During this period, Respondent no.2 come in contact with another woman and fell in love with her which spoiled relationship between petitioner and Respondent no.2—As a well planned act, sometimes in July, 2009 Respondent no.2 left tenanted premises and abandoned petitioner and he in connivance with landlord got an ex-parte eviction order in petition filed against him as well as against petitioner—Accordingly, petitioner was forced to leave the shared household—Around July 2009, Respondent no.2 after abandoning petitioner, filed divorce petition—Petitioner was constrained to file complaint under Section 12 of Domestic Violence Act and she also sough various interim measures and interim relief—Subsequently

petitioner came to know that Respondent no.2 had taken another premises, on rent in Defence Colony—Accordingly, she entered into the said new premises being her matrimonial home with the help of Protection Officer who handed over keys of front door, bedroom door and balcony door to her—Thereafter petitioner moved another application in court of learned Metropolitan Magistrate seeking protection against her removal from said shared household—An interim order was passed in favour of petitioner which was subsequently vacated by the learned Metropolitan Magistrate holding that present premises was not shared house hold—Aggrieved petitioner, preferred appeal which was dismissed, thus she preferred a CRL M.C.—According to petitioner, she was entitled to reside in new tenanted premises in Defence Colony being "shared household" under Act—Held:- A shared household includes any household owned or tenanted by either of the parties in respect of which either the aggrieved person/wife or the respondent or both jointly or singly have any right, therefore, the petitioner being legally wedded wife has a right to live with the husband, whether he lives in an ancestral house or own acquired house or rented house.

Kavita Dass v. *NCT of Delhi & Anr.* *747*

INDIAN TRADE UNION ACT, 1926—Writ Petition under Article 226 of the Constitution of India for issue a Writ of Mandamus requiring the Respondent to recognize the registered trade unions in the Railways Production Units as Railway Trade Unions—Brief Facts—Respondent, a duly registered trade union of workers of Railway Coach Factory (RCF), Kapurthala—RCF workers are treated at par with the Railway Production Units (RPUs)—In respect of Zonal Railways, the Ministry of Railway (Central) has the policy for recognition of unions based on secret ballot, this system is not available in RPUs—As per Rules for the Recognition of Service Associations of Railway Servants the Government agreed to

accord official recognition to Associations of its Industrial employees, which includes the railway servant—In all Central Government Ministries and Departments including the Railways, Joint Consultative Machinery (JCM) has been set up in 1966—JCM provided that it would " supplement and not replace the facilities provided to employees to make only representations, or the associations of employees to make representation of matters concerning their respective constituent service grade etc"—In this JCM, the representatives of the recognized Unions participate on behalf of the employees in Zonal Officers—In RPUs, no system of recognition of trade unions—Only Staff Councils are allowed to represent the cause of the workers and trade unions are not permitted—Writ Petition filed—Ld. Single Judge allowed the Petition—Hence the LPA—Appellant contended that the system of Staff Council was introduced in 1954 and subsequently approved by the Cabinet, Govt. of India in the year 1967—Pursuant to the system, the appellant shows one post of Zonal Secretary belonging to each recognized association at the production units—Since its inception, the Staff Council has worked properly and efficiently—At no point of time has there been any allegation that on account of mechanism of Staff Council, genuine grievances of workmen employed in the production units have not been redressed to the entire satisfaction of the employees and in the public interest—Staff Council is comprised of members directly elected by workers themselves, to represent the grievances and interest through regular meetings with the local management at local level—Also, hold meeting with the Board once a year where policy as well as the issues of common concern for the employees are taken up, discussed threadbare and ways and means are devised to sort them out amicably and peacefully—Held:- No doubt, recognition of Union is not a right—It is the prerogative of the employer to recognize a Union or not—In the Trade Union Act also, no provision for

recognition—It is also well established law that when the Government introduced the system of recognition, it was well within the rights of the Government to impose conditions for recognition—Such conditions are not to be treated as unreasonable restriction within the meaning of Article 19(4) of the Constitution—The question, however, as rightly delineated by the learned Single Judge is that when the rules of recognition are provided for zonal railways, whether excluding the RPUs from the purview thereof would amount to discrimination and would be impermissible under Article 14 of the Constitution—In order to justify such an exclusion of RPUs, the Government is required to demonstrate that there is a reasonable classification between RPUs on the one hand and Zonal Railways on the other hand and this classification is based in intelligible differentia having nexus with the objective sought to be achieved—Appellant has not been able to provide any satisfactory answer for this classification which appears to be irrational and arbitrary—Claim of the appellant that Staff Councils have worked properly, efficiently, satisfactorily or in public interest and have addressed genuine grievance of the workers is refuted by the respondent union—It is pointed out that such Staff Councils which existed in Zonal Railways as well were abolished long ago but continue to remain in Railway Production Units—This is so even when it enjoys the same status as the Railway Workshops where Staff Council system has been abolished—No valid reason is forthcoming as to why such Staff Council are abolished in the Railway Zonal Office but continue to remain in RPUs—Respondent union as well as its IAIRF have consistently been protesting against the dissatisfactory and improper working of the Staff Council for decades and have raised such issues from time to time—Even the Staff Council at the RCF Kapurthala itself recorded "the apathetic and indifferent attitude adopted by the RCF Administration to solve the most genuine and legitimate demands of the employees"—RPUs are deprived of their

representation in JCM by the aforesaid mechanism—Not wise to keep them away from this consultative machinery while deciding their fate and representation to them will be conducive to a healthy atmosphere and in public interest—No merit in this appeal—Accordingly dismissed with costs quantified at Rs. 15,000/-.

Union of India v. *Rail Coach Factory Men's Union* ... *84*

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) RULES, 2007—Rule 12—Juvenile Justice (Case & Protection Act) 2000—Section 7—Indian Penal Code, 1860—Section 376—Petitioner was arrested under Section 376 IPC—He raised plea of being juvenile as per School Leaving Certificate and Birth Certificate issued by MCD—His school records were got verified but his MCD certificate was not found available in MCD records—Thus, petitioner moved application under Section 7A of Act conducting ossification test to determine his juvenility—As per ossification test report his estimated age was between 19 to 20 years and on the basis of said report, learned trial Court held petitioner was not juvenile—Aggrieved by order, petitioner preferred revision urging learned Trial Court ought to have relied upon verified school certificate and should not have got conducted ossification test—Held:- Trial Court while holding age enquiry should summon and examine the Principal or the investigation officer who conducted the verification to ascertain the truth than from merely getting the school certificate verified from school—No enquiry regarding school certificate conducted by learned trial Court under Rule 12 of Rules.

Deepak Kumar v. *State*..... *413*

LIMITATION ACT, 1963—Section 27—Suit for possession and mesne profits—Respondents/plaintiffs claim to be owner of property having got the same under a Will from their mother—Mother purchased the same through registered power of

attorney, receipt, agreement to sell dated 17.04.1986 from Sh. Birender Kumar Jain—Sh. Birender Kumar Jain purchased the same vide registered Sale Deed dated 11.07.1966 from Smt. Raj Kumari Bhatnagar who purchased it from Delhi Housing Company vide registered sale deed dated 20.08.1959—Respondents/plaintiffs employed a chowkidar to look after the property—Committed breach of trust and forged documents—Executed document, power of attorney etc. in favour of appellants/defendants and gave possession—Suit for injunction filed by the mother of respondent/plaintiffs against the appellants/defendants—During pendency of suit for injunctions, filed another suit for possession and mesne profits—Made statement through advocate not to dispossess the appellants/defendants without due process of law—Suit withdrawn with liberty to claim relief sought in the suit for possession and mesne profits already filed—Appellants/defendants pleaded themselves to be owners having purchased the same from Sh. Shafiq Raja vide agreement to sell, general power of attorney etc. dated 09.03.1994—Suit barred by Order 2 Rule 2 CPC—Held—Suit not barred by Order 2 Rule 2—Appellants/defendants have not proved the complete chain of title documents—Suit decreed—Aggrieved appellants/defendants filed the regular first appeal—Held—Earlier suit withdrawn with liberty to seek the relief claimed in that suit in the second Suit—Result in consolidation of two suits—The relief claimed in earlier suit got merged in the second Suit, not hit be Order 2 Rule 2—Appellants/defendants cannot be the owner unless the complete chain of title documents is proved—Complete chain of documents not proved—Respondents/plaintiffs have proved the complete chain of title documents—Appeal dismissed.

— Regular First Appeal (RFA) filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) against judgment of the Trial

Court dated 15.01.2010 dismissing the suit filed by the appellant/plaintiff/sister for declaration, possession and injunction with respect to the property of the deceased father—Held—The suit which was filed on 2.11.2006 seeking rights in the suit property for declaration and injunction was clearly barred by time inasmuch as form of the suit cannot conceal the real nature of the suit which was really a suit for partition and possession of the property which belonged to the father. A suit for possession of an immovable property is covered by Article 65 of the Limitation Act, 1963 as per which, the suit for recovery of an immovable property has to be filed within 12 years of the date the possession of the property becomes adverse to that of the appellant/plaintiff. In the present case, the suit was ex facie barred by limitation, and in fact need not even have gone for trial inasmuch as the appellant/plaintiff in the plaint itself admits that the respondent No.1/defendant No.1 immediately after the death of the father, Sh. Bhagwan Singh in the year 1987 proclaimed himself to be the owner of the suit property on the basis of a Will.

Imposition of costs—Relying on the case of *Ramrameshwari Devi and Others v. Nirmala Devi and Others* (2011) 8 SCC 249 wherein the Supreme Court has held that unless actual costs are imposed a dishonest litigant will take unnecessary benefit of the false litigation, cost of Rs. 25.000 was imposed on the Appellant.

— Section 14—Consumer Protection Act, 1986—Section 2 (d)—District Consumer Forum dismissed as withdrawn petition of appellant/plaintiff because appellant/plaintiff was not found to be a Consumer under Consumer Protection Act, 1986—Suit

filed by appellant/plaintiff for declaration, challenging electricity bill issued by respondent/ defendant—Trial Court rejected plaint holding that suit was barred by limitation—Trial Court refused to give benefit of period spent by appellant/plaintiff in pursuing proceedings for similarly relief in consumer forum, Delhi—Order challenged before High Court—Held—Impression with respect to definition of a person being or not being a consumer is a legal issue and if there is a particular opinion of a legal issue there can not be said to be any lack of bonafides for denying benefit of section 14 of Limitation Act, to appellant/plaintiff—Once a plaintiff pursues, in bonafide manner, a claim in wrong forum which did not have jurisdiction, such a plaintiff is entitled to benefit of exclusion of period under section 14 of Limitation Act, spent in wrong forum—Once this period is excluded, suit will be within limitation—Appeal accepted—Impugned judgment set aside.

Anil Bhambri v. *North Delhi Power Ltd.* *567*

— Claims Tribunal awarded compensation to parents of deceased, aged 27 years who was working as Management Trainee—Order challenged by appellant before High Court—Respondents filed cross objections seeking enhancement of award amount—Respondents permitted to lead additional evidence of General Manager of employer and batch mate of deceased—Plea taken by appellant, deceased was contributorily negligent to extent of 50% and compensation is liable to be reduced on that account and future prospects be reduced—Per contra plea taken by respondents that multiplier be enhanced from 11 to 17, compensation for loss of love and affection and loss of estate be granted and income of deceased be taken as Rs. 1 lakh per month—Held—Although offending truck was parked on wrong side, accident would not have occurred if deceased had exercised due care and caution—Deceased was contributorily negligent to extent of 25% and compensation is liable to be reduced to extent of

25%—Since deceased was unmarried, multiplier has to be according to age parents—Claims Tribunal has applied correct multiplier of 11 and it does not warrant any enhancement—In cases of death of professionals, earning capacity of professional has to be taken into consideration depending upon professional degrees held by him—Deceased had future prospects of becoming a General Manager—It would be appropriate to take income of deceased as Rs. 35,000/- per month on basis of his earning capacity and professional degrees held by him—Appeal and cross objections partially allowed—Awarded amount enhanced.

N.D.M.C. & Ors. v. *I.C. Malhotra & Anr.* *759*

— Right of Children to Free and Compulsory Education Act, 2009 (RTE Act)—Section 35 and 38 of RTE Act & Sub-Rule 3 of Rule 10 of Delhi RTE Rules—W.P.(C) No.636/2012 preferred on behalf of approximately 326 private unaided recognized schools functioning in Delhi impugning the Notification No.F.15(172)/DE/ACT/2011/7290-7304 dated 27.01.2012 issued by the Lieutenant Governor of Delhi in exercise of powers conferred under Section 35 and 38 of the RTE Act read with Sub-Rule 3 of Rule 10 of Delhi RTE Rules—In W.P.(C) 40/2012 impugned order passed by Director of Education which mandated extending limits of neighbourhood for children belonging to EWS and disadvantaged groups, challenged—Alternatively claimed that this Court should lay down Guidelines and pre-conditions for exercise of power under Rule 10(3) of the Delhi RTE Rules for extending the limits/area of "neighbourhood" as defined under the RTE Act and the Delhi RTE Rules. Held—RTE Act did not define word neighbourhood—Delhi RTE Rules prescribed limits of neighbourhood as radial distance of 1 km. from residence of child in Classes I to V and radial distance of 3 Kms. from residence of child in Classes VI to VIII—Thus, private unaided schools members of Petitioner under Act and Rules were

required to admit children belonging to EWS and disadvantaged groups in Class I to extent of 25% of strength and resident of within limits of neighbourhood aforesaid—Impugned Notification had been issued extending limit of neighbourhood—Said Notification issued to get over challenge in W.P.(C) No. 40/2012 on ground of Director of Education being not entitled to extend limits of neighbourhood by an executive order—Private unaided schools under Act and Rules were obliged to fill up 25% of seats in Class I and / or at entry level if below Class I, from children belonging to EWS and disadvantaged groups—Paramount purpose was to provide access to education—Whether for that access, child was to travel within 1 Km. or more, was secondary—If obligation on private unaided schools to admit children belonging to EWS and disadvantaged groups was limited to those children only who were residing within a distance of 1 Km. from school same might result in a large number of such children even though willing for sake of acquiring education to travel more than 1 Km. being deprived thereof for reason of there being no seats in school within their neighbourhood—Private unaided schools were not found to be aggrieved from Notification—This Court not inclined to entertain W.P.(C) No. 636/2012 challenging same notification—Criteria devised by Division Bench in *Social Jurist v. Govt of NCT of Delhi* could be adopted for purpose of admission under RTE Act and Rules—Clarification/guidelines issued—Upon issuance of Notification challenged in W.P.(C) No.636/2012, W.P.(C) No.40/2012 became infructuous.

Federation of Public Schools v. *Government of NCT of Delhi* *490*

— Section 133 and 168—Section 165—Indian Evidence Act, 1872—Claims Tribunal dismissed claim petition holding that involvement of bus in question has not been proved by appellant—Reliance was placed on a letter written by

Investigating Officer (IO) to Transport Authority in which he had mentioned two numbers—Order challenged before High Court—Plea taken, Claims Tribunal has not conducted any inquiry and has overlooked principles of preponderance of probabilities and instead applied principle of proof beyond reasonable doubt applicable to criminal cases—Per contra, plea taken that involvement of offending vehicle has not been sufficiently proved by appellants—Held—It has been time and again held that Claims Tribunal has to conduct inquiry which is different from a trial—It is duty of Claims Tribunal to ascertain truth to do complete justice—If Claims Tribunal had any doubt about involvement of bus in question, it ought to have examined IO and other eye witness instead of drawing adverse inference—Status report of SHO of PS concerned and evidence on record shows IO may be in doubt at initial stage but after recording evidence of two witnesses, there was no doubt about bus in question being involved in accident—Police filed chargesheet after satisfying that accident was caused by driver of bus in question—Appeal allowed—Compensation Granted.

Satram Dass & Anr. v. *Charanjit Singh & Ors.*..... *785*

MOTOR VEHICLE ACT, 1988—The Appellant impugns the award passed by the Motor Accident Claims Tribunal, (the Tribunal) wherein the Claimants (Respondents No. 1 to 5 herein) were awarded a compensation of Rs.7,82,564/- for the death of Raghunandan Yadav (hereinafter referred to as the 'deceased') who was 41 years of age at the time of the accident—The contentions raised on behalf of the Appellant are:- (i) That there was no proof of negligence on the offending vehicle and therefore, the Respondents were not entitled for any compensation—(ii) That the deceased was not entitled for any increase in income as his income was computed according to the Minimum Wages—To prove the negligence on the part of the driver of the offending vehicle,

the Respondents examined PW-2 (sole eye witness), who testified that the motorcycle was being driven by the deceased on the left side of the road and the offending vehicle came from the opposite direction and hit the motorcycle. The certified copy of the site plan also shows that the motorcycle was lying on the extreme left of the road after the accident. In claim petition, the claimant are required to prove negligence only on the touchstone of preponderance of probability, which has been successfully proved in this case—In these circumstances, the finding of the Tribunal, cannot be faulted with—A perusal of the Notifications issued under the Minimum Wages Act would show that the minimum wages of a nonmatriculate were revised from Rs. 3876/- on 01.08.2008 to Rs. 5850/- on 01.02.2010. Thus, it has to be noticed that there was increase of about 50% in the minimum wages just in a year and a half. This was not only on account of inflation but also to provide a better standard of living to the people of the lower strata of the society—Therefore, the Tribunal rightly took the minimum wages of a non-matriculate (as the deceased produced his school certificate proving that he had passed 8th Class) which were Rs. 3876/- per month at the time of the accident and then added 50% towards the increase in minimum wages.

TATA AIG General Insurance Co. Ltd. v. *Kaushlya Devi & Ors.* *484*

— Section 2 (30), 163 A, 166 and 168-Common question of law for determination in these appeals was Whether, in view of Devision Bench of judgment of this Court in *Delhi Transport Corporation and Anr.* vs. *Kumari Lalita* 22 (1982) DLT 170 (DB) and *Rattan Lal Mehta* vs. *Rajinder Kapoor & Anr.* II (1996) ACCI (DB) increase towards inflation be granted, particularly when loss of dependency is to be assessed according to minimum wages?"—Contentions raised on behalf of Insurers, grant of compensation is based on liability of

tortfeaser to pay damages to victim—Damages suffered must be proved by victim or his LRs as case may be—Court cannot take judicial notice of increase in future inflation as nobody knows what is in store in future—Damages are to be assessed on date of incident—Benefit of inflation is inbuilt in multiplier and if further addition is made, it would mean increase in multiplier and punishing tortfeaser beyond his liability—Per contra, plea taken on behalf of claimants, although benefit on account of inflation is not akin to future prospects, yet, court cannot be oblivious to trend over last six decades since independence—In case of minimum wages, claimants are entitled to benefit of 50% increase-Held-Compensation which is awarded on basis of multiplier method is such that as years go by, some amount should be taken out from principal sum so that time dependency comes to end, principal as well as interest earned on principal amount are exhausted-Compensation awarded in Indian perspective with a high inflation is unable to provide for full life expectancy even if some discount is made towards imponderables in life—Almost everybody working in govt. department gets at least 4 to 5 promotions during their tenure, in private sectors pastures are much greener for some and not so rosy for others-Compensation provided by court is far less than just compensation as envisaged under Act mainly on account of inflationary trend in this country—Though multiplier method does take care of future inflation yet on account of inflation which remains in double digits in our country most of times, even after increase granted on account of future prospects compensation is not able to take care of actual loss of dependency—This court is bound by Division Bench judgment in *Rattan Lal Mehta* (Supra) which on aspect of multiplier taking care of future inflation was not brought to notice of this court earlier—Increase in minimum wages on account of inflation was not permissible-If benefit of inflation has to be given, everybody is entitled to that benefit and not person

getting minimum wages, unless they are treated as a class by themselves—No addition in minimum wages can be made on account of inflation for computation of compensation.

Dhaneshwari & Anr. v. *Tejeshwar Singh & Ors.* *585*

— Section 163-A—The Appellants are the parents of the deceased Sunny who died in a motor accident which occurred on 01.08.2008 impugned a judgment in MACT No. 611/2008 decided on 13.12.2010—In the Claim Petition filed before the Tribunal, it was averred that on 01.08.2008 at about 5.30 A.M. a two wheeler number DL-7S-BA-4864 met with an accident while it was being driven by Respondent No. 1 (Adarsh Kumar) and the deceased Sunny was riding as a pillion rider—The Tribunal by the impugned judgment found that the deceased himself was driving the two wheeler and Respondent No. 1 Adarsh Kumar (owner of the two wheeler) was one of the two pillion riders on the said two wheeler—Obviously, the Insurance Company indemnifies the owner on the basis of the contract of insurance where a third party is involved. Where an insurance contract provides for own damages or personal accident, the owner would be entitled to compensation in respect of the damage to the vehicle irrespective of any fault as also of the insurance amount upto the coverage in the contract in respect to the injuries received by him in an accident involving his own vehicle. Where the owner himself is a tortfeasor, he cannot claim compensation from his own insurer for a third party policy—In this case, the accident took place on account of the neglect or default of deceased Sunny himself. His legal representatives, therefore, would not be entitled to the grant of compensation from the owner under Section 163-A of the Act also.

Usha Sharma & Anr. v. *Adarsh Kumar & Anr.* *57*

NATIONAL INVESTIGATING AGENCY ACT, 2008—Section 3—Code of Criminal Procedure, 1973—Section 160-Petitioner

challenged notice under Section 160 of Code issued to him by officials of National Investigating Agency (NIA)—Petitioner averred he was asked to join investigation without serving notice under Section 160 on 04.01.2011 by officials of NIA which amounted to his illegal restrain—On said date, he was handed over notice to join investigation on 05.01.2011—During investigation, he was threatened and coerced to extent that he attempted to commit suicide and was taken to hospital—Also, even by giving notice under Section 160 a person cannot be called at a place which does not fall within jurisdiction of police station where he resided—Petitioner was stationed at Uttarkhand and in case officials of NIA wanted to interrogate him they could come to Uttarkhand whereas he was asked to join investigation in Delhi—Held—Officer of the NIA has jurisdiction to investigate and arrest any person relating to scheduled offences anywhere in India coupled with all the powers, duties, privileges and liabilities of a Police Officer—Provisions under NIA Act will override provisions of Code of Criminal Procedure, 1973.

Anant Brahmachari v. *UOI & Ors.* *682*

— Section 3— Code of Criminal Procedure, 1973—Section 160-Petitioner challenged notice under Section 160 Cr. P.C. issued to him by officials of National Investigating Agency (NIA)—He also prayed for permission of two lawyers to accompany him at all time as and when he would be issued notice under Section 160 Cr. P.C. recording his statement—Held—When a person is not called for interrogation as an accused the Constitutional protections entitled to the accused wil not be available to him—Petitioner has no right to be accompanied by a counsel when he is called to know f cts relevant to investigation of offence.

Anant Brahmachari v. *UOI & Ors.* *682*

PREVENTION OF CORRUPTION ACT, 1988—Sections 7 and 13 (1)(d), 13(2) and 19—Criminal Procedure Code, 1973—

Section 227—Quashing of proceedings u/s 7 and u/s 13 (1)(d) r/w Section 13 (2)—Petitioner arrested in trap case—Contention of petitioner that sanction was granted by authority which was not competent to grant the same—Direct sanctioning authority was Delhi Development Authority (DDA) and not Finance Member of DDA u/s. 19—Trial Court acquitted petitioner on ground that sanction order invalid, with liberty to CBI to take further legal action, if any, as deemed fit—After petitioner retired, CBI filed charge-sheet on same grounds without sanction—Petitioner filed application u/s 227 Cr.P.C. seeking dropping of proceedings on ground that fresh charge without sanction after retirement of petitioner bad in law—Trial Judge had not decided application, hence petition for quashing summoning order and proceedings filed—Held, issue to be decided is whether petitioner having been acquitted earlier in same proceedings for want of sanction by competent authority, could be tried again without sanction since he had retired and whether the proceedings should be quashed in view of protracted trial (16 years) faced by Petitioner—Proceedings against petitioner terminated in earlier trial on account of sanction having been granted by incompetent authority—In present case, proceedings initiated without sanction, since petitioner had retired, no infirmity—No period of limitation can be prescribed in which trial of criminal case must be closed mandatorily—So protracted trial no ground for quashing petition—Petition dismissed.

Jiwan Ram Gupta v. *State Thr. CBI* *524*

— Section 4(2)—Section 13—Territorial jurisdiction to entertain application for bail—FIR registered on the directions of the Hon'ble High Court of Allahabad to make inquiries into the matter of execution and implementation of National Rural Health Mission (NRHM) Scheme and utilization of founds in entire State of Uttar Pradesh and to also register a case against persons who are found to have committed prima facie

cognizable offence—Five separate preliminary inquiries were registered in different branches of CBI in New Delhi—Though the funds were provided by the Central Government but they were entrusted for disposal to the Directorate Mission NRHM, U.P.—Embezzlement of fund was not at the level of Central Government but at the level of Directorate of Mission NRHM, U.P—Anticipatory Bail application filed before Special Judge, Delhi—Dismissed on the ground of territorial jurisdiction—Order challenged—Held, misappropriation, embezzlement an offence under Section 13 PC Act were committed in the State of Uttar Pradesh—Offence committed in the State of Uttar Pradesh in terms Section 4(2) of the P.C. Act—Special Judge, Ghaziabad at Uttar Pradesh competent to try the offence—No error committed in the dismissal of application for anticipatory bail for want of territorial jurisdiction.

Sumit Tandon v. *CBI* *729*

— Sections 7 and 13 (1)(d), 13(2) and 19—Criminal Procedure Code, 1973—Section 227—Quashing of proceedings u/s 7 and u/s 13 (1)(d) r/w Section 13 (2)—Petitioner arrested in trap case—Contention of petitioner that sanction was granted by authority which was not competent to grant the same—Direct sanctioning authority was Delhi Development Authority (DDA) and not Finance Member of DDA u/s. 19—Trial Court acquitted petitioner on ground that sanction order invalid, with liberty to CBI to take further legal action, if any, as deemed fit—After petitioner retired, CBI filed charge-sheet on same grounds without sanction—Petitioner filed application u/s 227 Cr.P.C. seeking dropping of proceedings on ground that fresh charge without sanction after retirement of petitioner bad in law—Trial Judge had not decided application, hence petition for quashing summoning order and proceedings filed—Held, issue to be decided is whether petitioner having been acquitted earlier in same proceedings for want of sanction by competent authority, could be tried again without sanction since he had

retired and whether the proceedings should be quashed in view of protracted trial (16 years) faced by Petitioner—Proceedings against petitioner terminated in earlier trial on account of sanction having been granted by incompetent authority—In present case, proceedings initiated without sanction, since petitioner had retired, no infirmity—No period of limitation can be prescribed in which trial of criminal case must be closed mandatorily—So protracted trial no ground for quashing petition—Petition dismissed.

Jiwan Ram Gupta v. *State Thr. CBI* *524*

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005—Section 12—Indian Penal Code—1860—Section—448—Petitioner sought quashing of FIR under Section 448 IPC registered in Police Station Defence Colony, New Delhi, against her as well as setting aside of order passed by learned Additional Sessions Judge, New Delhi—Petitioner urged, she got married to Respondent no.2 in Delhi and after marriage, they lived together in Sri Lanka and Australia as husband and wife for 12 long years—Two sons were born from their wedlock—Their elder son was married and settled in London, while younger son was living in Delhi—In the year 1992, Respondent no.2 acquired licence to start his Company and couple came back to India and started living in Defence Colony, New Delhi—During this period, Respondent no.2 come in contact with another woman and fell in love with her which spoiled relationship between petitioner and Respondent no.2—As a well planned act, sometimes in July, 2009 Respondent no.2 left tenanted premises and abandoned petitioner and he in connivance with landlord got an ex-parte eviction order in petition filed against him as well as against petitioner—Accordingly, petitioner was forced to leave the shared household—Around July 2009, Respondent no.2 after abandoning petitioner, filed divorce petition—Petitioner was constrained to file complaint under Section 12 of Domestic

Violence Act and she also sough various interim measures and interim relief—Subsequently petitioner came to know that Respondent no.2 had taken another premises, on rent in Defence Colony—Accordingly, she entered into the said new premises being her matrimonial home with the help of Protection Officer who handed over keys of front door, bedroom door and balcony door to her—Thereafter petitioner moved another application in court of learned Metropolitan Magistrate seeking protection against her removal from said shared household—An interim order was passed in favour of petitioner which was subsequently vacated by the learned Metropolitan Magistrate holding that present premises was not shared house hold—Aggrieved petitioner, preferred appeal which was dismissed, thus she preferred a CRL M.C.—According to petitioner, she was entitled to reside in new tenanted premises in Defence Colony being "shared household" under Act—Held:- A shared household includes any household owned or tenanted by either of the parties in respect of which either the aggrieved person/wife or the respondent or both jointly or singly have any right, therefore, the petitioner being legally wedded wife has a right to live with the husband, whether he lives in an ancestral house or own acquired house or rented house.

Kavita Dass v. *NCT of Delhi & Anr.* *747*

RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT, 2009—Section 35 and 38 of RTE Act & Sub-Rule 3 of Rule 10 of Delhi RTE Rules—W.P.(C) No.636/2012 preferred on behalf of approximately 326 private unaided recognized schools functioning in Delhi impugning the Notification No.F.15(172)/DE/ACT/2011/7290-7304 dated 27.01.2012 issued by the Lieutenant Governor of Delhi in exercise of powers conferred under Section 35 and 38 of the RTE Act read with Sub-Rule 3 of Rule 10 of Delhi RTE Rules—In W.P.(C) 40/2012 impugned order passed by

Director of Education which mandated extending limits of neighbourhood for children belonging to EWS and disadvantaged groups, challenged—Alternatively claimed that this Court should lay down Guidelines and pre-conditions for exercise of power under Rule 10(3) of the Delhi RTE Rules for extending the limits/area of "neighbourhood" as defined under the RTE Act and the Delhi RTE Rules. Held—RTE Act did not define word neighbourhood—Delhi RTE Rules prescribed limits of neighbourhood as radial distance of 1 km. from residence of child in Classes I to V and radial distance of 3 Kms. from residence of child in Classes VI to VIII—Thus, private unaided schools members of Petitioner under Act and Rules were required to admit children belonging to EWS and disadvantaged groups in Class I to extent of 25% of strength and resident of within limits of neighbourhood aforesaid—Impugned Notification had been issued extending limit of neighbourhood—Said Notification issued to get over challenge in W.P.(C) No. 40/2012 on ground of Director of Education being not entitled to extend limits of neighbourhood by an executive order—Private unaided schools under Act and Rules were obliged to fill up 25% of seats in Class I and / or at entry level if below Class I, from children belonging to EWS and disadvantaged groups—Paramount purpose was to provide access to education—Whether for that access, child was to travel within 1 Km. or more, was secondary—If obligation on private unaided schools to admit children belonging to EWS and disadvantaged groups was limited to those children only who were residing within a distance of 1 Km. from school same might result in a large number of such children even though willing for sake of acquiring education to travel more than 1 Km. being deprived thereof for reason of there being no seats in school within their neighbourhood—Private unaided schools were not found to be aggrieved from Notification—This Court not inclined to entertain W.P.(C) No.

636/2012 challenging same notification—Criteria devised by Division Bench in *Social Jurist v. Govt of NCT of Delhi* could be adopted for purpose of admission under RTE Act and Rules—Clarification/guidelines issued—Upon issuance of Notification challenged in W.P.(C) No.636/2012, W.P.(C) No.40/2012 became infructuous.

SPECIFIC RELIEF ACT, 1963—Section 12, Section 20—Agreement to sell—Place of land—Possession to be finally considered on making up of balance valuation and paying the same to respondents—Reason for uncertainty because rights of respondent over partial area of land was by general power of attorney—Hence, no title by regular sale deed—On one side of land remained no boundary wall but a partly dried pond—Valuation thus after possession gained—Respondents argued that discretionary relief not to be granted as appellant already had the complete area under the agreement to sale. Held:- No crystallisation of area or price and hence, appellant cannot be held liable to pay balance price and breach has arise—Further held:- Doctrine of clean hands inapplicable—No evidence that appellant ever had the amount of land averred—Dishonour of cheque calls for breach of contract and has no bearing on doctrine of clean hands. Denial of discretionary relief cannot be raised by respondents who are guilty of breach—Once clear that agreement to sale has been acted upon, Specific relief has to be granted—Specific performance of area in possession of appellant granted—Competent person appointed to measure exact area of land in possession of appellant as to determine balance price—Balance multiplied by forty as rough appreciation of land price in Delhi in last 33 years.

SUPREME COURT RULES, 1966—Order IV Rules 2, 4, 6(b) challenged as ultra vires—Petitioner pleaded for prohibiting the creation of classification of advocates into AOR and non-AOR and restricting only AOR to file cases in the Supreme Court—Petitioner contended that the impugned classification has resulted into denial of right to practice under Sec.30, Advocates Act—Held, Sec. 30 has to be read harmoniously with Sec. 52 of the Act, which states that nothing in the Act shall be deemed to effect Art. 145 of the Constitution that lays down rule making power of the Supreme Court—Further held, the impugned rules are based on intelligible differentia with objective sought to be achieved.

Balraj Singh Malik v. *Supreme Court of India Through Its Registrar General* *538*

TRANSFER OF PROPERTY ACT, 1882—Section 53A—Indian Contract Act, 1882—Section 202—Limitation Act, 1963—Section 27—Suit for possession and mesne profits—Respondents/plaintiffs claim to be owner of property having got the same under a Will from their mother—Mother purchased the same through registered power of attorney, receipt, agreement to sell dated 17.04.1986 from Sh. Birender Kumar Jain—Sh. Birender Kumar Jain purchased the same vide registered Sale Deed dated 11.07.1966 from Smt. Raj Kumari Bhatnagar who purchased it from Delhi Housing Company vide registered sale deed dated 20.08.1959—Respondents/plaintiffs employed a chowkidar to look after the property—Committed breach of trust and forged documents—Executed document, power of attorney etc. in favour of appellants/defendants and gave possession—Suit for injunction filed by the mother of respondent/plaintiffs against the appellants/defendants—During pendency of suit for injunctions, filed another suit for possession and mesne profits—Made statement through advocate not to dispossess the appellants/defendants without due process of law—Suit withdrawn with liberty to claim relief

sought in the suit for possession and mesne profits already filed—Appellants/defendants pleaded themselves to be owners having purchased the same from Sh. Shafiq Raja vide agreement to sell, general power of attorney etc. dated 09.03.1994—Suit barred by Order 2 Rule 2 CPC—Held—Suit not barred by Order 2 Rule 2—Appellants/defendants have not proved the complete chain of title documents—Suit decreed—Aggrieved appellants/defendants filed the regular first appeal—Held—Earlier suit withdrawn with liberty to seek the relief claimed in that suit in the second Suit—Result in consolidation of two suits—The relief claimed in earlier suit got merged in the second Suit, not hit be Order 2 Rule 2—Appellants/defendants cannot be the owner unless the complete chain of title documents is proved—Complete chain of documents not proved—Respondents/plaintiffs have proved the complete chain of title documents—Appeal dismissed.

Vimla Gautam & Ors. v. *Mohini Jain & Anr.* *41*