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Corporation (DTC) was promoted as Havaldar and then to the post of Assistant Security Inspector (ASI)—He finally retired after attaining age of superannuation and all his retiral benefits were released to him—After about 7 months of retirement, charge sheet was issued to petitioner seeking explanation from him that why proceedings should not be initiated against him for producing forged educational documents at time of his promotion as ASI—Petitioner conceded that certificate produced by him showing he had passed High School Examination on basis of which he was promoted as ASI was forged but challenged issuance of charge sheet against him as being time barred, Also the period of limitation to initiate the proceedings was 4 years—Tribunal observed, Rule 9 (2)(b)(ii) of Pension Rule prescribing limitation of 4 years did not apply as it did not amount to misconduct and delinquency in performance of his duty, but, also held that his promotion was nonest and set aside his promotion as ASI—Petitioner challenged said order—Held:- When the appointment is obtained by fraud, even if the incumbent had worked for number of years that would not be a mitigating circumstance and such an appointment which is null and void, can always be terminated—However, finding of the Tribunal that act of seeking promotion by fraud is not a misconduct was set aside and also observed—Departmental proceedings could be initiated when fraud came to notice of Respondents and they should have acted promptly to serve charge sheet before retirement of petitioner—Since misconduct happened more than four years before the institution of departmental proceedings & had become time barred—Departmental proceedings quashed.

Rajinder Singh v. *DTC & Ors.*..... *404*

CODE OF CIVIL PROCEDURE, 1908—Order XL and Order XXXIX Rule 1&2—Suit for declaration and mandatory injunction, alleging financial irregularities committed by the defendants—Trial Court granted ad interim injunction and appointed receiver to look after the affairs of defendant no.1 society—Appellate Court reversed the findings and set aside the order of trial Court—Challenged—Held, the alleged financial

irregularities mentioned in plaint are more or less general allegations and plaintiffs themselves are facing criminal cases and record indicates that affairs of defendant no. 1 were being better managed by the defendants as compared to the management by the receiver; so applying the stringent tests laid down by the apex Court in the case of *Smt. Damyanti Naranga vs UOI,* AIR 1971 SC 966, there is no irregularity in the appellate order whereby appointment of receiver was set aside.

Bankey Bihari Lal & Ors. v. *Shiv Mandir (Gufawala) Sabha (Regd) & Ors.*..... *65*

— Section 10—First suit was for declaration that Plaintiffs had right to get membership of the society renewed, permanent injunction for restraining the defendants from creating third party interest in the temple property, and rendition of accounts, calling upon the defendants running temple to render accounts—During progress of the First suit, a Second suit was filed under Sec. 91 & 92 CPC after obtaining leave, praying for declaration that the defendants had no right to manage and control administration of the temple and direction to open membership of the society to the residents of the area—Held, trial Court rightly stayed the Second Suit under Sec. 10 CPC, since both the suits related to the same matter in issue.

Bankey Bihari Lal Aggarwal & Ors. v. *Shiv Mandir (Gufawala)& Ors.*..... *80*

— Adverse Possession—Plaintiff filed suit for possession, alleging that plaintiff purchased the suit property and allowed his brother, the defendant at request, to use the suit property for running a shop and thereafter the defendant purchased his own property but refused to vacate—Defendant pleaded that the suit property was allowed to be retained by him under a settlement and set up an alternative defence of adverse possession—Suit decreed in favour of plaintiff—Appeal—In appeal, only adverse possession ground raised—Held, not a single document filed by defendant to prove his case of

while this Court in its order dated 5th August 2010 noted that with the payment of the sum of Rs. 7,12,27,629/- plus interest accrued thereon in the fixed deposit the decree would stand satisfied, it did not extinguish the right of the DH to receive the full decretal amount i.e. the interest at 12% on Award amount (as modified by the order dated 8th April 2010) till the date of payment.

Klen & Marshalls Manufacturers and Exporters Ltd. v. *Power Grid Corporation Debtor India Ltd.* *386*

CODE OF CRIMINAL PROCEDURE, 1973—Section—227—Petitioner charged for having committed offences punishable under Section 307, 406, 498A—By way of Criminal Revision, he Challenged impugned order urging, only slight suspicion was against petitioner for committing offence punishable under Section 307 IPC so he should not have been charged under said section—Held :- If at the initial stage there is a strong suspicion which leads the Court to think that there is a ground for presumption that the accused had committed the offence, then it is not open to the Court to say that there is no sufficient ground for proceeding against accused—However, in present case, no strong proof to frame charge under Section 307 IPC against petitioner.

Amit Dahiya v. *State* *73*

— Sections 164, 306, 438—Prevention of Corruption Act, 1988—Sections 7 & 9—Petitioner charge sheeted for offences punishable under Section 7 & 9 of Act on allegations that he accepted illegal gratification from journalist of tehelka.com posing as arms dealers—During course of investigation, statement of Respondent no.2 was recorded under Section 164 Cr.P.C. and he was also granted anticipatory bail—Before filing of charge sheet, CBI moved application seeking pardon for Respondent no.2 to make him witness/approver—Application allowed—Aggrieved petitioner challenged order granting pardon which was upheld in SLP—Then petitioner filed application for taking Respondent no.2 into custody, in terms of Section 306 (4)(b) as he was made approver—Application

dismissed—Petitioner challenged order and urged Respondent no.2 was granted anticipatory bail contemplating his release on bail in event of arrest—Thus, he was never arrested before grant of pardon and as per provisions of Section 306(4)(b) unless he is already on bail, he is required to be detained in custody until termination of trial—Since he was not arrested so he was never granted bail—Held:- Though it is mandatory to keep the approver in custody unless on bail, however, Court is empowered in the interest of justice to avoid abuse of process of law and for the right of life and liberty of an approver, to grant bail if not granted earlier—Pardon does not get vitiated on this count.

Bangaru Laxman v. *State Thr. CBI & Anr.* *102*

CONSTITUTION OF INDIA, 1950—Article 226—Delhi School Education Act, 1973—Section 8(1), 8(3), 8(4), 10 & 11—Delhi Education Rules, 1973—Rules 118 & 120—The respondents were appointed as Assistant Teachers in the petitioner, an unaided minority school recognised under Delhi School Education Act, 1973—The respondents charged of grave misconduct and criminal trespass—Enquiry conducted—Ordered to be removed from service—Appeal before the Delhi School Tribunal—Tribunal allowed the appeal holding dismissal to be illegal and against the principles of natural justice—Petition challenged the order of the Tribunal—Petitioner's contention—The Rule 118 & 120 DSER did not apply to unaided school—The judgment of the Tribunal fundamentally flawed and liable to be set aside—Respondents submitted that even if Rule 118 DSER is not applicable to Unaided Minority School Rule 120 would nevertheless apply—Prior approval of DoE for imposition of major penalty was required—Held—There can be no manner of doubt that the Supreme Court excluded Section 8(2) from its application to unaided minority schools—Corresponding to Section 8(2) are Rules 96 to 121 of Chapter VIII of the DSER—Consistent with Section 12 read with Section 8(2) DSEA, Rule 96(1) DSER clearly states "nothing contained in this Chapter shall apply to an unaided minority school"—Rule 118 and 120 figure

in Chapter VIII which, as clearly stated in Rule 96(1), does not apply to unaided minority schools.

Managing Committee Frank Anthony Public School & Anr. v. *C.S. Clarke & Ors.* *35*

— Article 226—Delhi School Education Act, 1973—Section 8(1), 8(3), 8(4), 10 & 11—Delhi School Education Rules, 1973—Rules 118 & 120—The respondents were appointed as Assistant Teachers in the petitioner, an unaided minority school recognised under Delhi School Education Act, 1973—The respondents charged of grave misconduct and criminal trespass—Enquiry conducted ordered to be removed from the service—Appeal before the Delhi School Tribunal—Tribunal allowed the appeal—Holding dismissal to be illegal and against the principles of natural justice—Petition challenging the order of the Tribunal—Petitioner contend on merit that adequate opportunities were granted to the respondent to defend themselves before the Enquiry Officer—Charges found proved and were grave—Imposition of major penalty justified—Respondents contend that proceedings were malafide and vindictive and statements were not properly recorded—Held—The scope of the jurisdiction of this Court under Article 226 to examine the validity of the enquiry proceedings is limited—The procedure followed would have to be shown to be unjust or violative of the principles of natural justice—On merits, the report of enquiry would have to be shown to be perverse or based on no evidence—As regards the procedure adopted by the Enquiry Officer in the instant case, Rule 120 DSER did not apply to the enquiry proceedings—The Enquiry Officer was nevertheless expected to observe the principles of natural justice—Although the strict rules of evidence and procedure as envisaged in Court proceedings need not apply, the procedure adopted had to be just, fair and reasonable—The enquiry in the present case was held by a retired Principal of a Public School—The enquiry proceedings show that sufficient opportunity was given to Mr. & Mrs. Clarke to defend themselves—It is not possible to conclude that the procedure adopted by the Enquiry Officer in the instant case

was not just, fair and reasonable—Merely because the Principal was also the PO does not result in the violation of the principles of natural justice—It is not shown how any prejudice was caused to the Clarkes on that score—Also, they appear to have been given access to those documents that were relevant to the articles of charge—The conclusion arrived at by the Enquiry Officer cannot be held to be based on no evidence or perverse warranting interference by this Court under Article 226 of the Constitution—For the aforementioned reasons, impugned order of the Tribunal allowing the appeals of the Clarkes set aside—Writ petition allowed.

Managing Committee Frank Anthony Public School & Anr. v. *C.S. Clarke & Ors.* *35*

— Article 226—Public Tenders—Writ Petition filed by petitioner, challenged the revised price bid invited by the Respondent No. 2 i.e. Airport Authority of India (AAI) vide its communication dated 04.03.2011. Petitioner contended that it was in its capacity as the L-1 called for renegotiation of the price by Respondent No. 2, on 19.11.2010 which resulted in scaling down of its offer by Rs 125 lacs. The Petitioner contended that the impugned communication calling for revised bids paved the way for re-entry of R-3 (Eldis) and R-4 (Raytheon) into the bidding process, which was impermissible. The bid was for radar equipment for various AAI controlled airports, The Technical Evaluation Committee (TEC) had shortlisted the Petitioner and Raytheon, eliminating Eldis. Eldis had filed complaints against exclusion alleging bias towards the petitioner. Ministry of Civil Aviation requested Chairman AAI to inquire into Eldis' complaint. There was a divergence of opinion on the evaluation process between the TEC and the independent External Monitors ("IEM"). AAI sought Central Vigilance Commission (CVC) guidance, which was declined—Ministry advised AAI to take its administrative decision. At a meeting on 28.02 2011 of the Procurement Advisory Board (PAB) summoned by Chairman AAI a decision was taken to invite "snap bids" from technically qualified bidders. Held: decision taken at the meeting of the PAB, was not arrived at

for an oblique motive, or was violative of any provisions(s) of the Tender. Amongst other aspects, PAB had at its meeting of 28.02.2011, attached criticality to an express inclusion of the source code in the price bid. Before that, IEM in its report dated 07.12.2010 had highlighted, amongst others, this aspect of the matter. Further it was held that critical component of the financial bid cannot be assumed to be included on the basis of assumptions as, this could lead to disruption in the execution of the Tender at a later stage. For the aforesaid reasons, held that there was no merit in the submission that decision made at the meeting of the PAB held on 28.02.2011, was flawed. Therefore, the decision to call for "snap bids" as against cancellation of the Tender can also not be found fault with in view of the urgency expressed in both meetings of the PAB. Therefore, the necessary corollary of this would be that the impugned letter dated 04.03.2011 would have to be sustained.

Thales Air Systems S.A. v. *Union of India & Ors.* ... *115*

— Administrative Law—Dismissal from service—Petitioner appointed as constable—Declared as a proclaimed offender and departmental proceeding initiated against him alleging him to be a deserter on three different occasions—The petitioner contended that the charges of desertion were framed against him despite the knowledge of the respondents that the wife of the petitioner was unwell and was suffering from acute vulnerable diseases as Typhoid and Poly menherea leading to her abortion of two months pregnancy—The Enquiry officer, after considering the evidence which was produced during the enquiry proceedings and noting the fact that the petitioner did not appear despite an opportunity given to him, proceeded ex-parte against the petitioner and gave the findings that the charges against the petitioner were made out—The disciplinary authority accepted the report of the enquiry officer and awarded the punishment of dismissal from service after the petitioner failed to file reply to show cause notice given to the petitioner—Petitioner challenged his dismissal on the ground that throughout his service career from 2001 to 2006 there was no adverse entry in his service record and he had

an unblemished record and the charges of desertion against him in the circumstances are false—He is the only earning member and his wife has been suffering from diseases since the year 2005 and, therefore, he had applied for leave which was not granted—Complete set of documents were not provided to him nor any show cause notice had been issued to him initiating departmental proceedings and charge sheet—Violated the principles of natural justice—Punishment of dismissal is disproportionate to the misconduct attributable to the petitioner. Held—Since the petitioner did not appear despite the notices sent to him, he cannot make any grievance about not receiving the copies of the documents which were produced during the enquiry proceedings—No grounds have been made on behalf of petitioner for setting aside the ex-parte proceedings—Petitioner remained absent from 2002 upto 2005 and again from April, 2006 to December, 2006 for various periods—No grounds disclosed by the petitioner showing sufficient cause for non appearance of the petitioner during November, 2006 and December, 2006 when notices were sent to him to appear before the enquiry officer—If the petitioner could not appear on account of alleged medical condition of his wife, the petitioner should have replied to the allegations made against him—The enquiry officer, the disciplinary authority, appellate authority and the Revisional authority has noted the unauthorized absence of the petitioner—Petitioner has been absconding and deserting the service without any just and sufficient reason—In any case for whatsoever reason, if the leave of the petitioner was not sanctioned, the petitioner was not entitled to leave the service un-authorizedly.

Pradeep Kumar Singh v. *Union of India & Anr.*..... *161*

— Article 32—Public Interest Litigation—Petitioner alleged misuse of land by DMRC allotted to it for Vishwa Vidhyalaya Metro Station by allowing construction of residential units thereon by respondent no. 4 while the said land was earlier being used for purposes of parking vehicles by the Metro commuters—Documents filed by petitioner show that it was registered as a society barely a couple of months before filing

the petition and there is nothing to show as to how many and who are its members or that it has been incorporated to protect the interest of Metro commuters or that opportunity was given to Metro commuters to become members—Documents also show that construction of residential units commenced in the year 2007, if not earlier after the government accorded permission to DMRC to generate resources through development on the transferred land—Held, often it is found that the petitions in public interest are filed out of commercial rivalry and /or oblique motives, so in the absence of material to show that petitioner is representative of Metro commuters, Court not inclined to entertain this petition and which may ultimately adversely effect development and functioning of Metrorail.

Association of Metro Commuters & Anr. v. *Delhi Metro Rail Corporation & Ors.* *172*

— Writ impugns the order dated 25.05.2011 of the Central Administrative Tribunal which directed the Petitioner to treat the Respondent as a validly selected candidate and to offer him appointment to the post of sub-inspector (EXE) Male. Held: Court cannot interfere in the assessment made by the Delhi Police as employer, as to who is suitable and who is not for serving in the force which is required to constantly interact and render assistance to public. Tribunal in the impugned order erroneously followed the dicta in *Sandeep Kumar* in which no assessment of suitability was done by the Screening Committee, as was done in the present case.

Commissioner of Police v. *Ranvir Singh* *197*

— Article 226—Public Tenders—Writ Petition filed by petitioner, aggrieved by the fact that, the Global Tender Enquiry Document dated 07.07.2010 (hereinafter referred to as the "Tender"), which had technical specifications stipulated therein, inter alia, in respect of products described in Schedule 10, 13 and 47 (qua which bids were invited) were altered by Respondent no. 3, post pre-bid meeting dated 18.07.2011, to their detriment. In so far as products referred to in Schedules

10 and 47 are concerned, they are governed by condition no. 7.1 under said heading, which being identical read as follows: "Should be FDA/CE or BIS approved product". In so far as product referred to in Schedule 13 is concerned the relevant condition is 7.2, which reads as follows: "should be FDA/CE approved product". After a pre-bid meeting of the bidders convened by respondent no. 3 on 18.07.2011, corrigendums were issued on 26.07.2011 and 28.07.2011 in respect of the aforementioned conditions qua the products referred to above, which altered the standardization specification requirement exclusively to USFDA. This alteration in the Tender conditions, the petitioner alleges, has been brought about to exclude Indian bidders and/or all such bidders who do not market their products in the USA. Respondent No. 3 writ petition contended that the petition ought to be rejected since it fails to implead Department of Medical Education and Research, Government of Punjab, which was a necessary party. Held: The present action is bound to fail for reason of non-joinder of necessary parties coupled with the fact that there is, admittedly, an absence of concomitant pleadings in that regard.

Schiller Healthcare India Pzvt. Ltd. v. *Union of India & Ors.* *254*

— Writ—Examination Malpractice—Petitioner impugned the order dated 03.03.2011 passed by respondent No.2/Controller of Examinations, Jamia Millia Islamia University, whereby the Examination Committee constituted by respondent No.1/ University decided to penalize the petitioner for indulging in use of unfair means while writing Examination—MBA (Evening), Part-II, Paper—MBA-2011 held on 18.01.2011, by cancelling all the papers of the semester/year in which the petitioner had appeared and thus declining to promote him to the next academic year. However the incriminating material had gone missing from the custody of the concerned officer, i.e., the Deputy Controller of Examinations. Held: in the present facts and circumstances the Court had no option but to hold that the benefit of doubt has to be given to the petitioner by

accepting the status report dated 25.08.2011 submitted by the Addl.CP/Vigilance, Delhi Police to the effect that incriminating document allegedly confiscated by the members of the flying squad from the petitioner was not a seized property due to a lapse on the part of the Invigilator and the Assistant Superintendent and that proper procedure was not followed by respondent No.1/University as required by it before passing the impugned order dated 03.03.2011.

— Article 226, 227—Petition against award of Industrial Adjudicator holding that the employer has failed to prove any grounds for dismissal of service of petitioner workman—Petitioner contend that in a dispute pertaining to termination of employment and where the employer relies on a domestic inquiry preceding the termination, the Industrial Adjudicator is mandatorily required to first adjudicate the validity of termination order only after the domestic enquiry has been held to be vitiated. Practice as informed to be prevalent till now before the Industrial Adjudicators of conducting the proceedings in two stages need not continue merely for the reason of having been practiced for long. In today's days when Courts and the Industrial Adjudicators are struggling with docket explosion and are overburdened, need has arisen to have a fresh look at procedures which are found to be causing delays. Law cannot be a fossil. The Industrial Adjudicator upon completion of pleadings is required to proceed in the following manner:

(a) To examine whether a domestic inquiry preceding the punishment is pleaded to have been held and documents in support thereof filed.

(b) If the domestic inquiry is pleaded and documents in support thereof filed and the workman has challenged the validity of the said domestic inquiry, to determine whether such challenge is on any factual or purely legal grounds and frame issues on

the same.

(c) However if domestic inquiry is not pleaded or if pleaded but no documents in support thereof filed, the question of framing any issue as to domestic inquiry does not arise.

(d) If an issue as aforesaid to the domestic inquiry has been framed and the employer has also sought opportunity to in the alternative establish misconduct before the Industrial Adjudicator, to frame issue thereon also, simultaneously with framing issues on validity of inquiry.

(e) To, after hearing the parties consider whether in the facts of the case any prejudice (other than as above) is likely to be caused to either of the parties if evidence on both sets of issues is led together. Only on finding, by a reasoned order, a case of such prejudice or any other reason, is the trial to be bifurcated into two stages. Else, the parties to be directed to lead evidence on both sets of issues together.

(f) To, if the evidence on both sets of issues has been recorded together, to first consider the evidence only on the aspect of validity of the inquiry and without being influenced in any manner whatsoever by the depositions of the witnesses on the merits of the dispute i.e. misconduct with which the workman was charged with. If the inquiry is found to be valid, the question of rendering a finding on the merits does not arise. However if the domestic inquiry is found to be vitiated and a finding in that regard is returned, the Industrial Adjudicator may then proceed to adjudicate on the basis of evidence in that respect, whether misconduct has been established or not.

(g) The Industrial Adjudicator to, on case to case basis, decide whether the arguments on both aspects are to be heard together or at different stages. However as aforesaid an endeavour is to be made to record the evidence of the witnesses on both issues in one go only.

Chandni Chowk, Delhi, under the name and style of M/s. P.S. Creation an is carrying on his business from there—Another building No. 1186, Kucha Mahajani, Chandni Chowk, comprising 30 shops—Leave to defend dismissed—Petition—Held—The contention of the landlord was specifically to the effect that he is not the owner of either of the two premises; contention being that Smt. Bhagwati Devi in terms of her Will date 14.07.1982 had bequeathed the disputed property i.e. Shop No. 4479-80, Dau Bazar, Cloth Market, Delhi to the respondent; he has no other immovable property; this is his only immovable property; further contention being that property bearing No. 969, Bhojpura, Maliwara, Chandni Chowk, Delhi was owned by his father; the property i.e. building No. 1186, Kucha Mahajani, Chandni Chowk, Delhi has been bequeathed by his grandfather in the name of his brother—The assertion of the landlord that he is bona fide requiring this premises for his commission business which he has started in the year 1997 has also been substantiated by documentary evidence—Income tax returns in respect of his commission business have been placed on record—In these circumstances, the Court had rightly noted that no triable issue having arisen between the parties, the application for leave to defend was rightly dismissed.

Kishori Lal Krishan Kumar v. *Ankit Rastogi* *53*

DELHI SCHOOL EDUCATION ACT, 1973—Section 8(1), 8(3), 8(4), 10 & 11—Delhi Education Rules, 1973—Rules 118 & 120—The respondents were appointed as Assistant Teachers in the petitioner, an unaided minority school recognised under Delhi School Education Act, 1973—The respondents charged of grave misconduct and criminal trespass—Enquiry conducted—Ordered to be removed from service—Appeal before the Delhi School Tribunal—Tribunal allowed the appeal holding dismissal to be illegal and against the principles of natural justice—Petition challenged the order of the Tribunal—Petitioner's contention—The Rule 118 & 120 DSER did not apply to unaided school—The judgment of the Tribunal fundamentally flawed and liable to be set aside—

Respondents submitted that even if Rule 118 DSER is not applicable to Unaided Minority School Rule 120 would nevertheless apply—Prior approval of DoE for imposition of major penalty was required—Held—There can be no manner of doubt that the Supreme Court excluded Section 8(2) from its application to unaided minority schools—Corresponding to Section 8(2) are Rules 96 to 121 of Chapter VIII of the DSER—Consistent with Section 12 read with Section 8(2) DSEA, Rule 96(1) DSER clearly states "nothing contained in this Chapter shall apply to an unaided minority school"—Rule 118 and 120 figure in Chapter VIII which, as clearly stated in Rule 96(1), does not apply to unaided minority schools.

Managing Committee Frank Anthony Public School & Anr. v. *C.S. Clarke & Ors.* *35*

— Section 8(1), 8(3), 8(4), 10 & 11—Delhi School Education Rules, 1973—Rules 118 & 120—The respondents were appointed as Assistant Teachers in the petitioner, an unaided minority school recognised under Delhi School Education Act, 1973—The respondents charged of grave misconduct and criminal trespass—Enquiry conducted ordered to be removed from the service—Appeal before the Delhi School Tribunal—Tribunal allowed the appeal—Holding dismissal to be illegal and against the principles of natural justice—Petition challenging the order of the Tribunal—Petitioner contend on merit that adequate opportunities were granted to the respondent to defend themselves before the Enquiry Officer—Charges found proved and were grave—Imposition of major penalty justified—Respondents contend that proceedings were malafide and vindictive and statements were not properly recorded—Held—The scope of the jurisdiction of this Court under Article 226 to examine the validity of the enquiry proceedings is limited—The procedure followed would have to be shown to be unjust or violative of the principles of natural justice—On merits, the report of enquiry would have to be shown to be perverse or based on no evidence—As regards the procedure adopted by the Enquiry Officer in the instant case, Rule 120 DSER did not apply to the enquiry

proceedings—The Enquiry Officer was nevertheless expected to observe the principles of natural justice—Although the strict rules of evidence and procedure as envisaged in Court proceedings need not apply, the procedure adopted had to be just, fair and reasonable—The enquiry in the present case was held by a retired Principal of a Public School—The enquiry proceedings show that sufficient opportunity was given to Mr. & Mrs. Clarke to defend themselves—It is not possible to conclude that the procedure adopted by the Enquiry Officer in the instant case was not just, fair and reasonable—Merely because the Principal was also the PO does not result in the violation of the principles of natural justice—It is not shown how any prejudice was caused to the Clarkes on that score—Also, they appear to have been given access to those documents that were relevant to the articles of charge—The conclusion arrived at by the Enquiry Officer cannot be held to be based on no evidence or perverse warranting interference by this Court under Article 226 of the Constitution—For the aforementioned reasons, impugned order of the Tribunal allowing the appeals of the Clarkes set aside—Writ petition allowed.

Managing Committee Frank Anthony Public School & Anr. v. *C.S. Clarke & Ors.* *35*

INCOME TAX ACT, 1961—Section 147, Section 80 HHC Proceedings under Section 147 of the Act were initiated by issue of notice dated 5th July, 2004 as it was noticed that the petitioner had claimed excessive deduction under Section 80 HHC. The petitioner had business loss in exports of Rs. 7,16,189/- but this was ignored for computation of deduction under Section 80 HHC—Levy of interest is no such amount, which the assessee withholds and does not pay to the Revenue and makes use of the said amount and therefore, is liable to pay compensatory interest. It is meant to off set the loss or prejudice caused to the Revenue on account of non-payment of the taxable amount. The levy in question is automatic and is attracted the moment there is a default—Deduction under

Section 80 HHC is to be arrived at and claimed on profits earned from both export of self-manufactured goods and trading goods and profits and loss of both traders have to be taken into consideration. If after the adjustment there is positive profit, then only deduction under Section 80 HHC can be claimed. If there is loss, there cannot be any entitlement. The provisio did not act as a detriment or negate or reduce the claim of deduction.

Raju Bhojwani v. *Chief Commissioner of Income Tax-XI* *22*

INDIAN CONTRACT ACT, 1872—The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for—In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles.

Ghanshyam Dass Gupta v. *Makhan Lal* *376*

INDIAN PENAL CODE, 1860—Sections 326 and 304 Part-1—As per prosecution, deceased was smack addict whose place was frequently visited by other addicts—PW2, the brother of deceased with his wife PW3 lived in first floor of the premises in which the deceased lived in ground floor—On the night of incident PW2 was woken up by his wife PW3 on her hearing some commotion and she asked him to see what was happening—On going down PW2 witnessed the deceased and appellant quarrelling—He tried to intervene however, appellant had a knife in his hand with which he attacked the deceased and inflicted a knife injury on his left thigh and then fled the spot—PW2 chased him but could not nab him—PW2 informed PW14 who was on patrolling duty and they both took

been eliminated.

Union Public Service Commission v. *N Sugathan*..... *93*

— Decision: The Court was unable to fathom the right, if any, of the respondent/information seeker to information qua those who are similarly eliminated as him. Such information relating to persons who though may have been the applicants to a public post but were eliminated in the selection process at the same stage as the information seeker, cannot be said to be necessary in public interest or for the sake of transparency or otherwise.

Union Public Service Commission v. *N Sugathan*..... *93*

SERVICE LAW—Disciplinary action—Petitioners working as drivers with DTC charged with having entered the room of the Depot Manager, Naraina unauthorizedly, having abused the Depot Manager and having assaulted the Traffic Superintendent who was present in the room having fled by breaking the sheets of boundary of Naraina Depot after meeting out threats—Version of petitioners was that at the time of alleged incident, they were in Rohtak and were even challaned by traffic police for traffic violations, which shows that nothing as alleged by DTC occurred—Inquiry Officer found the charges proved and the Disciplinary Authority imposed punishment, and departmental appeals were dismissed, followed by dismissal of OAs filed before the Central Administrative Tribunal—In the meanwhile, local police registered FIR and filed chargesheet against petitioners regarding the Naraina Depot incident, in which after trial the learned Magistrate convicted the petitioners for offence under Sec. 323/506/34 IPC and released them on probation, but in appeal, the learned Additional Sessions Judge acquitted the petitioners holding that in view of challan at Rohtak, presence of Petitioners at Naraina was doubtful—Tribunal while dismissing OAs held that acquittal does not preclude departmental action and rules of evidence in the two proceedings are different—Challenged—Held, in the absence of any record to show that challan at Rohtak was issued after

verifying identity of violators and there being no plea that there was any reason for DTC to fudge the incident against the petitioners, in the exercise of powers of judicial review, High Court would not interfere with the concurrent findings of Inquiry Officer, Disciplinary Authority, Appellate Authority and Tribunal, particularly where there is no merit in ground of challenge.

Hardeep Singh v. *Delhi Transport Corporation* *148*

— Facts: Respondent belonged to the erstwhile Posts and Telegraph Building Works (Group "A") Service, which he joined in the year 1977 as Assistant Executive Engineer (Civil). The new telecom policy introduced in 1997 created a company called Bharat Sanchar Nigam Limited (BSNL). The intention of the Union Government was to transfer the entire telecom service to the newly formed BSNL by retaining the functions of policy formulation, licencing, wireless spectrum management, administrative control of PSUs etc. with the Union Government. A circular dated 24.03.2005 issued by the DoT indicated the *scheme* for calling for options of absorption of Group "A" officers of P&T Building Works (Group "A") Services in MTNL/BSNL. The respondent exercised the option of being absorbed in BSNL on 06.06.2005. At that point of time, disciplinary proceedings were pending against Respondent. Before his option could be accepted, he sent a letter for withdrawal of the offer on 02.08.2006. However, that was rejected by an order dated 11.08.2006 by the DoT. The Respondent preferred the Original Application before the Central Administrative Tribunal (Tribunal). The Tribunal decided the question in favour of the respondent by holding that the offer made by the respondent could be withdrawn by him inasmuch as the offer had not yet been accepted by the petitioner. Held: The entire issue was held to be contractual and based upon the employees exercising their option to be retained in the parent department or to be absorbed in either MTNL or BSNL. It was further held that the scheme was essentially an invitation to an offer and the option exercised by the employee an offer to an invitation and remained an offer

till its acceptance. It is only on the acceptance of the offer that a binding contract would result. In the present case, the respondent had withdrawn the option (offer) prior to its acceptance. There is nothing in law which prevented him from doing so. This is so because the offer had not been accepted and it had not resulted into a binding contract.

Union of India and Anr. v. *V.K. Jain* *369*

TRADEMARKS ACT, 1999—Section 29, Section 49 The plaintiff company is engaged in the business of packaging, moving and providing logistic services and has been using the trade marks AGARWAL PACKERS & MOVERS & DRS Group (Logo). The Trade mark AGARWAL PACKERS & MOVERS is registered in the name of the plaintiff-company in a number of classes, including class 39 for providing transporters and goods carriers, packers and storage of goods and travelling arrangement services and in a class 17 for packaging storage, etc. The plaintiff also holds copyright in the artistic work of AGARWAL PACKERS & MOVERS (LOGO). DRS Group (Logo) is also a registered trademark of the plaintiff in class 39.—Though the suit pertains to number of trademarks owned by the plaintiff-company, arguments by the parties were advanced only with respect to use of trademarks Agarwal Packers & Movers bearing registration No. 1275683 and DRS GROUP (Label) bearing registration No. 1480427 which were subject matter of the interim order dated 03rd June, 2011—Admittedly, defendant No. 1—Company does not own the trademarks in question which stand registered in the name of the plaintiff-company. Since neither the procedure prescribed in Section 49 has admittedly been followed nor defendant No.1. company has been registered under Section 49 (2) of the Act, it cannot be said that defendant No.1 is a registered user of trademarks in question—Since defendant No. 1 is neither the proprietor nor the registered user of the trademarks Agarwal Packers & Movers and DRS GROUP logo, it has absolutely no right to use them and any such use by defendant No. 1 would amount

to infringement of these trademarks, which are owned by the plaintiff-company—Emanating from equity jurisdiction, injunction is a discretionary relief—The Court is not bound to grant injunction merely because it is lawful to go so. Even if the plaintiff is able to make out violation of an alleged right, the Court may still refuse to protect him, if it is satisfied that looking into his conduct, it will not be equitable to exercise the discretion in his favour—The conduct of a party seeking injunction is an important factor to be taken into consideration by the Court while exercising its discretion in a matter. The plaintiff in an injunction suit must come to the Court with clean hands and do nothing which is not expected from an honest, upright, deserving litigant and is required to disclose all material facts which may, one way or the other, affect the decision. A person deliberately concealing material facts from Court is not entitled to any discretionary relief—The suit filed at Secundrabad cannot be said to be such a material fact as would have affected the decision of the Court even on ex parte injunction and non disclosure of this suit therefore, does not disentitle the plaintiff to the discretionary relief of injunction—Infringement of the trademarks of the plaintiff-company by Agarwal Packers & Movers Private Limited dose not entitle defendant No. 1 also to infringe those marks.

DRS Logistics (P) Ltd. v. *DRS Dilip Roadlines (Pvt) Ltd. Ors.* *1*

ILR (2012) II DELHI 1
CS (OS)

DRS LOGISTICS (P) LTD. ....PLAINTIFF

VERSUS

DRS DILIP ROADLINES (PVT) LTD. ORS. ....DEFENDANTS

(V.K. JAIN, J.)

CS (OS) NO. : 1486/2011,
IA. NO. : 9741/2011 & 11799/2011 **DATE OF DECISION: 07.09.2011**

Trademarks Act, 1999—Section 29, Section 49 The plaintiff company is engaged in the business of packaging, moving and providing logistic services and has been using the trade marks AGARWAL PACKERS & MOVERS & DRS Group (Logo). The Trade mark AGARWAL PACKERS & MOVERS is registered in the name of the plaintiff-company in a number of classes, including class 39 for providing transporters and goods carriers, packers and storage of goods and travelling arrangement services and in a class 17 for packaging storage, etc. The plaintiff also holds copyright in the artistic work of AGARWAL PACKERS & MOVERS (LOGO). DRS Group (Logo) is also a registered trademark of the plaintiff in class 39.—Though the suit pertains to number of trademarks owned by the plaintiff-company, arguments by the parties were advanced only with respect to use of trademarks Agarwal Packers & Movers bearing registration No. 1275683 and DRS GROUP (Label) bearing registration No. 1480427 which were subject matter of the interim order dated 03rd June, 2011—Admittedly, defendant No. 1—Company does not own the trademarks in question which stand registered in the name of the plaintiff-company. Since neither the procedure

prescribed in Section 49 has admittedly been followed nor defendant No.1. company has been registered under Section 49 (2) of the Act, it cannot be said that defendant No.1 is a registered user of trademarks in question—Since defendant No. 1 is neither the proprietor nor the registered user of the trademarks Agarwal Packers & Movers and DRS GROUP logo, it has absolutely no right to use them and any such use by defendant No. 1 would amount to infringement of these trademarks, which are owned by the plaintiff-company—Emanating from equity jurisdiction, injunction is a discretionary relief—The Court is not bound to grant injunction merely because it is lawful to go so. Even if the plaintiff is able to make out violation of an alleged right, the Court may still refuse to protect him, if it is satisfied that looking into his conduct, it will not be equitable to exercise the discretion in his favour—The conduct of a party seeking injunction is an important factor to be taken into consideration by the Court while exercising its discretion in a matter. The plaintiff in an injunction suit must come to the Court with clean hands and do nothing which is not expected from an honest, upright, deserving litigant and is required to disclose all material facts which may, one way or the other, affect the decision. A person deliberately concealing material facts from Court is not entitled to any discretionary relief—The suit filed at Secundrabad cannot be said to be such a material fact as would have affected the decision of the Court even on ex parte injunction and non disclosure of this suit therefore, does not disentitle the plaintiff to the discretionary relief of injunction—Infringement of the trademarks of the plaintiff-company by Agarwal Packers & Movers Private Limited dose not entitle defendant No. 1 also to infringe those marks.

Emanating from equity jurisdiction, injunction is a discretionary

relief. This is made amply clear also by Section 38 of Specific Relief Act which specifically provides that a perpetual injunction may be granted to the plaintiff. The Court is not bound to grant injunction merely because it is lawful to do so. Even if the plaintiff is able to make out violation of an alleged right, the Court may still refuse to protect him, if it is satisfied that looking into his conduct, it will not be equitable to exercise the discretion in his favour.

The conduct of a party seeking injunction is an important factor to be taken into consideration by the Court while exercising its discretion in a matter. The Court relies upon the pleadings set out and documents filed before it, in forming the requisite opinion and, therefore, it naturally expects the injunction seeker to disclose all the material and relevant facts which would enable the Court to form a correct opinion and exercise a sound judicial discretion. If a material fact having bearing on the matter in controversy, which was in the knowledge of the plaintiff has been withheld, he would be disentitled to grant of injunction in his favour. The Court would then rather not enter into merits of the case and may deny relief to him on this ground alone. The plaintiff in an injunction suit must come to the court with clean hands and do nothing which is not expected from an honest, upright and deserving litigant. **(Para 16)**

Important Issue Involved: Emanating from equity jurisdiction, injunction is a discretionary relief.

[Ch Sh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Chander M. Lall, Ms. Ekta Sarin and Ms. Nancy Roya and Ms. Ankita Ubeja, Advocates.

FOR THE DEFENDANTS : Mr. Amit Sibal, Ms. Prachi Vashisht Sharma and Mr. Giriraj Subramanium, Advocates.

CASES REFERRED TO:

1. *Marie Stops Intl.* vs. *Parivar Seva Sanstha* 2010 (43) PTS 141 (Del).
2. *Vee Excel Drugs and Pharmaceuticals Ltd. HAB Pharmaceuticals and Research* LIM 2009 (111) DRJ 192.
3. *Khoday Distilleries* vs. *Scotch Whiskey Association and Ors.* (2008) 10 SCC 723.
4. *Micolube India Ltd.* vs. *Maggon Auto Centre* 150 (2008) DLT 458.
5. *M/s Ansul Industries* vs. *M/s Shiva Tabacoo Company* ILR (2007) I Delhi 409.
6. *Ramdev Food Products Pvt. Ltd.* vs. *Arvindbhai Rambhai Patel and Ors* (2006) 8 SCC 726.
7. *Midas Hygiene Industries (P) Ltd.* vs. *Sudhir Bhatia and Others* [(2004) 3 SCC 90].
8. *Vijay Sayal and Anr.* vs. *State of Punjab* (2003) 9 SCC 401.
9. *P. John Chandy and Co. Pvt. Ltd* vs. *John P. Thomas* (2002) 5 SCC 90.
10. *Smt Champa Arora* vs. *Shiv Lal Arora* 94 (2001) DLT 658.
11. *Virumal Praveen Kumar* vs. *Gokal Chand Hari Chand* 87(2000) Delhi Law Times 327.
12. *Rajni Dua and Ors.* vs. *Bhushan Kumar and Ors.* ILR (1998) II Delhi 870.
13. *Baker Hughes and Anr* vs. *Hiroo Khushlani and Anr.* 74 (1998) DLT 715.
14. *Satish Khosla* vs. *M/s Eli Lilly Ranbaxy Ltd. and Anr.* 71 (1998) DLT 1.
15. *M/s. Power Control Appliances and Others* vs. *Sumeet Machines Pvt. Ltd.* [(1994) 2 SCC 448].
16. *S.P. Chengalavaraya* vs. *Jagannath* (1994) 1 SCC 1.
17. *M/s Seemax Construction (P) Ltd.* vs. *State Bank of India and Another,* AIR 1992 Delhi 197.

18. *M/s Hindustan Pencils Pvt. Ltd.* vs. *M/s India Stationery Products Co. and Anr.* ILR (1989) I Delhi 115.

19. *Udai Chand* vs. *Shankar Lal* (1978) 2 SCC 209.

20. *Kale and Ors.* vs. *Deputy Director of Consolidation and Ors.* (1976) 3 SCC 119.

21. *Rajabhai Abdul Rehman Munshi* vs. *Vasudev Dhanjibhai Mody* AIR 1964 SC 345.

22. *Hari Narain* vs. *Badri Das* AIR 1963 SC 1558.

23. *Whitman* vs. *Disney Productions,* 263 F2d 229.

RESULT: Disposed of.

V.K. JAIN, J.

IA No. 9741/2011 (O. 39 R. 1&2 CPC) and IA No. 11799/2011 (O.39 R. 4 CPC)

1. This suit has been filed by DRS Logistics (P) Ltd through its authorized signatory/Director Shri Ramesh Agarwal. The plaintiff-company is engaged in the business of packaging, moving and providing logistic services and has been using the trade marks AGARWAL PACKERS & MOVERS & DRS Group (Logo). Initially, this business was started in the name of a partnership firm M/s AGARWAL PACKERS & MOVERS, which on formation of the plaintiff-company was merged into it vide agreement dated 15th April, 1993. The trade mark AGARWAL PACKERS & MOVERS is registered in the name of the plaintiff-company in a number of classes, including class 39 for providing transporters and goods carriers, packers and storage of goods and travelling arrangement services and in class 17 for packaging storage, etc. The plaintiff also holds copyright in the artistic work of AGARWAL PACKERS & MOVERS (LOGO). DRS Group (Logo) is also a registered trademark of the plaintiff in class 39. The plaintiff-company had a turnover or Rs 310 crores in the year 2008-2009 and Rs 360 crores in the year 2009-10. The plaintiff claims to have incurred advertisement expenditure of Rs 1 crore 85 lakh and Rs 2 crore 50 lakh respectively during the aforesaid two years.

2. Defendant No. 1 DRS Dilip Roadlines (Pvt.) Ltd. is a company managed and owned by defendants No. 2 and 3, who are also the directors in the plaintiff-company. It is alleged that investigations conducted by the plaintiff-company have revealed that defendant No. 1 has printed

quotations bearing various trademarks owned by the plaintiff-company, including the trademark Agarwal Packers & Movers. The quotations also provide for payment to be made in the name of defendant No. 1-company. According to the plaintiff-company, initially, quotation is given to the customer representing to them as if it was for and on behalf of the plaintiff-company and when the order is confirmed, a certificate is issued to the customer for an endorsement from him that he had engaged Agarwal Packers & Movers (Proprietor M/s DRS Dilip Roadlines (Pvt.) Ltd.) for transportation of his belongings and the invoicing to the customer is also done in the name of defendant No. 1-company. The defendants have also issued advertisements using the trademark Agarwal Packers & Movers on them and when a telephone call is made on a telephone number given in the advertisement, the pre-recorded message says "Welcome to Agarwal Packers & Movers". The person who answers the phone introduces himself as Agarwal Packers & Movers and eventually, orders are booked in the name of defendant No.1-company. The plaintiff has sought an injunction, restraining the defendant for using its registered trademarks Agarwal Packers & Movers, DRS GROUP logo and Dilip Roadlines (Pvt.) Ltd., either as a trade name or domain name and from passing off its services and businesses as those of the plaintiff-company.

3. In their written statement, the defendants have taken a preliminary objection that Mr Ramesh Agarwal is not competent to act, the plaintiff on behalf of the plaintiff-company, has concealed material facts from this Court by not disclosing that Mr Ramesh Agarwal has been sued by the plaintiff-company, in Secunderabad, for infringement of its trademarks. It is also alleged that the Board Resolution dated 25th January, 2007, relied upon by the plaintiff, is a fake and forged document. It is further alleged that Mr Ramesh Agarwal has floated a company by the name of Agarwal Packers & Movers Pvt. Ltd and diverted the business of the plaintiff-company to that company by using its name, brand, logo, etc. It is also alleged that since Mr Ramesh Agarwal and Mr Dinesh Agarwal had siphoned off funds of the plaintiff-company and played frauds upon it, a family meeting took place on 18th March, 2009 in the presence of the representative of Kotak Mahindra Bank, which is a strategic investor in the plaintiff-company. In the meeting, a decision was taken for geographical division of the operations of the plaintiff-company. Thereafter, Mr Ramesh Agarwal and Mr Rajinder Agarwal formed a group taking the operational divide as the division of the business and also started doing

business outside their areas. In view of these acts of Mr Ramesh Agarwal and Mr Rajinder Agarwal, the defendants were constrained to carry on business under the name and style of M/s DRS Dilip Roadlines Pvt. Limited and receive payment from the customer in the name of defendant No. 1-company.

4. Though the suit pertains a number of trademarks owned by the plaintiff-company, the arguments by the parties were advanced only with respect to use of trademarks Agarwal Packers & Movers bearing registration No. 1275683 and DRS GROUP (Label) bearing registration No. 1480427 which were subject matter of the interim order dated 03rd June, 2011.

5. It is not in dispute that the trademarks Agarwal Packers & Movers, DRS GROUP logo are owned by the plaintiff-company and are duly registered in its name.

6. Section 29 of Trademarks Act, to the extent it is relevant provides that a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with that trade mark, in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark. Sub-Section 29 (2), to the extent it is relevant, provides that a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses, in the course of trade, a mark which because of its identity with the registered trade mark and the similarity of the goods or services covered by such registered trade mark is likely to cause confusion on the part of the public or is likely to have an association with the registered trademark.

"Registered user" has been defined in 2(x) of the Act to mean a person who is for the time being registered as such under Section 49. Section 49 of the Act prescribes a procedure for registration of a person as a registered user of the trademark. Registered proprietor as well as the proposed registered user have to jointly apply in writing to the Registrar in the prescribed manner and such an application is to be accompanied by the documents prescribed in clause (a) and (b) of sub-Section (1) of Section 49. On the requirement of sub-Section (1) being complied with, the Registrar is to register the proposed registered user in respect of

goods and services as to which he is so satisfied.

7. Admittedly, defendant No.1-company does not own the trademarks in question which stand registered in the name of the plaintiff-company. Since neither the procedure prescribed in Section 49 has admittedly been followed nor defendant No. 1-company has been registered under Section 49 (2) of the Act, it cannot be said that defendant No. 1 is a registered user of trademarks in question.

8. It is not in dispute that the trademarks Agarwal Packers & Movers and DRS GROUP logo are being used by defendant No.1-company. The advertisement published in Times of India, New Delhi on 30th May, 2011 would show that the trademark Agarwal Packers & Movers has been prominently used by defendant No. 1 which also claimed that it was a DRS Group company.

9. The quotations submitted by defendant No. 1, copies of which have been filed by the plaintiff-company as Annexure A to the plaint would show that DRS GROUP logo as well as the trademark Agarwal Packers & Movers had been prominently used on them and the quotations also contain stipulation that payment is to be made in favour of DRS Dilip Roadlines Private Limited. In fact, the receipt, issued by defendant No. 1, describes it as an associate of DRS Logistics Private Limited and Agarwal Packers & Movers. In fact, this is not the case of the defendants that they are not using the trademark Agarwal Packers & Movers and DRS Group logo, their case is that since Mr Ramesh Agarwal, Mr Dinesh Agarwal and Mr Rajinder Agarwal had formed a group to harm their interests, they were compelled to use the aforesaid marks and receive payment in the name of defendant No.1-company. Since defendant No. 1 is neither the proprietor nor the registered user of the trademarks Agarwal Packers & Movers and DRS GROUP logo, it has absolutely no right to use them and any such use by defendant No. 1 would amount to infringement of these trademarks, which are owned by the plaintiff-company.

10. It was contended by the learned counsel for the defendants that in the meeting of the Board of Directors held on 18th September, 2009, the defendants were permitted to use these trademarks and thereby the plaintiff-company had acquiesced in the use of trademarks in question by them. The relevant extract from the minutes of the meeting held on 18th September, 2009 read as under:-

"The Chairman referred to the Share Subscription-cum-Shareholders Agreement dated February 6, 2007 executed with the Investor whereunder it was agreed that the business of the Company shall be done only in DRS Logistics Private Limited.

The Chairman stated that he has received emails containing information relating to DRS Dilip Roadlines Private Limited ("DRS Dilip Roadlines") and Agarwal Packers & Movers Private Limited ("Agarwal Packers & Movers"), being companies where allegedly business of the Company is being diverted by the regions controlling the respective companies.

The Chairman requested the Founder Directors to provide the reasons for the operations of these companies and how can he, as a Director of the Company, derive any comfort that these companies and their operations are not prejudicial to the interest of the company. He also requested members to provide the names of other entities set-up by them.

He further stated that he would like to put on record, and asked Ms Asha to take note of the same, that none of the promoters/ founders of the Company are entitled to float any entity in similar business as that of DRS Logistics Private Limited except with the prior written approval of the Investor and why and how these companies and their operations have come into existence without the prior consent of the Investor.

Mr A.K. Agarwal stated that the business was commenced in DRS Dilip Roadlines on knowing that business was being conducted through Agarwal Packers & Movers by the other Founder Directors. He stated that the DRS Dilip Roadlines was an old entity which was converted into a private limited company. The Chairman inquired that does it mean that DRS Dilip Roadlinees is a new company, Mr A.K. Agarwal nodded and said yes it is a new company. Further, Mr A.K. Agarwal claimed that DRS Dilip Roadlines has started business only for servicing the client, MRF Limited, because he was facing some practical problem of payment and bookings on this customer's account. Mr A.K. Agarwal stated that while Agarwal Packers & Movers is doing other business, he confirmed that he has not started any other business in DRS Dilip Roadlines.

The Chairman intervened and asked him to focus on DRS Dilip Roadlines. The Chairman restated that first and foremost this company, DRS Dilip Roadlines, has been set up without the prior permission of the Investor and asked Mr A.K. Agarwal to give comfort to the Board that there is no diversion resulting in loss of business to the Company. Mr A.K. Agarwal sought some time from the Chairman to discuss the point internally with Mr Dayanand Agarwal and Mr Sanjay Agarwal as to what comfort could be given to the Board. The Chairman reiterated that he should also respond as to why DRS Dilip Roadlines was formed without the consent of the Board. To this Mr A.K. Agarwal responded that there are many things that have been done without the consent of the Board and this is one of such hundred things The Chairman stated that this doesn't absolve the wrongdoings and that he would like Mr A.K. Agarwal to state how he intends to set these things right."

11. In **Power Control Appliances** (1994) 2 SCC 448, Supreme Court, inter alia, observed as under:

"Acquiescence is sitting by, when another is invading the rights and spending money on it. It is a course of conduct inconsistent with the claim for exclusive rights in a trade mark, trade name etc. It implies positive acts; not merely silence or inaction such as is involved in laches. In Harcourt v. White10 Sr. John Romilly said: "It is important to distinguish mere negligence and acquiescence." Therefore, acquiescence is one facet of delay. If the plaintiff stood by knowingly and let the defendants build up an important trade until it had become necessary to crush it, then the plaintiffs would be stopped by their acquiescence. If the acquiescence in the infringement amounts to consent, it will be a complete defence as was laid down in **Mouson (J. G.) & Co. v. Boehm**". The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant as was laid down in Rodgers v. Nowill12.

"Delay simpliciter may be no defence to a suit for infringement of a trade mark, but the decisions to which I have referred to clearly indicate that where a trader allows a rival trader to expend money over a considerable period in the building up of a business

with the aid of a mark similar to his own he will not be allowed to stop his rival's business. If he were permitted to do so great loss would be caused not only to the rival trader but to those who depend on his business for their livelihood. A village may develop into a large town as the result of the building up of a business and most of the inhabitants may be dependent on the business. No hard and fast rule can be laid down for deciding when a person has, as the result of inaction, lost the right of stopping another using his mark. As pointed out in Rowland v. Michell15 each case must depend on its own circumstances, but obviously a person cannot be allowed to stand by indefinitely without suffering the consequence."

12. In my view, the aforesaid minutes do not amount to any permission/acquiescence on the part of the plaintiff-company with respect to use of the trademarks Agarwal Packers & Movers and/or DRS Group Logo by defendant No. 1. Defendant No. 2 Mr A.K. Agarwal, when questioned about the business of defendant No. 1-company, claimed that this business was started only for serving MRF Limited because he was facing some practical problem in making payments on this customer's account. He specifically stated that he had not started any new business in DRS Dilip Roadlines. In fact, the explanation given by Mr A.K. Agarwal did not satisfy the Chairman, who asked him to give comfort to the Board that there was no diversion resulting in loss of business to the plaintiff-company. The Chairman also questioned the formation of DRS Dilip Roadlines without consent of the Board and when Mr A.K. Agarwal stated that a number of other things had been done without consent of the Board, the Chairman maintained that this did not absolve the wrongdoings on the part of Mr A.K. Agarwal.

13. In my view, this resolution at best can mean that the Board of Directors of the plaintiff-company condoned the act of defendant No. 1 in serving MRF Limited on account of some practical problems which Mr A.K. Agarwal claimed to be facing in respect of payments and bookings on this customer's account. This resolution cannot by any stretch be interpreted to mean that the Board of Directors of the plaintiff-company had permitted the use of the trademark Agarwal Packers & Movers by defendant No. 1-company and forever. This is not the case of defendant No. 1 that it is using the trademark Agarwal Packers & Movers and DRS Group Logo only for serving one client MRF Limited. In fact, the plaintiff-

company had not permitted use of its trademarks by defendant No. 1 even for serving MRF Limited in future.

14. The defendants have taken a preliminary objection that the resolution dated 25th January, 2007 is a forged and fabricated document and in any case, it does not authorize Mr A.K. Agarwal to file the present suit on behalf of the plaintiff-company. It, however, transpired during arguments that though the list of documents filed with the plaint referred to Board of Resolution dated 06th October, 2006 in favour of Mr Ramesh Agarwal, the copy filed by the plaintiff was of the resolution dated 25th January, 2007. The plaint, however, has no reference to the Resolution dated 25th January, 2007. The plaintiff has already placed on record a copy of the Resolution dated 06th October, 2006. This Resolution has not been disputed by the defendants and admittedly, it bears the signature of the father of defendants No. 2 and 3. A perusal of the resolution passed by the Board of Directors of the plaintiff-company on 06th October, 2006 would show that vide this Resolution, Mr Ramesh Agarwal was authorized to file suits for injunction for infringement of trademark, passing off and unfair competition before this Court against the companies/ persons for infringement of the trademark of the plaintiff-company. In view of this resolution, it is difficult to say that Shri Ramesh Agarwal does not have authority from the plaintiff-company to file the suit alleging infringement of the trademark of the plaintiff-company by defendant No. 1-company.

15. It was vehemently contended by the learned counsel for the defendants that the plaintiff is not entitled to equitable and discretionary relief of injunction since it did not disclose to the Court that a suit has already been filed against Shri Ramesh Agarwal, Shri Rajinder Agarwal and their company against Agarwal Packers & Movers (Pvt.) Ltd. by the plaintiff-company for infringement of its trademarks. The suit at Secunderabad has been filed through one Mr Bhoopal Rao, before the First Additional Chief Judge, City Civil Court.

16. Emanating from equity jurisdiction, injunction is a discretionary relief. This is made amply clear also by Section 38 of Specific Relief Act which specifically provides that a perpetual injunction may be granted to the plaintiff. The Court is not bound to grant injunction merely because it is lawful to do so. Even if the plaintiff is able to make out violation of an alleged right, the Court may still refuse to protect him, if it is satisfied

that looking into his conduct, it will not be equitable to exercise the discretion in his favour.

The conduct of a party seeking injunction is an important factor to be taken into consideration by the Court while exercising its discretion in a matter. The Court relies upon the pleadings set out and documents filed before it, in forming the requisite opinion and, therefore, it naturally expects the injunction seeker to disclose all the material and relevant facts which would enable the Court to form a correct opinion and exercise a sound judicial discretion. If a material fact having bearing on the matter in controversy, which was in the knowledge of the plaintiff has been withheld, he would be disentitled to grant of injunction in his favour. The Court would then rather not enter into merits of the case and may deny relief to him on this ground alone. The plaintiff in an injunction suit must come to the court with clean hands and do nothing which is not expected from an honest, upright and deserving litigant.

17. Defendant No. 1-company is not a party to the Civil Suit filed at Secunderabad. The plaintiff is vehemently disputing the authority of Shri Bhopal Rao to file the aforesaid suit on behalf of the plaintiff-company. The proceedings in that suit have admittedly been stayed by Andhra Pradesh High Court. The case set up in the suit filed at Secunderabad, through Mr. Bhopal Rao is that assuming that Agarwal Packers & Movers is not a registered user of the trademarks in question as is being claimed by that company and it had infringed the registered trademarks of the plaintiff-company by using them for its business purposes, that would have no bearing on the question as to whether defendant No. 1 has infringed the trademarks of the plaintiff-company or not. The question which arises for consideration of the Court in such matters is as to whether disclosure of the fact withheld by the plaintiff could have made any difference to the interim order passed by this Court on 03rd June, 2011. In my view, even if the plaintiff had disclosed the factum of filing of the suit by Shri Bhoopal Rao on its behalf at Secunderabad against Ramesh Agarwal and Rajinder Agarwal, that would have made no difference to the interim order passed by this Court since defendant No.1-company has no authority in law to use the registered trademarks owned by plaintiff-company and infringement of these trademarks by Agarwal Packers and Movers (Pvt.) Ltd. does not condone the infringement by the plaintiff. The subject matter of the suit at Secunderabad therefore is altogether different from the subject matter of

the present suit. It is, therefore, difficult to say that the plaintiff has obtained ex parte injunction from the Court by withholding a material fact.

18. In support of his contention, based on concealment, the learned counsel for the defendant has relied upon **M/s Seemax Construction (P) Ltd. v. State Bank of India and Another,** AIR 1992 Delhi 197 and **Virumal Praveen Kumar vs. Gokal Chand Hari Chand** 87(2000) Delhi Law Times 327. In the case of **Seemax** (supra), this Court inter alia, observed as under:

> "The suppression of material fact by itself is a sufficient ground to decline the discretionary relief of injunction. A party seeking discretionary relief has to approach the court with clean hands and is required to disclose all material facts which may, one way or the other, affect the decision. A person deliberately concealing material facts from court is not entitled to any discretionary relief. The court can refuse to hear such person on merits. A person seeking relief of injunction is required to make honest disclosure of all relevant statements of facts otherwise it would amount to an abuse of the process of the court."

There is no quarrel with the proposition of law laid down in this case, but, in my view, the suit filed at Secundrabad cannot be said to be such a material fact as would have affected the decision of the Court even on ex parte injunction and non disclosure of this suit therefore, does not disentitle the plaintiff to the discretionary relief of injunction. In that case, the plaintiff had suppressed the factum of having filed a suit for permanent injunction in respect of encashment of the bank guarantee and had further concealed filing of another suit in Munsif Court at Ganganagar seeking injunction in regard to encashment of bank guarantee of Rs 4,38,000/-. In these circumstances, the Court was of the view that a material fact had been concealed by the plaintiff from the Court and had not made full, complete and honest disclosure of the material fats. The facts here are altogether different.

In **Virumal Praveen Kumar** (supra), the plaintiff filed a suit claiming to be lawful proprietor of the trademark '555' and claimed that it was registered under an application dated 30th July, 1991. The plaintiff concealed from the Court that a suit had been filed against it by M/s. Needle Industries and William Prim GmbH & Co. Ltd., seeking relief of

infringement of the trademark '555' and when the defendant disclosed this fact to the Court, the plaintiff, tried to take advantage of an incorrect suit number having been given by the defendant to claim that no such suit had been filed against it. It was for this reason that the Court hold that the plaintiff had suppressed the vital fact on the dispute before it and, therefore, was not entitled to interim injunction which he had obtained from the Court. However, as noted earlier, the suit at Secundrabad has not been filed against DRS Logistics Private Limited though it has been filed against Ramesh Chand Agarwal and his company Agarwal Packers & Movers Private Limited. That suit has no bearing on the question of infringement of the trademarks of the plaintiff-companies by defendant No. 1. Of course, it would have been desirable had the plaintiff disclosed the suit filed at Secundrabad, but, considering the nature of the controversy involved in that suit and the question in dispute in the suit before this Court, it cannot be said that failure of the plaintiff to disclose the aforesaid suit amounts to suppression of a fact material to this extent that the plaintiff-company which owns these registered trademarks should be deprived of its right to seek injunction against infringement of those marks by defendant No.1-company.

19. The learned counsel for the defendants has also submitted copies of the judgments **Micolube India Ltd. v. Maggon Auto Centre** 150 (2008) DLT 458, **Satish Khosla vs. M/s Eli Lilly Ranbaxy Ltd. and Anr.** 71 (1998) DLT 1, **Smt Champa Arora v. Shiv Lal Arora** 94 (2001) DLT 658, **Vijay Sayal and Anr. v. State of Punjab** (2003) 9 SCC 401, **Udai Chand v. Shankar Lal** (1978) 2 SCC 209, **S.P. Chengalavaraya v. Jagannath** (1994) 1 SCC 1, **Rajabhai Abdul Rehman Munshi v. Vasudev Dhanjibhai Mody** AIR 1964 SC 345 on the issue of suppression of material facts. There is no dispute with the proposition of law applied in these cases, but, in the facts and circumstances of the case, I do not think that failure of the plaintiff to disclose the suit at Secundrabad against Agarwal Packers & Movers Private Limited, Ramesh Agarwal and Rajinder Agarwal, amounts to suppression of material facts and disentitles the plaintiff from claiming injunction against use of its registered trademarks by defendant No.1.

20. On the question of acquiescence and permissive user, the learned counsel for the defendant has submitted copies of decisions in **Hari Narain v. Badri Das** AIR 1963 SC 1558, **Vee Excel Drugs and Pharmaceuticals Ltd. HAB Pharmaceuticals and Research** LIM 2009

(111) DRJ 192. **M/s Ansul Industries v. M/s Shiva Tabacoo Company** ILR (2007) I Delhi 409, **M/s Power Control Appliances and Ors. v. Sumeet Machines Pvt. Ltd.** (1994) 2 SCC 448, **Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai Patel and Ors** (2006) 8 SCC 726, **P. John Chandy and Co. Pvt. Ltd v. John P. Thomas** (2002) 5 SCC 90, **M/s Hindustan Pencils Pvt. Ltd. v. M/s India Stationery Proucts Co. And Anr.** ILR (1989) I Delhi 115, **Khoday Distilleries v. Scotch Whiskey Association and Ors.** (2008) 10 SCC 723, **Marie Stops Intl. v. Parivar Seva Sanstha** 2010 (43) PTS 141 (Del), **Baker Hughes and Anr v. Hiroo Khushlani and Anr.** 74 (1998) DLT 715.

He has relied upon the following observations made by this Court in **Ansul Industries** (supra):

> "Implied or express consent to use of a trademark under Section 30(1)(b) of the Act is a statutory defense to a suit for infringement. Consent involves affirmative acceptance and not merely standing by and absence of objection. Affirmative acceptance can be in writing and can be termed as express consent. Implied consent can be oral and by conduct. The conduct, however, must indicate acceptance and not mere inaction or inactivity. Inaction in every case without anything more does not lead to an inference of implied consent. However where the plaintiff has laid by and inspite of his right by his conduct has encouraged the defendant to alter his condition and the latter has acted upon this faith of encouragement so held out, the plaintiff loses his claim to claim injunction"

Section 30 of Trademarks Act has absolutely no application to the facts of this case and in fact, no defence based on Section 30 of the Act has been taken by the defendants. In this case, the appellant M/s Ansul Industries as well as the respondent M/s Shiva Tobacco were manufacturing and selling the same product, i.e., chewing tobacco, the appellant under the name 'Udta Panchhi' and the respondent under the name 'Panchhi Chhap'. The respondent was also the registered user of the brand name 'Punchhi Chhap' under the Trade and Merchandise Marks Act, whereas there was no registration of the trademark 'Udta Panchhi' in favour of the appellant. In para 44 of the judgment, this Court referred to certain principles of law in the matter of granting interim injunction in such matters and principle (vi) referred therein read as under:-

"Where initial adoption by the defendant itself is vitiated by fraud and/or is dishonest, delay is not a valid ground to allow misuse. If user is at the inception is tainted by fraud and dishonesty, continuous use does not bestow legality."

The learned counsel for the defendant has relied upon the following observations made by the Supreme Court in **Ramdev Food Products Pvt. Ltd.** (supra):-

"103. Acquiescence is a facet of delay. The principle of acquiescence would apply where: (i) sitting by or allow another to invade the rights and spending money on it; (ii) it is a course of conduct inconsistent with the claim for exclusive rights for trade mark, trade name, etc.

104. In **M/s. Power Control Appliances and Others v. Sumeet Machines Pvt. Ltd.** [(1994) 2 SCC 448], this Court stated:

"26. Acquiescence is sitting by, when another is invading the rights and spending money on it. It is a course of conduct inconsistent with the claim for exclusive rights in a trade mark, trade name etc. It implies positive acts; not merely silence or inaction such as is involved in laches."

105. In an infringement of trade mark, delay by itself may not be a ground for refusing to issue injunction as has been observed by Lahoti, J. (as His Lordship then was) in **Midas Hygiene Industries (P) Ltd. v. Sudhir Bhatia and Others** [(2004) 3 SCC 90] in the following terms:

"5. The law on the subject is well settled. In cases of infringement either of trade mark or of copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the mark was itself dishonest." (Emphasis supplied). 106. The defence of acquiescence, thus, would be satisfied when the plaintiff assents to or lay by in relation to the acts of another person and in view of that assent or laying by and consequent acts it would be unjust in all the circumstances to grant the specific relief."

In **P. John Chandy and Co. Pvt. Ltd** (supra), Supreme Court made a distinction between acquiescence and consent, in a dispute between a landlord and tenant. I, however, find no such proposition in this case as would be of help to the defendants in any manner.

The following observations made by this Court in **Hindustan Pencils** (supra) have been relied upon by the learned counsel for the plaintiff:-

"It would appear that 'inordinate delay', which has never been defined by the Courts so far, would be analogous or similar to 'laces'. In **Whitman v. Disney Productions,** 263 F2d 229 it was observed by the 9th Circuit Court of Appeal in U.S.A. as follows:

"Mere passage of time cannot constitute laces, but if the passage of time can be shown to have lulled defendant into a false sense of security, and the defendant acts in reliance thereon, laces may, in the discretion of the trial Court, be found."

It would follow, logically, that delay by itself is not a sufficient defense to an action for interim injunction, but delay coupled with prejudice caused to the defendant would amount to 'laces'."

However, neither any case of latches nor of inordinate delay has been set up by the defendant in the written statement nor is it otherwise made out in the facts and circumstances of the case.

In this case, the plaintiffs were the registered proprietors of the trademark 'Nataraj' with device of 'Nataraj' in respect of a number of stationery products, including pins and clips. The defendants in that case had obtained copyright in a label similar to the label of the plaintiffs in respect of the pins. The case of the plaintiffs was that they had come to know about copyright registration granted to the defendants only in the middle of the year 1995, whereas the case of the defendants was that the plaintiffs were aware of the use of the trademark 'Nataraj' by them sine the year 1982 when the advertisement of the plaintiffs and defendants appeared in the magazine. It was contended by the defendants that there was six years delay on the part of the plaintiffs in filing the suit and, therefore, they were not entitled to injunction. This Court in para 31 of the judgment, inter alia, observed as under:

"If a party, for no apparent or a valid reason, adopts, with or

without modifications, a mark belonging to another, whether registered or not, it will be difficult for that party to avoid an order of injunction because the Court may rightly assume that such adoption of the mark by the party was not an honest one. The Court would be justified in concluding that the defendant, in such an action, wanted to cash in on the plaintiff's name and reputation and that was the sole, primary or the real motive of the defendant adopting such a mark. Even if. in such a case, there may be an inordinate delay on the part of the plaintiff in bringing a suit for injunction, the application of the plaintiff for an interim injunction cannot be dismissed on the ground that the defendant has been using the mark for a number of years."

However, in para 33 of the judgment, this Court expressed the following view:

"As already noted, acquiescence may mean an encouragement by the plaintiff to the defendant to use the infringing mark. It is as if the plaintiff wants the defendant to be under the belief that the plaintiff does not regard- the action of the defendant as being vocative of the plaintiff's rights. Furthermore, there should be a tacit or an express assent by the plaintiff to the defendant's using the mark and in a way encouraging the defendants to continue with the business. In such a case the infringer acts upon an honest mistaken belief that he is not infringing the trade mark of the plaintiff and if, after a period of time when the infringer has established the business reputation, the plaintiff turns around and brings an action for injunction the defendant would be entitled to raise the defense of acquiescence. Acquiescence may be a good defense even to the grant of a permanent injunction because the defendant may legitimately contend that the encouragement of the plaintiff to the defendant's use of the mark in effect amounted to the abandonment by the plaintiff of his right in favor of the defendant and, over a period of time, the general public has accepted the goods of the defendant resulting in increase of its sale. It may, however, be stated that it will be for the defendant in such cases to prove acquiescence by the plaintiff. Acquiescence cannot be inferred merely by reason of the fact that the plaintiff has not taken any action against the infringement of its rights."

In **Khoday Distilleries** (supra), Supreme Court observed that Delay would be a valid defence where it has caused a change in the subject matter and action or brought about a situation in which justice cannot be done.

In **Marie Stops Intl.** (supra), the Court quoted Ziff Davis with respect to permissive user. I fail to appreciate how these observations can be of any help to the defendants in a case of infringement of trademark. When defendant No.1 is neither the proprietor nor the registered user of trademarks in question. I have also gone through the observations made in the case of **Baker Hughes and Anr** (supra), but, I find no such proposition of law in this case as would be any help to the defendants.

The learned counsel for the defendants has also referred to **Kale and Ors. v. Deputy Director of Consolidation and Ors.** (1976) 3 SCC 119 and **Rajni Dua and Ors. v. Bhushan Kumar and Ors.** ILR (1998) II Delhi 870 with respect to family arrangement. However, in the present case, no family arrangement permitting the defendants to use the trademarks Agarwal Packers & Movers and DRS GROUP (Label) has been made out. This is not a case where the defendants are using the trademark owned by the plaintiff-company and crediting the receipts in the account of the plaintiff-company. They have been receiving payments in the name of defendant No. 1 and not in the name of the plaintiff-company. In any case, the trademark is owned by the plaintiff which is a corporate entity and defendant No. 1 has no right to use it without its being the registered user for these trademarks.

21. The learned counsel for the defendants vehemently contended that Agarwal Packers & Movers Private Limited, a company formed by Ramesh Agarwal and Rajinder Agarwal was infringing the registered trademarks of the plaintiff-company. The case of the plaintiff is that there was a registered user agreement between the plaintiff-company and Agarwal Packers & Movers Private Limited. The case of the defendants, on the other hand, is that no such agreement has been executed under the authority of the plaintiff-company and in any case the Memorandum and Articles of Association of the plaintiff-company prohibit the plaintiff-company from entering into such an agreement without affirmative vote of strategic investor Kotak Mahindra Bank. In this regard, he relied upon class 22 and 24 of the Articles of Association of the plaintiff-company. I, however, need not go into this aspect of the matter since a suit has

already been filed at Secundrabad against Agarwal Packers & Movers Private Limited and that company is not a party to this suit. If Agarwal Packers & Movers Private Limited is infringing the trademarks of the plaintiff-company, it is for the Court at Secundrabad to pass appropriate order against that company if it finds that the suit before it has been file by a person duly authorized by the plaintiff-company in this regard. But, infringement of the trademarks of the plaintiff-company by Agarwal Packers & Movers Private Limited does not entitle defendant No. 1 also to infringe those marks.

22. For the reasons given in the preceding paragraphs, defendant No. 1 is restrained from using the trademarks Agarwal Packers & Movers bearing registration No. 1275683 and DRS GROUP (Logo) bearing registration No. 1480427 on any advertising or promotional material, on its invoice or in any other manner, during pendency of the suit. Interim order dated 03rd June, 2011 stands merged in this order. However, in the facts and circumstances of the case, it is directed that the trial will be fast tracked by appointing a Local Commissioner, at the cost of the plaintiff, to record evidence of the parties in a time bound manner.

The applications stand disposed of.

CS(OS) 1486/2011 and IA No. 11800/2011 (O. 1 R. 10 CPC)

List on 12th October, 2011 for disposal of IA.

ILR (2012) II DELHI 22
W.P. (C)

RAJU BHOJWANI ....PETITIONER

VERSUS

CHIEF COMMISSIONER OF INCOME TAX-XI ....RESPONDENT

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

W.P. (C) NO. : 1931/2010 DATE OF DECISION: 09.09.2011

Income Tax Act, 1961—Section 147, Section 80 HHC Proceedings under Section 147 of the Act were initiated by issue of notice dated 5th July, 2004 as it was noticed that the petitioner had claimed excessive deduction under Section 80 HHC. The petitioner had business loss in exports of Rs. 7,16,189/- but this was ignored for computation of deduction under Section 80 HHC—Levy of interest is no such amount, which the assessee withholds and does not pay to the Revenue and makes use of the said amount and therefore, is liable to pay compensatory interest. It is meant to off set the loss or prejudice caused to the Revenue on account of non-payment of the taxable amount. The levy in question is automatic and is attracted the moment there is a default—Deduction under Section 80 HHC is to be arrived at and claimed on profits earned from both export of self-manufactured goods and trading goods and profits and loss of both traders have to be taken into consideration. If after the adjustment there is positive profit, then only deduction under Section 80 HHC can be claimed. If there is loss, there cannot be any entitlement. The provisio did not act as a detriment or negate or reduce the claim of deduction.

Levy of interest is on such amount, which the assessee withholds and does not pay to the Revenue and makes use of the said amount and, therefore, is liable to pay compensatory interest. It is meant to off set the loss or prejudice caused to the Revenue on account of non-payment of the taxable amount. The levy in question is automatic and is attracted the moment there is a default. The automatic and mandatory nature of the said levy has been elucidated and explained by the Supreme Court in the case of **Commissioner of Income Tax versus Anjum M.H. Ghaswala and Others,** (2001) 252 ITR 1 (SC). In the said case, the Supreme Court has examined whether the Settlement Commission has the power to waive interest under the said Sections. It was held that the Settlement Commission has not been given any express power of waiver and reduction of interest against the levy of interest under Section 234A, 234B and 234C and the Settlement Commission also does not have any power to do so under Chapter XIX-A of the Act. It was accordingly opined:-

> "We do not find any such problem in the provisions of the Act to which we have already referred. Sections 234A, 234B and 234C in clear terms impose a mandate to collect interest at the rates stipulated therein. The expression "shall" used in the said section cannot by any stretch of imagination be construed as "may". There are sufficient indications in the scheme of the Act to show that the expression "shall" used in sections 234A, 234B and 234C is used by the Legislature deliberately and it has not left any scope for interpreting the said expression as "may". This is clear from the fact that prior to the Amendment brought about by the Finance Act, 1987, the Legislature in the corresponding section pertaining to imposition of interest used the expression "may" thereby giving discretion to the authorities concerned to either reduce or waive the interest. The change brought about by the Amending Act (Finance Act, 1987) is a clear indication of the fact that the intention of the Legislature

was to make the collection of statutory interest mandatory. In this connection, we may usefully refer to the judgment of this court in **Jaywant S. Kulkarni v. Minochar Dosabhai Shroff**, AIR 1988 SC 1817, wherein this court held that when the Legislature changes the expression "may" to "shall" by amendment of the statute, it is clear that it intended to make the provision mandatory from the existing directory provision. Therefore, the question of the Commission relying upon external aids, for the purpose of interpretation like the Wanchoo Committee Report, Discussions of the Select Committee of Parliament and introduction of Chapter XIX-A in the Act, Press Release of the Board dated May 21, 1996, etc., are purpose- less because of the clear and unambiguous language used in sections 234A, 234B and 234C and section 245D(4) and (6). We notice if only the Commission were to follow the golden rule of interpretation by giving the words of the statute their natural and ordinary meaning without unnecessarily going into a forensic exercise of trying to find out the object of the introduction of Chapter XIX-A or Part F of Chapter XVII, the Commission would not have fallen in error.

(Para 10)

Important Issue Involved: Deduction under Section 80 HHC is to be arrived at and claimed on profits earned from both export of self-manufactured goods and trading goods and profits and loss of both traders have to be taken into consideration. If after the adjustment there is positive profit, then only deduction under Section 80 HHC can be claimed.

[Ch Sh]

APPEARANCES:

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

FOR THE RESPONDENT : Deepak Anand, Advocate

CASES REFERRED TO:

1. *Lalsons Enterprises* vs. *DCIT* [2004] 89 ITD 25 (Del).
2. *IPCA Laboratory Limited* vs. *Deputy Commissioner of Income Tax, [2004] 266 ITR 521 (SC).*
3. *Dr. Prannoy Roy* vs. *Commissioner of Income Tax,* (2002) 254 ITR 0755 (Del)].
4. *Commissioner of Income Tax* vs. *Anjum M.H. Ghaswala and Others,* (2001) 252 ITR 1 (SC).
5. *UCO Bank* vs. *CIT, (1999) 237 ITR 889 (SC).*
6. *Dr. S. Reddappa* vs. *UOI,* (1998) 232 ITR 62 (Kar).
7. *Ranchi Club Limited* vs. *CIT,* (1996) 217 ITR 72 (Pat).
8. *Union Home Products Limited* vs. *UOI,* (1995) 215 ITR 758 (Kar).
9. *Jaywant S. Kulkarni* vs. *Minochar Dosabhai Shroff,* AIR 1988 SC 1817.

RESULT: Dismissed.

SANJIV KHANNA, J.:

1. The petitioner-Raju Bhojwani is the sole proprietor of Reshmica Exports. For the assessment year 2002-03, the petitioner filed his return on 4th October, 2002 declaring total taxable income of Rs. 6,76,660/- after claiming deduction of Rs.6,34,503/- under Section 80 HHC of the Income-Tax Act, 1961 (Act, for short).

2. Proceedings under Section 147 of the Act were initiated by issue of notice dated 5th July, 2004 as it was noticed that the petitioner had claimed excessive deduction under Section 80 HHC. The petitioner in fact had business loss in exports of Rs.7,16,189/- but this was ignored for computation of deduction under Section 80 HHC.

3. By this time, the Supreme Court had decided **IPCA Laboratory Limited versus Deputy Commissioner of Income Tax,** [2004] 266 ITR 521 (SC) holding, inter alia, that on a plain reading of Section 80 HHC it is clear that in arriving at the profits earned from exports, profits and losses of both manufactured goods and trading goods have to be taken into consideration. If after such adjustment, there is positive profit,

the assessee would be entitled to deduction under Section 80 HHC. If there is a loss, he will not be entitled to any deduction.

4. The petitioner filed a return of income in response to the notice under Section 147 of the Act again declaring total income to Rs.6,76,660/- as declared in the original return. The Assessing Officer held that the assessee had suffered loss in export business and, therefore, not entitled to deduction under Section 80 HHC. Deduction under Section 80 HHC was also denied on the ground of interest received and rental income had been included for computing the said deduction. The total income was assessed at Rs.13,72,974/-. Interest under Section 234B of the Act was directed to be levied as per law.

5. The petitioner filed an appeal, which was partly allowed by the Commissioner of Income-Tax (Appeals). The first appellate authority noticed that Section 80 HHC had been retrospectively amended by the Taxation Laws (Amendment) Act, 2005 and the assessee was entitled to benefit of the proviso added with retrospective effect from 1st April 1998 on account of profits from sale of export incentives. Commissioner of Income-Tax (Appeals) also directed to treat 90% of interest income as income qualifying for deduction under Section 80HHC. Direction of the Assessing Officer to charge interest under section 234B was not interfered with.

6. The Revenue and the assessee both approached Income-Tax Appellate Tribunal but without success. The petitioner had filed cross-objection challenging levy of interest under Section 234B of the Act but the appeal was dismissed, inter alia, recording as under:

> "4.1 Learned counsel for the assessee Shri Manjani submitted that the assessee claimed deduction u/s. 80 HHC based on the decision of Special Bench of the Tribunal in the case of Lalsons Enterprises, 80 ITD 25.
>
> Subsequently, due to judgment of Hon'ble Supreme Court in the case of **IPCA Laboratories** (supra), the assessee was denied deduction u/s. 80HHC. However, due to retrospective amendment, the assessee was entitled to partial deduction u/s. 80HHC. The assessee on the basis of his own estimate has paid the advance tax. To that extent, there is no default and hence, no interest u/s. 234B was payable. The interest u/s. 234B became payable due

to the decision rendered by the Hon'ble Supreme Court. Since the assessee could not foresee such decision of Hon'ble Supreme Court, deduction u/s. 80HHC was denied and higher income as charged to tax. Accordingly, default in payment of advance tax was an unforeseen one. Thus, interest u/s. 234B in such cases is not leviable....

4.2 Learned DR, on the other hand, submitted that the assessee is not denying his liability to pay advance tax. Once the advance tax was payable the computation is to be made on the basis of assessed income and not returned income. This may be a case of genuine hardship due to subsequent decision of the Hon'ble Supreme Court, the same cannot be a ground not to charge the interest. Interest u/s. 234B is mandatory and compensatory in nature. However, for reduction or waiver of interest, appropriate petition may be filed before appropriate authorities.

5. We have considered rival submissions. As per the income declared in return of income, the assessee was required to pay advance tax. Thus, liability to pay advance tax is not denied. Though the assessee has paid advance tax is not denied. Though the assessee has paid advance tax as per his own estimate, interest is chargeable on the advance tax payable on the basis of assessed income and not income declared in return of income. Charging of interest being mandatory in nature in view of the decision of the Hon'ble Supreme Court in the case of Anjum Ghaswala, 252 ITR 1, the levy has to upheld. However, the assess, if so advised, may approach appropriate authority for reduction or waiver of the interest charged."

7. The petitioner thereafter filed an application under Section 234B and 234C for waiver of interest before the Commissioner of Income-Tax, which has been rejected by the impugned order dated 22nd February, 2010. The Commissioner of Income-Tax has held that the request for waiver of interest is not covered either under CBDT circulars dated 23rd May, 1996, 30th January, 1997 or under the Circular No. 2/2006 dated 17th January 2006.

8. The contention raised by the petitioner is that the findings recorded by the Commissioner that the petitioner's case is not covered by CBDT circulars dated 23rd May, 1996, 30th January, 1997 or the Circular No. 2/2006 is incorrect and, therefore, there is an error in the decision making process.

9. Sections 234A, 234B and 234C of the Act were introduced by Direct Tax Laws (Amendment) Act, 1987 with effect from 1st April 1989, with a view to simplify the existing provisions relating to interest, penalty, etc. and remove discretion of the assessing authorities, which had led to litigation and consequential delay. The provisions provide for mandatory interest in respect of late filing of returns and delay, non-payment or short payment of advance tax. Constitutional validity of these provisions were challenged before the High Courts but was upheld on the ground that the provisions are not penal in nature but compensatory in character [see **Union Home Products Limited versus UOI,** (1995) 215 ITR 758 (Kar), **Ranchi Club Limited versus CIT,** (1996) 217 ITR 72 (Pat) and **Dr. S. Reddappa versus UOI,** (1998) 232 ITR 62 (Kar). Also see **Dr. Prannoy Roy versus Commissioner of Income Tax,** (2002) 254 ITR 0755 (Del)].

10. Levy of interest is on such amount, which the assessee withholds and does not pay to the Revenue and makes use of the said amount and, therefore, is liable to pay compensatory interest. It is meant to off set the loss or prejudice caused to the Revenue on account of non-payment of the taxable amount. The levy in question is automatic and is attracted the moment there is a default. The automatic and mandatory nature of the said levy has been elucidated and explained by the Supreme Court in the case of **Commissioner of Income Tax versus Anjum M.H. Ghaswala and Others,** (2001) 252 ITR 1 (SC). In the said case, the Supreme Court has examined whether the Settlement Commission has the power to waive interest under the said Sections. It was held that the Settlement Commission has not been given any express power of waiver and reduction of interest against the levy of interest under Section 234A, 234B and 234C and the Settlement Commission also does not have any power to do so under Chapter XIX-A of the Act. It was accordingly opined:-

"We do not find any such problem in the provisions of the Act to which we have already referred. Sections 234A, 234B and 234C in clear terms impose a mandate to collect interest at the rates stipulated therein. The expression "shall" used in the said section cannot by any stretch of imagination be construed as "may". There are sufficient indications in the scheme of the Act

to show that the expression "shall" used in sections 234A, 234B and 234C is used by the Legislature deliberately and it has not left any scope for interpreting the said expression as "may". This is clear from the fact that prior to the Amendment brought about by the Finance Act, 1987, the Legislature in the corresponding section pertaining to imposition of interest used the expression "may" thereby giving discretion to the authorities concerned to either reduce or waive the interest. The change brought about by the Amending Act (Finance Act, 1987) is a clear indication of the fact that the intention of the Legislature was to make the collection of statutory interest mandatory. In this connection, we may usefully refer to the judgment of this court in **Jaywant S. Kulkarni v. Minochar Dosabhai Shroff,** AIR 1988 SC 1817, wherein this court held that when the Legislature changes the expression "may" to "shall" by amendment of the statute, it is clear that it intended to make the provision mandatory from the existing directory provision. Therefore, the question of the Commission relying upon external aids, for the purpose of interpretation like the Wanchoo Committee Report, Discussions of the Select Committee of Parliament and introduction of Chapter XIX-A in the Act, Press Release of the Board dated May 21, 1996, etc., are purpose- less because of the clear and unambiguous language used in sections 234A, 234B and 234C and section 245D(4) and (6). We notice if only the Com- mission were to follow the golden rule of interpretation by giving the words of the statute their natural and ordinary meaning without unnecessarily going into a forensic exercise of trying to find out the object of the introduction of Chapter XIX-A or Part F of Chapter XVII, the Commission would not have fallen in error.

11. In **Anjum M.H. Ghaswala** (supra), the Supreme Court also examined the circulars issued by the CBDT under Section 119(2)(a) of the Act. These circulars have been issued pursuant to the observations of various High Courts while examining the constitutional validity of the said Sections. The High Courts had observed that in case of extreme difficulty or peculiar cases like retrospective amendment etc., it was open to the assessee to move the concerned authority for appropriate relief. Accordingly, CBDT had issued the said circulars authorizing the Commissioner to reduce or waive interest, if the conditions stipulated

therein are satisfied. The Supreme Court also observed that these circulars are binding on the Revenue [see **UCO Bank versus CIT,** (1999) 237 ITR 889 (SC)] and can be taken into consideration by the Settlement Commission to grant relief.

12. The question, therefore, is whether the case of the petitioner is covered by the circular dated 23rd May, 1996 as clarified by another circular dated 30th January, 1997 or by the circular No. 2/2006 dated 17th January, 2006. The relevant portion of the circular dated 23rd May, 1996 relied upon by the petitioner reads as under:

"In exercise of the powers conferred under clause (a) of sub-section (2) of section 119 of the Income-tax Act, 1961, the Central Board of Direct Taxes hereby direct that the Chief Commissioner of Income-tax and Director-General of Income-tax may reduce or waive interest charged under section 234A or section 234B or section 234C of the Act in the classes of cases or classes of income specified in paragraph 2 of this order for the period and to the extent the Chief Commissioner of Income-tax /Director General of Income-tax deem fit. However, no reduction or waiver of such interest shall be ordered unless the assessee has filed the return of income for the relevant assessment year and paid the entire tax due on the income as assessed except the amount of interest for which reduction or waiver has been requested for. The Chief Commissioner of Income-tax or the Director-General of Income-tax may also impose any other conditions deemed fit for the said reduction or waiver of interest.

2. The class of incomes or class of cases in which the reduction or waiver of interest under section 234A or section 234B or, as the case may be, section 234C can be considered, are as follows:

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(d) Where any income which was not chargeable to income-tax on the basis of any order passed in the case of an assessee by the High Court within whose jurisdiction he is assessable to income-tax, and as a result, he did not pay income-tax in relation to such income in any previous year and subsequently, in consequence of any retrospective amendment of law or as the case may be, the decision of the Supreme Court in his own case,

which event has taken place after the end of any such previous year, in any assessment or reassessment proceedings the advance tax paid by the assessee during the financial year immediately preceding the relevant assessment year is found to be less than the amount of advance tax payable on his current income, the assessee is chargeable to interest under section 234B or section 234C and the Chief Commissioner or Director-General is satisfied that this is a fit case for reduction or waiver of such interest."

13. In the subsequent circular dated 30th January, 1997, on which reliance is placed, it has been clarified and the scope of the earlier circular has been expanded to include, decisions of the High Courts in cases of third party assessees. The relevant portion of the said circular reads as under:

"2. In partial modification of this para of the order, the Central Board of Direct Taxes has decided that there shall be no condition that the decision of the High Court or the Supreme Court, as referred to therein, must be given in the asessees own case. Also the condition that any retrospective amendment of law or the decision of the Supreme Court or the jurisdictional High Court must have been made after the end of the relevant year stands withdrawn."

14. In the present case, the petitioner has not relied upon any decision of the Delhi High Court which was holding the field when he filed the return claiming deduction under Section 80 HHC without taking into consideration the business losses. The petitioner, on the other hand, has stated that there was a decision of a Full Bench of the tribunal in his favour, namely, **Lalsons Enterprises versus DCIT** [2004] 89 ITD 25 (Del).

15. There was a dispute about interpretation of Section 80 HHC but there was no decision of the jurisdictional High Court, i.e., the High Court of Delhi, in favour of the interpretation placed by the petitioner. Thus, clause (d) of the circular dated 23rd May, 1996 is not applicable and does not entitle the petitioner to claim waiver or reduction of interest.

16. The second circular dated 30th January, 1997 expanded the scope of clause (d) and deleted the condition that there should be a decision of the High Court or the Supreme Court in the assessee's own

case. Decision of the High Court or the Supreme Court could be in case of a third party, but it should have interpreted the Section. Another condition, that the retrospective amendment or the decision of the High Court or jurisdictional High Court must be after the end of the relevant previous year, was also withdrawn. As noticed above, there is no decision of the jurisdictional High Court of Delhi on the issue in question. The petitioner was aware that the interpretation placed by him was being contested by the Department/Revenue. The manner or mode of claiming deduction was therefore debatable and was being contested by both sides. The issue was open. The second circular dated 23rd May, 1996 is, therefore, not applicable.

17. Reliance placed by the petitioner on the circular No. 2/2006 dated 17th January, 2006 is also misconceived. As a result of Taxation Law (Amendment) Act, 2005, profits on sale of Duty Entitlement Pass Book Scheme, DEPB credit or Duty Free Replenishment Certificate, DFRC are treated at par with duty draw back for the purposes of proportionate increase of profits derived from exports, subject to conditions/ restrictions as stipulated. This amendment was made with retrospective effect. In view of the retrospective amendment, circular 2/2006 was issued stipulating as under: "

xxx

2. The amendments relating to Duty Entitlement Pass Book Scheme and Duty Replenishment certificate have been brought into the statute with retrospective effect. Therefore, it has been decided that no penalty shall be levied or interest shall be charged in respect of any fresh demand raised consequent to the enactment of Taxation Laws (Amendment) Act, 2005, on account of variation in the returned/assessed income attributable to profits on sale of DEPB credits or DFRC. Further, in such cases where assessments have already been completed and,-

(i) Interest has been charged, the Chief Commissioner of Income-tax shall waive the interest relating to claim of profit on sale of DEPB credits or DFRC for deduction u/ s 80-HHC;

(ii) Penalty has been levied, the Chief Commissioner of Income-tax shall waive the penalty relating to claim of

profit on sale of DEPB credits or DFRC for deduction u/s 80-HHC; or

(iii) Penalty relating to claim of profit on sale of DEPB credits or DFRC for deduction u/s 80-HHC, has been initiated but not levied, the penalty proceedings shall be dropped.

3. Further, it is also directed that such demand shall be recovered over a period of 5 years. For this purpose, every Assessing Officer raising such a demand will maintain the details of such demand in a separate register so that the information can be furnished to the Board as and when required. These registers shall be kept in the custody of the Assessing Officers who will hand it over to their successors at the time of their transfer."

18. In the present case, the assessee had income from sale of export incentives. 90% of the said amount was computed at Rs.9,06,433/- and deduction under Section 80 HHC was calculated at 70% of the said amount, i.e., Rs.6,34,503/- and was claimed as a deduction in the original return. This claim was reiterated in the return filed on 5th July, 2004 pursuant to the notice under Section 147. As noticed above, this second return was after the decision of the Supreme Court in **IPCA Laboratories** (supra) dated 11th March, 2004, wherein it has been held that deduction under Section 80 HHC is to be arrived at and claimed on profits earned from both export of self-manufactured goods and trading goods and profit and loss of both trades have to be taken into consideration. If after the adjustment there is positive profit, then only deduction under Section 80 HHC can be claimed. If there is loss, there cannot be any entitlement. As per the computation made in Form No. 10CCAC, which has been enclosed as annexure B to the petition, the petitioner had business loss of Rs.7,16,188/-, after excluding the income from the export incentives. In these circumstances, it is not possible to accept the contention of the petitioner that the retrospective amendment by Taxation Law (Amendment) Act, 2005 was detrimental and had reduced the claim for deduction made by him under Section 80 HHC as originally claimed. In fact, this aspect has been dealt with and explained vide response given by the Revenue in their reply dated 10th February, 2010 to the application for waiver of interest filed by the petitioner. In the said response, it has been stated as under:-

" With retrospective amendment to section 80HHC (5th proviso) you rather stand benefited as you become entitled for deduction of Rs.1,27,292/-* instead of Nil deduction before the said amendment. In the light of the 5th provision inserted to section 80HHC through the retrospective amendment to section 80HHC by IT Amendment Act, 2005 and the decisions of Ld. CIT(A) & Hon'ble ITAT in your case, deduction u/s. 80 HHC is recomputed as follows:

Net profit as per P&L a/c	13,72,974/-
Less: 90% of Interest Income of Rs.12,29,056/- (to be considered under the head Income from Other Sources)	11,06,150/-
Rent received (to be considered under the head Income from House Property)	84,000/-
Business profits	1,82,824/-
Less: Under clause (baa) of explanation to section 80HHC	
• 90% of export incentives of Rs.10,07,148/-	9,06,433/-
• 90% of others (Rs.1,088/-)	979/-
Profits of the business (as per explanation (baa) to section 80HHC	(-) 7,24,588/-
Adjusted profits of business	(-)7,24,588/-.

Profits derived from Exports=Profits of business x Export turnover u/s 80HHC(3)(a) Total turnover

= (-)7,24,588/- x 14,73,016/- / 14,73,016/-

= (-)7,24,588/-

Add: 90% of export incentives (as per newly inserted 5th proviso To sec. 80HHC) 9,06,433/-

Profits eligible for deduction u/s.80HHC 1,81,845

Allowable deduction u/s 80HHC= 70% of Rs.1,81,845/-=1,27,292*

Hence, your contention that interest u/s 234B & 234C became chargeable due to unforeseen retrospective amendments to section 80HHC is not acceptable. Further, there is no issue of profits on sale of Duty Entitlement Pass Book credits or Duty Free Replenishment Certificate in your case to which the circular No. 2/2006 refers."

19. The aforesaid factual position is not disputed. It is clear that as a result of the insertion of the proviso, the petitioner became entitled to deduction under Section 80 HHC of Rs.1,27,292/-. The proviso did not act as a detriment or negate or reduce the claim of deduction.

20. In view of the aforesaid discussion, we do not find any merit in the present writ petition and the same is accordingly dismissed.

No costs.

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W.P. (C)

MANAGING COMMITTEE FRANK ANTHONY PUBLIC SCHOOL & ANR. ....PETITIONERS

VERSUS

C.S. CLARKE & ORS. ....RESPONDENTS

(S. MURALIDHAR, J.)

W.P. (C) NO. : 1666/2001 DATE OF DECISION: 03.10.2011
W.P. (C) NO. : 1672/2001

(A) Constitution of India, 1950—Article 226—Delhi School Education Act, 1973—Section 8(1), 8(3), 8(4), 10 & 11—Delhi Education Rules, 1973—Rules 118 & 120—The respondents were appointed as Assistant Teachers in the petitioner, an unaided minority school recognised under Delhi School Education Act, 1973—The

respondents charged of grave misconduct and criminal trespass—Enquiry conducted—Ordered to be removed from service—Appeal before the Delhi School Tribunal—Tribunal allowed the appeal holding dismissal to be illegal and against the principles of natural justice—Petition challenged the order of the Tribunal—Petitioner's contention—The Rule 118 & 120 DSER did not apply to unaided school—The judgment of the Tribunal fundamentally flawed and liable to be set aside—Respondents submitted that even if Rule 118 DSER is not applicable to Unaided Minority School Rule 120 would nevertheless apply—Prior approval of DoE for imposition of major penalty was required—Held—There can be no manner of doubt that the Supreme Court excluded Section 8(2) from its application to unaided minority schools—Corresponding to Section 8(2) are Rules 96 to 121 of Chapter VIII of the DSER—Consistent with Section 12 read with Section 8(2) DSEA, Rule 96(1) DSER clearly states "nothing contained in this Chapter shall apply to an unaided minority school"—Rule 118 and 120 figure in Chapter VIII which, as clearly stated in Rule 96(1), does not apply to unaided minority schools.

There can be no manner of doubt, therefore, that the Supreme Court clearly excluded Section 8(2) DSEA from its application to unaided minority schools. Section 8(2) DSEA reads as under:

> **"8. Term and conditions of service of employees of recognized private schools.**
>
> (1) ....
>
> (2) Subject to any rule that may be made in this behalf, no employee of a recognized private school shall be dismissed, removed or reduced in rank nor shall his service be otherwise terminated except with the prior approval of the Director." **(Para 16)**

Corresponding to Section 8(2) DSEA are Rules 96 to 121 of Chapter VIII of the DSER. Consistent with Section 12 read with Section 8(2) DSEA, Rule 96(1) DSER clearly states "nothing contained in this Chapter shall apply to an unaided minority school". Rule 118 and 120 figure in Chapter VIII which, as clearly stated in Rule 96(1), does not apply to unaided minority schools. It is therefore futile for Mr. Saini, the learned counsel for the Clarkes, to contend that notwithstanding the judgment of the Supreme Court in the **Frank Anthony Public School** case, Rule 120 DSER will apply to the School. **(Para 17)**

(B) Constitution of India, 1950—Article 226—Delhi School Education Act, 1973—Section 8(1), 8(3), 8(4), 10 & 11—Delhi School Education Rules, 1973—Rules 118 & 120—The respondents were appointed as Assistant Teachers in the petitioner, an unaided minority school recognised under Delhi School Education Act, 1973—The respondents charged of grave misconduct and criminal trespass—Enquiry conducted ordered to be removed from the service—Appeal before the Delhi School Tribunal—Tribunal allowed the appeal—Holding dismissal to be illegal and against the principles of natural justice—Petition challenging the order of the Tribunal—Petitioner contend on merit that adequate opportunities were granted to the respondent to defend themselves before the Enquiry Officer—Charges found proved and were grave—Imposition of major penalty justified—Respondents contend that proceedings were malafide and vindictive and statements were not properly recorded—Held—The scope of the jurisdiction of this Court under Article 226 to examine the validity of the enquiry proceedings is limited—The procedure followed would have to be shown to be unjust or violative of the principles of natural justice—On merits, the report of enquiry would have to be shown to be perverse or based on no evidence—As regards the procedure adopted by the

Enquiry Officer in the instant case, Rule 120 DSER did not apply to the enquiry proceedings—The Enquiry Officer was nevertheless expected to observe the principles of natural justice—Although the strict rules of evidence and procedure as envisaged in Court proceedings need not apply, the procedure adopted had to be just, fair and reasonable—The enquiry in the present case was held by a retired Principal of a Public School—The enquiry proceedings show that sufficient opportunity was given to Mr. & Mrs. Clarke to defend themselves—It is not possible to conclude that the procedure adopted by the Enquiry Officer in the instant case was not just, fair and reasonable—Merely because the Principal was also the PO does not result in the violation of the principles of natural justice—It is not shown how any prejudice was caused to the Clarkes on that score—Also, they appear to have been given access to those documents that were relevant to the articles of charge—The conclusion arrived at by the Enquiry Officer cannot be held to be based on no evidence or perverse warranting interference by this Court under Article 226 of the Constitution—For the aforementioned reasons, impugned order of the Tribunal allowing the appeals of the Clarkes set aside—Writ petition allowed.

The scope of the jurisdiction of this Court under Article 226 to examine the validity of the enquiry proceedings is limited. The procedure followed would have to be shown to be unjust or violative of the principles of natural justice. On merits the report of enquiry would have to be shown to be perverse or based on no evidence. As regards the procedure adopted by the EO in the instant case, as already observed, Rule 120 DSER did not apply to the enquiry proceedings. The EO was nevertheless expected to observe the principles of natural justice. Although the strict rules of evidence and procedure as envisaged in court proceedings need not apply, the procedure adopted had to be just, fair and reasonable. **(Para 22)**

The enquiry in the present case was held by a retired Principal of a public school. The enquiry proceedings show that sufficient opportunity was given to Mr. and Mrs. Clarke to defend themselves. This Court has been taken through the records of the enquiry proceedings and the correspondence between the parties. There were four specific articles of charge dealt with by the EO. The first was about the Clarkes insulting and humiliating the Principal while attempting to forcibly enter the Principal's new (unfinished) bungalow. The second was the unauthorised occupation of the tutorial room. The third was the refusal by the Clarkes to accept the accommodation rented for them by the School at a rent much higher than their entitlement. Fourth was the non-submission of class results by Mr. C.S. Clarke. As regards each item of charge the EO has discussed the evidence led in some detail. It does appear that the Clarkes chose not to lead evidence and were satisfied with making a statement that the reply dated 3rd January 1989 to the memo dated 20th December 1988 should be taken to be their reply to the charge sheet. Importantly, the Clarkes did not choose to lead evidence as regards the incident of 15th December 1988. **(Para 23)**

It is not possible to conclude that the procedure adopted by the EO in the instant case was not just, fair and reasonable. Merely because the Principal was also the PO does not result in the violation of the principles of natural justice. It is not shown how any prejudice was caused to the Clarkes on that score. Also, they appear to have been given access to those documents that were relevant to the articles of charge. This Court fails to appreciate the observation of the Tribunal that the enquiry was held in a "hush-hush manner". It is not possible for this Court, in exercise of its jurisdiction under Article 226 of the Constitution, to examine the allegation whether the signatures of the Clarkes on the proceedings of the EO on a particular date were forged as alleged by them. In any event, the Tribunal too declined to entertain their application under Section 340 Cr PC and that part of the

impugned order was accepted by the Clarkes. The conclusion arrived at by the EO cannot be held to be based on no evidence or perverse warranting interference by this Court under Article 226 of the Constitution. **(Para 24)**

For the aforementioned reasons, this Court finds the impugned order dated 22nd June 2000 of the Tribunal allowing the appeals of the Clarkes to be unsustainable in law. It is hereby set aside. The writ petitions are allowed, but in the circumstances, with no order as to costs. **(Para 26)**

Important Issue Involved: The finding in inquiry can be interfered in exercise of jurisdiction under Article 226 only if it is shown to be unjust or violative of principles of natural justice or perverse or based on no evidence.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. S.K. Taneja and Mr. J.K. Das, Senior Advocates with Mr. Avijeet Bhujbal, Mr. Punit Taneja, Mr. P.P. Nayak and Mr. A.K. Sinha, Advocates.

FOR THE RESPONDENTS : Mr. R.K. Saini with Mr. Atul Wadera and Mr. Sitab Ali Chaudhary, Advocates for R-1 Ms. Avnish Ahlawat, Advocate for DoE.

CASES REFERRED TO:

1. *Christian Medical College Hospital Employees' Union* vs. *Christian Medical College Vellore Association* AIR 1988 SC 37.
2. *Frank Anthony Public School Employees' Association* vs. *Union of India* AIR 1987 SC 311.
3. *Ahmedabad St. Xavier's College Society* vs. *State of Gujarat* AIR 1974 SC 1389.

4. *Behram Khurshid* vs. *State of Bombay* AIR 1955 SC 123.

RESULT: The writ petitions allowed with no order as to costs.

S. MURALIDHAR, J.

1. These two writ petitions by the Managing Committee ('MC.) of the Frank Anthony Public School ('School.) and its Principal, Petitioner Nos. 1 and 2 respectively, are directed against the common order dated 22nd June 2000, passed by the Delhi School Tribunal ('Tribunal.) allowing the Appeal Nos. 36 and 37 of 1989 filed by Mr. and Mrs. C.S. Clarke respectively holding their dismissal by the School by orders dated 30th July 1989 to be illegal and against the principles of natural justice. While Mr. C.S. Clarke [Respondent No. 1 in W.P. (C) No. 1672 of 2001] was held to be entitled to reinstatement with all consequential benefits, the legal representatives of Mrs. C.S. Clarke [Respondent No. 1 in W.P. (C) No. 1666 of 2001], who expired during the pendency of her appeal in the Tribunal, were held to be entitled to the consequential benefits.

2. While directing notice to issue in the writ petitions on 11th April 2001, this Court recorded the statement of the learned counsel for Respondent No. 1 that no steps would be taken by them to get the impugned order of the Tribunal implemented during the pendency of the writ petitions. Rule was ultimately issued in both writ petitions on 18th February 2003. Mr. C.S. Clarke who had continued occupying the premises within the school campus made a statement on 31st July 2009 that he would vacate the premises within six weeks thereafter.

Background Facts

3. Mrs. C.S. Clarke was appointed as an Assistant Teacher in the School on 7th January 1975 and Mr. C.S. Clarke was appointed as such on 16th May 1975. The School is an unaided minority school recognized as such under the Delhi School Education Act, 1973 ('DSEA.). The employees of an unaided minority school are required to sign a statutory service agreement in terms of Section 15 DSEA which contains terms and conditions and the mode of enforcing the Code of Conduct for the teachers. It is stated that the said contracts are vetted and approved by the Director of Education ('DoE.) [Respondent No.2 in both writ petitions] and are registered in the Register of Contracts under Rule 130 of the Delhi School Education Rules, 1973 ('DSER').

4. As part of the terms of the contract, Mr. and Mrs. C.S. Clarke were allotted residential accommodation at a place rented by the School. However, the landlady of the premises instituted eviction proceedings against the School. In terms of an order dated 2nd September 1987 passed by the Rent Controller, the flat had to be vacated by 30th November 1988. By a letter dated 6th September 1988 the Principal of the School, Mr. G.W. Mayer, informed Mr. and Mrs. Clarke of the above development. Mr. Mayer stated that he was looking for another accommodation for them. In November 1988 after an accommodation was located in Malviya Nagar, Mr. Clarke was asked by the Principal to inspect the flat so that steps to hire it may be taken by the School. However, Mr. Clarke refused to do so. It is stated that in the meanwhile, Mr. Mayer fell ill and had to be hospitalized for about ten days beginning 12th November 1988. On 14th December 1988, Mr. and Mrs. Clarke were evicted from their quarters. The Principal permitted them to use the guest room on the first floor of the building in the School Block and to also store some of their stuff in the basement of the main building. According to the School, it was made clear to Mr. and Mrs. Clarke that this would be a temporary arrangement till such time an alternative rented accommodation was located by the School.

5. According to the School on 15th December 1988, Mr. and Mrs. Clarke came to the Principal's office demanding that they be allotted quarters within the School premises. They demanded that the Principal's new bungalow, which was unoccupied as it was still incomplete, be allotted. They then proceeded to forcibly enter into the said bungalow. The Principal immediately proceeded with them to the bungalow. According to the Principal, at the entrance to the bungalow, Mrs. Clarke used abusive language against the Principal, seized his coat thereby tearing off the buttons, pushed him and threatened to slap him. The Principal made no attempt to retaliate or push her away. He held his hands up so that all could see that he was not touching her. According to the School, while Mrs. Clarke was still attacking the Principal, Mr. Clarke broke the chain on the gate of the bungalow, and entered the ground floor. He then unsuccessfully tried to break open the entrance door of bungalow. In the meanwhile, pupils in some of the nearby classrooms raised an alarm and some senior teachers came out and requested Mrs. Clarke not to create a scene.

6. In the afternoon of 15th December 1988, one of the School Sergeants, Mr. R. Harisson, informed the Principal that Mrs. Clarke had forcibly occupied the room adjacent to the guest room (also referred to as the 'tutorial room') which the Principal had permitted them to use and this occupation of the adjacent room was without the Principal's permission. It is stated that not only they forcibly occupied the said tutorial room but also threw out the furniture which was kept there. On 16th December 1988 the Principal requested Mrs. And Mrs. Clarke to vacate the tutorial room but they refused to do so. On 20th December 1988 a memorandum was issued to Mr. and Mrs. Clarke about the incident of 15th December 1988. On 22nd December 1988, the Principal informed Mr. and Mrs. Clarke that an alternative rented accommodation had been located for them at Dayanand Colony, Lajpat Nagar. They were given time till 27th December 1988 to move out from the guest room as well as the tutorial room and hand over vacant possession thereof to the Headmaster, as the Principal would be out of station from 23rd December 1988. When the Principal returned on 30th December 1988, the Headmaster informed him that Mrs. Clarke had taken the key of the new flat on 29th December 1988 but had returned it on the pretext that the flat was small. According to the School, however, the new flat was bigger than the previously rented flat. Mr. and Mrs. Clarke sent a reply dated 3rd January 1989 to the memorandum dated 20th December 1988 denying the Principal's version of the incidents of 15th December 1988. On 3rd January 1989, the Principal informed Mr. and Mrs. Clarke that they were given two more days till 5th January1989 to move out from the guest room and shift to the rented flat and that their refusal to do so would be a continuation of their grave misconduct and criminal trespass.

7. On 14th January 1989 the Board of Governors ('BoG.)/MC of the School framed charges against Mr. and Mrs. Clarke for serious misconduct. The articles of charge were that on 15th December 1988, Mr. and Mrs. Clarke had "openly insulted and humiliated the Principal and forcibly entered into the Principal's bungalow" and thereafter forcibly occupied the room adjacent to the guest room and yet refused to accept the accommodation rented out to them. They had, by refusing to vacate the said premises, and occupy the rented premises, continued to commit gross misconduct and criminal trespass. The further charge against Mr. Clarke was that he had not submitted report cards in respect of Class VI (F) of which he was the Class Teacher to the Headmaster for his signature

for distribution to the pupils. On 21st December 1988, Mr. Clarke informed the Principal that he was unable to prepare the report cards. This action was stated to be a deliberate attempt to harm the School and its pupils. The BoG appointed Mr. H.N. Kashyap, a former Principal of the Delhi Public School as the Enquiry Officer ('EO').

8. Mr. and Mrs. Clarke in reply to the charge sheet chose to adopt the reply dated 3rd January 1989 already filed by them in response to the memorandum dated 20th December 1988. While witnesses were examined on behalf of the School and cross-examined by Mr. Clarke, neither he nor Mrs. Clarke chose to examine themselves or any others as their witnesses. At the end of the enquiry Mr. H.N. Kashyap submitted a report holding the charges against Mr. and Mrs. Clarke to be proved. A copy of the enquiry report was furnished to Mr. and Mrs. Clarke by the Vice-Chairman of the MC on 23rd June 1989. A copy of the transcript of the cross-examination of Mr. Mayer, Principal of the School signed by Mr. Kashyap and Mr. Mayer and countersigned by Mr. and Mrs. Clarke in confirmation was also enclosed. Mr. Clarke sent a reply dated 16th July 1989. Thereafter, the BoG/MC met again on 30th July 1989 and passed a resolution removing both Mr. and Mrs. Clarke from service of the School for their grave misconduct. A copy of the resolution was furnished to both of them by a letter dated 31st July 1989.

9. Aggrieved by the order of removal from service, Mr. and Mrs. Clarke filed appeals before the Tribunal. Before the Tribunal it was contended by the Clarkes that no Disciplinary Committee ('DC.) in terms of Rule 118 DSER was constituted and that the procedure outlined in Rule 120 DSER was also not followed. Copies of the charge sheet and vital documents were not supplied to the Clarkes to enable them to defend themselves properly. In reply, the School contended that the Tribunal had no jurisdiction to deal with the appeals. Reliance was placed on the judgment of the Supreme Court in **Frank Anthony Public School Employees' Association v. Union of India** AIR 1987 SC 311 (hereinafter 'the Frank Anthony Public School case'). It was submitted that the special provisions contained in Section 15 DSEA would override the general provisions contained in Section 8(1)(a) DSEA. On merits, it was submitted that the charges were fully proved in a properly held enquiry after following the procedures in conformity with the principles of natural justice.

The Tribunal's order

10. In its impugned order dated 22nd June 2000 the Tribunal discussed in detail the decision of the Supreme Court in the **Frank Anthony Public School** case. The Tribunal noted that Section 12 DSEA was struck down by the Supreme Court insofar as it made Sections 8(1), 8(3), 8(4), 10 and 11 DSEA inapplicable to unaided minority schools. Consequently, the remedy under Section 8(3) DSEA of approaching the Tribunal to challenge an illegal dismissal was held applicable to unaided minority schools. Consequently, the appeals were held to be maintainable before the Tribunal.

11. The Tribunal then proceeded to observe, "and for that purpose, while doing so, the Tribunal has naturally to look into the provisions pertaining to the composition of the disciplinary authority, the penalties and procedure to be adopted for imposing such penalties in respect of the employees. And these provisions are contained in Rules 117 to 120." It was concluded by the Tribunal that the School authorities ought to have followed the provisions of Rule 118 and Rule 120 DSEA and having failed to do so, they had violated the principles of natural justice. It was further observed that "the enquiry was conducted in a hush-hush manner and that no adequate opportunity for cross-examination of the witnesses was given to the delinquents. Hence, the order of imposition of penalty of dismissal in both the cases are quashed as being illegal." However, the prayer of the Respondents for proceeding against the School under Section 340 CrPC was declined. As far as Mr. Clarke was concerned, the Tribunal ordered his reinstatement with all consequential benefits. As Mrs. Clarke had expired during the pendency of her appeal, her legal representatives were held entitled to the consequential benefits.

Submissions of counsel

12. Mr. S.K. Taneja and Mr. J.K. Das, learned Senior counsel appearing for the School submitted that the Tribunal erred in construing the ratio of the judgment of the Supreme Court in the **Frank Anthony Public School** case. It is submitted that once the Supreme Court categorically held that Section 8(2) DSEA would not apply to an unaided minority school, then the corresponding provisions of the DSER in Chapter VIII thereof could also not apply. Consequently, there was no question of applicability of Rule 118 or Rule 120 DSER to the School. There was a separate Chapter XI of the DSER which dealt with unaided minority

schools. The judgment of the Supreme Court in the **Frank Anthony Public School** case did not, by any stretch of imagination, hold either Sections 13 to 15 of Chapter V of the DSEA or Rules 127 to 130 of Chapter XI of the DSER to be inapplicable to unaided minority schools. Once it was clear that Rule 118 and Rule 120 DSER did not apply, the judgment of the Tribunal had to be held to be fundamentally flawed and set aside on that ground itself. On merits it was submitted that the proceedings before the EO showed that adequate opportunities had been granted to the Clarkes to defend themselves. However, they declined to lead evidence or to examine themselves. A copy of the enquiry report was furnished to them. Their reply thereto was considered by the MC before imposing the punishment of removal from service. The charges found proved were grave and the imposition of a major penalty was justified.

13. Mr. R.K. Saini, learned counsel appearing for the Clarkes submitted that the proper way of construing the decision of the Supreme Court in the **Frank Anthony Public School** case would be to infer that in view of Section 12 DSEA being struck down, Rule 96(1) DSER also stood impliedly repealed. Even if it was deduced that by virtue of Section 8(2) DSEA not applying to unaided minority schools Rule 118 DSER would not apply, Rule 120 DSER would nevertheless apply. In other words, it is submitted that the entire procedure outlined in Rule 120 DSER short of having to obtain the prior approval of the DoE for imposition of a major penalty would apply even to an unaided minority school. He referred to the judgments of the Supreme Court in **Behram Khurshid v. State of Bombay** AIR 1955 SC 123 and **Christian Medical College Hospital Employees' Union v. Christian Medical College Vellore Association** AIR 1988 SC 37. He reiterated that the procedure adopted by the EO in the present case was not in conformity with Rule 120 DSER.

14. Mr. Saini next submitted that the entire proceedings were mala fide and vindictive. According to him, Mr. Clarke had been the real spirit behind the judgment of the Supreme Court in the Frank Anthony Public School case. He was the only Anglo-Indian member of the employees. association and his success in that case was not to the liking of the MC. The compromise entered into by the School with the landlady in respect of the premises rented out for Mr. and Mrs. Clarke was behind the back of Mr. Clarke. All of a sudden on 6th September 1988 a letter was sent

by the Principal stating that the accommodation had to be vacated. On 14th December 1988 the bailiff forcibly evicted Mr. and Mrs. Clarke from the rented premises. The events of 15th December 1988 as outlined by the School were totally concocted and distorted. Mrs. Clarke caught hold of the coat collar of the Principal only to support herself from falling down. Thirdly, it is submitted that the entire enquiry proceedings were a sham. The charges were vague. The Principal himself was the Presenting Officer ('PO.) in the enquiry and he was also the complainant. Fourthly, and the documents were not supplied till the end of the enquiry. Fourthly, an unusual procedure was adopted whereby of the charged officials were first asked to make their statements; only thereafter were the documents supplied. The statements of the witnesses examined on behalf of the School were not properly recorded in question and answer form. The committing of criminal trespass was not a specific charge against Mr.Clarke and yet he was found guilty of that charge. The whole enquiry proceedings were conducted in a pre-determined and mala fide manner. Additionally, it was contended that the signatures of the charged officials on the proceedings before the EO on 2nd May 1989 were forged. This was reflective of the mala fide intentions of the School. Moreover, the proceedings of 3rd May 1989 were in fact signed only on 8th May 1989. Accordingly, it was submitted that no interference is called for with the impugned order of the Tribunal.

The Frank Anthony Public School Case

15. The first issue concerns the understanding of the Tribunal of the ratio of the judgment in the **Frank Anthony Public School** case. The issue before the Supreme Court concerned the demand by the employees of the School that they were entitled to the benefit of Section 10 DSEA which provides that the scales of pay and allowances, medical facilities, pension, gratuity, provident fund and other prescribed benefits of the employees of a recognized private school "shall not be less than those of the employees of the corresponding status in school run by the appropriate authority." Section 10 was made applicable to unaided minority schools by virtue of Section 12 DSEA which stated that nothing contained in this Chapter IV of the DSEA (of which Sections 8 to 11 form part) will apply to an unaided minority school. In para 14 of the judgment in the **Frank Anthony Public School** case, the Supreme Court noticed that "the principal controversy between the parties centered around Section 10." The ratio of the judgment can be gleaned from paras 20 to 21 which

read as under (AIR @ 330):

> "20. Thus, Sections 8(1), 8(3), 8(4) and 8(5) do not encroach upon any right of minorities to administer their educational institutions. Section 8(2), however, must, in view of the authorities, be held to interfere with such right and, therefore, inapplicable to minority institutions. Section 9 is again innocuous since Section 14 which applies to unaided minority schools is virtually on the same lines as Section 9. We have already considered Section 11 while dealing with Section 8(3). We must, therefore, hold that Section 12 which makes the provisions of Chapter IV inapplicable to unaided minority schools is discriminatory not only because it makes Section 10 inapplicable to minority institutions, but also because it makes Sections 8(1), 8(3), 8(4), 8(5), 9 and 11 inapplicable to unaided minority institutions. That the Parliament did not understand Sections 8 to 11 as offending the fundamental right guaranteed to the minorities under Article 30(1) is evident from the fact that Chapter IV applies to aided minority institutions and it cannot for a moment be suggested that surrender of the right under Article 30(1) is the price which the aided minority institutions have to pay to obtain aid from the Government.
>
> 21. The result of our discussion is that Section 12 of the Delhi School Education Act which makes the provisions of Chapter IV inapplicable to unaided minority institutions is discriminatory and void except to the extent that it makes Section 8(2) inapplicable to unaided minority institutions. We, therefore, grant a declaration to that effect and direct the Union of India and the Delhi Administration and its officers, to enforce the provisions of Chapter IV (except Section 8(2)) in the manner provided in the Chapter in the case of the Frank Anthony School. The management of the school is directed not to give effect to the orders of suspension passed against the members of the staff."

16. There can be no manner of doubt, therefore, that the Supreme Court clearly excluded Section 8(2) DSEA from its application to unaided minority schools. Section 8(2) DSEA reads as under:

> **"8. Term and conditions of service of employees of recognized private schools.**

(1) ....

(2) Subject to any rule that may be made in this behalf, no employee of a recognized private school shall be dismissed, removed or reduced in rank nor shall his service be otherwise terminated except with the prior approval of the Director."

17. Corresponding to Section 8(2) DSEA are Rules 96 to 121 of Chapter VIII of the DSER. Consistent with Section 12 read with Section 8(2) DSEA, Rule 96(1) DSER clearly states "nothing contained in this Chapter shall apply to an unaided minority school". Rule 118 and 120 figure in Chapter VIII which, as clearly stated in Rule 96(1), does not apply to unaided minority schools. It is therefore futile for Mr. Saini, the learned counsel for the Clarkes, to contend that notwithstanding the judgment of the Supreme Court in the **Frank Anthony Public School** case, Rule 120 DSER will apply to the School.

18. In order to overcome the difficulty of there being specific provisions applicable to unaided minority schools in Chapter V DSEA (Sections 13 to 15) and Chapter XI of the DSER (Rules 127 to 131), it was submitted by Mr. Saini that only that portion of Section 8(2) read with Rules 118 and 120 which requires prior approval of the Director for removal or dismissal of an employee would not apply to an unaided minority school; short of that the procedure outlined in Rule 120 would apply. This Court is unable to split the provisions contained in Section 8(2) DSEA and Rules 118 and 120 DSER. The legislative intent is clear. Section 8(2) DSEA was not meant to apply to an unaided minority school. If that is the position then it goes without saying that the corresponding Rules 118 to 120 DSER would also not apply to an unaided minority school.

19. There is also no merit in the contention of Mr. Saini that since the School invoked Rule 121 DSER to contend that the Tribunal could not have directed reinstatement with consequential benefits, the School had in a sense conceded that Chapter VIII DSER in which Rule 121 figured, would apply to an unaided minority school. Rule 121 DSER states that when a dismissed employee is ordered to be reinstated the question of the salary to be paid to such employee for the period he was put of service has to be decided by the MC. It may be that in the proceedings against an unaided private minority institution before the

Tribunal under Section 8(3) DSEA a direction is issued regarding reinstatement. In such event an incidental question concerning the implementation of such direction may arise. However, that does not ipso facto make Rule 120 DSER, which concerns the procedure to be adopted in the enquiry proceedings for dismissal or removal of an employee, applicable to the unaided minority institution.

20. The decision in **Christian Medical College Hospital Employees' Union v. Christian Medical College Vellore Association** does not come to the aid of the Respondents. There, the question was whether a minority educational institution would be amenable to the Industrial Disputes Act, 1947 ('ID Act.). Referring to the judgment of the Supreme Court in **Ahmedabad St. Xavier's College Society v. State of Gujarat** AIR 1974 SC 1389, it was observed by the Court (AIR @ 45) that:

> "The smooth running of an educational institution depends upon the employment of workmen who are not subjected of victimisation or any other kind of maltreatment. The conditions of service of workmen in all institutions including minority educational institutions have to be protected in the interest of the entire society and any unfair labour practice, such as 'hiring and firing', termination of retrenchment of the service of a workman on irrational grounds will have to be checked. The Act makes provisions in respect of these matters."

It was further held that the ID Act "being a general law for prevention and settlement of industrial disputes cannot be construed as a law which directly interferes with the right of administration of a minority educational institution guaranteed under Article 30(1) of the Constitution." Likewise the decision in **Behram Khurshid v. State of Bombay** was rendered in a different context. The decision in the Frank Anthony Public School case which holds that Section 8 (2) DSEA would not apply to an unaided minority institution is directly on the point and is binding on the parties as much as on this Court.

21. On this issue, it must be observed that although the Tribunal was right in holding that Section 8(3) DSEA would apply to an unaided minority school it erred in observing as a sequitur that Section 8(2) DSEA read with Rules 118 and 120 DSER would also apply. Consequent upon the above erroneous conclusion, the Tribunal proceeded to observe that the enquiry in the present case was held in violation of Rules 118

and 120 DSER. On this ground alone, the impugned order of the Tribunal deserves to be set aside.

Validity of the enquiry proceedings and removal order

22. The scope of the jurisdiction of this Court under Article 226 to examine the validity of the enquiry proceedings is limited. The procedure followed would have to be shown to be unjust or violative of the principles of natural justice. On merits the report of enquiry would have to be shown to be perverse or based on no evidence. As regards the procedure adopted by the EO in the instant case, as already observed, Rule 120 DSER did not apply to the enquiry proceedings. The EO was nevertheless expected to observe the principles of natural justice. Although the strict rules of evidence and procedure as envisaged in court proceedings need not apply, the procedure adopted had to be just, fair and reasonable.

23. The enquiry in the present case was held by a retired Principal of a public school. The enquiry proceedings show that sufficient opportunity was given to Mr. and Mrs. Clarke to defend themselves. This Court has been taken through the records of the enquiry proceedings and the correspondence between the parties. There were four specific articles of charge dealt with by the EO. The first was about the Clarkes insulting and humiliating the Principal while attempting to forcibly enter the Principal's new (unfinished) bungalow. The second was the unauthorised occupation of the tutorial room. The third was the refusal by the Clarkes to accept the accommodation rented for them by the School at a rent much higher than their entitlement. Fourth was the non-submission of class results by Mr. C.S. Clarke. As regards each item of charge the EO has discussed the evidence led in some detail. It does appear that the Clarkes chose not to lead evidence and were satisfied with making a statement that the reply dated 3rd January 1989 to the memo dated 20th December 1988 should be taken to be their reply to the charge sheet. Importantly, the Clarkes did not choose to lead evidence as regards the incident of 15th December 1988.

24. It is not possible to conclude that the procedure adopted by the EO in the instant case was not just, fair and reasonable. Merely because the Principal was also the PO does not result in the violation of the principles of natural justice. It is not shown how any prejudice was caused to the Clarkes on that score. Also, they appear to have been given

access to those documents that were relevant to the articles of charge. This Court fails to appreciate the observation of the Tribunal that the enquiry was held in a "hush-hush manner". It is not possible for this Court, in exercise of its jurisdiction under Article 226 of the Constitution, to examine the allegation whether the signatures of the Clarkes on the proceedings of the EO on a particular date were forged as alleged by them. In any event, the Tribunal too declined to entertain their application under Section 340 Cr PC and that part of the impugned order was accepted by the Clarkes. The conclusion arrived at by the EO cannot be held to be based on no evidence or perverse warranting interference by this Court under Article 226 of the Constitution.

25. The DC considered the enquiry report and the comments thereto by the Clarkes. It thereafter took a deliberated decision to impose the punishment of removal from service. The incident of 15th December 1988 involving an attempt to forcibly occupy the Principal's bungalow in the School campus, the abusing and attempted assault of the Principal, the forcible occupation of the tutorial room and the neglect to turn in the class results, cumulatively considered, are serious enough to warrant the penalty of removal from service.

26. For the aforementioned reasons, this Court finds the impugned order dated 22nd June 2000 of the Tribunal allowing the appeals of the Clarkes to be unsustainable in law. It is hereby set aside. The writ petitions are allowed, but in the circumstances, with no order as to costs.

ILR (2012) II DELHI 53
RCR

KISHORI LAL KRISHAN KUMAR ....PETITIONER

VERSUS

ANKIT RASTOGI ....RESPONDENT

(INDERMEET KAUR, J.)

RCR NO. : 413/2011 DATE OF DECISION: 20.10.2011

Delhi Rent Control Act, 1958—Sections 14(1)(e) & 25 (B)—Eviction petition on the ground of bonafide requirement of tenanted premises forming part of 4479-80, Dav Bazar, Cloth Market, Delhi—Petitioner is 34 years of age; has experience in business of sale and purchase of sarees and other textiles and handicrafts as he was a partner of M/s Ankit Saree—Petitioner has no immovable property in Delhi—Intends to start his own business—Wants eviction of suit premises—Leave to defend filed—Petitioner is not the owner—Other partners of the firm not joined hence bad for non-joinder of parties—The requirement of landlord is not bonafide —Landlord is owner of one shop No. 969, Bhojpura, Maliwara, Chandni Chowk, Delhi, under the name and style of M/s. P.S. Creation an is carrying on his business from there—Another building No. 1186, Kucha Mahajani, Chandni Chowk, comprising 30 shops—Leave to defend dismissed—Petition—Held—The contention of the landlord was specifically to the effect that he is not the owner of either of the two premises; contention being that Smt. Bhagwati Devi in terms of her Will date 14.07.1982 had bequeathed the disputed property i.e. Shop No. 4479-80, Dau Bazar, Cloth Market, Delhi to the respondent; he has no other immovable property; this is his only immovable property; further contention being that

property bearing No. 969, Bhojpura, Maliwara, Chandni Chowk, Delhi was owned by his father; the property i.e. building No. 1186, Kucha Mahajani, Chandni Chowk, Delhi has been bequeathed by his grandfather in the name of his brother—The assertion of the landlord that he is bona fide requiring this premises for his commission business which he has started in the year 1997 has also been substantiated by documentary evidence—Income tax returns in respect of his commission business have been placed on record—In these circumstances, the Court had rightly noted that no triable issue having arisen between the parties, the application for leave to defend was rightly dismissed.

The last objection raised by the petitioner is that the Trial Court has not appreciated the facts in the correct perspective and the bona fide requirement of the landlord was not really bona fide and to substantiate this submission, he has drawn attention of this court to the averments made in his application for leave to defend; contention of the tenant is that the respondent/landlord is a owner of one shop No. 969, Bhojpura, Maliwara, Chandni Chowk, Delhi under the name and style of M/s. P.S. Creation and is carrying on his business from there; he also has another building i.e. bearing No. 1186, Kucha Mahajani, Chandni Chowk, Delhi which comprises of 30 shops; in this view of the matter, the present eviction petition has not been filed for bona fide requirement as there is a sufficient accommodation available with the landlord. In the reply affidavit, the contention of the landlord was specifically to the effect that he is not the owner of either of the two premises; contention being that by Smt. Bhagwati Devi in terms of her Will date 14.07.1982 had bequeathed the disputed property i.e. Shop No. 4479-80, Dau Bazar, Cloth Market, Delhi to the respondent; he has no other immovable property; this is his only immovable property; further contention being that property bearing No. 969, Bhojpura, Maliwara, Chandni Chowk, Delhi is owned by his father; the property i.e. building No. 1186, Kucha Mahajani,

Chandni Chowk, Delhi has been bequeathed by his grandfather in the name of his brother; even otherwise, this property under the occupation of old tenants; rent receipts to substantiate this submission have also been placed on record. The assertion of the landlord that he is bona fide requiring this premises for his commission business which he has started in the year 1997 has also been substantiated by documentary evidence. Income tax returns in respect of his commission business have been placed on record. In these circumstances, the court had rightly noted that no triable issue having arisen between the parties, the application for leave to defend was rightly dismissed.

(Para 5)

Important Issue Involved: It is for the tenant to disclose facts which would show that the desire of the landlord is not bona fide.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. R.K. Kapoor, Ms. Anita Sharma and Ms. Ritu Sharma, Advocates.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Sarwan Dass Bange* vs. *Ram Prakash,* 2010 IV AD (Delhi) 250.
2. *Shiv Sarup Gupta* vs. *Dr. Mahesh Chand Gupta* (1999) 6 SCC 222.
3. *Prativa Devi* vs. *T.V. Krishnan* 1996 (5) SCC 353.

RESULT: Petition dismissed.

INDERMEET KAUR, J. (Oral)

CM No. 19377/2011(exemption) in RCR NO. 413/2011

Exemption is allowed subject to just exceptions.

RCR No. 413/2011 and CM No. 19376/2011 (stay)

1. This petition has impugned the order dated 04.07.2011 whereby the petition under Section 14(1)(e) read with 25(B) of the Delhi Rent Control Act (DRCA) had been dismissed.

2. Record shows that the present eviction petition had been filed by the landlord-Ankit Rasogi under Section 14(1)(e) of the DRCA. He claimed himself the owner and landlord of premises forming a part of property bearing No. 4479-80, Dau Bazar, Cloth Market, Delhi comprising of ground floor, first floor and a second floor. The ground floor was in occupation of the present tenant. Petitioner is stated to be 34 years of age; he has experience in the business of sale and purchase of sarees and other textiles and handicraft as he was a partner of M/s. Ankit Saree; thereafter he had started his individual commission business in textile since 1997. Petitioner has no immovable property in Delhi; he intends to start his own business and for his own bona fide requirement he wants eviction of the suit premises.

3. The defendant/tenant had filed his application for leave to defend. The first contention raised is that the petitioner is not the landlord/owner of the suit premises. This has been disputed by the petitioner. It is not in dispute that the premises were originally owned by Smt. Bhagwati Devi; petitioner in his affidavit has stated that Bhagwati Devi was his grandmother and in terms of her Will dated 14.07.1982, the suit premises had been bequeathed to him; the same has also been mutated in the municipal records. The application for leave to defend shows that the tenant has in fact not challenged the fact that Ankit Rastogi is not his landlord; in fact in his application, he has stated that the petitioner had stopped receiving rent from the respondent, in these circumstances, the rent was being rendered by the tenant by way of a money order to the petitioner. Thus, the relationship of landlord and tenant stands admitted between the parties. For a petition under Section 14(1)(e) of the DRCA, the relationship of landlord and tenant is a crucial factor and this relationship having been admitted this objection is clearly without merit.

4. The second contention raised by the tenant is that the defendant /tenant has been arrayed in the eviction petition as M/s Kishori Lal Krishna Kumar; the other partners of the firm have not been joined as a party and the petition is thus bad for non-joiner of the parties; in para 15 of the application for leave to defend, it has so been stated; contention being

that all partners of the respondent/tenant have not been made a party. In reply affidavit of the petitioner, the explanation furnished by the petitioner is that the name of the partners were not known to the petitioner and that is why, the respondent has been arrayed in the manner as depicted in the eviction petition. These circumstances had correctly been noted in the impugned judgment; that this was only a bald objection raised by the petitioner and not being a triable issue, this objection had not been paid heed to.

5. The last objection raised by the petitioner is that the Trial Court has not appreciated the facts in the correct perspective and the bona fide requirement of the landlord was not really bona fide and to substantiate this submission, he has drawn attention of this court to the averments made in his application for leave to defend; contention of the tenant is that the respondent/landlord is a owner of one shop No. 969, Bhojpura, Maliwara, Chandni Chowk, Delhi under the name and style of M/s. P.S. Creation and is carrying on his business from there; he also has another building i.e. bearing No. 1186, Kucha Mahajani, Chandni Chowk, Delhi which comprises of 30 shops; in this view of the matter, the present eviction petition has not been filed for bona fide requirement as there is a sufficient accommodation available with the landlord. In the reply affidavit, the contention of the landlord was specifically to the effect that he is not the owner of either of the two premises; contention being that by Smt. Bhagwati Devi in terms of her Will date 14.07.1982 had bequeathed the disputed property i.e. Shop No. 4479-80, Dau Bazar, Cloth Market, Delhi to the respondent; he has no other immovable property; this is his only immovable property; further contention being that property bearing No. 969, Bhojpura, Maliwara, Chandni Chowk, Delhi is owned by his father; the property i.e. building No. 1186, Kucha Mahajani, Chandni Chowk, Delhi has been bequeathed by his grandfather in the name of his brother; even otherwise, this property under the occupation of old tenants; rent receipts to substantiate this submission have also been placed on record. The assertion of the landlord that he is bona fide requiring this premises for his commission business which he has started in the year 1997 has also been substantiated by documentary evidence. Income tax returns in respect of his commission business have been placed on record. In these circumstances, the court had rightly noted that no triable issue having arisen between the parties, the application for leave to defend was rightly dismissed.

6. In 2010 IV AD (Delhi) 250 **Sarwan Dass Bange vs. Ram Prakash,** a bench of this court has noted that it is for the tenant to disclose facts which would show that this desire of the landlord was fanciful and not bona fide. In **Prativa Devi vs. T.V. Krishnan** 1996 (5) SCC 353, the Apex Court had reiterated that the landlord is the best judge of his residential requirement and has a complete freedom in the matter and it is no concern of the courts to dictate to the landlord how, and in what manner he should live; there is no law which can deprive the landlord of the beneficial enjoyment of his property. The Apex Court in (1999) 6 SCC 222 **Shiv Sarup Gupta Vs. Dr. Mahesh Chand Gupta** has laid down the scope of a revision petition to this Court holding that the court is to interfere in revision only when the order of the Controller is found to be not in accordance with law or when the same is perverse and based on a conclusion which no reasonable person could have reached.

7. Applying the said test and on the basis of records it cannot be said that the impugned order passed by the Controller in the present case is not in accordance with law.

Petition is accordingly dismissed.

ILR (2012) II DELHI 58
CRL. A.

MADAN LAL @ MANOHAR @ MOTTA ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S. RAVINDRA BHAT AND PRATIBHA RANI, JJ.)

CRL. A. NO. : 560/2011 DATE OF DECISION: 03.11.2011

Indian Penal Code, 1860—Sections 326 and 304 Part-1—As per prosecution, deceased was smack addict whose place was frequently visited by other addicts—

PW2, the brother of deceased with his wife PW3 lived in first floor of the premises in which the deceased lived in ground floor—On the night of incident PW2 was woken up by his wife PW3 on her hearing some commotion and she asked him to see what was happening—On going down PW2 witnessed the deceased and appellant quarrelling—He tried to intervene however, appellant had a knife in his hand with which he attacked the deceased and inflicted a knife injury on his left thigh and then fled the spot—PW2 chased him but could not nab him—PW2 informed PW14 who was on patrolling duty and they both took deceased to hospital where he was declared brought dead—Trial Court convicted appellant under Section 304 Part-I and sentenced him to life imprisonment—On facts held that conviction rightly recorded u/s 304 Part-I IPC—Contention of appellant that case under Section 326 could not be accepted as the injury caused was intended and in the ordinary course of nature would have caused death which it did—Having regard to nature of injury which was a solitary knife blow on a non-vital part of body, sentence altered to RI for 7 years—Appeal partly allowed.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Inderjit Singh Mehra, Advocate.

FOR THE RESPONDENT : Mr. Sanjay Lao, APP. for the State.

CASE REFERRED TO:

1. *Darya Singh* vs. *State of Punjab* AIR 1965 SC 328.

RESULT: Appeal partly allowed.

S. RAVINDRA BHAT (OPEN COURT)

1. This appeal challenges a judgment and order of the learned Additional Sessions Judge dated 13.10.2010 in S.C. 82/2007. The Appellant (hereafter called "Madan Lal") was convicted for committing the offence

punishable under Section 304 Part-I IPC, and directed to undergo life imprisonment and also pay Rs. 5,000/-as fine.

2. The prosecution case was that one Kishan, lived in the Ground Floor portion of T396, Gali No. 15, Factory Road, Neem Wala Chowk, Nabi Karim, Delhi. It was alleged that PW-14, who was on patrolling duty in Neem Wala Chowk, was informed by PW-2 around 04.00 AM in the morning on 20.03.2007 that Kishan had been stabbed by Madan Lal with a knife and that was lying in a room. It was further stated that PW-14 and PW-2 went to the premises where he found Kishan lying in a seriously injured condition in a room on the Ground Floor. Both, i.e. PW-2 and PW-14 took the victim in a three-wheeler to Lady Harding Hospital. Kishan was declared "brought dead" – a fact sought to be established by the MLC (Ex. PW-18/A). Having regard to these facts, a Daily Diary No. 7-A entry (Ex. PW-5/A) was recorded, which formed the basis of the FIR, and investigated. PW-10 and PW-15, both policemen, reached the hospital and recorded the statement of PW-2, under Section 161 Cr.PC (placed on the record) as Ex. PW-2/A. PW2 stated that the deceased Kishan was a smack addict whose place used to be frequently visited by other addicts. He also stated about hearing a noise around 03.00 AM on 20.03.2007 from the street near his house (he used to live on the First Floor of the same premises as the deceased, who was his brother). PW-2 further claimed to have witnessed the deceased and the appellant quarrelling (both were smack addicts) with each other; he tried to intervene; but the Appellant had a knife in his hand with which he attacked the deceased and inflicted a knife injury on his left thigh and then fled the spot. PW-2 claims to have given a chase to the Appellant but without success and thereafter returned to Neem Wala Chowk and recounted the episode to PW-14.

3. After conclusion of investigation, the Appellant, who had, in the meanwhile been arrested, was charged with commission of the crime. He pleaded not guilty and claimed trial. The prosecution relied on the testimony of 18 witnesses, including PW-2, the deceased's brother as well as PW-3, his (PW-2's wife). In addition, the prosecution relied on the testimonies of PWs-10, 11, 14 and 15 as well as the testimony of the doctor, who conducted the Postmortem proceeding, i.e. PW-18. After considering these and other materials placed on the record, the Trial Court held the Appellant guilty of committing the offence punishable under Section 304 Part-I IPC and sentenced him in the manner described previously in this

judgment.

4. The appellant's counsel argued that the reliance placed on the testimony of two interested witnesses, i.e. PW-2 and PW-3, who were relatives of the deceased, himself a smack addict, was incorrect. In the absence of any corroborative material, the Court ought not to have readily accepted their version. It was submitted that the manner in which the crime was described by PW-2, i.e. a quarrel in the early hours of the morning, between the smack addicts, was highly improbable and at any rate, his testimony could not be believed. Learned counsel submitted that the cross-examination of PW-2 revealed that other smack victims used to routinely prowl in the area. In these background of circumstances, the possibility of PW-2, a married man living upstairs with his family, going-down, merely on hearing a quarrel was extremely remote. Furthermore, submitted the counsel, the witness had clearly deposed that there was no light in the vicinity of the spot where the incident is alleged to have occurred. In these circumstances, the claim by PW-2 that he was an eye-witness, was improbable.

5. It was also argued that even though the deceased was PW-2's brother, the latter did not, by his own admission, make any effort to save him. Yet, after the stabbing incident, despite being unarmed, PW-2 claimed to have given a chase to the appellant. These established that the witness was highly unreliable. Learned counsel also highlighted that the testimony of PW-3 about having witnessed the incident cannot be believed. She claimed having heard the incident even when PW-2, her husband was asleep; she did not, however, wake him up. She in fact did not witness the incident, but admittedly claimed to have seen the quarrel from the balcony of the second floor despite admitting that there was no light in the vicinity of the area. She even claimed that other neighbours were watching the incident; the prosecution, however, intentionally made no effort to join such natural witnesses in the proceeding, because they would have been independent and would have stated the truth.

6. Having regard to these circumstances, submitted the counsel, the Court could not rule-out the possibility of manipulation by the police, who were confronted with a blind murder and decided to rope in the appellant.

7. Learned counsel made the alternative submission that even if the

prosecution story in this case were held to have been entirely correct, about the attack, the injury upon the deceased and his death, the Trial Court fell into error in returning the conviction under Section 304 Part-I IPC. At best, argued the counsel, the facts proved establish commission of a crime punishable under Section 326 IPC, as a grievous injury on a non fatal area, i.e. the leg was inflicted with the help of a dangerous weapon, such as a knife. Furthermore, submitted the counsel, the sentence imposed, i.e. life imprisonment was too harsh and disproportionate.

8. Before considering the submissions made on behalf of the appellant, it would be useful to extract the Trial Court observations regarding the result of the Postmortem as well as the report. The same reads as follows:

"XXXXXX XXXXXX XXXXXX

11. The dead body was sent for postmortem examination to mortuary of the hospital on 21.03.2007. The post-mortem examination was conducted by Dr. Rajiv Sharma, who prepared report (Ex. POW-16/A). As per postmortem examination report, the dead body was found having the following external injuries:

> "A stab wound, wedge shape, clean cut margins, undermined lower margins, 3 cm x 0.5 cm x 9 cm, muscle deep, obliquely placed over the anterior aspect of left thigh. The upper end of the stab wound was blunt and was laterally present and was about 20 cm below the mid-inguinal point. The lower end of the stab wound was acutely pointed and medially present about 13 cm above the superior margin of patella (knee bone). Extra vassation of blood was seen all over the margins and in the underneath subcutaneous tissue and blood oozing out of wound was seen grossly."

12. On internal examination of the dead body the following injury corresponding the external injury no. 1 was found:

> "All the muscles over anterior and medial compartment of left upper thigh were clean cut through and through, femoral vessels were completely transected, gross hemorrhage was seen in the soft tissues and about 100 ml of clotted blood was seen accumulated over medial aspect

of left upper thigh. Cut ends of muscle and vessels showing extra vassination of blood."

13. In the opinion of the autopsy doctor, the death had occurred due to shock and hemorrhage as a result of stab wound on the left lower limb. The external injury no. 1 with its corresponding internal injuries, in the opinion of autopsy doctor were sufficient to cause death in ordinary course of nature

XXXXXX XXXXXX XXXXXX".

9. From the narration of facts, it is evident that PW-14 was informed about the incident at around 04.00 AM or so; Ex. 18/A, the MLC produced in the case, shows that the deceased was taken to the hospital at 04.45 AM in the morning and declared "Brought Dead". The earliest police record (D.D. No. 7A, i.e. Ex. PW-5/A) is timed at 04.55 AM. These facts, the Trial Court, noticed, were not contested; no cross-examination of witnesses who deposed to the events, was undertaken.

10. With this background, it would be necessary to consider the Appellant's submissions. The grievance that the conviction is based on relatives' testimony (i.e. depositions of PW-2 and PW-3) cannot be taken to its extremity. It was held nearly four decades ago, by the Supreme Court (see **Darya Singh v. State of Punjab** AIR 1965 SC 328) that the testimony of such witnesses cannot be rejected, but has to be scrutinized with care. Further, if there are no other witnesses, or others do not step forward to depose about the crime, the Court cannot reject such eyewitnesses' testimonies merely because they are related to the deceased. Ultimately, the Court has to see what they say, applying the test of credibility.

11. The combined testimonies of PW-2 and PW-3 show that in the early hours of the morning, there was some commotion in their neighbourhood. The deceased was PW-2's brother, and lived in the ground floor of the premises where they resided; apparently the commotion or disturbance awoke PW-3, who asked her husband, PW-2 to go down and see what was happening. He did so, and saw the Appellant quarrelling with the deceased. He (PW-2) clearly said that the Appellant took out his knife and attacked the deceased. Such being the case, PW-2 could not be faulted for not trying to save his brother; either the appellant was too quick for him (after all, there was only one knife blow) or he was fearful

at that stage. Nonetheless, he mustered some courage to chase the appellant when he fled the spot. He could not nab him; PW-2 apparently then went in search of some help, chanced upon PW-14, and told him about the attack. Both returned to the spot; the injured had been taken inside by then, from where he was taken to the hospital.

12. The testimony of PW-3 in a sense complements that of PW-2; though she did not see the attack itself, she appears to have witnessed its immediate aftermath when PW-2 separated the deceased from the Appellant; this part of the evidence was not disputed. PW-3 also deposed to helping in bring the injured inside the premises, and having been told (by him) that the Appellant was his attacker. This was treated by the Trial Court as a dying declaration.

13. So far as the Appellant's submission regarding insufficient light is concerned, this court notices that in the cross-examination, both PW-2 and PW-3 agreed that the local authorities had not installed street lights. But at the same time, both volunteered that there was sufficient light, in the neighborhood. In any case, PW-2 actually saw the appellant, who was a neighbor. Therefore, this argument is insubstantial.

14. This Court is unpersuaded by the argument that motive was not sufficiently proved. Motive assumes considerable significance when the prosecution banks on circumstantial evidence. Motive is usually locked in the mind of the offender, and is difficult to prove at the best of times; actions, which reveal motive are key to their existence. In cases where ocular evidence is forthcoming, absence of motive or absence of proof of motive is an insignificant factor.

15. Having regard to the above discussion, we are of the opinion that the findings of the Trial Court do not call for interference. In this context, the Court is unpersuaded by the Appellant's submission that the conviction ought to have been under Section 326 IPC. While the Appellant no doubt used a weapon described under that provision, he had every intention of inflicting the injury that he did. That injury, in the ordinary course of nature would have caused death – and indeed caused death. The injuries mentioned in the post-mortem report and the time when the victim breathed his last are so proximate as to leave no room for doubt in our mind that the conviction recorded under Section 304-I IPC, in this case, was justified.

16. Our findings and observations, are however, not dispositive of the appeal. We notice that the Trial Court has sentenced the Appellant to life imprisonment. Having regard to the nature of the injury, which was a solitary knife blow on a non-vital part of the body, the sentence appears to be harsh and disproportionate. We are of the opinion that ends of justice would be met if the sentence is altered to rigorous imprisonment for seven years.

17. In the light of the above discussion, the Appeal succeeds to the extent that instead of life imprisonment, the Appellant's sentence is reduced to seven years' imprisonment. The other sentence is left undisturbed. The Appeal is allowed to the above extent.

ILR (2012) II DELHI 65
CM (M)

BANKEY BIHARI LAL & ORS. ....PETITIONERS

VERSUS

SHIV MANDIR (GUFAWALA) SABHA (REGD) & ORS. ....RESPONDENTS

(INDERMEET KAUR, J.)

CM (M) NO. : 770/2003 DATE OF DECISION: 30.11.2011

Code of Civil Procedure, 1908—Order XL and Order XXXIX Rule 1&2—Suit for declaration and mandatory injunction, alleging financial irregularities committed by the defendants—Trial Court granted ad interim injunction and appointed receiver to look after the affairs of defendant no.1 society—Appellate Court reversed the findings and set aside the order of trial Court—Challenged—Held, the alleged financial irregularities mentioned in plaint are more or less general allegations and plaintiffs themselves are facing

criminal cases and record indicates that affairs of defendant no. 1 were being better managed by the defendants as compared to the management by the receiver; so applying the stringent tests laid down by the apex Court in the case of *Smt. Damyanti Naranga vs UOI,* AIR 1971 SC 966, there is no irregularity in the appellate order whereby appointment of receiver was set aside.

The Apex Court in AIR 1971 SC 966 **Smt. Damyanti Naranga Vs. Union of India and others** has laid stringent test which are required to be passed before a Receiver can be appointed. These five tests which have to be noted by the Court while exercising this equity jurisdiction have been summarized herein as under:-

> "(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the court. The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.
>
> (2) The court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit.
>
> (3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has

been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm.

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio' that is to say, in the enjoyment of no one, as the court can hardly do wrong in taking possession; it will then be the common interest of all the parties that the court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a court with jurisdiction to appoint a receiver.

(5) The court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc." **(Para 7)**

Important Issue Involved: Tests for appointment of receiver laid down in the case of *Smt. Damyanti Naranga vs UOI,* AIR 1971 SC 966.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. P.R. Aggarwal, Advocate.

FOR THE RESPONDENTS : Mr. Anil Sapra, Sr. Advocate with Mr. Maneesh Goyal, Advocate.

CASE REFERRED TO:

1. *Smt. Damyanti Naranga* vs. *Union of India and others* AIR 1971 SC 966.

RESULT: Petition Dismissed.

INDERMEET KAUR, J. (Oral)

1. Impugned order is the order dated 25.09.2003 vide which the order passed on the application filed by the plaintiffs under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure (hereinafter referred to as the 'Code') and under Order XL of the Code had been reversed. Vide order dated 17.05.2003, the prayer made by the plaintiffs seeking appointment of a receiver had been allowed; further prayer for grant of interim relief had also been afforded to them; the trial Court was of the view that a prima-facie case is made out by the plaintiffs for grant of ad-interim injunction in their favour; pursuant thereto, the management i.e. defendants No. 2 & 4 were restrained from managing the affairs of the society i.e. of defendant No. 1 and a retired Additional District Judge Mr. S.M. Aggarwal had been appointed as receiver to look after the affairs of the defendant No. 1 as also to conduct elections for the said purpose. This order was subject matter of an appeal which was disposed of vide the impugned order dated 25.09.2003. The impugned order had upset these findings holding that neither a prima-facie case is made out in favour of the plaintiffs for grant of injunction and nor is any ground made out for appointment of a receiver.

2. At the outset, it has been urged by learned counsel for the respondents that this Court is sitting in its power of superintendence under Article 227 of the Constitution of India and unless and until there is a manifest error or an illegality committed by the first appellate court, interference under powers of superintendence is not called for. It is in this background that the arguments of the respective counsels have to be appreciated.

3. Written submissions have been filed by the plaintiff. Contention is that the trial Court had correctly appreciated the averments made in the plaint which were to the effect that the affairs of defendant No. 1 society were regularly being managed by defendants No. 2 to 4 where financial irregularities were being committed and the said defendants are liable to render accounts of the society; contention being that the strength of the members of the society had earlier increased immensely from 160 to 500 but now it had been brought down to 51 all of whom are family members of the defendant No. 1 society which is being run at the whims and fancies of its management. Contention being that the impugned order upsetting this finding of the trial court suffers from an infirmity.

4. Arguments have been refuted.

5. Record has been perused.

6. Present suit is a suit for declaration and mandatory injunction. The averments made in the plaint have been perused. They are largely to the effect that financial irregularities have been committed by the defendant society along with its office bearers. Contention in the plaint is that the four plaintiffs are all founder members of the plaintiff society; this has been averred in para 12; further contention being that they seek renewal of their membership to which they have a legal right. Prayer 'b' of the plaint also specifically states that a decree of declaration be passed in favour of the plaintiffs and against the defendants declaring that the action of the defendant in depriving the plaintiffs of their membership by not renewing it be set aside. In the written statement these contentions have been refuted. In the written statement it has specifically been pointed out that the plaintiffs were never the founder members of the society. In reply to this para of the plaint i.e. para 4 of the written statement, it has been stated that plaintiff No. 2 who had earlier been the Vice-President has left the society in 1998 and has since ceased to be a member of the society; plaintiffs No. 3 & 4 were never executive members of the society; plaintiff No. 3 was not even an ordinary member of the society; plaintiffs No. 1 & 4 had also not got their membership renewed after 1996. This contention which has been made in the written statement has not been refuted. Even before this Court, there is no counter submission. Learned counsel for the respondents/defendants has pointed out that the complete record of the society which includes list of its members and minutes of meeting have been placed on record and these facts which

have specifically been stated in the written statement emanate from the record to which even otherwise there is no dispute. Contention being that the plaintiffs have not come to the Court with clean hands and they deserve no relief. Further contention being that the impugned order has noted all the contentions raised by the petitioners in the correct perspective and it calls for no interference.

7. The Apex Court in AIR 1971 SC 966 **Smt. Damyanti Naranga Vs. Union of India and others** has laid stringent test which are required to be passed before a Receiver can be appointed. These five tests which have to be noted by the Court while exercising this equity jurisdiction have been summarized herein as under:-

> "(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the court. The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.
>
> (2) The court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit.
>
> (3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm.
>
> (4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the court very reluctantly disturbs possession by

receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio' that is to say, in the enjoyment of no one, as the court can hardly do wrong in taking possession; it will then be the common interest of all the parties that the court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a court with jurisdiction to appoint a receiver.

(5) The court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc."

8. The averments made in the application under Order XL of the Code seeking appointment of a Receiver have also been perused which have to be read along with the contents of the plaint. The financial irregularities purported to have been carried out by the defendants have not been detailed or spelt out; they are by and large general allegations. In fact it is the plaintiffs themselves who are facing charges of mis-conduct; plaintiff No. 3 is facing trial under Section 302 of the IPC which has been converted into charges under Section 304 of the IPC for which he has suffered imprisonment; an FIR is pending against plaintiff No. 1 under Sections 406/420 of the IPC and an FIR has also been registered under the Maintenance of Internal Security Act (MISA) against plaintiff No. 4. These facts are also not in dispute and have been noted in the impugned order.

9. The impugned order has also noted that the comparative statement of the gross receipts collected for the period during which Receiver had been appointed under consent orders of the Court i.e. for October, 1999, 2000, 2001 & 2002 shows that the collections made for prior period i.e.

period during which the defendants were managing the affairs of the society were much more as compared to the receipts for the aforenoted period when the Receivers were getting the election conducted. This prima-facie indicates that the affairs of the defendant No. 1 Society were in fact better managed by defendants No. 2 to 4. Order appointing the Receiver was thus rightly set aside.

10. The impugned order refusing the relief under Order XXXIX Rules 1 & 2 of the Code also suffers from no infirmity. The Court had correctly noted that in the main suit there was no prayer made in the plaint that the defendants should be restrained from managing the affairs of the society and as such the relief prayed for by way of interim relief which has not been sought for in the main suit could not have been granted. Even otherwise, the plaintiffs as noted supra have not come to the Court with clean hands; they have concealed the fact about their membership; such a party is not entitled to an injunction which is a discretionary relief to be granted only if a prima-facie case is made out by the plaintiff; balance of convenience should also lie in his favour and the Court is of the prima-facie view that32 non grant of the injunction an irreparable loss would be suffered by him in case such relief is not granted to him. Impugned order had been passed taking all the aforenoted parameters into account; it suffers from no infirmity.

11. Dismissed.

ILR (2012) II DELHI 73
CRL. REV. P.

AMIT DAHIYA **....PETITIONER**

VERSUS

STATE **....RESPONDENT**

(SURESH KAIT, J.)

CRL. REV. P. NO. : 531/2011 **DATE OF DECISION: 02.12.2011**

Indian Penal Code, 1860—Section 307, 406, 498A—Code of Criminal Procedure, 1973—Section—227—Petitioner charged for having committed offences punishable under Section 307, 406, 498A—By way of Criminal Revision, he Challenged impugned order urging, only slight suspicion was against petitioner for committing offence punishable under Section 307 IPC so he should not have been charged under said section—Held :- If at the initial stage there is a strong suspicion which leads the Court to think that there is a ground for presumption that the accused had committed the offence, then it is not open to the Court to say that there is no sufficient ground for proceeding against accused—However, in present case, no strong proof to frame charge under Section 307 IPC against petitioner.

Learned counsel for the petitioner submits that this is only suspicion and nothing else. To support his argument he relied upon **Union of India v. Prafulla Kumar Samal** 1979 AIR (SC) 366 and referred to para No.8 which reads as under:-

> "The scope of section 227 of the Code was considered by a recent decision of this Court in the case of **State of Bihar v. Ramesh Singh** AIR 1977 SC 2018 where Untwalia, J. speaking for the Court observed as

follows:-

> 'Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor pro poses to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebut ted by the defence evidence; if any, cannot show that the accused committed the offence then there will be no sufficient ground for proceeding with the trial'.
>
> This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of the Sessions Judge in order to frame a charge against the accused. Even under the Code of 1898 this Court has held that a committing Magistrate had ample powers to weigh the evidence for the limited purpose of finding out whether or not a case of commitment to the Sessions Judge has been made out." **(Para 9)**

Important Issue Involved: If at the initial stage there is a strong suspicion which leads the Court to think that there is a ground for presumption that the accused had committed the offence, then it is not open to the Court to say that there is no sufficient ground for proceeding against accused.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. B.S. Rana, Advocate.

FOR THE RESPONDENT : Ms. Rajdipa Behura, APP for State with SI Ashok Kumar, Police Station Prashant Vihar in Person.

CASES REFERRED TO:

1. *Union of India* vs. *Prafulla Kumar Samal* 1979 AIR (SC) 366.
2. *State of Bihar* vs. *Ramesh Singh* AIR 1977 SC 2018.

RESULT: Petition allowed.

SURESH KAIT SURESH KAIT, J. (Oral)

1. Vide instant petition, the petitioner has challenged the impugned order dated 18.10.2011 whereby learned Trial Court has framed charges for the offence punishable under Section 498A/406/307 Indian Penal Code, 1860.

2. At the outset, Mr. B.S. Rana, learned counsel for the petitioner submitted that instant petition is restricted to the challenging the framing of charge under Section 307 Indian Penal Code, 1860 only.

3. It is pertinent to mention that petitioner earlier filed similar Criminal Revision Petition No.516/2011, however during arguments, learned counsel for petitioner, withdrawn the same on 18.11.2011. Consequently, this Court could not have given opinion thereon.

4. Learned counsel for the petitioner submits that the alleged incident is of dated 17.01.2011 when the wife of the petitioner was got admitted in Bhagwati Hospital, Sector – 13, Rohini, Delhi in semi-conscious position.

5. On the statement of father of victim, who is father-in-law of petitioner, case FIR No. 25/2011 was registered under Section 498A Indian Penal Code, 1860 at police Station Prashant Vihar, Delhi. During investigation, offence under Section 406/307 Indian Penal Code, 1860 were also added. Accordingly, charge-sheet has been filed for the offence under Section 498A/406/307 Indian Penal Code, 1860.

6. Learned counsel for the petitioner submits that vide impugned order, the Trial Court has also framed charge U/s 406/307 IPC apart from Section 498A Indian Penal Code, 1860 also.

7. He further submits that as per the report of concerned Doctor on MLC, the wife of the petitioner was in semi-conscious; however, she was not fit for statement. Admittedly, statement of victim was recorded only on 22.01.2011 i.e. four days after the alleged incident. It is also not in dispute that on 17.01.2011, victim was not in a position to make statement.

8. Learned counsel for the petitioner further submits that the victim in her statement, which was recorded on 22.01.2011 stated that on 22.08.2010 after Rakhi festival she was given beating after which she was turned out from the house barefooted. About half an hour later, they came to her and found her sitting in a park; from where they brought her back to the house and started taunting. On 16.01.201, when she was sleeping in her bedroom with her son Garvit, her husband (petitioner herein) went out by saying that he was going to meet his mother and she may sleep. When she opened her eyes, she found herself in the hospital and she does not remember what happened in between but she was having a doubt that her husband gave her something for eating and then tried to strangulate her because earlier also on 26.09.2010, her husband had tried the same.

9. Learned counsel for the petitioner submits that this is only suspicion and nothing else. To support his argument he relied upon **Union of India v. Prafulla Kumar Samal** 1979 AIR (SC) 366 and referred to para No.8 which reads as under:-

> "The scope of section 227 of the Code was considered by a recent decision of this Court in the case of **State of Bihar v. Ramesh Singh** AIR 1977 SC 2018 where Untwalia, J. speaking for the Court observed as follows:-
>
> 'Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no

sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor pro poses to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebut ted by the defence evidence; if any, cannot show that the accused committed the offence then there will be no sufficient ground for proceeding with the trial..

This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of the Sessions Judge in order to frame a charge against the accused. Even under the Code of 1898 this Court has held that a committing Magistrate had ample powers to weigh the evidence for the limited purpose of finding out whether or not a case of commitment to the Sessions Judge has been made out."

10. Though, strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. However, learned counsel submits that at the initial stage, if there is a strong suspicion which leads the Court to think that there is a ground for presumption that the accused has committed the offence, then it is not open to Court to say that there is not sufficient ground for proceeding against the accused.

11. Learned counsel for petitioner further submits that as per the medical report of Bhagawati Hospital dated 17.01.2011, in the column of *History and physical examination* it is clearly mentioned that *Hanging Mark (+) around the neck.* He further submits that hanging mark around the neck comes only when there is a case of hanging; whereas the allegations made by the wife of the petitioner is that the petitioner administered some poisonous substance and thereafter she became unconscious and she regained her consciousness in the hospital.

12. He further submitted that the wife of the petitioner was re-examined on 24.01.2011 at about 04:45PM at Dr. Baba Saheb Ambedkar

Hospital, Rohini, Delhi wherein it is recorded in under the column of *Particulars of injuries or symptoms in case of poisoning* that alleged history of the patient being found semi conscious in a room at her home on the night 16.01.2011. She was taken to Bhagwati Hospital and an MLC was prepared vide 652 and hospital No.46/2010. Now, patient has been brought for opinion regarding the cause of the marks on the neck. At the bottom of the report, it is mentioned that *The pattern of the ligature mark is consistent with hanging.*

13. Learned counsel further submits that as per the opinion of the two hospitals, the present case is not a case of administering some poisonous substance rather of hanging and an attempt to commit suicide.

14. He has drawn the attention of this Court at Annexure E which is hand written note in Hindi wherein victim allegedly written as under:-

"Being fed up with my parents, my in-laws I am committing suicide."

15. Though, learned counsel has also referred to the order dated 14.09.2011 passed by this Court in Bail Application No.983/2011 in respect of the petitioner herein. However, I am not considering the observations made therein.

16. Learned counsel for the petitioner further submitted that in the report dated 04.08.2011 of FSL, wherein it is reported that *'On chemical and TLC examination, metallic poisons, ethyl and methyl alcohol, cyanide, phosphide, alkaloids, barbiturates, tranquilizers and pesticides could not be detected in exhibit '1'.* Therefore, even on the basis of the FSL report, the case of the prosecution is baseless as far as Section 307 Indian Penal Code, 1860 is concerned.

17. Ms. Rajdipa Behura, learned APP, on the other hand, submits that after the incident, continuously for four days, victim was not fit for making statement, therefore, her statement could not be recorded before 22.01.2011. She has referred to annexure P at page No.104 of the petition, wherein it is recorded that *'the statement of the victim would be recorded as soon as she would be fit for statement'.*

18. She further submitted that as per the report of Dr.Baba Saheb Ambedkar Hospital, Rohini, Delhi the patient found in semi-conscious state in her room on the night 16.01.2011, thereafter she was taken to

Bhagwati Hospital and the MLC was prepared. It is further recorded that the pattern of ligature mark is consistent with hanging, which shows that petitioner had tried to kill her, somehow she is safe.

19. Learned APP further referred to the statement of the wife of the petitioner wherein she has clearly stated that she he (petitioner) administered some poisonous substance due to which, she became unconscious and found herself in the hospital.

20. She fairly concedes that the FSL report dated 04.08.2011 does not support the allegations, as made by the victim.

21. I note that the issue of strong suspicion has already been decided by the Apex Court way back in 1979 in **Union of India vs. Prafulla Kumar** (supra) wherein it is recorded that the strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. It is further recorded that if at the initial stage, there is a strong suspicion which leads the Court to think that there is a ground for presumption that the accused has committed the offence, then it is not open to Court to say that there is not sufficient ground for proceeding against the accused.

22. In the instant case, there is one strong report of the FSL whereby the case as alleged by the victim is not made out. Though, the suicide note, as mentioned by learned counsel, seems to be strong proof, however, at this stage, in the absence of FSL opinion, nothing can be said on that.

23. In the circumstances, I am of the opinion that charge framed under Section 307 Indian Penal Code, 1860 vide impugned order dated 18.10.2011 is faulty one, therefore, charge under Section 307 Indian Penal Code, 1860 against the petitioner is hereby quashed.

24. Learned Trial Court may proceed as per law for the offence under Section 498A/406 Indian Penal Code, 1860.

25. Observations made herein shall not come in the way of learned Trial Court during trial.

26. In view of above, Criminal Revision Petition No.531/2011 is allowed and stands disposed of.

27. Consequently, Criminal M.A.No.18515/2011 (stay) renders infructuous and disposed of as such.

28. Dasti.

ILR (2012) II DELHI 80
CM (M)

BANKEY BIHARI LAL AGGARWAL & ORS. ....PETITIONERS

VERSUS

SHIV MANDIR (GUFAWALA) & ORS. ....RESPONDENTS

(INDERMEET KAUR, J.)

CM (M) NO. : 1816-24/2006 DATE OF DECISION: 07.12.2011

Code of Civil Procedure, 1908—Section 10—First suit was for declaration that Plaintiffs had right to get membership of the society renewed, permanent injunction for restraining the defendants from creating third party interest in the temple property, and rendition of accounts, calling upon the defendants running temple to render accounts—During progress of the First suit, a Second suit was filed under Sec. 91 & 92 CPC after obtaining leave, praying for declaration that the defendants had no right to manage and control administration of the temple and direction to open membership of the society to the residents of the area—Held, trial Court rightly stayed the Second Suit under Sec. 10 CPC, since both the suits related to the same matter in issue.

The object of Section 10 is to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same

matter in issue. Though the heading of this section is "stay of suit", it does not operate as a bar to the institution of the subsequent suit. It is only the trial of the later suit that is not to be proceeded with. The object is to avoid conflicting decisions by the two competent Courts over the same matter as also to save the time of the Court. The impugned order had correctly noted all these parameters going into the pleadings of both the suits and having drawn the conclusion that the second suit is liable to be stayed. Merely because the second suit was a representative suit under Sections 91 & 92 of the Code would not take away the matter in issue which was to be adjudicated upon by the second Court which was substantially in issue before the first Court. Impugned order staying the second suit suffers from no infirmity. **(Para 5)**

Important Issue Involved: Object of Section 10 is to prevent the Courts of concurrent jurisdiction from trying two parallel suits between the same parties on same matter in issue.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONERS : Mr. P.R. Aggarwal, Advocate.

FOR THE RESPONDENTS : Mr. Anil Sapra, Sr. Advocate with Mr. Maneesh Goyal, Advocate.

RESULT: Petition dismissed.

INDERMEET KAUR, J. (Oral)

1. Order impugned is the order dated 04.05.2002 vide which on an application filed by the defendant under Section 10 of the Code of Civil Procedure (hereinafter referred to as the 'Code.) the suit proceedings i.e. suit No. 207/2002 (representative suit under Sections 91 & 92 of the Code) had been stayed.

2. The first suit No. 123/2000 had been filed by four plaintiffs Bankey Behari Lal Aggarwal & others against Shiv Mandir (Gufawala)

and others; this was a suit for declaration, permanent and mandatory injunction as also for rendition of accounts. The averments made in plaint and the prayers which were six in number have been perused. The gist of the case of the plaintiffs was that the defendants who are running the Shiv Mandir Society must render accounts of the manner in which the funds of the society are being utitlized; no third party interest qua the property of the society should be created during the pendency of the suit; the plaintiffs have a right to get their membership renewed and persons who are aspirants and willing to become members should also be considered on the payment of necessary charges. Admittedly this suit was in progress at the time when the second suit was filed. It is not in dispute that in this suit an application for amendment had been filed to make it a representative suit which prayer had been rejected.

3. The second suit i.e. Suit No. 207/2002 was filed by 10 plaintiffs against six defendants; this was a suit under Sections 91 & 92 of the Code. Admittedly before the suit could proceed, leave had to be taken from the concerned Court which had been granted and the suit proceeded. Vide the aforenoted application under Section 10 of the Code filed by the defendants a prayer was made seeking a stay of the present proceedings as the matter in issue in the present suit and the earlier suit were the same and as such the second suit could not proceed. The averments made in the present suit as also prayers made therein have been perused. The gist of this second suit which is a wider ambit in a representative capacity was to the same effect; prayer being that a decree of declaration be passed in favour of the plaintiffs and against the defendants declaring that the defendants have no right to manage and control the administration of the temple, namely Shiv Mandir Sabha (Regd.) Society as also a direction to open the membership of the Society for the residents of the area who wish to become members on their paying requisite fee.

4. The Court below had adverted to the provisions of Section 10 of the Code and had rightly held that the two suits relate to the same matters in issue; the earlier suit and the later suit being on the same matter in issue, the second suit was rightly stayed.

5. The object of Section 10 is to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. Though the heading of this section is "stay of suit", it does not operate as a bar to the

institution of the subsequent suit. It is only the trial of the later suit that is not to be proceeded with. The object is to avoid conflicting decisions by the two competent Courts over the same matter as also to save the time of the Court. The impugned order had correctly noted all these parameters going into the pleadings of both the suits and having drawn the conclusion that the second suit is liable to be stayed. Merely because the second suit was a representative suit under Sections 91 & 92 of the Code would not take away the matter in issue which was to be adjudicated upon by the second Court which was substantially in issue before the first Court. Impugned order staying the second suit suffers from no infirmity.

6. Dismissed.

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RFA

MADAN LAL **....APPELLANT**

VERSUS

SUNDER LAL **....RESPONDENT**

(VALMIKI J. MEHTA, J.)

RFA NO. : 707/2010 **DATE OF DECISION: 09.12.2011**

Code of Civil Procedure, 1908—Adverse Possession—Plaintiff filed suit for possession, alleging that plaintiff purchased the suit property and allowed his brother, the defendant at request, to use the suit property for running a shop and thereafter the defendant purchased his own property but refused to vacate—Defendant pleaded that the suit property was allowed to be retained by him under a settlement and set up an alternative defence of adverse possession—Suit decreed in favour of plaintiff—Appeal—In appeal, only

adverse possession ground raised—Held, not a single document filed by defendant to prove his case of adverse possession and claim of defendant in evidence affidavit is only with respect to the alleged settlement, with no specific date or month or year as to when the possession was notified to be hostile to plaintiff and mere long possession cannot be adverse possession.

The law with respect to adverse possession is now well settled. The plea of adverse possession commences in wrong and is continued against right. The plea of adverse possession has to be established by showing open, hostile and continuous possession adverse to the true owner. Such an adverse possession has to be clearly shown preferably by very strong documentary evidence. In the present case, admittedly not a single document was filed by the appellant/defendant to prove his alleged case of adverse possession. In fact, even in the evidence filed by way of affidavit, there is no averment as to the appellant/defendant being in adverse possession. In this affidavit by way of evidence, the claim is only with respect to ownership on the ground of settlement/agreement of becoming owner of the suit shop for not claiming rights in 100 sq. yds. plot which was said to have been purchased out of the funds available from the sale of quarter No.3/106, Subhash Nagar, Delhi belonging to the father of the parties. In this affidavit by way of evidence filed by the appellant/defendant there is no specific date or month or year as to when the possession was notified to be hostile to the respondent/plaintiff and how it has since continuously continued to be hostile. Obviously, therefore the appellant/defendant miserably failed to prove the plea of having become owners by means of adverse possession. Long possession cannot be adverse possession.

(Para 5)

Important Issue Involved: Mere long possession cannot be adverse possession, as the possession to be held adverse, it must be shown to be open, hostile and continuous possession adverse to the true owner.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Ravi Sharma, Advocate.

FOR THE RESPONDENT : Mr. T.C. Sharma, Advocate.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 11.5.2010. By the impugned judgment, the suit of the respondent/plaintiff for possession with respect to a shop i.e. shop No.1, ground floor, BE-306, Gali No.5, Hari Nagar, New Delhi was decreed. Parties to the present case are brothers.

2. The facts, as pleaded by the respondent/plaintiff in the plaint, are that the respondent/plaintiff purchased the suit plot admeasuring 50 sq. yds. by means of a registered sale deed dated 28.7.1990 and thereafter constructed three shops on the same out of which the disputed shop No.1 is one of the shops. It is pleaded that the appellant/defendant being a brother requested that a shop be given to him because he wanted to carry out his business therein. The subject shop was therefore given to the appellant/defendant where he star ted his cycle repairing business and subsequently the business of steel iron in the name of M/s S M Steel Company. The respondent/plaintiff claimed that thereafter the appellant/defendant purchased his own properties, including one shop in the property bearing No.BE-176, Hari Nagar, New Delhi and therefore having an alternative place to do business, the appellant/defendant was asked to vacate the premises but he failed to do so whereupon the subject suit for possession was filed.

3. The appellant/defendant laid two defences before the trial Court. The first defence was that the respondent/plaintiff had purchased a plot of 100 sq. yds. within the same municipal number of the property i.e.

in BE-306 (in addition to the suit plot which again is on the same municipal number and which is of 50 sq. yds.), and, this plot of 100 sq. yds. was actually purchased out of the funds which were got by the respondent/plaintiff from the sale of the property bearing No.3/106, Subhash Nagar, Delhi which belonged to the father of the parties. It was pleaded that under an agreement/settlement, appellant/defendant was to retain the subject shop for not claiming any share in the property being plot of 100 sq. yds. which was said to have been purchased from the joint/common funds available at the time of sale of quarter No.3/106, Subhash Nagar, Delhi belonging to the father of the parties. An alternative plea of adverse possession was also set up.

4. Learned counsel for the appellant has only argued the appeal with respect to plea of adverse possession.

5. The law with respect to adverse possession is now well settled. The plea of adverse possession commences in wrong and is continued against right. The plea of adverse possession has to be established by showing open, hostile and continuous possession adverse to the true owner. Such an adverse possession has to be clearly shown preferably by very strong documentary evidence. In the present case, admittedly not a single document was filed by the appellant/defendant to prove his alleged case of adverse possession. In fact, even in the evidence filed by way of affidavit, there is no averment as to the appellant/defendant being in adverse possession. In this affidavit by way of evidence, the claim is only with respect to ownership on the ground of settlement/agreement of becoming owner of the suit shop for not claiming rights in 100 sq. yds. plot which was said to have been purchased out of the funds available from the sale of quarter No.3/106, Subhash Nagar, Delhi belonging to the father of the parties. In this affidavit by way of evidence filed by the appellant/defendant there is no specific date or month or year as to when the possession was notified to be hostile to the respondent/plaintiff and how it has since continuously continued to be hostile. Obviously, therefore the appellant/defendant miserably failed to prove the plea of having become owners by means of adverse possession. Long possession cannot be adverse possession.

6. Since the counsel for the respondent has argued for sustaining the judgment also on the other ground that the settlement as pleaded was not proved, let me deal with this aspect also. This other plea which was

set up by the appellant/defendant in the trial Court of the settlement, was a plea which was not proved because there is again no date, month or year of this alleged settlement. There is no documentary proof of the alleged settlement. Further, no evidence was led before the trial Court as to in fact whether the funds from the property of the father were utilized for the purchase of 100 sq. yds plot. There were only respective oral statements of both the parties on this aspect. Whereas the appellant/defendant pleaded that funds utilized for the purchase of 100 sq. yds of plot on which the suit shop is constructed, were out of the funds of the father, the respondent/plaintiff on the other hand claimed that father died in the year 1960 and the subject property was already sold by the father during his life time in the year 1956. The plot of 100 sq. yds was purchased in the year 1966 i.e. six years after the death of the father and about 10 years after the sale of quarter in Subhash Nagar. The appellant/defendant has not filed any documentary evidence on record with respect to his alleged plea of the quarter having been sold after the death of the father, and, I find that his affidavit by way of evidence also fails to depose on this aspect. In fact, the affidavit by way of evidence filed on behalf of the appellant/defendant shows that the property at Subhash Nagar was probably sold during the life time of the father himself. This becomes clear when we refer to the written statement filed on behalf of the appellant/defendant, and para 4 thereof in which the averment is: "that the quarter No.3/106 Subhash Nagar, Delhi was allotted to Shri Ramesh Chander i.e. the late father of the plaintiff and the defendant by the Rehabilitation Ministry. The above mentioned property i.e. Quarter No.3/106 was sold in 1960's and Shri Ramesh Chander died" i.e. as if deposing that the Quater No.3/106 was sold even before the death of the father-Ramesh Chand.

7. Finally, I may add that plea of benami ownership of the respondent/plaintiff and the entitlement of ownership of the appellant/defendant with respect to the plot of 100 sq. yds, is in fact quite clearly barred by Benami Transactions (Prohibition) Act, 1988. I actually therefore need not have gone into details with respect to even this alleged settlement/agreement on the ground that the appellant/defendant was an alleged co-owner in the plot of 100 sq. yds. To conclude, I may add that the appellant/defendant in his cross-examination admitted categorically that the shops were constructed by the respondent/plaintiff and he was given the subject shop by the respondent/plaintiff because he was the brother

of the respondent/plaintiff.

8. A civil case is decided on balance of probabilities. Once as per the title documents the respondent/plaintiff was the owner, the burden was heavily upon the appellant/defendant to prove the plea of adverse possession or the alleged settlement (assuming it could have been raised in spite of Benami Transactions (Prohibition) Act, 1988) and which pleas the appellant/defendant has miserably failed to prove.

9. In view of the above, there is no merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

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CRL. M.C.

A.K. SINGH ....PETITIONER

VERSUS

STATE ....RESPONDENT

(SURESH KAIT, J.)

CRL. M.C. NO. : 4121/2011 DATE OF DECISION: 12.12.2011

Delhi Police Act, 1978—Section 66 (B)—Bus of petitioner impounded by police—Petitioner made complaints to Commissioner of Police and concerned ACP regarding articles removed from his bus while in custody of police, but no action taken—Petitioner then moved application before learned Metropolitan Magistrate (MM) for direction to TI and ACP, to take photographs of damaged Bus, to get prepared inventory of articles removed by police, and to get damage assessed from Government approved valuer—MM though allowed prayer to take photographs but

did not pass any order for preparation of inventory—Petitioner then filed suit for recovery of damages against traffic police officials and also filed criminal complaint against them—Petitioner again moved application before MM praying for same relief which was dismissed as infructous—Being aggrieved he preferred Cr. M.C. Held :- As per Section 66 (2) of Delhi Police Act police on taking charge of an unclaimed property, is supposed to prepare inventory and send the same to Commissioner of Police.

Ld. Counsel for the petitioner has referred Section 66 (B) of D.P. Act, 1978, same is re-produced as under:-

"66. Police to take charge of unclaimed property:

(1) It shall be the duty of every police officer to take temporary charge-

(a) Of all unclaimed property found by, or made over to, him and

(b) Of all property found lying in any public street, if the owner or person in charge of such property, on being directed to remove the dame, refused or fails to do so.

(2) The police officer taking charge of the property under Sub-Section.

(1) Shall furnish an inventory thereof to the Commissioner of police." **(Para 10)**

Important Issue Involved: As per Section 66 (2) of Delhi Police Act, Police on taking charge of an unclaimed property, is supposed to prepare inventory and send the same to Commissioner of Police.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Ajay Kumar, Advocate.

FOR THE RESPONDENT : Mr. Rajdipa Behura, APP for State.

RESULT: Cr. M.C. allowed.

SURESH KAIT, J. (Oral)

CRL.M.A. 19177/2011

Exemption is allowed subject to just exceptions.

Criminal M.A. stands disposed of.

+ CRL. M.C. 4121/2011

1. Ld. Counsel for the petitioner submits that on 11.01.2011, vehicle of the petitioner was impounded under Section 66 (B) of D.P. Act. On 21.01.2011, petitioner made a complaint to Commissioner of Police, Delhi, but no action on the complaint of the petitioner has been taken.

2. Simultaneously, petitioner made a complaint to ACP, Vivek Vihar, Delhi. Even said ACP did not take action.

3. On 14.02.2011, petitioner moved an application dated 14.02.2011 before the ld. Metropolitan Magistrate (Traffic) inter alia praying for the direction to the TI and ACP, Vivek Vihar to take photographs of the damaged bus no.DL-IPB-3581 and to prepare an inventory of articles removed from his bus while in the custody of the police, to get the damaged assessed from a Govt. approved valuar, so that the petitioner would be able to initiate appropriate legal action against the erring officials.

4. The trial court vide its order dated 15.02.2011 passed the following order:

> "TI concerned of VKC and IO/SI Manu Sehrawat from P.S. Vivek Vihar is directed to file the status report on 17.02.2011 at 10.00 a.m. In the meantime, the applicant is likely to take photograph of the aforesaid vehicle through any photographer at 11:00 a.m. on 16.02.2011."

5. Thereafter, petitioner moved an application before the ld. Metropolitan Magistrate praying for making the inventory of the missing stolen articles of the bus. The same was rejected vide order dated 06.04.2011 saying that same application has already been dismissed by this court. Therefore, the said application found to be infructuous.

6. On 08.04.2011, the petitioner filed a suit for recovery of damages against the traffic officials of Vivek Vihar Circle and others. Same is pending before ld. ADJ, Karkardooma, Delhi.

7. Ld. Counsel for the petitioner further submits that petitioner also filed a criminal complaint case against the traffic officials and others and the same is pending before ld. M.M. Karkardooma Courts, Delhi.

8. On 28.04.2011, Insurance Company i.e. National Insurance Company of the said vehicle also sent a letter in claim no. 2171/2011 dated 28.04.2011 in response of the claimed application of the petitioner.

9. Being aggrieved, the petitioner has preferred the Revision Petition, before the Sessions Court, Karkardooma Court, Delhi against the order dated 06.04.2011. Same was dismissed vide order dated 08.09.2011.

10. Ld. Counsel for the petitioner has referred Section 66 (B) of D.P. Act, 1978, same is re-produced as under:-

> "66. Police to take charge of unclaimed property:
>
> (1) It shall be the duty of every police officer to take temporary charge-
>
> (a) Of all unclaimed property found by, or made over to, him and
>
> (b) Of all property found lying in any public street, if the owner or person in charge of such property, on being directed to remove the dame, refused or fails to do so.
>
> (2) The police officer taking charge of the property under Sub-Section.
>
> (1) Shall furnish an inventory thereof to the Commissioner of police."

11. Ld. Counsel for the petitioner further submits that as per clause 2 of Section 66, the Police Officer being In-charge of the property under Sub-Section 1 furnish inventory thereof to the Commissioner of Police.

12. Admittedly, this inventory has not been prepared initially. However, the said inventory has been prepared after the order dated 08.09.2011.

13. I note, the grievance of the petitioner is that after impounding the bus by the traffic police, articles of the bus has been stolen or damaged while the bus was in custody of the traffic police.

14. For this purpose, in fact, he wanted to at least prepare the inventory for the purpose of the Insurance claim or to take action against the erring officials. The petitioner has right to take any recourse of the provision of the law if available to him.

15. I also note that the first court i.e. Ld. MM has allowed to take the photographs of the bus whereas denied the permission to prepare the inventory of the missing articles of the bus.

16. Ld. ADJ has perused the record of the Traffic Police in the instant case and is of the view that police has not complied with the Section 66 (2) in letter and spirit. Therefore, ld. ADJ was of the view that whatever prepared i.e. not inventory as enumerated in Section 66 (2) of the D.P. Act. The grievance of the petitioner is if he has violated any of the rules of Traffic Rules, undisputedly, he is liable to pay penalty fine whatever it is. The police cannot misuse the powers in discharging their duties, as provided under the Act. Therefore he is running pillar to post to get the inventory prepared of the missing / stolen articles of the bus.

17. In my opinion the Court below should have been given liberty to the petitioner instead of giving only the opportunity to take photographs of the bus. Only photographs cannot give complete view as required.

18. If the police failed to comply with Section 66 (2) of the D.P. Act where they were supposed to prepare the inventory and send to Commissioner of Police, then the petitioner at this stage should be allowed to prepare the inventory, which they could not.

19. Without setting aside the order passed by the Courts below, I modified the order passed by both the Courts below, with the direction that ACP, Vivek Vihar shall allow the petitioner or authorized agent including the person from Insurance Company to prepare the inventory of missing articles of the bus, if any.

20. Accordingly, petitioner shall appear before the aforesaid ACP on 16.12.2011 at 11 AM.

21. No further order is required.

22. Accordingly, Cr.M.C.4121/2011 stands disposed of.

23. Dasti.

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LPA

UNION PUBLIC SERVICE COMMISSION ....APPELLANT

VERSUS

N SUGATHAN ....RESPONDENT

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

LPA NO. : 797/2011, 802/2011, 803/2011, 810/2011 **DATE OF DECISION: 12.12.2011**

Right to Information Act, 2005—Appeal impugns the order of the Learned Single judge date 4th May 2011, dismissing the Writ Petition of the appellant. These intra appeals, though against separate orders and different respondents, are taken up together since all entail the same question of exemptions available to the appellant UPSC under the Right to Information Act, 2005.

(A) LPA 797/2011: That the said writ petition was preferred impugning the order dated 14th January 2011 of the Central Information Commission (CIC) directing the UPSC to disclose the respondent the list of shortlisted candidates for the post of Senior Instructor (Fishery Biology) along with their experience and educational qualifications—Appellant contended that such information is the personal detail of the selected candidate and there is distinction between maintaining

transparency and maintaining confidentiality; that the applicants in the selection process submit their information to the UPSC in confidence and UPSC cannot be directed to divulge the same—Held that an applicant for a public post participates in a competetive process where his eligibility/suitability for the public post is weighed/compared vis-à-vis other applicants. The appointing/recommending authorities as the UPSC, in the matter of such selection, are required and expected to act objectively and to select the best Appeal dismissed.

We may notice that Supreme Court in **CBSE v. Aditya Bandopadhyay** (2011) 8 SCC 497 has held that an examining body cannot be said to be in a fiduciary relationship with the examinee. It was also held that the examining body is not in a fiduciary relationship qua the examiner, though entitled to protect the identity of examiner. **(Para 10)**

(B) LPA preferred against the order dated 19th April, 2011 of the learned Single Judge dismissing W.P (C) No. 2442/2011 preferred by the appellant UPSC impugning the order dated 12th January, 2011 of the CIC directing the appellant UPSC to provide to the respondent/ information seeker photocopies of the experience certificates of the candidates who applied for the post of Senior Scientific officer (Biology) in Forensic Science Laboratory of the Government of National Capital Territory of Delhi and who were interviewed on 10th & 11th September, 2009—Held that those who are knocked out before the interview even and did not have a chance to compete any further, are definitely entitled to know that they have not been knocked out arbitrarily to deprive them from even competing any further, and hence the appeal was also dismissed.

The challenge by the appellant UPSC in this appeal is the same as in LPA 797/2011 (supra) and need is as such not felt to reiterate what has already been observed hereinabove.

Those who are knocked out before the interview even and did not have a chance to compete any further, are definitely entitled to know that they have not been knocked out arbitrarily to deprive them from even competing any further. **(Para 14)**

(C) LPA 810/2011: The present appeal is different to the extent that the information sought in this case relates to all the applicants for the post and not merely to those who had gone past the stage at which the respondent/information seeker had been eliminated.

Decision: The Court was unable to fathom the right, if any, of the respondent/information seeker to information qua those who are similarly eliminated as him. Such information relating to persons who though may have been the applicants to a public post but were eliminated in the selection process at the same stage as the information seeker, cannot be said to be necessary in public interest or for the sake of transparency or otherwise.

The present appeal is different to the extent that the information sought in this case relates to all the applicants for the post and not merely to those who had gone past the stage at which the respondent/information seeker had been eliminated. We are unable to fathom the right if any of the respondent/information seeker to information qua those who are similarly eliminated as him. Such information relating to persons who though may have been the applicants to a public post but were eliminated in the selection process at the same stage as the information seeker, cannot be said to be necessary in public interest or for the sake of transparency or otherwise. An applicant who has been eliminated and is satisfied with his elimination is entitled to object to the disclosure of the information submitted by him to the appointing/recruiting agency. **(Para 20)**

Important Issue Involved: An applicant to a public post who has been overlooked is entitled to know the reasons which prevailed with the appointing/recommending authority for preferring another over him.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Naresh Kaushik, Ms. Amita KalKal Chaudhary, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *CBSE* vs. *Aditya Bandopadhyay* (2011) 8 SCC 497.
2. *The Institute of Chartered Accountants of India* vs. *Shaunak H. Satya* (2011) 8 SCC 781.
3. *N. Kannadasan* vs. *Ajay Khose* (2009) 7 SCC 104.
4. *Dr. Duryodhan Sahu* vs. *Jitendra Kumar Mishra* (1998) 7 SCC 273.

RESULT: LPA 797/2011, LPA 802/2011, LPA 803/2011 were dismissed. LPA 810/2011 was partly allowed.

RAJIV SAHAI ENDLAW, J.

1. Notices of the appeals were issued. None of the respondents appear inspite of service; however in LPA 797/2011 a letter dated 1st December, 2011 has been received from the respondent stationed at Kerala informing that he is unable to appear because of ailments; in LPA 810/2011 a counter affidavit has been filed by the respondent. It is not expedient to await the respondents any further and we have heard the counsel for the appellant UPSC.

2. These intra appeals, though against separate orders and different respondents, are taken up together since all entail the same question of exemptions available to the appellant UPSC under the Right to Information Act, 2005.

LPA 797/2011.

3. LPA 797/2011 is preferred against the order dated 4th May, 2011 of the learned Single Judge dismissing W.P.(C) No. 2918/2011 preferred by the appellant UPSC. The said writ petition was preferred impugning the order dated 14th February, 2011 of the Central Information Commission (CIC) directing the appellant UPSC to disclose to the respondent therein the list of shortlisted candidates for the post of Senior Instructor (Fishery Biology) along with their experience and educational qualifications.

4. It was/is the stand of the appellant UPSC that the said information was exempt from disclosure under Section 8(1) (e) and (j) of the Right to Information Act, 2005. The CIC in its order dated 14th February, 2011 held that the information as to the experience and educational qualification of the shortlisted candidates in the selection process could not be said to be held by the appellant UPSC in a fiduciary capacity or as personal information and disclosure of such information was in the interest of transparency as it removed all doubts as to the fairness of the process of short listing. The learned Single Judge did not find any infirmity in the order of the CIC and held the provisions of Section 8(1) (e) and (j) to be inapplicable thereto.

5. It is the contention of the appellant UPSC in appeal also that such information is the personal detail of the selected candidate and the CIC and the learned Single Judge have not appreciated the distinction between maintaining transparency and maintaining confidentiality; that the applicants in the selection process submit their information to the UPSC in confidence and UPSC cannot be directed to divulge the same.

6. We are unable to accept the said contention. The information submitted by an applicant seeking a public post, and which information comprises the basis of his selection to the said public post, cannot be said to be in private domain or confidential. We are unable to appreciate the plea of any secrecy there around. An applicant for a public post participates in a competitive process where his eligibility/suitability for the public post is weighed/compared vis-a-vis other applicants. The appointing/recommending authorities as the UPSC, in the matter of such selection, are required and expected to act objectively and to select the best. Such selection process remains subject to judicial review. Though at one time it was held (See **Dr. Duryodhan Sahu v. Jitendra Kumar Mishra** (1998) 7 SCC 273) that a writ of quo warranto questioning appointment

to a public office/post cannot be filed in public interest but some exceptions have been carved out to the said principle also (See **N. Kannadasan v. Ajay Khose** (2009) 7 SCC 104).

7. Moreover the information seeker i.e. the respondent herein in the present case is not a stranger to the selection process but the father of another applicant. Certainly an applicant to a public post who has been overlooked is entitled to know the reasons which prevailed with the appointing/recommending authority for preferring another over him. Without such information, the applicant who has remained unsuccessful would not even be in a position to know as to why he/she was not appointed and another preferred over him/her and would also not be able to seek judicial review against the irregularity if any in the appointment/selection process. Moreover, we are unable to fathom the secrecy/confidentiality if any as to the educational qualification and experience of the selectee to a public post; such information ordinarily also is in public domain and educational qualifications and experience are something to be proud of rather than to hide in a closet. Whosoever on the basis of his educational qualification and experience seeks appointment particularly to a public office cannot claim any secrecy/confidentiality with respect thereto.

8. It is also not the plea of the appellant UPSC that the selectee had furnished the information as to his/her educational qualification and/or experience to the appellant UPSC with any rider as to its disclosure as in fact he could not. We also find Section 8 (1) (e) and (j) under which exemption is claimed, themselves carve out an exception of the disclosure of the information being in public interest. We are of the view that disclosure of information as to the educational qualification and experience of a person selected/shortlisted for a public post is in public interest in as much as the selectee is seeking the benefit of appointment to the public post on the basis thereof and the competitors in the appointment process, if not the public are definitely entitled to know the qualifications and experience of the occupant of such public post. The Apex Court in **The Institute of Chartered Accountants of India v. Shaunak H. Satya** (2011) 8 SCC 781 held that the object of the RTI Act is inter alia to ensure transparency and bring in accountability. It was further held that examining bodies should change their old mindset and tune themselves to the new regime of disclosure of maximum information.

9. While on the subject, we may clarify that what we have observed may not apply to information of certain nature viz. medical information or information relating to the family, even if required to be submitted for the purpose of selection/appointment; however need is not felt to elaborate further on the said aspect, the same being not relevant to the matter in controversy.

10. We may notice that Supreme Court in **CBSE v. Aditya Bandopadhyay** (2011) 8 SCC 497 has held that an examining body cannot be said to be in a fiduciary relationship with the examinee. It was also held that the examining body is not in a fiduciary relationship qua the examiner, though entitled to protect the identity of examiner.

11. We therefore do not find any merit in LPA 797/2011 and dismiss the same.

LPA 802/2011.

12. LPA 802/2011 is preferred against the order dated 19th April, 2011 of the learned Single Judge dismissing W.P.(C) No. 2442/2011 preferred by the appellant UPSC impugning the order dated 12th January, 2011 of the CIC directing the appellant UPSC to provide to the respondent/ information seeker photocopies of the experience certificates of the candidates who applied for the post of Senior Scientific Officer (Biology) in Forensic Science Laboratory of the Government of National Capital Territory of Delhi and who were interviewed on 10th & 11th September, 2009.

13. In this case also the defence of the appellant UPSC was of Section 8(1) (j) of the Act. The CIC held that since length of experience was an eligibility condition for being invited for the interview, the experience certificate furnished by the candidates could not be treated as personal information and directed the appellant UPSC to provide photocopies of the experience certificates of the candidates who had been invited for the interview. The respondent/information seeker in the present case was himself one of the applicants and had not been invited for the interview. The learned Single Judge has while dismissing the writ petition held that photocopies of experience certificates cannot be held to be invasion of privacy or requiring the confidentiality under Section 8(1)(j) of the Act and further held that disclosure of such information could also be said to be in larger public interest.

14. The challenge by the appellant UPSC in this appeal is the same as in LPA 797/2011 (supra) and need is as such not felt to reiterate what has already been observed hereinabove. Those who are knocked out before the interview even and did not have a chance to compete any further, are definitely entitled to know that they have not been knocked out arbitrarily to deprive them from even competing any further.

15. We therefore do not find any merit in this appeal also and dismiss the same.

LPA 803/2011.

16. LPA 803/2011 is preferred against the order dated 19th May, 2011 of the learned Single Judge dismissing W.P.(C) No. 3365/2011 preferred by the appellant UPSC impugning the order dated 7th February, 2011 of the CIC directing the appellant UPSC to disclose information on the number of years of experience of all the candidates shortlisted for interview to the post of Dy. Director (Ballistics) in the Central Forensic Science Laboratories and also provide photocopies of experience certificates of all the candidates called for the interview.

17. The position in this case is the same as in LPA 802/2011 and need is not felt to discuss the issue again. We may notice that CIC itself has restricted the information directed to be supplied to only shortlisted/ those called for interview and not allowed information qua others who were not even called for the interview.

18. Axiomatically LPA 803/2011 is also dismissed.

LPA 810/2011.

19. LPA 810/2011 is preferred against the order dated 19th April, 2011 of the learned Single Judge dismissing the W.P.(C) No.2444/2011 preferred by the appellant UPSC impugning the order dated 12th January, 2011 of the CIC directing the appellant UPSC to furnish to the respondent/ information seeker the details of the candidates who applied for the post of Dy. Government Counsel in the Department of Legal Affairs, Ministry of Law & Justice pursuant to an advertisement No.13/2007 and for which interviews were held on 12th June, 2009. The information sought relates to date of birth, year and date of completion of law degree, year and date of completion of LL.M. degree if any, date of enrolment as Advocate and their teaching or research experience in law. The respondent/

information seeker in this case also was an applicant to the post and had not been called for interview. The defence of the appellant UPSC in the present case also is the same as in the first appeal above.

20. The present appeal is different to the extent that the information sought in this case relates to all the applicants for the post and not merely to those who had gone past the stage at which the respondent/information seeker had been eliminated. We are unable to fathom the right if any of the respondent/information seeker to information qua those who are similarly eliminated as him. Such information relating to persons who though may have been the applicants to a public post but were eliminated in the selection process at the same stage as the information seeker, cannot be said to be necessary in public interest or for the sake of transparency or otherwise. An applicant who has been eliminated and is satisfied with his elimination is entitled to object to the disclosure of the information submitted by him to the appointing/recruiting agency.

21. Though the respondent has filed a counter affidavit in this appeal but even there-from we are unable to decipher the need to him of such information relating to other applicants similarly eliminated as him. Though we are conscious that the right to information under the Act is de hors the need therefor or interest therein but it may not be lost sight of that the information submitted by an applicant for a public post, who is eliminated from the selection process, is in the hands of the appointing/ recruiting agency a third party information and does not enter the public domain as long as he is so eliminated from the selection process. We are therefore inclined to restrict the information required to be furnished in this case to that relating to only those candidates called for the interview.

22. We accordingly modify the order of the CIC by restricting it to the supply of information as sought relating to those called for the interview and clarify that the appellant UPSC is not required to disclose the information relating to applicants for the post who were not even called for the interview. LPA 810/2011 is accordingly partly allowed.

No order as to costs.

ILR (2012) II DELHI 102
CRL. M.C.

BANGARU LAXMAN ....PETITIONER

VERSUS

STATE THR. CBI & ANR. ....RESPONDENTS

(MUKTA GUPTA, J.)

CRL. M.C. NO. : 1906/2011 DATE OF DECISION: 13.12.2011

Code of Criminal Procedure, 1973—Sections 164, 306, 438—Prevention of Corruption Act, 1988—Sections 7 & 9—Petitioner charge sheeted for offences punishable under Section 7 & 9 of Act on allegations that he accepted illegal gratification from journalist of tehelka.com posing as arms dealers—During course of investigation, statement of Respondent no.2 was recorded under Section 164 Cr.P.C. and he was also granted anticipatory bail—Before filing of charge sheet, CBI moved application seeking pardon for Respondent no.2 to make him witness/approver—Application allowed—Aggrieved petitioner challenged order granting pardon which was upheld in SLP—Then petitioner filed application for taking Respondent no.2 into custody, in terms of Section 306 (4)(b) as he was made approver—Application dismissed—Petitioner challenged order and urged Respondent no.2 was granted anticipatory bail contemplating his release on bail in event of arrest—Thus, he was never arrested before grant of pardon and as per provisions of Section 306(4)(b) unless he is already on bail, he is required to be detained in custody until termination of trial—Since he was not arrested so he was never granted bail—Held:- Though it is mandatory to keep the approver in custody unless on bail, however, Court is empowered in the interest of justice to avoid

abuse of process of law and for the right of life and liberty of an approver, to grant bail if not granted earlier—Pardon does not get vitiated on this count.

A perusal of Section 306(1) shows that though the initial clause uses the words "any person directly or indirectly concerned in or privy to an offence to which this section applies", however, the person is qualified by the subsequent portion of the sub-section which states "may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof". **(Para 6)**

Important Issue Involved: Though it is mandatory to keep the person in custody unless on bail, however, Court is empowered in the interest of justice to avoid abuse of process of law and for the right of life and liberty of an approver, to grant bail if not granted earlier—Pardon does not get vitiated on this count.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Sunil Kumar, Sr. Advocate with Mr. Manish Mohan and Mr. Atul Kumar, Advocates.

FOR THE RESPONDENT : Mr. Narender Mann, Standing Counsel for CBI. Ms. Madhurima Tatia, Advocate for Respondent no.2.

CASES REFERRED TO:

1. *Siddharam Satingappa Mhetre* vs. *State of Maharashtra and others, (2011) 1 SCC 694.*
2. *Santosh Kumar Satishbhushan Bariyar* vs. *State of Maharashtra,* (2009) SCC 498.
3. *Prem Chand* vs. *State,* 1995 CRL.L.J.1534.

4. *Suresh Chandra Bahri* vs. *State of Bihar,* AIR 1994 SC 2420.
5. *Roshan Beevi and others* vs. *Joint Secretary to Government of Tamil Nadu and others,* 1984 CRL.L.J. 134.
6. *Lallu* vs. *State* 1979 Raj LW 465.
7. *Maneka Gandhi* vs. *Union of India* AIR 1978 SC 597.
8. *State of Karnataka* vs. *L. Muniswamy* AIR 1977 SC 1489 : (1977 CriLJ 1125).
9. *Ayodhya Singh* vs. *State* 1973 Cri.L.J. 768.
10. *A. L. Mehra* vs. *State* AIR 1958 Punj 72: (1958 Cri.LJ 413).
11. *Karuppa Servai* vs. *Kundaru* AIR 1952 Mad 833: (1953 Crl.L.J. 45).

RESULT: Petition dismissed.

MUKTA GUPTA, J.

1. The Petitioner is an accused before the learned Special Judge, CBI, Rohini in complaint case No.8/2009 under Sections 120B IPC read with Sections 7 and 9 of the Prevention of Corruption Act, 1988. The allegations against the Petitioner are that he accepted illegal gratification from the journalists of tehelka.com posing as arms dealers. During the course of investigation on 21st March, 2005, Respondent No.2 herein Mr. T. Satyamurthy appeared before the learned Special Judge, CBI and prayed for anticipatory bail under Section 438 Cr.P.C. The said prayer was not opposed by the CBI and Respondent No.2 was, thus, granted the relief of anticipatory bail. On 21st April, 2005, the Respondent No.2 appeared before the learned Metropolitan Magistrate and got his statement recorded under Section 164 Cr.P.C. in the presence of the Investigating Officer. Before filing of the charge sheet on 3rd July, 2006, the CBI moved an application before the learned Special Judge, CBI seeking pardon for Respondent No.2, co-accused so as to make him a witness/ approver in the case. Learned Special Judge on 17th July, 2006 allowed the said application of Respondent No.1/ CBI under Section 306 Cr.P.C. after perusing the statement of Respondent No.2 recorded under Section 164 Cr.P.C.

2. The Petitioner being aggrieved by the order granting pardon approached this Court by way of a criminal revision petition No.769/2006, which was dismissed by this Court vide its order dated 30th August, 2010. The Petitioner took the matter to the Hon'ble Supreme Court by way of special leave petition. On 22nd November, 2011 Hon'ble Supreme Court dismissed the SLP of the Petitioner holding that the Special Judge was competent to grant pardon to Respondent No.2 under Section 306 Cr.P.C. The matter does not rest there. Thereafter on 16th January, 2008, the Petitioner filed an application before the learned Special Judge, CBI seeking an order in terms of Section 306 (4)(b) Cr.P.C. for taking the Respondent No.2, an approver in this case, into custody on the specific ground that he was never arrested before grant of pardon and that according to the said provision, an approver unless he is already on bail, is required to be detained in custody until termination of the trial. Vide order dated 7th April, 2011 the learned Special Judge dismissed the application of the Petitioner. This is the order impugned in the present petition.

3. Learned counsel for the Petitioner contends that the learned Special Judge fell into grave error in not exercising power under Section 306(4)(b) Cr.P.C. Respondent No.2 had been granted anticipatory bail, however, he was not arrested. According to the learned counsel, the expression "anticipatory bail" is really a misnomer as what is actually contemplated under Section 438 Cr.P.C. is an order directing the release of an accused on bail in the event of his arrest. Thus, as long as the person is not arrested, he cannot be on bail. In the present case though Respondent No.2 had been granted an order that in the event of arrest he would be released on bail, however, he was never granted bail as he was not arrested. Learned counsel contends that since Respondent No.2 is not on bail, the provision of Section 306(4)(b) Cr.P.C. comes into play. According to learned counsel, the finding of the learned Special Judge that the words "unless already on bail" are synonymous to "unless he is in custody" is erroneous.

4. According to the learned counsel, the terms "arrest" and "custody" are not interchangeable. Reliance is placed on **Roshan Beevi and others v. Joint Secretary to Government of Tamil Nadu and others,** 1984 CRL.L.J. 134 to contend that the person granted pardon may not necessarily be an accused. Reliance is also placed on **Suresh Chandra Bahri v. State of Bihar,** AIR 1994 SC 2420 to contend that the dominant

object of requiring an approver to be detained in custody until conclusion of trial is not intended to punish the approver for having come forward to give evidence in support of the prosecution but to protect him from the possible indignation, rage and resentment of his associates in a crime to whom he has chosen to expose as well as with a view to prevent him from the temptation of saving his onetime friends and companions after he is granted pardon and released from the custody. It is, thus, contended that the provisions of Section 306(4)(b) is based on the principle of public policy and public interest and violation thereof cannot be tolerated in terms of the order of the Hon'ble Supreme Court. Thus, according to the Petitioner, compliance of Section 306(4)(b) Cr.P.C. is mandatory. As the Petitioner is entitled to a free and fair criminal trial in accordance with the procedure established by law, he has a fundamental right under Article 21 of the Constitution to file an application and ensure compliance of Section 306(4)(b) Cr.P.C.

5. Per contra, learned counsel for the CBI states that the words "any person supposed to have been directly or indirectly concerned in or privy to an offence" cannot be read in isolation. They are to be read in conjunction with the words used in the end of Section 306(1) with "whether as principal or abettor". It is contended that there is no distinction in grant of bail under Sections 436/437/438/439 Cr.P.C. Even under Section 438 Cr.P.C. the person is to be released on bail on being arrested. It is further contended that once bail is granted, it enures to the person till conclusion of the trial. Since Respondent No.2 was granted anticipatory bail, he cannot be taken into custody on being granted pardon. The Hon'ble Supreme Court has already upheld the validity of the order granting pardon to Respondent No.2. The Petitioner is devising ways and means to wriggle out of the evidence in the form of accomplice evidence of Respondent No.2. The present petition has been filed to thwart the criminal justice process. The evidence of Respondent No.2 has already been recorded. Prosecution evidence is complete during trial. The case is fixed for recording of statement of accused on 2nd December, 2011 and thus, the provisions of Section 306(4)(b) Cr.P.C., which is based on public policy even if interpreted as contended by the learned counsel, cannot be given effect to. No useful purpose will be served in sending Respondent No.2 in custody.

4. Learned counsel for Respondent No.2 contends that the requirement of Section 306(4)(b) Cr.P.C. is a procedural requirement.

There is no legal obligation on the Trial Court or a right in favour of the accused to insist for compliance thereof. Reliance is placed on **Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra,** (2009) SCC 498. A Full Bench of this Court in **Prem Chand v. State,** 1995 CRL.L.J.1534 has held that since the approver's evidence was recorded, he could be released on bail as no useful purpose would be served in his further detention in jail and the administration of justice was not likely to be affected on his release. In the present case also, statement of Respondent No.2 has already been recorded. Therefore, no useful purpose will be served in now sending him in custody.

5. I have heard learned counsel for the parties at length. Before adverting to the contentions, it would be relevant to reproduce the relevant portions of Section 306 Cr.P.C:-

> **"306. Tender of pardon to accomplice.-** (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Justice Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.
>
> (2) xx xx xx xx
>
> (3) xx xx xx xx
>
> (4) Every person accepting a tender of pardon made under sub-section (1)-
>
> (a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;
>
> (b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

6. A perusal of Section 306(1) shows that though the initial clause uses the words "any person directly or indirectly concerned in or privy to an offence to which this section applies", however, the person is qualified by the subsequent portion of the sub-section which states "may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof".

7. In **Suresh Chand Bahri** (supra) the Hon'ble Supreme Court was dealing with a case where the approver was examined by the committing Magistrate and was subsequently released on bail by the High Court. While dealing with this situation, it was held that release would in no way affect the validity of pardon granted to approver. The relevant portion of the judgment reads as follow:-

> "34. As regards the contention that the trial was vitiated by reason of the approver Ram Sagar being released on bail contrary to the provisions contained in clause (b) of sub-sec. (4) of S. 306 of the Code. It may be pointed out that Ram Sagar after he was granted pardon by the learned Magistrate by his order dated 9-1-1985, he was not granted bail either by the committing Magistrate or by the learned Additional Judicial Commissioner to whose Court the case was committed for trial. The approver Vishwakarma was, however, granted bail by an order passed by the High Court of Patna, Ranchi Bench in Criminal Misc. Case No. 4735/1986 in pursuance of which he was released on bail on 21-1-1987 while he was already examined as a witness by the committing Magistrate on 30-1-1986 and 31-1-1986 and his statement in Sessions trial was also recorded from 6-9-1986 to 19-11-1986. It is no doubt true that clause (b) of S. 306(4) directs that the approver shall not be set at liberty till the termination of the trial against the accused persons and the detention of the approver in custody must end with the trial. The dominant object of requiring an approver to be detained in custody until the termination of the trial is not intended to punish the approver for having come forward to give evidence in support of the prosecution but to protect him from the possible indignation, rage and resentment of his associates in a crime whom he has chosen to expose as well as with a view to prevent him from the

temptation of saving his one time friends and companions after he is granted pardon and released from custody. It is for these reasons that clause (b) of S. 306(4) casts a duty on the court to keep the approver under detention till the termination of the trial and thus the provisions are based on statutory principles of public policy and public interest, violation of which could not be tolerated. But one thing is clear that the release of an approver on bail may be illegal which can be set aside by a superior Court, but such a release would not have any effect on the validity of the pardon once validly granted to an approver. In these circumstances even though the approver was not granted any bail by the committal Magistrate or by the trial Judge yet his release by the High Court would not in any way affect the validity of the pardon granted to the approver Ram Sagar."

8. In **Prem Chand** (supra) the Full Bench of this Court held:-

"8. It is the provisions of S. 306(4)(b) providing that every person accepting a tender of pardon, shall unless he is already on bail, be detained in custody until the termination of the trial which have come up for interpretation. Its constitutional validity has also been challenged.

9. So far as the language used in S. 306(4)(b), it is quite explicit that the person accepting tender of pardon unless already on bail, has to be detained in custody till the end of the trial. The word used is "shall", and there is almost a unanimity of opinion of different High Courts that the legislature has not envisaged grant of bail to a person during the trial after he has accepted pardon. The underlying object of requiring the approver to remain in custody until the termination of trial is not to punish him for having agreed to give evidence for the State, but to protect him from the wrath of the confederates he has chosen to expose, and secondly to prevent him from the temptation of saving his erstwhile friends and companions, who may be inclined to assert their influences, by resiling from the terms of grant of pardon. In fact, the Madras High Court in the case **Karuppa Servai v. Kundaru** AIR 1952 Mad 833: (1953 Crl.L.J. 45), has observed that this provision is based on very salutary principles of public policy and public interest. The approver's position was considered

to be like a sealed will in a will forgery case, and he should not be allowed to let off on bail. The Rajasthan High Court has in **Ayodhya Singh v. State** 1973 Cri.L.J. 768 and **Lallu v. State** 1979 Raj LW 465 taken the view that the provisions in this regard are mandatory, and that Court cannot go behind the wisdom of the legislature as expressly laid down under Section 306, Cr. P.C. In the former case the circumstance that the disposal of the case was likely to take a long period of time as the prosecution had cited 174 witnesses, was not considered as valid ground for bail when the law prohibits any such release till the termination of the trial. In **Mukesh Ramchandra Reddy** 1958 Cri.L.J. 343, the Andhra Pradesh High Court has as well interpreted the word "shall" in the said provisions as primarily obligatory and casting a duty on the Court to detain an accused to whom pardon has been tendered, in custody until the termination of the trial. The Punjab High Court in **A. L. Mehra v. State** AIR 1958 Punj 72: (1958 Cri.LJ 413), declined to draw an analogy from the power available with the Court to grant bail to accused at any stage of the trial, and it was observed that it was not within the competency of the Court to admit an approver to bail when the law declares in unambiguous language that the approver shall not be released until the decision of the case. These special provisions were treated to override the general provisions entitling the Court to grant bail.

10. There is, therefore, little doubt that so far as the plain reading of S. 306(4)(b), Cr. P.C., the same leaves no manner of doubt that a person accepting a tender of pardon has to be kept in custody till the trial is over unless he was on bail at the time of the grant of pardon. This has been almost the uniform view of judicial decisions, and the use of the word "shall" has been interpreted to leave no flexibility in this regard. The general power of grant of bail available to the Courts under the Code is thus circumscribed by the special provisions. In fact, an accused loses his character as such when pardon is granted to him. He is, of course, an accomplice. However, the character of accused can be again attributed to him if his case falls under S. 308, Cr. P. C. That is when the Public Prosecutor certifies that he has by willfully concealing anything essential, or by giving false evidence

has not complied with the condition on which the tender was made. Rather even at this stage he is entitled to show that he has, in fact, complied with the condition upon which such tender was made. If he succeeds in doing so, that is the end of the matter. If, however, the Court is satisfied with the certification by the Public Prosecutor in spite of the submission by the approver, then his trial starts and he acquires the character of accused. It is as such that in Sub-sec. (4) of Section 308 the word used qua him for the first time is "accused".

11-12. The crucial questions raised from the side of the petitioner are whether the provisions of S. 306(4)(b) in all their rigidity can be treated as constitutionally valid, and further whether in the exercise of inherent powers under Section 482, Cr. P. C., the Court can release an approver during the course of trial when it is in the ends of justice and his detention amounts to abuse of process of Court.

13. In the case **State of Karnataka v. L. Muniswamy** AIR 1977 SC 1489 : (1977 CriLJ 1125) it has been observed as under (at p. 1128 of Cri LJ):

> "The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects it would be impossible to appreciate the width and contours of that salient jurisdiction."

13A. The Supreme Court has further in the case **Maneka Gandhi v. Union of India** AIR 1978 SC 597 observed that it is not a valid argument to say that the expression "personal liberty" in Art. 21 must be so interpreted so as to avoid overlapping between that Article and Art. 19(1). The expression "personal liberty" in Art. 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Art. 19.

It was further observed that if a law depriving a person of "personal liberty" and prescribing a procedure for that purpose within the meaning of Article 21 has to stand the test of one or more of the fundamental rights conferred under Art. 19 which may be applicable in a given situation, ex hypothesi it must also be liable to be tested with reference to Art. 14. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Art. 14 like a brooding omnipresence and the procedure contemplated by Art. 21 must answer the test of reasonableness in order to be in conformity with Art. 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive, otherwise, it should be no procedure at all and the requirement of Art. 21 would not be satisfied.

16. Section 482 of the Cr. P. C. is to the following effect:-

> "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

17. The power available under this provision is notwithstanding anything else contained in the Code. In case the High Court is satisfied that an order needs to be made to prevent abuse of the process of any Court, or otherwise to secure the ends of justice, the inherent powers are available, and they are not limited or affected by anything else contained in the Code. We are not oblivious that these powers have not to be ordinarily invoked where specific provisions are contained in the Code or specific prohibitions enacted. However, in cases where the circumstances unmitigatingly bring out that a grave injustice is being done, and an abuse of process of court is taking place, either as a result of the acts of the accused taking place, either as a result of the acts of the accused or the unavoidable procedural delays in the Courts, we are of the firm opinion that the inherent .powers should and need to be exercised. The approver's evidence in the present case has already been recorded, and no useful purpose is being served in his detention. The administration of justice is

not in any manner likely to be affected by his release. There is no reason to suppose that the machinery of law would not be able to give protection to the petitioner in case any adventurism is sought to be displayed by his confederates, or their supporters. The conduct of the petitioner in seeking his release itself shows that he carries no apprehensions. It would not be, therefore, correct for the Court to still create such fears and profess to provide him unsolicited protection by detaining him for indefinite period. Thus in the case of **A. L. Mehra,** (1958 Cri LJ 413) (supra) the Punjab High Court released the approver from confinement in exercise of inherent powers to prevent the abuse of the process of court, finding that he had been in confinement for several months. Similarly the Madras High Court in the case of **Karuppa Servai** (1953 Cri LJ 45) (supra) laid emphasis on the detention of an approver till he has deposed at the trial in the Sessions Court truly and fully to matters within his knowledge.

18. We are further of the opinion that there is no rational basis for inflexible classification of approvers who are in detention, and those who because of fortuitous circumstances happen to be on bail at the time of grant of' pardon. A person being granted bail and still not in detention are not considered in law as incompatible. So far as allurement of release if allowed pardon, it is inherently there in any pardon. As such too much of significance and rigidity need not be attached to time factor. Moreover, a witness, even though an accomplice need not be detained for more than what is essential for procurement of or enabling him to give his evidence. His personal liberty can, therefore, be curtailed, if at all, for beneficial ends of administration of justice, and once they are served, his further detention becomes irrelevant. His detention till that earlier stage, may also be considered proper to avoid creation of the impression of too ready an approver to serve his personal end of immediate or early let off even in cases where the involvement of the other accused in that crime may turn out to be doubtful. The existence of the provision of detention thus may serve as a damper to opportunists who may be too keen to oblige the police, and also prevent a possible abuse of this process as a short-cut by investigating agencies when they find no other evidence available

or dubiously seek to involve innocent persons."

9. Thus, the decisions of the Hon'ble Supreme Court and the Full Bench of this Court clearly hold that though it is mandatory to keep the person in custody unless on bail, however, the Court is empowered, in the interest of justice, to avoid abuse of process of law and for the right to life and liberty of an approver to grant bail, if not granted earlier. The pardon does not get vitiated on this count.

10. In the present case firstly in the interest of justice and the fundamental right to life and liberty of Respondent No.2 when his statement has already been recorded before the learned Metropolitan Magistrate, no useful purpose will be served to send him in custody now. Further Respondent No.2 has already been granted an order of anticipatory bail, which enures to his benefit till conclusion of the trial as held in **Siddharam Satingappa Mhetre v. State of Maharashtra and others,** (2011) 1 SCC 694. In view of the order of anticipatory bail directing sending Respondent No.2 custody is not possible as the moment he is arrested he has to be released on bail as directed by the Court while granting anticipatory bail. The evidence of Respondent No.2 and all other prosecution witnesses has been recorded. The case does not fall in the ambit of Section 308 Cr.P.C. Respondent No.2 though not on bail technically, however, even if this Court directs him to be arrested, would have to be released on bail in view of the anticipatory bail order. I find no reason to interfere with the impugned order.

11. The petition is dismissed.

ILR (2012) II DELHI 115
W.P. (C)

THALES AIR SYSTEMS S.A. ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

W.P. (C) NO. : 1883/2011 DATE OF DECISION: 13.12.2011

Constitution of India, 1950—Article 226—Public Tenders—Writ Petition filed by petitioner, challenged the revised price bid invited by the Respondent No. 2 i.e. Airport Authority of India (AAI) vide its communication dated 04.03.2011. Petitioner contended that it was in its capacity as the L-1 called for renegotiation of the price by Respondent No. 2, on 19.11.2010 which resulted in scaling down of its offer by Rs 125 lacs. The Petitioner contended that the impugned communication calling for revised bids paved the way for re-entry of R-3 (Eldis) and R-4 (Raytheon) into the bidding process, which was impermissible. The bid was for radar equipment for various AAI controlled airports, The Technical Evaluation Committee (TEC) had shortlisted the Petitioner and Raytheon, eliminating Eldis. Eldis had filed complaints against exclusion alleging bias towards the petitioner. Ministry of Civil Aviation requested Chairman AAI to inquire into Eldis' complaint. There was a divergence of opinion on the evaluation process between the TEC and the independent External Monitors ("IEM"). AAI sought Central Vigilance Commission (CVC) guidance, which was declined—Ministry advised AAI to take its administrative decision. At a meeting on 28.02 2011 of the Procurement Advisory Board (PAB) summoned by Chairman AAI a decision

was taken to invite "snap bids" from technically qualified bidders. Held: decision taken at the meeting of the PAB, was not arrived at for an oblique motive, or was violative of any provisions(s) of the Tender. Amongst other aspects, PAB had at its meeting of 28.02.2011, attached criticality to an express inclusion of the source code in the price bid. Before that, IEM in its report dated 07.12.2010 had highlighted, amongst others, this aspect of the matter. Further it was held that critical component of the financial bid cannot be assumed to be included on the basis of assumptions as, this could lead to disruption in the execution of the Tender at a later stage. For the aforesaid reasons, held that there was no merit in the submission that decision made at the meeting of the PAB held on 28.02.2011, was flawed. Therefore, the decision to call for "snap bids" as against cancellation of the Tender can also not be found fault with in view of the urgency expressed in both meetings of the PAB. Therefore, the necessary corollary of this would be that the impugned letter dated 04.03.2011 would have to be sustained.

Thus, having perused the record and considered the views and counter-views expressed institutionally, by various department of the AAI, we are not persuaded to hold that the decision taken at the meeting of the PAB, on 28.02.2011, was arrived at for an oblique motive, or was violative of any provision(s) of the Tender. Amongst other aspects, PAB had at its meeting of 28.02.2011, attached criticality to an express inclusion of the source code in the price bid. Before that, IEM in its report dated 07.12.2010 had highlighted, amongst others, this aspect of the matter. In this context, the argument of Mr Singh that the source code being a critical element of the software modules to be supplied, was impliedly included in the price offered by various bidders, does not impress us. The fact that it is critical would have us believe, that the terms of the Tender qua the price bids should expressly refer to the same. A critical component of the

financial bid cannot be assumed to be included on the basis of assumptions as, this could lead to disruption in the execution of the Tender, at some later stage. For the aforesaid reasons, we do not find any merit in the submissions made on behalf of the TAS that decision made at the meeting of the PAB held on 28.02.2011, was flawed. Therefore, the decision to call for snap bids as against cancellation of the Tender, can also not be found fault with in view of the urgency expressed in both meetings of the PAB. The petitioner before us also, did not make any submission on these lines. Therefore, the necessary corollary of this would be that the impugned letter dated 04.03.2011 would have to be sustained. We hold accordingly.

(Para 35)

Important Issue Involved: It does not lie within the domain of the court to examine the results of the evaluation carried out by a team of experts.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. V.P. Singh, Sr. Advocate with Ms. Tasneem Ahmadi, Mr. Anuj Kr. Ranjan & Mr. M.I. Choudhary, Advocates.

FOR THE RESPONDENTS : Mr. Sachin Datta, CGSC with Mr. Abhimanyu Kumar. Advocate for Respondent No. 1. Mr. Sandeep Sethi, Sr. Advocate with Mr. Digvijay Rai, Sanding Counsel for Respondent No. 2/AAI along with Mr. S. Sundara Raman, ED (CNS-P), Mr. Sanjan U. Ghosh, GM (CNS-P) & Mr. Mansoor Ahmed, Jt. GM (CNS-P) Mr. Kamal Mehta, Mr. Vivek Bhardwaj & Mr. Brijesh Singh, Advocates for Respondent No. 3. Mr.

Suhail Dutt, Sr. Advocate with Mr Ujjwal Sharma & Mr. Vishal Dass, Advocates for Respondent No. 4.

RESULT: Petition dismissed.

RAJIV SHAKDHER, J.

Main contours of the challenge laid in the petition

1. In this writ petition a challenge has been laid to the revised price bid invited by respondent no 2, that is, the Airport Authority of India (in short 'AAI') vide its communication dated 4.3.2011. The main grievance of the petitioner is that, it is, in effect, the lowest bidder (hereinafter in short referred to as 'L-1') since, respondent no. 3, i.e., Eldis was excluded from the race, so to speak, on account of its technical ineligibility.

1.1 It is, therefore, the contention of the petitioner before us that it was in its capacity as the L-1 it was called for renegotiation of the price by the AAI, on 19.11.2010 which, resulted in scaling down of its offer by Rs 125 lacs.

1.2 It is for these reasons that the second prayer in the writ petition is for issuance of a writ of mandamus qua the respondents, seeking thereby a direction to them, to issue a Letter of Award (in short 'L.O.A') with regard to the tender in issue, being tender No. (CNS-P)-12/2009-10 (hereinafter referred to in short as the 'Tender').

1.3 It is therefore the contention of the petitioner that the impugned communication dated 4.3.2011, whereby the AAI has called for revised bids, is nothing but a ploy to re-induct in the fray respondent no. 3, by ostensibly confining the invitation to those who had qualified both the eligibility and the technical criteria laid out in the Tender.

1.4 It is the say of the petitioner that it is because of this reason that respondent no. 3 i.e., Eldis and respondent no. 4, i.e., Raytheon Canada Radar Systems (in short 'Raytheon') are in the fray; whereas the communication dated 19.11.2010 and, the events which led up to it, would show that it was the only entity which had met every criteria put in place by the respondents, and thus, ought to have been logically issued a LOA.

PARTIES

2. Before we proceed further we may indicate that for the sake of convenience that we would be referring to main parties by their names, albeit in abbreviated forms. Therefore, the petitioner being Thales Air Systems S.A. would be referred to as TAS; the Respondent no. 1, i.e., Union of India as UOI, Respondent no. 2, i.e., Airport Authority of India as AAI; Respondent no. 3, i.e., Eldis as Eldis, and lastly Respondent No. 4, i.e., Raytheon Canada Radar Systems as Raytheon.

FACTS

3. In order to appreciate the contentions of parties and the challenge made in the petition it may be necessary to refer to the background in which disputes have emerged inter-se the parties.

3.1 On 16.12.2009, the UOI had issued a global tender inviting bids for supply, installation, testing and commissioning of eight (8) co-located airport surveillance radar (ASR) with mono-pulse secondary surveillance radar (MSSR) Mode-S (collectively referred to as 'radars') in respect of airports situate at Amritsar, Chennai, Cochin, Kolkata, Mumbai and Delhi.

3.2 The purpose being, while for the first four (4) airports (referred to hereinabove) one (1) radar each would be necessary, as regards Mumbai and Delhi, offers were invited for two (2) radars each. The Tender, adverted to the fact that the estimated cost for purchase of the said radars would be Rs 225.50 crores and, that each bidder would be required to deposit earnest money equivalent to Rs 2,50,50,000/-.

3.3 Apart from other conditions the eligibility criteria as also the tendering procedure, was laid out in the Tender. As per clause 5.2 to 5.5 each bidder was required to submit its tender by way of three (3) envelopes marked A, B and C respectively. Envelope 'A' was to contain eligibility requirements as per the stipulated conditions contained in the Tender; envelope 'B' similarly, was required to contain the technical bid; and lastly, in envelope 'C', the bidder was required to put in its price bid as per the format given in annexure 'I'. Importantly, clause 5.5.5. of the Tender clearly stipulated that any information found missing would result in the bid being rejected. Similarly, clause 5.5.6 provided that envelope 'C', which was to contain the price bid, should advert to the particulars qua the price alone and, not allude to any conditions. In other words, the tendency to append ifs' and buts' to the price bid had to be eschewed.

Resultantly, anything that the bidder had to say was required to be stated in the technical bid. Consequently, if any condition was stipulated in the price bid, the bid was liable to be rejected.

3.4 As per clause 5.6, it was further stipulated that the three (3) envelopes had to be separately sealed. Each such envelope was required to bear the tender number alongwith the appropriate caption, i.e., "eligibility criteria" in respect of, envelope marked A, "technical bid" in respect of, envelope marked 'B' and, "price bid" qua envelope marked 'C'.

3.5 The bids as per the Tender were required to be submitted by 1430 hours on 29.1.2010. The submission of bids was required to be made with the Executive Director, CNS (Planning), at the indicated address. It may be pertinent to note at this stage that, as per clause 14 of the Tender, each bidder was mandatorily required to execute an Integrity Pact, in the given format, i.e., annexure VIII to the Tender. The Integrity Pact, had to be submitted by the bidder in envelope 'A', alongwith the earnest money deposit. In clause 14.3, it was, therefore, clearly indicated that in pursuance of the Integrity Pact executed by the bidders, one of the Independent External Monitor's (in short, IEM's) would be one, Mr R.C. Rekhi.

3.6 The Tender contained several parts and sections. What is important for our purposes is clause 1.3 and 7 in section 'B., titled terms and conditions, which inter alia provided that the systems/equipment offered by the bidder should be a ***'proven product'*** and that it should be in operation in ***two*** or ***more international*** airports. The manner of proof was also adverted to in the said clause.

3.7 Clause 7.1 gave the right to AAI to accept the tender in full or in part, as also, the right not to accept the lowest tender or, to reject any or all the tenders without assigning any reason whatsoever.

3.8 Clause 7.2, conferred on AAI, the right that, in case, any particulars and prescribed information was found missing or, is incomplete, in any respect, or the prescribed conditions were not fulfilled, then AAI shall have the authority to treat the bid as non-responsive, and consequently, reject the same.

3.9 Clause 13.9 required as indicated above, in the context of clause 5.5, that the price bid would be submitted strictly as per the price schedule referred to in annexure 'I'.

4. There is under clause 17 a right conferred on AAI to inspect the factory of the bidder.

4.1 At this juncture one may also refer to annexure 'VI', which sets out the proforma for submitting an undertaking by the bidder. Amongst other terms of the undertaking (given as per the said proforma) clause 'I' required the bidder to undertake that it unconditionally accepted the tender conditions in its entirety qua the tendered work. The said clause expressly stipulates a prohibition against insertion of any condition(s) to the offer made and, in case, any condition(s) were found appended to the offer, the same were to be treated as withdrawn.

4.2 Similarly, the proforma for the Integrity Pact, adverted to above, is set out in annexure 'VIII' appended to Tender. The appointment of an Independent External Monitor (in short 'IEM') is provided for in clause 8.1 of the said Integrity Pact. Clause 8.5 of the Integrity Pact adverts to the fact that the IEM could make recommendation and/or give their suggestions to the management, i.e., AAI to either "discontinue" or "heal" the violation or, take other relevant action. Beyond this, the IEM is not conferred with any right to demand from the parties, either that it acts in a specific manner or, refrains from action or, even tolerates a particular action. The IEMs are required to submit their recommendation in the form of a written communication to the Chairperson, AAI.

5. It is in the context of the aforesaid broad terms and conditions that the petitioner and other five (5) entities which, included Eldis and Raytheon, filed their bid with the AAI. The other three (3) bidders apart from TAS, Eldis, Raytheon were Indra/NRP, Selex and GECI. For the sake of completion of narrative, it may be important at this stage itself, to note that AAI had issued four (4) corrigendums, which were really in the nature of amendments to the initial Tender.

6. It appears that during the evaluation of the submissions made vide envelopes 'A', GECI was disqualified as it did not meet the eligibility criteria. Consequently, AAI appears to have proceeded to the next stage, that is, opening of the technical bids, which were contained in envelopes marked 'B'.

6.1 As per the averments made in the writ petition by end June, 2010, the Technical Evaluation Committee (in short 'TEC'), set up by AAI, pruned the list of contenders in the race to, two entities, i.e., TAS

and Raytheon. It is specifically averred in the writ petition that Eldis had been disqualified as it had not been found to be technically qualified, in view of the fact that the radars, offered by it, had not operated at major airports in accordance with requirements of clause 1.3 of the Tender conditions. It is thus the say of TAS, that it was surprised to find representatives of Eldis at the opening of the financial bids held on 30.9.2010. On the said date, admittedly, three (3) of the earlier six (6) bidders were invited, i.e., TAS, Eldis and Raytheon.

6.2 It is, however, not disputed by TAS that upon the price bids being opened it was found that Eldis had made the lowest bid, followed by, TAS and Raytheon.

6.3 It is at this stage that, TAS shot off a letter of even date, i.e., 30.9.2010 to AAI, alluding thereto, to the defects in the financial bid (envelope 'C'), submitted by, Eldis. Broadly, TAS raised two objections. First, that the bid submitted by Eldis was not in consonance with the terms of clause 5.5 of Section A of the Tender, in as much as, the financial bid submitted by Eldis, in Envelope 'C', was not sealed with wax. The second objection raised was that, the price bid of Eldis (which was to be filed in the prescribed format, i.e., annexure 'I') did not comply with the template provided by AAI in the Tender and, in the corrigendum no. 2 issued by it, which was posted on AAI's website, at the time of bid preparation. More specifically, it was pointed out that line no. 5 of the pricing schedule was missing; and this was, according to TAS, a clear violation of clause 5.5.1 and 5.5.4. It was stressed that in view of the above, clause 5.5.5 of Section A of the Tender would get triggered. The net effect of this, according to TAS, ought to have been that the bid of Eldis should have been rejected.

6.4 It would be important to note at this stage that, even though in the writ petition there is a specific averment to the effect that Eldis had got knocked out of the race, in June, 2010, purportedly on account of the fact that it failed to meet the technical criteria; there was no reference to the same by TAS, in its letter dated 30.9.2010. This aspect will have some bearing as much has been made out with regard to the fact that Eldis had been introduced by AAI, in a manner of speaking, through the back-door.

6.5 The objections, as adverted to above by us, were confined to the financial bid. The aforementioned letter of TAS, was followed by yet

another letter dated 7.10.2010, wherein for the first time an objection was raised with regard to the purported failure of Eldis in having met the eligibility/ technical criteria as stipulated in clause 4.3 of Section E and clause 1.3 of Section B of the Tender which required the radars offered by the bidders, to have operated, at ***"major international airports"***. In support of its objection, a reference was made in this communication to the Airports Economic Regulatory Authority of India Act, 2008 (in short 'AERA Act'), which according to it, defined what a major international airport would be. Based on the definition provided in the AERA Act, it was averred in the said communication that the radar offered by Eldis was evidently in operation at Pardubice Airport in Czech the Republic which recorded an annual traffic range of forty to sixty thousand passengers over the last five (5) years as against what was defined in the AERA Act which stipulated a minimum traffic of 1.5 million passengers.

6.6 There were certain other objections raised with regard to the capacity of Eldis, to deliver eight (8) radars, as per the requirement of the Tender in issue. In this connection a reference was made to the fact that Eldis had produced a very small number of co-mounted of radars; evidently being only two in number.

6.7 The thrust was that Eldis, did not have the industrial capability to support the supply of eight (8) radars, within, the stipulated period.

6.8 Objections in terms of clause 4.2 of Section E of the Tender, was also raised, vis-a-vis, the minimum financial turnover stipulated in the Tender. It was pointed out that in 2007, Eldis had reached a turnover of Rs 33 crores at the exchange rate obtaining as on 12.02.2010, whereas as per the Tender document it had to achieve a threshold of Rs 33.6 crores. The defects in the price bid alluded to in their communication of 30.9.2010, were also reiterated.

6.9 The sum and substance of the objections put forth was that, Eldis would not be in a position to install safe radars, especially, keeping in mind the fact that, in years to come, the Indian air space would be one of the busiest and most dense. In this regard, a specific reference was made to the airport at Mumbai.

7. It would be important to note at this juncture that a perusal of record would show that there is no dispute with regard to the fact that on 19.11.2010, at 1200 hours, a meeting of the Procurement Advisory

Board (in short 'PAB') was held under the aegis of the chairman of AAI. At this meeting the PAB, was apprised as regards the conditions appended in the price bid submitted by Eldis, one of which was regarding the fact that the supplied software product did not include the "source code" of individual modules and, hence the price of the source code was not included n the price offered by the Eldis. In view of the fact that PAB was advised that a conditional bid was violative of clause 5.5.6 of section A, the bid was declared invalid. There is also a reference in the official record to the fact that in the price bid there was an omission of one item in the price bid; in respect of which opinion of the legal department was sought which had opined that the objection being purely technical it may not sustain in court.

7.1 Thus in view of the fact that the bid of Eldis, which was declared invalid, and consequently rejected; the PAB recommended the acceptance of the bid offered by the TAS, which was quoted as Rs 121.91 crores; being 46% lower than the estimated cost pegged at Rs 225.5 crores. At this very meeting, a decision was also taken to call TAS for negotiations.

8. It is the say of TAS, that at this meeting all other bidders, in particular, Eldis got excluded, and it was, resultantly declared as L-1 by AAI. It is also the say of TAS that, it is because of this reason, vide a communication dated 19.11.2010 TAS was invited to the office of AAI for meeting on price negotiations, which was stated to be held on or before 23.11.2010.

9. What was perhaps not known to TAS was that, in the meanwhile, two complaints had been filed by Eldis. First one dated 05.11.2010, and the second dated 21.11.2010. In so far as that second complaint dated 21.11.2010 was concerned, it was filed by the Eldis with the Ministry Of Civil Aviation. In this complaint, it was alleged that undue favour had been shown to TAS, which was in effect L-2. It was further alleged that not only the bid filed by TAS was not in conformity with the Tender conditions; as they had changed the format of the bid by providing for six (6) columns as against the prescribed five (5) columns in the Tender, in violation of clause 5.5.1 of part 'A' and clause 13.9 of part 'B', but also the fact that the bid of TAS was higher by almost Euro 1.92 million. It appears that the complainant Eldis, alleged that even if all taxes and costs of spares etc. was loaded on to its bid, it would be lower by

approximately Rs 98 lacs as compared to the bid offered by TAS. The complaint apparently also alluded to the fact that TAS had executed several contracts with AAI, in the past, and to date, had failed to discharge its obligation, or execute the said contracts within the time frame stipulated in the contract.

10. On the basis of the complaint received in the Ministry Of Civil Aviation, a communique dated 24.11.2010, was issued to the Chairman, AAI requesting him to examine the allegations made in the complaint, with a report to them.

11. It appears that the complaints made by Eldis (in one on which, as noticed above, even the Ministry of Civil Aviation had sought examination) were sent to the IEM for their opinion.

12. Perhaps unaware of this development, TAS issued a communication dated 24.11.2010 to AAI, offering a reduction in price to the extent of Rs 125 lacs. It is claimed by TAS that, in the background of the price negotiation meeting, a second meeting was convened between the chairman of the AAI and the representatives of the TAS which included its Indian counterparts, i.e., the CEO and Managing Director, India respectively; on 9.12.2010. At this meeting, the issuance of LOA to TAS was apparently discussed and, according to TAS, an assurance was given that a LOA would be issued in its favour within less than a week.

13. On 07.12.2010, the matter was deliberated upon evidently by the IEM whereupon, after examining the view of various functionaries IEM opined as follows:

> "After detailed deliberations with IEMs, I am of the view that the tenders submitted by bidders had certain deviations from NIT documents which have made the evaluation rather ambiguous and also following deficiencies were noted in particular.
>
> 1. All columns/ rows of the price bid were not filled up.
> 2. Additional columns were created in price bid.
> 3. Additional notes made in price bid
> 4. Tax liability not clearly mentioned
> 5. Whether Source Code and other proprietary software included in the quotes or not is not clear.

> Also, based on deliberations with other IEMs, a conscientious unanimous decision was arrived at, and accordingly, I recommend that the tender should be re-invited after making clear and unambiguous provisions so that the bidding process is objective, fair and transparent and in accordance with the CVC guidelines.
>
> Short term bids are recommended in this case to minimize delay."

14. The aforementioned fact also appears to have, not come to the knowledge of the TAS. We have no way of knowing as to what transpired at the meeting of 09.12.2010 – with AAI denying this fact that any such commitment was made. What is evident from the record, though, is that the issue as regards the rejection of the financial bid of Eldis was under examination even prior to the meeting of 09.12.2010. As a matter of fact the first complaint of Eldis was made on 05.11.2010; a date as is evident much prior to the PAB meeting convened on 19.11.2010.

15. The official record shows that there was a divergence in the opinion rendered by IEM and the Directorate within the AAI, i.e., the CNS-P Directorate. This cleavage of views propelled the Chairman of AAI to refer the matter to the Central Vigilance Commission (in short, CVC) for its advice on the matter in particular its perception of the "evaluation process" adopted in the background of the provisions of the Tender. Accordingly, a communication dated 21.12.2010 was issued by the Chief Vigilance Officer (in short 'CVO') of the AAI seeking the advice of the CVC. Alongwith the said communication, the necessary documents were enclosed for the CVC's perusal. Amongst other documents, the report of the IEM as well as a copy of the comments of CNS-P Directorate/Chairman of AAI were also enclosed.

16. It appears that the CVC did not oblige and accordingly vide a office memorandum dated 14.01.2011, remitted the matter to the AAI with the observation that the tenders were required to be evaluated in a transparent and equitable manner, as per the laid down policy; and that rendering advice in respect of a specific tender would amount to interference in the work of the executive. Since the matter was at a 'pre-decision stage', the CVC did not deem it fit to involve itself in the decision making process, and consequently, advised the AAI, to take an appropriate decision in the matter. A contrary averment in the writ petition

by TAS to the effect that CVC had given its stamp of approval to the process adopted, is not borne out from the record.

17. In view of this development, AAI once again approached the Ministry of Civil Aviation for advice and guidance for processing the Tender, further. A communication in this regard was sent on 02.02.2011. In this letter, AAI adverted to the fact that it had referred the matter to the CVC on 21.12.2010 (with regard to which a communication was sent to the Ministry of Civil Aviation on 28.12.2010). In this very letter, a brief reference was also given of the advice rendered by the CVC vide its letter dated 14.01.2011.

18. The Ministry of Civil Aviation, however, in the fitness of things, informed the Chairman of AAI vide letter dated 22.02.2011, that the AAI should take an administrative decision in the matter keeping in view of the directions/circulars of the CVC, in respect of, such like matters.

19. The ball, in a manner of speaking, having been put back in the court of AAI, a meeting of the PAB was convened by the Chairman of AAI on 28.2.2011. After recording the background in which the meeting had been convened and the events that had transpired in the past, it took note of the following discrepancies in the bids of all three (3) technically qualified bidders i.e., TAS, Eldis and Raytheon. The minutes being crucial to the adjudication of the case, the relevant portion is extracted hereunder for the sake of convenience:-

> "In the PAB meeting held on 28.02.2011, ED(CNS-P) informed about the urgent requirement of 8 nos. Of ASR/MSSR at various airports in India. He also highlighted the importance of ASR/ MSSR as a necessary surveillance sensor for ensuring safe, efficient capacity handling of air traffic. It was also emphasized that augmentation of Delhi and Mumbai ASR/MSR had become an immediate necessity of considering the density of air traffic at those airports as also new ASR/MSSRs at Cochin and Amritsar where traffic has increased, resulting in air space complexities. In addition there is requirement of ASR/MSSR at Chennai, Kolkata, Ahmedabad and Trivandrum also which are nearing the end of their life (about 13 to 15 years old).
>
> PAB took note of the fact that the 'Notes' contained in the price bid of M/s ELDIS was also mentioned in the technical bid

> in the "Bill of Quantities", which was not brought out in the technical evaluation report (not only in this tender but in the earlier tender of SITC of 9 MSSRs also).
>
> PAB also took note of the fact that price quoted by M/s ELDIS in their price bid is indeterminate and the bid conditional in nature as the "Notes" had stipulated conditions (Software products in this bid do not contain source code of individual modules, these being proprietary items of M/s ELDIS) which had a financial impact. M/s ELDIS, have stated in their letter dt. 29.11.2010, after opening of the price bid that source code will be available free of cost. However, the other two bidders have not indicated explicitly, about supply of source code. As a practice, all ICDs (interface Control Documents) of Radar Data formats are included in the quoted price, along with source codes. But since M/s ELDIS had mentioned about source codes and the other two bidders have not explicitly mentioned anything about source code in their quote, therefore there is an element of uncertainty in their quote, which requires confirmation.
>
> PAB deliberated at length on the issue considering all the pros and cons in light in CVC's directions/ guidelines and IEM's report and came to the conclusion that inviting of snap bids from technically qualified bidders of the subject tender would be appropriate under the circumstances which will provide level playing field for all the technically qualified bidders in a equitable manner.
>
> PAB approved:
>
> (i) Invitation of snap bids (in view of the urgent requirement of ASR/MSSRs) with clear and unambiguous provisions from technically qualified bidders of the subject tender after re-working the price schedule suitably.
>
> (ii) Adequate legal precautionary measures shall be taken so that the tender process is not unduly delayed, in view of the urgent nature of the project.
>
> PAB also instructed that the technical evaluation team should be suitably cautioned/ instructed to be more cautions in evaluating technical bids in future an suitable Technical Instruction issued

in this regard."
(emphasis is ours)

20. Since a decision had been taken to invite "snap bids" from technically qualified bidders, the impugned communication dated 04.03.2011 was issued to each of the three (3) bidders, calling for their revised bids. It was also indicated therein, that the revised bids should be submitted on 25.03.2011 upto 1130 hours, and that bids would be opened on the same date, at 1200 hours.

21. Being aggrieved, TAS moved this court on 22.03.2011 when; after hearing the counsels for UOI and AAI, an interim order was passed directing stay of the operation of the impugned letter dated 04.03.2011. On 27.09.2011 the writ petition was admitted and since final hearing in the matter had commenced, interim orders were made absolute during the pendency of the petition on the said date.

21.1 In opposition to the writ petition, counter affidavits were filed by all respondents.

21.2 In rebuttal, rejoinders were filed by the petitioner. In so far as AAI is concerned, in their counter affidavit, they have justified their decision to invite snap bids from technically qualified bidders. The reason articulated is that, given the urgency of obtaining the radars and, given the fact that the defects were found in the price bids of all three technically qualified bidders, it would only be fair that a snap bids are invited in respect of the Tender in issue, as it would both be pragmatic and equitable qua the concerned parties.

21.3 The AAI has denied allegations of illegality levelled against it qua the purported re-induction of Eldis in the fray by means which were not in accordance with the provisions of the Tender. It is because of the urgency that AAI, based on the advice of the PAB, has taken the route of inviting snap bids in preference to the recommendation of the IEM to annul the Tender in issue and to recommence the entire process. In this connection, AAI has explained its stand vis-a-vis the allegation raised by TAS, that Eldis, did not meet the eligibility criteria, in as much as, its radars did not operate at major international airports. It was averred that the definition given in the AERA Act did not have any bearing on the issue, and that, in any event, the radars proposed to be supplied by Eldis were operating at two major international airports, namely, Pardubice

International Airport in the Czech Republic, and Surapaya International Airport, in Indonesia. In this regard, it was sought to be explained by AAI that when this issue cropped up at TEC meet, (at the stage of evaluation of technical bids) it had indeed rejected the bid of Eldis on the ground that it radars did not operate at two major international airports by adopting the very same arguments put forth by TAS; which was, that it ought to operate at a major international airport, which met the criteria as defined for such an airport under the AERA Act. This decision of the TEC was reviewed by the management of AAI, on the ground that the Tender did not stipulate a criteria for categorising an airport as a major international airport, and also that, the definition in the AERA Act (which defined a major airport on the basis of passenger footfalls) would have no relevance to the performance of radars which Eldis or any one of the other bidder hoped to supply to AAI. Based on this decision, a two (2) member committee was constituted to evaluate at site, the performance of the radar offered by Eldis. The two (2) member committee comprised of Mr. S. Sundraraman, Execute Director (CNS-P) and Sh. P.K. Mishra, General Manager (ATM), IGIA. These two gentlemen did not form part of the original TEC, which had in the first instance evaluated the technical bids. On a physical inspection, a report dated 10.09.2010 was generated, whereby a recommendation was made that the radar which Eldis offered matched the Tender requirements of AAI. The report further adverted to the fact that the radars supplied by Eldis were working at seven (7) locations; even while its radars were undergoing installation in two other locations. This apart, Eldis had also signed a contract with Republic of China for one radar of the type offered to AAI.

22. On the other hand, Eldis while generally contesting the averments made in the writ petition, specifically adverted to the fact that at no stage, did AAI communicate to it, that it had not met the technical specifications.

22.1 It was stressed that the TAS had infact suppressed the fact that vide its complaints dated 05.11.2010 and 21.11.2010, Eldis had brought to the notice of the concerned authorities in the AAI issues as regards substantial non compliance of the requirements of financial bid by TAS. In this regard, reference was also made to the findings of the IEM, who had adverted to the gaps in the financial bid filed by TAS.

22.2 Eldis contested the averment of TAS that AAI at any stage, had conveyed its intention to award the contract to TAS or that process

adopted at the meeting of PAB held on 19.11.2010 had received the imprimatur of the CVC or, even that of the Ministry of Civil Aviation.

22.3 It was also averred that, in case, as averred, Eldis had been disqualified at the stage of evaluation of the technical bids, then TAS ought to have approached the court in September, 2010 itself, and not waited till March, 2011. The financial bids, which were opened on 30.09.2010; as per the terms of contract, could have been opened only vis-a-vis in those bidders, who had qualified the technical evaluation round.

22.4 The fact that TAS had violated the clauses 5.5.1 and 13.9 of the Tender by inserting extra columns in the price bid was clearly accepted by the IEM as well as PAB in its meeting held on 28.02.2011. Eldis, asserted its right in having the contract awarded to it, as it was not only technically qualified but also the L-1, in view of the fact that its financial bid was admittedly lower than that of TAS.

23. On the other hand, Raytheon while supporting the action of AAI in calling for snap bids and rebutting most of the pleas taken by TAS in the writ petition was, as was expected, guarded about the eligibility of Eldis. Raytheon, took the stand that it had no knowledge of any communication pertaining to disqualification of Eldis for the alleged reason of failing to meet eligibility criteria. In any event, on the issue as to whether Eldis was technically qualified having regard to the fact that a fresh assessment was carried out by a two member committee; Raytheon chose to reserve its comments.

24. The UOI largely adopted the stand of AAI.

25. In the rejoinder, as expected, the petitioner rebutted the stand of the respondents herein.

Submissions of Counsels

26. In the background of the pleadings filed in the matter; arguments on behalf of the petitioner were addressed by Sh. V.P. Singh, Sr. Advocate assisted by Ms. Taslim Ahmadi, Advocate, the UOI was represented by Mr. Sachin Datt; AAI was represented by Mr. Sandeep Sethi, Sr. Advocate, assisted by Mr. Digvijay Rai; Mr. Kamal Mehta addressed arguments on behalf of Eldis; while Mr. Suhail Dutt, Sr. Advocate assisted by Mr. Ujjwal Sharma and Mr. Vishal Dass, represented Raytheon.

27. Briefly, apart from what is stated in the pleadings filed by TAS, Mr. Singh stressed the fact that a two member committee was propped up, to somehow, re-induct Eldis in the fray by giving it a clean chit with regard to what was a clear violation of the eligibility/technical parameters set forth in the Tender, that is, the radar offered by the bidders should have been in operation in at least two major international airports. Mr. Singh, as noticed by us hereinabove, while referring to the averments made in the writ petition adverted to section 2(i) of the AERA Act. Mr. Singh submitted that TAS, became aware that Eldis had been re-inducted into the race only when its representatives participated in the opening of financial bids, on 30.09.2010. The fact that Eldis did not conform to the Tender requirements was brought to the notice of AAI immediately thereafter vide letters dated 30.09.2010 and 07.10.2010. Mr. Singh thus contended that the objections raised by TAS had merit, in as much as, the PAB in its meeting dated 19.11.2010, had expressly rejected the bid of Eldis.

27.1 It is because of this circumstance that at the meeting of PAB dated 19.11.2010, TAS was declared L-1 and was invited for price negotiations. These price negotiations were held on 23.11.2010, whereupon TAS by a letter dated 24.11.2010, offered a reduction in its quoted bid. Mr. Singh, contended, given this background, there was no justification in the AAI, calling for revised bids. The justification given in paragraph 2 of counter affidavit filed by the AAI, to the effect, that the Ministry Of Civil Aviation had received complaints, and that IEM, had found discrepancies in the bid filed by various bidders was not sustainable. In this regard, Mr. Singh contended that IEM had no authority or mandate to review financial bids. It was next contended that, in any event, the recommendation of IEM was not given effect to as AAI had ultimately not annulled the Tender, but called for revised bids. Mr. Singh also adverted to the letter of the CVC dated 14.01.2011, whereby it had refused to interfere in the Tender process. It was submitted on behalf of TAS that the decision of the PAB dated 28.02.2011, was contrary to, its own decision dated 19.11.2010. Mr. Singh submitted that the decision taken in the PAB meeting of 28.02.2011, was based on an erroneous premise, that the bidders had not indicated as to whether they would supply the source code, when in the meeting of 19.11.2010 it was recorded, that the source code was a critical element in the software module of the radars and hence, needed no explicit indication as the

software cannot function without the source code. For these reasons, Mr. Singh submitted that the impugned decision to call for revised bids was clearly arbitrary, and an exhibition of, unbridled executive act, tailored to favour Eldis. It was contended that the impugned decision deserves to be set aside.

28. On behalf of Eldis, Mr Kamal Mehta submitted that TAS had been less than candid in the averments made in the writ petition. It was the submission of Mr Mehta that contrary to what has been averred in the writ petition there was no approval granted in favour of the petitioner either by the CVC or the Joint Secretary and Secretary to the Govt, of India in the Ministry Of Civil Aviation. There was nothing on record to show, according to Mr Mehta, that a decision was taken to issue a LOA in favour of TAS. It was thus contended that the writ petition deserves to be dismissed on the ground that it seeks to enforce the terms of the tender. The TAS, according to Mr Mehta, had not acquired any enforceable legal right merely by being declared as L-1 in the PAB meeting of 19.10.2010; albeit by an erroneous decision, which involved, the illegal exclusion of Eldis. It was asserted that TAS, who is involved in several projects with AAI had exerted, as it appears now, undue influence over the TEC, constituted by AAI, while the process of evaluation was under way. This had in fact, resulted in, the TEC coming up with an undefined criteria to oust Eldis from the race. The criteria adopted that the radars offered by bidders ought to have operated at major airports, did not have the backing of a defined standard against which this specific attribute could be measured. TEC, according to Mr Mehta, therefore, at the behest of the representatives of TAS adopted the definition of AERA Act which, in no way, could be the basis for assessing the performance/ capability of a radar. It is to correct this error, that AAI perhaps, constituted a two-member team to assess the performance of the radar offered by Eldis, in exercise of power contained in clause 2.3 of Section A of the Tender. Mr Mehta, however, stressed the point that Eldis by itself was never communicated any shortcoming or any decision purportedly taken to reject its technical bid. Therefore, the presence of its representative at the meeting held on 30.09.2010, to open financial bids, was legitimate. It was submitted that at this meeting, undoubtedly, Eldis was found to be the lowest bidder, and having been confronted with this fact, TAS shot off its letters dated 30.09.2010 and 7.10.2010 to AAI, seeking the ouster of Eldis from the fray. To give sustenance to its campaign against

Eldis, TAS inspired media reports, including the one datelined 08.10.2010, which is dutifully appended to the writ petition. According to Mr Mehta, this campaign led to the flawed decision, of the PAB, taken at its meeting dated 19.11.2010; whereby Eldis was sought to be excluded on a ex facie flimsy ground that, its financial bid had conditions attached to it. The PAB, in coming to this decision, chose to ignore the fact that Eldis had on 05.11.2010 already instituted a complaint vis-a-vis TAS. It was this complaint, as well as that, which followed the PAB meeting, i.e., the complaint dated 21.11.2010 made to the Ministry Of Civil Aviation, the CVC and other concerned authorities, which resulted in the re-examination of the entire issue. The fact that the financial bid of TAS, was itself in breach of the provisions of Clause 5.5.1 of part A and clause 13.9 of part B of the Tender, had been overlooked. On the other hand, Eldis in its financial bid, indicated, only by way of clarification, that the source code was not included in the software; which for reasons best known to the authorities concerned was categorized, unfairly, as a condition appended to its financial bid. In including such a note, Eldis only sought to clarify that the source code of an individual module, being a proprietary item, which ordinarily is not included in the sale of a software product, would be supplied free of cost. Therefore, such a note could not have been construed in the first place as a condition appended to the financial bid, and then, being used to oust Eldis. It was pointed out that the said note, existed even at the time when the technical evaluation of the bids was carried out. Mr Mehta, next contended that a bidder in any event could not have been ousted on the ground of having appended such a note/ condition, when in terms of the undertaking executed by the bidder in accordance with annexure VI of the Tender the same stood automatically withdrawn. Since all these factors put forth by the representatives of Eldis did not find necessary favour with the concerned authorities at AAI, Eldis was left with no option but to escalate the matter by writing to superior authorities, which included the CVC, the Ministry of Civil Aviation as also the External Monitor, i.e., IEM. This error was finally corrected with the report of IEM dated 7.12.2010; though the remedy offered by it involved cancellation of the Tender. While, the report of IEM was broadly accepted by the PAB in its meeting of 28.2.2011, the conclusion arrived at was different, in as much as, a decision was taken to invite snap bids from technically qualified bidders, keeping in mind the urgency in the matter. This decision of the official respondents, according to Mr Mehta, cannot be found fault with.

29. Mr Suhail Dutt, who appeared for Raytheon largely relied upon the stand taken by the said respondent in the counter affidavit filed on its behalf.

30. Mr Sachin Dutta, who appeared for the UOI, supported the stand taken by the counsel for AAI.

REASONS

31. Having perused the record and heard learned counsels for the parties, in our view, the following undisputed facts have emerged. Against the Tender dated 16.12.2009, six (6) companies had submitted their bids. These bids were submitted in three (3) separate envelopes marked 'A', 'B' and 'C'. Envelope marked 'A' contained submissions qua eligibility criteria; envelope marked B contained the bidder's submissions vis-a-vis its technical qualification; while envelope marked 'C' included a bidder's financial offer. Out of the six (6) bidders, one (1) bidder, i.e., GECI was disqualified in the first round of evaluation which pertained to eligibility criteria.

31.1 It appears that by the time the evaluation process reached the assessment of technical bids, only three (3) bidders remained in the fray, which included TAS, Eldis and Raytheon. This is evident from the fact that at the meeting held on 30.09.2010, the representatives of, the aforementioned bidders, were present.

31.2 The submission of Mr Singh that Eldis was eliminated from the race, so to speak, at the end of June, 2010, is not quite accurate; what emerges on perusal of the record is as follows:-

31.3 In and around 21.6.2010 the TEC, which was charged with the responsibility of evaluating the technical bids, short-listed only Raytheon and TAS, while excluding the others which included Eldis. The evaluation of the TEC was put up before the Member (Planning). The Member (Planning), however, after evaluating the view of the TEC, raised the following issues:

(i) whether the definition of "major airport" found in the AERA Act could be used to oust the bidders, when that definition did not get reflected in the Tender document;

(ii) whether the performance of a radar can be assessed on the basis of passenger movement in the airports; and

(iii) whether it would be advisable to seek performance assessment from an independent body or, in the alternative, a team of officer(s) ought to be deputed for an on-site study at the airport, where the offered radars are installed, for a performance evaluation.

31.4 These views were put up before the Chairman of AAI, who constituted a fresh team of two members, comprising of Mr Sundara Raman, ED (CNS-P and Mr P.K. Mishra, GM (ATM), IGI Airport, to conduct an on-site study; in consonance with the power conferred on AAI in terms of clause 2.3 of Section A of the Tender. This resulted in the said team visiting the Pardubice airport in the Czech Republic, and the consequent, generation of a report dated 10.09.2010. By virtue of the said report the said team, came to a conclusion that Eldis met the technical specifications referred to in the Tender. As a matter of fact, we had sought information from AAI as to the qualification of the two member team. The information supplied to us demonstrated that the members of the team were eminently qualified to carry out the inspection at site. It may be pertinent to point out that during the course of argument before us no cavil was raised vis-a-vis the professional qualification of the team which visited the Pardubice airport for an on-site inspection; perhaps for a very wise reason since one of the persons who made the on-site inspection was Mr. Sundara Raman, Executive Director, (CNS-P) Directorate. Mr Sundara Raman was also one of the members of the PAB meeting held on 19.11.2010 on which great store has been laid by TAS.

31.5 We must note at this juncture the submission advanced by Mr Singh that there was no power or mandate conferred on the two-member team to carry out such an inspection, post an evaluation by the TEC. We are not persuaded by the said submission for the following reason. The power to carry out an on-site inspection is contained in clause 2.3 of Section A of the Tender, which reads as follows:

> "Bidder may be required to demonstrate/ practically verify the specific/ all features of the equipment as deemed fit by AAI, for evaluation of the bid."

31.6 The point to be noted is that the evaluation is for the benefit of the AAI. AAI for its convenience has constituted a committee; titled as TEC. The process of evaluation of technical bids is internal to the

institution and, in the process of evaluation, views are often obtained from various other branches / wings of an institution. The contemporaneous discussion, on the record, shows that the rationale adopted by the TEC for ousting the two bidders including Eldis was differed with, by Member (Planning), on the ground that a criteria adopted was not defined in the Tender. This led to an on-site inspection, for a real time performance evaluation, of the radars, being offered by the said bidder, i.e., Eldis. Such an on-site inspection was well within the ambit of the provisions of the Tender. Therefore, merely because a fresh two-member team was constituted by AAI to make an on-site assessment of the radars offered by Eldis, the decision of AAI cannot be found fault with on this score.

31.7 The submission of Mr. Singh that the definition given in the AERA Act pertaining to the term 'major airport' ought to have been applied in determining whether Eldis met the eligibility/ technical criteria stipulated in the Tender is, according to us, completely misconceived. The AERA Act has been enacted to regulate tariff and other charges vis-a-vis aeronautical services rendered at airports and, to monitor performance of standards of airports. The definition of the term major airport (to be noted the definition does not refer to the term major international airport as was alluded to by the complainant/TAS) provided in section 2(i) of the AERA Act could not have been imported as a part of Tender conditions in ascertaining the performance of radars offered by various bidders. The management of AAI in its wisdom adopted this course. We can hardly find fault with the course adopted in law or otherwise. It would, as has been very felicitously observed by Lord Loreburn in **Macbeth & Co. Vs Chislett** (1910) A.C. 220, be a "new terror" in interpretation of statutes (the same principle would apply to our minds to Tender documents) to import a definition given in one Act of the Parliament into another statute, to define terms and expression given in that statute, which are neither incorporated or referred to, without regard to the setting, context and the background in which the statutes have been enacted. This dicta has been cited with approval in **CIT vs Jaswant Singh Charan Singh** (1967) 2 SCR 720.

31.8 The management of AAI therefore correctly overrode the decision of TEC to apply the definition of 'Major Airport' given in section 2(i) of the AERA Act to oust Eldis. Furthermore, the said decision

also pre-empted, a possible challenge, by Eldis on the ground that an undefined criteria had been applied to oust it from the race. AAI, in our view, adopted a correct approach by having conducted an on-site study of the radar offered by Eldis. The record shows, that the team vide its report of 10.09.2010, gave a thumbs-up to Eldis in so far as technical specifications were concerned. That, AAI possessed such a power to order an on-site inspection, cannot be doubted, in view of the provision of clause 2.3 of Section A of the Tender.

31.9 If that be so, surely it does not lie within the domain of the court to examine the results of the evaluation carried out by a team of experts. The court by itself has no expertise in the field. There are no malafides urged qua the two experts. Thus, logically our scrutiny must end here, as regards whether or not Eldis met eligibility / technical criteria. The experts having stated so, in the affirmative; in the absence of malafides, coupled with our lack of expertise and absence of any material to the contrary; we must respect their assessment. That Eldis met the eligibility/ technical criteria is, evident from the fact that it continued to be in the fray till 19.11.2010, when it was sought to be excluded on account of purported conditions attached to its price bid.

32. What surprises us is that, even though, TAS appears to have had knowledge of the exclusion of Eldis from the fray, it chose not to take recourse to legal remedies till March, 2011. TAS, claims that it became aware of this fact only on 30.09.2011, when the representatives of Eldis were found present at the meeting fixed for opening financial bids. Assuming this to be correct, it still does not explain the delay between September, 2010 and March, 2011.

33. The fact remains that pursuant to the report dated 10.09.2010, Eldis alongwith TAS and Raytheon was cleared to the third and final stage, i.e., the stage for processing financial bids. Consequently, the representatives of the said bidders were called to the meeting fixed for 30.09.2010, convened for opening financial bids. The comparative evaluation of the price bids of Eldis, TAS and Raytheon threw up the following broad discrepancies: While Eldis had inserted in its price bid, in row 5, particulars, regarding taxes and duties; TAS had done the same in respect of components quoted in Euros. Furthermore, TAS had not shown the correct amount of service charge, which was, evidently pegged at 10.33%, qua services quoted in Indian rupees. Similarly, Raytheon had

committed a similar error in respect of services rendered in India which were quoted in CAD.

33.1 These discrepancies emerged in an internal assessment carried out on 05.10.2010. In this assessment, the contents of TAS's representation, not only with regard to the aforementioned omission in the price bid of Eldis, but also, as regards the fact that the price bid was not sealed with wax, was also noticed. In respect of the aforesaid observations, it emerges, that Eldis had deleted row no. 5 from its price schedule, TAS had not quoted service tax for services quoted in Euros, and Raytheon, while quoting service tax, had decided not to quote service tax at the rate of 10.33% on the services rendered in India. As regards the failure of Eldis in not sealing its price bid with wax, the final observation was that the bid submitted by Eldis was sealed with a tape and the folds of the bid bore the stamp of Eldis. It was also pointed out that when the Tender was opened for the first time on 12.2.2010, when none of the representative of the bidder present including TAS raised objections with regard to the failure of Eldis in sealing its envelope marked 'C' with wax. Consequently, the financial bids of all participants were put in a carton, which was, sealed with tapes and the said carton was signed by the representatives of the bidders in the presence of AAI officers. The financial bids were thus taken out of the said carton only on 30.09.2010, in the presence of the bidders. representatives, after due verification.

33.2 From the record, it emerges, that a further assessment was carried out on 18.10.2010, when it came to light that the price bid of Eldis contained certain notes. It was pointed out in this assessment that this was in violation of section 5.5.1. of Section A of the Tender and therefore the bid could be considered as non-responsive and liable for rejection. In this connection reference was also made to clauses 5.5.5, 5.5.6 and 5.5.8 of the Tender. Accordingly, the financial bid of Eldis was not taken up for comparison. This consequently left, only TAS and Raytheon in the fray. On a comparison of the two price bids, it was found that on the basis of net cost to AAI (excluding service tax) the bid of TAS in the sum of Rs 121.8834 crores, was lower than that, quoted by Raytheon. On the very same basis, Raytheon's bid was quantified at Rs 164.0152 crores. It was also noted that, TAS's bid was 46% lower than the estimated cost for the said Tender, which was pegged at Rs 225.50 cores.

33.3 The record shows that both the department of Finance and the department of Law differed with the view taken by the Directorate of CNS-P. They took pains to point out that there were flaws in the price bid of all three bidders, i.e., TAS, Eldis and Raytheon. As a matter of fact the department of Law was of the view that the merits and demerits of a Tender should be examined collectively and not in isolation. The opinion of the department of law veered around the position that exclusion of Eldis on this ground, was "highly technical" and would not sustain in court.

33.4 The Executive Director (in short 'ED'), CNS-P, however, took the view that the missing information in row 5 of the price bid submitted by Eldis had made it difficult to evaluate the bid, coupled with the fact that there were certain notes appended to the price bid of Eldis, which made it conditional. For all these reasons, the said officer, was of the view that the bid of Eldis was non-responsive. On the other hand, the discrepancy in the bid of TAS, which included insertion of additional columns, ED (CNS-P), was not material as despite the said discrepancy it was still possible to ascertain the price quoted by TAS. Somewhat similar was the view expressed qua the bid of the Raytheon. The aforementioned view finally found approval with the PAB, in its meeting dated 19.11.2010.

33.5 It emerges from the record is that while this process was on, both TAS and Eldis, had in the meanwhile made complaints against each other. TAS, as indicated above had lodged two complaints 30.09.2010 and 7.10.2010. On the other hand, Eldis had made a complaint on 05.11.2010, followed by, a complaint dated 21.11.2010 pursuant to the decision taken by the TEC. What is noticeable from the complaint of TAS dated 30.09.2010, no issue with regard to technical qualification of Eldis was raised. The allegations were confined to the price bid, which have been noticed by us hereinabove. For the first time allegations with regard to the purported failure of Eldis in meeting eligibility/ technical criteria, stipulated in the tender was raised in the letter dated 7.10.2010, which incidentally also alluded to the allegations raised in the earlier letter dated 30.09.2010. In our view, the allegations with regard to Eldis meeting the eligibility/technical criteria had been adequately resolved internally by AAI. These allegations in the month of October, 2010 by TAS, were an after thought, which obviously has its genesis, in the information made available to TAS, by an insider; who though employed with AAI,

conveniently passed on crucial commercial information to TAS.

33.6 This singular act according to us speaks volumes about the failure on the part of the officers to maintain sanctity of the institutional decision making process. We are constrained to observe this, as it is reflective of the prevalent atmosphere in the commercial world where, every fair and unfair means are employed to gather information on rivals in the trade. This is despite the fact that there are, at least, in today's times, adequate legitimate means available to gather most, if not all, relevant information. Therefore, such dubious practice adopted by some commercial entities, deserves to be deprecated.

33.7 Coming back to the issue, the complaint of Eldis dated 05.11.2010 and 21.11.2010 formed the basis of the examination by the IEM. In accordance with the terms of the Integrity Pact, executed by the bidders, a report was generated by IEM, which found that there were flaws in the price bids of all bidders; this included TAS. Consequently, the IEM advised that the Tender be cancelled. In order to minimize delay, the IEM, recommended short term bids.

33.8 In view of the difference of opinion in the view of ED (CNS-P) and that taken by the IEM, AAI referred the matter to the CVC. The CVC refused to intervene in the matter, as did the Ministry of Civil Aviation, which resulted in a situation that AAI, had to take a decision in the matter. It is important to note that view held by ED (CNS-P) was largely reflected in the decision taken at PAB meeting of 19.11.2010.

33.9 This resulted in the meeting of PAB dated 28.02.2011. Significantly, the members of this PAB, except two members out of the six, who were part of the previous PAB of 19.11.2010, were the same. The two members, who were not part of PAB of 28.02.2011, were those belonging to Finance and Law Departments, both of which had expressed their view against exclusion of Eldis. At this meeting after due deliberation, a decision was taken to call for ***"snap bids"*** taking into account various factors, including the ambiguity in the Tender with regard to inclusion of source code. We may emphasise that Mr Sundara Raman was a member of this PAB meeting as well. At this meeting, a decision was taken to invite snap bids from the three (3) technically qualified bidders. It is pertinent to note that the PAB took this opportunity to caution the TEC in future evaluation of technical bids.

33.10 In effect the decision taken at PAB meeting of 19.11.2010 was reviewed by PAB in their subsequent meeting of 28.02.2011. The question is: was there material available on record for review? A perusal of the minutes of the meeting of PAB of 28.02.2011, would show that they had, apart from anything else, the benefit of the IEM report of 07.12.2010. The fact that the department of Finance and Law were not ad-idem with ED(CNS-P) is also apparent from a perusal of the record, as noticed by us hereinabove.

34. The argument advanced by Mr Singh touching upon the meeting held on 23.11.2010 between the representatives of TAS and AAI, and the consequent reduction in price offered by TAS, are of no relevance for the following reasons: Firstly, the assertion of TAS that a representation had been made on behalf of AAI to issue a LOA in its favour is stoutly denied by AAI. There is nothing on record to establish otherwise. Secondly, an internal decision taken at the meeting of PAB held on 19.11.2010 would not be enforceable unless it had the institutional approval and was formally communicated to the concerned parties; in this case TAS. Therefore, the offer of TAS to reduce its price was a unilateral act which did not give rise to any binding legal relationship.

35. Thus, having perused the record and considered the views and counter-views expressed institutionally, by various department of the AAI, we are not persuaded to hold that the decision taken at the meeting of the PAB, on 28.02.2011, was arrived at for an oblique motive, or was violative of any provision(s) of the Tender. Amongst other aspects, PAB had at its meeting of 28.02.2011, attached criticality to an express inclusion of the source code in the price bid. Before that, IEM in its report dated 07.12.2010 had highlighted, amongst others, this aspect of the matter. In this context, the argument of Mr Singh that the source code being a critical element of the software modules to be supplied, was impliedly included in the price offered by various bidders, does not impress us. The fact that it is critical would have us believe, that the terms of the Tender qua the price bids should expressly refer to the same. A critical component of the financial bid cannot be assumed to be included on the basis of assumptions as, this could lead to disruption in the execution of the Tender, at some later stage. For the aforesaid reasons, we do not find any merit in the submissions made on behalf of the TAS that decision made at the meeting of the PAB held on 28.02.2011, was flawed. Therefore, the decision to call for snap bids as against cancellation of the

Tender, can also not be found fault with in view of the urgency expressed in both meetings of the PAB. The petitioner before us also, did not make any submission on these lines. Therefore, the necessary corollary of this would be that the impugned letter dated 04.03.2011 would have to be sustained. We hold accordingly.

36. For the foregoing reasons the writ petition is according to us, devoid of merits and hence, deserves to be dismissed. It is ordered accordingly.

37 The record shows that there have been six (6) effective hearings in the matter. The petitioner having failed; therefore, as a natural consequence of the result, ought to bear a portion of the cost. The respondents have engaged senior counsel as well as instructing counsels in the matter. Accordingly, we quantify the cost at Rs 3,00,000/-. The petitioner will pay a sum of Rs 20,000/- to UOI; while the balance sum will be paid in equal proportion to AAI, Eldis and Raytheon. The said costs shall be paid within two weeks.

ILR (2012) II DELHI 143
CRL. A.

RAM SINGH @ KARAN ....APPELLANT

VERSUS

STATE N.C.T OF DELHI ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. A. NO. : 707/2002 & CRL. M.B. NO. : 773/2011 & CRL. A. NO. : 367/2002

DATE OF DECISION: 13.12.2011

Indian Penal Code, 1860—Sections 363, 366, 376, 109—Appellant Ram Singh, convicted for offence punishable under Section 376 and appellant Bhagwan Dass under

Section 376/109 IPC—Both appellants challenged their conviction urging, prosecutrix was consenting party which fact was upheld by the Trial Court, but it considered her consent immaterial on basis of her School Leaving Certificate mentioning her age below 16 years, whereas, ossification test opined her age to be 16 to 18 years—School leaving Certificate not reliable in absence of contemporaneous document supporting it, so medical evidence should have prevailed—Also, sentence awarded of 7 years on higher side—In appeal, conviction upheld, as School Leaving Certificate found to be reliable and no reason found to rely on ossification test which gave rough estimate of age—Held:- for special reasons to be recorded Court can award a sentence less than minimum prescribed period of 7 years—Prosecutrix was just below 16 years but was in love with one of the appellants and had gone of her own will, being special reasons to reduce sentence of appellants below 7 years.

However, the core issue is the age of the prosecutrix. The learned Trial Court, on the basis of the School Leaving certificate came to the conclusion that the date of birth of the prosecutrix was 20th March, 1982 and thus on the date of incident i.e. 25th August, 1997 she was 15 years 5 months and 5 days old. I find no reason to disagree with the learned Trial Court on this count. The School Leaving Certificate of the prosecutrix from Government Middle School, P- Block, Sultanpuri, has been proved as EXPW10/A by PW10 Ravinder Singh Mann. Even the school record, on the basis of which the School Leaving Certificate was prepared, had been produced. As per the school record, the date of birth of the prosecutrix was recorded as 20th March, 1982. The prosecutrix was admitted to the school on 2nd April, 1986 on the basis of the School Leaving Certificate issued by the previous school attended by the prosecutrix. Thus, there is no reason not to rely on the certificate and rely on the bone ossification test which gives only a rough estimate

of age. Further, even as per the bone ossification test, the prosecutrix was about 16 years thus corroborating the age of the prosecutrix in the School Leaving Certificate. I find no infirmity in the impugned judgment convicting the appellants for the offences punishable under Section 376 and 376/109 IPC respectively. **(Para 9)**

Important Issue Involved: For special reasons to be recorded Court can award a sentence less than minimum prescribed period of 7 years for offence punishable under Section 376 IPC.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Bhupesh Narula, Advocate Mr. Permod Bajaj, Advocate.

FOR THE RESPONDENT : Mr. Mukesh Gupta, APP for State.

RESULT: Appeal Disposed of.

MUKTA GUPTA, J.

1. By these appeals, the Appellants lay a challenge to the judgment dated 28th April, 2002 convicting the Appellant Ram Singh for offence punishable under Section 376 IPC and the Appellant Bhagwan Dass for offence punishable under Sections 376/109 IPC.

2. By the order on sentence, the Appellants Ram Singh and Bhagwan Dass have been directed to undergo rigorous imprisonment for a period of seven years and a fine of Rs.500/- each and in default of payment of fine to further undergo simple imprisonment for one month.

3. Learned counsel for the Appellants contends that though the Appellant Ram Singh was charged for the offences punishable under Sections 366/376 IPC and the Appellant Bhagwan Dass for offences punishable under Sections 366/34 and 376/109 IPC, however Appellant Ram Singh has been convicted only for offence punishable under Section 376 IPC and Appellant Bhagwan Dass for abetment thereof. The learned Trial Court has held that the prosecutrix was a consenting party by

upholding the defence of the Appellants. However, in view of the School Leaving Certificate it came to the conclusion that the prosecutrix was below 16 years of age and, thus, her consent was immaterial.

4. Learned counsel for the Appellants submits that as per the ossification test the age of the prosecutrix was opined to be 16 to 18 years and in view thereof, the Appellants were entitled to be acquitted of the charges framed. The date of birth, as entered in the School Leaving Certificate, was supported by no contemporaneous document. In the absence of reliability of the School Leaving Certificate, the medical evidence, i.e., the report of the bone ossification test should have prevailed thus entailing the benefit to the Appellants. Further, in view of the fact that the Trial Court itself came to the conclusion that the prosecutrix was a consented party, the sentence awarded to the Appellants was on the higher side.

5. I have heard learned counsel for the parties.

6. Briefly, the case of the prosecution is that FIR No.511/1997 was lodged for offences under Sections 363/366/376 IPC at PS Sarojini Nagar on complaint filed by Charan Singh, the father of the prosecutrix, who alleged that on 25th August, 1997, at about 8:30 p.m. his daughter "u" aged about 15 to 16 years had gone to Ram Mandir, Safdarjang Enclave to celebrate Janmashtmi but had not returned back. He apprehended that accused Ram Singh @ Karan and Bhagwan Dass had kidnapped his daughter. On 28.8.1997, both the appellants along with prosecutrix were apprehended near Hanuman Mandir. Statement of the prosecutrix was recorded under Section 164 Cr.P.C. wherein she stated that she was born on 20th March 1982. That year i.e. in 1997, she failed in the 10th standard because she was weak in Mathematics, since then she had stopped going to school. Her mother sent her to her uncle's house at Safdarjang Enclave. Her aunt's daughter was also of her age. On the day of Janmashtmi, both of them went with their friends to see Ram Mandir. When she went to the toilet, she met two boys whom she knew since earlier as they were neighbours in Sultanpuri. She named them as Ram Singh @ Karan and Bhagwan Dass @ Bablu. They stated that her parents were standing on the other side and were calling her as her sister was unwell. She went with them. There she found two other unknown boys standing near a taxi. The two boys put a handkerchief on her mouth, made her sit in the taxi and took her. When she got up in the morning,

she found that she was in a plot which had a dilapidated room. There Ram Singh gave beatings to her and then raped her. When Ram Singh was doing this Bhagwan Dass @ Babloo was standing outside guarding the place. She could not make noise as her mouth was shut with a chunni. Thereafter, the two of them went away and came there in the evening but did not speak to her. Next day morning they planned to take her at a Mandir where the Police and her mother rescued her.

7. The prosecutrix has supported her version and so have her parents PW3 Rajwati and PW4 Charan Singh. However, prosecutrix was confronted by the letters written by her to Ram Singh which expressed her love towards him. In her statement in the Court, she also stated that she went to different places in a rickshaw and on foot with the Appellants, however she did not raise any hue and cry.

8. In view of the letters of the prosecutrix expressing her love towards the Appellant Ram Singh and the conduct of the prosecutrix, the learned Trial Court came to the conclusion that the prosecutrix was a consenting party in going with the appellants. This finding of the learned Trial Court is not incorrect on the basis of evidence on record.

9. However, the core issue is the age of the prosecutrix. The learned Trial Court, on the basis of the School Leaving certificate came to the conclusion that the date of birth of the prosecutrix was 20th March, 1982 and thus on the date of incident i.e. 25th August, 1997 she was 15 years 5 months and 5 days old. I find no reason to disagree with the learned Trial Court on this count. The School Leaving Certificate of the prosecutrix from Government Middle School, P- Block, Sultanpuri, has been proved as EXPW10/A by PW10 Ravinder Singh Mann. Even the school record, on the basis of which the School Leaving Certificate was prepared, had been produced. As per the school record, the date of birth of the prosecutrix was recorded as 20th March, 1982. The prosecutrix was admitted to the school on 2nd April, 1986 on the basis of the School Leaving Certificate issued by the previous school attended by the prosecutrix. Thus, there is no reason not to rely on the certificate and rely on the bone ossification test which gives only a rough estimate of age. Further, even as per the bone ossification test, the prosecutrix was about 16 years thus corroborating the age of the prosecutrix in the School Leaving Certificate. I find no infirmity in the impugned judgment convicting the appellants for the offences punishable under Section 376 and 376/109 IPC respectively.

10. As regards the sentence, the prosecutrix was just below 16 years. For special reasons to be recorded, the Court can award a sentence less than the minimum prescribed period of 7 years. In view of the fact that from the evidence adduced, the Appellants have been able to successfully show that the prosecutrix was in love with the Appellant Ram Singh @ Karan and had gone of her own free will thus, it is a fit case to reduce the sentence of the Appellant below 7 years.

11. The Appellant Ram Singh has been convicted for offence punishable under Section 376 IPC. He has undergone a sentence of Rigorous Imprisonment for about 5 years 8 months. The Appellant Bhagwan Dass has been convicted for offence punishable under Section 376/109 IPC. He has undergone Rigorous Imprisonment for about 3 years. In view the aforesaid discussion, the sentence of the Appellants are modified to the period already undergone. The appellants are in custody. The Superintendent, Tihar Jail, is directed to release the Appellants forthwith, if not required in any other case.

12. The appeals and application are disposed of accordingly.

ILR (2012) II DELHI 148
W.P. (C)

HARDEEP SINGH ....PETITIONER

VERSUS

DELHI TRANSPORT CORPORATION ....RESPONDENT

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

W.P. (C) NO. : 8653/2011 & 8669/2011 **DATE OF DECISION: 13.12.2011**

Service Law—Disciplinary action—Petitioners working as drivers with DTC charged with having entered the

room of the Depot Manager, Naraina unauthorizedly, having abused the Depot Manager and having assaulted the Traffic Superintendent who was present in the room having fled by breaking the sheets of boundary of Naraina Depot after meeting out threats—Version of petitioners was that at the time of alleged incident, they were in Rohtak and were even challaned by traffic police for traffic violations, which shows that nothing as alleged by DTC occurred—Inquiry Officer found the charges proved and the Disciplinary Authority imposed punishment, and departmental appeals were dismissed, followed by dismissal of OAs filed before the Central Administrative Tribunal—In the meanwhile, local police registered FIR and filed chargesheet against petitioners regarding the Naraina Depot incident, in which after trial the learned Magistrate convicted the petitioners for offence under Sec. 323/506/34 IPC and released them on probation, but in appeal, the learned Additional Sessions Judge acquitted the petitioners holding that in view of challan at Rohtak, presence of Petitioners at Naraina was doubtful—Tribunal while dismissing OAs held that acquittal does not preclude departmental action and rules of evidence in the two proceedings are different—Challenged—Held, in the absence of any record to show that challan at Rohtak was issued after verifying identity of violators and there being no plea that there was any reason for DTC to fudge the incident against the petitioners, in the exercise of powers of judicial review, High Court would not interfere with the concurrent findings of Inquiry Officer, Disciplinary Authority, Appellate Authority and Tribunal, particularly where there is no merit in ground of challenge.

In the absence of there being anything to show that the challan for triple riding without documents issued at Rohtak, Haryana at the same time as the incident at Naraina Depot mentioned the names therein of the petitioners after satisfying as to the identity of the petitioners and in the face of the

finding reached by the Inquiry Officer on the basis of statements of witnesses, we, in the exercise of power of judicial review, are not inclined to give any credence to the defence of the petitioners of the incident being false for the reason of the petitioners at the relevant time being at Rohtak, Haryana. The FIR as of the incident at Naraina Depot was lodged immediately as is expected in the natural course of events and in the absence of any plea of any reason for falsely implicating the petitioners in such incident, we are again unable to find any merit in the case of the petitioners. **(Para 10)**

Important Issue Involved: In the exercise of powers of judicial review, High Court would not interfere with the concurrent findings of Inquiry Officer, Disciplinary Authority, Appellate Authority and Tribunal, particularly where there is no merit in ground of challenge.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Anil Mittal & Mr. Amritansh Batheja, Advocates.

FOR THE RESPONDENT : Mrs. Avnish Ahlawat with Ms. Lakita Choudhary, Advocates.

CASES REFERRED TO:

1. *Commissioner of Police, New Delhi* vs. *Narender Singh* (2006) 4 SCC 265.
2. *Ajit Kumar Nag* vs. *General Manager (PJ) Indian Oil Corporation Ltd., Haldia* (2005) 7 SCC 764.
3. *Kamaladevi Agarwal* vs. *State of West Bengal* (2002) 1 SCC 555.

RESULT: Petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. The petitions though by separate petitioners, impugn the common

order dated 10th October, 2011 of the Central Administrative Tribunal, Principal Bench, New Delhi dismissing OA No.3418/2010 and OA No.3235/2010 preferred by each of the petitioners respectively. The petitioners in both the writ petitions, employed with the respondent DTC as Drivers, were charged with, having on 4th December, 1987 at 1500 hours entered the room of the Depot Manager, Naraina Depot unauthorizedly, having used unparliamentary language and also behaved in an objectionable manner with the Depot Manager, having attacked Mr. R.B.L. Srivastava, Traffic Superintendent, Naraina Depot, who was also present in the room of Depot Manager at the time of the incident with a chair and having fled therefrom by breaking the sheets of the boundary of Naraina Depot after meting out threats to the Depot Manager to kill him.

2. The charges were found by the Inquiry Officer to have been proved against both petitioners and the Disciplinary Authority of the respondent DTC after giving notice to the petitioners imposed punishment of "bringing the petitioners in the initial stage of Driver's pay scale for a period of two years". The departmental appeals of the petitioners were dismissed. The petitioners thereafter approached the Tribunal by preferring OAs aforesaid.

3. The version of both petitioners was/is that they had taken leave from duty and gone to their Village-Sahalavasa in District-Rohtak, Haryana; that they were riding on a two wheeler scooter along with another person and were apprehended by the Police at around 1535 hours on 4th December 1987 and challaned for triple riding and for not possessing Registration Certificate and Driving Licence. It was thus their case that when they were at Rohtak, Haryana at 1535 hours on 4th December, 1987, they could not on the same day at 1500 hours possibly have indulged in the acts aforesaid at Naraina Depot. 4. In this regard it may be mentioned that FIR No.423/1987 under Sections 323/506/34 IPC of Police Station-Patel Nagar, New Delhi was also lodged of the incident aforesaid at Naraina Depot on 4th December, 1987 and the petitioners were prosecuted. Though they were convicted under Sections 323/506/34 IPC and released on probation but the appeals preferred by them were allowed by the Court of the learned Additional Sessions Judge on the ground that in view of the challan at Rohtak, Haryana at the same time, it was doubtful that the petitioners could at the same time be at Naraina Depot, at a distance of about 150 Km. from Rohtak, Haryana.

5. It was/is thus the case of the petitioners, that having been acquitted of the same charge, the punishment meted out to them is wrongful.

6. The Tribunal by referring to **Ajit Kumar Nag Vs. General Manager (PJ) Indian Oil Corporation Ltd., Haldia** (2005) 7 SCC 764, **Kamaladevi Agarwal Vs. State of West Bengal** (2002) 1 SCC 555 and **Commissioner of Police, New Delhi Vs. Narender Singh** (2006) 4 SCC 265 held that, acquittal by a Criminal Court does not preclude an employer from taking action, the rules of evidence in the two proceedings being different. The Tribunal, from the Inquiry Officer's report found the charges to have been proved on the basis of deposition of the witnesses as well as documentary proof. The Tribunal has also recorded satisfaction that the entire inquiry proceedings had been held in accordance with law and strictly following the principles of natural justice. Accordingly, the OAs preferred by the petitioners, were dismissed.

7. The counsel for the petitioners before us has again reiterated that the petitioners at the time of the incident, for the reason of being at Rohtak, Haryana, could not possibly have been at Naraina Depot and the charges and findings against them are false and the punishment meted out to them contrary to law, they having been acquitted of the same charges in the prosecution.

8. We have enquired from the counsel for the petitioners as to whether there is anything to show that the police official who challaned, allegedly the petitioners, for triple riding and without requisite documents at Rohtak, Haryana, had satisfied himself as to the identity of the persons riding on the scooter. The counsel for the petitioners has fairly stated that there is no such document.

9. We have next enquired from the counsel for the petitioners whether it was/is the plea of the petitioners that there was any reason for the respondent DTC or any of its officials to fudge the incident aforesaid at Naraina Depot. The counsel has again fairly stated that no such plea has been taken.

10. In the absence of there being anything to show that the challan for triple riding without documents issued at Rohtak, Haryana at the same time as the incident at Naraina Depot mentioned the names therein of the petitioners after satisfying as to the identity of the petitioners and in the face of the finding reached by the Inquiry Officer on the basis of

statements of witnesses, we, in the exercise of power of judicial review, are not inclined to give any credence to the defence of the petitioners of the incident being false for the reason of the petitioners at the relevant time being at Rohtak, Haryana. The FIR as of the incident at Naraina Depot was lodged immediately as is expected in the natural course of events and in the absence of any plea of any reason for falsely implicating the petitioners in such incident, we are again unable to find any merit in the case of the petitioners.

11. Else, this Court in exercise of power of judicial review is not to interfere with the concurrent findings of fact of the Inquiry Officer, Disciplinary Authority, Appellate Authority and the Tribunal particularly when no merit is found in the ground aforesaid of challenge thereto.

12. The writ petitions are accordingly dismissed; we refrain from imposing any costs on the petitioners.

ILR (2012) II DELHI 153
CRL. REV. P.

VED PRAKASH SAINI **....PETITIONER**

VERSUS

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

(SURESH KAIT, J.)

CRL. REV. P. NO. : 559/2011 **DATE OF DECISION: 13.12.2011**

Indian Penal Code, 1860—Section—419, 420, 467, 468, 471, 120B—Code of Criminal Procedure, 1973—Section—362—Petitioner taken into custody on charges punishable under section 419, 420, 467, 468, 471, 120B IPC—He moved three bail applications which were dismissed—His fourth bail application moved after around 2-1/2 yeas of his being in custody, was allowed

on ground of being in prolonged custody, trial would take long time and he would not claim any right, title or interest in immovable property qua which offence was committed—After gap of about 4 months, co accused also moved bail application, and trial court issued suo moto notice for cancellation of bail granted to petitioner on said application of co accused—However, Ld. Sessions Judge after appreciating records withdrew said notice—But, subsequently again issued suo moto notice to petitioner for cancellation of bail and cancelled his bail—Aggrieved petitioner filed Criminal Revision Petition challenging impugned order—Held:- Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted.

I note that the grounds mentioned in the order while cancelling the bail of the petitioner, granted vide order dated 26.08.2010 on each and every fact. Both the learned counsel appearing in the matter argued and learned District Judge was aware of the fact that instant case is also under Section 467 Indian Penal Code also registered at police Station Model Town and being investigated by Crime Branch. The cases investigated by Crime Branch are usually tried only by the ACMM and not by the Magistrate. There was no concealment of the facts at the time of granting bail vide order dated 26.08.2010. Moreso, the petitioner has, already undergone 2 + years in custody and the maximum punishment if convicted by the ACMM would be 07 years. **(Para 29)**

Important Issue Involved: Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail already granted.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Amarinder Saran, Senior, Advocate with Mr. Prasoon Kumar

and Mr. Somesh Jha, Advocates.

FOR THE RESPONDENT : Mr. Navin Sharma, APP for state with Inspector Ashok Kumar, Crime Branch in person. Mr. Sanjay Rathi, Adv. for complainant.

CASES REFERRED TO:

1. *Subhendu Mishra* vs. *Subrat Kumar Mishra & Ors.* 2000 SCC (Crl) 1508.
2. *Dolat Ram* vs. *State of Haryana 1995 (1) SCC 349.*

RESULT: Petition allowed.

SURESH KAIT, J. (Oral)

Crl.M.A.No.19266/2011(exemption)

Exemption is allowed subject to just exceptions.

Criminal M.A. stands disposed of.

CRL.REV.P. 559/2011

1. Notice issued.

2. Mr.Navin Sharma, learned APP accepts notice on behalf of State.

3. With the consent of learned counsel for parties, matter has been taken up for disposal.

4. Vide instant petition, the petitioner has sought to set aside the order dated 07.12.2011 passed by the Sessions Court in Bail Application No.156/2011 titled **'State v. Mahip Singh Saini @ M.S. Saini'** whereby learned Sessions Judge, In-charge, North-West, District Rohini, Delhi on *suo moto* notice has cancelled the bail of the petitioner extended to him vide order dated 26.08.2010.

5. The facts of the case in brief are that pursuant to the complaint lodged by Naresh Kumar, present FIR was registered at police station Model Town against the petitioner and co-accused person. On 12.02.2008, the petitioner was taken into custody by the police on the allegations that he impersonated himself as Rajender Kumar and Charanjeet Singh and in

furtherance of such act has put his signature upon some sale documents by which a property bearing No.D-46, Ishwar Colony was transferred in the name of Smt. Nirdosh Saini, the petitioner being in the chain also parted his photograph on some of the documents. On 14.05.2008, the petitioner during his custody applied for regular bail before framing of charge. The said bail application was dismissed by this Court vide order dated 14.05.2008.

6. After gap of about one year i.e. on 11.05.2009, petitioner again moved bail application before this Court and the same was dismissed as withdrawn with liberty to take recourse before learned Trial Court as the charges were to be framed.

7. Thereafter, after a span of another year and two months i.e. on 18.07.2009, charges were framed under Section 419/420/467/468/471/120-B Indian Penal Code and during this period the petitioner remained in custody.

8. Thereafter, the petitioner moved the bail application before learned Sessions Judge, Rohini Courts, which was accepted vide order dated 26.08.2010 on account of the fact of prolonged custody and trial will take long time and statement of petitioner that he has no concern with the property in question and will not claim any right, title or interest in the said property in which the petitioner has been allegedly involved as alleged by the prosecution.

9. Thereafter, on 24.12.2010, upon the bail application of the co-accused, Mahip Singh Saini, the very same Court issued suo moto notice for cancellation of bail being granted to present petitioner.

10. Vide order dated 18.07.2011, after appreciating the records and grounds taken by the petitioner, learned Sessions Judge withdraw the said notice.

11. Again on 24.11.2011, a *suo moto* notice for cancellation of bail was received by petitioner. Vide impugned order dated 07.12.2011, learned Sessions Judge has cancelled the bail of the petitioner, which was granted to him on 26.08.2010 by the very same Court.

12. Mr.Amarinder Saran, learned Senior Advocate, appearing for petitioner submits that it was argued that the main accused was Mahip Singh Saini, who was involved in several cases and the petitioner /

accused has clean antecedents and not involved in any other case. It was further argued that the trial will take long time and out of 42 cited witnesses, only 03 witnesses have been examined so far. It is further argued that the power of learned Magistrate is to award maximum 03 years of imprisonment, whereas since the petitioner has already undergone 2+ year's incarceration and the real beneficiary were Mahip Singh Saini and his wife Smt.Nirdosh Saini, and latter has already been granted bail.

13. I note learned Sessions Judge in his order dated 26.08.2010 has already recorded the submission of learned APP who opposed the bail application that the petitioner has impersonated as Charanjeet Singh and prepared an agreement. Thereafter, obtained arbitration award from Gorakhpur, UP. Pursuant to which, execution petition was also filed which was dismissed vide order dated 02.07.2010 by learned Civil Judge – 01, North, Delhi.

14. Learned Sessions Judge after recording the submission of learned counsel for petitioner, granted bail to the petitioner vide order, as mentioned above.

15. I note that in the impugned order, same learned Sessions Judge on the bail application of co-accused Mahip Singh Saini has also decided whether the bail granted to petitioner should be cancelled or not.

16. After hearing learned counsel for petitioner, learned District Judge has recorded in the impugned order that the petitioner was granted bail vide order dated 26.08.2010. It is also recorded that the bail application filed on behalf of co-accused Mahip Singh Saini and bail application No.605/2008 of the petitioner was dismissed by High Court and subsequently bail was granted to the petitioner by Sessions Court.

17. Learned District Judge has further recorded that at the time of bail order, the very important piece of evidence i.e. report of PW7 Senior Finger Print Expert was pointed out by prosecutor, which was not earlier argued and analysed. It has been confirmed by the expert witness that the thumb impression found on different documents were of petitioner who put the thumb impression as of Charanjit Singh/ Rajender. Learned District Judge has also recorded that as per the prosecution case, the petitioner appeared in different Courts under name of Charanjit Singh/ Rajinder, who was identified by co-accused Mahip Singh Saini. They forged the documents and were part of the conspiracy for obtaining the

possession of the immoveable property belonging to the complainant i.e. Naresh Kumar.

18. On the above discussion, learned District Judge was of the opinion that the report of the hand writing expert and also the fact that at the time of granting bail to the petitioner, it was argued on 26.08.2010 that the power of learned Magistrate is to award maximum punishment of three years and the petitioner was in custody for 2 + years, while in fact the trial was before learned ACMM, whose power is to award imprisonment for more than 03 years. And also one of the fact i.e. offence under Section 467 Indian Penal Code charged against the petitioner, which is punishable with life imprisonment. Accordingly, the bail granted to the petitioner on 26.08.2010 been cancelled.

19. Mr.Amarinder Saran, learned Senior counsel for petitioner has pointed out that in the bail application, upon which order dated 26.08.2010 has been passed, in the cause title it is clearly mentioned as under:-

> "FIR No.14/2005
> U/s 419/420/467/468/471/120-B IPC
> P.S.Model Town
> D.O.A. 12.02.2008"

Therefore, there was no concealment of the fact that the petitioner is being tried for the offence under Section 467 Indian Penal Code and same was in the knowledge of learned District Judge, at the time of passing the bail order.

20. He has further argued that the only submission which he fairly concedes that the punishment for the offence under Section 467 Indian Penal Code can go upto life imprisonment, however, if this was the submission of learned counsel for petition, then learned District Judge should have noticed that the case is under Section 467 Indian Penal Code.

21. He further submitted that this allegation alone cannot be ground for cancelling or taking away the bail which was granted by virtue of order passed way back on 26.08.2010, by issuing suo moto notice. It has been further argued that learned District Judge has no power to recall or rescind from his own order as same is barred under Section 362 Cr. P. C.

22. To buttress his argument, he has relied upon **Subhendu Mishra v. Subrat Kumar Mishra & Ors** 2000 SCC (Crl) 1508 wherein in para No.4, the observation made by the Apex Court in **Dolat Ram v. State of Haryana** 1995 (1) SCC 349 were reiterated as follows:-

> "Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are : interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court, it appears to us overlooked the distinction of the factors relevant for rejecting bail in a non-bailable case in the first instance and the cancellation of bail already granted."

23. Further, learned counsel for petitioner submits that there is no concealment of fact by petitioner. Any wrong submission of an advocate cannot be construed as concealment of facts by client. However, the petitioner has not concealed anything, rather he has mentioned each and every provision of offence alleged in the FIR against petitioner.

24. Mr.Navin Sharma, learned APP on the other hand submits that there is no infirmity in the impugned order passed by learned District Judge because of the fact that the petitioner had concealed the material facts and had misrepresented that learned Magistrate has the maximum power to inflict three years imprisonment and the petitioner had already undergone 2 + year's incarceration.

25. He further submitted that case was pending trial before learned Additional Chief Metropolitan Magistrate, Delhi who has the power to impose maximum imprisonment upto seven years, not before the

Metropolitan Magistrate.

26. Learned APP further, submitted that petitioner is the main culprit as he hatched the conspiracy and impersonated as Charanjit Singh / Rajender and prepared an agreement and thereafter obtained arbitration award from Gorakhpur, UP. Pursuant thereto, execution petition was also filed which was dismissed on 02.07.2010 by learned Civil Judge. However, pursuant to the execution petition, so dismissed, possession of the property had been received by the petitioner in the presence of Mahip Singh Saini, under the garb of Order XXI Code of Civil Procedure as the precept was got transferred to Delhi Courts from Gorakhpur, UP for execution.

27. By summing up his submission, learned APP submits that Section 362 Cr. P.C. does not preclude learned District Judge from passing the impugned order as that Section is only meant for that the Court not to alter its order or judgment, if that has been passed in disposing of a case.

28. In rejoinder, learned counsel for petitioner submits that bail order is not an interlocutory order and its final order; the considerations for cancelling the bail order are in total different than to granting of bail, therefore, learned District Judge should not have passed the impugned order.

29. I note that the grounds mentioned in the order while cancelling the bail of the petitioner, granted vide order dated 26.08.2010 on each and every fact. Both the learned counsel appearing in the matter argued and learned District Judge was aware of the fact that instant case is also under Section 467 Indian Penal Code also registered at police Station Model Town and being investigated by Crime Branch. The cases investigated by Crime Branch are usually tried only by the ACMM and not by the Magistrate. There was no concealment of the facts at the time of granting bail vide order dated 26.08.2010. Moreso, the petitioner has, already undergone 2 + years in custody and the maximum punishment if convicted by the ACMM would be 07 years.

30. Keeping the total period undergone by petitioner and the power of learned ACMM, I deem it appropriate to set aside the impugned order dated 07.12.2011, passed by learned District Judge.

31. Consequently, the bail order dated 26.08.2010 restored. Petitioner be released from custody on the earlier bail bond(s) and terms and

conditions, imposed earlier at the time of granting bail vide order dated 26.08.2010.

32. Copy of order be sent to the Jail Superintendent, for compliance.

33. Accordingly, Criminal Revision Petition No.559/2011 is allowed and stands disposed of.

34. In view of above order in the petition, Criminal M.A. No.19265/2011 for stay does not warrant any further adjudication. Accordingly, it stands disposed of.

35. *Dasti.*

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W.P. (C)

PRADEEP KUMAR SINGH ....PETITIONER

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(ANIL KUMAR & SUDERSHAN KUMAR MISRA, J.)

W.P. (C) NO. : 8213/2011 & CM NO. : 18510/2011 **DATE OF DECISION: 14.12.2011**

Constitution of India, 1950—Administrative Law—Dismissal from service—Petitioner appointed as constable—Declared as a proclaimed offender and departmental proceeding initiated against him alleging him to be a deserter on three different occasions—The petitioner contended that the charges of desertion were framed against him despite the knowledge of the respondents that the wife of the petitioner was unwell and was suffering from acute vulnerable diseases as Typhoid and Poly menherea leading to her abortion of two months pregnancy—The Enquiry officer, after considering the evidence which was produced during the enquiry proceedings and noting the fact that the petitioner did not appear despite an opportunity given to him, proceeded ex-parte against the petitioner and gave the findings that the charges against the petitioner were made out—The disciplinary authority accepted the report of the enquiry officer and awarded the punishment of dismissal from service after the petitioner failed to file reply to show cause notice given to the petitioner—Petitioner challenged his dismissal on the ground that throughout his service career from 2001 to 2006 there was no adverse entry in his service record and he had an unblemished record and the charges of desertion against him in the circumstances are false—He is the only earning member and his wife has been suffering from diseases since the year 2005 and, therefore, he had applied for leave which was not granted—Complete set of documents were not provided to him nor any show cause notice had been issued to him initiating departmental proceedings and charge sheet—Violated the principles of natural justice—Punishment of dismissal is disproportionate to the misconduct attributable to the petitioner. Held—Since the petitioner did not appear despite the notices sent to him, he cannot make any grievance about not receiving the copies of the documents which were produced during the enquiry proceedings—No grounds have been made on behalf of petitioner for setting aside the ex-parte proceedings—Petitioner remained absent from 2002 upto 2005 and again from April, 2006 to December, 2006 for various periods—No grounds disclosed by the petitioner showing sufficient cause for non appearance of the petitioner during November, 2006 and December, 2006 when notices were sent to him to appear before the enquiry officer—If the petitioner could not appear on account of alleged

medical condition of his wife, the petitioner should have replied to the allegations made against him—The enquiry officer, the disciplinary authority, appellate authority and the Revisional authority has noted the unauthorized absence of the petitioner—Petitioner has been absconding and deserting the service without any just and sufficient reason—In any case for whatsoever reason, if the leave of the petitioner was not sanctioned, the petitioner was not entitled to leave the service un-authorizedly.

Since the petitioner did not appear despite the notices sent to him, he cannot make any grievance about not receiving the copies of the documents which were produced during the enquiry proceedings. **(Para 13)**

The petitioner was proceeded ex-parte during the enquiry and in the present petition no grounds have been made on behalf of petitioner for setting aside the ex-parte proceedings. Rather, what transpires from the enquiry proceedings is that the petitioner remained absent from 2002 upto 2005 and again from April, 2006 to December, 2006 for various periods. There are no grounds disclosed by the petitioner which would show sufficient cause for non appearance of the petitioner during November, 2006 and December, 2006 when notices were sent to him to appear before the enquiry officer. If the petitioner could not appear on account of alleged medical condition of his wife, the petitioner should have replied to the allegations made against him. However, no copy of any reply alleged to have been sent by the petitioner has been produced except the copies of letter dated 31st August, 2006 and 4th December, 2006. The letter dated 31st August, 2006 is of the date prior to the show cause notice which had been issued to the petitioner and the letter dated 4th December, 2006 does not deal with anything regarding the charges made against him. Rather, in the letter dated 4th December, 2006 the petitioner sought release of his salary for eight months and requested to resolve his problem. The enquiry officer, the disciplinary

authority, appellate authority and the Revisional authority has noted the unauthorized absence of the petitioner. **(Para 14)**

Important Issue Involved: When the petitioner did not appear before the enquiry officer despite the notices sent to him, he cannot make any grievance about not receiving the copies of the documents which were produced during the enquiry proceedings.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ranjeet Kumar, Advocate.

FOR THE RESPONDENTS : Mr. Rajinder Nischal, Advocate.

CASES REFERRED TO:

1. *Life Insurance Corporation of India vs. R.Dhandapani,* AIR 2006 SC 615
2. *M.V.Bijlani* vs. *Union of India & Ors.* (2006) 5 SCC 88.
3. *Sangrila Food Production Ltd. & Anr.* vs. *Life Insurance Corporation of India & Anr.,* (1996) 5 SCC 54.
4. *Kerala Solvent Extractions Ltd.* vs. *A. Unnikrishnan and Anr.* MANU/SC/0885/1993: (1994) IILLJ888SC.

RESULT: Petition dismissed.

ANIL KUMAR, J.

CM No.18510/2011

Allowed subject to all just exceptions.

WP(C) No.8213/2011

1. The petitioner has sought quashing of order dated 18th July, 2007 dismissing him from the service and direction to the respondents to reinstate the petitioner into service without prejudice to any of his rights and contentions.

2. The petitioner has contended that he was posted at 176th Battalion CRPF when he was dismissed from service by order dated 18th July, 2007 passed by the Commandant, 176th Battalion, CRPF, Greater Noida. The petitioner alleged that he was appointed as constable and he had been performing his duties to the post to the best of his ability.

3. According to the petitioner, he was declared as a proclaimed offender and departmental proceedings were initiated against him. Article of Charges were framed against him alleging him to be a deserter on three different occasions. The petitioner contended that the charges of desertion were framed against him despite the knowledge of the respondents that the wife of the petitioner was unwell and was suffering from acute vulnerable diseases as Typhoid and Poly menherea which has led to her abortion of two months pregnancy.

4. The petitioner pleaded that his wife was in an acute physical disturbed state of mind and he had to be present besides her and no other family member was present to tackle the medical condition of his wife.

5. According to the petitioner, he had timely appraised his senior officer of his situation by letter dated 30th August, 2006. The petitioner has also relied on the letter dated 4th December, 2006 which was allegedly sent by the petitioner by registered post. The petitioner has produced the postal receipts in respect of the alleged letters, however, no registered acknowledgement due card has been produced nor any certificate from the postal authorities that the registered articles sent by the petitioner were served on the addressee.

The petitioner has also produced some of the medical records pertaining to his wife in support of his plea that his wife was allegedly suffering from certain ailments. The petitioner alleged that no show cause notice was given to him nor the copies of the documents were given to him and the enquiry officer by his report dated 4th April, 2007 had held that the charges against the petitioner were made out. During the enquiry, seven witnesses were examined in support of the charges that the petitioner absconded from duty during the period from 11th April, 2006 to 3rd June, 2006; 28th June, 2006 to 4th July, 2006 and 15th August, 2006 to 4th November, 2006 and from 11th April, 2006 till the date of the enquiry. During the enquiry proceedings, the respondents also relied on the record of the petitioner's absence from 13th July, 2003 to 17th October, 2003; 26th November, 2003 to 2nd December, 2003;

10th December, 2003 to 11th February, 2004; 19th July, 2005 to 1st September, 2005; 18th September, 2002 to 13th November, 2002; 19th March, 2002 to 22nd March, 2003 and 21st November, 2005 to 20th December, 2005.

7. The medical record produced by the petitioner of his wife in the present petition are the prescriptions dated 16th September, 2006; 17th November, 2006 and 21st November, 2006. The blood report and other body parameters of the wife of the petitioner has also been filed by the petitioner with the writ petition. The reports are of during the period November, 2006.

8. The enquiry officer, after considering the evidence which was produced during the enquiry proceedings and noting the fact that the petitioner did not appear despite an opportunity given to him, had proceeded ex-parte against the petitioner and after considering the documents and evidence on record gave the findings that the charges against the petitioner were made out.

9. The disciplinary authority, Commandant of 176 Battalion, CRPF, Greater Noida, accepted the report of the enquiry officer and awarded the punishment of dismissal from service after the petitioner failed to file reply to show cause notice given to the petitioner.

10. The petitioner preferred an appeal against the order dated 18th July, 2007 dismissing him from service before the DIG Range Headquarter who dismissed the appeal and upheld the order dated 18th July, 2007 by his order dated 19th March, 2009. Against the order dated 19th March, 2009, the petitioner filed a writ petition, being CWJC No.685/2010, before the High Court of Judicature at Patna which disposed of the writ petition with direction to the petitioner to avail the remedy of revision which was available to him under the CRPF Act. After the disposal of the petitioner's writ petition by order dated 23rd February, 2010, the petitioner filed a revision petition which was also dismissed by order dated 16th April, 2010. The petitioner has filed the present petition against his order of dismissal which has been sustained in the appeal and the revision filed by the petitioner.

11. The petitioner has impugned the order of his dismissal on the ground that throughout his service career from 2001 to 2006 there was no adverse entry in his service record and he had an unblemished record

and the charges of desertion against him in the circumstances are false. According to him, he is the only earning member and his wife has been suffering from diseases since the year 2005 and, therefore, he had applied for leave which was not granted. The petitioner has challenged his order of dismissal also on the ground that the complete set of documents were not provided to him nor any show cause notice had been issued to him initiating departmental proceedings and charge sheet. It is contended that in the circumstances the respondents have violated the principles of natural justice. The petitioner has also made the grievance that the enquiry officer concluded the enquiry proceedings within two months and that the punishment of dismissal is disproportionate to the misconduct attributable to the petitioner.

12. This Court has heard the learned counsel for the petitioner and Sh.Rajinder Nischal, Advocate for the respondents who had appeared on advance notice given to the counsel. From the record it has been pointed out that the petitioner was placed under suspension on account of his absence from the headquarter and the departmental enquiry was initiated on 2nd December, 2006 and letter No.P.Eight-1/06-RSJ was sent to the petitioner intimating him to appear for the preliminary hearing and for presenting any objection and comments in writing. The petitioner was granted time till 15th December, 2006, however, no reply was received from the petitioner. Another letter dated 17th December, 2006 was sent to the petitioner at his residential address. This is not disputed by the petitioner that the residential address in the record of the respondent is the correct address of the petitioner. The petitioner was asked to appear personally and to explain his position uptil 30th December, 2006, however, no reply was received from the petitioner. Since the petitioner was sent the notices at the address which is the correct address of the petitioner, the plea of the petitioner that he had not received any show cause notice cannot be accepted.

13. Since the petitioner did not appear despite the notices sent to him, he cannot make any grievance about not receiving the copies of the documents which were produced during the enquiry proceedings.

14. The petitioner was proceeded ex-parte during the enquiry and in the present petition no grounds have been made on behalf of petitioner for setting aside the ex-parte proceedings. Rather, what transpires from the enquiry proceedings is that the petitioner remained absent from 2002

upto 2005 and again from April, 2006 to December, 2006 for various periods. There are no grounds disclosed by the petitioner which would show sufficient cause for non appearance of the petitioner during November, 2006 and December, 2006 when notices were sent to him to appear before the enquiry officer. If the petitioner could not appear on account of alleged medical condition of his wife, the petitioner should have replied to the allegations made against him. However, no copy of any reply alleged to have been sent by the petitioner has been produced except the copies of letter dated 31st August, 2006 and 4th December, 2006. The letter dated 31st August, 2006 is of the date prior to the show cause notice which had been issued to the petitioner and the letter dated 4th December, 2006 does not deal with anything regarding the charges made against him. Rather, in the letter dated 4th December, 2006 the petitioner sought release of his salary for eight months and requested to resolve his problem. The enquiry officer, the disciplinary authority, appellate authority and the Revisional authority has noted the unauthorized absence of the petitioner.

15. Rather in the brief history given in the order dated 16th April, 2010 it has been highlighted that the petitioner had not reported on 26th March, 2006 in 176 Battalion. On 11th April,2006 he had been given local leave for one day, however, the petitioner did not appear for the roll call and he reported for duty thereafter on 3rd June, 2006 after 52 days from 12th April, 2006 to 2nd June, 2006 and remained absent without any justification and without availing the leave. A preliminary enquiry was, therefore, initiated and he was awarded the punishment by the Commandant of 176 Battalion of line arrest for seven days from 26th June, 2006 to 2nd July, 2006 along with packed drill for one hour daily without salary and allowance. Even during the line arrest the petitioner absconded and eloped from the line arrest on 28th June, 2006 and reported on 4th July, 2006 on his own. The petitioner thus did not complete the punishment awarded to him from 26th June, 2006 to 2nd July, 2006 nor the petitioner challenge the order of punishment imposed by the Commandant of 176 Battalion.

16. The petitioner again absconded during the line arrest on 15th August, 2006 entailing obstruction of his salary and allowance by letter dated 23rd August, 2006 to the office of the Company Commander. The petitioner was also sent a communication to be present on the date failing which legal action was to be taken against the petitioner. The petitioner

was sent another communication by the headquarter of the respondent by letter dated 9th September, 2006 to report for duty within five days and on failure of the petitioner to report for the duty, to initiate disciplinary action against him.

17. The petitioner did not report for duty and thereafter arrest warrants were issued against the petitioner. The petitioner thereafter reported on 4th November, 2006 and he was suspended by order dated 4th November, 2006. While the petitioner had reported for duty, memo dated 13th November, 2006 was given to the petitioner for departmental enquiry against him and he was asked to submit his reply within 10 days. However, the petitioner again absconded from the camp on 11th November, 2006 after the initiation of departmental enquiry. The enquiry officer also sent the communication dated 2nd December, 2006 and 17th December, 2006 at the residential address of the petitioner by registered post asking him to come and participate in the enquiry till 30th December, 2006. On failure of the petitioner to appear before the enquiry officer, ex-parte proceedings were initiated against him under Section 14 of CCS/CCA Rules.

18. From the record it is also apparent that copy of the enquiry report was sent to the petitioner by letter dated 22nd May, 2007 by registered post and the petitioner was given time to file the reply within 15 days. The petitioner, however, did not file any reply and consequently the enquiry report was considered by the disciplinary authority and accepted and the punishment of dismissal from service was awarded.

19. The learned counsel for the petitioner in the facts and circumstances has not been able to substantiate that the petitioner was not given any show cause notice or that the petitioner has an unblemished record. The petitioner has not been able to show sufficient cause for his non appearance and for setting aside the ex parte enquiry proceedings initiated against him. From the record it is apparent that the petitioner has been absconding and deserting the service without any just and sufficient reason. In any case for whatsoever reason, if the leave of the petitioner was not sanctioned, the petitioner was not entitled to leave the service un-authorizedly.

20. Learned counsel for the petitioner has also contended that the punishment of dismissal awarded to the petitioner is disproportionate to his alleged misconduct of leaving the service without getting his leave

sanctioned as his wife was seriously ill and there was no one to look after her. The petitioner was in a disciplined force and he could not leave the service till sanctioning of his leave. Though the petitioner has produced the copies of medical report of his wife for November, 2006, however, he had been absenting for different periods from 2003 for which he has not even given any explanation and has rather contended that he had unblemished record. The pleas and contentions raised by the petitioner cannot be accepted in the facts and circumstances.

21. It has been held by the Supreme Court that the relief granted by the Courts should be legal and tenable within the frame work of law and should not incur and justify the criticism that the jurisdiction of the Courts tend to degenerate into misplaced sympathy/generosity and private benevolence. The Supreme Court in **Life Insurance Corporation of India Vs. R.Dhandapani,** AIR 2006 SC 615 has held as under:-

> "9. In recent times, there is an increasing evidence of this, perhaps well-meant but wholly unsustainable, tendency towards a denudation of the legitimacy of judicial reasoning and process. The reliefs granted by the Courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the Courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability. [See: **Kerala Solvent Extractions Ltd. v. A. Unnikrishnan and Anr.** MANU/SC/0885/1993: (1994) IILLJ888SC.]"

The petitioner in the facts and circumstances is not entitled for any relief on the ground that his wife was seriously ill and that there was no one to look after her.

22. In exercise of its jurisdiction under Article 226 of the Constitution of India, it has always been the discretion of the High Court to interfere or not to interfere depending upon the facts and circumstances of the

case. In **Sangrila Food Production Ltd. & Anr. v. Life Insurance Corporation of India & Anr.,** (1996) 5 SCC 54, it was held that the court in exercise of its jurisdiction can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give a party complete and substantial justice. The jurisdiction of the High Court, in exercise of its extraordinary jurisdiction, is normally exercisable keeping in mind a principle of equity. Regarding the scope of judicial interference, it was held that in (2006) 5 SCC 88, **'M.V.Bijlani v. Union of India & Ors.'** that the judicial review is of the decision making process and it is not the re-appreciation of the evidence. The Supreme Court had held at page 95 as under;-

> "It is true that the jurisdiction of the Court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

23. The learned counsel for the petitioner is unable to show any procedural lapses in conducting the enquiry and awarding of punishment by the disciplinary authority after copy of the enquiry report was sent to the petitioner. The petitioner has not been able to make out sufficient cause for his non appearance before the enquiry officer despite notice to him. The petitioner has not satisfactorily explained his act of abandoning his service and remaining absent without leave on many occasions.

24. In the totality of facts and circumstances, the learned counsel for the petitioner has not been able to show any such illegality, irregularity or such perversity in the order of the respondent dismissing the petitioner from service which would require interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

25. The writ petition in the facts and circumstances is without any merit and it is, therefore, dismissed.

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W.P. (C) (PIL)

ASSOCIATION OF METRO COMMUTERS & ANR. ....PETITIONERS

VERSUS

DELHI METRO RAIL CORPORATION & ORS. ....RESPONDENTS

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

W.P. (C) (PIL) NO. : 8675/2011 DATE OF DECISION: 14.12.2011

Constitution of India, 1950—Article 32—Public Interest Litigation—Petitioner alleged misuse of land by DMRC allotted to it for Vishwa Vidhyalaya Metro Station by allowing construction of residential units thereon by respondent no. 4 while the said land was earlier being used for purposes of parking vehicles by the Metro commuters—Documents filed by petitioner show that it was registered as a society barely a couple of months before filing the petition and there is nothing to show as to how many and who are its members or that it has been incorporated to protect the interest of Metro commuters or that opportunity was given to Metro commuters to become members—Documents also show that construction of residential units commenced in the year 2007, if not earlier after the government accorded permission to DMRC to generate resources through development on the transferred land—Held, often it is found that the petitions in

public interest are filed out of commercial rivalry and /or oblique motives, so in the absence of material to show that petitioner is representative of Metro commuters, Court not inclined to entertain this petition and which may ultimately adversely effect development and functioning of Metrorail.

Even otherwise, we find the said residential development to which objection is taken, having commenced at least in the year 2007 if not earlier i.e. four years prior hereto and the agreement of the respondent No.1 DMRC with the respondent No.4 Young Builders Pvt. Ltd. is also of 15.12.2008. From the documents filed by the petitioner itself, we also find the Government of India to have accorded permission to the respondent No.1 DMRC to generate resources through development on the land transferred to it by the Government and sanction having been accorded as far back as in 2007 by the DDA for the said residential development at Vishwa Vidhyalaya MRTS metro station. There is thus nothing before us as to show that there is any irregularity in the actions with respect whereto the petition is filed. We as aforesaid, are not satisfied as to the bona fides of the petitioner either. Often it is found that the petitions in public interest are filed out of commercial rivalry and / or other oblique motives. The Supreme Court in **Kushum Lata Vs. UOI** 2006 (7) SCALE 41 & **Dr. B. Singh Vs. UOI** AIR 2004 SC 1923 has warned against allowing such misuse of public interest litigations. Without the petitioner placing anything before this Court that it is representative of the Metro commuters, we are not inclined to entertain this petition and which may ultimately have the effect of adversely affecting the development and functioning of the Metrorail and its commuters. **(Para 7)**

Important Issue Involved: The petitions in public interest which are filed out of commercial rivalry and/or oblique motives. are not to be entertained.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Aruneshwar Gupta with Mr. Manish Raghav & Mr. Nikhil Singh, Advocates.

FOR THE RESPONDENTS : Mr. A.S. Rao, Advocate for R-1 Mr. Jatan Singh, Advocate For R-3/UOI.

CASES REFERRED TO:

1. *Narmada Bachao Andolan* vs. *State of Madhya Pradesh* 2011 (5) SCALE 624.
2. *Kushum Lata* vs. *UOI* 2006 (7) SCALE 41.
3. *Dr. B. Singh* vs. *UOI* AIR 2004 SC 1923.

RESULT: Petition dismissed.

RAJIV SAHAI ENDLAW, J.

1. This petition, filed in Public Interest, claims the following reliefs:

> "A. Issue writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing Respondent No.1 to 3 to restore the original parking space at Vishwa Vidhyalaya Metro Station.
>
> B. Issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction to Respondent No.1 to 3 not to increase the parking rates at Vishwa Vidhaylaya Metro Station from Rs. 175;
>
> C. Issue writ of Certiorari or any other writ in nature of certiorari or any other order or direction calling for records of the case and after going into legality and validity of the tender allocated for residential and commercial development at Vishwa Vidhyalya to Respondent No.2 by Respondent No.1 quash and set aside the same."

2. The petitioner claims to be a Society. However, the documents filed by the petitioner show the petitioner to have been registered as a Society only on 03.10.2011 i.e. barely a couple of months before filing of this petition. There is also nothing to show as to how many and who are the members of the petitioner. There is thus nothing to show that the

petitioner has been incorporated (even the memorandum of the petitioner has not been filed) to protect the interest of the Metro commuters, as its name suggests, or that it represents the Metro commuters. There is also nothing to show that any opportunity was given to the Metro commuters to become the member of the petitioner or that what is canvassed by the petitioner in this petition is the view of or in the beneficial interest of the majority of the Metro commuters.

3. The petitioner alleges misuse by the respondent No.1 Delhi Metro Rail Corporation (DMRC) of the land allotted to it for Vishwa Vidhyalaya MRTS metro station by allowing construction thereon of residential units by the respondent No.4 Young Builders Pvt. Ltd. It is the plea of the petitioner that the land where the construction of the residential units has been permitted was earlier being used for purposes of parking of vehicles of the Metro commuters and the parking space has been considerably reduced owing to the construction being permitted. It is further contended that as per the order dated 30.03.2009 of the MRTS Cell of the Ministry of Urban Development of the Government of India, the land allotted to the respondent No.1 DMRC is not to be "normally" leased out for residential development. The petition as aforesaid also takes exception to the increase affected in the parking charges.

4. We have enquired from the counsel for the petitioner as to what is the use shown in the Master / Zonal Plan of the land use whereof is stated to have been converted from parking to for construction of residential units. The counsel for the petitioner states that neither he nor the petitioner has examined the said aspect and an enquiry in this regard be commenced by issuing the notice of the petition.

5. We have next enquired from the counsel whether the revenues of the respondent No.1 DMRC are not intended to be augmented from such developments and as to how prohibiting such development by the respondent No.1 DMRC would impact the commuter fare fixed by the Metro. Judicial notice is taken of the respondent No.1 DMRC having developed shopping / commercial malls / spaces at several metro stations in Delhi and having huge earning therefrom. We have as such enquired from the counsel whether, if the earnings of the respondent No.1 DMRC were to be only from the fare collected from the commuters, the fares would multiply manifold. The counsel again states that the petitioner has not studied the said aspect either. He however submits that for the fear

of the unknown, this Court should not restrain from entertaining this petition.

6. We are unable to agree. A person who brings a lis before the Court, even in public interest, is required to, unless the facts speak for themselves, satisfy the Court as to the illegality in the actions of the State / public body affecting the public interest. A petitioner, even in a Public Interest Litigation cannot seek commencement of a roving and fishing inquiry. It was so held in **Narmada Bachao Andolan Vs. State of Madhya Pradesh** 2011 (5) SCALE 624. A litigant who is unwilling to collect / gather facts, which in today's transparent regime are available on the asking, cannot be allowed to waste the time of the Court.

7. Even otherwise, we find the said residential development to which objection is taken, having commenced at least in the year 2007 if not earlier i.e. four years prior hereto and the agreement of the respondent No.1 DMRC with the respondent No.4 Young Builders Pvt. Ltd. is also of 15.12.2008. From the documents filed by the petitioner itself, we also find the Government of India to have accorded permission to the respondent No.1 DMRC to generate resources through development on the land transferred to it by the Government and sanction having been accorded as far back as in 2007 by the DDA for the said residential development at Vishwa Vidhyalaya MRTS metro station. There is thus nothing before us as to show that there is any irregularity in the actions with respect whereto the petition is filed. We as aforesaid, are not satisfied as to the bona fides of the petitioner either. Often it is found that the petitions in public interest are filed out of commercial rivalry and / or other oblique motives. The Supreme Court in **Kushum Lata Vs. UOI** 2006 (7) SCALE 41 & **Dr. B. Singh Vs. UOI** AIR 2004 SC 1923 has warned against allowing such misuse of public interest litigations. Without the petitioner placing anything before this Court that it is representative of the Metro commuters, we are not inclined to entertain this petition and which may ultimately have the effect of adversely affecting the development and functioning of the Metrorail and its commuters.

8. We therefore dismiss this petition, refraining ourselves from imposing any costs on the petitioner.

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RFA

RAKESH RAWAT & ANR. ....APPELLANTS

VERSUS

RAJESH KUMAR RAWAT & ORS. ....RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA NO. : 411/2010 DATE OF DECISION: 15.12.2011

Code of Civil Procedure, 1908—Partition—Preliminary decree passed by trial Court ascertaining respective shares of parties, not challenged—Local Commissioner appointed by trial Court who gave a report, but the same rejected due to dissatisfaction expressed by both parties—Thereafter, parties agreed to arriving at valuation of the suit property by inter se bidding, in which plaintiff offered higher bid than defendant, who did not raise his bid despite several opportunities—Trial Court passed Final Decree, determining the value payable by the plaintiff to the defendants—Appeal—Appellant's contention that preliminary decree wrongly determines shares of parties rejected on the ground that since the appellant never appealed against the preliminary decree, the same has now become final—Appellant's other contention that final decree could be passed only after obtaining valuation report of the property also rejected, holding that valuation report is one of the methods of determining the value of the suit property for the purposes of passing final decree, but that is only one of the methods and inter se bidding by the parties is also one of the well recognized methods, so appellants having agreed to inter se bidding and having lost in the same, cannot now object.

The last argument which was urged on behalf of the appellants was that there could not have been passed a final decree unless a valuation report was called for so as to determine the value of the properties. Of course finding out the value of a property through a valuation report is one of the methods of determining value of property, however, inter se bidding between the parties to a suit is also a well recognized mode for arriving at the value of the properties, more so, when this is an agreed inter se bidding procedure. The appellants having agreed to the inter se bidding procedure, and having lost out in the bidding by offering a lower amount of Rs. 25,000/- per sq. yd. instead of Rs. 30,000/- per sq. yd. which was offered by the respondent No.1/ plaintiff, therefore, now cannot object to the final decree by urging that the valuation report should have been called for before passing of the final decree. I, therefore, reject this argument urged on behalf of the appellants / defendants that the final decree could only have been passed after valuation report of the property was filed for the value to be arrived at.

(Pare 8)

Important Issue Involved: Valuation report is one of the methods of determining the value of the suit property for the purposes of passing final decree, but that is only one of the methods and inter se bidding by the parties is also one of the well recognized methods.

[Gi Ku]

APPEARANCES:

FOR THE PETITIONER : Ms. Purnima Sethi, Advocate.

FOR THE RESPONDENT : Mr. Ramesh Kumar, Advocate for Respondent No. 1. Ms. Latika Choudhary, Advocate for Respondent No. 3.

CASES REFERRED TO:

1. *Ramrameshwari Devi & Ors.* vs. *Nirmala Devi & Ors.,*

(2011) 8 SCC 249.

2. *State of Maharashtra* vs. *Ramdass Srinivas Nayak,* AIR 1982 SC 1249.

RESULT: Appeal dismissed

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 29.5.2010 passing a final decree determining the value which shall be payable by the respondent No.1 / plaintiff to the appellants / defendants. The preliminary decree declaring shares of the parties in the various properties was passed earlier vide judgment and decree dated 1.5.2009, and which judgment admittedly has become final because the same was never challenged by any of the parties.

2. By the preliminary decree dated 1.5.2009 a decree was passed declaring the respondent No.1/plaintiff as entitled to 4/6th share in the first suit property i.e. D-63/1, Vijay Colony, Near Usmanpur, 3rd Pusta, Shastri Park, Delhi – 110053. The respondent No.1 / plaintiff was also held entitled to a 2/3rd share in the second suit property i.e. D-75, Vijay Colony, Near Usmanpur, 3rd Pusta, Shastri Park, Delhi – 110053. The appellants / defendant Nos. 1 and 2 were entitled to 1/6th share in the first property and 1/3rd share in the second property. In the second property only the defendant No.2 was held entitled to 1/3rd share in the property.

3. A local commissioner was appointed after passing of the preliminary decree, however, in view of the dissatisfaction of both the parties to the report of the local commissioner, the report of the local commissioner was rejected by the court vide order dated 26.5.2010.

4. The parties, thereafter, in the present case agreed to the modality of arriving at the value of the suit property by inter se bidding. As per the inter se bidding, the respondent No.1 / plaintiff offered an amount of Rs. 30,000/- per sq. yd. for both the properties, but the appellants / defendants only offered a sum of Rs. 25,000/- per sq. yd. This offer of Rs. 5,000/- per sq. yd. was not increased by the appellants in spite of opportunities given by the trial court.

5. Learned counsel for the appellants argued before this Court the following aspects for allowing the appeal:

(i) The preliminary decree wrongly determines the shares of the parties.

(ii) The trial court has wrongly recorded the aspect as to the inter se bidding, and the facts as stated in the impugned judgment does not state the correct factual position, inasmuch as there was no actual bidding. It is also argued that the order was passed in haste without giving sufficient opportunity to the appellants.

(iii) Lastly, it was argued that as per various judgments of Supreme Court valuation of the property ought to have been arrived at and only after a valuation is arrived at through the valuer's report, and only on the basis of such valuation could the final decree have been passed.

6. So far as the first point of argument of challenging the preliminary decree is concerned, this argument is wholly misconceived inasmuch as a preliminary decree is as much a judgment and decree as a final judgment and decree, and if the appellants were aggrieved in any manner by the preliminary judgment and decree dated 1.5.2009 declaring the respective shares of the parties, then, such judgment and decree which was appealable ought to have been appealed from. Admittedly, till date neither the appellants, nor the respondent No.3 who is supporting the appellants, have challenged the preliminary judgment and decree. Therefore, I reject the argument raised on behalf of the appellants by seeking to challenge the preliminary judgment and decree dated 1.5.2009 in a challenge which is now laid against the final judgment and decree dated 29.5.2010.

7. The second argument which is urged on behalf of the appellants is that the trial court has wrongly recorded as a matter of fact that there was inter se bidding. It is also argued that the order was passed in haste without giving any opportunity to the appellants.

I am indeed surprised and pained at this unfortunate argument which is being urged on behalf of the appellants through their counsel and which is totally against the factual aspects which have been stated in the impugned final judgment and decree. I may note that Supreme Court right from the judgment in the case of **State of Maharashtra v.**

Ramdass Srinivas Nayak, AIR 1982 SC 1249 has held that if in case a factual narration as to what transpired during the hearing is wrongly recorded in judicial proceedings, then, the only way to get such factual aspects allegedly wrongly recorded, corrected, is by immediately approaching the concerned court which has recorded the factual aspects after the order/judgment is passed. If the matter is not brought to the notice of the concerned court when the matter is fresh in the mind of the said court immediately after it being recorded, by moving of an application seeking correction of the record, then, the matter must necessarily end there and it is not open to a party in an appeal to canvass that factual aspects which are stated in a judicial order have been wrongly recorded by the court. This judgment of the Supreme Court in the case of **Ramdass Srinivas Nayak** (supra) has been followed thereafter in at least over a dozen reported judgments. Admittedly, the appellants have not filed any application till date before the trial court challenging the factual aspects as narrated in the order, and therefore, it is really a sorry state of affairs that unnecessary and expansive arguments are being made against judicial record, and, which in fact in my opinion borders on contempt of court. I, therefore, reject the argument that the trial court judgment / impugned judgment does not correctly factually record the narration of facts with regard to the appellants only offering Rs. 25,000/- per sq. yd. and the respondent No.1 / plaintiff offering Rs. 30,000/- per sq. yd. with respect to the properties for being purchased by inter se bidding. I may note that counsel for the respondent No.1 has brought to my attention the fact that the trial court has recorded that enough opportunities were given to the appellants / defendants to increase their offer, but they failed to do so.

8. The last argument which was urged on behalf of the appellants was that there could not have been passed a final decree unless a valuation report was called for so as to determine the value of the properties. Of course finding out the value of a property through a valuation report is one of the methods of determining value of property, however, inter se bidding between the parties to a suit is also a well recognized mode for arriving at the value of the properties, more so, when this is an agreed inter se bidding procedure. The appellants having agreed to the inter se bidding procedure, and having lost out in the bidding by offering a lower amount of Rs. 25,000/- per sq. yd. instead of Rs. 30,000/- per sq. yd. which was offered by the respondent No.1/ plaintiff, therefore, now

cannot object to the final decree by urging that the valuation report should have been called for before passing of the final decree. I, therefore, reject this argument urged on behalf of the appellants / defendants that the final decree could only have been passed after valuation report of the property was filed for the value to be arrived at.

9. In view of the above, there is no merit in this appeal, which is accordingly dismissed with costs of Rs. 20,000/- and which shall be paid within a period of two weeks from today. The Supreme Court in the recent judgment of **Ramrameshwari Devi & Ors. v. Nirmala Devi & Ors.,** (2011) 8 SCC 249 has observed that it is high time that actual and realistic costs be imposed. I am also empowered to impose actual costs in terms of **Volume V of the Punjab and Haryana High Court Rules and Orders (as applicable to Delhi) Chapter VI Part I Rule 15.**

10. The appeal is accordingly dismissed. By the impugned judgment respondent No.1 was given one month's time to pay the amount as per the rate of Rs. 30,000/- per sq. yd., and since the impugned judgment was stayed during the pendency of this appeal, the respondent No.1 / plaintiff is now granted time upto 31.1.2012 to abide by the directions with regard to payment as contained in the impugned judgment.

CM No.11267/2010 (u/O 41 R 27)

Dismissed as not pressed.

ILR (2012) II DELHI 183
RFA

WELL PROTECT MANPOWER SERVICES PVT. LTD. **....APPELLANT**

VERSUS

COMMISSIONER MUNICIPAL CORPORATION OF DELHI & ANR. **....RESPONDENTS**

(J.R. MIDHA, J.)

RFA NO. : 394/2010 **DATE OF DECISION: 16.12.2011**

Delhi Municipal Corporation Act, 1957—Sec. 478 (2)—Plaintiff had three agreements with the defendants for watch & ward (security) under which defendant paid some money after making deductions on account of loss on account of theft in the properties—Plaintiff's suit for recovery of money dismissed by Trial Court on the ground that the suit was instituted beyond the period of six months provided under Sec. 478 (2) of the Act—Appeal—Held, test for applying the period stipulated under Sec. 478 (2) of the Act is whether the Act was done in statutory capacity or the act has been performed under the colour of statutory duty—Since in the present case the deductions done by the defendant were under an agreement and not under the statute, the suit could not be held time barred by invoking Sec. 478(2).

The principles laid down by the Courts in the aforesaid judgments are summarised as under:-

Section 478(2) of the Delhi Municipal Corporation Act provides for a limitation of six months in respect of any act done or purported to have been done in pursuance of the provisions of the Act or any rule, regulation or bye-law made

thereunder. The test to be applied for such determination is: Whether the act was done in statutory capacity or has the act been performed under the colour of statutory duty? Section 478(2) shall apply, if the act is done or purported to have been done in pursuance of the provisions of the Act or any rule, regulation or bye-law made thereunder.

(Para 7)

Important Issue Involved: Test for applying the period stipulated under Sec. 478(2) of the Act, is whether the act was done in statutory capacity or the act has been performed under the colour of statutory duty.

[Gi Ku]

APPEARANCES:

FOR THE APPELLANT : Mr. Tarkeshwar Nath and Mr. Saurabh Kumar Tuteja Advocate.

FOR THE RESPONDENT : Ms. Mansi Gupta Advocate for R-1.

RESULT: Appeal allowed.

J.R. MIDHA, J.

1. The appellant instituted a suit for recovery of Rs. 8,59,743/- against the respondent towards the balance amount payable under the three agreements.

2. The learned Trial Court dismissed the suit on the ground that it has been instituted beyond the period of limitation of six months provided in Section 478(2) of the Delhi Municipal Corporation Act, 1957.

3. The appellant has challenged the judgment of the learned Trial Court on the ground that the suit does not fall within the ambit and scope of Section 478 of the Delhi Municipal Corporation Act. It is submitted that the period of limitation for filing of the instant suit is three years under the Limitation Act. It is submitted that the cause of action for instituting the suit arose in October, 2005 and the suit was instituted within two and a half years of the said cause of action and, therefore, the suit was within the limitation.

4. Section 478(2) of the Delhi Municipal Corporation Act provides for a period of limitation of six months in respect of suits relating to any act done or purported to have been done in pursuance of the Act or under any rule, regulation or bye-law made thereunder. Section 478 of the Delhi Municipal Corporation Act is reproduced hereinbelow:-

"478. **Notice to be given of suits. -**

(1) No suit shall be instituted against the Corporation or against any municipal authority or against any municipal officer or other municipal employee or against any person acting under the order or direction of any municipal authority or any municipal officer or other municipal employee, in respect of any act done, or purporting to have been done, in pursuance of this Act or any rule, regulation or bye-law made thereunder until the expiration of two months after notice in writing has been left at the municipal office and, in the case of such officer, employee or person, unless notice in writing has also been delivered to him or left at his office or place of residence, and unless such notice states explicitly the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of residence of the intending plaintiff, and unless the plaint contains a statement that such notice has been so left or delivered.

(2) No suit, such as is described in sub-section (1), shall unless it is a suit for the recovery of immovable property or for a declaration of title thereto, be instituted after the expiry of six months from the date on which the cause of action arises.

(3) Nothing in sub-section (1) shall be deemed to apply to a suit in which the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the institution of the suit."

5. The learned counsel for the appellant has referred to and relied upon the following three judgments:-

(i) In **Municipal Corporation of Delhi v. Sushila Devi,** 1999 (4)

SCC 317, the branch of a dead roadside tree fell down resulting in the death of a person whose legal representatives instituted a suit for recovery of damages against the Municipal Corporation. The Supreme Court rejected the plea of the Municipal Corporation that the suit was barred by limitation provided in Section 478 of the Delhi Municipal Corporation Act. It was held that the suit would be governed by the Limitation Act. The findings of the Supreme Court are as under:-

"6. A bare reading of Section 478(1) shows that its applicability is attracted to a suit filed 'in respect of any act done or purporting to have been done' in pursuance of the Act or Rules, Regulations or Bye-laws made thereunder. The learned counsel for the Corporation submitted that an act includes an omission as well. The Court has found an omission on the part of the Municipal Corporation in discharging its duty to take care and therefore under Sub-section (2) the limitation for filing the suit was six months from the date of accrual of cause of action, i.e., 18th and 19th August, 1964.

7. The contention has to be rejected forthwith. The bundle of facts constituting the cause of action which has accrued to the claimants are -the ownership and possession of the tree vesting in the Corporation, its maintenance by the Corporation, fall of the branch of the tree over the deceased and the death consequent to the injury sustained. **The causa proxima, i.e., the immediate cause of action is the fall of the branch of the tree over the head of the deceased. The fall of the branch of the tree cannot be attributed to any act done or purporting to have been done in pursuance of the Act etc. by the Municipal Corporation or any officer or employee thereof. The liability has arisen and has been sought to be enforced by the claimants under the law of torts. The finding recorded in the suit and in the Letters Patent Appeal is one of negligence on the part of the Municipal Corporation. To such an action Section 478 does not apply at all.** The suit filed within a period of two years from the date of accrual of cause of action was governed by Article 82 of the Limitation Act, 1963 and was well within limitation. The plaintiffs' action was founded in tort. The plaintiffs have not rested their case on any statutory duty on the part of the Corporation and failure or negligence in performing

such duty."

(Emphasis Supplied)

(ii) In **M/s Niagra Hotels & Builders (P) Ltd. v. Union of India & Ors.,** 65 (1997) DLT 826, a suit for recovery of excess amount of duty on transfer of property was resisted by the Municipal Corporation on the ground that it was filed beyond the period of limitation under Section 478(2) of the Delhi Municipal Corporation Act. It was held that the suit was not in respect of any act done or purported to have been done in pursuance to the provisions of the Act or any rule, regulation or bye-law made thereunder but was for recovery of excess amount of duty on transfer of property collected by the Municipal Corporation and, therefore, the same would be governed by the normal law of limitation applicable to the filing of such suit which is three years. The relevant findings of this Court are as under:-

"10.2.The above contention of the defendant MCD, in my opinion, is not tenable on the short ground that the limitation of six months, prescribed in Section 478(2) of the Act, is applicable only in respect of those suits which fall within the ambit and scope of Section 478(1) of the Act, namely, filed in respect of any act done, or purported to have been done in pursuance of the Act or any rule, regulation or bye-law made thereunder. The nature of the present suit, filed by the plaintiff, is decidedly not such so as to fall within the ambit and scope of Section 478(1) of the Act because the present suit filed by the plaintiff is for the recovery of the amount which has been charged as duty on transfer of property in excess of the amount payable under the provisions of Section 147(2)(b)(v) of the Act."

"10.4. A similar question with regard to the scope of Section 478(2) of the Act also came up for consideration of this Court in case **The Municipal Corporation of Delhi v. The Delhi Stock Holders (I & S) Association Limited,** (RSA No. 327D/1962 decided on 25.1.72). In the abovesaid case, this Court, relying on the abovesaid decision of the Supreme Court and also on an another decision of the Supreme Court in case **Tilok Chand Moti Chand v. H.B. Munshi** [(1969) 2 SCR 8241] has held that in such like cases, not covered within the ambit and scope of Section 478(1) of the Act, the period of limitation for

filing the suit would not be governed by the provisions of Section 478(2) of the Act and the period of limitation in such like cases, would be three years as provided under the normal law of limitation governed by the Limitation Act, 1963.

10.5. As already stated, the present suit filed by the plaintiff-Company is not in respect of any act done or purported to have been done in pursuance of the provisions of the. Act or any rule regulation or bye-law made thereunder, but the same is for the recovery of the excess amount of duty on transfer of property, collected by the defendant MCD and thus, in my opinion, the period of limitation for filing the present suit, in the facts and circumstances of the present case, would not be governed by Sub-section (2) of Section 478 of the Act and the same would governed by the normal law of limitation, applicable to the filing of such like suits, which is three years. ..."

(Emphasis Supplied)

(iii) In **DTC v. Beant Kaur,** 1988 ACJ 463, this Court held that Section 478 of the Delhi Municipal Corporation Act has no application to a claim for compensation filed under the Motor Vehicles Act. The relevant findings of this Court are as under:-

"(6) ... A notice under Section 478 would be necessary only when an action is questioned under the Act. The accident does not relate to any of the statutory functions of the appellant under the Act and, therefore, in my opinion, a claim petition cannot be dismissed for want of notice under Section 478 of the Delhi Municipal Corporation Act. It is not necessary to serve such a notice before filing a petition under Section 110-A of the Act." (Emphasis Supplied)

6. The learned counsel for the respondent has referred to and relied upon the judgment of this Court in the case of **Shri G.C. Sharma v. Municipal Corporation of Delhi,** ILR (1979) 11 Delhi 771. This Court held a suit for recovery of damages arising out of the cancellation of licence of an Architect to be barred by Section 478 of the Delhi Municipal Corporation Act because the licence was cancelled in pursuance of the Act. The findings of this Court are as under:-

"9. The power to grant, suspend and revoke a license is contained in S. 430 of the Act. It provides that license may be granted by the Commissioner or by an officer empowered to grant the same on payment of fees. The Commissioner or the officer by whom the license is granted is also given power to suspend or revoke the license.

10. Was the Corporation in cancelling the license acting or purporting to act in pursuance of the Act? That is the question. The trial judge answered the question in the affirmative, and I think that he was right in so doing.

11. The words "in respect of any act done, or purporting to have been done, in pursuance of this Act" are of capital significance. These words are wider than words such as 'done or intended to be done' used in other enactments. The words "act done or purporting to have been done" are the most comprehensive words. The word "purporting" covers a profession by acts or by word or by appearance of what is true as well as what is not true. (**Koti Reddi v. Subbian,** AIR 1918 Mad. (FB) 62."

"23. These are words of great weight and authority. They directly apply to this case. **The test, therefore, is : Was the act done in statutory capacity or private capacity? Or to put it in other words : Has the act been performed under colour of a statutory duty ? (Secy. of State v. Lodna Colliery, AIR 1936 Pat. 513 (517) (11). If it is done or is professed to be done in pursuance of the enactment the statute will afford the protection.** As Mahajan J. tersely put it, "It is not necessary that the act should be directly justifiable under the enactment, as this would reduce the protection to a mere nullity." (Mohd. Sadaat Ali v. Administrator, Corporation of City of Lahore, AIR 1945 Lahore 324 (330) (FB) (12). A person acting under statutory powers may erroneously exceed the powers given by a statute yet he is acting or purporting to act in pursuance of the statute. (Halsbury 3rd (Simond's) ed. Vol. 24 Para 340 p. 188). In strictness, anything not authorised by a statute cannot be in "pursuance" of it, whilst if authorised it would need no other protection. But the statute affords protection even when an

actionable wrong has been committed. Such is the significance of the word 'purporting' used in the section. The ordinary right of the subject to his remedy is cut down by stringent provisions as to time and notice of action.

24. The object of such a provision as S. 438 is to afford protection to persons acting in pursuance of the enactment against belated claims. A short period of limitation is, therefore, provided. The protection afforded by s. 478 is not an absolute protection. It does not bar suits, but only requires that they must be brought within six months. Its effect is to limit, as against the general public and in favor of certain persons, the period for bringing actions already fixed by the law of limitation. It is a restriction of the ordinary right of the subject."

(Emphasis Supplied)

7. The principles laid down by the Courts in the aforesaid judgments are summarised as under:-

Section 478(2) of the Delhi Municipal Corporation Act provides for a limitation of six months in respect of any act done or purported to have been done in pursuance of the provisions of the Act or any rule, regulation or bye-law made thereunder. The test to be applied for such determination is: Whether the act was done in statutory capacity or has the act been performed under the colour of statutory duty? Section 478(2) shall apply, if the act is done or purported to have been done in pursuance of the provisions of the Act or any rule, regulation or bye-law made thereunder.

8. In the present case, the appellant had three agreements with the respondents for watch and ward (security) of the properties of the corporation. The respondent made the payment of Rs. 23,10,711/- to the appellant after deducting Rs. 8,59,743/- towards the loss on account of the theft in the properties. The respondent has made deduction of Rs. 8,59,743/- under the agreements and not in pursuance of the Act or under any rule, regulation or bye-law made thereunder. The rights and obligations of the parties shall be governed by the agreements between them. The deduction has not been done in statutory capacity or under the colour of a statutory duty. Section 42(w) read with Section 201 would not make the acts done by the respondent under the agreements to be statutory. As held by the Supreme Court in **MCD v. Sushila Devi**

(supra), the causa proxima i.e. immediate cause of action is the deduction on account of the loss suffered by the Municipal Corporation due to the theft. The deduction cannot be attributed to any act done or purporting to have been done in pursuance of the Act or any rule, regulation or bye-law made thereunder. The findings of the learned Trial Court are contrary to the well settled principles laid down by the Supreme Court in the case of **MCD v. Sushila Devi** (supra).

9. In the facts and circumstances of this case, the appeal is allowed and the judgment of the learned Trial Court is set aside. Since the learned Trial Court has dismissed the suit on the ground of limitation and has not given any finding on merits, the case is remanded back to the learned Trial Court for fresh decision on merits.

10. Both the parties shall appear before the learned Trial Court on 6th January, 2012 when the learned Trial Court shall fix the date for hearing both the parties on merits. The LCR be returned back forthwith.

ILR (2012) II DELHI 191
MAC APPEAL

UTTAR PRADESH STATE ROAD TRANSPORT CORPORATION **....APPELLANT**

VERSUS

RAMWATI & ORS. **....RESPONDENTS**

(G.P. MITTAL, J.)

MAC APPEAL NO. : 194/2011 **DATE OF DECISION: 19.12.2011**

Motor Vehicles Act, 1988—Appeal impugned order dated 05.10.2010 of the Motor Accidents Claims Tribunal (MACT) where compensation was awarded to family of deceased—Appellant claims that there was contributory negligence and that the award was exorbitant—The

Tribunal had found the driver to be negligent and further that the bus had gone to extreme wrong side and hit the victim head on. Held—There was no contributory negligence involved in this case as every head on collision does not constitute the same and the facts in this case clearly indicate the mistake of appellant's driver—The amount awarded is not exorbitant as the correct income and dependency amounts have been taken and compensation accordingly, calculated.

The Tribunal's finding with regard to rashness and negligence on the part of Satya Prakash, the Appellant's driver is held as under:

> "8. The onus of this issue was upon the petitioner and they had to prove that the deceased has suffered fatal injuries in the road side accident due to rash and negligent driving of the Respondent No.1 while driving bus No. UP 14 U 9924. To prove this issue, the petitioner has examined PW-2 who had deposed that the deceased was travelling alongwith Mahesh on motorcycle from Delhi to his native village via G.T. Road and cousin brother of the deceased was going ahead of them on motorcycle No.DL 7SAR 1976 and at about 11.30 a.m. the accident happened due to rash and negligent driving of the Respondent No.1 who was driving the vehicle at high speed and basically he deposed in terms of the petition. He further deposed that the deceased died on the spot and the driver of the offending vehicle was apprehended at the spot.
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> In cross-examination, he deposed that Sh. Bani Singh was about 100 meters ahead of his motorcycle. He was going on left hand side and police recorded his statement and FIR was lodged on his statement. Petitioners have also filed certified copies of the record of the criminal case against Respondent No.1, on the court file which includes copy of FIR, copy of

chargesheet which is against the Respondent No.1, site plan and postmortem report. Standard of proof under Motor Vehicle Act is not akin to the code of civil procedure nor the strict rule of evidence are applicable. FIR against the Respondent No.1 & the postmortem of the deceased both are the facts which are sufficient to prove that Sh. Bani Singh died on 22.3.08 because of rash and negligent driving of the Respondent No.1. This issue is decided accordingly." **(Para 3)**

Apart from PW2's testimony that the offending bus was being driven in a rash and negligent manner, the certified copy of the site plan prepared in the criminal case FIR No.51/2008 Police Station Arnia, Bulandshaher was placed on record by the Respondents (Claimants). The site plan clearly shows that the offending bus went on its extreme right and hit the motor cyclist. It cannot be laid down as a general proposition of law that in the case of every head on collision, there would be contributory negligence. Driver Satya Prakash who was Respondent No.1 before the Trial Court entered the witness box as RW-1 and sworn an affidavit that the motor cyclist lost balance while overtaking another vehicle. The details of that vehicle were not given by driver Satya Prakash. His testimony is belied from the certified copy of the site plan in the criminal case which shows that the accident took place on the extreme right side of the road. It was incumbent upon the driver to explain as to how the bus reached there. Thus, the Tribunal's finding that the accident took place on account of rash or negligent driving of the offending vehicle by its driver Satya Prakash cannot be faulted. **(Para 4)**

CONTENTION NO. (ii) AMOUNT OF COMPENSATION

The deceased was getting a salary from Maa Anandmai Service Station, which was almost equivalent to the minimum wages. The certificate was not proved. The Tribunal made addition of 50% in the minimum wages to compute the loss of dependency. The minimum wages of an unskilled worker

on 22.03.2008 were Rs. 3633/- per month. The minimum wages are revised from time to time to offset inflation as also to provide a better standard of living and to give the benefit of the growth of G.D.P. to the less paid workers. Just within one 01 year and 08 months, the minimum wages of unskilled worker were revised to Rs. 5278/- per month which shows an increase of 45%. This Court in (i) **UPSRTC v. Munni Devi,** IV (2009) ACC 879; (ii) **National Insurance Company Ltd. v. Renu Devi & Ors.,** III (2008) ACC 134; and (iii) **Narinder Bishal & Anr. v. Rambir Singh & Ors.** MAC APP. 1007-08/2006 decided by this Court on 20th February, 2008, made addition of 50% in the minimum wages taken for calculation for loss of dependency. **(Para 5)**

Important Issue Involved: Every head on collision in a motor vehicle accident cannot be treated as a case of contributory negligence. Compensation cannot be said to be exorbitant if allowances for increased minimum wage is made.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Pradeep Kumar, Advocate.

FOR THE RESPONDENTS : Mr. S.N. Parashar, Advocate for Respondents No. 1 to 5.

CASES REFERRED TO:

1. *UPSRTC* vs. *Munni Devi,* IV (2009) ACC 879.
2. *National Insurance Company Ltd.* vs. *Renu Devi & Ors.,* III (2008) ACC 134.
3. *Narinder Bishal & Anr.* vs. *Rambir Singh & Ors.* MAC APP. 1007-08/2006.

RESULT: Appeal dismissed.

G.P. MITTAL, J.

1. The Appellant U.P. State Road Transport Corporation challenges

an award dated 05.10.2010, whereby a compensation of ' 8,73,952/- was granted in favour of the Respondents No.1 to 5. Deceased Bani Singh died in a motor accident which took place on 22.03.2008. He was aged 28 years. He was working with Maa Anandmai Service Station, opposite Chand Cinema, Kalyanpuri and getting a salary of ' 3,516/- per month as per the salary certificate Ex.PW1/2.

2. Following contentions are raised on behalf of the Appellant:-

(i) There was contributory negligence on the part of the deceased Bani Singh as there was a head on collision.

(ii) The amount of compensation awarded is exorbitant and excessive.

CONTENTION NO.(i)

3. The Tribunal's finding with regard to rashness and negligence on the part of Satya Prakash, the Appellant's driver is held as under:

> "8. The onus of this issue was upon the petitioner and they had to prove that the deceased has suffered fatal injuries in the road side accident due to rash and negligent driving of the Respondent No.1 while driving bus No. UP 14 U 9924. To prove this issue, the petitioner has examined PW-2 who had deposed that the deceased was travelling alongwith Mahesh on motorcycle from Delhi to his native village via G.T. Road and cousin brother of the deceased was going ahead of them on motorcycle No.DL 7SAR 1976 and at about 11.30 a.m. the accident happened due to rash and negligent driving of the Respondent No.1 who was driving the vehicle at high speed and basically he deposed in terms of the petition. He further deposed that the deceased died on the spot and the driver of the offending vehicle was apprehended at the spot.
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> In cross-examination, he deposed that Sh. Bani Singh was about 100 meters ahead of his motorcycle. He was going on left hand side and police recorded his statement and FIR was lodged on his statement. Petitioners have also filed certified copies of the record of the criminal case against Respondent No.1, on the court file which includes copy of FIR, copy of chargesheet which is against the Respondent No.1, site plan and postmortem report. Standard of proof under Motor Vehicle Act is not akin to

> the code of civil procedure nor the strict rule of evidence are applicable. FIR against the Respondent No.1 & the postmortem of the deceased both are the facts which are sufficient to prove that Sh. Bani Singh died on 22.3.08 because of rash and negligent driving of the Respondent No.1. This issue is decided accordingly."

4. Apart from PW2's testimony that the offending bus was being driven in a rash and negligent manner, the certified copy of the site plan prepared in the criminal case FIR No.51/2008 Police Station Arnia, Bulandshaher was placed on record by the Respondents (Claimants). The site plan clearly shows that the offending bus went on its extreme right and hit the motor cyclist. It cannot be laid down as a general proposition of law that in the case of every head on collision, there would be contributory negligence. Driver Satya Prakash who was Respondent No.1 before the Trial Court entered the witness box as RW-1 and sworn an affidavit that the motor cyclist lost balance while overtaking another vehicle. The details of that vehicle were not given by driver Satya Prakash. His testimony is belied from the certified copy of the site plan in the criminal case which shows that the accident took place on the extreme right side of the road. It was incumbent upon the driver to explain as to how the bus reached there. Thus, the Tribunal's finding that the accident took place on account of rash or negligent driving of the offending vehicle by its driver Satya Prakash cannot be faulted.

CONTENTION NO.(ii) AMOUNT OF COMPENSATION

5. The deceased was getting a salary from Maa Anandmai Service Station, which was almost equivalent to the minimum wages. The certificate was not proved. The Tribunal made addition of 50% in the minimum wages to compute the loss of dependency. The minimum wages of an unskilled worker on 22.03.2008 were Rs. 3633/- per month. The minimum wages are revised from time to time to offset inflation as also to provide a better standard of living and to give the benefit of the growth of G.D.P. to the less paid workers. Just within one 01 year and 08 months, the minimum wages of unskilled worker were revised to Rs. 5278/- per month which shows an increase of 45%. This Court in (i) **UPSRTC v. Munni Devi,** IV (2009) ACC 879; (ii) **National Insurance Company Ltd. v. Renu Devi & Ors.,** III (2008) ACC 134; and (iii) **Narinder Bishal & Anr. v. Rambir Singh & Ors.** MAC APP. 1007-08/2006

decided by this Court on 20th February, 2008, made addition of 50% in the minimum wages taken for calculation for loss of dependency.

6. The overall compensation of Rs. 8,73,952/- awarded by the Tribunal cannot be said to be excessive. There is no ground to interfere with the award.

7. The appeal is devoid of any merit; the same is accordingly dismissed.

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W.P. (C)

COMMISSIONER OF POLICE ....PETITIONER

VERSUS

RANVIR SINGH ....RESPONDENT

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

W.P. (C) NO. : 6518/2011 DATE OF DECISION: 20.12.2011

Constitution of India, 1950—Writ impugns the order dated 25.05.2011 of the Central Administrative Tribunal which directed the Petitioner to treat the Respondent as a validly selected candidate and to offer him appointment to the post of sub-inspector (EXE) Male. Held: Court cannot interfere in the assessment made by the Delhi Police as employer, as to who is suitable and who is not for serving in the force which is required to constantly interact and render assistance to public. Tribunal in the impugned order erroneously followed the dicta in *Sandeep Kumar* in which no assessment of suitability was done by the Screening Committee, as was done in the present case.

We have recently in our judgment dated 16.11.2011 in W.P.(C) No.8752/2011 titled **Vinod Kumar Vs. Commissioner of Police** held that the Court cannot interfere in the assessment made by the Delhi Police as employer, as to who is suitable and who is not for serving in the force which is required to constantly interact and render assistance to public. It has been repeatedly held that the Court cannot interfere in the selection process.

(Para 9)

Important Issue Involved: The Court cannot interfere in the assessment made by the Delhi Police as employer, as to who is suitable and who is not for serving in the force which is required to constantly interact and render assistance to public

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. V.K. Tandon Advocate.

FOR THE RESPONDENT : (Appearance not given).

CASES REFERRED TO:

1. *Vinod Kumar* vs. *Commissioner of Police* W.P.(C) No.8752/2011.
2. *DAD* vs. *Sushil Kumar* SLP(C) No.5340 of 1996.
3. *Morris* vs. *Crown Office* (1970) 2 Q.B. 114.

RESULT: Petition allowed.

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the order dated 25.05.2011 of the Central Administrative Tribunal, New Delhi allowing the O.A. No.3509/2010 preferred by the respondent and directing the petitioner to treat the respondent as a validly selected candidate and offer him appointment to the post of sub-inspector(EXE) Male. Notice of this petition was issued and the operation of the order stayed. The petitioner, as directed has produced the record relating to recruitment of the respondent. The counsels

have been heard.

2. The respondent had applied for the said post in the recruitment drive of the year 2007 and was provisionally selected subject to verification of character and antecedent, medical fitness and final checking of documents etc. After he had filled up the application form and the attestation form, he was accused of offences under Sections 332/353/186/285/506 r/w 34 of the IPC and 25/54/59 Arms Act in FIR No.116/2008 dated 30.05.2008 of Police Station Sadar Narwana, District Jind, Haryana. Upon discovery of the said fact during verification, the case of the respondent was put up before the screening committee constituted by the commissioner of police. In the interregnum, the Court of the Judicial Magistrate, Narwana vide judgment dated 15th June, 2009 acquitted the respondent, giving him benefit of doubt. The Screening committee of the petitioner however considering the gravity of the offences with which the respondent was charged and in the light of observations in the judgment (supra) did not find the respondent suitable for the post and the petitioner vide communication dated 8th October, 2009 cancelled the candidature of the respondent.

3. The respondent earlier preferred an O.A. No.2989/2009 impugning such cancellation of his candidature and which O.A. was disposed of vide order dated 19.03.2010 remitting the case to the petitioner to reconsider the same taking notice of the circumstance of acquittal of the petitioner of all the charges.

4. The petitioner again considered the case of the respondent and vide order dated 10th June, 2010 again found the respondent not suitable for appointment in Delhi Police. OA.No.3509/2010 (supra) was filed by the respondent impugning the said order and which OA has been allowed as aforesaid by the Tribunal vide orders impugned in this petition. The Tribunal has primarily relied on Commissioner of Police Vs Sandeep Kumar (2011) 4 SCC 644.

5. This Bench has also, in several other cases coming before us been consistently following the dicta of the Supreme Court in **Sandeep Kumar** (supra). **Sandeep Kumar** had concealed his involvement in a criminal case under Section 325/34 IPC and which case had also ended in an acquittal on compromise. The Supreme Court held that Sandeep Kumar at the time of the FIR was about 20 years of age; at that age, young people often commit indiscretions and such indiscretions can often

be condoned; youth will be youth; they are not expected to behave in as mature a manner as older people and minor indiscretions made by young people should be condoned rather than to brand them as criminals for the rest of their lives. Relying upon **Morris Vs. Crown Office** (1970) 2 Q.B. 114, it was held that the non-mentioning of involvement in a criminal case was out of fear inasmuch as if the same had been disclosed, he would have been automatically disqualified. The Supreme Court accordingly held cancellation of provisional selection of Sandeep Kumar to be illegal.

6. However in the present case cancellation of candidature of the respondent is not merely because of involvement in a criminal case (in which he was ultimately acquitted) but the case of the respondent was examined by the Screening Committee of the petitioner, not once but twice. The said Screening Committee has given detailed reasons in its order dated 10th June, 2010 (supra) for finding the respondent unsuitable for appointment in Delhi Police. It is apposite to quote the said order as under:

"ORDER

Shri Ranvir Singh s/o Shri Nafe Singh (Roll No.415007) applied for the post of Sub-Inspector (Exe.) – Male in Delhi Police during the recruitment held in the year 2007. He was put through all the tests required for the post and declared provisionally selected subject to satisfactory police verification report of his character and antecedents etc. His character and antecedents report revealed that he was involved in a criminal case FIR No.116/08 dated 30.05.2008 u/s 332/353/186/285/506 r/w 34 IPC and 25/54/59 Arms Act, PS Sadar, Narwana, Jind, Haryana.

The Screening Committee of PHQ comprising Shri Qamar Ahmed, Jt. C.P./Hdqrs. Chairman, Shri M.N. Tiwari, DCP/Vigilence, Member and Shri L.C. Jain, LA to CP/Delhi Member met on 18.09.2009 and examined the case of Shri Ranvir Singh to assess his suitability for the post of Sub-Inspector (Exe.) due to his involvement in above mentioned criminal case. The Committee considered the facts of the case, judgment of the Hon'ble Court, gravity of offence, involvement and role of the candidate in this case. The judgment of the Hon'ble Supreme Court of India dated 04.10.1996 in Civil Appeal No.13231 of

1996 (arising out of SLP(C) No.5340 of 1996-**DAD Vs. Sushil Kumar**) was also kept in view.

The brief facts of the case are that Shri Ranbir Singh (Roll No.415007) was involved in case FIR No.116/2008 u/s 332/353/285/186/506 r/w 34 IPC and 25/54/59 Arms Act PS Sadar, Narwana, Haryana dated 30.05.2008. The case was registered against three persons namely Shri Navneet Singh s/o Dalel, Randhir s/o Nafe Singh and Ranvir s/o Nafe Singh (Candidate) on the complaint of one ASI Raghubir Singh of PS Sadar Narwana who alleged that he and HC Shish Pal while on patrolling duty in the intervening night of 29/30.05.2008 heard noise of two fires. They got down from the vehicle and saw that there was a car behind them which stopped near them in which there were three boys who all were drunk. They (accused) started beating them and tore his uniform. One of the accused was armed with pistol and they threatened them that if they go behind them they would fire on them. After beating and threatening both the police official, the accused left the spot. ASI Raghubir Singh (complainant) informed the PCR at Narwana and followed the car in which the accused persons were travelling and also noted the registration number of the vehicle. At about 1.00 AM, Constable Ramesh Kumar and ASI Rattan Singh came in a PCR vehicle and apprehended the culprits. After the necessary formalities of investigation, challan was presented in the court against the accused. During the trial, one Constable (PW-1) stated that he was on patrolling duty alongwith ASI Raghubir Singh (Complainant). He heard noise from behind and the accused persons threatened to kill them but during cross examination he failed to tell the number of persons in the vehicle from which the sound of firing emanated and also failed to identify the accused persons in the court. He stated that they had recovered a revolver from the accused and not a pistol. They PW-2 ASI Raghubir Singh, the complainant who was also the IO of the case did not produce case property in the court. He could not tell about the person who had fired and the persons who had beaten him. PW-4 HC Shish Pal also failed to recognize the accused persons due to darkness. DSP Sube Singh stated that the FIR was not written by him and he did not know who registered the FIR. He admitted

that he did not try to join any public witness. He also admitted that the site plan was not prepared by him and he did not arrest the accused persons. The statements of police officials were found contradictory to each other during the cross examination. The prosecution witnesses admitted that they had not seen the person who had fired and also the persons who had beaten them. Sh. Ranvir Singh (Candidate) was in possession of license under Arms Act so offence against Ranvir (Candidate) u/s 25/54/59 Arms Act was not proved. The Hon'ble Court of Judicial Magistrate 1st Class, Narwana, Haryana vide its judgment dated 15.06.2009 acquitted all the accused by giving them benefit of doubt.

In this case, though the prosecution failed to establish the person who had fired and who had beaten the police officials but the incident of firing had taken place. Shri Ranvir Singh was checked at the place of incident and he was found in possession of a pistol which shows that he was the person who had fired. This is a case of acquittal in which material witnesses turned hostile. His involvement shows premeditated tendency to indulge in crime without fear of law and such type of attitude renders him unsuitable for appointment in a law enforcing agency and in a disciplined force like Delhi Police.

Moreover, Shri Ranvir Singh filled the application form on 12.11.2007 and attestation form on 28.03.2008. The case was registered on 30.05.2008 subsequent to submission of application and attestation forms. The information regarding registration of the case was required to be communicated to DCP/4th Bn. DAP but he failed to do so despite clear instructions mentioned in these forms that **"if a criminal case is registered against you or you are arrested/detained/convicted/debarred etc. subsequent to the submission of the forms the relevant details regarding the same should be communicated to DCP/4TH Bn. DAP, failing which it shall be deemed to be suppression of factual information."**

From the above, it is obvious from the judgment that the evidence was "contradictory and inconsistent". Constable Ramesh Kumar, Police driver turned hostile and did not identify the accused

in the Court and ASI Raghubir Singh failed to identify the person who had beaten him and the person who had fired a shot. There is no denying that incident took place in which firing occurred. The seized pistol was licensed in the name of Shri Ranvir Singh, the applicant. The Ld. Judicial Magistrate acquitted the accused by giving them benefit of doubt. However, it is obvious by the test of preponderance of probabilities that Ranvir Singh was involved in the incident and that the shot had been fired by the pistol licensed in his name. An individual with such a past is obviously unfit for police service.

In view of the above facts, Sh. Ranvir Singh, is not found suitable for appointment in Delhi Police for the post of sub-Inspector (Exe.)."

7. The record produced before us contains the Minutes of the Meeting of the Screening Committee which in addition contains the following –

"In this case, though the prosecution failed to establish the person who fired and who beat the police officials but the incident of firing was happened, Sh. Ranvir Singh (candidate) was checked at the place of incident and he was found in possession of pistol which shows that he was the person.

This is a case of acquittal in which material witnesses turned hostile. His involvement shows premeditated tendency to indulge in crime without fear of law and such type of attitude renders him unsuitable for appointment in a law enforcing agency and in a disciplined force like Delhi Police."

8. The respondent had also alleged that the petitioner was indulging in pick and choose policy and stated that about 6 candidates have been given appointment despite being involved in criminal cases. The names and particulars have also been given. This plea of the respondent is also supported from the records produced before us. Though in the said records the reasons for the Screening Committee recommending six other candidates who were also charged with offences, for appointment are not contained and those records were not asked for or produced before us but the very fact that of the seventeen candidates whose cases were examined by the Screening Committee six were recommended shows

application of mind by the Screening Committee. It was up to the respondent to establish that the six candidates who notwithstanding involvement in a criminal case were recommended for appointment by the Screening Committee, were similarly placed as the respondent and to make out a case of discrimination. The same has not been done.

9. We have recently in our judgment dated 16.11.2011 in W.P.(C) No.8752/2011 titled **Vinod Kumar Vs. Commissioner of Police** held that the Court cannot interfere in the assessment made by the Delhi Police as employer, as to who is suitable and who is not for serving in the force which is required to constantly interact and render assistance to public. It has been repeatedly held that the Court cannot interfere in the selection process.

10. We may in this regard also notice that the "Policy For Deciding Cases of Candidates Provisionally Selected in Delhi Police, Involved in Criminal Cases (Facing Trial or Acquitted)" has been framed vide Standing Order No.398/2010 dated 23.11.2010. The said Policy also provides reference of such candidates to the Screening Committee to assess suitability for appointment; once the petitioner itself is not rejecting the candidature merely on the ground of involvement in a criminal case and notwithstanding such involvement assessing the suitability it cannot be denied the said right. The petitioner Delhi Police is often criticized for its force. The popular public conception of the men in Police uniform being the biggest "Gundas" cannot be ignored. In the light thereof, a candidate whom the experts in the Screening Committee have found unfit for serving in the police cannot be thrust on the police and the same if done may not only instill a false feeling of bravado and confidence in respondent, detrimental to his functioning in the police but may also affect the morale of the police department. No undue weightage can be given to the factum of the respondent being acquitted of the criminal charge. Just like such acquittal has been held not to impact the departmental inquiry proceedings on the same charge, for the reason of test of proof being different in the two proceedings, similarly in the matter of employment also, an acquittal of a criminal charge cannot be allowed to wash away the said charge or to place a person in the same position as if never had been charged.

11. The petitioner was thus fully entitled to consider the factum of the charge against the respondent even though ultimately acquitted thereof in assessing suitability of the respondent for induction in the police force.

Else no error is found in the said assessment capable of interference.

12. The Tribunal in the impugned order has blindly followed the dicta in **Sandeep Kumar** and other similar judgments in which no assessment of suitability had been done by the Screening Committee. The facts of the present case do not allow applicability of the ratio of the said judgment.

13. The petition therefore succeeds and is allowed. The order dated 25.05.2011 of the Tribunal is set aside / quashed and the orders of the petitioner rejecting the candidature of the respondent for appointment to the post of Sub-Inspector (Executive) Male are upheld.

No order as to costs.

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RFA

RIZWAN SHAH **....APPELLANT**

VERSUS

SHWETA JOSHI & ORS. **....RESPONDENTS**

(G.S. SISTANI, J.)

RFA NO. : 460/2010 **DATE OF DECISION: 20.12.2011**

Malicious Prosecution—Appeal impugns Judgement and decree and dated 30.01.2010 dismissing suit of the appellant claiming damages for malicious prosecution—FIR lodged against appellant under Section 363/366/376/511/506IPC by Respondent No. 3 alleging that his daughter was kidnapped by the Appellant—After the trial, appellant was acquitted by the judgement dated 31.10.2001—Thereafter Appellant filed suit for damages, which was dismissed. Held: The respondent not only leveled false charges against the

appellant but also prosecuted the entire case vigorously with sole intention of getting the appellant convicted. Respondents also filed applications for cancellation of bail alleging the appellant to be a habitual criminal and a permanent resident of Kashmir without any rational basis. Respondents have deposed false facts one after the other throughout the proceedings. The criminal proceedings were initiated based upon false facts and sustained and contested by repeatedly asserting false and baseless allegations lowering image and reputation of appellants in the eyes of his neighbours, friend and relation. Damages awarded to the tune of Rs. 2,50,000.

The respondents not only levelled false charges against the appellant but also prosecuted the entire case vigorously with the sole intention of getting the appellant convicted. Apart from initiating the prosecution on false facts, the respondents also filed applications for cancellation of bail alleging the appellant to be a habitual criminal and a permanent resident of Kashmir without any rational basis for the same. Respondent no. 3, Sh. Satish Joshi deposed in his cross-examination that the allegations that appellant is a habitual criminal or that he is a permanent resident of Kashmir was made solely upon the information given by the police and by a neighbour of the appellant whose name and details he does not remember. The respondents have deposed false facts one after the other throughout the proceedings. The criminal proceedings were initiated based upon false facts and sustained and contested by repeatedly asserting false and baseless allegations. There are several discrepancies in the deposition of the respondents. While in the written statement filed before the trial court, it has been alleged by the respondents that the car was being driven by some other person since the appellant cannot drive but in her evidence by way of affidavit, respondent no. 1 asserts that the appellant was driving the car when he offered lift to respondent no. 1. While respondent no. 1 and respondent no. 2 clearly deny that respondent no. 1 has filled any form

for admission in the Indira Gandhi National Open University; respondent no. 3 Sh. Satish Joshi deposed in his cross-examination that respondent no. 1 joined IGNOU for further studies and further deposed that respondent no. 1 might have taken admission for BPP course in the said University.

(Para 44)

In view of the observations made above, I am of a view that the respondents maliciously prosecuted the appellant without any reasonable and probable cause. I find this to be a typical case where the daughter of the family decided to marry a man outside her own community and faced strong opposition from her family, and later on under the pressure of her family and relatives, the daughter deposed against the appellant in order to save her and her family's honour.

(Para 45)

Lastly, it has contended by counsel for appellant that the appellant has suffered mental agony and pain due to false charges levelled against him by the respondents. His reputation has been tarnished and he faced humiliation at the hands of his friends, relatives, neighbours and people in his social circle. The counsel further contends that due to malicious prosecution, the appellant had to remain in judicial custody for eight months and faced a long trial which exhausted him mentally and financially; he lost his job in Saubi Arabia and that his future employment prospects have also been hampered. I find merit in the said contention.

(Para 46)

Important Issue Involved: Malicious Prosecution is a Prosecution on some charge of crime which is wilful wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or its bound to know are wrong and against the dictates of public policy.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. A.C. David, Advocate.

FOR THE RESPONDENT : Mr. Bhupender Sharma Advocate.

CASES REFERRED TO:

1. *Kishan Singh (D) through LRS. vs. Gurpal Singh & Others* reported in (2010)4 JCC 2547.
2. *Prempal & Others* vs. *Commissioner of Police* reported at 168(2010) DLT 285.
3. *West Bengal State Electricity Board* vs. *Dilip Kumar Ray* reported in AIR 2007 SC 976.
4. *Radhey Mohan Singh* vs. *Kaushalya Devi and Another* reported in 105 (2003) DLT 678 (DB).
5. *Chairman and MD, BPL Ltd.* vs. *S.P. Gururaja and others* (2003)8 SCC 567.
6. *Chairman and MD, BPL Ltd.* vs. *S.P. Gururaja and others,* JT 2003 (Suppl2) SC 515).
7. *State of A.P.* vs. *Goverdhanlal Pitti* (2003)4 SCC 739).
8. *State of Punjab* vs. *U.K. Khanna* (2001)2 SCC 330).
9. *Kumaon Mandal Vikas Nigam Ltd.* vs. *Girja Shankar Pant* (2001)1 SCC 182.
10. *Prabodh Sagar* vs. *Punjab SEB,* (2000) 5 SCC 630).
11. *RK Soni* vs. *S. Singhara Singh* reported at AIR 1992 Delhi 264.
12. *KB Mathur & Others* vs. *Sheel Kumar Saxena and Others* reported in 46 (1992) DLT 114.
13. *S.R. Venkataraman* vs. *Union of India* (1979) 2 SCC 491; AIR 1979 SC 49).
14. *Bharat Commerce Industries* vs. *SN Shukla* reported at AIR 1966 Calcutta 388 (DB).
15. *Abbott* vs. *Refuge Assurance Co* (1962) 1 QB 432.
16. *Ucho Singh* vs. *Nageshar Prasad,* AIR 1956 Patna 285.

17. *Jones Bros. (Hunstanton) Ltd.* vs. *Stevens*, (1955)1 QB 275: (1954)3 All ER 677 (CA).

18. *Dallison* vs. *Caffery* (196501 QB 348].

19. *Lumley* vs. *Gye* (1853)2 E&B 216 : 22 LJQB 463.

RESULT: Appeal allowed.

G.S. SISTANI, J.

1. The present appeal has been filed by the appellant under section 96 of the Code of Civil Procedure 1908 against the judgment and decree dated 30.01.2010 passed by learned ASJ, dismissing the suit of the appellant claiming damages for his malicious prosecution by the respondents herein.

2. The brief facts that are necessary to be noticed for disposal of the present appeal are that on 22.10.1999, FIR No. 748/99 under sections 363/366/376/511/506 IPC was registered against the appellant in Police Station Patel Nagar on a complaint lodged by respondent no. 3 Satish Joshi alleging that his daughter respondent no.1 Shweta Joshi has been kidnapped by the appellant. On 24.10.1999, respondent no. 1 was recovered from the house of the appellant at 1731, Second Floor, Kucha Dakhni Rai, Darya Ganj, Delhi. Her statement was recorded under section 164 Cr.P.C and after completing the investigation, challan was filed in the court indicting the appellant Rizwan Shah under section 363 IPC. After the trial, the accused (appellant herein) was acquitted by the learned trial court by a judgment dated 31.10.2001 and the judgment attained finality as no appeal was filed. Pursuant to his acquittal, the appellant served a notice dated 31.07.2002 upon the respondents for recovery of a sum of Rs. 8.5 lakhs towards malicious prosecution and defamation. Since despite service of notice, respondents failed to pay the said damages, the appellant was forced to file a suit against the respondents claiming damages to the tune of Rs. 5 lakhs alleging malicious prosecution by the respondents. The said suit was dismissed by the learned Additional District Judge vide judgment dated 30.01.2010 which has led to the filing of the present appeal.

3. Appellant has examined thirteen witnesses. Since the evidence of PW-1 is extremely important I deem it appropriate to reproduce the same.

That the deponent developed love affairs with Defendant No.1 Ms. Shweta Joshi and Defendant no.2 and 3 namely Rani and Satish Joshi are the parents of defendant no.1. During love affairs the defendant no.1 wrote letters to the deponent. The letter dt. 3.10.1999 written by Defendant no.1 and the other of her letter are Ex. as Ex.PW-1/B1 and PW-1/B2.

That the deponent was looking for a job in Saudi Arabia and was interviewed by M/s. Continental Holding and was selected to Hotel Hilton in Madina as English Secretary with wages @1400/ -Saudi Riyal equallent to Rs.18,200/-India Rupees.Besides lodging, boarding, Food, Medical and Ticket. The said contract was initially for 2 years and extendable. In July 1999 the Foreign Deligate assured the deponent that he will get formal appointment letter in Dec., 1999.

That the deponent told the said information of job to defendant No.1 who after knowing that pressurized the deponent to get marry with her soon so that the deponent ask her to take permission of her parents as there was difference in religion between both as Muslim and Hindu Brahmin. But the defendant no.1 on avoiding the same on one pretext or the other.

That on 22.10.1999 around 8:30 a.m. the defendant no.1 came to deponent's residence and handed over Certificate issued by CGHS on 21st of Jan., 1993 as a proof of her age which was 6.2.1981. The information/ entries in the said form were filled by the defendant No.2. Besides this the defendant no.1 also handed over him her personal diary and note book, copy of CGHS certificate dt. 21.1.1993 is mark 'B' and the personal diary and note book are Ex. As Ex. PW-1/C1 and PW-1/C2, respectively.

That after reaching the deponent's house, the defendant No.1 by black-mailing emotionally on the threats that in case the deponent refused to marry she will commit suicide, compelled that the deponent to marry with her and out of love and affection and under the pressure of Defendant no.1 on the same day in a Mandir both are married as per Hindu rites and ceremonies. The defendant no.1 told the deponent that if they marry in Mandir then her parents will accept the marriage.

That the deponent received Bullet shot in Srinagar, J & K in the year 1995 by the Militant due to which he lost two of his nerves of abdomen i.e. Lumber and Sacral which resulted Foot Drop Problem in deponent enabling him to apply any force from his feet on the objects like clutch, break and excelator and thus disentitles him from driving car etc. Copy of the Medical Papers are Ex.PW-1/C3 and PW-1/C4.

That as per the defendant No.1 desire both got married in a Temple near Oberoi Hotel and both stayed together at plaintiff/ deponent residence for about two nights after marriage, however, during the said period of stay the deponent did not establish sexual relations with defendant no.1.

That due to the false allegations of Defendant No.3 the police visited the house of defendant and defendant No.1 opened the door at the knock of the police and the deponent was arrested by the Police in his own locality before the known people, of Darya Ganj.

That the defendant no.1 was examined by the Doctor after her recovery from the deponent and on 24.10.1999 examined by the Lady Doctor Smt. Ritu Gupta in presence and permission of defendant no.2. The M.L.C. dt. 24.10.1999 is exhibited as Ex.PW-1/E1 and the statement of Dr. Ritu Gupta before Court is Ex. as Ex.PW-1/E2. In the said examination the defendant No.1 deliberately, knowingly and wilfully told her age as 171/ 2 years in conspiracy with defendant no.2 and 3. All the defendants were aware about this fact that the statement was false and the defendant no.1 was major in age at that time.

That the defendant no.2 was confronted with the photocopy of CGHS certificate mark 'B' to which she denied knowingly that she was doing wrong. At the time of making these false allegations against the deponent before Trial court on oath the defendants were aware of this fact that their false deposition will prejudice the interest of deponent and will amount defamation.

That the deponent never abducted or threatened the defendant no.1 nor indulge in any illegal activities as alleged by the defendants before Police and Court of law.

That the deponent was arrested from his own locality in Darya Ganj where he was having high estimation in the eyes of society and due to which his image and reputation lowered considerably in the eyes of people who started talking about his character and conduct. Due to the defendants act of levelling rackless false allegations on the deponent which has been done by maliciously, intentionally, deliberately and wilful to willify, destroy, denigrade the reputation, image and personality of the plaintiff/ deponent in public estimation and also to put the deponent in false and frivolous criminal trial and litigation.

That due to the baseless, reckless and nonsense allegations of the defendants that the deponent is criminal in nature facing number of criminal trial, has abducted, threatened and raped the defendant No.1 the reputation of deponent has lowered and he was humiliated amongst his friends, relations, social circle. Not only this the deponent was forced to face a false trial for around 3 years and judicial custody for 8 months he could not properly treated and he also lost handsome prospective job in Hotel Hilton, Madina, Saudi Arabia which caused a loss of Rs.4,36,800/-and he further find difficult to get job. Not only this due to the conduct of the defendants the deponent also suffered mental pain and agony, inconvenience and also loss his right to move freely for year together. The defendants were fully aware about this fact that due to their above said act the state machinery will set in motion against the deponent and he will face a malicious prosecution in the court of law."

4. PW-1, Rizwan Shah deposed in his cross –examination as under:

"I have placed on record the documents to prove that I am unable to drive car. When I was in custody, I was operated upon surgically. Shweta remained Hindu throughout and marriage was solemnized in Temple as per her will and consent. I have not stated anywhere the fact that the parents of Shweta were not aware about her missing. It is wrong to say that any drug was administered to Shweta. (objection raised beyond pleadings). It is wrong to say that after administering her drugs, I put Shweta to my house in car with my friend. (Objected to beyond pleadings). It is correct that police arrested me from my house

with Shweta after report was lodged by her father. Vol. I made a call at Shweta's house to her father that she was residing with me and was insisting for marriage with me.

It is wrong to say that I started sending signed or unsigned letters to Shweta and her parents after acquittal.

No formal document is supplied to the employees by employer if one gets employment in Dubai. Only visa has to be obtained and Visa has been obtained and due to Gulf War it has been kept by authorities. Work permit has also been sanctioned."

5. PW-2 Mohd. Farid deposed in his evidence by way of affidavit that being a neighbour he had very good relations with Rizwan and his family and the ladies of both the families visited each other. He deposed that in November, 1999 Gulfam told him that Rizwan had been arrested by police in rape and abduction of some minor Hindu girl and sent to Jail. He was shocked to see this information as Rizwan had a very good image in his eyes and estimation and even his sisters used to visit Rizwan House but they never complained anything about Rizwan. Even after shifting Rizwan's family from his neighbour there was visits of his family members including the females to Rizwan family, but after knowing that Rizwan was arrested by Police in rape and abduction case he stopped his sister to visit Rizwan's family / house. That the news of Rizwan's arrest was got vide publicity in the Society as Rizwan was having very good reputation in society. He did not invite Rizwan in the marriage of his sister Shehnaz who married in year 2000, keeping in view the criminal allegations on Rizwan.

6. PW-2 Mohd. Farid in his cross-examination has deposed that :

He was born at given address and he got education upto fifth standard. He deposed that the affidavit filed in the court was prepared on his instance and not at the instance of his advocate. The affidavit was got attested from Oath Commissioner close to the seat of the plaintiff counsel. He deposed that he went to Oath Commissioner and signed the registered kept by him. He also deposed that he had come to court at the asking of plaintiff and without any summon. He next deposed that he has close relations with plaintiff and he has been in visiting terms with plaintiff and participates in marriages in his family since long for last several

years. He also deposed that the family of the plaintiff is respectable because his NANAJI was Deputy Mayor of Delhi and his name was Maulana Imdad Sabri. The witness also deposed that he was residing in his house. He also deposed that it is wrong that being neighbour of the plaintiff, he is deposing falsely and has mentioned false fact in the affidavit filed by him.

7. PW-7, Shiv Kumar, UDC, All India Radio deposed in his examination-in-chief as under:

"I have brought relevant record from my office. Certified copy of official record are Ex.PW-7/A and Ex.PW-7/B. Original I have brought. According to our record, Smt.Rani Joshi, took maternity leave of 90 days from 3/2/1981 to 3/5/1981. Smt. Rani Joshi did not take any maternity leave on 6/12/1981."

8. PW-9, Sh.K. Mahalingam deposed in his examination-in-chief as under:

"Kumari Shweta Joshi sought admission in BPP Programme vide enrolment no.996423315. She got admission in June, 1998 again said July 1998. The minimum age of the candidate for such course is 18 years."

9. In his cross-examination by counsel for respondent, **PW-9, Sh. K Mahalingam** deposed that:

"It is correct that application form brought by me Regn. no.996423315/ Admission-99 does not bear signature of candidate. However, original form 137658 brought by me bears signature of candidate..

10. The respondents have examined three defence witnesses. It is relevant to reproduce the evidence of DW-1, Ms Shweta Joshi stated in her evidence by way of affidavit as under:

"That on 22.10.1999 the plaintiff met me at Wadhwa College, Patel Nagar. I was waiting for my father. The plaintiff came there and asked me where the classes were held. I told him to inquire from the reception. I was waiting for my father as he used to pick me from there and as such I was standing there.

That the plaintiff asked me to sit in the car on the pretext that

he would drop me at my residence. I refused to sit in car but the plaintiff persistently told me that instead of wasting the time here, it is better to reach the home at the earliest. On this inducement I sat in the car and instead of going towards my residence he turned the car on another direction. I immediately asked him as to where he was going he then told me that he had to go to a marriage of his friend and thereafter he would drop me at my residence.

That plaintiff took me to a place where there were two dilapidated rooms and a boundary wall. On my asking where he had brought me he told me that it was a temple. There was no murti, there was garlands. He asked me to put garlands around his neck but I strongly opposed and refused. I told him that my parents were waiting but instead of taking at my residence, he took me to a building which I came to know was his house. The plaintiff told me that I should marry him as he was having good business and that I would be happy after marry him. But I desisted and refused to accept his proposal. He threatened me that if I would not say yes then he would kill my parents. I asked him to allow me to telephone my parents but he refused and did not allow me to move from there. The plaintiff created horrible atmosphere and he continuously threatened me and asked to face dire consequences if I did not bow before his wishes. There was a great panic in my mind.

That on the same night police along with my parents reached the house of the plaintiff. I was recovered from his room. was taken to police station and I was got medically examined. During the course of illegal confinement the plaintiff wanted to have sexual intercourse with me but he could not be succeeded in his illegal design due to my stiff resistance.

I do not know who is or who was Shah. I was having no love affair with any Shah. On the other hand on 22.10.99 he forced me to sit in the car on the inducement that he would drop me at my residence. I further state that I did not make any call to the plaintiff. On 22.10.99 my father did not reach the college at 9:15 a.m. and as per direction of my father I was to go to my residence by auto/ three wheeler. But my father could not reach

there and I was waiting for his arrival. The plaintiff met me and he by deceitful means, compelled me to sit in his car on the assurance that he would drop me at my residence. As a result of his assurance, I sat in his car. I found that his intention was not good so I immediately objected and protested by saying that where he was taking me as he took another way not leading to my house. On my objection and protest, plaintiff threatened me not to raise voice and compelled me to sit without any objection but the fact remains that I was perceiving his malafide intention but the car was with speed so I was helpless in getting myself rescued from his clutches.

I never recorded my date of birth as 6.12.78 in any application from at I.G.N.O.U. My parents were married in 1979 much after 6.12.78. It is quite strange that my date of birth is shown prior to date of marriage of my parents. This fact itself shows that the plaintiff with the connivance of officials of I.G.N.O.U. Delhi has managed the preparation of these documents which are forged. He also attempted to rape but due to my stiff resistance, he could not succeed in his nefarious activity."

11. DW-1 Ms.Shweta deposed in her cross–examination by counsel for appellant as under:

"I do not remember if plaintiff was all alone on 22.10.1999 when he met me in car near Wadhwa College, Patel Nagar. Plaintiff was driving the car when he gave me lift. I do not remember if I have mentioned in my written statement that some other person was driving the car and not plaintiff. The attention of the witness brought to para no.13 of WS where it is recorded that some other person was driving the car. It is incorrect to suggest that plaintiff did not come to Wadhwa College, Patel Nagar nor he gave me any lift on 22/10/1999. It is incorrect to suggest that on 22.10.1999, I reached house of plaintiff at Darya Ganj at about 8:30 a.m. along with photocopy of CGHS of my mother and other documents mentioned exhibited above. My statement was recorded by police. I do not remember if I stated before Magistrate/ police/ Session Court that some other person was driving the car on 22/10/1999. It is incorrect to suggest that on 22/10/1999 nothing happened on behalf of plaintiff and on account

of that fact; I have not stated this fact before any authority. I was forcibly made to sit in the car.

The plaintiff took me to one place having no Murti under threat. Later on, plaintiff told me that it was his house. I do not remember if I stated before Magistrate that plaintiff took me to Mandir near Oberoi Hotel on that day. I do not remember for how many days I remained in the house of plaintiff. I also do not remember as to where I remained on the night of 22/10/1999. I also do not remember whether I was with my parents on 22/10/1999 or with plaintiff at night. I do not remember as to after how many days of 22/10/1999 police came to the house of plaintiff. I also do not remember if police came to plaintiff's house on 22/10/1999 or 23/10/1999.

Letter Ex.PW-1/B-1 is in my handwriting. It was obtained by plaintiff under threat. It bears my signature at point A. Ex.PW1/B-2 is not in my handwriting. It is incorrect to suggest that PW1/B2 is in my handwriting. PW1/E bears signature of my mother at point A. It is incorrect to suggest that I mentioned before Doctor at the time of my medical examination that I got married with plaintiff voluntarily. It is incorrect to suggest that now I am telling lie under impression of parents. On 22/10/1999, I was not allowed to telephone to my house. I cannot say if plaintiff telephoned at my residence or not. I do not remember if there was telephone at the house of plaintiff at that time. I do not remember if plaintiff remained with me throughout on 22/10/1999 and 23/10/1999 or he left for elsewhere. It is incorrect to suggest that I was having love affairs with plaintiff. It is incorrect to suggest that we both used to have talks on telephone. It is also incorrect to suggest that we both used to have talks on telephone. It is also incorrect to suggest that I have noted down telephone number of plaintiff in my personal diary. It is incorrect to suggest that offer of service was received by plaintiff from South Arabia and he disclosed this fact to me, I insisted to get married before his departure to South Arabia. It is incorrect to suggest that I sent this message through my friend Pooja to plaintiff in this regard.

It is incorrect to suggest that I submitted form in Indira Gandhi

National Open University in BPP Programme.

My date of birth is 6/12/1981. I have not placed any document on record to show that my date of birth is 6/12/1981 nor I have brought any such document. It is incorrect to suggest that my date of birth is not 6/12/1981 and it is also incorrect that my date of birth is 6/2/1981. It is incorrect to suggest that I have mentioned my date of birth as 6/12/1981 to see the plaintiff convicted in that case. It is incorrect to suggest that I have concealed my actual date of birth knowingly.

I do not remember if I moved application for cancellation of bail of plaintiff through that counsel. I do not know who opened the door from arrival of police to plaintiff's house. It is incorrect to suggest that I opened the door on 22/10/1999."

12. In her evidence by way of affidavit, **DW-2 Smt. Rani Joshi** stated as under:

"That I was married to Satish Joshi in the year 1979 and Shweta is my daughter. That police recovered Shweta from the custody of Rizwan. Shweta thereafter was given to us. My husband used to drop and pick Shweta to Wadhwa College, Patel Nagar and after classes were over he used to pick up Shweta from there.

That on 22.10.99 as usual my husband took Shweta to Wadhwa College Patel Nagar where she was prosecuting her studies and at 9.30 A.M. my husband again went there to bring her back but she was not there. He made enquiries from college and it was revealed that Shweta had already left the college on the same day at about 2 P.M. a telephonic call was received to the effect that the caller was Rizwan who was taking Shweta to Bangalore. After receipt of this information the matter was reported to the police as my daughter Shweta was kidnapped/abducted by Rizwan.

That after facing trial Rizwan was given benefit of doubt and was acquitted. After acquittal and I order to harass the respondents, he filed the present suit with ulterior motives.

I did not fill up the C.G.H.S. Form, nor my daughter ever filled the admission form in the I.G.N.O.U. where her date of birth is

shown as 6.12.78 much earlier to my marriage.

I say that my marriage took place in 1979 and the date of birth is shown in form is much earlier to my marriage. This forged document is prepared by the plaintiff. It is further stated that on the affidavit signatures of Shweta are forged.

That the plaintiff had sent letters containing vulgar language and wherever it was objected he did not desist from his nefarious activities. I and my husband and daughter were put under great stress and we were so terrorized but we adopted non violence attitude and tolerated the violence of the plaintiff for nothing. The document produced by the plaintiff are not correct. He did so in order to pressurize me, my husband and my daughter to yield to his wishes.

That my daughter Shweta had never developed love affairs with the plaintiff, who adopted all sort of illegal acts. But he could not succeed in his evil design. No legal marriage took place between Shweta and the plaintiff.

Shweta never pressurized the plaintiff for marriage. The plaintiff has taken a falsely stand that Shweta pressurized him to marry her. The intentions of the plaintiff remain throughout to exploit my family. My daughter Shweta has no friend by name of Pooja. I know all the girls familiar to my daughter. But Pooja is not friend/familiar of my daughter Shweta. Shweta never received any letter through any body. Nor any conversation/message were exchanged by my daughter. On 22.10.99 as usual Shweta had gone to attend her classes and after the class was over she was waiting for her father. The plaintiff with a mischievous design offered lift in his car. The plaintiff acted in such a fashion and Shweta reluctantly and under compulsion sat in his car. Shweta was induced that she would be taken to her house. She was taken by the plaintiff to his residence, force and threats were used by the plaintiff. Shweta was threatened that she would be killed and the family members will be eliminated. She was taken to an isolated place and she was forced to put a garland around his neck. She was illegally confined. She was also threatened to kill me and my husband if Shweta would cry for help. I and my husband alongwith the police reached the house of the plaintiff and police recovered Shweta from custody of the plaintiff.

That my daughter Shweta attended her classes on 22.10.99 and she herself did not go to the house of the plaintiff but she was abducted. No personal diary or note book were given by Shweta but these documents were snatched by the plaintiff when Shweta was in his custody.

A timely intervention of the parents and the police saved Shweta and police recovered her from his custody. No marriage has ever taken place with Shweta. Shweta was compelled to sit in the car, which was being driven by another person. The plaintiff did so in order to achieve his object of abducting Shweta.

That Shweta was illegally confined by the plaintiff. During the period of illegal confinement, plaintiff attempted to commit rape but could not succeeded because of stiff resistence from Shweta. With the assistance of police Shweta was released when Shweta was released from the custody of the plaintiff face of Shweta was pale and perplexed. She was weeping bitterly.

I and my husband after receipt of telephone from the plaintiff were confident that Shweta was kidnapped / abducted by the plaintiff. That at time of kidnapping / abducting my daughter was put under pressure/ threat and under such circumstances she was kidnapped/ abducted. During the course of investigation her statement was recorded by the Metropolitan Magistrate. My daughter clearly stated in her statement that how she was kidnapped and abducted and how she was threatened by the plaintiff. I further say that I my husband and Shweta were threatened by the plaintiff. He was compelling me, my husband and Shweta not to depose against him otherwise we will be done to death and as such an application for cancellation of bail was moved."

13. DW-2, Ms. Rani Joshi deposed in her cross-examination as under:

"It is correct that my affidavit in this court is based upon the feedback which I received from my daughter.

It is correct that when my daughter was born I was employed

in All India Radio at Jallandhar and thereafter I got transferred to Delhi. At the time when my daughter was born I had given correct particulars in my leave for maternity. It is correct that I had applied for maternity leave from 3.2.81 to 3.5.81 regarding the birth of my daughter Shaveta. It is further correct that I resumed my duties on 5.5.81 at Jalandhar.

It is incorrect to suggest that we deliberately to falsely implicate the plaintiff, I had given the date of birth of my daughter Shaveta as December '81 instead of 6.02.1981. Vol. We have disclosed the actual date of birth of my daughter to police but the police insisted upon the certificate of my daughter in which the said date was given, the police told us that it is the date given in the certificate which is required to be submitted to the court. I have also stated this position to the court.

I have not furnished the original certificate in the court as we did not have the same in our possession.

In our application the cancellation of bail we have described the plaintiff as Kashmiri on the information given towards police. It is incorrect that we have described in this manner so that he may not be bailed out. It is correct that in all our applications, my daughter was shown as a minor. Vol. This was because the police has told us that the date of birth of my daughter as given in the certificate is admissible only..

14. DW-3, Sh. Satish Joshi has stated in his affidavit as under:

"That my daughter Shweta used to go to Wadhwa College Patel Nagar for getting coaching in the morning at 8:00 A.M. I used to drop her in the morning and used to pick up her from the college at 9:15 A.M.

That as usual on 22.10.99, I dropped my daughter at 8 a.m. and when I reached Wadhwa College Patel Nagar at 9:30 a.m. for bringing my daughter. My daughter was not there. I searched here and there but whereabouts of my daughter were not known I came back to my house but she was not present in the house also.

That at about 1:30 p.m. my wife came from her office till then

I made enquiries from every corner but my daughter was not traced. At about 2:00 p.m, I received a telephonic call from one Rizwan that Shweta was with him and he was taking Shweta to Bangalore. After receipt of this call I immediately went to police station Connaught Place and then Mandir Marg ultimately I was directed by P.S. Mandir Marg to go to P.S. Patel Nagar where I lodged the FIR regarding kidnapping of my daughter Shweta. On 22.10.99 at 11:30 p.m. I and my wife were called by the police of Patel Nagar. We went there, police took us to the house of Rizwan at Darya Ganj from the second floor of the house, police recovered my daughter Shweta from the custody of Rizwan. None else except Rizwan and my daughter were present there. Police prepared recovery memo regarding recovery of my daughter. At the time of receiving my daughter Shweta was very perplexed, her face was pale, mentally she was very upset for some time, she was unable to speak Rizwan confessed his guilt who was arrested by the police.

That my daughter was got medically examined. She was sent to Nari Niketan and I moved an application on 24.10.99 before the Ld. M.M. for seeking custody of my daughter Shweta. After hearing me and the state custody of my daughter Shweta was given to me. Statement of Shweta u/s.164 Cr. P.C. was recorded.

That my daughter was not born on 6.12.78 as mentioned in the application form neither she submitted any affidavit. Her signatures are forged.

That no marriage took place between the plaintiff and defendant no.1 i.e. my daughter. She was all alone and the plaintiff enacted the drama of garlanding which is false and my daughter was put under great stress. I have been receiving threats from the plaintiff. He also sent vulgar and obscene and objectionable letters and by this way he had terrorized me and my family.

That my daughter Shweta had joined English speaking course in British School of Language at Kasturba Gandhi Marg where the plaintiff had enquired something, my daughter told him that it be enquired from the reception. My daughter refused to tell her telephone number to the plaintiff.

That I and my family members still are being harassed by the plaintiff to marry Shweta with him. My daughter never accompanied him but she was forced and was abducted by the plaintiff to force her to marry with him. In the locality at the time of recovery of my daughter there was tense atmosphere as the plaintiff was terrorize the persons of the locality. My daughter has no friend in name of Pooja. My daughter had never contacted anybody including the plaintiff on phone or otherwise. She is very religious and a devotee of Hinduism.

That the plaintiff kept my daughter in his custody illegally, solely with intent to compel her to yield to his wishes. My daughter continued to protest and tried to save her from his clutches. The plaintiff directly or indirectly advances threats to me, to my wife and to my daughter, as a result of which the entire family lives in a horrible situation. My daughter was abducted with intent to compel her to marry but my daughter objected and protested against such designs of the plaintiff. The plaintiff is responsible for causing great mental agony to me and to my family."

15. In his cross-examination by counsel for appellant, **DW-3, Sh.Satish Joshi** deposed as under:

"My daughter Shweta was taking coaching from Wadhwa College, Patel Nagar during the period 22.10.99. She was to appear in 10th class examination. I am not sure whether my daughter Shweta was taking coaching classes for class 10th. My daughter appeared in examination for 10th class from central School, Gole Market. Later on she joined IGNOU for further studies. I cannot say in which class she was taking coaching as she had already sought her admission at WADHWA College, Patel Nagar. It is correct that my daughter was taking coaching classes for Bachelor Preparatory Programme in Wadhwa College. I do not know whether my daughter had taken admission for BPP in IGNOU. It is incorrect that I am deliberately showing ignorance about admission of my daughter for BPP Course in IGNOU. I don't know whether the minimum age in admission in BPP Course is 18 years. My daughter might have taken admission in BPP Course on 15.07.98 Vol. I have no knowledge about it.

As at the time the application for cancellation of bail of the plaintiff was moved on 19.11.99, it was only under the mental harassment and the circumstances it was mentioned in that application in para 8 that the accused was criminal by nature and various cases were pending against him. I cannot tell now as to in how many cases the plaintiff was involved. I had stated in my said application on the basis of the feedback, I received from the neighbour of the plaintiff. I do not remember, now, the name and other particulars of those neighbours. I had reached the house of the plaintiff at about 11:30 p.m. I remained there till my daughter was recovered from there, say for about 15 minutes.

The DOB of my daughter is 06.12.1981, as per certificate, in fact, it is 06.02.1981. This thing was duly communicated to the police. It is incorrect that intentionally and deliberately I have not produced any document to show her DOB as 06.02.1981. I do not remember as to on what basis as stated in para no.7 of my application dt. 21.03.2001 that the plaintiff was a permanent resident of Kashmir and that it will not be possible to arrest him if he absconds.

It is incorrect that my daughter was in love with the plaintiff and that she had left on her own with him. It is incorrect to say that as I lodged a false case against the plaintiff, he had to remain in custody for about nine months. It is further incorrect that the plaintiff was maliciously prosecuted at my instance. It is further incorrect that because of my action against the plaintiff he has been defamed and that he lost his job in Hotel Madina, Saudi Arabia."

16. The counsel for appellant submits that the judgment of the trial court is bad in law and is contrary to the facts on record. The counsel next submits that the trial court has lost sight of the findings of learned additional sessions judge that the conduct of the respondents was highly suspicious, unfair and an afterthought and rather the conduct of the appellant was fair and more reliable. Placing reliance upon the case of **Prempal & Others v. Commissioner of Police** reported at 168(2010) DLT 285 wherein relying upon the findings of the additional sessions judge (ASJ), the court came to the conclusion that the petitioner was falsely implicated in a number of criminal cases; the counsel for appellant

has drawn the attention of the court to the various findings arrived at by the learned Additional Sessions Judge while acquitting the appellant wherein the Additional Sessions Judge has observed that the respondents have withheld the best evidence of the proof of date of birth of respondent no. 1 Shweta Joshi and that respondents have furnished incorrect information to the investigating officer. Counsel for appellant has drawn the attention of this Court to para 12 of the appeal filed by appellant which reads as follows:

> "12. That in the same judgment the Ld. ASJ held the age of the respondent no. 1 is more than 18 years and criticised the respondent no. 2 and 3 of withholding the real document of age with respect to the age of respondent no.1. The Ld. Trial Court observed that;
>
> > "I have come to the conclusion that the parents withheld the best evidence and hence adverse inference can be drawn against them."
>
> The Ld. ASJ. , further observed that;
>
> > "in their effort to seek the accused convicted for the act done by him, they have furnished incorrect information to the Investigating Officer.
>
> Further held that;
>
> > "the best documentary evidence in this case has been withheld by the prosecution and it raises serious doubt about the intention of the parents and not handing over the reliable documents to the police."

17. It is the case of the appellant that the appellant and respondent no. 1 had a love affair. When the appellant informed respondent no. 1 Shweta Joshi that he has secured a job with Hotel Hilton, Madina in Saudi Arabia, respondent no. 1 insisted on marriage. On the fateful day of 22.10.1999, respondent no. 1, instead of going to her coaching classes at Wadhwa College, Patel Nagar, directly came to the house of the appellant along with a copy of the CGHS certificate dated 21.01.1993 as a proof of her date of birth which was recorded as 06.02.1981 in the said certificate. As per the version of the appellant, when the appellant refused to marry respondent no.1 and asked respondent no. 1 to first take permission from her parents as the appellant was a Muslim and

respondent no. 1 a Hindu Brahmin, respondent no. 1 blackmailed him emotionally that she would commit suicide if the appellant did not marry her. The appellant surrendered to the wishes of respondent no. 1 out of love and affection and they got married as per Hindu rites and ceremonies in a temple near Oberoi Hotel. On the same day at about 2.00 pm, the appellant telephonically informed the parents of respondent no. 1 that he has married their daughter and they are flying to Bangalore. It is further the case of the appellant that respondent no. 1 was a major and was a consenting party to the marriage but later on, she deposed falsely against the appellant in connivance with respondent no. 2 and 3 so as to falsely implicate the appellant and the respondents maliciously prosecuted the appellant for kidnapping, abduction and of attempt to rape respondent no. 1.

18. Counsel for appellant submits that respondents have deliberately maliciously prosecuted the appellant in the criminal case alleging that respondent no. 1 Shweta Joshi was a minor at the time of the marriage between appellant and respondent no. 1 though the respondents were very well aware about the fact that respondent no. 1 was not only a major but was also a consenting party to the marriage. It is further the contention of counsel for appellant that to set the state machinery in motion, the respondents misled the police by not handing over the matriculation certificate of respondent no. 1 but a xerox copy of a transfer certificate issued by Joseph's Convent School, Jallandhar in which the date of birth of respondent no. 1 was incorrectly recorded as 06.12.1981 and the said document was issued only on the instance of the respondents. The counsel has drawn the attention of the court to the medical examination of respondent no.1, which was conducted in the presence of the mother of respondent no.1 (*respondent no.2 herein*), wherein it has been recorded that respondent no. 1 had married appellant Rizwan Shah on Friday, i.e., 22.10.1999 in a mandir on her own consent (willingly); and contends that later on at the instance of respondents no. 2 and 3, respondent no. 1 made false allegations against the appellant that the appellant abducted her in a car and married her forcibly. Further relying upon the MLC of respondent no. 1, the counsel submitted that despite living together for about three nights, the appellant did not develop any sexual relations with respondent no. 1. It is the contention of counsel for appellant that respondents falsely implicated the appellant with mala fide intention to teach him a lesson for marrying their daughter against

their wishes since the appellant was of a different religion. To further his case, the counsel next submitted that the respondents had not filed any missing report with the police till 2 o'clock in the day and it was only when the appellant informed respondents no. 2 and 3 that he has married respondent no. 1 Shweta and that they are flying to Bangalore that the respondent no. 2 and 3 approached the police station to lodge an FIR. The counsel contends that the date of birth of respondent no. 1 has been deliberately withheld from the court to prove that she was a minor so as to invalidate the marriage since consent of a minor is invalid.

19. The counsel for appellant next submits that the date of birth of respondent no. 1 has been conclusively proved to be 06.02.1981 from the service records of respondent no. 2 Smt Rani Joshi (mother) which clearly show that she was on maternity leave from 03.02.1981 to 03.05.1981 whereas the date on 6.12.1981, date of birth as shown in the transfer certificate, cannot be relied upon as the mother was on duty at the All India Radio Office at Jallandhar. The counsel further submits that the date of birth is also proved from the deposition of respondent no. 3 Sh. Satish Joshi who deposed before the trial court that the date of birth of his daughter is 06.02.1981 and has categorically denied her date of birth to be 06.12.1981. Attention of the Court is also drawn to the notebook exhibited as Ex. PW2/D2 of respondent no. 1 wherein she has admitted to have written her date of birth as February 6 in her own handwriting. The counsel further draws the attention of the court to the police verification report dated 11.11.2000 exhibited as Ex. PW-11/1 wherein the CGHS dispensary has confirmed the date of birth of respondent no. 1 to be 06.02.1981.

20. It is contended by counsel for appellant that the learned trial court has grossly erred in holding that the appellant has failed to prove the falsity of the transfer certificate dated 24.08.1986, which records the date of birth of respondent no. 1 as 06.12.1981, in view of the fact that the appellant had successfully proved from the service record of respondent no. 2 Smt. Rani Joshi that the date of birth of respondent no. 1 is 06.02.1981 and further that respondent no. 2 had deposed in her cross-examination that the date of birth of respondent no. 1 is 06.02.1981. It is the contention of the counsel for appellants that once the date of birth of respondent no. 1 Shweta Joshi was proved to be 06.02.1981 then any certificate recording a date different from the actual date of

birth of respondent no. 1 is ipso facto false and bogus.

21. Counsel for appellant has strongly urged before this court that the respondents have made improvements in their statements before the court which makes the falsity in the case of the prosecution apparent. The counsel contends that in the FIR, and in statements before the police and the court, it has been deposed by respondent no. 1 that it was the appellant who was driving the car and there is no mention of any other person in those statements whereas in the written statement filed by the respondents, it has been alleged that the car was being driven by some other person since the appellant cannot drive. The counsel next contends that the appellant suffers from Foot Drop Ailment due a bullet injury received by the appellant in the year 1995 by a militant in Jammu and Kashmir as a result of which the appellant cannot apply force on objects like clutch, break, and accelerator thereby debarring the appellant from driving any vehicle.

22. It is vehemently argued by counsel for appellants that the respondents had not only set the criminal law in motion maliciously, but have also vigorously pursued the prosecution to ensure the conviction of the appellant. In support of the aforementioned contention, the counsel submits that the respondents filed an application on 24.10.1999 for custody of respondent no. 1 further alleging the fact that respondent no. 1 was a minor. It is next submitted that respondents had even filed two applications for cancellation of bail of the appellant; the first application was filed on 19.11.1999 which is one and a half month after the recovery of respondent no. 1 alleging that appellant is criminal by nature and various cases are pending against him. Another application for cancellation of bail was filed on 23.03.2001, which is after two years of moving of the first application, alleging that appellant is a permanent resident of Kashmir and thus would abscond if granted bail. While submitting that both the applications were dismissed by the trial court, the counsel contends that respondents not merely lodged FIR simpliciter but tried their level best at each and every stage of the prosecution to secure conviction of the appellant by moving applications for custody and cancellation of bail stating false facts.

23. Counsel for appellant vehemently argued before the court that due to the false allegations of rape, kidnapping and abduction by the respondents, the appellant has suffered immense damage. The counsel

submits that due to the false complaint, the police approached the house of the appellant in Darya Ganj and he was arrested from his own locality harming his image and reputation among his friends, relations and social circle and has been humiliated by his neighbours and other people. The counsel next submits that due to these false allegations, the appellant was forced to face criminal trial for about three years and was in judicial custody for eight months all of which have given immense mental pain and agony to the appellant. The appellant lost his job with the Hilton Hotel, Madina in Saudi Arabia and due to the false allegations made by the respondents; his future employment prospects have also been hampered since the allegations got vide publicity inside and outside the court and thus, he is duly entitled for damages from the respondents. To support his claim for damages, the counsel for appellant places reliance on **RK Soni v. S. Singhara Singh** reported at AIR 1992 Delhi 264 and more particularly at para 6 which reads as under:

> "6. As far as damages are concerned, the plaintiff has not faced the trial and had not incurred any expenditure in defending the complaint in the Court of law. However, there is evidence led by the plaintiff which I have no reason to doubt that the plaintiffs reputation has suffered because of said malicious prosecution brought by the defendant inasmuch as the defendant had tried to serve non bailable warrants of arrest on the plaintiff and on finding that plaintiff was not available he had tried to show the plaintiff as a criminal and absconder from law by his utterances while trying to serve the said warrants in presence of the workers of the plaintiff and other persons. In an action for malicious prosecution the damages would represent first the general damages, a solatium for injured feelings and reputation. The second would be special damages for actual damages incurred by the plaintiff as a pecuniary loss. In the present case, the plaintiff is claiming general damages because of his being humiliated and harassed by such malicious prosecution and his esteem having been lowered in the eyes of his relations and friends. As far as quantum of the said general damage is concerned, I think the plaintiff has brought the claim of Rs. 2,00,000/- which assessment of damages is on a very higher side. Counsel for the plaintiff has made reference to **Smt. Manijeh v. Sohrab Peshottan Kotwal,** AIR 1949 Nag 273, wherein it has been held

> that in an action for malicious prosecution vindictive damages are permissible. The learned Judge has referred to the law laid down in 10 Halsbury's Laws of England, p. 87, para 108 in this respect. He has also cited Lala **Punnalal v. Kasturichand Ramaji** AIR 1946 Mad 147, in which it was held that exemplary damages are consolatory rather than penal, resting upon the principle that, where there is malice, the mental pain caused to the plaintiff must be taken note of and a solatium awarded for it. It was held that the exemplary damages for torts can be awarded not only under English law but also under the Indian law in cases where the defendant has acted contumaciously."

24. Per contra, counsel for respondents has denied any love affair of respondent no. 1 with the appellant and has argued that appellant used to harass respondent no. 1 by repeatedly calling her at her residence telephone number and pressing her for marriage. On 22.10.1999, respondent no. 1 had gone to Wadhwa College to attend her coaching class and after the class finished, she was waiting for her father, respondent no. 3 herein, to pick her up when appellant accosted her and offered a lift. After great reluctance, respondent no. 1 sat in the car but appellant instead of dropping her to her residence, took her to a dilapidated building and forced her to marry her. As per the version of the respondents, no marriage took place between the appellant and respondent no. 1 and the appellant failed to develop sexual relations with respondent no. 1 due to stiff resistance offered by her. It has been alleged by the respondents that appellant illegally detained respondent no. 1 till she was recovered by the police from the house of the appellant.

25. The counsel for respondents submit that there is no infirmity in the judgement of the learned trial court as the trial court has passed the judgment after perusing the pleadings and the evidence lead by the parties as well as the law laid down in the judicial pronouncements. The counsel submits that no false allegations have been made against the appellant and the appellant is only trying to encash his acquittal and to harass the respondents so as to seek revenge for initiating criminal proceedings against the appellant.

26. It is strongly urged by counsel for respondents that the major premise on which the appellant has brought a suit for malicious prosecution against the respondents is the acquittal of appellant by the Additional

Sessions Judge and it is on the basis of his acquittal only that the appellant asserts that complaint filed by respondents is false and malicious. The counsel contends that the appellant was acquitted by the Learned Additional Sessions Judge on the grounds of benefit of doubt and there has been no categorical finding by the court of sessions that the complaint and FIR lodged by the respondents were false or were lodged with any mala fide intention. Relying upon a judgment of Division Bench reported at 105 (2003) DLT 678, it has been asserted by counsel for respondents that there were various reasons for which the accused is given benefit of doubt and is acquitted and this by itself cannot lead to a conclusion that the complaint was based on extraneous consideration leading to entitlement for damages. A further reliance is sought on **Radhey Mohan Singh v. Kaushalya Devi and Another** reported in 105 (2003) DLT 678 (DB) wherein the Hon'ble High Court had held that because of non-corroboration of story by the prosecution, accused was given benefit of doubt. The relevant para relied upon by counsel for respondent reads as under:

> "7. Learned Counsel for the appellant placed reliance on **Ucho Singh v. Nageshar Prasad,** AIR 1956 Patna 285. In this case, the Court observed where the finding of the Courts of fact is that the accusation against the plaintiffs made by the defendant was false to his knowledge and that there was enmity between the parties and their supporters, the conclusion would follow that the prosecution of the plaintiffs was malicious as well as without any reasonable and probable cause. There is no quarrel with the proposition as enunciated in this case but when the principle of this case is made applicable to the facts of this case, the conclusion is irresistible. In the instant case, the appellant himself had committed the offence, giving the respondent reasonable and probable cause for filing of complaint which on investigation was found to be correct. It is true that because of the lapses of the prosecution and non-corroboration of the story by the prosecution, the accused was given benefit of doubt but in the facts of this case, on the finding arrived at by the learned trial Court, it cannot be construed that there was no reasonable or probable cause of filing the complaint. The trial Court came to a definite finding that prosecution of the appellant by the respondent was not a malicious prosecution and consequently

> the appellant is not entitled to damages."

27. It is further the contention of counsel for respondents that the findings by a criminal court have no bearing on a civil suit for malicious prosecution and the judgement of the criminal court can only be used as an evidence to prove the acquittal of the appellant and not beyond. To support the aforementioned contention, the counsel for respondent places reliance upon **Kishan Singh (D) through LRS. v. Gurpal Singh & Others** reported in (2010)4 JCC 2547 and more particularly at para 19 which reads as under:

> "19. Thus, in view of the above, the law on the issue stands crystallised to the effect that the findings of fact recorded by the civil court do not have any bearing so far as the criminal case is concerned and vice versa. Standard of proof is different in civil and criminal cases. In civil cases it is preponderance of probabilities while in criminal cases it is proof beyond reasonable doubt. There is neither any statutory nor any legal principle that findings recorded by the court either in civil or criminal proceedings shall be binding between the same parties while dealing with the same subject-matter and both the cases have to be decided on the basis of the evidence adduced therein. However, there may be cases where the provisions of Sections 41 to 43 of the Indian Evidence Act, 1872, dealing with the relevance of previous judgments in subsequent cases may be taken into consideration."

28. The counsel for respondent contended that there was reasonable and probable cause for approaching the police authorities and lodging a complaint. It is submitted by counsel for respondents that such a conduct is natural and justified for a parent whose daughter was missing and untraceable and the situation was further aggravated when respondent no. 3 was telephonically informed by appellant that he is taking respondent no. 1 to Bangalore which created a doubt in the mind of respondent no. 3 that the appellant has kidnapped respondent no. 1 since the appellant used to make frequent calls at the residence of respondents. In such circumstances, the respondent no. 3 had no other option than to approach the police to recover his daughter. The counsel next submits that it is the truthfulness of the fact explained by the complainant at the time of getting a criminal case registered which is material for deciding as to

whether the complainant was having reasonable cause or not and whether those facts are ultimately held to be true or false by the court of law is immaterial. The counsel asserts that malice and absence of reasonable cause must co-exist before the suit for malicious prosecution is allowed. In support of the aforesaid contention, the counsel for respondent placed reliance on the facts of the case in **KB Mathur & Others v. Sheel Kumar Saxena and Others** reported in 46 (1992) DLT 114 wherein the Hon'ble High Court of Delhi was dealing with a situation where the plaintiff was released on anticipatory bail and charge-sheet was quashed by the court against the landlord and the question arose whether tenant prosecuted the landlord maliciously and without reasonable and probable cause. The Hon'ble Court came to a conclusion in the negative since reasonable and probable cause was available to the defendant to lodge the complaint.

29. Further contending that the only material time when reasonable and probable cause has to be found out is the time when the criminal proceedings are commenced or set into motion, the counsel for respondents places reliance on the case of **Bharat Commerce Industries v. SN Shukla** reported at AIR 1966 Calcutta 388 (DB) and more particularly at para 7 which reads as under:

> "7. In our opinion, the whole approach of Mr. Das is erroneous. In a suit for malicious prosecution, the plaintiff must prove (1) that the defendant prosecuted him, and (2) that the prosecution ended in the plaintiff's favour, and (3) that the prosecution lacked reasonable and probable cause, and (4) that the defendant acted maliciously. In the instant case, admittedly there was a prosecution and an acquittal, the only question that we shall have to find out on the facts and circumstances of this case is whether the prosecution under Sections 408 and 420 I. P. C. lacked reasonable and probable cause and whether Bharat Airways Ltd. acted maliciously. In the past, "malice" was identified with "lack of reasonable and probable cause" and often malice was inferred from lack of reasonable and probable cause and vice versa. But the present state of law seems to be that the concept of malice is to be kept distinct from the concept of lack of reasonable and probable cause. Ordinarily, malice denotes spite or hatred against an individual but it is often difficult to infer spite or hatred from the conduct of a person. It is said that the devil does not know

> the mind of man. Therefore, the ordinary meaning of malice cannot be determined by any subjective standard. Clarke and Lindsell have rightly said in their book on Law of Tort, 11th Edition. Article 1444 at page 870:
>
> > "The term 'malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of malice animus and as denoting that the party is actuated by an improper motive. The proper motive for prosecution is of course a desire to secure an end to justice."
>
> Professor Winfield has also made similar observations in his book on the Law of Torts (3rd Edition) at page 604:
>
> > "Judicial attempts to define malice have not been completely successful. 'Some other motive than a desire to bring to justice a person whom he (the accuser) honestly believes to be guilty", seems to overlook the fact that motives are often mixed. Moreover anger is not malice; indeed, it is one of the motives on which the law relies in order to secure the prosecution of criminals, and yet anger is much more akin to revenge than to any desire to uphold the law, perhaps we are nearer the mark if we suggest that malice exists unless the pre-dominant wish of the accuser is to vindicate law."
>
> Thus, in order to give an objective meaning to the term, 'malice', it should be found out whether the accuser has commenced prosecution for vindication of justice e.g., for redress of a public wrong. If he is actuated by these considerations, he cannot be said to have any malice. But if his object to prosecute is to be vindictive or to malign him before the public or is guided by purely personal considerations he should be held to have malice in the matter. Similarly, the lack of reasonable and probable cause should be also understood objectively. Reasonable and probable cause does not connote the subjective attitude of the accuser. If the accuser thinks that it is reasonable to prosecute, that fact by itself cannot lead to the conclusion that judicially speaking, he has reasonable and probable cause for the prosecution. The term 'reasonable' shows that the causes must

conform to the standards of a reasonable and prudent man and the term 'probable' shows that the causes may result in the proof of the guilt. Therefore, a reasonable and probable cause can only mean that the grounds for the plaintiffs guilt are reasonable according to a reasonable and prudent man and that there are materials which might result in the conviction of the accused. It can never be said that the reasonable and probable causes are grounds which must inevitably result in conviction. If acquittal means that the prosecution has been commenced without any reasonable and probable ground, then it would not have been necessary to say that apart from or in addition to the acquittal the plaintiff, in a suit for malicious prosecution, must prove that the defendant lacks reasonable and probable cause in prosecuting the plaintiff. A man may be acquitted and yet there may be a reasonable and probable cause for prosecution. This analysis of the legal position shows that the probative value of the evidence or the legal conclusions on the evidence cannot be very relevant in determining whether the accuser has a reasonable and probable cause in prosecuting the plaintiff. It is not necessary that in order to come to the conclusion that the accuser has a reasonable and probable cause, the evidence adduced must be commensurate with the conviction of the accused. In a criminal trial, benefit of doubt often plays an important part. If some part of the evidence leads to a conclusion that a man is guilty and if another part of the evidence in the same case indicates that the man may not be guilty, or if two possible views of a conflicting nature can be spelt out from the entire facts of the case, the accused gets benefit of doubt. Therefore, the only relevant and material time when a reasonable and probable cause for prosecution has to be found out is the time when the criminal proceeding is commenced or set in motion. It is only from this point of view that the evaluation of the evidence in a suit for malicious prosecution should be made. Mr. Das's whole approach is that as the guilt of the plaintiff was not proved, or insufficient or contradictory evidence was adduced during the hearing of the criminal case, there cannot be a reasonable and probable cause for the prosecution. He has not made any distinction between 'malice and reasonable and probable cause and has contended that as there was lack of reasonable and probable cause, there must

have been malice. He has referred us to that part of the plaintiff's evidence where he has deposed that in or about November, 1952 he has been unjustly superseded by a junior man who was a nominee of Mr. Kejriwal, an important officer of the Company. But apart from that uncorroborated oral evidence there is nothing to show that Bharat Airways Ltd. had an animus against him. It is true that the same set of facts may lead to the conclusion that there is malice as well as lack of reasonable and probable cause. It is also true that in some cases the existence of malice may be a relevant consideration to determine lack of reasonable and probable cause and vice versa. But as stated earlier, the two concepts cannot be held to be identical. In this connection, attention may be drawn to the following observations of Mr. Winfield at page 662 in the same book:

> "At one time malice was not always kept distinct from lack of reasonable and probable cause but a cogent reason for separating them is that, however spiteful an accusation may be, the personal feelings of the accuser are really irrelevant to its probable truth. The probability or improbability of X having stolen my purse remains the same however much I may dislike X. And it has long been law that malice and lack of reasonable and probable cause must be separately proved. Malice may, however, be inferred from want of probable cause, but it cannot be established by that alone."

With these observations, the oral and documentary evidence may now be examined. (After examining the oral and documentary evidence his Lordship went on to hold.) It should be remembered that we are not deciding in this appeal the guilt or innocence of Mr. Shukla in the context of the criminal charges levelled against him; nor are we enjoined to assess the evidence of the criminal case in its applicability to Section 222(2) of the Code of Criminal Procedure, except in an indirect way. In this connection we should remember the following observations of Mr. Winfield in his book at p. 608: "If there is an honest belief that the accusation is true, then even though the belief is mistaken, the charge may still be reasonable and probable. Nor under the facts upon which the prosecution was founded be such as would be admissible as

evidence to establish the guilt of the accused. "The distinction between the facts to establish actual guilt and those required to establish a bona fide belief in guilt should never be lost sight of in considering such cases. But this does not entitle a man, not making an accusation, to shut his eyes to facts which would make any reasonable person infer that the accused party's conduct was not criminal." We should, therefore, try to find out whether the appellant commenced the prosecution without any honest belief of the plaintiff's guilt and whether it failed or neglected to take reasonable care to inform itself of the true facts before commencing or proceeding with the prosecution."

30. It is next contended by counsel for respondents that all the witnesses had deposed in the trial court as to how respondent no. 1 was kidnapped by the appellant and there was a reasonable and probable cause for respondent no. 3 to lodge a complaint with the police authorities. Counsel further submitted that respondent no. 1 Shweta Joshi was forcibly taken to a temple and later on the appellant tried to develop sexual intimacy with her but could not succeed due to her stiff resistance.

31. Counsel for respondent points out that the main thrust of the case for malicious prosecution by the appellant is the age of respondent no. 1 Shweta Joshi as the counsel for appellant has submitted that the respondents implicated the appellant in false criminal case alleging that respondent no. 1 was a minor and thus incapable of giving consent despite being well aware of the fact that respondent no. 1 was a major at the time of marriage. It was next submitted by the counsel that the appellant was charged for offences under section 363/366/506 Part II IPC and for the offence under section 366, age is not a consideration at all. The counsel contends that the correct date of birth has not been proved in the lower court nor did the court direct the respondent no. 1 to undergo ossification test in order to determine the age of respondent no. 1 Shweta Joshi.

32. It is further contended by counsel for respondents that the applications for cancellation of bail were moved only because the appellant had threatened the respondents that they will have to face dire consequences if the complaint was not withdrawn and for deposing against the appellant once the appellant gets released on bail. It is next submitted that a complaint to this effect was lodged by the respondents with the police

authorities.

33. I have heard counsels for the parties and have carefully perused the entire material placed on record. The contentions of counsel for appellant are summarised as under:

- The trial court has lost sight of the findings of the learned ASJ wherein while acquitting the appellant, the learned ASJ has observed that the respondents withheld the best evidence of proof of age of respondent no.1, furnished false information to the investigating officer and has also cast a serious doubt on the intention of parents of respondent no. 1.
- The respondents have maliciously prosecuted the appellant by knowingly deposing false facts to the police authority that respondent no. 1 is a minor and the marriage was forcible.
- The respondents have vigorously prosecuted the case so as to ensure the conviction of the appellant by repeatedly alleging before the court of sessions that respondent no. 1 is a minor.
- Due to the false allegations of the respondents, the appellant has suffered immense mental agony and pain since his reputation has been tarnished, he lost his job in Saudi Arabia and his future employment prospects have also been hampered; he had to face criminal trial for three long years and remain in judicial custody for around eight months.

34. The contentions of counsel for respondents is summarised as under: . The appellant has been acquitted by only giving him a benefit of doubt due to lapses in the prosecution case and has not been totally exonerated from the charges.

- The findings of a court in criminal proceedings have no bearing on a civil suit for malicious prosecution.
- Respondents no. 2 and 3 had reasonable and probable cause to lodge a complaint with the police authorities as it is natural of any parents whose daughter went missing.
- There is no malice in prosecuting the appellant but the

only intention was to recover respondent no. 1 and to punish the appellant of the offences committed by him.

- The age is not the sole criteria of the prosecution case.

35. The law relating to malicious prosecution has been elaborately laid down by the Apex Court in **West Bengal State Electricity Board v. Dilip Kumar Ray** reported in AIR 2007 SC 976 as under:

"14.....Malicious prosecution-Malice.-Malice means an improper or indirect motive other than a desire to vindicate public justice or a private right. It need not necessarily be a feeling of enmity, spite or ill will. It may be due to a desire to obtain a collateral advantage. The principles to be borne in mind in the case of actions for malicious prosecutions are these:ùMalice is not merely the doing of a wrongful act intentionally but it must be established that the defendant was actuated by malus animus, that is to say, by spite or ill will or any indirect or improper motive. But if the defendant had reasonable or probable cause of launching the criminal prosecution no amount of malice will make him liable for damages. Reasonable and probable cause must be such as would operate on the mind of a discreet and reasonable man; 'malice' and 'want of reasonable and probable cause,' have reference to the state of the defendant's mind at the date of the initiation of criminal proceedings and the onus rests on the plaintiff to prove them.

OTHER DEFINITIONS OF 'MALICIOUS PROSECUTION'.– 'A judicial proceeding instituted by one person against another, from wrongful or improper motive and without probable cause to sustain it.

'A prosecution begun in malice, without probable cause to believe that it can succeed and which finally ends in failure.

'A prosecution instituted wilfully and purposely, to gain some advantage to the prosecutor, or through mere wantonness or carelessness, if it be at the same time wrong and unlawful within the knowledge of the actor, and without probable cause.'

'A prosecution on some charge of crime which is wilful, wanton, or reckless, or against the prosecutor's sense of duty and right,

or for ends he knows or is bound to know are wrong and against the dictates of public policy.'

The term 'malicious prosecution' imports a causeless as well as an ill-intended prosecution.

MALICIOUS PROSECUTION is a prosecution on some charge of crime which is wilful, wanton, or reckless, or against the prosecutor's sense of duty and right, or for ends he knows or its bound to know are wrong and against the dictates of public policy.

In malicious prosecution there are two essential elements, namely, that no probable cause existed for instituting the prosecution or suit complained of, and that such prosecution or suit terminated in some way favourably to the defendant therein.

1. The institution of a criminal or civil proceeding for an improper purpose and without probable cause. 2. The cause of action resulting from the institution of such a proceeding. Once a wrongful prosecution has ended in the defendant's favor, he or she may sue for tort damages - Also termed (in the context of civil proceedings) malicious use of process. (Black's, 7th Edn., 1999)

'The distinction between an action for malicious prosecution and an action for abuse of process is that a malicious prosecution consists in maliciously causing process to be issued, whereas an abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect - the improper use of a regularly issued process. For instance, the initiation of vexatious civil proceedings known to be groundless is not abuse of process, but is governed by substantially the same rules as the malicious prosecution of criminal proceedings.' 52 Am. Jur. 2d *Malicious Prosecution* S. 2, at 187 (1970).

The term 'malice,' as used in the expression 'malicious prosecution' is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives.

As a general rule of law, any person is entitled though not always bound to lay before a judicial officer information as to any criminal offence which he has reasonable and probable cause to believe has been committed, with a view to ensuring the arrest, trial, and punishment of the offender. This principle is thus stated in *Lightbody case*, 1882, 9 Rettie 934 = When it comes to the knowledge of anybody that a crime has been committed a duty is laid on that person as a citizen of the country to state to the authorities what he knows respecting the commission of the crime, and if he states, only what he knows and honestly believes he cannot be subjected to an action of damages merely because it turns out that the person as to whom he has given the information is after all not guilty of the crime. In such cases to establish liability the pursuer must show that the informant acted from malice i.e. .not in discharge of his public duty but from an illegitimate motive,. and must also prove that the statements were made or the information given without any reasonable grounds of belief, or other information given without probable cause; and Lord Shand added (p. 940): .He has not only a duty but a right when the cause affects his own property.'

Most criminal prosecutions are conducted by private citizens in the name of the Crown. This exercise of civic rights constitutes what with reference to the law of libel is termed a privileged occasion; but if the right is abused, the person injured thereby is, in certain events, entitled to a remedy. (See H. Stephen, *Malicious Prosecution,* 1888; Bullen and Leake, Prec. P1., Clerk and Lindsell. Torts, Pollock, Torts; LQR, April 1898; Vin., Abr., tit. 'Action on the Case' *Ency. of the Laws of England.*)

MALICIOUS PROSECUTION means that the proceedings which are complained of were initiated from a malicious spirit i.e. from an indirect and improper motive, and not in furtherance of justice. (*1905-06*)10 CWN 253 (FB)

[The performance of a duty imposed by law, such as the institution of a prosecution as a necessary condition precedent to a civil action, does not constitute 'malice'. [**Abbott v. Refuge Assurance Co** (1962) 1 QB 432]

['Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted' (per Diplock U in **Dallison v. Caffery** (196501 QB 348]. (Stroud, 6th Edn., 2000).

15. "['Malice' means and implies spite or ill will.] Incidentally, be it noted that the expression 'mala fide' is not meaningless jargon and it has its proper connotation. Malice or mala fides can only be appreciated from the records of the case in the facts of each case. There cannot possibly be any set guidelines in regard to the proof of mala fides. Mala fides, where it is alleged, depends upon its own facts and circumstances.. (See **Prabodh Sagar v. Punjab SEB,** (2000) 5 SCC 630)

16. The legal meaning of malice is 'ill will or spite towards a party and any indirect or improper motive in taking an action'. This is sometimes described as 'malice in fact'. 'Legal malice' or 'malice in law' means 'something done without lawful excuse'. In other words, 'it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others.' (See **State of A.P. v. Goverdhanlal Pitti** (2003)4 SCC 739)

17. [T]he word 'malice' ... in common acceptation means and implies 'spite' or 'ill will'. One redeeming feature in the matter of attributing bias or malice and is now well settled that mere general statements will not be sufficient for the purposes of indication of ill will. There must be cogent evidence available on record.... In the case of **Jones Bros. (Hunstanton) Ltd. v. Stevens,** (1955)1 QB 275: (1954)3 All ER 677 (CA) the Court of Appeal has stated upon reliance on the decision of **Lumley v. Gye** (1853)2 E&B 216 : 22 LJQB 463 as below:

'For this purpose maliciously means no more than knowingly. This was distinctly laid down in Lumley v. Gye where Crompton, J. said that it was clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation of master and servant by harbouring and keeping the servant after he has quitted his master during his period of

service, commits a wrongful act for which he is responsible in law. Malice in law means the doing of a wrongful act intentionally without just cause or excusen - **Bromage v. Prosser** (1825)1 C&P 673: 4 B&C 247. Intentionally. refers to the doing of the act; it does not mean that the defendant meant to be spiteful, though sometimes, as for instance to rebut a plea of privilege in defamation, malice in fact has to be proved.' (See **State of Punjab v. U.K. Khanna** (2001) 2 SCC 330)

18. "[Malice in law.] Malice in law is, however, quite different. Viscount Haldane described it as follows in Shearer v. Shields 1914 AC 808 as:

> 'A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of mind is concerned, he acts ignorantly, and in that sense innocently.'

Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause." (See **S.R. Venkataraman v. Union of India** (1979)2 SCC 491; AIR 1979 SC 49)

19. [Malice per common law.] Malice in common law or acceptance means ill will against a person, but in the legal sense it means a wrongful act done intentionally without just cause or excuse.. (See **Chairman and MD, BPL Ltd. v. S.P. Gururaja and others** (2003)8 SCC 567 and **Chairman and MD, BPL Ltd. v. S.P. Gururaja and others,** JT 2003 (Suppl2) SC 515)

20. While it is true that legitimate indignation does not fall within the ambit of malicious act, in almost all legal inquiries, intention, as distinguished from motive is the all-important factor. In common parlance, a malicious act has been equated with intentional act without just cause or excuse.. [See **Jones Bros. (Hunstanton) v. Stevens,** (1955)1 QB 275: (195403 All ER 677 (CA), **Mandal Vikas Nigam Ltd. v. Girja Shankar Pant**

(2001)1 SCC 182.

36. The case of the appellant rests primarily upon the finding of the learned ASJ while acquitting the appellant of the charge of kidnapping respondent no. 1. The counsel for respondent vehemently opposed the reliance placed by appellant on the findings of the criminal court and urged that in a civil suit for malicious prosecution, the civil court has to come on its own findings as to the facts and the findings in the criminal proceedings have no bearing on a civil suit for malicious prosecution. In the circumstances of the present case, I do not find force in the aforesaid contention of counsel for respondent as the judgement dated 30.10.2001 passed by learned ASJ has been duly exhibited as Ex. PW-1/K by the appellant before the trial court and therefore, merits consideration. Further, the judgement of acquittal has attained finality since the said judgement was passed in 2001 and no appeal or review has been stated to be preferred by the respondents against the said judgment.

37. The Blacks' Law Dictionary (eighth edition at pg 977) defines malicious prosecution as the institution of criminal or civil proceedings for an improper purpose and without probable cause. It further says that the tort requires an adversary to prove four elements: (1) the initiation or continuation of a lawsuit; (2) lack of probable cause; (3) malice; (4) favourable termination of the lawsuit. While it is not disputed that the respondents had filed a case against the appellant for allegedly kidnapping respondent no. 1 and that the prosecution was terminated in favour of the appellant thereby acquitting the appellant of the criminal charges; the questions to be determined are whether there was any reasonable and probable cause in initiating/sustaining a complaint and whether the respondents were motivated by malice.

38. It is the contention of counsel for respondents that there was no malice since the intention of the respondents was only to recover their daughter, Shweta Joshi and to see that the appellant is punished for the offence committed by him. It is further put forth by the counsel that the respondents no. 2 and 3 were in such a state of mind that they could not depose the correct age of their daughter respondent no. 1 to the police. I do not find any merit in the contention of counsel for respondents. I have perused the contents of the FIR wherein respondent no. 3 has even given details about the clothes and slippers that respondent no. 1 was wearing. It is hard to believe that though such minute details have

not slipped from the mind of respondent no. 3, the date of birth of respondent no. 1 was wrongly deposed. Even in the wildest of imagination, it cannot be believed that respondents no.2 and 3, who are none else but parents of respondent no.1 Shweta Joshi and respondent no. 1 herself are not aware of the correct date of birth of respondent no. 1. It is also not the case of respondents where all the respondents have uniformly deposed a date of birth of respondent no. 1. There has been a specific finding by the additional sessions judge that the respondents have withheld the best evidence of proof of date of birth of respondent no. 1 which is the senior secondary examination certificate which was in their possession and power and hence an adverse inference can be drawn against them. After appreciating the entire evidence put forth by the prosecution, there is a categorical finding by the learned additional sessions judge that respondent no. 1 was above 18 years of age at the time of alleged incident. The relevant portion of the judgement dated 30.10.2001 passed by the additional sessions judge is reproduced below:

> ""12.....The sole question is whether prosecution has successfully proved it that she was born on 6.12.81 or not. On the one hand there is an oral testimony of Shweta and her mother that she was born on 6/12/1981 and on the other hand there is the testimony of Shri Satish Joshi in the examination in-chief itself that his daughter was born on 6/2/1981 and not on 6/12/1981. Once I thought that it might be and not on 6/12/1981. Once I thought that it might be a typographical error but I have checked it and I am satisfied that there is no typographical error in recording the statement of Satish Joshi because he stated in the affirmative that his daughter was born on 6/2/1981 and in the next sentence he made a statement in the negative stating that it was incorrect that his daughter was born on 6/12/1981. Rani Joshi was confronted with photocopy of her CGHS Card where the date of birth of her daughter was recorded as 6/2/1981. She denied the document and legally as it was a photocopy, the same could not be put to the witness. She offered to show her CGHS card which was never shown. It is correct that in this case opportunity was granted to the accused to summon the office record of Smt. Rani Joshi to verify the correct date of birth of Shweta but he missed that opportunity on the advise of his advocate. Subsequently, the applications were moved by the

> accused to summon that record but these applications were rejected for legal reasons. In spite of this I cannot lose sight of the fact that the accused was in possession of documents which has raised suspicion in the mind of the court that whether she was born on 6th February or on 6th December, 1981. This doubt is created by placing on record admissible evidence also. The accused has placed on record one autograph book which is admittedly in the handwriting of prosecutrix Shweta. On the page of Ex. PW2/D2 she has written in her own hand her name. She has recorded her date of birth as 6/2 and sunsign as Aquarius. The explanation added by the prosecutrix that she wrote her wrong date of birth and sunsign on the advise of a friend is neither probable nor believable, especially in the circumstances of this case when the accused is claiming that this was the date of birth furnished by her mother in her office record and she herself gave the photocopy of their CGHS Card to the accused. The documentary evidence placed on record by the prosecutrix was photocopy of a transfer certificate issued by Joseph Convent School, Jullundhar. Firstly, this document is not proved as per Indian Evidence Act and the same cannot be read in evidence. It's only photocopy and it is no evidence that on what basis her date of birth was recorded in this certificate. PW-2 specifically deposed that she was admitted in cross examination that Shweta was admitted in UKG in M.P Bengali, Sr. School Gole Market. No certificate from that school has been produced. The girl had already passed Secondary School Examination from CBSE , Delhi and the date of birth of a child is recorded in that certificate. Why that certificate was not handed over by the parents to police? She was a student of a school in Gole Market, very close to the house of her parents but no certificate from that school has been placed on record. It is not stated where she was born and whether her date of birth was recorded in any municipal authority or not and no such certificate has been placed on record. The best documentary evidence in this case has been withheld by the prosecution and it raises a serious doubt about the intention of the parents in not handing over the reliable documents to the police. Instead of handing over secondary school examination certificate to the police, a transfer certificate

issued by school in Jullundhar was handed over to the police which was issued in 1985, as against this evidence led by the prosecution, accused has proved on record through DW-1 that prosecutrix applied for admission in Indira Gandhi National Open University in 1998 and in the admission form she gave her date of birth as 6/12/1978. This form was filled by her in 1998. This evidence led in defence also raises reasonable doubt about the prosecution claim that she was below 18 years of age at the time of incident. As against oral testimony of Shweta and her mother, this documentary evidence, that too furnished by the prosecutrix herself while seeking admission that she was born in 1978 cannot be ignored. Hence, from the entire quality of evidence led by prosecution I have come to the conclusion that the parents withheld the best evidence and hence adverse inference can be drawn against them. The prosecutrix herself wrote her date of birth in her autograph book as 6/2. The photo copy of the transfer certificate handed over by the complainant to the Investigating Officer is not proved on record and the oral testimony of PW Shweta and Rani Joshi is not worth relying. In their effort to seek the accused convicted for the acts done by him they have furnished incorrect information to the Investigating Officer. Above all the complainant Satish Joshi himself deposed that his daughter was born on 6/2/81 and not on 6/12/1981. There is no reason to disbelieve his testimony. The incident took place on 22/10/1999 and in any case whether she was born on 6/2/1981 as told by Satish Joshi or on 6/12/1978 as stated by Shweta in her admission form, she was above 18 years of age on the day of the incident. Even otherwise, I find the version given by the accused more reliable and trustworthy that while coming to him, Shweta herself brought a photocopy of her mother's CGHS Card as a proof that she was born on 6/2/1981 and she was recorded in her autograph book that she was born on 06.02.1981. Hence for sole reason that the prosecutrix was above 18 years of age, the charge u/s 363 IPC fails."

39. I have carefully gone through the autograph book of respondent no. 1 exhibited as Ex. PW-1/C1 wherein respondent no. 1 has admittedly written in her own handwriting that her date of birth is 6th Feb and her sunsign is Aquarius. I have also perused the police verification report

dated 11.11.2000 exhibited as Ex. PW-11/1 wherein the police officer has submitted that he went to the CGHS Dispensary at 31, North Avenue, New Delhi and a doctor Dr. Krishan Kumar, CMO, after checking the records of CGHS, confirmed that the date of birth of respondent no. 1 Shweta Joshi is 6.02.1981. The appellant has also placed on record the service records of respondent No. 2 Smt Rani Joshi who is the mother of respondent no. 1. A bare perusal of the said service record exhibited as Ex. PW-7/A shows that respondent no. 2 was on maternity leave for a period of ninety days from 03.02.1981 to 03.05.1981 and resumed her duty from 05.05.1981. In her cross-examination, respondent no. 2 Smt Rani Joshi has herself admitted that she took maternity leave during the said period regarding the birth of respondent no. 1 Shweta Joshi. The next leave period is shown to be from 13.12.1981 to 24.12.1981 which makes it amply clear that on 06.12.1981, respondent no. 2 was on duty at her All India Radio Office, at Jullundhar. PW-7, Sh. Shiv Kumar, UDC, All India Radio has also deposed in his examination-in-chief that respondent no. 2 Smt Rani Joshi was not on any maternity leave on 06.12.1981. Admittedly, respondent no. 1 is the only child of respondent no. 2 and the date alleged to be date of birth of respondent no. 1 Shweta Joshi is a date on which respondent no. 2 was in office, which is highly improbable.

40. Furthermore, respondent no. 3 Sh. Satish Joshi has deposed in his cross-examination that the date of birth of respondent no. 1 is 06.12.1981, as per certificate but in fact it is 06.02.1981. I have carefully perused the statements of respondents before the additional sessions judge as they have duly been exhibited as Ex. PW-1/J1, Ex. PW-1/J2 and EX PW-1/J3. I have also gone through the statements of the respondents made before the additional district judge in the suit for malicious prosecution. While before the additional sessions judge, respondents no. 1 and 2 have repeatedly said that the date of birth of respondent no. 1 is 6.12.1981 and not 06.02.1981 whereas before the additional district judge, respondent no. 2 Smt Rani Joshi has deposed in her cross-examination that she stated the actual date of birth to the police but it was the police who insisted that it is the date given in the certificate which is required to be submitted to the court. This shows a clear admission on the part of respondent no. 2 that the date of birth in the transfer certificate is not the actual date of birth of respondent no. 1.

41. The counsel for appellant has also drawn the attention of the court to the admission form of Indira Gandhi National Open University exhibited as Ex. PW-9/A filled in by respondent no. 1 where she has filled her date of birth to be 06.12.1978. The minimum age for admission to the BPP program in the said University is 18 years as has been deposed by PW-9, Sh. K. Mahalingam. He has further deposed in his examination-in-chief that Shweta Joshi got admission in the said University in July 1998 further corroborating the fact that Shweta was above 18 years of age at the time of alleged incident. Therefore from the observations made above, I am of the view that the respondent no. 1 was above 18 years of age at the time of alleged incident and the state machinery was set into motion by deposing false and incorrect information to the police authorities. The prosecution itself was based upon false facts.

42. It is contented by counsel for respondent that there was a reasonable and probable cause to complain to the police authorities as their daughter respondent no. 1 had not returned home after attending college and the situation further aggravated when appellant called the respondent no. 3 to inform that he is taking respondent no. 1 to Bangalore. The Black's Law Dictionary clearly lays down that there must be a reasonable and probable cause for initiating the proceedings as well as for continuation of the said proceedings. Though I find little force in the contention of counsel for respondents that it is natural and justified for parents of respondent no.1 (respondents no. 2 and 3 herein) to approach the police authorities at the very first instance rather than making enquiries from friends/relations or from the college/coaching classes, but the fact that the respondent no. 1 Shweta Joshi is also a prosecutor in the criminal proceedings instituted against the appellant and after being duly recovered on 24.10.1999, she still chose to prosecute the appellant knowingly that the allegations are false, casts a cloud of suspicion on the bona fide of the respondents. Respondent no. 2 Smt Rani Joshi has categorically stated in her affidavit that the entire affidavit is based upon the feedback given to her by respondent no. 1. There has been a categorical finding by the additional sessions judge to the effect that there is no evidence to show that respondent no. 1 was dragged in the car or that she was enticed by the appellant. It is further the finding of the Additional Sessions Judge that there was no evidence led by the prosecution to prove that any threat was extended by appellant to respondent no. 1 that her parents would be killed if she disclosed anything to them. The relevant

extract of the judgment dated 30.10.2001 is as under:

> "13.....Her entire cross-examination suggest that in the absence of her parents, she used to telephone the accused as well as to receive his telephone. Has she not been a willing partner in the exchange of his telephone there was no occasion for her to take life from the accused on the fateful day for going back to her house. She deposed that her father used to pick her up at 9.15 a.m from Wadhwa College, Patel Nagar. On 22/10 he did not come till 9.25 a.m and hence she accompanied the accused. She knew that accused used to telephone her at her residence and he used to offer to marry her and if she was not interested in marrying him there was no occasion for her to take lift from a boy who used to tease her by telephoning her or pressing her for marriage. That too just after 10 minutes of the usual arrival time of her father. .....
>
> Her conduct only shows that she of her own free will took the lift from the accused. There is no evidence that she was dragged in the car or was forced to sit in the car. Even if her testimony taken as a gospel truth, the accused only offered a lift. She could have easily refused it, why she took the lift and went with the accused. It only suggests that she wilfully accompanied the accused."

43. I have also perused the MLC of respondent no. 1 exhibited as Ex. PW-1/E wherein it has been recorded that respondent no. 1 got married to appellant Rizwan Shah willingly and voluntarily. In her evidence by way of affidavit, respondent no. 1 has deposed that appellant had tried to develop physical intimacy with her but could not succeed due to stiff resistance of respondent no. 1. This version is clearly proved to be false as a bare perusal of the MLC indicated that there were no marks of assault nor were there any external marks of injury seen anywhere on the body of respondent no. 1. Her hymen was also found to be intact ruling out any possibility of sexual intercourse between the appellant and respondent no. 1. Had the version of respondent no. 1 been true, there must have been some injury marks on the body of respondent no. 1 that she would have sustained while offering the stiff resistance. Furthermore, the learned ASJ has held that respondent no. 1 was not confined to the house of the appellant since investigating officer in whose presence

respondent no. 1 was recovered and respondent no. 1 herself deposed that when police came to the house of the appellant, the door was opened by respondent no. 1 and not the appellant and therefore charge under section 366 IPC also fails.

44. The respondents not only levelled false charges against the appellant but also prosecuted the entire case vigorously with the sole intention of getting the appellant convicted. Apart from initiating the prosecution on false facts, the respondents also filed applications for cancellation of bail alleging the appellant to be a habitual criminal and a permanent resident of Kashmir without any rational basis for the same. Respondent no. 3, Sh. Satish Joshi deposed in his cross-examination that the allegations that appellant is a habitual criminal or that he is a permanent resident of Kashmir was made solely upon the information given by the police and by a neighbour of the appellant whose name and details he does not remember. The respondents have deposed false facts one after the other throughout the proceedings. The criminal proceedings were initiated based upon false facts and sustained and contested by repeatedly asserting false and baseless allegations. There are several discrepancies in the deposition of the respondents. While in the written statement filed before the trial court, it has been alleged by the respondents that the car was being driven by some other person since the appellant cannot drive but in her evidence by way of affidavit, respondent no. 1 asserts that the appellant was driving the car when he offered lift to respondent no. 1. While respondent no. 1 and respondent no. 2 clearly deny that respondent no. 1 has filled any form for admission in the Indira Gandhi National Open University; respondent no. 3 Sh. Satish Joshi deposed in his cross-examination that respondent no. 1 joined IGNOU for further studies and further deposed that respondent no. 1 might have taken admission for BPP course in the said University.

45. In view of the observations made above, I am of a view that the respondents maliciously prosecuted the appellant without any reasonable and probable cause. I find this to be a typical case where the daughter of the family decided to marry a man outside her own community and faced strong opposition from her family, and later on under the pressure of her family and relatives, the daughter deposed against the appellant in order to save her and her family's honour.

46. Lastly, it has contended by counsel for appellant that the appellant has suffered mental agony and pain due to false charges levelled against him by the respondents. His reputation has been tarnished and he faced humiliation at the hands of his friends, relatives, neighbours and people in his social circle. The counsel further contends that due to malicious prosecution, the appellant had to remain in judicial custody for eight months and faced a long trial which exhausted him mentally and financially; he lost his job in Saubi Arabia and that his future employment prospects have also been hampered. I find merit in the said contention.

47. The appellant has filed his affidavit by way of evidence before the trial court which has been extracted above. As per this affidavit, the appellant has deposed that on account of his arrest and imprisonment for a period of more than eight months and having regard to the grave and serious allegations, his image and reputation was greatly lowered in the eyes of his neighbours, friends and relations. The appellant has also relied on the evidence of one of his neighbours, PW-2, Sh. Mohd. Fariq. As per PW-2, being a neighbour he had very good relations with the appellant and his family, and ladies from their household would visit the house of the appellant. PW-2 has also deposed that in November, 1999 one Gulfam told him that Rizwan, appellant herein, had been arrested by police in rape and abduction of some minor Hindu girl and sent to Jail, and after learning about the same, he stopped his sister from visiting the family of Rizwan. PW-2 has also deposed that news of appellant's arrest was given vide publicity in the Society and keeping in view the criminal allegations on the appellant, he was not invited to the marriage of his sister. In support of his evidence that his reputation has suffered immensely, he has relied on the evidence of PW-2. The appellant has also deposed that on account of malicious prosecution his reputation was degraded, he lost a handsome prospect of his job in Hotel Hilton, Madina, Southi Arabia, which caused loss of Rs.4,36,800/, besides he suffered mental pain and agony, inconvenience and legal expenses. Although the appellant was cross-examined, but not a single question was put with regard to loss suffered by him. During the cross-examination of Mohd. Fariq, PW-2, this witness has deposed that the family of the appellant is respectable because his NANAJI (maternal grand-father) was a Deputy Mayor of Delhi. There is nothing in the cross-examination of PW-1 or PW-2 which would shake the evidence of the said witness. During the cross-examination, PW-1 has deposed that no formal document is supplied to

employees by employer if one gets employment in Dubai and only Visa is to be obtained and the Visa has been obtained, however, due to Gulf War it has been kept by the authorities. PW-1 has also stated during the cross-examination that the work permit has been sanctioned. Although there is no documentary evidence on record that the appellant had been offered a job in Dubai and he was to be paid annually Rs.4,36,800/-, he has suffered loss in the sum of Rs.4,36,800/-as he could not join Dubai, but in the absence of any evidence this figure is not proved.

48. PW-1 has further deposed in his evidence that his family enjoys a great reputation. His father is a reputed businessman, his elder brother is a doctor, his younger brother is an Engineer, and both are employed in Southi Arabia and his sister is B.Sc. and M.B.A. and his maternal-grand-father (NANAJI, Sh.Imdad Sabri) was Deputy Mayor of Delhi and his father was Chairman of MCD, Freedom Fighter and Former M.L.A. from Matia Mahal Constituency.

49. There is also no evidence to show as to what would have been spent on legal expenses by the appellant, but taking into consideration the antecedents and status of the appellant and also looking into the grave and serious allegations of rape, abduction of a minor, which could not be proved, certainly the reputation of the appellant would have suffered, as is evident from the evidence of PW-2, who did not even invite the appellant in the marriage of his sister and also keeping in view that the appellant was in custody for eight months and had to face a lengthy trial, this court assesses the damages on the conservative side of Rs.2,50,000/-.

50. The appeal is allowed in the above terms.

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W.P. (C)

SCHILLER HEALTHCARE INDIA PVT. LTD. ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

W.P. (C) NO. : 6066/2011 DATE OF DECISION: 23.12.2011

Constitution of India, 1950—Article 226—Public Tenders—Writ Petition filed by petitioner, aggrieved by the fact that, the Global Tender Enquiry Document dated 07.07.2010 (hereinafter referred to as the "Tender"), which had technical specifications stipulated therein, inter alia, in respect of products described in Schedule 10, 13 and 47 (qua which bids were invited) were altered by Respondent no. 3, post pre-bid meeting dated 18.07.2011, to their detriment. In so far as products referred to in Schedules 10 and 47 are concerned, they are governed by condition no. 7.1 under said heading, which being identical read as follows: "Should be FDA/CE or BIS approved product". In so far as product referred to in Schedule 13 is concerned the relevant condition is 7.2, which reads as follows: "should be FDA/CE approved product". After a pre-bid meeting of the bidders convened by respondent no. 3 on 18.07.2011, corrigendums were issued on 26.07.2011 and 28.07.2011 in respect of the aforementioned conditions qua the products referred to above, which altered the standardization specification requirement exclusively to USFDA. This alteration in the Tender conditions, the petitioner alleges, has been brought about to exclude Indian bidders and/or all such bidders who do not market their products in the USA. Respondent No. 3 writ

petition contended that the petition ought to be rejected since it fails to implead Department of Medical Education and Research, Government of Punjab, which was a necessary party. Held: The present action is bound to fail for reason of non-joinder of necessary parties coupled with the fact that there is, admittedly, an absence of concomitant pleadings in that regard.

In our view the present action is bound to fail for reason of non-joinder of necessary parties coupled with the fact that there is, admittedly, an absence of concomitant pleadings in that regard. The submission of Mr Ganesh that the court could (if it felt it was necessary) implead the Principal(s), on its own, loses sight of the fact that impleadment of a party without provision of the requisite facts in the pleadings, would be an exercise in futility. The party impleaded would not know the allegation it is called upon to answer. This would have necessarily required an amendment of the pleadings. There is no doubt, in the instant case, given the case set up on behalf of the petitioners, the Principals of respondent no. 3, GMCA/Government of Punjab were a necessary party. The prayer in the writ petition seeks quashing of the two impugned corrigendums. Could this, effective relief, be granted to the petitioners without impleading the Principals? The answer to this, has to be an emphatic no. If this be the position, the writ petition has to fail.

12.1 Mr Ganesh during the course of his submissions responded to this central issue by contending that it was not necessary for the petitioners to implead the Principals of respondent no. 3, since the actions they sought to impugn were entirely of respondent no. 3's own making. This argument has several difficulties. First, as clearly established, respondent no. 3 is undoubtedly acting for and on behalf of GMCA/ Government of Punjab, any order which we issue, on one or the other ground, is bound to impact the Principal(s). Second, any finding affecting the interest of the Principal(s) without hearing, would be completely in breach

of every known principle of natural justice. Third, in any adjudicatory process the court or, for that matter any decision making authority, should be satisfied that its decision meets the test of preponderance of probability. Suspicion, as is often said, cannot be a substitute for proof. This, requires examination of every aspect, of the case. There are many an instance, where matters which appear at first blush, to be open and shut cases, on a closer scrutiny tell a different tale. Therefore, in our view, in the absence of respondent no. 3's Principal, it is not possible to arrive at a conclusion, at which, the learned counsel for petitioner wants us to arrive, that is, at the meeting of 31.07.2011 aspects relating standardization specification of products, falling in all three schedules, i.e., Schedules 10, 13 and 47, were not discussed.

(Para 12)

In the light of what has emerged, we can only say, given the state of the record presented before us that the irregularity, if any, (which is the best that can be stated at this juncture on behalf of the petitioners) in the meeting held on 31.7.2011 was rectified pursuant to the decision arrived at by GMCA/ Government of Punjab in its meeting held on 20.8.2011. At this meeting GMCA/ Government of Punjab ratified all earlier decisions and, in particular, reiterated its instructions to respondent no. 3 that the products in issue should bear exclusive, a USFDA certification. **(Para 14)**

Important Issue Involved: Non-joinder of necessary parties result in the dismissal of the writ petition.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. S. Ganesh, Sr. Advocate with Ms. Surekha Raman, Mr. Gaurav Nair, Mr. Varun Singh & Mr. Anuj Sarma, Advocates.

FOR THE RESPONDENTS : Mr. Jatan SIngh, CGSC with Mr. Prashant Ghai, Advocate for Respondent Nos. 1 and 2. Mr. C.N. Sree Kumar & Mr. R.R. Chandran, Advocates for Respondent No. 3.

RESULT: Petition dismissed.

RAJIV SHAKDHER, J.

1. The grievance of the petitioner is in a narrow compass. The petitioner is aggrieved by the fact that, the Global Tender Enquiry Document dated 07.07.2010 (hereinafter referred to as the 'Tender'), which had technical specifications stipulated therein, inter alia, in respect of products described in Schedule 10, 13 and 47 (qua which bids were invited) were altered by respondent no. 3, post pre-bid meeting dated 18.07.2011, to its detriment.

1.1 The specific products in issue, vis-a-vis which, detailed technical specifications are set out in schedules 10, 13 and 47; are briefly described as follows, in the Tender:

(i) Defibrillator with external paddles and external pace maker.

(ii) Ventilator-High End (I.C.U.).

(iii) Defibrillator with external paddles, internal paddles and external pace makers.

1.2 Amongst numerous specifications adverted to, in the Schedules referred to above; what we are concerned with is, only that specification, which pertains to standardization and appears under the heading: **"Standards, Safety and Training"** in the Tender. In so far as products referred to in Schedules 10 and 47 are concerned, they are governed by condition no. 7.1 under said heading, which being identical read as follows: **"Should be FDA/CE or BIS approved product"**. In so far as product referred to in Schedule 13 is concerned the relevant condition is 7.2, which reads as follows: **"should be FDA/CE approved product"**. For the clarity, we may indicate that FDA refers to the United States Food and Drugs Agency, while CE is certification granted by the European Union. Hereafter for the sake of convenience we will be referring to them as USFDA and CE.

2. It appears that after a pre-bid meeting of the bidders convened by respondent no. 3 on 18.07.2011, corrigendums were issued on 26.07.2011 and 28.07.2011 in respect of the aforementioned conditions qua the products referred to above, which altered the standardization specification requirement exclusively to USFDA. The net result being that in respect of the products in issue, the prospective bidders can submit tenable bids only if the said products have a USFDA Certification/approval. The alternatives provided in the Tender; enabling the bidders to submit bids qua the said products having an approval from the European Union i.e., CE or, BIS approval, stands deleted. This alteration in the Tender conditions, the petitioner alleges, has been brought about to exclude Indian bidders and/or all such bidders who do not market their products in the USA.

3. In the petition averments have been made in extenso with regard to the credentials of petitioner no. 1 company, which we are informed is a prospective bidder. The petitioner no. 1 company, it is averred, is a product of a joint venture between Schiller A.G., a company based in Switzerland, and the R.R. Group in India. It is averred that petitioner no. 1 company was set up in 1997, with the objective of making available, quality medical equipment in the Indian market. There are averments to the effect that a range of products are offered by petitioner no. 1 company, which extends to critical care, cardiology, radiology, tele-medicine, cardio pulmonary, anesthesia and surgery. There is also a reference to various products, manufactured by petitioner no. 1 company. We need not burden our judgment with the products as none of this is in issue before us.

3.1 Briefly, the petitioner no. 1 goes on to aver that it, not only markets and/or supports products of Schiller A.G., that is, its joint venture partner but, has also set up a manufacturing facility at Puducherry where, it manufactures medical diagnostic equipments, which are complementary to the products of Schiller A.G. products. This apart, it is also averred that, it distributes products of certain other multinationals. It is specifically averred that petitioner no. 1 company is a leading player qua defibrillator and stress test products. It is claimed that it has ISO 9000-2000 as well as ISO 13485-2003, certification for design, manufacture, sale and service of medical equipments.

3.2 In the background of the aforementioned credentials, the petitioner no. 1 company, alludes to the fact that respondent no. 3; which is

designated as a National Procurement Support Agency (in short 'NPSA'), is mandated to invite tenders for various medical institutions and colleges under the Pradan Mantri Swasthya Suraksha Yojana (in short 'PMSSY'). It is thus contended that, respondent no. 3 invited the aforementioned Tender under PMSSY whereby, it sought offers, inter alia, in respect of the aforementioned products.

3.3 It is in connection with the Tender that a pre-bid meeting was held by respondent no. 3, on 18.07.2011, at its office at Noida. At this meeting the representatives of the bidders raised various queries and sought clarifications, some of which were accepted, and others clarified. Post the said meeting, first of the impugned corrigendums. dated 26.07.2011 was issued, whereby as indicated above, the standardized specification was altered so as to include **"approved by only USFDA"**. This corrigendum pertained to the products referred to in several other Schedules as also products referred to in Schedules 10 and 13.

3.4 The petitioner no. 1 company being aggrieved, immediately thereafter, that is, on 28.07.2011 shot off a letter dated 28.07.2011 to respondent no. 3. In this letter, it was broadly conveyed to respondent no. 3, that the amendment in the standardization specification brought about in condition no. 7.1 of schedule 10 had the effect of restricting participation and thus affecting competition. In order to drive home its point, the petitioner no. 1 company adverted to the fact that, its products were IEC and CE certified, and thus, ought to be acceptable. A reference was also made to the fact that, guidelines issued for World Bank funded projects required that, not only should the technical specification be drafted in a transparent manner, but also that, they should be non-restrictive in nature. To buttress its submission, the petitioner no. 1 company also adverted to the fact that major medical research institutes in India, such as, All India Institute of Medical Sciences (AIIMS), Post Graduate Institute (PGI) and G.B. Pant hospitals were purchasing products, which were either USFDA or CE approved. Examples of sophisticated equipment, such as neonate ventilators supplied to AIIMS and PGI in 2010, which had CE certification, were also given in this communication. A reference was also made to the change in the standardization specification qua the product, referred to in Schedule 13. To highlight the incongruity, a reference was made to the product referred to in Schedule 47; which though more or less similar to the product referred to in Schedule 10, continued to be acceptable with either USFDA or CE approval.

3.5. The result of the aforesaid communication appears to be that respondent no. 3, on 28.07.2011, issued a second corrigendum wherein, the anomaly referred to in the petitioner no. 1 company.'s letter of 28.7.2011, pertaining to the product referred to in Schedule 47, was apparently corrected, to reflect that, the standardization specification for that product as well would be: "only USFDA". The petitioner no. 1 company, however, persisted with its efforts and towards this end made a second representation dated 30.7.2011, in which, a reference was made to the letters dated 27.7.2011 and 28.07.2011, and also email dated 27.7.2011. It may only be noted that, there is neither on record or, in the list of dates or even in the petition a reference to the email or the letter dated 27.7.2011. In the representation dated 30.7.2011, petitioner no. 1 company reiterated its demand that the original tender conditions should be adhered to by respondent no. 3. This request was followed by yet another letter dated 05.08.2011. The said representation more or less reiterated what had been stated in its letter dated 28.7.2011.

4. Having received no response from respondent no. 3, the petitioners approached this court by way of the captioned writ petition. The writ petition was moved before this court on 23.08.2011, when notice was issued and it was directed that the award of tender, if any, would be subject to the final outcome of the case. The said interim direction was reiterated on 28.09.2011. The petition was admitted on 21.10.2011, when the interim order dated 23.08.2011, was made absolute, during the pendency of the writ petition. Submissions in the case were heard on 30.11.2011 and 01.12.2011. The judgment was reserved on 01.12.2011.

5. Prior to commencement of hearing in the matter, directions were issued to respondents to place on record their respective stands on affidavit. Respondent no. 3, which is the contesting respondent in the case, has filed two affidavits. The first affidavit was filed on 16.09.2011, which was, followed by an additional affidavit dated 09.11.2011. The second affidavit was accompanied by an application seeking indulgence of this court to place on record certain additional documents. It is pertinent to note that the additional affidavit was filed pursuant to the rejoinder filed by the petitioner, on 26.09.2011. We had by an order dated 30.11.2011 allowed the application based on the stand taken by the petitioners that they had no objection to the application being allowed and the additional affidavit being placed on record. The petitioners also chose not to file a rejoinder to the said additional affidavit.

6. Based on the aforesaid state of the pleadings, it would be relevant to outline the stand of respondent no. 3 taken in its first affidavit-in-reply dated 16.09.2011. In this affidavit respondent no. 3 clearly took the following objections in rebuttal:

(i) The writ petition ought to be rejected since it fails to implead a necessary party which, according to respondent no. 3, was the Department of Medical Education and Research, Government of Punjab. In this regard it is averred that Govt. of Punjab was a client of respondent no. 3, as was reflected in the Memorandum of Understanding (MOU) dated 17.08.2010. The respondent no. 3 was thus a consultant, who had undertaken the exercise of purchasing the equipment on behalf of its client.

(ii) Based on the representations made by petitioner no. 1 company the matter was referred to the purchaser which, in this case was the Government Medical College, Amritsar (GMCA), and five senior most specialist in the field, including the Principal of GMCA. The experts in the field deliberated upon the various representations made by petitioner no. 1 company, at a meeting held on 31.07.2011, and thereafter, came to the conclusion that the standard specification for the products referred to in Schedules 10 and 13 should continue to be **"USFDA only"**, whereas the condition for product referred to in Schedule 47 should be modified and amended so as to read as **'USFDA only'** bringing it in line with the product referred to in Schedule no. 10. In this regard a reference was also made to the fact that respondent no. 3 was servicing various clients qua the equipment in question which had a similar standardization specification, i.e., USFDA. By way of example reference was made to the Tamil Nadu Medical Services Corporation Ltd., Chennai; and the Employee State Corporation. Thus the argument raised qua respondent no. 3, of having an ulterior motive in prescribing the impugned standardization specification, was sought to be repelled. In order to buttress its position that there was a deliberation on the issue, a reference was also made to emails dated 31.07.2011, 01.08.2011 and 02.08.2011, exchanged between the representatives of respondent no. 3 and the purchaser, i.e., GMCA.

(iv) Reference was made to clause 9 of the General Instructions Issued To The Bidders (in short GITB), which according to respondent no. 3 permitted the purchaser (i.e., the GMCA) to modify the technical

parameters prior to the dead line stipulated in the Tender for submission of bids.

(v) It was averred that under the present Tender a two-bid system was stipulated, which required the bidders to submit their techno-commercial bid and the price bid in two separate envelopes. It was further averred that as per the guidelines contained in the General Financial Rules (in short GFR), a pre-bid conference was held on 18.07.2011, prior to the date stipulated for opening of the techno-commercial bids.

(vi) The impugned modification, in the standardization specification, was brought about pursuant to a 'written order' issued by the purchaser, i.e., GMCA, and after due deliberation with the prospective bidders, at the aforementioned pre-bid conference. The respondent no. 3 went on to aver, that the modification had the approval of an expert body and hence could not be interdicted.

7. The petitioners, however, refuted the stand taken by respondent no. 3, qua the maintainability of the petition on the ground of non-joinder of necessary party as it was neither a party to or, aware of the existence or contents of the MOU dated 17.08.2010. It went on to aver that the turn of events would show that upto the date of the pre-bid meeting and thereafter, the representatives of the purchaser/ GMCA or the government of Punjab had no objection to the standardization specification stipulated in the Tender. The objections, if at all, were of two other bidders present at the pre-bid meeting and, it was only to favour them, that the standardization specifications were altered. It went on to aver that the minutes of the pre-bid meeting dated 18.7.2011, would show that, the suggestion of competing bidders to amend the standardization specification was deferred till such time a decision in the matter could be taken by GMCA/Government of Punjab. This decision, according to the petitioners, was taken only on 31.7.2011 and **"not on any date prior thereto"**. The suggestion was that, respondent no. 3 on 26.7.2011 had issued a corrigendum on its own, without the say so of its Principal, i.e., GMCA/ Government of Punjab. Therefore, it was contended, that the stand taken in the affidavit dated 16.09.2011, that the corrigendum was issued on the 'written orders' of GMCA/ Govt. of Punjab, was incorrect. This, the petitioners sought to establish, by alluding to the fact that respondent no. 3 had placed on record in the first instance only the minutes of the meeting dated 31.7.2011. The oblique suggestion was thus, that the

corrigendum dated 26.7.2011 was issued by respondent no. 3 at the behest of two competing bidders. It was further averred that there is no cogent or, reasonable explanation given in the affidavit dated 16.9.2011 whereby, the rationale for changing the standardization specification of the products in issue could be elucidated. The apparent absence of rationale was sought to emphasized by adverting to the fact that, while more critical equipment(s) used in operation theatres; specially those for neonates/ infants, continued to provide for both CE and USFDA certification, a change in the standardization specification for products in issue, which were non-invasive, had been brought about. By way of example it was averred that Tamil Nadu Medical Services Corporation had issued a tender for an identical product in October, 2010, wherein provision for both certificates that is, CE and USFDA was made. Reference is also made to a tender issued on 29.08.2011 by ESIC, Rohini, whereby a similar leeway was given. It was highlighted that the Govt. of Punjab had in July, 2011 issued a tender for defibrillators, wherein again, the standardization specification provided was CE/ USFDA.

8. The respondent no. 3 having been questioned vis-a-vis its stand that the first corrigendum dated 26.7.2011 was not based on 'written instructions' of its client, GMCA/Govt. of Punjab, as indicated above, decided to file an additional affidavit dated 9.11.2011. With this affidavit, as noticed above, additional documents were filed. In the additional affidavit a specific averment is made that after the pre-bid meeting of 18.07.2011, a meeting was held on 21.07.2011 in the presence of the nodal officer, one Dr. Jitender Singh, who was also present at the pre-bid meeting of 18.7.2011, under the chairmanship of Dr. S.S. Shergill, Principal GMCA. This meeting evidently was held at 2.00 pm. At the meeting held on 21.7.2011, the issues raised by bidders at the pre-bid meeting held on 18.7.11 were discussed and, thereupon it was resolved that standardization specification in respect of products referred to in Schedule 10 and 13 should be altered to reflect approval by: "USFDA only"; would be acceptable. This, according to respondent no. 3, resulted in corrigendum dated 26.7.2011. Thereafter, on receipt of representation of the petitioner no. 1 company, an expert body once again considered the matter on 31.7.11, when it was resolved that the products referred to in all three schedule, that is, Schedules 10, 13 and 47 would require a USFDA certification.

8.1 The respondent no. 3 in order to buttress it stand that it was only an agent, acting on behalf of its client, that is, GMCA/Government of Punjab adverted to the draft Tender document submitted to the client on 16.5.2011, and the consequent approval received on 22.06.2011, which, according to it, had resulted in the issuance of the Tender, on 07.07.2011.

8.2 It was further submitted that in respect of both, that is, incorporation conditions in the Tender or, their modification, respondent no. 3; (which is a company working under the administrative control of Government of India, Ministry of Health and Family Welfare) was governed by the instructions of its client – bearing in mind their requirement and/ or specifications with regard to the products in issue. Therefore, the examples cited by the petitioners of instances where, standardization specifications had not been altered was of no real significance. It was reiterated that the representations of petitioner no. 1 company, were considered by the client, i.e., GMCA/Government of Punjab at its meeting held on 31.07.2011, and since the petitioners had chosen to assail the decision of its client, i.e., GMCA/ Govt. of Punjab by instituting the present writ petition, a meeting was held on 20.08.2011 by the GMCA, wherein it was resolved to affirm the decision taken at the meeting held on 31.7.2011.

Submission of Counsels

9. The arguments in the matter more or less replicated the stands taken in the pleadings filed by the parties. On behalf of the petitioners submissions were advanced by Mr S. Ganesh, Sr. Advocate instructed by Ms Surekha Raman, while on behalf of respondent no. 3 arguments were made by Mr. C.N. Sreekumar.

9.1. Mr Ganesh, learned senior counsel, in his oral submissions, once again, highlighted the fact that the decision to change the standardization specification for the products in issue, was taken at the behest of two competing bidders without the necessary authority of the Principal. Mr Ganesh in order to buttress his submissions adverted to the fact that the minutes of meeting of 31.7.2011 did not advert to the meeting held on 21.7.2011, which would ordinarily have been the position, in the normal course, if such a meeting had been held, as averred by respondent no. 3.

9.2 In support of this submission, a reference was made with regard to the email dated 31.7.2011 issued by the principal, to the representative of respondent no. 3, enclosing therewith the minutes of meeting dated 31.7.2011 wherein, petitioner no. 1 company's representations qua the corrigendums issued was evidently considered.

9.3 It was highlighted that there were two versions of minutes of the meeting dated 31.7.2011 filed by respondent no. 3, along with its counter affidavit of 16.9.2011. The first version of the minutes of meeting dated 31.7.2011 referred only to the product indicated in Schedule 10, and consequently, what was sent by the principal of GMCA to the representative of respondent no. 3, on 31.7.2011, was the said version of the minutes of meeting dated 31.7.2011. According to Mr Ganesh, the second version of the minutes of meeting dated 31.7.2011, appended to the counter affidavit, which referred to the products indicated in all three Schedules, i.e., Schedules 10, 13 and 47; was concocted. It was contended that because the second version of the minutes of the meeting of 31.7.2011 did not exist, in the return mail of 01.8.2011, the representative of respondent no. 3 sought GMCA's decision with respect to products referred to in Schedules 13 and 47. It is because of this, Mr Ganesh contended, that on the very same date by a return mail, a question mark was raised with regard to product referred to in Schedule 47. Therefore, according to Mr Ganesh, the representative of respondent no. 3 by email dated 02.8.2011, drew the attention of GMCA to the last line on page no. 4 of the representation of petitioner no. 1 company vis-a-vis the product referred to in Schedule 47.

9.4. The sum and substance of Mr Ganesh's argument was that, there was firstly, no meeting held by GMCA on 21.7.2011, and that, the version of the minutes of meeting evidently held on 21.7.2011, which was appended with the additional affidavit of 09.11.2011 was forged and fabricated. Secondly, the version of the minutes of meeting of 31.7.2011, wherein, purportedly all three products were discussed was a got up document.

10. Mr Sreekumar, who appeared for the respondent no. 3, drew our attention once again to the contents of minutes of meeting dated 21.7.2011, to establish the fact that it was at the behest of GMCA that the corrigendum dated 26.7.2011 was issued. Mr Sreekumar highlighted the fact that at the end of the day, respondent no.3 was only an agent

of its client, and had to thus, strictly, adhere to the instructions issued by its client, i.e., GMCA/ Government of Punjab. The decision, which was taken at the meeting of 31.7.2011 vis-a-vis the amendment of the standardization specification with regard to the products mentioned in Schedule 10, 13 and 47 had been ratified by the Principal, i.e., the GMCA/ Govt. of Punjab. The fact that it was an agent, apart from anything else, was also sought to be demonstrated from the very same emails which were referred to by Mr Ganesh. It was, therefore, contended that any explanation with regard to the veracity of the minutes of the meeting or the purported contradiction in the emails could only be explained by GMCA. It was submitted that despite a specific averment being made as regards the non-maintainability of the writ petition on the ground of failure to implead the necessary party, the petitioners had chosen to neither amend the writ petition nor seek impleadment of its Principal. The power to modify the standardization specifications being available under clause 9 of the GITB of the Tender, the prospective bidders could not be heard to contend that the principal could not alter such standardization specifications. The reasons which propelled the principal, i.e., GMCA to amend the standardization specifications were contained in the minutes of the meeting dated 20.08.2011.

Reasons

11. Having heard the learned counsel for the parties and perused the record what has emerged is as follows:

11.1 Respondent no. 3 is a procurement agency, which got appointed as a consultant by the Government of Punjab vide MOU dated 17.08.2010. As per the terms of the said MOU respondent no.3 is, inter alia, obliged to prepare the eligibility criteria for the bidders as also draft the bid documents (See appendix 'A' clause 3) in addition to its duty to procure, supply, install, test and commission, medical equipment as required by the Principal, based on the list of equipment and specifications provided by the client. The relevant clause read as follows:

"DUTIES OF THE CONSULTANTS

DESCRIPTION OF THE SERVICES:

The consultant shall undertake the following services

xxxx

xxxx

(iii) Preparation of eligibility criteria for bidders and preparation of bid documents

xxxx

xxxx

(xii) Procurement, Supply, Installation, Testing and commissioning of Medical Equipments as required by the client based on the list of equipments and specification provided by the client..."

11.2 The Tender itself proclaims that it was being issued under the PMSSY scheme, for the Government of Punjab, Department of Medical Education and Research, by respondent no. 3. This fact is further borne out on a plain reading of clause 1 appearing in Section I of the Tender which reads as follows:

"1. Procurement & Consultancy Services Division of HLL Lifecare Limited, for and on behalf of Govt. of Punjab, Department of Medical Education and Research invites sealed tenders, from eligible and qualified tenderers for supply of following medical equipments for Amritsar medical College, Punjab under PMSSY." (Emphasis is ours)

11.3 Having regard to the above, we have no doubt that respondent no. 3 was only acting as an agent for procurement of products in issue, on behalf of the Govt. of Punjab, and that, the products in issue were required for use of GMCA. Therefore, the main issue which comes to fore is: whether the present action would fail in the absence of the main protagonist, being a necessary party. It may be pertinent to note that this aspect was squarely put to Sh. Ganesh during the course of hearing held on 30.11.2011. Since the matter was heard in part, Mr Ganesh took time to mull over the matter and return with necessary instructions in that behalf. On resumption of hearing on 01.12.2011, Mr Ganesh indicated that if the court was inclined to implead GMCA, his client would have no objection; however, as advised he would not on his own seek impleadment as he was confident that he would be able to make good his submission even without the presence of GMCA. As a matter of fact a two page synopsis was supplied to us, during the course of arguments on 30.11.2011, by Mr Ganesh. A quick perusal of the synopsis revealed

that the minutes of meeting of 31.07.2011 had been assailed on the ground of fraud and fabrication. This aspect prompted the bench to once again ascertain whether the counsel could press allegations of fraud against an entity without it being impleaded and in the absence of necessary pleadings in that behalf. In response to this query, Mr Ganesh wisely took the stand that the petitioners do not seek to press their submission qua fraud. Because this aspect of the matter was not specifically recorded in the proceeding of 30.11.2011 and 01.12.2011, we thought it important to say so, in our narrative, only to highlight the fact that despite objection taken in this behalf by respondent no. 3, no steps to retrieve the situation were made by the petitioners.

11.4 Therefore, what is required to be seen is whether we should disbelieve the stand of respondent no.3 that a meeting was convened on 21.7.2011 by respondent no. 3's Principal, whereby it was conveyed to respondent no. 3 to amend the standardization specifications. A perusal of the minutes of the pre-bid meeting and the representations received at the said meeting would show that following objections were raised with regard to products referred to in schedules 10 and 13:

"SCHEDULE 10

xxxx

xxxx

Technical Specifications

xxxx

7. Standards, Safety and Training 7.1 Should be FDA/CE or BIS approved product

M/s Phillips & M/s Instromedix — The products should be USFDA and CE/BIS approved.

Comments — This is life saving critical equipment and after amending more than 3 reputed vendors are there like zoll, Physiocontrol (Lifepack), Neuonkodan, Philips etc. Hence for amending, college may like to take the decision. USFDA should be considered."

"SCHEDULE 13

xxxx

xxxx

7. Standards, Safety and Training

7.2 Should be FDA or CE approved product

M/s Philips – The product should be USFDA and CE approved.

Comments – This is life saving critical equipment and after amending, more than 3 reputed vendors are there like Masque, Drager, P B Hamilton & Philips etc. so for amendment, college make like to take the decision. USFDA should be considered."

11.5 It is not denied, at this meeting the nodal officer of PMSSY, Dr. Jatinder Singh was present. We have no reason to believe that what transpired at the pre-bid meeting of 18.7.2011 was not conveyed to the Principal, i.e., GMCA. This perhaps resulted in a decision being taken on 21.7.2011, which got conveyed to respondent no. 3, and consequently, led to the issuance of the corrigendum dated 26.7.2011. The fact that this was so, is evident from the extract of the minutes of 21.7.2011. The relevant portions of the minutes are extracted hereinbelow:

"Minutes of the meeting held on 21/7/2011 to discuss the prebid meeting held on 18/7/2011 in the Office of Principal, Govt. Medical College, Amritsar at 02:00 PM under the Chairmanship of Dr. SS Shergill, Principal.

xxxx

- Dr. Jatinder Singh, Nodal Officer, PMSSY apprised the audience of the outcome of the pre-bid meeting held on 18/7/2011 at HLL Corporate Office, Noida.
- Vendor specific queries raised at the pre-bid meeting were discussed in light of the original specifications and a note was taken of the resolution of various technical issues as posed by the vendors and issued for comments by HLL Lifecare Limited.
- **The queries posed by the vendors were resolved and sent as a note for issuance of a corrigendum to the main tender document. This was to be hosted on the websites as mentioned in the original NIT.**

- The meeting ended with thanks to the Chair."

11.6 It is after the first corrigendum was issued on 26.7.2011 that, representations were received from petitioner no. 1 company, wherein the arguments for continuation of approval of both USFDA and CE were put forth and the anomaly with respect to continuation of the standardization specifications, as provided in the Tender, in respect of the product referred to in schedule 47, was adverted to. The fact that this aspect of the matter did not arise at the pre-bid conference of 18.7.2011, is evident from the representations made qua conditions stipulated vis-a-vis various products, none of which adverted to the product referred to in schedule 47.

11.7 The representations of the petitioner no. 1 company, amongst others, dated 28.7.2011 and 30.7.2011 qua the corrigendum of 26.7.2011, were addressed at the meeting dated 31.7.2011. The fact that a meeting was held on 31.7.2011 cannot be disbelieved as minutes to that effect have been generated. What has, however, emerged is that there are two versions of the minutes of meeting dated 31.7.2011. Both versions are appended with the counter affidavit filed by respondent no. 3, on 16.09.2011. The first version is appended at page 707 of the paper book, while the other version is appended at page 710 of the paper book. In the first version, there is a reference to amendment in the standardization specification qua products referred to in all three schedules, i.e., Schedules 10, 13 and 47, while in the second version there is a reference to only that product which finds mention in Schedule 10. The emails, exchanged between GMCA and respondent no. 3, also highlight this aspect of the matter.

11.8 The point to be noted is that, the first email of 31.7.2011 was sent by the principal of GMCA to the representative of respondent no. 3, and the emails that followed were exchanged between the nodal officer Dr. Jatinder Singh, and the representative of respondent no. 3. As was submitted by Mr Sreekumar, it is quite possible that the committee of experts which deliberated on 31.7.2011, considered the amendments in respect of the product referred to in Schedule 10, in the first instance, based on the representation of the petitioner no. 1 company of 28.7.2011 (as the title to the representation refers to only Schedule 10) and, thereafter, having realized that in the body of the representation reference is also made to products mentioned in Schedule 13 and 47, reconvened and

considered the standardization specification with regard to the other two products falling in schedule 13 and 47, and thus, generated the second version of the minutes of the meeting dated 31.07.2011. A perusal of the email dated 31.07.2011 sent by the Principal by itself does not enable one to ascertain as to which version of the minutes was sent; though when read in conjunction with the emails of 01.8.2011 and 02.8.2011 it raises several queries which could best be answered only by GMCA/Government of Punjab had they been impleaded as parties.

11.9 For example, was Dr. Jatinder Singh, the nodal officer present through out the meeting held on 31.07.2011? What time did the meeting commence and end? Who were participants in the meeting? Did they continue, through out the meeting? The answers to these and several other connected issues could only be supplied by GMCA/Government of Punjab had it been impleaded as party and an opportunity given to it to explain the purported gaps in respondent nos 3's explanation of the events. The fact hat the petitioners chose not to implead GMCA/ Government of Punjab can only work to their detriment. As a matter of fact we discerned a definite caginess and diffidence on the part of the petitioners to implead GMCA/ Government of Punjab in the writ petition despite the court squarely putting the issue in the fore-front.

12. In our view the present action is bound to fail for reason of non-joinder of necessary parties coupled with the fact that there is, admittedly, an absence of concomitant pleadings in that regard. The submission of Mr Ganesh that the court could (if it felt it was necessary) implead the Principal(s), on its own, loses sight of the fact that impleadment of a party without provision of the requisite facts in the pleadings, would be an exercise in futility. The party impleaded would not know the allegation it is called upon to answer. This would have necessarily required an amendment of the pleadings. There is no doubt, in the instant case, given the case set up on behalf of the petitioners, the Principals of respondent no. 3, GMCA/Government of Punjab were a necessary party. The prayer in the writ petition seeks quashing of the two impugned corrigendums. Could this, effective relief, be granted to the petitioners without impleading the Principals? The answer to this, has to be an emphatic no. If this be the position, the writ petition has to fail.

12.1 Mr Ganesh during the course of his submissions responded to this central issue by contending that it was not necessary for the petitioners

to implead the Principals of respondent no. 3, since the actions they sought to impugn were entirely of respondent no. 3's own making. This argument has several difficulties. First, as clearly established, respondent no. 3 is undoubtedly acting for and on behalf of GMCA/ Government of Punjab, any order which we issue, on one or the other ground, is bound to impact the Principal(s). Second, any finding affecting the interest of the Principal(s) without hearing, would be completely in breach of every known principle of natural justice. Third, in any adjudicatory process the court or, for that matter any decision making authority, should be satisfied that its decision meets the test of preponderance of probability. Suspicion, as is often said, cannot be a substitute for proof. This, requires examination of every aspect, of the case. There are many an instance, where matters which appear at first blush, to be open and shut cases, on a closer scrutiny tell a different tale. Therefore, in our view, in the absence of respondent no. 3's Principal, it is not possible to arrive at a conclusion, at which, the learned counsel for petitioner wants us to arrive, that is, at the meeting of 31.07.2011 aspects relating standardization specification of products, falling in all three schedules, i.e., Schedules 10, 13 and 47, were not discussed.

13. In such a scenario we need only look at the decision taken by GMCA at its meeting held on 20.8.2011. At the said meeting, the decision to amend the standardization specification for all products referred to in schedule 10, 13 and 47 was ratified. The reasons given therein are as follows:

> ".....1. The Committee in its meeting dated 31/7/2011 had decided that the prime objective was of ensuring that the best equipment that would meet the requirements of strict standards and dependability during emergencies, should be purchased. (Letter No. 1786-88 dated 31-7-2011).
>
> 2. Defibrillators and ventilators are life saving equipment which should meet the highest level of specifications and meet the most stringent quality control measures. Only the adherence to these measures would ensure their use in life saving situations during emergencies.
>
> 3. USFDA Certification is the most accepted and trusted norm the world over in terms of ensuring the quality of life saving machinery and equipment. It is also considered as the gold standard

as far as certification of life saving machinery/ equipment is concerned.

4. Inspite of the fact that other certification agencies may have similar specifications as USFDA approved products but USFDA approved products are more acceptable because of their assurance to quality, previous good experience and the fact that they meet and ensure the highest standards of operability and longevity. These parameters are extremely important when considering life saving machines.

The Committee Members were of the considered opinion that since the item in question were life saving they should meet all stringent standards as framed as USFDA. The Committee also decided that no change to the corrigendum to the tender may be made.

It was decided to covey the decision to HLL Lifecare, Procurement consultants to the Project...."

14. In the light of what has emerged, we can only say, given the state of the record presented before us that the irregularity, if any, (which is the best that can be stated at this juncture on behalf of the petitioners) in the meeting held on 31.7.2011 was rectified pursuant to the decision arrived at by GMCA/ Government of Punjab in its meeting held on 20.8.2011. At this meeting GMCA/ Government of Punjab ratified all earlier decisions and, in particular, reiterated its instructions to respondent no. 3 that the products in issue should bear exclusive, a USFDA certification.

15. As indicated hereinabove the petitioner cannot quibble with the fact that the clause 9 of the GITB of the Tender gave the requisite power to respondent no. 3 to amend/ alter the standardization specifications. There are as a matter of fact no allegations of fraud or fabrication in the writ petition. As noticed hereinabove, submissions made at the bar in this regard were given up by Mr Ganesh. In the absence of any averments in the pleadings with regard to fraud, no further enquiry can be made in the present proceedings.

16. Therefore, having regard to the state of the pleadings and what was urged before us, we are of the view that the present writ petition has to fail. Accordingly, the writ petition is dismissed. We had asked

parties to file their bill of costs. Respondent no. 1 and 2 have not filed their bill of costs. The writ petition having been dismissed, the petitioner shall pay to respondent no. 3 costs in the sum of Rs. 3,02,000/-.

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W.P. (C)

UNION OF INDIA & ANR. ....PETITIONERS

VERSUS

BALJIT SINGH SONDHI ....RESPONDENT

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

W.P. (C) NO. : 9047/2011 DATE OF DECISION: 23.12.2011

CCS (CCA) Rules, 1965—Rule 14—Respondent while working as Commissioner of Income Tax (Appeals) discharged quasi-judicial service and decided petition filed by assessee against order of Income Tax Officer (I.T.O) after inviting report from I.T.O.—Thereafter, said I.T.O. filed complaint against Respondent alleging, Respondent changed comments in his ACR and he had shown undue favour to assessee against whom ITO had passed orders—Investigation was held which revealed, Respondent allowed unauthorized relief to said assessee—In response to charge sheet, Respondent justified passing of his orders—However, matter was referred to Central Vigilance Commission which advised for initiation of major penalty proceeding against Respondent—Accordingly, competent authority initiated disciplinary proceedings against Respondent under Rule 14—Thereupon, Respondent preferred OA before Tribunal seeking quashing of charge sheet urging, he discharged quasi-judicial duties while

disposing of the petition of assessee and his order was justified on merits—Also, his reply was not looked into by concerned authority—Tribunal allowed application and quashed charge sheet on ground of violation of principles of natural justice and petitioner was granted liberty to examine explanation furnished by Respondent carefully—Assailing said order, petitioner preferred writ petition and urged disciplinary proceedings could be initiated even against employee who committed misconduct while discharging his quasi judicial duties—Held:- Disciplinary proceedings can be initiated only if an action of Officer indicates culpability—A close scrutiny of his action is required and a great caution is to be adopted before initiating disciplinary proceedings.

It cannot be disputed that under certain circumstances, disciplinary proceedings can be initiated against the Government employee even when he was discharging quasi-judicial function. However, in the aforesaid cases itself, the Supreme Court particularly stressed the fact that such an action has to be taken only after great caution and a close scrutiny of his actions, and only if the circumstances so warrant. **(Para 9)**

Important Issue Involved: Disciplinary proceedings can be initiated only if an action of Officer indicates culpability and a close scrutiny of his action is required.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONERS : Mr. R.V. Sinha with Mr. R.N. Singh and Mr. A.S. Singh, Advocates.

FOR THE RESPONDENT : Nemo.

CASES REFERRED TO:

1. *Union of India & Others* vs. *K.K. Dhawan* [AIR 1993 SC 1478].

2. *Union of India & Others* vs. *A.N. Saxena* [JT 1992 (2) SC 532].

RESULT: Petition dismissed.

A.K. SIKRI, ACTING CHIEF JUSTICE (ORAL)

1. The respondent herein is working as Commissioner of Income Tax (Appeals) in the Income Tax Department, Central Board of Direct Taxes, Ministry of Finance, Government of India. In discharge of his quasi-judicial service, he had decided the proceedings filed by one Shri Subhash Singh, proprietor of M/s Mogra Service Station under Section 264 of the Income Tax Act (hereinafter referred to as 'the Act') in respect of Assessment Year 2002-03. That petition was filed by Shri Subhash Singh, the assessee. The assessee had questioned addition of Rs. 4,37,070/- on account of alleged inflation of purchases made by the Income Tax Officer. As per the Income Tax Officer, the assessee had shown the purchase of diesel at Rs. 6,12,52,775/- in the Profit and Loss account, but in the ledger account, the figure of purchase was shown at Rs. 6,08,15,705/-. The difference between two figures was Rs. 4,37,070/-, which was treated as inflation of purchase by the ITO. The plea of the assessee while challenging this addition in his petition under Section 264 of the Act was that the assessee was running a petrol pump and while the stock was delivered by the oil companies free of charge, the assessee had to incur expenditure by way of payments to the drivers and khalasis for food etc. for the sake of ensuring proper quantity and quality of the goods. The explanation of the assessee was that Rs. 4,37,070/- was incurred on that account which was debited under the head 'trip expenses'. He also explained that though a separate account was maintained in the books of accounts in respect of this expenditure, during the year under consideration these expenses were merged with the figure of purchase of High Speed Diesel and that was a reason for difference of amount. He also submitted that the matter was reconciled before the ITO, but may have escaped his attention as the assessment was completed at the fag end of the year.

2. The respondent, before deciding the said petition, called for the comments of the ITO and the ITO submitted his report. Thereafter, order dated 30.8.2005 was passed by him allowing the said petition and

accepting the plea of the assessee that it was not a case of showing inflated figure of purchase, but expenses incurred for payment to drivers and khalasis were, in fact, shown in 'trip expenses' and duly accounted for. Therefore, the addition made by the ITO was not sustainable.

3. This was clearly a quasi-judicial order passed on the petition filed on 15.5.2005 and decided on 30.8.2005 after inviting the report of the ITO as mentioned above. It seems that thereafter a complaint dated 21.3.2008 was made on the same ITO who had passed the assessment orders against the respondent in the said complaint, the I.T.O. alleged that the respondent had changed the comments in his review report in the ACR which was earlier rated as 'excellent'. The ITO also referred to the aforesaid case and alleged that the respondent had shown undue favour to Subhash Singh while deciding the petition under Section 264 of the Act on receipt of the complaint. It is the version of the petitioner/ employer that on receipt of the complaint, the matter was investigated. It was revealed during the course of investigation that the respondent had allowed unauthorized relief to the said assessee thereby conferring undue favour to it and causing loss to the Government's revenue. Show cause notice was issued to the respondent. The respondent submitted his response/reply to the said charge-sheet. He contended that the petition was decided after proper verification of the facts and not in undue haste as alleged in the complaint and that it was decided with due care. Even on merits, he justified the passing of the orders dated 30.8.2005 while accepting the petition of Subhash Singh under Section 264 of the Act, inter alia, submitted as under:

> ".....The bare facts brought on record by the ITO are that he assessee had shown the purchase of diesel at Rs.6,12,52,775/- in the profit & loss account, in the ledger account the figure of purchase was shown at Rs.6,08,15,705. The difference between the two figures was Rs.437070. This was treated as inflation of purchases by the ITO. In his report the ITO has stated that the plea taken in the petition under section 264 of the Act that the position was reconciled before the ITO was new and not taken before him at the assessment stage. But strangely enough his discussion on the matter clearly shows that he was fully conversant with the issue and the point of view expressed by the assessee.

On 07.06.05 a letter was addressed to the ITO vide letter No.CIT-XX/Kol/264/05-06/1020 once again (Annexure-9). In this letter all the points raised by the ITO had on 01.03.05 made a query about the difference of Rs.137070 and called for reconciliation. Thereafter he took two more hearings on 09.03.05 and 21.03.05. the record is silent about any examination of the issue made by the ITO. On 24.03.05 he finalized the assessment. It was mentioned in this letter addressed to the ITO that on account of this it could not be determined if he had examined this issue before passing his order even though he had made a specific query in this regard. Hence he was directed to examine the "Trip expenses" account and if this tallied with the difference of Rs.437070 as stated above then possibly no adverse presumption would be possible. Without such an exercise the addition was premature. The report of the ITO was called for.

The reply of the ITO was received vide letter No.wd-1(4)/Hg/ revision petition/05-06/338 dated 23.08.05 (Annexure-10). The ITO clearly made no worthwhile enquiry as directed but has commented that such "Trip expenses" were not seen in the accounts of the year 2001-02. The specific plea of the assessee was not addressed by the ITO as was required. He has made certain other irrelevant observations having no bearing on the limited enquiry entrusted to him. He has also acknowledged that the appeal filed in this case stood withdrawn by the assessee.

Hence, the record clearly shows that the ITO was entrusted with the enquiry, verification and reconciliation with regards the "Trip expenses" of Rs.437070. Despite the lapse of two and a half months his report finally submitted on 23.08.05 does not case any light on the issue or supports his contentions made in his letter dated 27.05.05. The order passed by me is very elaborate and it is clearly brought out as to why the order of the AO does not bring on record evidence sufficient to merit the addition made by the AO. Hence the report of the AO was not ignored but taken due cognizance of. Despite the fact that the AO on 01.03.05 had made a specific requirement for reconciliation of the difference of Rs.437070 and has also taken two hearing on 01.03.05 & 21.03.05 after he was given the benefit of doubt and was asked vide letter dated 07.06.05 to examine the plea taken

in the petition under section 264 of the Act in this regard. His verification did not yield anything to support his conclusion in the assessment order. As the verification was entrusted to the AO there was no requirement of any enquiry by me. Hence, in conclusion it is stated that there was no haste in passing the order under section 264 of the Act and further the report of the AO was not ignored and no blind reliance was placed on the submission of the assessee, as the AO was required to verify the same before they were accepted. Lastly, the order passed by the Commissioner under section 264 of the Act must satisfy the well settled test of "judicial act" (**Dwarka Nath v ITO** [1965] 57 ITR 349 SC)."

4. The matter was referred to the Central Vigilance commission (CVC) vide U.O. Note dated 23.2.2009 for its first stage advice. CVC vide its OM dated 03.3.2009 advised for initiation of major penalty proceedings against the respondent herein. The Competent Authority initiated disciplinary proceedings against the respondent herein under Rule 14 of CCS (CCA) Rules, 1965 vide Memorandum dated 24.8.2009.

5. On receipt of the said charge-memo, the respondent filed the application, i.e., O.A. No.288/2010 under Section 19 of the Administrative Tribunal Act, 1985 (hereinafter referred to as 'the Act') seeking quashing of the charge-sheet on various grounds including the ground that the issuance of charge-sheet was actuated by *mala fide*; he had discharged his quasi-judicial duties while disposing of the petition under Section 264 of the Act and there was no undue favour shown to Subhash Singh; and the order was justified on merits. He submitted that while taking decision to initiate disciplinary proceedings, his reply was not even put before the Finance Minister and therefore, was not looked into by the Finance Minister.

6. The petitioner herein filed reply to the said OA to which the respondent filed his rejoinder. Thereafter, matter was argued which resulted in passing the impugned order dated 16.3.2011 by the Tribunal allowing the OA to quash the charge-sheet primarily on the ground that this charge-sheet was against the principles of natural justice as the explanation of the respondent was not even looked into. However, liberty was granted to the petitioner to examine the explanation furnished by the respondents carefully as per the decisions of the Supreme Court in the cases of

Union of India & Others Vs. A.N. Saxena [JT 1992 (2) SC 532] and **Union of India & Others Vs. K.K. Dhawan** [AIR 1993 SC 1478]. The relevant portion of the Tribunal's order is as under:

> "12. The impugned charge memo dated 24.8.2009 being against the principles of natural justice, is thus quashed and set aside with liberty to the respondents to examine the explanation furnished by the applicant carefully as per the decision of the Supreme Court in **A.N. Saxena** and **K.K. Dhawan** (supra), and also to take into consideration the fact that the complaint was filed by Sandipan Khan whose order only the applicant was hearing the revision, and the fact that the applicant being his reviewing authority had downgraded his reports, as also hat the allegations subject matter of charge emanated from an order passed by the applicant in his judicial or quasi-judicial capacity, and that the charge memo was issued to the applicant in 2009 pertaining to the events of the year 2005. The respondents will also consider the factum of the order passed by the applicant having attained finality, as mentioned above, having not been challenged in any judicial forum, as prima facie it appears to us that if the order passed by the applicant is said to be tainted with mala files with a view to help the assessee, as is the case of the respondents, normally such order should have been challenged."

7. Assailing that order, present writ petition is preferred by the Department.

8. The submission of Mr. R.V. Sinha, learned counsel appearing for the petitioner, was that it was improper on the part of the learned Tribunal to go into the validity of the charge-sheet at this stage inasmuch as all these aspects could be gone into only after the completion of inquiry. He submitted that in view of the judgment of the Supreme Court in **A.N. Saxena** (supra) and **K.K. Dhawan** (supra), disciplinary proceedings could be initiated even against the employee who committed misconduct while discharging his quasi-judicial duties and therefore, there is no bar holding such an inquiry. Therefore, the judgment of the Tribunal was contrary to law laid down by the Supreme Court in the aforesaid cases and various other judgments.

9. It cannot be disputed that under certain circumstances, disciplinary proceedings can be initiated against the Government employee even when

he was discharging quasi-judicial function. However, in the aforesaid cases itself, the Supreme Court particularly stressed the fact that such an action has to be taken only after great caution and a close scrutiny of his actions, and only if the circumstances so warrant. Following dicta has been laid down by the Apex Court in **A.N. Saxena** (supra):

> "In our view, an argument that no disciplinary action can be taken in regard to actions taken or purported to be done in the course of judicial or quasi-judicial proceedings is not correct. It is true that when an officer is performing judicial or quasi-judicial functions disciplinary proceedings regarding any of his actions in the course of such proceeding should be taken only after great caution and a close scrutiny of his actions and only if the circumstances so warrant. The initiation of such proceedings, it is true, is likely to shake the confidence of the public in the officer concerned and also if lightly taken likely to undermine his independence. Hence the need for extreme care and caution before initiation of disciplinary proceedings against an officer performing judicial or quasi-judicial functions in respect of his actions in the discharge or purported to discharge his functions. But it is not as if such action cannot be taken at all. Where the actions of such an officer indicate culpability, namely a desire to oblige himself or unduly favour one of the parties or an improper motive there is no reason why disciplinary action should not be taken."

10. Two things follow from the above, viz:

(a) Disciplinary proceedings can be initiated only if an action of the officer indicates culpability, that is to say, desire to oblige himself or giving undue favour to one of the parties or where there is an improper motive; and

(b) A close scrutiny of his action is required and a great caution is adopted before taking a decision as to whether disciplinary proceedings are to be initiated or not.

11. The question is as to whether such parameters were kept in mind by the petitioners while taking the decision to initiate the disciplinary proceedings.

12. We find from the reading of the impugned judgment of the

Tribunal that the matter was placed before the Finance Minister along with the relevant records. As per Note Sheet at Pages 16/N and 17/N of the file, there was not even a whisper that the respondent had submitted his reply to the show cause notice issued to him. The Tribunal, in this behalf, remarked as under:

> "Pages 16/N and 17/N as reproduced above, is a note prepared by the Director General of Income Tax (Vigilance) and CVO, CBDT, which was put up before the concerned authorities up to the Finance Minister for charge sheeting the applicant. There is not a word mentioned as regards issuance of the show cause notice and the reply filed by the applicant, least, consideration of the same. From the documentary evidence relied upon by the respondents, themselves, it is thus proved that before issuing the charge memo to the applicant, concerned authorities would not even consider the reply filed by the applicant to the show cause notice."

13. We have already indicated the nature of orders passed by the respondent in the petition filed by Shri B.S. Sondhi under Section 264 of the Act and the manner in which he had given his explanation justifying his order and taking a categorical stand that neither the order was passed in undue haste nor in a negligent manner. He justified the orders on merits and argued that his case was that it is the ITO who made unsustainable addition and even when the matter was referred to him, in his report he did not dealt on the actual issue raised. It is also very important to note that the action against the respondent was initiated on the complaint by the same ITO. Again, it would be of interest to note that against the orders of that ITO only, the respondent was hearing the revision petition. The respondent was also is reviewing authority and had downgraded the reports of the said ITO. On this basis, the respondent had submitted that the said ITO had his own axe to grind and he had made a frivolous complaint and these aspects were of vital importance. It was necessary to place the same before the disciplinary authority to arrive at judicious decision whether to hold an inquiry or not. In the absence of explanation, the representation of the assessee before the disciplinary authority and obviously, the decision to initiate disciplinary proceeding was tainted and was violative of the principle of natural justice. The Tribunal has, thus, not committed any wrong in quashing the charge-sheet on this ground. At the same time, opportunities were given

to the petitioner to examine the explanation furnished by the respondent and take afresh decision in the light of the judgments of the Supreme Court in **A.N. Saxena** (supra) and **K.K. Dhawan** (supra) etc. as per its observations made in Para 12 which are extracted above. Therefore, this is not a case for any interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution while sitting any judicial review of the orders of the Tribunal.

14. Before we part with, we would like to point out that the respondent had also set up a specific case that the whole action was tainted with *mala fide* and in fact, there was a motivated attempt on the part of the petitioner to harm the career prospect of the respondent, who is very young and also senior in his batch. He has mentioned that on earlier two occasions also two charge-sheets were served upon the respondent which were quashed by the Tribunal. According to him, he was even denied promotion for which he had again to knock the door of the Tribunal and after the OAs were allowed and vide orders dated 12.2.2009, directions were given to the Department to open the sealed cover regarding the DPC held in 2006 for the post of Chief Commissioner of Income Tax and giving effect to it will all consequential benefit. Even this order was not obeyed which forced the respondent to file the contempt proceedings on 08.7.2009. However, instead of complying with the direction, in total disregard of the observations of the Tribunal, charge-sheet dated 24.8.2009 was issued. Subject matter of which was quasi-judicial passed by him as above. These facts are mentioned in detail in Para 2 of the Tribunal's order. All these facts are not denied, which can give us an impression that somewhere in the office of Income Tax Department, some persons have grudge against the respondent.

15. We are leaving the matter at that without any further comments as the Tribunal has allowed the OA of the respondent on different grounds and we have examined those grounds while undertaking judicial review of the orders of the Tribunal. Thus, finding no merit in this writ petition, the same is dismissed *in limine*.

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MAC. APP.

UTTARANCHAL TRANSPORT CORPORATION ....APPELLANT

VERSUS

NAVNEET JERATH ....RESPONDENT

(G.P. MITTAL, J.)

MAC. APP. NO. : 264/2005 DATE OF DECISION: 03.01.2012

Motor Vehicles Act, 1988—Section 168—Respondent lost his right arm while travelling in bus of appellant due to accident with a truck—Appeal filed for reduction of compensation granted by Tribunal—Plea taken, driver and owner of truck were equally responsible and without them being impleaded, compensation could not have been awarded against appellant—Since Respondent kept his arm outside window, he was equally at fault and compensation awarded be reduced on account of respondents's contributory negligence—First Respondent had not purchased any artificial limb till arguments in appeal were heard which would show that first Respondent really did not need artificial prosthesis—Cross objections filed by respondent—Plea taken, compensation awarded is too low and meager and cannot be said to be just and proper—Held—Driver of bus was not produced by appellant corporation to prove manner of accident—Thus, it could not be said that there was no negligence on part of bus driver or truck driver was at fault—Assuming driver of bus and truck were equally responsible, this would be a case of composite negligence—In such case it is for victim to elect as to against which of two tortfeasers he would proceed to claim compensation—There was no negligence on First Respondent's part in placing his elbow/arm on

window sill and even if his elbow was protruding by a few inches, it was duty of Appellant's driver to drive bus in such a manner that there is safe distance between two vehicles—Principle governing grant of compensation in injury and death cases is to place claimant in almost same financial position as they were in before accident—First Respondent was entitled to be given addition of Rs. 50% of income towards future prospects as ITRs placed on record show that First Respondent's income gradually increased from AY 1994-95 to AY 1996-97—Compensation for physiotherapy allowed and compensation for artificial limbs doubled—Appeal of appellant dismissed and cross objections of First Respondent allowed.

Important Issue Involved: (A) When the driver of offending vehicle was not examined to prove the manner of the accident, it could not be said that there was no negligence on the part of the driver.

(B) In a case of composite negligence, it is for the victim to elect as to against which of the two tortfeasers he would proceed to claim compensation.

(C) There is no negligence on passenger's part in placing the elbow/arm on window sill even if his elbow was protruding by a few inches because it is duty of driver to driver the bus in such a manner that there is safe distance between the two vehicles.

(D) Where a claimant is given compensation towards loss of earning capacity, he is not entitled to any compensation for engaging office assistance.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. R.K. Kapoor, Advocate with Ms. Reetu Sharma, Advocate.

FOR THE RESPONDENT : Mr. Rajat Aneja, Advocate, Ms. Shweta Singh, Advocate with Mr. Vaibhav Jairaj, Advocate for R-1.

CASES REFERRED TO:

1. *Raj Kumar* vs. *Ajay Kumar & Anr.,* 2011 (1) SCC 343.
2. *Arvind Kumar Mishra* vs. *New India Assurance Co. Ltd.* 2010 (10) SCC 254.
3. *Yadava Kumar* vs. *D.M., National Insurance Co. Ltd.* 2010 (10) SCC 341.
4. *Oriental Insurance Co. Ltd.* vs. *Ram Prasad Varma & Ors.,* 2009 (2) SCC 712.
5. *T.O. Anthony* vs. *Karvarnan & Ors.,* (2008) 3 SCC 748.
6. *Oriental Insurance Company Limited* vs. *Vijay Kumar Mittal & Ors.* 2008 ACJ 1300.
7. *S. Achuthan* vs. *M. Gopal,* 3 (2003) ACC 765 (DB).
8. *R.D. Hattangadi* vs. *Pest Control (India) (P) Ltd.,* 1995 (1) SCC 551.
9. *General Manager, Kerala State Road Transport Corporation, Trivandrum* vs. *Mrs. Susamma Thomas & Ors.,* 1994 ACJ 1.
10. *Ramesh Kumar Awasthi* vs. *The Collector, Saharanpur & Ors.,* AIR 1982 Allahabad 425.
11. *General Manager State Road Transport Corpn.* vs. *Krishnan* (1981 ACJ 273).
12. *Concord of India Insurance Co. Ltd.* vs. *Smt. Nirmala Devi & Ors.,* 1979 (4) SCC 365.
13. *Sushma Mitra* vs. *M. P. State Road Transport Corporation* (1974 ACJ 87).
14. *Sushma Mitra* vs. *M.P.S.R.T.C.* (1974 ACJ 87).
15. *Delhi Transport Undertaking* vs. *Krishnawanti,* 1972 ACJ

423.

16. *Baker* vs. *Willoughby,* 1970 AC 467.

17. *C.K. Subramonia Iyer* vs. *T. Kunhikuttan Nair,* AIR 1970 SC 376.

18. *Jamnagar Motor Transport Union* vs. *Gokaldas Pitambar's L.Rs.* (1966 ACJ 42).

19. *The State of Punjab & Anr.* vs. *Guranwanti,* 1960 PLR 571.

20. *State of Punjab* vs. *Smt. Guranwanti* (AIR 1960 Punj.490).

RESULT: Appeal dismissed and cross objections allowed

G.P. MITTAL, J.

1. This Appeal is directed against the judgment dated 17.05.2004 passed by the Motor Accident Claims Tribunal (the Tribunal) whereby a compensation of Rs. 11,71,000/- was awarded in favour of the First Respondent for having suffered amputation of right hand above elbow and other injuries in an accident which took place on 20.05.1995. He suffered permanent disability in respect of his right upper limb to the extent of 85%.

2. The grounds of challenge are that the accident took place on account of rash and negligent driving of the truck driver who came from the opposite direction and struck against bus number UP-02B-6972 driven by the Appellant's (Corporation) driver. The First Respondent also contributed to the accident as he held his arm outside the window. It is averred that the compensation awarded is exorbitant and excessive.

3. The First Respondent filed cross objections on the ground that the compensation awarded is too low and meager and cannot be said to be just and proper as envisaged under Section 168 of the Motor Vehicles Act, 1988 (the M.V. Act).

NEGLIGENCE

4. The accident took place on 20.05.1995 when First Respondent (Navneet Jerath) was travelling in bus number UP-02B-6972 from Nainital to Delhi. First Respondent entered the witness box as PW-10 and deposed that at about 1:30/1:45 A.M. (in the night) the bus reached near Gajrola

U.P. His son aged about 4+ years was sleeping in his lap. He was sitting on the window side on the right side of the bus. The witness deposed that the bus was being driven at a high speed. He noticed a huge impact and something came scratching from the right side of the bus. He found his right arm missing and felt tremendous pain. The bus stopped after a distance of 400-500 meters. A few people went to the spot in search of his missing arm but it could not be traced.

5. PW-9 Vinay Kumar corroborated PW-10's testimony. He deposed that at about 1;00/1:30 A.M. he was occupying a seat in the rear side of the bus. The bus was being driven at a fast speed when the collision took place. Even after the accident, the bus stopped at a distance of about half a km. He deposed that the claimant pointed out that his right arm was missing. The bus was reversed to the place of the accident. With the help of some torches the Claimant's right arm was tried to be traced but the same was not found.

6. The Tribunal by the impugned judgment held that the driver of the offending bus was not produced. There was no reason to disbelieve PW-8 and PW-10's testimonies. The Tribunal applied the principle of res ipsa loquitor and held that the accident took place on account of rash and negligent driving by the bus driver. It is urged by the learned counsel for the Appellant that the accident occurred on account of rash and negligent driving of the truck coming from the opposite direction. The driver and the owner of the truck have not been impleaded in the petition. In any case, the driver and owner of the truck were equally responsible and without them being impleaded, compensation could not have been awarded against the Appellant.

7. The second limb of argument on negligence is that since the First Respondent kept his arm outside the window, he was equally at fault and the compensation awarded to be reduced on account of First Respondent's contributory negligence. I see no reason to disagree with the conclusion reached by the Tribunal with regard to the negligence of the driver of bus number UP-02B-6972 for more than one reason.

8. Firstly, there was no negligence on First Respondent's part in placing his elbow/arm on window sill which I would deal in detail a little later. The driver of the bus was not produced by the Appellant Corporation to prove the manner of the accident. Thus, it could not be said that there

was no negligence on the part of the bus driver or that the truck driver was at fault. Assuming that the driver of the bus number UP-02B-6972 and the truck driver were equally responsible, this would be a case of composite negligence. In such cases, it is for the victim to elect as to against which of the two tortfeasors he would proceed to claim the compensation. In this connection, I am supported by a judgment of the Supreme Court in **T.O. Anthony v. Karvarnan & Ors.,** (2008) 3 SCC 748, 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 wrongdoers, it is said that the person was injured on account of the composite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer 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."

9. As far as the First Respondent's plea of placing his arm / elbow on window sill is concerned, it is important to note that the Appellant Corporation's bus was running on night service. It is no where the Appellant's case that First Respondent had flung his arm outside the window. Most of the passengers do sleep while travelling in a bus running in the dead of night. It was Appellant's duty to ensure that the passengers are carried to their destination with adequate care and safety. It was expected of the Appellant's driver to have taken care that his bus would not come too close to any vehicle coming from the opposite

direction in order to avoid any danger to the safety of the passengers in which the Appellant's driver utterly failed.

10. In **Delhi Transport Undertaking v. Krishnawanti,** 1972 ACJ 423, an accident took place while a passenger was travelling in a bus resting her elbow on the window. The driver suddenly overtook a cart carrying logs of wood which were protruding. A passenger's elbow struck against a log and she was injured. This Court held that there was no contributory negligence on the part of the passenger and the accident took place because of the negligent driving of the bus driver. Para 10 of the report is extracted hereunder:-

> "10. It is the duty of the driver of the public buses to take all steps, which a person of ordinary prudence would take, to ensure the safety of the passengers. The driver of the bus in question cannot be said to be unaware of the fact that the passengers were in the habit of putting their hands outside the bus. He could thus foresee that while overtaking a moving cart if he would not leave sufficient space between the cart and the bus, there was a likelihood of the passengers' arms being injured. The respondent had elbow on the window while sitting in the bus. This cannot be said to be negligent way of sitting. On the other hand it may be called a slightly more comfortable way of sitting. The driver having noted the protruding wooden logs should have ensured a sufficient space between the bus and the cart while overtaking it. In case, he found that the oncoming traffic did not permit him of that much space, it was his duty not to risk overtaking the cart. The driver thus was rightly held negligent in overtaking the cart which resulted in injuries to the respondent."

11. The Delhi High Court in **Krishnawanti** (supra) relied on a judgment of Punjab High Court in **The State of Punjab & Anr. v. Guranwanti,** 1960 PLR 571, where it was held as under:-

> "It is well known that often passengers travel with their elbows resting on the window of the car. There is no prohibition against it. The plaintiff at that time of the morning considering the state of traffic cannot be said to have failed to use reasonable care for her safety by resting her below on the window."

12. In **Ramesh Kumar Awasthi v. The Collector, Saharanpur & Ors.,** AIR 1982 Allahabad 425, a similar question came before the Division Bench of Allahabad High Court. The Division Bench relied on **Krishnawanti** (supra) and held as under:-

> "6. On the perusal of the evidence we are satisfied that the appellant had kept his elbow on the window sill when the accident occurred. It was the duty of both the drivers to ensure safety of the passengers and for that purpose they should have taken care to leave sufficient space between the two vehicles at the time of crossing each other. The story introduced by Satvir Singh (DW2) that the accident occurred as the driver of the bus coming from the opposite direction wanted to save a cow is a cock and bull story. No evidence has been produced to prove that story. The driver's evidence would have been the best evidence to prove the circumstances which led to the accident but he was not produced. The drivers of the two buses were employees of the Corporation and they were best persons to state the truth about the accident but they were not produced for the reasons best known to the Corporation. The two drivers had special knowledge of the manner in which the accident took place and the reason for the two buses crossing each other with such closeness as to cause the accident. The Corporation did not produce them. Consequently, the irresistible conclusion is that if they had been produced their testimony would have gone against the case set up by the Corporation. It is well settled that if a witness having special knowledge of the facts is withheld it is legitimate to draw an adverse inference against that party. In our opinion, the two drivers were best persons to explain the circumstances which led to the accident and since the Corporation did not produce them we have to proceed on the assumption that the accident occurred on account of their negligence. Moreover, the fact that the two buses plying on a wide road, crossed each other so closely without there being any justification for the same itself proves the negligence of the two drivers.
>
> 9. It is a matter of common knowledge that passengers sitting near the window rest their hand on the window sill specially when on a long journey in the country-side. The driver of a bus carrying passengers on long journeys is expected to have

> knowledge of this fact. The drivers of the two buses were bound to take precaution against the possibility that while grazing each other some person might be placing his hand or elbow on the window sill. Since the two vehicles came too close to each other resulting into accident without there being justification for the same it has to be presumed that the drivers had failed to take reasonable care for the safety of passengers and therefore they were negligent. In **Jamnagar Motor Transport Union v. Gokaldas Pitambar's L.Rs.** (1966 ACJ 42) the Supreme Court in a similar situation where the two buses grazed while crossing each other held that both the drivers were negligent. The view that we are taking has been taken by various High Courts in a number of cases. Reference may be made to **State of Punjab v. Smt. Guranwanti** (AIR 1960 Punj.490), **Sushma Mitra v. M.P.S.R.T.C.** (1974 ACJ 87), **Delhi Transport Undertaking v. Krishnawanti** (1972 ACJ 423) and **General Manager State Road Transport Corpn. v. Krishnan** (1981 ACJ 273).
>
> 10. We are then faced with the question as to whether the appellant was guilty of contributory negligence as his right hand elbow was protruding out of the bus and for that reason he was not entitled to any compensation. On the evidence on record it is well established that the appellant was resting his right elbow on the window sill at the time when the accident occurred. Bool Chand, Conductor of the bus has stated that a portion of 2 1/2" of the appellant's right elbow was protruding outside the bus. His statement thus makes it amply clear that the appellant had not taken his arm out of the window, in-stead while resting his hand on the window sill a small portion of his hand 2 1/2" was protruding out of the bus. This is a normal for a passenger who sits on the seat near the window to rest his hand on the window sill. There is no law prohibiting resting of hand on the window sill or protruding small part of the body outside the bus. There is further no evidence on record to show that any signboard was placed in the bus warning the passengers from placing their elbows or hands on the window sill. The conductor also did not state that on seeing the bus coming from the opposite direction he had warned the appellant to keep his elbow inside the bus. In

Sushma Mitra v. M. P. State Road Transport Corporation (1974 ACJ 87) it was held that the appellant was not guilty of contributory negligence in keeping his elbow on the window sill because it is common practice for the passengers who sit near the window to rest their arm on the window and there was no evidence that the passengers were cautioned not to do so. The Court held that the passenger was not guilty of any contributory negligence. We would like to emphasize that the evidence on record shows that the place where the accident occurred was outside the town and the traffic was not heavy and there was ample space for the two vehicles to pass each other without coming close. If the drivers had taken adequate care for the safety of the passengers the accident could not have occurred in the manner it has happened in the present case. There is also no evidence that the bus coming from the opposite direction blew its horn or that the appellant was cautioned by the conductor or the driver on seeing the bus coming from the opposite direction to remove his hand from the window sill. The appellant was going on a long journey from Meerut to Rishikesh and in that" process it was quite natural for him to rest his hand on the window sill. It appears that two vehicles were being driven with excessive speed as merely by the impact the appellant's fore-arm was slit and severed instantaneously leaving no time for the appellant to withdraw his hand. These circumstances show that the appellant was not guilty of negligence by placing his elbow on the window sill."

13. Simply because the First Respondent was resting the elbow on window sill and even if his elbow was protruding by a few inches, it was the duty of Appellant's driver to drive the bus in such a manner that there is safe distance between the two vehicles. That having not been done, it has to be held that the accident took place on account of rash and negligent driving of driver of bus number UP-02B-6972 owned by the Appellant.

QUANTUM OF COMPENSATION

14. The First Respondent was aged about 35 years on the date of the accident and was a successful Chartered Accountant (CA) paying income tax on the date of the accident and even much before that.

Because of the injuries suffered by him, the First Respondent remained admitted in Sir Ganga Ram Hospital from 21.05.1995 to 27.05.1995 for traumatic amputation of right arm. He was operated upon for debridement and closure of stump. The First Respondent was then admitted in Vohra Nursing Home, Rajouri Garden where he remained admitted till 02.06.1995. The Tribunal awarded the compensation under various heads which can be extracted from Para 30 of the judgment in a tabulated form:-

1.	Reimbursement of medical expenses	Rs. 30,000/-
2.	Permanent disability/loss of future earning	Rs. 5,76,000/-
3.	Pain, sufferings and loss of enjoyment of amenities of life	Rs. 2,00,000/-
4.	Provision of artificial limb	Rs. 3,15,000/-
5.	Special diet/conveyance/other assistant	Rs. 50,000/-
	TOTAL COMEPNSATION	**Rs. 11,71,000/-**

15. In the Claim Petition filed before the Tribunal a compensation of Rs. 75 lacs was claimed. It was averred that the First Respondent would have to visit UK or USA to get artificial limb and would have to arrange a sum of Rs. 6 to 7 lacs for the same. Considering his visits for replacement of the artificial limbs 7-8 times, the expenses under that head were assessed to be Rs. 42 to 45 lacs. It was stated that the First Respondent had already spent a sum of Rs. 75,000/- on his treatment, special diet and conveyance.

16. The First Respondent averred (in the Claim Petition) that he possessed a handsome personality, quick movement, sharpness and was of jovial nature. He had to attend various offices i.e. Income Tax, Sales Tax, Registrar of Companies on behalf of his clients and loss of the right arm would always be a handicap to him. He was a Treasurer of Lion's Club Delhi. As a CA he had a very bright future and his earning capacity was affected to the extent of 85%.

17. In the written submissions filed before the Tribunal on 04.04.2004 and in this Appeal more details were filed and a compensation of ' 89,23,000/- was claimed which is extracted as under:-

	Particulars	Average span of Active Professional Practice upto	Amount (in Rs.)
(i)	Cost of Artificial limb every 7/8 years (Average life of Artificial Limb). The Petitioner could not opt for it because of paucity of funds, since cost is Rs. 4 to 5 lacs the average is taken for computation. As per Endolite (PW11, Ex.PW11/ A & Ex.PW11/B), it will require a change after every 7 years.	35 years	15,00,000/-
(ii)	Cost for automatic designed car Rs. 6,25,000/- meant for disabled persons as the Petitioner has lost his right arm (3 cars in 20 years would be required during this remaining spend of life).	35 years	18,75,000/-
(iii)	Salary to Attendant for minimum 20 years @ Rs. 4,000/- x 12 months x 20 years on an average, though, in future the salary of the Attendant would also increase.	35 years	9,60,000/-
(iv)	Salary to Driver Rs. 3,500 x 12 months x 20 years on an average, though, in future the salary of the Driver would also increase.	35 years	8,40,000/-
(v)	Cost of medicines, special diabetic diet etc. Rs. 1,500 per month x 12 months x 20 years	35 years	3,60,000/-
(vi)	Physiotherapy present cost	35 years	2,88,000/-

(vii)	Rs. 1,200 x 12 months x 20 years and conveyance, which will increase in future. For pain, agony and suffering and loss amenities of life, loss of society, social status, marital life etc. etc., which will also increase in future. With 85% disability all around social status will fact not only his future prospects but also his life span and that of his wife, who has already grown in appearance and for prospects of education and marriage of children.	—	1,00,000/-
(viii)	Disfigurement deformity at 85%	—	15,00,000/-
(ix)	To loss of income from 21.05.1995: (a) One year total disablement; (b) Loss of earnings; and (c) Future prospects of loss of income with the increased income.	35 years	15,00,000/-
	TOTAL AMOUNT		89,23,000/-

18. The principle governing grant of compensation in injury and death cases is to place the claimant in almost the same financial position as they were in before the accident. In **Concord of India Insurance Co. Ltd. v. Smt. Nirmala Devi & Ors.,** 1979 (4) SCC 365, the Supreme Court observed that the determination of compensation must be liberal, not niggardly since the law values life and limb in a free country in generous scales.

19. In **General Manager, Kerala State Road Transport Corporation, Trivandrum v. Mrs. Susamma Thomas & Ors.,** 1994 ACJ 1, the Supreme Court held as under:-

"5.....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'. All this means that the sum awarded must be fair and reasonable by accepted legal standards."

20. In **Oriental Insurance Co. Ltd. v. Ram Prasad Varma & Ors.,** 2009 (2) SCC 712, the Supreme Court held that the expression 'just' must be given its logical meaning. Though, the compensation awarded cannot be a bonanza or a source of profit but in considering as to what would be just and equitable, all facts and circumstances must be taken into consideration.

21. As per the disability certificate Ex.PW-1/A, the First Respondent suffered amputation of right arm above elbow. He suffered 85% permanent physical impairment in relation to his right upper limb. The question of grant of compensation in respect of permanent disability, particularly, with reference to loss on earning capacity came up for consideration before the Supreme Court in **Raj Kumar V. Ajay Kumar & Anr.,** 2011 (1) SCC 343, the Supreme Court held as under:-

"5. The provision of the Motor Vehicles Act, 1988 ('the Act' for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. [See **C.K. Subramonia Iyer v. T. Kunhikuttan Nair,** AIR 1970 SC 376,

R.D. Hattangadi v. Pest Control (India) (P) Ltd., 1995 (1) SCC 551 and **Baker v. Willoughby,** 1970 AC 467.

6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

7. Assessment of pecuniary damages under item (i) and under item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses - item (iii) - depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages - items (iv), (v) and (vi) - involves

determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decision of this Court and High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability - item (ii)(a). We are concerned with that assessment in this case.

Assessment of future loss of earnings due to permanent disability

8. Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accidents injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ('the Disabilities Act' for short). But if any of the disabilities enumerated in Section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation.

9. The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than

not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%.

10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

11. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terns of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency).

We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this Court in **Arvind Kumar Mishra v. New India Assurance Co. Ltd.** 2010 (10) SCC 254 and **Yadava Kumar v. D.M., National Insurance Co. Ltd.** 2010 (10) SCC 341.

12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence:

(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature

of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity."

22. The Appellant's grievance is that the amount of compensation awarded is exorbitant and excessive whereas the First Respondent's contention is that although he could never be placed in the position in which he was before he lost his right arm but he has to be awarded compensation to be placed in the same financial position. On behalf of the First Respondent, it is contended that he wanted to have the latest artificial limb manufactured by Endolite and cost of one such limb would

be Rs. 11 to 13 lacs.

23. It is urged that the compensation awarded towards loss of earning capacity was on the lower side. The First Respondent being a CA would use his right hand in his day to day activities; the Tribunal fell into error in reducing 85% disability in respect of the right upper limb to be 50% with respect to the whole body. It is argued that no compensation has been awarded for future medical expenditure / physiotherapy; for arrangement of a driver; for arrangement of an attendant and for purchase of a automatic vehicle.

24. On the other hand, it is urged on Appellant's behalf that the First Respondent had not purchased any artificial limb (as per his own showing) till the arguments in the Appeal were heard which would show that the First Respondent really did not need the artificial prosthesis. It is averred that the Tribunal was benevolent in granting 50% of future income towards the loss of earning capacity when the disability of 85% was only with respect to the right upper limb.

LOSS OF FUTURE EARNING CAPACITY

25. First Respondent's income tax returns were placed on record since Assessment Year (AY) 1994-95 when the Respondent returned the income of Rs. 32,300/-. In the next year, the First Respondent had taxable income of Rs. 62,200/-; in the next AY 1996-97, although, the gross receipts had increased but the taxable income was almost at the same level i.e. Rs. 62,200/-. The Tribunal, therefore, took the First Respondent's monthly income to be Rs. 6,000/- per month, estimated the loss of earning capacity to be 50% and applied the multiplier of 16 to compute the loss of future earning capacity as Rs. 5,76,000/-.

26. Considering the First Respondent's job who was to carry out the writing work would also use the Desktop and Laptop in the present day, the Tribunal was right in assessing the loss of earning capacity in view of **Raj Kumar** (supra) as 50%. The three income tax returns placed on record including the two previous Assessment Year would show that the First Respondent's income gradually increased from AY-1994-95 to AY-1996-97. The First Respondent was entitled to be given an addition of 50% of the income towards future prospects. The compensation for loss of earning capacity at the rate of Rs. 6,000/- would come to Rs. 7,72,800/- (Rs. 6,000/- x 12 – 7600/- (income tax)

+ 50% x 16 x 50%).

FUTURE MEDICAL EXPENSES/IMPLANTATION OF ARTIFICIAL LIMB.

27. The First Respondent as PW-1 deposed that he would feel pain in his right limb and had to go for physiotherapy periodically. He deposed that he would spent Rs. 1200/- to Rs. 1500/- for taking medicines for diabetes and other health problems like high Cholesterol level. First Respondent did not lead any evidence to prove that he suffered diabetes and high level of Cholesterol because of the accident. The Tribunal rightly declined to grant any compe````` `nsation for the same. At the same time, considering the nature of injuries suffered, it can be inferred that the First Respondent would require physiotherapy from time to time. I award lump sum compensation of Rs. 15,000/- towards future medical expenses/physiotherapy.

28. The bone of contention between the parties is with regard to the purchase of artificial prosthesis. During inquiry before the Tribunal, the First Respondent himself proved the quotation Ex.PW-11/A and PW-11/B to show the price of the prosthesis as Rs. 2,98,100/-. PW-11 Rajender Kumar examined by the First Respondent deposed that artificial limb had been provided to about 900 patients with 100% success rate. The maintenance cost for a period of five years was given by him to be Rs. 15,000/-. At the time of the Appeal, quotation of another version of that very company was placed on record whose costs is quoted as Rs. 11,13,000/-. It is urged by the learned counsel for the First Respondent that since he (the First Respondent) was a professional CA he was expected to have meetings with his high ranking clients and attend various conferences and therefore, needed the latest prosthesis as was mentioned in the quotation dated 04.04.2011. It is submitted that one prosthesis may last from 7-8 years and therefore, the First Respondent would need five prosthesis considering his life expectancy to be 75 years.

29. On the other hand, it is submitted by the learned counsel for the Appellant that the fact that the First Respondent did not go for purchase of any prosthesis till hearing of the appeal would speak volume that he really did not need any artificial limb or he might have purchased a cheaper version.

30. It was the First Respondent himself who wanted an artificial limb from Endolite and proved its quotation through PW-11 for Rs. 2,98,000/-. It is contended on First Respondent's behalf that the artificial limb could not be purchased because of non-release of the compensation. I would not agree. The compensation was released to the First Respondent as and when he applied for the same during pendency of the appeal. Considering that the First Respondent was a professional CA and would need an artificial limb to carry out day to day activities to the extent possible, I would grant the cost of two artificial limbs and the compensation of Rs. 3,15,000/- is increased to Rs. 6,30,000/- including the cost of maintenance as Rs. 30,000/-.

PROVISION OF AN ATTENDANT/DRIVER

31. First Respondent examined PW-9 Rohit Kumar who deposed that he was working as Assistant with First Respondent since 1995. He was initially getting a salary of Rs. 1200/- per month which was subsequently raised to Rs. 2500/- per month. In cross-examination the witness deposed that in the year 1995 when he joined the services of the First Respondent six employees were working with him. Even in those days, he (First Respondent) would take some officials with him during his visits to the ITO. Once the First Respondent was granted compensation towards loss of earning capacity, he was not entitled to any compensation for engaging office assistance. At the same time, considering First Respondent's status he would need help of a driver in driving his motor car who can also double up as his personal attendant.

32. The Tribunal granted a sum of Rs. 50,000/- as lump sum compensation towards special diet, conveyance and attendant. The minimum wages of a skilled worker on the date of the accident were Rs. 1919/- per month. If a young driver between the age of 25-35 was employed by him, he would help in ferrying the First Respondent from one place to another place and would also help him in carrying his day to day activities. I would apply the multiplier of 16 to the salary of a driver and would award him a compensation of Rs. 2,000/- x 12 x 16 = Rs. 3,84,000/-. In view of provision made for a driver, the First Respondent would not be entitled to any compensation for purchase of an automatic motor car.

33. I would further award him a sum of Rs. 10,000/- towards special diet and Rs. 5,000/- for conveyance for attending to the doctor.

PAIN AND SUFFERING / LOSS OF AMENITIES / DISFIGUREMENT

34. A compensation of Rs. 2,00,000/- was granted to the First Respondent for pain and suffering, loss of amenities of life and loss of expectancy. In the case of **Raj Kumar** (supra) it was held that where compensation of more than 50% of loss of earning capacity is granted, the compensation for loss of amenities in life should be nominal.

35. In this case, I have granted a compensation of 50% towards the loss of earning capacity. There are a catena of judgments where compensation of Rs. 3,00,000/- was awarded towards loss of one limb above elbow or above knee. In **S.Achuthan v. M. Gopal,** 3 (2003) ACC 765 (DB), a compensation of Rs. 3,00,000/- was granted towards pain and suffering in the case of fracture Tibia/Fibula left leg and neurological injuries. In the case of **Oriental Insurance Company Limited v. Vijay Kumar Mittal & Ors.** 2008 ACJ 1300 after referring to a number of decision, this Court awarded a sum of Rs. 2.5 lacs towards non pecuniary damages for the loss of right leg below knee i.e. 60% permanent disability.

36. In the circumstances, I would award a sum of Rs. 1,00,000/- each towards pain and suffering, towards loss of amenities in life and towards disfigurement.

REIMBURSEMENT OF MEDICAL EXPENSES

37. The First Respondent placed on record bills for purchase of medicines for Rs. 8,000/- and paid Rs. 20,945/- towards treatment in Sir Ganga Ram Hospital. Grant of compensation of Rs. 30,000/- under this head cannot be faulted.

38. The overall compensation granted by the Tribunal and by this Court is extracted in the tabulated form as under:-

	Head of Compensation	Granted by the Tribunal	Granted by High Court
1.	Reimbursement of medical expenses	Rs. 30,000/-	Rs. 30,000/-
2.	Permanent disability/loss of future earning	Rs. 5,76,000/-	Rs.7,72,800/-
3.	Pain, sufferings and loss of	Rs. 2,00,000/-	Rs. 3,00,000/-

	enjoyment of amenities of life		
4.	Provision of artificial limb	Rs. 3,15,000/-	Rs. 6,30,000/-
5.	Special diet/conveyance/other assistant	Rs. 50,000/-	
6.	Future medical expenses/ Future Physiotherapy	—	Rs. 15,000/-
7.	Provision of a driver-cum-attendant		Rs. 3,84,000/-
8.	Special Diet and conveyance for attending to the doctor		Rs. 15,000/-
	TOTAL	**11,71,000/-**	**21,46,800/-**

39. The Tribunal awarded interest @ 6% per annum from the date of filing of the petition till the date of payment. The interest rates were quite low at the beginning of this century which impelled the Tribunal to award interest at the rate of 6% per annum. The accident took place in the year 1995. The interest rates were very high at that time. Again there is rise in the interest rate on account of inflation being in doubt digits. In the circumstances, the First Respondent would be entitled to interest @ 7.5 % per annum throughout.

40. 75% of the enhanced amount along with its interest shall be held in FDR in UCO Bank, Delhi High Court Branch for a period of seven years, on which First Respondent would be entitled to payment of interest on quarterly basis. Rest of the amount along with interest shall be released to the First Respondent forthwith.

41. In the result, MAC APP.264/2005 filed by the Appellant Corporation is dismissed and the cross objections filed by the First Respondent are allowed in above terms. No costs.

42. Pending applications also stand disposed of.

ILR (2012) II DELHI 308
W.P. (C)

SYED ARSHAD HUSSAIN ....PETITIONER

VERSUS

JAMIA MILLIA ISLAMIA & ANR. ....RESPONDENTS

(HIMA KOHLI, J.)

W.P. (C) NO. : 2587/2011 AND CMS NO. : 5507/2011, 20068/2011 **DATE OF DECISION: 03.01.2012**

Constitution of India, 1950—Writ—Examination Malpractice—Petitioner impugned the order dated 03.03.2011 passed by respondent No.2/Controller of Examinations, Jamia Millia Islamia University, whereby the Examination Committee constituted by respondent No.1/University decided to penalize the petitioner for indulging in use of unfair means while writing Examination—MBA (Evening), Part-II, Paper—MBA-2011 held on 18.01.2011, by cancelling all the papers of the semester/year in which the petitioner had appeared and thus declining to promote him to the next academic year. However the incriminating material had gone missing from the custody of the concerned officer, i.e., the Deputy Controller of Examinations. Held: in the present facts and circumstances the Court had no option but to hold that the benefit of doubt has to be given to the petitioner by accepting the status report dated 25.08.2011 submitted by the Addl.CP/Vigilance, Delhi Police to the effect that incriminating document allegedly confiscated by the members of the flying squad from the petitioner was not a seized property due to a lapse on the part of the Invigilator and the Assistant Superintendent and that proper procedure was not followed by respondent No.1/University as

required by it before passing the impugned order dated 03.03.2011.

In view of the above mentioned facts and circumstances that have emerged in the present case, the Court has no option but to hold that the benefit of doubt has been given to the petitioner by accepting the status report dated 25.08.2011 submitted by the Addl.CP/Vigilance, Delhi Police to the effect that incriminating document allegedly confiscated by the members of the flying squad from the petitioner was not a seized property due to a lapse on the part of the Invigilator and the Assistant Superintendent and that proper procedure was not followed by respondent No.1/University as required by it before passing the impugned order dated 03.03.2011, cancelling all the papers of the semester/year in which the petitioner appeared and refusing to grant promotion to him. **(Para 11)**

Important Issue Involved: Benefit of doubt can be given to petitioner where incriminating material had gone missing from the custody of the concerned department/officer.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. R.K. Saini, Advocate with Mr. Vikas Saini and Mr. Sheikh Imran Alam, Advocates.

FOR THE RESPONDENTS : Ms. Jaya Goyal, Advocate with Mr. Rohit Gandhi, Advocate.

RESULT: Petition allowed.

HIMA KOHLI, J. (ORAL)

1. The present writ petition is filed by the petitioner impugning the order dated 03.03.2011 passed by respondent No.2/Controller of Examinations, Jamia Millia Islamia University, whereby the Examination Committee constituted by respondent No.1/University decided to penalize the petitioner for indulging in use of unfair means while writing the

Examination - MBA (Evening), Part-II, Paper – MBA-201 held on 18.01.2011, by cancelling all the papers of the semester/year in which the petitioner had appeared and thus declining to promote him to the next academic year.

2. The facts of the case lie in a narrow compass. It is the case of the petitioner that he had completed B.Tech. (Electrical) from respondent No.1/University and being in employment, he took admission in MBA (Evening) three year course in the year 2009. Between January-February 2011, the petitioner was to appear for the second year MBA (Evening) examination. On 18.01.2011, the petitioner appeared for the paper – MBA-201 (Part-II) examination in respect of the subject, Financial Management, which was the first paper of the said semester/year. As per the petitioner, during the course of the examination, the flying squad paid a surprise visit to room No.320, where the petitioner was answering his examination and on discovering some documents in his pocket, the same were confiscated. The stand of the petitioner is that the documents in question pertained to the office where he was employed, i.e., M/s ETA Engineering Pvt. Ltd. and that the said documents were in no manner related to the examination in which he was appearing on the relevant date. It is averred in the petition that the checking staff and the invigilator on duty examined the contents of the documents found in possession of the petitioner and thereafter left the issue with the invigilator on duty. However, the invigilator on duty took away the answer sheet of the petitioner, subject to the decision of the competent authority.

3. Although the aforesaid examination in question, in which the petitioner had appeared, took place on 18.01.2011, respondent No.1/ University did not initiate any action on the same date. Instead, necessary proceedings were initiated against the petitioner on the next day i.e., on 19.01.2011, when a notice was issued to the petitioner charging him of indulging in use of unfair means by bringing written material in the examination hall and calling upon him to appear before the Examination Committee on 18.02.2011 to show cause as to why further action be not taken against him in accordance with the Ordinance of respondent No.1/ University. Upon receiving the aforesaid notice dated 19.01.2011, the petitioner appeared before the Examination Committee on 18.02.2011 and furnished his explanation to the effect that the documents found in his possession were work related official documents left inadvertently in his pocket and they were not relevant for taking the examination in question.

Thereafter, the petitioner received the impugned order dated 03.03.2011 passed by respondent No.2/Controller of Examinations stating *inter alia* that his case had been considered in the light of the material on record, the statement as tendered by the petitioner before the Examination Committee, and after due deliberations, it was deemed appropriate to cancel all the papers of the semester/year in which the petitioner had appeared and to refuse him promotion to the next academic year. Aggrieved by the aforesaid order dated 03.03.2011, the petitioner has preferred the present petition.

4. Vide order dated 04.05.2011, while taking notice of the stand of the petitioner that he had inadvertently carried in his pocket some official documents belonging to his office, which were discovered during checking by the concerned Invigilator while the petitioner was appearing in the examination in question and further, in view of the submission made by the counsel for the petitioner that the petitioner had in his possession, photocopies of the documents, which he had been allegedly carrying with him on 18.01.2011, while issuing notice to the respondents and calling upon them to file counter affidavits, the Court deemed it expedient to direct the DCP (Vigilance), Delhi Police to probe the matter and to find out as to how the incriminating material allegedly confiscated by the Flying Squad from the petitioner was no longer available with the office of respondent No.1/University and instead was being produced by the petitioner in Court.

5. The aforesaid order was passed in the light of the submission made by the counsel for respondent No.1/University that the incriminating material had gone missing from the custody of the concerned officer, i.e., the Deputy Controller of Examinations. The DCP(Vigilance), Delhi Police was also directed to ascertain as to whether on the relevant date the alleged incriminating material was at all taken into possession by the Invigilator or not. Further, as an interim measure, the petitioner was permitted to attend his final year classes while making it clear that the said interim protection granted to him would not create any special equity in his favour and the same would be subject to the final outcome of the present petition. It is stated that on the basis of the aforesaid interim order dated 04.05.2011, the petitioner has been attending his final year classes and the examinations are slated to begin in the month of January 2012.

6. Pursuant to the aforesaid order, the Addl.CP/Vigilance, Delhi Police submitted two status reports. The first one is dated 19.07.2011, wherein a request was made to the Court to direct respondent No.1/ University to render necessary co-operation and appoint a Nodal Officer to provide all assistance during the enquiry. The second and final status report submitted by the Addl.CP/Vigilance is dated 25.08.2011, which is reproduced hereinbelow for ready reference:-

> "In continuation of the previous status report dated 19.07.11, it is further submitted that the respondent Jamia Milia Islamia University had also conducted an internal enquiry in to the matter, a copy of which was filed by them in the Hon'ble Court on 19.07.11. A copy of the same was provided to this office on 08.08.11.
>
> However, as directed the matter was still enquired in to by this office. During enquiry, it revealed that on 18.01.2011, Prof. M.N. Doja was the invigilator and Asst. Prof. Mohamad Amjad was co-invigilator in room number 320, where the petitioner Syed Arshad Hussain was taking his MBA,Part-II, Paper No.201 examination. Dr. Syed Akhtar Imam was on duty as Assistant Superintendent.
>
> During the examination, Dr. Arshad Noor Siddiqui member of the flying squad visited room No.320 and confiscated an incriminating document from the petitioner's pocket. He handed over the confiscated document along with the answer booklet to the invigilator, Prof. M.N. Doja, who further reportedly handed it over to Dr. Sayed Akhtar Imam, Assistant Superintendent. But Prof. Doja could not produce any witnesses to corroborate his version that the document was handed over to Dr. Sayed Akhtar Imam. However, Dr. Sayed Akhtar Imam denied receiving any incriminating document along with the answer booklet from Prof. M.N. Doja, and hence he could not initiate the requisite proceeding against the petitioner on the date of examination i.e. 18.01.11.
>
> In view of the above contradictions, it is clear, that the incriminating document allegedly confiscated by the flying squad member Dr. Arshad Noor Siddiqui from the petitioner was not seized property due to the lapse on the part of invigilator Prof. M.N. Doja and Dr. Sayed Akhtar Imam (Assistant

Superintendent)."

7. Counsel for the petitioner contends that in the light of the aforesaid status report, wherein the Addl.CP/Vigilance submitted that the incriminating document allegedly confiscated by the flying squad members from the petitioner was not a seized property on account of a lapse on the part of the concerned Invigilator and the Superintendent of Examinations, there exists no basis for passing of the impugned order dated 03.03.2011 by respondent No.1/University inasmuch as there was no material available with the University, for it to have arrived at a conclusion that the petitioner was found indulging in using unfair means under the Ordinance 15(XV) Para 30, 31 "Instructions to Candidates for Examinations" and use of "Unfair means/Misbehavior" printed on the Admit Card issued to the examinees, due to which all his papers for the relevant semester/year were cancelled.

8. Learned counsel for respondent No.1/University submits that a copy of the enquiry report dated 07.07.2011 submitted by the Enquiry Officer appointed by the Vice Chancellor of respondent No.1/University has been enclosed, alongwith the counter affidavit filed by respondent no.1/University on 18.07.2011. A perusal of the aforesaid preliminary enquiry report dated 07.07.2011 prepared by the Enquiry Officer, Prof.Nisar-Ul-Haq, Head, Department of Political Science, respondent no.1/University makes an interesting reading. The Enquiry Officer has set out the sequence of events, which occurred on 18.01.2011 and taken notice of the discrepancies between the versions of the parties directly involved in the case, namely, the Invigilator, Prof. M.N. Doja and the Assistant Superintendent, Dr. Akhtar Imam. After conducting detailed discussions with all the parties involved in the case, i.e., the staff members of the flying squad, the Invigilators, the Superintendent and the Assistant Superintendent, the Enquiry Officer had the following observations to make:-

> "1. The Invigilator (Prof. M.N. Doja) and Assistant Superintendent (Dr. Akhtar Imam) are found to be the main persons involved. The statements of the two are contradictory and hence it is difficult to discern which one is responsible for not registering the case of unfair means against Syed Arshad Hussain on 18th January 2011, the day of the examination.

> 2. It was very clear to the Enquiry Officer, that the Superintendent of Examinations- Prof. Khalid Moin was completely unaware of the incident till the next day, when the Proctor, brought it to his notice. Also, the mandatory requirement of the presence of five Assistant Superintendents and the Superintendent of Examinations during the examination was clearly not adhered to. There was just one Assistant Superintendent (that too the junior most one) present on 18th January 2011 in the MBA (E) examination hall.
>
> 3. There was considerable delay in booking the case. Further the case was booked (the next day) without any proof.
>
> 4. The responsibility of safeguarding the incriminating document rests with the Invigilator, Prof. M.N. Doja and/or Dr. Akhtar Imam, both of whom are giving contradictory explanations of the incident. They have evidently lapsed in discharging the duties assigned to them, and one or both of them are not giving an absolutely truthful account. 5. It seems that the relevant paper was taken away by the student Syed Arshad Hussain at some point from the custody of either the invigilator – Prof. M.N. Doja or the Assistant Superintendent – Dr. Akhtar Imam. Either or both of the latter come under the purview of suspicion. 6. The procedure for booking the case of unfair means was not followed right at the outset. First at the level of invigilator, second at the level of the Assistant Superintendent and finally while booking the case of unfair means on the next day and that too without any written document as proof.
>
> 7. The flying squad team needs to be commended for discharging their duty and ensuring the initiation of follow up action.
>
> 8. The student has taken the advantage of the support from the obvious lack of unanimity and inefficiency amongst those responsible for conducting the examinations."

9. After taking notice of all the aforesaid discrepancies and observing that the petitioner had taken advantage of the lack of due diligence shown by the invigilator and the superintending staff of respondent No.1/ University in following necessary procedures in case of such a nature, the following suggestions were made by the Enquiry Officer:-

"Suggestions for future:

A. Clear outlined responsibilities (including time of presence at the Examination Centre's) of the all the Personnel involved in the Examination Process – Superintendent of Examinations and all the Assistant Superintendents, Invigilators, Security guards etc.

B. Clear outlined guidelines for booking students under unfair means including presence of any incriminating documents on the person of the candidates/Examinees. This will avoid any discrepancy on the questionability of unfair means.

C. Log Book/Record maintained of all the 'out of the ordinary' happenings in the Examination Hall."

10. It is candidly admitted by the counsel for respondent No.1/ University that it is on account of the errors/omissions committed by the Invigilator and the Superintendent of the Examinations on the relevant date that the incriminating documents were not seized from the petitioner and they remained in his possession. It is further submitted by her that those responsible for the aforesaid errors/omissions are being brought to book by initiating appropriate departmental enquiry against them.

11. In view of the above mentioned facts and circumstances that have emerged in the present case, the Court has no option but to hold that the benefit of doubt has been given to the petitioner by accepting the status report dated 25.08.2011 submitted by the Addl.CP/Vigilance, Delhi Police to the effect that incriminating document allegedly confiscated by the members of the flying squad from the petitioner was not a seized property due to a lapse on the part of the Invigilator and the Assistant Superintendent and that proper procedure was not followed by respondent No.1/University as required by it before passing the impugned order dated 03.03.2011, cancelling all the papers of the semester/year in which the petitioner appeared and refusing to grant promotion to him.

12. It is pertinent to note that vide order dated 21.12.2011, respondent No.1/University was directed to produce in a sealed cover, the result of Part-II of MBA (Evening) course undertaken by the petitioner. The said result was however not produced on the date fixed, i.e., 23.12.2011. Today, counsel for respondent No.1/University hands over the result of the petitioner, which reveals that except for the paper - MB201 relating to the subject, Financial Management, which is subject matter of the

present petition, the petitioner has cleared the remaining six papers in respect of the other subjects.

13. While allowing the present petition and setting aside and quashing the impugned order dated 03.03.2011, respondent No.1/University is directed to declare the results of the petitioner for the Part-II of MBA (Evening) course and permit him to take his final year examinations as also the supplementary examination for MB-201 paper relating to the subject, Financial Management in this session itself.

14. Before parting with the present case, the Court expresses its deep dismay and discontentment at the manner in which the officials of respondent No.1/University have handled the incident of 18.1.2011 and this has also displayed the lack of the application of mind on the part of the Examination Committee in scrutinizing the documents related to the petitioner. Had such measures been taken at that stage when the documents were placed before the Committee, it would have found that the very case of respondent No.1/University, that unauthorized material was found in the possession of the petitioner while writing the examination, had remained unsubstantiated due to non-availability of such documents in the custody of the concerned officials of the respondent/University. Instead, the Committee proceeded to act in a casual and mechanical manner and imposed a penalty on the petitioner.

15. It is unfortunate that the malady of examinees resorting to unfair means/indiscipline while attempting papers seems to be spreading like wild fire. Every other day, there are reported cases of blatant cheating by examinees themselves or with the assistance of accomplices, thus polluting the entire education system. All out efforts must be made by educational institutions and Universities to nip such illegal activities in the bud and bring the guilty to book. But to attain the said object, the authorities must be extremely vigilant and quick to act and then meticulously follow the procedures prescribed for booking those who are caught in the act. If due promptitude and efficiency is exercised by them, it shall go a long way in stemming the tide of rampant cheating and use of unfair means by examinees and send a clear message to all the stakeholders that such activities shall not be tolerated and the guilty would not be spared. Also, a greater degree of care for creation of stringent rules and adherence thereto is expected out of respondent No.1/University to discourage any act amounting to cheating/use of unfair means by the examinees, more

so, when electronic devices like mobile phones etc. are being used to perpetrate such illegality. To achieve this goal, it is deemed expedient to direct respondent No.1/University to ensure that all the officers involved in the examination process, are made well conversant with such like electronic devices and familiarized with all the necessary steps required to be followed by them when confronted with such situations, which require immediate intervention and prevention.

16. The present case is a clear case of lack of due diligence exercised on the part of the concerned officers of respondent No.1/University present at the spot, which fact has clearly been brought out in the status report filed by the Addl.CP/Vigilance, Delhi Police as also in the Enquiry Report submitted by the Enquiry Officer appointed by the Vice Chancellor of respondent No.1/University, wherein a number of discrepancies in the version of the events that occurred on 18.1.2011 were pointed out and some suggestions have been made to ensure that in future, all the personnel involved in the examination process discharge their duties responsibly and that well defined guidelines are set out for booking students caught using unfair means in examinations.

17. The respondent No.1/University is therefore directed to take immediate steps to implement the suggestions made by the Enquiry Officer in his report dated 07.07.2011 and streamline and define the steps to be followed by the personnel of the University involved in the Examination process. The Vice Chancellor of respondent No.1/University shall ensure that requisite updated guidelines/manuals are prepared and circulated to all the personnel who shall be involved in the examination process, within a period of two months from today. Further, in view of the submission made by the counsel for respondent No.1/University that necessary steps shall be taken by the University to book the erring personnel involved in the present case, respondent No.1/University is directed to initiate appropriate departmental enquiry in that regard and conclude the same as per law, as expeditiously as possible.

18. The petition is disposed of alongwith the pending applications. A copy of this order be forwarded by the Registry forthwith to the Vice Chancellor of respondent No.1/University for perusal and compliance.

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IFCI LIMITED ....PETITIONER

VERSUS

STATE BANK OF INDIA & ORS. ....RESPONDENT

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

W.P. (C) NO. : 1296/ 2011 & C.M. NO. : 2723/2011 **DATE OF DECISION: 05.01.2012**

Petitioner impugned the judgment dated 06.12.2010 passed by the appellate Authority for Industrial & Financial Reconstruction (in short, AAIFR). which confirmed the order passed by the Board for industrial & Financial Reconstruction (in short, BIFR) dated 18.04.2007 which infact was a clarification and/or modification of its earlier order dated 14.09.2006. Whether the direction of the BIFR, which has been overturned by the AAIFR, to the effect that 5% of the sale proceeds, which were adjusted by the first respondent i.e., State Bank of India (hereinafter referred to as SBI) are required to be shared amongst all other secured creditors? Contention of petitioner is that the respondent had itself contended before the AAIFR even in the proceedings which culminated in the order dated 14.07.2001 that the amount deposited had to be shared between the SBI and itself (i.e. IFCI)—Held: That the concessions on law, by counsel cannot bind a litigant.

However, for reasons best known, the BIFR chose to reverse the directions by its order dated 08.09.2000, which the AAIFR, as noticed by us above, set aside by its order of 03.07.2001. The subsequent orders that the BIFR has passed i.e., orders dated 14.09.2006 and 18.04.2007 have

to be looked at, in the background of these facts as noticed by us above. We are of the view that the AAIFR's order, in sum and substance, certainly recognizes this position of SBI qua the sick industrial company i.e., PIL. Therefore, the argument of Mr. Bindra that SBI had taken a stand that the amount deposited could be shared with it, in our view, cannot dilute this legal position. It is settled that concessions on law by counsel cannot bind a litigant (see **Uptron India Ltd Vs. Shammi Bhan and Another,** (1998) 6 SCC 538, para 23 at page 547). Therefore, the argument that the Gujarat High Court had knowledge of the termination of the first reference when it passed order dated 05.05.2006 contrary to what the AAIFR notes, in our view, also cannot help the cause of the secured creditors. It is pertinent to note that the only direction issued by the Gujarat High Court was, to dispose of the application dated 11.03.2006, and not, as it could not have, to dispose it of, in a particular manner. There was, no legal obligation on the part of SBI to permit PIL to operate its working capital account maintained with it, having regard to precarious financial position of PIL. Having taken the risk, it must be permitted to enjoy its fruit.

(Para 23.1)

Important Issue Involved: Concessions on law, by counsel cannot bind a litigant.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. P.S. Bindra, Advocate.

FOR THE RESPONDENTS : Mr. Rajiv Kapur and Ms. Vatsala Rai Advocates for Respondent No. 1/SBI with Mr. P.J. Thomas, General Manager, SBI Mr. Dinkar Singh, Advocate for Respondent Nos. 2 to 5.

CASE REFERRED TO:

1. *Uptron India Ltd* vs. *Shammi Bhan and Another,* (1998) 6 SCC 538.

RESULT: Petition dismissed.

RAJIV SHAKDHER, J. (ORAL)

1. In the captioned writ petition, a challenge has been laid to the judgment dated 06.12.2010 passed by the Appellate Authority for Industrial & Financial Reconstruction (in short, AAIFR). The AAIFR by the impugned judgment confirmed the order passed by the Board for Industrial & Financial Reconstruction (in short, BIFR) dated 18.04.2007 which infact was a clarification and/or modification of its earlier order dated 14.09.2006. The short point which arises in the present writ petition is whether the direction of the BIFR, which has been overturned by the AAIFR, to the effect that 5% of the sale proceeds, which were adjusted by the first respondent i.e., State Bank of India (hereinafter referred to as SBI), are required to be shared amongst all other secured creditors. The petitioner herein, i.e., IFCI Limited is one such secured creditor. It is important to note that the entire controversy centres around an order dated 04.05.1999, passed by the BIFR, in the first reference, filed by the sick industrial company, which is respondent no.6 herein i.e., Prashant Industries Limited, which for the sake of convenience would be referred to as PIL. Therefore, it would be important to first incorporate herein the pertinent part of the order dated 04.05.1999, passed by the BIFR.

> *"that banks should allow the company to operate its accounts after adjusting 5% of all the sale proceeds. Further, if the company failed to start operating its accounts or submit stock statements within the given time limits and the bank reported this to the Board, BIFR would allow them to file recovery suits against the company."*

2. As indicated hereinabove, this order of the BIFR dated 04.05.1999 was passed in the first reference preferred by PIL, being : case no.342/1998.

3. There is no dispute that the BIFR by virtue of an order dated 08.09.2000 modified its order dated 04.05.1999. The relevant modifications carried out by the BIFR are briefly as follows :-

(i) the deduction from the sale proceeds of PIL was reduced from 5% to 2.5%;

(ii) the direction for deduction of 5% of the sale proceeds upto 31.08.2000 was made to stand;

(iii) PIL was directed to credit a corresponding amount in the account maintained by SBI, initially in the 'No Lien Account' (in short, NLA) by 08.12.2000;

(iv) the amount so deposited, was directed to be appropriated towards dues of all secured creditors including IREDA on a pro-rata basis by taking the principal dues of secured creditors, as outstanding on 31.03.2000, as the base and;

(v) lastly to enable the apportionment of the above, all secured creditors were directed to convey the details of their principal dues as on 31.03.2000, to the operating agency within a period of one month.

4. The order dated 08.09.2000 passed by the BIFR, was assailed by the PIL as well as by the SBI before the AAIFR. The appeal of the PIL was registered as 405/2000, while that of the SBI was registered as 420/2000.

5. The AAIFR upon due consideration of the matter and after hearing parties in both appeals, by an order dated 03.07.2001 dismissed the appeal of the PIL and allowed that of the SBI. The relevant portion of the order which contains three (3) explicit directions are extracted hereinbelow :-

> "..In view of the above discussion, the appeal no.405/2000 filed by the company has no merit and is dismissed and allowing appeal no.420/2000 of SBI, the impugned order dated 08.09.2000 in so far as it reduces the deductions from 5% to 2.5% of the sale proceeds, sharing of the amount so deducted, and the retention of the deducted amounts in 'no lien account' and the manner of sharing of the amount so deducted as modified, is set aside and thereby BIFR's order dated 04.05.1999 stands restored...."

6. As noticed hereinabove, the AAIFR by its order dated 03.07.2001 issued the following three (3) directions :-

(i) it reversed the order of the BIFR dated 08.09.2000 in so far as it reduced the deduction from 5% to 2.5% of the sale proceeds;

(ii) it also reversed the direction that required the SBI to share the amounts so deducted; and

(iii) it also set aside the direction which required SBI to retain the amounts deducted, in an NLA, as also the direction issued to share the amount so deducted.

7. Naturally, the sick industrial company i.e., PIL was aggrieved by the said order of the BIFR and hence, instituted a writ petition in the Gujarat High Court. This writ petition was numbered as Special Civil Application No.5428/2001. It is not in dispute that the Gujarat High Court passed an interim order dated 18.07.2001, whereby it initially stayed the directions passed by the AAIFR vide its order dated 03.07.2001.

8. Against the order of the Gujarat High Court dated 18.07.2001, the SBI preferred a review petition, which was disposed of by it vide order dated 28.12.2001. The necessary consequences of the order dated 28.12.2001 was that, the interim direction of the Gujarat High Court whereby, the deduction from the sale proceeds was restricted to 2.5% of the sale proceeds was restored to 5% of the sale proceeds.

9. PIL being aggrieved by the order dated 28.12.2001 passed by the learned Single Judge in Special Civil Application (SCA) No.548/2001, preferred a Letters Patent Appeal (in short LPA) before the Division Bench.

10. It is important to note that in the meanwhile two events had occurred; the first was that, PIL had filed a second reference with the BIFR on 29.11.2002, while the second event which transpired in the interregnum was that, the BIFR had rejected the first reference being : case no.342/1998, on 14.02.2003.

11. In view of these events, when the LPA was taken up by the Division Bench on 09.04.2003, it naturally came to the conclusion that the LPA had become infructuous, which was accordingly so ordered by the Division Bench, by its order dated 09.04.2003.

12. As indicated hereinabove, the second reference which had been preferred by PIL, came to be registered by the BIFR as case no.116/

2003.

13. The BIFR, at the very first hearing qua the second reference, which was held on 20.09.2005, passed certain directions. It is not in dispute that at the said hearing dated 20.09.2005, BIFR declared the PIL as sick industrial company based on its balance-sheet as on 31.03.2002. Interestingly, the BIFR simultaneously issued a show cause notice to the PIL as to why it should not be wound up. There were certain other directions issued, which included a direction to the promoter of the PIL to deposit 25% of the quantified means of finance, in the NLA, with SBI, which was the operating agency, in the said reference. This direction came to be passed to enable the BIFR to gather as to whether the promoter had the requisite amount to resuscitate the sick industrial company i.e., PIL.

14. PIL preferred an appeal against the order dated 20.09.2005 with the AAIFR. This appeal was however, withdrawn by the PIL, which was so recorded by the AAIFR in its order dated 13.02.2006.

15. It appears that during the course of the hearing of the second reference i.e., case no.116/2003, an order came to be passed by the BIFR, on 18.01.2006. Here again, several directions were issued by the BIFR. The relevant part of this order reads as follows :-

> "...The winding up notice dated 20.09.2005 was kept in abeyance. SBI shall share the amount lying in the NLA with the concerned secured creditors/others in accordance with the extant High Court orders..."

16. Against the order dated 18.01.2006, SBI preferred an appeal being: 89/2006. The AAIFR vide order dated 13.10.2006, dismissed the appeal as having become infructuous, while granting liberty to SBI to prefer a fresh appeal against any order passed by the BIFR.

17. The PIL in the meanwhile filed an application dated 11.03.2006 with the BIFR, in the then subsisting reference i.e., second reference case no.116/2003, wherein several reliefs were sought. What concerns us is, the relief whereby, PIL sought a direction from the BIFR that, the amount lying in the NLA or any other account received from it or on behalf of the company after filing of the first reference be invested in a fixed deposit with the Nationalized bank.

18. It is also not in dispute that in the pending writ petition on 26.04.2006, PIL had filed an additional affidavit before the Gujarat High Court, pursuant to which the Gujarat High Court passed an order dated 05.05.2006. Since submissions have been made based on this order, by the learned counsel for the appellant as well as the supporting respondents, the relevant portion of the said order is extracted hereinafter :-

> "...However, it is clarified that the proceedings pending before the BIFR in accordance with the amount deposited by the petitioner shall be decided within a period of 3 months from the receipt of writ of this order in accordance with law."

19. It is also not in dispute that the PIL on 18.05.2006 moved an application in the aforementioned writ petition i.e., SCA No.5428/2001 seeking a direction from the court that its application dated 11.03.2006 be adjudicated upon by the BIFR. By an order dated 28.07.2006, the Gujarat High Court, it appears, passed a direction that the PIL's application dated 11.03.2006 be decided by the BIFR within three months of the receipt of the said order.

20. It is pursuant to the said direction that the BIFR passed its order dated 14.09.2006, which was clarified by its order dated 18.04.2007. It is these orders which were assailed in the appeal before the AAIFR by the SBI. There were other appeals also filed but we are concerned with the direction limited to the distribution of the 5% of the sale proceeds deposited by the PIL. The AAIFR, for several reasons, which have been articulated in the impugned order, have reversed the direction qua this issue contained in orders dated 14.09.2006 and 18.04.2007. The discussion of the AAIFR on this issue is contained in paragraph 24 to 32 of the impugned judgment. The sum and substance of the discussion in the aforementioned paragraphs of the impugned judgment is that the order of the BIFR dated 08.09.2000 was reversed by the AAIFR vide its order dated 03.07.2001; a direction passed by the High Court on 05.05.2006 was first passed when, it had not been informed that the first reference being : case no.342/1998 had already been dismissed on 14.02.2003; and lastly, the order of the BIFR dated 04.05.1999 which was restored by the AAIFR by its order dated 03.07.2001, neither directed creation of any NLA nor the deposit of any sum in the NLA. In other words, the AAIFR appears to have reasoned that the order dated 04.05.1999 basically, concerned financing banks and hence allowed SBI to adjust the sale

proceeds against the banks' loan account. For these reasons, the AAIFR set aside the order of the BIFR dated 18.04.2007.

21. Before us, in support of the appeal, Mr. Bindra, Mr. Dinkar have been heard, while Mr. Kapur, who appears for the main contesting party has advanced submissions.

21.1 The sum and substance of the contention of Mr. Bindra is that the SBI had itself contended before the AAIFR even in the proceedings which culminated in the order dated 14.07.2001, that the amount deposited had to be shared between the SBI and itself (i.e., IFCI). For this purpose, Mr. Bindra drew our attention to the contentions recorded in the order of the AAIFR dated 03.07.2001, which reads as follows :-

> "...The SBI and IFCI had given financial assistance in respect of Textile Division and as such SBI alongwith IFCI alone are entitled to appropriate the 5% or 2 +% deduction out of sale proceeds routed through SBI ....."

21.2. It is, therefore, Mr. Bindra's contention that SBI cannot now be allowed to renege from its stand taken before the AAIFR, as far back as on, 03.07.2001. In order to buttress his submission, he took us through the orders of AAIFR, BIFR and the Gujarat High Court, which have been referred to, by us above, to demonstrate that the direction passed by the BIFR on 18.04.2007 was justified and legally tenable. Mr. Dinkar, who appears for respondent no.2, 3, 4 and 5 i.e., assignee of debts of erstwhile secured creditors of PIL, has supported the submissions made by Mr. Bindra.

22. On the other hand, Mr. Kapur, who appears for SBI has contended that the direction contained in order dated 04.05.1999 is explicit in nature, in as much as, it only requires adjustment of the sale proceeds deposited with it to the extent of 5%, and that, there was no direction for depositing the amount in the NLA. Mr. Kapur has further contended that this direction was passed in the first reference i.e., case no.342/1998, which got disposed of on 14.02.2003 and therefore, there was no occasion for the Gujarat High Court to have issued further directions in respect of the said reference. Mr. Kapur also contended that SBI was the only entity entitled to make adjustment as, undoubtedly, it was the only working capital financer of the sick industrial company i.e., PIL. It was contended that the petitioner i.e., IFCI and other secured creditors were

term loan lenders, and thus, could not have taken the benefit of the order of 04.05.1999.

23. Having heard the learned counsel for the parties as well as perused the records and the orders passed by the authorities below as also those of the Gujarat High Court. On a perusal of the record, we are of the view, as indicated at the very outset, the genesis of the dispute is pivoted on the order of the BIFR dated 04.05.1999. Mr. Kapur is right in his submission that the order only required it to carry out adjustment to the sale proceeds deposited by the PIL and there was no further direction issued to deposit the amount in the NLA. The difficulty arose since the BIFR modified its order dated 04.05.1999, by an order dated 08.09.2000. There is no dispute that the AAIFR had reversed the said order explicitly by its order dated 03.07.2001. The reversal, in terms, carried out by the AAIFR pertained to even the directions passed by BIFR for deposit of amount in the NLA and its pro-rata distribution amongst the secured creditors. In this scenario, the subsequent direction which the Gujarat High Court issued, inter alia, directing the BIFR to adjudicate upon the application of the PIL, could not in law take away the right of the SBI, which was undoubtedly the only working capital financer, to adjust the sale proceeds. The reason being that the working capital financer funds an entity for carrying out its day to day activities. It is not unknown that while a reference is pending before the BIFR if, working capital finance is not made available, then the functioning of a sick industrial company could come to grinding halt in absence of such finance. The working capital finance is, ordinarily made available to fund, amongst others, the purchase of raw material and to make payroll payments to the workers /employees: it is a capital of business used to fund its day-to-day trading (see Oxford Dictionary on Accounting, First Indian Edition 2004, at Page 355). Therefore, the BIFR in its wisdom on 04.05.1999 had permitted the operation of the working capital account maintained with the SBI, only upon PIL allowing adjustment of a miniscule percentage of its sale proceeds by the SBI. The said adjustment would have concededly serviced a very small portion of the interest which, accrued on that account.

23.1 However, for reasons best known, the BIFR chose to reverse the directions by its order dated 08.09.2000, which the AAIFR, as noticed by us above, set aside by its order of 03.07.2001. The subsequent orders that the BIFR has passed i.e., orders dated 14.09.2006 and 18.04.2007

have to be looked at, in the background of these facts as noticed by us above. We are of the view that the AAIFR's order, in sum and substance, certainly recognizes this position of SBI qua the sick industrial company i.e., PIL. Therefore, the argument of Mr. Bindra that SBI had taken a stand that the amount deposited could be shared with it, in our view, cannot dilute this legal position. It is settled that concessions on law by counsel cannot bind a litigant (see **Uptron India Ltd Vs. Shammi Bhan and Another,** (1998) 6 SCC 538, para 23 at page 547). Therefore, the argument that the Gujarat High Court had knowledge of the termination of the first reference when it passed order dated 05.05.2006 contrary to what the AAIFR notes, in our view, also cannot help the cause of the secured creditors. It is pertinent to note that the only direction issued by the Gujarat High Court was, to dispose of the application dated 11.03.2006, and not, as it could not have, to dispose it of, in a particular manner. There was, no legal obligation on the part of SBI to permit PIL to operate its working capital account maintained with it, having regard to precarious financial position of PIL. Having taken the risk, it must be permitted to enjoy its fruit.

24. In these circumstances, we are of the opinion in the ultimate analysis the order of the AAIFR is both legally tenable and fair and hence, deserves to be sustained. It is ordered accordingly. The writ petition and all pending applications are disposed of.

ILR (2012) II DELHI 328
W.P. (C)

MEWA SINGH DHALIWAL ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

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

W.P. (C) NO. : 133/2012 DATE OF DECISION: 09.01.2012

Border Security Force Act, 1968—Order dated 21st October, 2011 of the Border Security Force was impugned, whereby the petitioner's request to give him one more chance to qualify the FPETs was declined. Held: Relief granted by Court must be tenable within the legal framework of law and should not be based on misplaced sympathy, benevolence and generosity. Petitioner failed thrice even after intensive physical training—Reversion of petitioner to the rank of constable as he was, prior to his appointment as sub-Inspector, cannot be faulted.

Important Issue Involved: The reliefs granted by the Courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the Courts tends to degenerate into misplaced sympathy, generosity and private benevolence.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. K.K. Sharma, Advocate.

FOR THE RESPONDENTS : Mr. Ravinder Aggarwal, Advocate.

CASES REFERRED TO:

1. *Life Insurance Corporation of India* vs. *R. Dandapani,* AIR 2006 SC 615.
2. *Kerala Solvent Extractions Ltd.* vs. *A. Unnikrishnan and Anr.* (1994) II LLJ 888 SC.

RESULT: Petition dismissed.

ANIL KUMAR, J.

1. The petitioner has impugned the order dated 21st October, 2011 whereby the petitioner's request to give him one more chance to qualify the FPETs was declined.

2. In the impugned order dated 21st October, 2011, it is stipulated that the petitioner had joined BSF on 31st December, 2001 as Constable (GD). Later on, he qualified for SI(DE) competitive examination and joined SI(DE) batch No.51 at STC BSF, Yelahanka, Bangalore on 27th January, 2010 after tendering technical resignation from 128 Bn BSF.

3. It was further held that during the basic training, the petitioner could not qualify any of the FPET tests. During the final test conducted by a Board of Officers w.e.f. 22nd to 29th November, 2010 he had failed. Though a retest was conducted however, the petitioner failed to qualify the FPETs, and was, therefore, relegated for three months and given intensive physical training.

4. After the intensive physical training, the petitioner was again tested thrice on 24th March, 2011, 1st April, 2011 and 25th May, 2011. But the petitioner could not qualify the physical efficiency test entailing the issuance of a show cause notice dated 19th September, 2011 proposing to cancel his appointment to the rank of Sub Inspector under Clause 7 of the appointment offer and to revert him back to the rank of Constable, which he was holding prior to the appointment to the rank of Sub-Inspector, under the provision of FR-13.

5. The petitioner had replied to show cause notice dated 23rd September, 2011 seeking one more chance to qualify the FPETs.

6. The reply to the show cause notice was considered by the respondents, and no justification was found to allow the petitioner one more opportunity. Consequently, the prayer of the petitioner for one more chance to qualify the FPET was rejected holding that due to his poor physical standards his appointment to the rank of Sub Inspector is unsustainable and therefore, it was cancelled under Clause 7 of the appointment offer. The petitioner was reverted to the rank of Constable prior to the appointment to the rank of Sub Inspector as per provision FR-13 as his lien to the said rank was found to be still alive. The petitioner was therefore, reverted back to the rank of Constable and technical resignation from 128 Bn. BSF was revoked to enable the petitioner to join there. It was also held that the period spent by the petitioner on training would be treated as period spent on duty and therefore necessary orders were passed.

7. The petitioner has impugned the order declining his request for one more chance to qualify the physical tests contending that the reason that he could not pass the race test of 3.2 kms. in 17.25 minutes is on account of expiry of his father on 3rd December, 2009. Though his training had commenced 15 days thereafter w.e.f. 15th January, 2010. According to the petitioner, he was mentally disturbed which affected his performance. The petitioner also attributed his poor performance to the fact that no leave was granted to him. According to the petitioner, he was granted annual leave after 17 months, only after he was re-tested and thereafter relegating his training by three months.

8. The petitioner has also impugned the order reverting him to the post of Constable on the ground that he had secured a total of 324.5 marks and yet he was declared 'fail' whereas the other 16 candidates who secured lesser marks were declared 'pass'. The petitioner has also claimed that he cannot be reverted to the post of Constable as he had had rendered over 10 years of clean and unblemished service as a Constable in the BSF.

9. This Court has heard learned counsel for the petitioner and learned counsel for the respondents, Mr.Ravinder Aggarwal, Advocate, who has appeared on advance notice. The plea of the petitioner that though he had secured 324.5 marks he had been declared as failed, while the other 16 candidates who secured lesser marks had been passed, is not sustainable in the facts and circumstances. Perusal of the final score sheet reveals that the petitioner had secured only 18 marks in FPETs out of 30 marks. All the other candidates who have been shown below the name of the petitioner have scored more marks in FPET. Perusal of the

FPETs marks reveal that some of the candidates have secured 30 marks out of 30, and that the candidates who are below the petitioner and who have been declared successful have secured 24 or above marks in FPET. In the circumstances, the plea of the petitioner that though he had secured 324.5 marks in total and yet he had been declared failed does not entitle him for the relief claimed by him as he had failed to qualify the FPET.

10. Learned counsel for the petitioner is also unable to show any right of the petitioner to avail leave before undergoing retest. The petitioner was retested thrice on 24th March, 2011, 1st April, 2011 and 25th May, 2011 whereas his father had died on 3rd December, 2009. Retesting of the petitioner was almost after 15 months and there is no approximate relation between the death of father of the petitioner and the performance of the petitioner in the retest.

11. This also cannot be disputed that the petitioner was put to a final test before relegating him for three months and given intensive physical training w.e.f 22nd to 29th November, 2010. The relegation of the petitioner for training after he failed in the retest and giving intensive physical training to him also cannot be faulted by the petitioner on any of the grounds mentioned in the petition.

12. The petitioner failed thrice even after intensive physical training and in the circumstances, if the respondents have denied yet another chance for retesting the petitioner and has reverted him to the rank of Constable as he was prior to his appointment to the rank of Sub Inspector as per provision FR-13 as his lien to the said rank was still alive, the action of the respondents cannot be faulted on any of the grounds raised by the petitioner.

13. The learned counsel for the petitioner in the last has contended that the petitioner's plea of being given another chance and being retested be considered as a mercy petition and this Court should exercise its power in the facts and circumstances. Even this plea of the petitioner cannot be accepted. The relief granted by the Court must be tenable within the framework of law and should not be based on misplaced sympathy, generosity and private benevolence. The Supreme Court had dealt with this aspect in the case of **Life Insurance Corporation of India v. R. Dandapani,** AIR 2006 SC 615 and had held as under:-

> "8. In recent times, there is an increasing evidence of this, perhaps well-meant but wholly unsustainable, tendency towards a denudation of the legitimacy of judicial reasoning and process. The reliefs granted by the Courts must be seen to be logical and tenable within the framework of the law and should not incur and justify the criticism that the jurisdiction of the Courts tends to degenerate into misplaced sympathy, generosity and private benevolence. It is essential to maintain the integrity of legal reasoning and the legitimacy of the conclusions. They must emanate logically from the legal findings and the judicial results must be seen to be principled and supportable on those findings. Expansive judicial mood of mistaken and misplaced compassion at the expense of the legitimacy of the process will eventually lead to mutually irreconcilable situations and denude the judicial process of its dignity, authority, predictability and respectability. [See: **Kerala Solvent Extractions Ltd. v. A. Unnikrishnan and Anr.** (1994) II LLJ 888 SC."

14. In the totality of the facts and circumstances, the petitioner has failed to make out any illegality, irregularity or any perversity in the order dated 21st October, 2011 of the respondents reverting the petitioner to the post of Constable prior to the appointment to the rank of Sub Inspector on account of the petitioner failing repeatedly in FPETs. The writ petition, therefore, is without any merit, and it is dismissed. Parties are also left to bear their own costs.

ILR (2012) II DELHI 333
FAO (OS)

JK INDUSTRIES LTD. ....APPELLANT

VERSUS

DS STRATAGEM TRADE A.G. ....RESPONDENT

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

FAO (OS) NO. : 11/2012 DATE OF DECISION: 09.01.2012

Arbitration and Conciliation Act, 1996—Section 34—The scope of interference under Section 36 is limited and it is not for the Courts to form an opinion as to which would have been the better course of action to follow, so long as the view formed by the Arbitral Tribunal is a plausible one. The mere fact that there is a dissenting view in the Arbitral Tribunal would not make any difference as the majority view would have to be tested on the aforesaid parameters.

Important Issue Involved: The scope of interference under Section 36 is limited and it is not for the Courts to form an opinion as to which would have been the better course of action to follow, so long as the view formed by the Arbitral Tribunal is a plausible one.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Rajiv Nayar, Sr. Advocate with Mr. Ramesh Singh, Mr. A.T. Patra, Ms. Aradhana Patra & Mr. Y.N. Bhardwaj, Advocates.

FOR THE RESPONDENT : Mr. Abhinav Vashisht, Sr. Advocate with Mr. P.K. Jain, Mr. Rajesh Roshan, Mr. Rajeev Kumar & Mrs. Alka Kumar, Advocates.

RESULT: Appeal dismissed.

SANJAY KISHAN KAUL, J. (ORAL)

Caveat No. 29/2012

Learned counsel for the caveator has entered appearance.

Caveat stands discharged.

CM No. 378-380/2012

Allowed subject to just exceptions. Applications stand disposed of.

FAO(OS) No. 11/2012 & CM No. 377/2012 (Stay)

The present dispute between the parties is two-decade old arising from an agreement dated 16.01.1991 in terms whereof 5,00,000/- Metric Tons (MT) urea for fertilizers was to be supplied by the appellant to the respondent. The product was to be sourced from Romania and was meant for delivery in China. The selling price was in the range of USD 157-159 per MT CIF FO China main port for the first three liftings and USD 127 per MT FOB Constantza Romania for the second three liftings. The lodging of the first shipment was required to be completed not later than 15.02.1991. Payments had to be made by prime bank letter of credit which was irrevocable, transferable and payable at site with partial delivery and partial payment admitted with quantity variation of more or less 5%. It is undisputed that a default occurred on the part of the appellant in complying with this obligation under the agreement which gave rise to claims by the respondent against the appellant. In view of Article 10 of the agreement containing the arbitration clause, the disputes were referred to the IICA in Geneva (Switzerland), the award being enforceable by the competent court of law at Geneva.

The history, even during the arbitration proceeding, has a prolonged process of adjudication and the award of the arbitral tribunal saw light of the day only on 15.05.1998. The arbitral tribunal consisted of Dr. Mostafa El-Said, Chairman, Mr Peter M. Wolrich, Arbitrator and Mr B. Sen, Arbitrator. The respondent was held entitled to a risk purchase amount of USD 8,48,750/- alongwith pendente lite and future interest and

costs. The operative portion of the award is as under:

> "In view of the foregoing the Arbitral Tribunal awards and declares as follows: The defendant is liable to pay to the claimant the following amounts: US$
>
> | | | |
> |---|---|---|
> | (1) | The difference between the market Price and the contract price including Insurance for the first shipment | 8,48,750.00 |
> | (2) | Rate of interest from 15th March 1991 Till 31st December 1997 | 3,77,624.00 |
> | (3) | The ICC costs including Arbitrator's fees | 1,41,500.00 |
> | (4) | The Claimant's Attorney fees | 96,999.63 |
> | | Total | 14,64,873.63 |
>
> To the sum of US$ 1226374 (i.e., the sum of US$ 848750 plus US$ 377624). It has to be added any due interest after the 31st of December 1997 including the post award rate of interest, based on the LIBOR which is prevailing during the relevant time period, until payment is made."

The next set of delay occurred as the appellant failed to pay its share of the arbitrators' fee and costs resulting in a copy of the award not being released to the appellant. It is only when these payments were made vide letter dated 24.09.2004 after six years that a copy of the award was made available and it is thereafter that OMP No. 484/2004 was filed on the original side of this court laying a challenge to the award under Section 34 of the Arbitration and Conciliation Act, 1996 (in short the 'Said Act') by the appellant. The objections filed were dismissed by the learned Single Judge in terms of the impugned order dated 24.11.2011.

We may notice at the threshold that one of the arbitrator Mr B. Sen has given a dissenting opinion on one issue, i.e., the determination of market price for risk purchase since the view of the majority was that the market price has to be CIF China port bulk at the time of delivery, i.e., 13.03.1991, while Mr B. Sen was of the view that the comparison of the market price on the date of breach had to be based on the prevailing price in Romania although it was also a controlled price. In fact it is this issue which is the main substratum of the submissions of the learned senior counsel for the appellant before us.

Learned senior counsel for the appellant drew our attention to the findings of the Arbitral Tribunal in this behalf in terms whereof under the heading of 13th issue the arbitral tribunal reached the conclusion that the appellant was in default with regard to the first shipment only and that it must compensate the respondent for damages resulting therefrom. It is again undisputed that the Swiss law is the substantive law applicable and the measure of damages was to be calculated with reference to article 191 of the Swiss Code of Obligation (CO) which provided for three methods of calculating damages:

(i) Actual damages.

(ii) Difference against the price for which he has bought the substitute goods.

(iii) Without need to buy substitute good, the difference between the market price and the contract price.

The option is with the claimant to chose any one of the methods according to the Swiss law. It is under the third option that the respondent claimed the measure of damages, i.e., the difference between the market price and the contract price. The Arbitral Tribunal discussed the aspect of the market price prevailing at the date of delivery which was the contentious issue. The respondent argued that the relevant market price was the price at which they could have purchased the replacement cargo and referred to FMB "Fertilizer Market Bulletin" issue of 04.03.1991 for establishing the market price which a seller would have asked for urea being USD 194-196 for CIF China. In the award a comparative chart has thereafter been produced.

On the other hand the respondent contended that the source of purchase of urea was Romania and at the time of scheduled delivery the prices were much lower. In nutshell while the appellant contended that it is the controlled price in Romania which would govern such price, the respondent contended that it would be the price prevalent CIF China. The majority view has taken into consideration the principles governing such price fixation and observed as under:

> "After lengthy deliberation, and careful study of the arguments and documents presented by both parties and after consulting the various publications on world market of Urea, particularly those published by the abovementioned sources, namely FMB,

Fertecon and British Sulphur, the Arbitral Tribunal agreed on certain principles to govern its determination of the present sub-issue, namely what is the market price at the date of delivery of the first shipment, i.e., 13th March 1991. These principles are the followings:

(1) Market price has to be related to the Agreement price. Referring to the Agreement of 7th Jan. 1991, price quoted for the first shipment is CIF Fo China Main Port and the source of supply is Romania. Price is for a bulk transaction of 500 000 MT and for bagged Urea. Hence market price would be for the same.

(2) If at the time of delivery, i.e., 13th March 1991, it proved difficult, if not impossible, to purchase in bulk from Romania or to find prices quoted CIF China, the Arbitral Tribunal has to refer to the nearest comparable market price to the one specified and quoted in the Agreement."

It is in the aforesaid principles that the findings are arrived at. These findings are best reproduced from the award itself and read as under:

"Applying the above two principles on the facts of the present case, the Arbitral Tribunal reached the following conclusion.

(1) It was difficult, if not impossible to purchase Urea from Romania at the time of delivery i.e., 13th March 1991, particularly, if demand is for a bulk and abnormally huge transaction as the one agreed upon in the Agreement of 7th Jan. 1991. This fact was confirmed by the defendant itself in its letter dated march 22, 1991 and the document "certificate" attached to it which is issued by Chimica Enterprise for Foreign Trade and which was considered by the defendant itself as a reliable source for information. This document, dated 28th February 1991, states that due to changes in policy the Romanian government decided to give priority to the Romanian Agriculture Demand for Urea so that the quantities available for export were considerably diminished. Moreover, production capacities were reduced due to government decision to mainly use natural gas and electricity during winter period for domestic heating instead for the production of Urea.

Even if it is possible, under special circumstances to import Urea from Romania at the time of delivery, i.e., 13th March 1991, certainly this could not be done in bulk.

(2) The bargaining position of the claimant at the time of delivery was much weakened compared with his position at the time of concluding the Agreement of 7.1.1991. The reasons for this were rightly stated by the claimant in its amended final pleading referred to earlier. Claimant is no longer able to buy in bulk and to negotiate a favourable price.

(3) Consulting various sources of information and statistics on the market for Urea, it is quite clear that there was a sharp upward trend in the prices of Urea starting from end of August 1990 due to the break of the Arabian Gulf Crisis as the result of the invasion of Iraq of Kuwait. This trend had continued until the first week of March at changing rates. Starting from the second week the Urea market has changed gear. At the time of delivery it remained higher than at the time of concluding the present Agreement. This is true if we have referred to any of the sources available for information and statistics about the Ureas' market "see the table presented by the defendant itself and which is reproduced in our discussion of the present issue". This is also true for bulk or bagged Urea whatever the source of supply and more particularly for supply from East Europe. Reference has to be made to the documents attached to the Defendant submission dated April 4, 1991, particularly to Fertecon weekly Nitrogen Fax of 16 January 1991 and of 14 March 1991 as well as to Fertilizer Week January 14, 1991 and March 18, 1991.

In view of the above facts it is doubtful that the information provided by the Defendant through its communications with Romferchim of Romania is reliable. This information indicates that prices for Urea supplied for export from Romania did decline at the time of delivery as compared with their level at the time of concluding the present Agreement by about US$ 10/MT from US$ 130/MT to US$ 120/MT.

The reasons for the non-reliability of this information are:

(1) It is inconsistent with the information provided by the various

sources of information and statistics concerning the market for Urea referred to above. Information published regularly by well-recognized organizations indicates that there was an increase in price not a decline for all types of Urea from whatever source at the time of delivery compared with the time of concluding the present agreement.

(2) The Romanian market for Urea at the relevant time is a controlled market in which prices are arbitrarily determined and do not necessarily follow the trend in world free markets.

(3) The information is related to a single transaction and price quoted for it may reflect various considerations other than the prevailing world price. In the absence of information that cover large number of transactions it I difficult to rely, in a controlled market, on one transaction to reach a definite and reliable conclusion as regard the real price of Urea supplied from Romania."

The Arbitral Tribunal determined the market price: at the time of delivery, i.e., 13.03.1991 excluding Sinochem's commission as USD 180 CIF bulk China port.

We have already noticed above the view adopted by the third arbitrator Mr B. Sen is a dissenting view who wanted the controlled prevailing price in Romania to be taken into account. In our considered view the course adopted by the majority view of the Arbitral Tribunal and upheld by the learned Single Judge cannot be said to be perverse or devoid of any merit so as to call for interference by us. The scope of interference under Section 34 of the said Act is limited and it is not for the learned Single Judge or for us to form an opinion as to which would have been the better course of action to follow, so long as the view formed by the Arbitral Tribunal is a plausible one. The mere fact that there is a dissenting view in the Arbitral Tribunal would not make any difference as the majority view would have to be tested on the aforesaid parameters. We also cannot ignore the fact that while computing the value of damages for such risk purchase the basic principle is the concept of replacement. If this principle is taken into account the pricing of the same goods CIF China is a reasonable one.

The second aspect urged by learned senior counsel for the appellant

is qua the period of interest on the quantum of damages. This has been dealt with in 15th issue. The relevant Swiss law, as contained in CO. Article 104 has been reproduced in the award and read as under:

"Co. 104

(i) If an obligator is in default as to the payment of financial debt, he shall pay a penalty interest at five percent per annum, even if the contract provides for a lower rate."

It is the submission of learned senior counsel that the quantification of debt took place only when the award was made and thus the appellant can be said to be in default as to payment of financial debt only when the sum is quantified. To buttress this submission learned counsel sought to rely upon the observations made in **Union of India vs Air Foam Industries (P) Ltd.** AIR 1974 SC 1265 in para 9.

On perusal of the judgment we find that firstly the said judgment dealt with the different factual matrix and is not law for the principle that the date when damages were caused, should not be taken as a date from which interest is payable. Secondly, the legal principles enunciated in the judgment in any case would not apply as the law governing is a Swiss law and not the Indian law. We are unable to read Co. Article 104 in a manner as if to provide that interest is payable from the date of the award and not from the date of the default, i.e., 15.03.1991 as awarded.

We may note that the learned senior counsel sought to also contend that capitalization of interest is not permissible under the Indian law unless there is a contract to the contrary and thus the grant of such capitalized interest is contrary to the "public policy of India". We are unable to accept this plea for the reason that "public policy of India" cannot imply that where the substantive law governing the amount awarded under the award is the Swiss law, recourse can be had to the Indian law to contend that the method of calculation of interest is not permissible. There is nothing shown to say that under the Swiss law capitalization of interest is impermissible.

The last aspect urged by learned senior counsel for the appellant arises from the provisions of the Foreign Exchange Regulation Act, 1973 (in short FERA). The learned Arbitral Tribunal has discussed this aspect noticing the plea advanced on behalf of the appellant herein that certain contractual provisions may attract prohibition contained in Section 9, 16

and 27 of the FERA which provides that activities which come within the purview of those sections cannot be undertaken without the previous permission of the Central Government or the Reserve Bank of India. We fail to see the merit in this plea as the contract between the parties is not governed by the laws of India and sub-Section (2) of Section 47 of FERA makes it clear that the implied term of every contract "governed by law of any part of India" is that if such a permission is required, the permission must be first obtained. It is in this context that the Arbitral Tribunal observed that the agreement dated 07.01.1991 cannot be said to be ab initio illegally void in view of the provisions of FERA. The learned Single Judge found this clearly a plausible view. The submission of learned counsel for the appellant is that the recourse to sub-section (2) of Section 47 of the FERA could not have been resorted to when the governing law was Swiss law.

In our considered view this argument is self defeating as on one hand it is the prohibition arising out of sub-section (1) of Section 47 which is pleaded before us and, on the other hand it is contended that sub-section (2) should not apply. In any case once the transaction is governed by the Swiss law, the Act itself would not apply.

The aforesaid being the only submissions advanced before us by the learned counsel for the appellant and we finding no merit in the same, the appeal is dismissed with costs of Rs 25,000/-. The stay application is also, accordingly, dismissed.

ILR (2012) II DELHI 342
FAO

SANTOSH BINDAL & ORS. ....APPELLANTS

VERSUS

NATIONAL INSURANCE CO. LTD. & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

FAO NO. : 85/1997 DATE OF DECISION: 09.01.2012

Motor Vehicles Act, 1988—Section 166—Code of Civil Procedure, 1908—Order 41 Rule 24—Claim petition dismissed on ground that appellants failed to establish that accident was caused on account of rash and negligent driving of driver of offending vehicle—Order challenged before High Court—Plea taken, accident was caused on account of rash and negligent driving of driver of offending vehicle—Testimony of eye witness could not have been rejected in absence of any rebuttal by examining driver of vehicle—High Court being court of First Appeal is empowered to decide quantum of compensation instead of remanding case to Tribunal for its decision on issue—Per contra, plea taken Tribunal's finding that negligence on part of driver of offending vehicle not established cannot be faulted because it was not possible for a person to see accident from a distance of 3000 yards—Held—Driver of offending vehicle admitted involvement of truck and its being driven by him at time of accident—Yet driver and owner did not prefer to file any written statement—Driver did not prefer to controvert allegations of negligence deposed by eye witness—Negligence has to be proved by claimants on touchstone of preponderance of probability and not beyond shadow of all reasonable doubts—Tribunal

ought to have relied on testimony of eye witness to reach conclusion that accident was caused on account of rash and negligent driving of driver of truck—Even if no finding on quantum of compensation is given by Tribunal, High Court as Court of First Appeal can appreciate evidence and compute compensation—Compensation granted in favour of appellants.

Important Issue Involved: (A) In a claim petition under Section 166 of the Motor Vehicles Act, 1988 the negligence has to be proved on the touchstone of preponderance of probability and not beyond the shadow of all reasonable doubt.

(B) Even if no finding on the quantum of compensation is given by the Tribunal, High Court as the court of First Appeal can appreciate the evidence and compute the compensation.

(C) Where factum of accident is admitted by driver but neither driver prefers to file any written statement nor prefers to controvert allegations of negligence deposed by eye witness, the Tribunal ought to have reached conclusion that the accident was caused on account of rash and negligent driving of driver.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Nitinjya Chaudhary, Advocate

FOR THE RESPONDENTS : Mr. Pradeep Gaur, Advocate with Mr. Amit Gaur, Advocate for Respondent No. 1

CASES REFERRED TO:

1. *Parmeshwari* vs. *Amir Chand & Ors.,* 2011 (11) SCC 635.

2. *Kusum Lata & Ors.* vs. *Satbir & Ors.,* 2011 (3) SCC 646.
3. *Sarla Verma* vs. *Delhi Transport Corporation & Anr.,* (2009) 6 SCC 121.
4. *M. Subramanium* vs. *General Manager,* 1991 DLT 750.

RESULT: Allowed.

G. P. MITTAL, J.

1. The Appellants who are the legal heirs of the deceased Basant Lal @ Basant Kumar Bindal impugn the judgment dated 09.08.1996 passed by the Motor Accident Claims Tribunal (the Tribunal) whereby the petition under Section 166 of the Motor Vehicles Act (the M.V. Act) was dismissed on the ground that the Appellants (the Claimants) failed to establish that the accident was caused on account of rash and negligent driving of truck number HRB-5865 driven by the third Respondent Jagdish Lal.

2. The following contentions are raised on behalf of the Appellants:-

(1) The accident was caused on account of rash and negligent driving of truck number HRB-5865 by the third Respondent Jagdish Lal which was amply proved by the testimony of PW-1 Ashok Kumar. In any case, his testimony could not have been rejected in the absence of any rebuttal by examining Jagdish Lal, the third Respondent.

(2) The Tribunal did not compute the quantum of compensation payable to the Appellants as negligence itself was not established. This Court being the Court of First Appeal is empowered under Order 41 Rule 24 to decide the quantum of compensation instead of remanding the case to the Tribunal for its decision on the issue.

3. *Per contra,* it is contended by the learned counsel for the First Respondent (National Insurance Company Limited) that it was not possible for a person to see an accident from a distance of 3000 yds. The Tribunal, therefore, rightly disbelieved PW-1. The Tribunal's finding that negligence on the part of Jagdish Lal in causing the accident was not established and the same cannot be faulted.

NEGLIGENCE:-

4. Ashok Kumar (PW-1) deposed that on 16.03.1993 at about 9:15 P.M. he was proceeding to Shahpur on foot. When he was at a distance of half a km. from Bhorgarh, he noticed a two wheeler with two persons, going ahead of him. It was going on the correct side of the road. A truck number HRB-5865 came from the opposite direction (wrong side) at a high speed and struck against the scooterist, due to which the scooterist fell down. The truck did not stop. Both the driver and his pillion rider were dragged by the truck and only after a distance of 10-15 steps did the truck stopped. He testified that the driver ran away from the spot. People collected at the site of the accident. Both the injured were removed to Hindu Rao Hospital. One person died at the spot.

5. The Tribunal while disbelieving PW-1's testimony relied on his cross-examination wherein the witness had stated that the accident took place at a distance of 3000 yds. The Tribunal referred to the judgment of **M. Subramanium v. General Manager,** 1991 DLT 750, where an eye witness who had seen the occurrence form 100 ft. was disbelieved on the ground that it was not possible to believe that in the ordinary course of human conduct a person walking more than 100 ft. behind would have noticed as to in what manner the person going ahead on a bicycle would have met with an accident.

6. In my view, the Tribunal fell into error in holding that the PW-1 deposed that he saw the accident from a distance of 3000 yds. In fact, in the cross-examination the witness deposed that he was at a distance of one kila. The witness then gave the dimension of one kila to be equal to 3000 yds. The dimension of a kila (in the case of agriculture) differs from place to place. It was in this context that a clarification was obtained from this witness. The length and breadth of one kila of land may differ in each case but it can definitely be said that PW-1 did not see the incident from a close quarter.

7. It is important to note that the accident took place in the night (at 9:15 P.M.). The witness was categorical that the deceased was going on his correct side and that the truck came from the opposite direction travelled on the wrong side and hit the scooterist. It may be mentioned that Jagdish Lal, the third Respondent appeared before the Tribunal on 24.09.1993. He admitted that the accident took place with a truck number HRB 5865 on 16.03.1993. He was driving the truck at the time of the

accident in which Basant Lal suffered fatal injuries. Although, the third Respondent appeared in the Court on 24.09.1993 and the case was adjourned for filing of the written statement yet the driver and the owner of the truck number HRB 5865 preferred not to file any written statement and they were proceeded ex-parte.

8. Much ado is made about the fact that PW-1 could not have seen the accident at a such great distance. It is contended that there was another person (excluding the deceased) who was travelling on the scooter and that the said person ought to have been produced to depose about the manner of the accident. It has to be borne in mind that in a Claim Petition under Section 166 of the M.V. Act the negligence has to be proved on the touch stone of preponderance of probability. (**Parmeshwari v. Amir Chand & Ors.,** 2011 (11) SCC 635; and **Kusum Lata & Ors. v. Satbir & Ors.,** 2011 (3) SCC 646).

9. Jagdish Lal, the third Respondent as stated earlier admitted the involvement of the truck and its being driven by him at the time of the accident. He preferred not to appear to controvert the allegations of negligence made in the petition and then as deposed by PW-1. In the circumstances, the Tribunal ought to have relied on PW-1's testimony to reach the conclusion that the accident was caused on account of rash and negligence driving of the third Respondent as the Appellants were required to prove the negligence preponderance of probabilities are not beyond the shadow of all reasonable doubt. **M. Subramanium v. General Manager** (supra) relied on by the Tribunal, is not attracted to the facts of the present case as the factum of accident is admitted by the third Respondent in this case. Thus, there is no escape from the conclusion that the culpable negligence and rashness in driving truck number HRB 5865 at the time of the accident is proved by the Appellants.

QUANTUM OF COMPENSATION

10. Order 41 Rule 24 of the code of Civil Procedure reads as under:-

> "24. Where evidence on record sufficient, Appellate Court may determine case finally -Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of

the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which Appellate Court proceeds".

11. The proposition of law is not disputed by the learned counsel for the first Respondent that even if no finding on the quantum of compensation is given by the Tribunal, this Court as the Court of first Appeal can appreciate the evidence and compute the compensation.

12. The First Appellant entered the witness box as PW-4. She deposed that her husband was 32 years at the time of the accident. He left behind two children, aged 5 years and 3 years and a mother aged about 60 years. She further deposed that her husband was working as a Supervisor in a factory and was getting a salary of Rs. 2,500/- per month. She deposed that her husband owned 4+ kila of land and had an annual income of Rs. 25,000/- from that. She proved jamabandi Ex.PW-4/1. In cross-examination, the witness deposed that after the death of her husband her devar (husband's brother) was looking after the land and was giving her Rs. 7,000/- per annum.

13. It is not the Appellants' case that husband was doing the service in Delhi and was returning home in Village Khurshid Nagar, Tehsil Kosli, District Rohtak to look after the land. If the land was being given on contract basis even when the deceased was alive, the same was being done even after his death. Thus, no compensation can be awarded on account of any loss of income for non-supervision of agriculture.

14. The Appellants also examined PW-3 Mahavir Prasad who was the husband of the Proprietor of M/s. Bindal Industries. He proved the certificate Ex.PW-3/1 showing that the deceased was being paid a salary of Rs. 2,500/- per month. The witness also produced the attendance register and the accounts book. In cross-examination, the witness admitted that no appointment letter was issued to the deceased. He added that the salary was being paid to the deceased by cheque.

15. PW-3's testimony that the attendance register mentioning the deceased's name was being maintained and that he was being paid salary by cheque was not challenged in the cross-examination. From the salary certificate Ex.PW-3/1, it is established that the deceased was working as a supervisor in M/s. Bindal Industries and was getting a salary of '2,500/- per month.

16. The Supreme Court in the case of **Sarla Verma v. Delhi Transport Corporation & Anr.,** (2009) 6 SCC 121 laid down the following principles for grant of compensation in death cases:-

"I. MULTIPLIER

Age of the deceased (in years)	Multiplier
15-20	18
21-25	18
26-30	17
31-35	16
36-40	15
41-45	14
46-50	13
51-55	11
56-60	09
61-65	07
Above 65	05

II. DEDUCTION FOR PERSONAL AND LIVING EXPENSES

Deceased – unmarried

(i) Deduction towards personal expenses. : 1/2 (50%)

(ii) Deduction where the family of the bachelor is large and dependent on the income of the deceased. : 1/3rd (33.33%)

Deceased – married

(i) 2 to 3 dependent family members. : 1/3rd

(ii) 4 to 6 dependent family members : 1/4th

(iii) More than 6 family members : 1/5th

(iv)	Subject to the evidence to the contrary. :	Father, brother and sisters will not be considered as dependents.

III. FUTURE PROSPECTS

(i)	Permanent job : 40 years of age	Actual salary – tax + 50% Below towards future prospects.
(ii)	Permanent job : Between 40-50 years	Actual salary – tax + 30% towards future prospects.
(iii)	More than 50 years with: permanent job.	Actual salary only. No addition for future prospects.
(iv)	Deceased employed at a fixed: Salary (without provision for increments)"	Only actual income to be taken. No addition. Annual

17. The Appellants would be entitled to addition of 50% of salary towards future prospects as he was in stable employment. Since the number of dependents were four, one-fourth of deceased's income was liable to be deducted towards his personal and living expenses. The appropriate multiplier on the age of 32 years of the deceased would be 16. The loss of dependency works out as Rs. 5,40,000/- (2500/- + 50% - 1/4 x 16 x 12).

18. In addition the Appellant No.1 is entitled to compensation of Rs.10,000/- towards loss of consortium; Appellant Nos. 2 to 4 are entitled to compensation of Rs. 25,000/- towards loss of love and affection.

19. The Appellants are further entitled to a sum of Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of estate. The overall compensation payable comes to Rs. 5,90,000/- (i.e. Rs. 5,40,000/- + Rs. 50,000/-).

20. The amount of compensation shall carry interest @ 7.5% per annum from the date of filing of the petition till the date of payment. National Insurance Company, the first Respondent is directed to deposit the amount of compensation along with upto date interest within 30 days with the Registrar General of Delhi High Court, New Delhi.

21. 50% of the compensation shall be payable to Appellant No.1 Smt. Santosh Bindal. 15% each to Appellants No.2 and 3 Ankush Bindal and Ena Bindal (who must have attained the age of majority now) and 20% compensation shall be payable to the Appellant No.4 Smt. Angoori Devi.

22. Since the accident took place almost 18 years back, 50% of the compensation awarded along with the interest shall be released to the Appellants forthwith. Rest of the 50% shall be held in fixed deposits for a period of two years in UCO Bank, Delhi High Court Branch, New Delhi. Appellants No. 2 and 3 shall be entitled to premature release of the amount deposited, if needed for their education.

23. The impugned award is set aside and the Appeal is allowed in above terms. No costs.

ILR (2012) II DELHI 350
W.P. (C)

MAHATTA & CO. & ANR. ....PETITIONERS

VERSUS

MUNNA LAL SHUKLA & ANR. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P. NO. : 8365-66/2006 DATE OF DECISION: 10.01.2012

Constitution of India, 1950—Article 226, 227—Petition against award of Industrial Adjudicator holding that the employer has failed to prove any grounds for dismissal of service of petitioner workman—Petitioner contend that in a dispute pertaining to termination of employment and where the employer relies on a domestic inquiry preceding the termination, the Industrial Adjudicator is mandatorily required to first

adjudicate the validity of termination order only after the domestic enquiry has been held to be vitiated. Practice as informed to be prevalent till now before the Industrial Adjudicators of conducting the proceedings in two stages need not continue merely for the reason of having been practiced for long. In today's days when Courts and the Industrial Adjudicators are struggling with docket explosion and are overburdened, need has arisen to have a fresh look at procedures which are found to be causing delays. Law cannot be a fossil. The Industrial Adjudicator upon completion of pleadings is required to proceed in the following manner:

(a) To examine whether a domestic inquiry preceding the punishment is pleaded to have been held and documents in support thereof filed.

(b) If the domestic inquiry is pleaded and documents in support thereof filed and the workman has challenged the validity of the said domestic inquiry, to determine whether such challenge is on any factual or purely legal grounds and frame issues on the same.

(c) However if domestic inquiry is not pleaded or if pleaded but no documents in support thereof filed, the question of framing any issue as to domestic inquiry does not arise.

(d) If an issue as aforesaid to the domestic inquiry has been framed and the employer has also sought opportunity to in the alternative establish misconduct before the Industrial Adjudicator, to frame issue thereon also, simultaneously with framing issues on validity of inquiry.

(e) To, after hearing the parties consider whether in the facts of the case any prejudice (other than as above) is likely to be caused to either of the parties if evidence on both sets of issues is led together. Only on finding, by a reasoned order, a case of such prejudice or any other reason, is the trial to be bifurcated into two stages. Else, the parties to be directed to lead evidence on both sets of issues together.

(f) To, if the evidence on both sets of issues has been recorded together, to first consider the evidence only on the aspect of validity of the inquiry and without being influenced in any manner whatsoever by the depositions of the witnesses on the merits of the dispute i.e. misconduct with which the workman was charged with. If the inquiry is found to be valid, the question of rendering a finding on the merits does not arise. However if the domestic inquiry is found to be vitiated and a finding in that regard is returned, the Industrial Adjudicator may then proceed to adjudicate on the basis of evidence in that respect, whether misconduct has been established or not.

(g) The Industrial Adjudicator to, on case to case basis, decide whether the arguments on both aspects are to be heard together or at different stages. However as aforesaid an endeavour is to be made to record the evidence of the witnesses on both issues in one go only.

The practice as informed to be prevalent till now before the Industrial Adjudicators of conducting the proceedings in two stages need not continue merely for the reason of having been practiced for long. In today's days when Courts and the Industrial Adjudicators are struggling with docket explosion and are overburdened, need has arisen to have a fresh look at procedures which are found to be causing delays. Law cannot be a fossil. The Supreme Court in **Union of India v. Raghubir Singh** (1989) 2 SCC 754 emphasized the need for adapting the law to new urges in society and quoted with approval the Holmesian aphorism that the "life of the law has not been logic, it has been experience". It was further held that in a developing society such as India, law does not assume its true function when it follows a groove chased amidst a context which has long since crumbled. Similarly in **State of Punjab v. Devans Modern Breweries**

Ltd. (2004) 11 SCC 26 it was held that a decision although neither reversed nor overruled may cease to be law owing to changed conditions and changed law, as reflected by the principle "cessante ratione legis cessat ipsa lex" . Recently in **Bhuwalka Steel Industries Ltd. v Bombay Iron and Steel Labour Board** (2010) 2 SCC 273 it was reiterated that the trend of judicial opinion is that stare decisis is not a dogmatic rule allergic to logic and reason; it is a flexible principle of law operating in the province of precedents providing room to collaborate with the demands of changing times dictated by social needs, State policy and judicial conscience. **(Para 20)**

The Supreme Court in **National Council for Cement & Building Materials v. State of Haryana** (1996) 3 SCC 206 commented on the appalling situation created by such preliminary issues which take long years to settle. The Supreme Court in **Cooper Engineering Ltd.** itself has expressed anguish over such delays and held that the challenge if any to the finding of the Industrial Adjudicator on the validity of the inquiry ought to await the final award if the employer also intends to prove the misconduct before the Industrial Adjudicator. The Constitution Bench of the Supreme Court in **Karnataka SRTC** also held that the opportunity of leading evidence to prove misconduct in alternative ought to be exercised before the decision on the validity of the inquiry. I have had occasion to discuss the said aspect in detail in **Glaxo Smithkline Consumer Healthcare Ltd. v. P.O. Labour Court**-IX 2010 V AD (Del) 832 and need is not felt to reiterate the same. **(Para 21)**

I am therefore of the opinion, that the Industrial Adjudicator upon completion of pleadings is required to proceed in the following manner:

(a) To examine whether a domestic inquiry preceding the punishment is pleaded to have been held and documents in support thereof filed.

(b) If the domestic inquiry is pleaded and documents in support thereof filed and the workman has challenged the validity of the said domestic inquiry, to determine whether such challenge is on any factual or purely legal grounds and frame issues on the same.

(c) However if domestic inquiry is not pleaded or if pleaded but no documents in support thereof filed, the question of framing any issue as to domestic inquiry does not arise.

(d) If an issue as aforesaid to the domestic inquiry has been framed and the employer has also sought opportunity to in the alternative establish misconduct before the Industrial Adjudicator, to frame issue thereon also, simultaneously with framing issues on validity of inquiry.

(e) To, after hearing the parties consider whether in the facts of the case any prejudice (other than as above) is likely to be caused to either of the parties if evidence on both sets of issues is led together. Only on finding, by a reasoned order, a case of such prejudice or any other reason, is the trial to be bifurcated into two stages. Else, the parties to be directed to lead evidence on both sets of issues together.

(f) To, if the evidence on both sets of issues has been recorded together, to first consider the evidence only on the aspect of validity of the inquiry and without being influenced in any manner whatsoever by the depositions of the witnesses on the merits of the dispute i.e. misconduct with which the workman was charged with. If the inquiry is found to be valid, the question of rendering a finding on the merits does not arise. However if the domestic inquiry is found to be vitiated and a finding in that regard is returned, the Industrial Adjudicator may then proceed to adjudicate on the basis of evidence in that respect, whether

misconduct has been established or not.

(g) The Industrial Adjudicator to, on case to case basis, decide whether the arguments on both aspects are to be heard together or at different stages. However as aforesaid an endeavour is to be made to record the evidence of the witnesses on both issues in one go only. **(Para 22)**

[An Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. Vinay Sabharwal, Advocate.

FOR THE RESPONDENTS : Mr. Arun Birbal, Advocate Amicus Curiae.

CASES REFERRED TO:

1. *Glaxo Smithkline Consumer Healthcare Ltd.* vs. *P.O. Labour* Court-IX 2010 V AD (Del) 832.
2. *Bhuwalka Steel Industries Ltd.* vs. *Bombay Iron and Steel Labour Board* (2010) 2 SCC 273.
3. *State of Punjab* vs. *Devans Modern Breweries Ltd.* (2004) 11 SCC 26.
4. *Karnataka State Road Transport Corporation* vs. *Lakshmidevamma* (2001) 5 SCC 433.
5. *National Council for Cement & Building Materials* vs. *State of Haryana* (1996) 3 SCC 206.
6. *Bharat Forge Co. Ltd.* vs. *A.B. Zodge* (1996) 4 SCC 374.
7. *Union of India* vs. *Raghubir Singh* (1989) 2 SCC 754.
8. *Shambhu Nath Goyal* vs. *Bank of Baroda* (1983) 4 SCC 491.
9. *Shankar Chakravarti* vs. *Britannia Biscuit Co. Ltd.* (1979) 3 SCC 371.
10. *Cooper Engineering Ltd.* vs. *P.P. Mundhe* 1975 II L.L.J 379 (SC).

11. *Workmen of Firestone Tyre & Rubber Co. of India (P) Ltd.* vs. *Management* (1973) 3 SCR 587.
12. *Toshniwal Brothers P. Ltd.* vs. *Bir Singh* ILR 1973(1) Delhi 319.
13. *Delhi Cloth & General Mills Co.* vs. *Ludh Budh Singh* (1972) 3 SCR 29.

RESULT: Partly allowed.

RAJIV SAHAI ENDLAW, J.

1. The petition impugns the award dated 21st April, 2005 of the Industrial Adjudicator on the following reference:-

> "Whether dismissal of services of Sh. Munna Lal Shukla by the management is illegal and/or unjustified and if so, to what relief is he entitled and what directions are necessary in this respect?"

and holding the petitioner employer to have failed to prove that any inquiry in accordance with law was held prior to the dismissal of the services of the respondent workman and also having failed to prove before the Industrial Adjudicator any grounds for dismissal of respondent workman from service and consequently directing the petitioner employer to reinstate the respondent workman w.e.f. 1991 with 40% of back wages "immediately as he is a skilled employee".

2. Notice of the petition was issued and vide ex parte order dated 15th May, 2006 which was made absolute on 28th September, 2010, the operation of the award stayed. The respondent workman filed a counter affidavit and an application under Section 17B of the Industrial Disputes Act, 1947; however on 7th January, 2009 the said application was withdrawn with liberty to file a fresh application. *Rule* in the petition was issued on 7th January, 2009. Another application under Section 17B of the Act was filed which was allowed vide order dated 4th February, 2010. However none has been appearing thereafter for the respondent workman since 7th July, 2010.

3. The counsel for the petitioner employer was heard on 22nd February, 2011 and 24th February, 2011 and the record of the Industrial Adjudicator perused. It was the case of the respondent workman in his statement of claim dated 10th October, 2000 before the Industrial Adjudicator that he had been in employment of the petitioner employer

as a Printer since 1st November, 1971 and his last drawn wages were of Rs. 3,150/- per month; that he went on sanctioned leave from 25th May, 1998 to 13th June, 1998 but could not join duty till 31st August, 1998 owing to illness and intimation whereof was sent to the petitioner employer by post; that however when he reported for duty on 1st September, 1998, he was not taken back; that during the conciliation proceedings however the petitioner employer produced a letter which showed the services to have been suspended w.e.f. 2nd September, 1998 and undercover of letter dated 18th December, 1998 he was served with a charge sheet dated 2nd September, 1998; that he replied to the charge sheet on 6th January, 1999; that the petitioner employer appointed Shri D.C. Gandhi as Inquiry Officer but who was not independent and partial; that no opportunity was given to him to participate and he was also not paid any suspension allowance; that on 30th July, 1999 the respondent workman had been served with a show cause notice along with the report of the Inquiry Officer; that though the respondent workman replied to the show cause notice but he was dismissed from service w.e.f. 6th September, 1999; that he was out of employment since then.

4. The petitioner employer in its reply/written statement before the Industrial Adjudicator pleaded that the last drawn wages of the respondent workman were '2,930/- per month; that the respondent workman was a habitual absentee; particulars of the days between January, 1997 and May, 1998 when he was unauthorizedly absent were furnished; it was further pleaded that the respondent workman had been absent from duty from 13th June, 1998 till he was served with a charge sheet dated 2nd September, 1998 in respect of unauthorized absence; that the respondent workman did not give any reply to the same; that though in the absence of any reply the petitioner employer was entitled to dismiss the respondent workman but Shri D.C. Gandhi, Advocate was appointed as an Inquiry Officer who conducted an inquiry in accordance with the principles of natural justice; that the respondent workman did not appear in the inquiry despite repeated notices and publication in the newspaper Veer Arjun of 24th May, 1999; that the Inquiry Officer thus proceeded ex parte against the respondent workman and after recording the evidence of the petitioner employer, submitted a report dated 28th July, 1999 holding the respondent workman to be guilty of all the charges; a second show cause notice dated 30th July, 1999 was issued to the respondent workman proposing the punishment of dismissal; the respondent workman furnished a reply

dated 17th August, 1999 thereto which was not found satisfactory and accordingly order dated 6th September, 1999 of dismissal was made.

5. The petitioner employer in the reply/written statement (supra) also pleaded that the Industrial Adjudicator may try and decide the issue with regard to validity of domestic inquiry first and in case inquiry was found to be defective and/or set aside, sought opportunity to adduce evidence before the Industrial Adjudicator to prove the charges against the respondent workman.

6. A rejoinder was filed by the respondent workman before the Industrial Adjudicator controverting the reply/written statement of the petitioner employer.

7. Though the respondent workman filed list of documents with documents before the Industrial Adjudicator but the petitioner employer failed to file any document whatsoever, not even the record of the domestic inquiry conducted.

8. The Industrial Adjudicator on 18th February, 2002 framed the following issues:-

> "1. Whether a fair and proper enquiry was not conducted in accordance with principles of natural justice?
>
> 2. As per terms of reference."

and listed the matter for evidence of the respondent workman. The respondent workman filed an affidavit by way of evidence on the same lines as the claim petition and vide order dated 24th March, 2003 the matter was adjourned for cross examination of the respondent workman by the petitioner employer and the petitioner employer was also directed to file the inquiry report. Vide order dated 21st March, 2005 the Industrial Adjudicator, noticing that the petitioner employer had neither cross examined the respondent workman inspite of opportunity nor filed the inquiry report, closed the right of the petitioner employer to cross examine the respondent workman and listed the matter for evidence of the petitioner employer. The petitioner employer however instead of producing any evidence filed an application stating that as per the issues, the parties were required to adduce evidence only on the issue of validity of domestic inquiry and not on merits of the charges or merits of the term of reference; however the respondent workman in his affidavit by way of evidence had also deposed on merits which was not permitted by law.

The petitioner employer thus contended that the affidavit by way of evidence of the respondent workman in so far as on the merits, be struck down.

9. The Industrial Adjudicator vide order dated 21st April, 2005 dismissed the said application of the respondent workman as frivolous, closed the evidence of the petitioner employer and announced the award impugned in the petition.

10. During the hearing before this Court on 24th February, 2011, it was noticed that the petitioner employer has not produced the record of the inquiry claimed to have been conducted, before this Court also. It was the contention of the counsel for the petitioner employer on that date that in accordance with the law as laid down in **Workmen of Firestone Tyre & Rubber Co. of India (P) Ltd. v. Management** (1973) 3 SCR 587 and **Cooper Engineering Ltd. v. P.P. Mundhe** 1975 II L.L.J 379 (SC), the Industrial Adjudicator is mandatorily required to treat the issue of validity of domestic inquiry as a preliminary issue and to first record evidence thereon only and at that stage does not even have jurisdiction to record evidence on the aspect of misconduct.

11. Myself, *prima facie* being of the view that splitting up of the proceedings before the Industrial Adjudicator into two stages leads to unusual delays and the same witnesses being examined twice over and often being not available when the occasion for examination at the second stage arises, observed in the order dated 24th February, 2011 that the petitioner employer ought not to be permitted to contend as a matter of right or routine that the proceedings before the Industrial Adjudicator should be so spilt up into two stages. Since the respondent workman was unrepresented and finding the question to be otherwise of importance in a large number of cases, Mr. Arun Birbal, Advocate was vide order dated 24th February, 2011 requested to and appointed as Amicus Curiae to assist the Court on the aforesaid legal question.

12. The learned Amicus Curiae has supported the legal contention of the counsel for the petitioner employer that the Industrial Adjudicator in a dispute as to termination of employment and where the employer relies on a domestic inquiry preceding the termination, is mandatorily required to first adjudicate the question of validity of the inquiry and gets jurisdiction to adjudicate the validity of the termination order only after the domestic inquiry conducted has been held to be vitiated. He has in

this regard invited attention to:-

A. **Delhi Cloth & General Mills Co. v. Ludh Budh Singh** (1972) 3 SCR 29 laying down that in a proceeding before the Industrial Adjudicator, either on a reference under Section 10 or by way of an application under Section 33 of the Act, the jurisdiction of the Industrial Adjudicator is as follows:-

(a) If no domestic inquiry had been held by the management or if the management makes it clear that it does not rely upon any domestic inquiry that may have been held by it, it is entitled straightaway to adduce evidence before the Tribunal and justify its action. The Tribunal is bound to consider that evidence on merits, and, in such a case it is not necessary for the Tribunal to consider the validity of the domestic inquiry.

(b) If a domestic inquiry had been held, it is open to the management to rely upon it in the first instance, and alternatively, and without prejudice to its plea that the inquiry was proper, simultaneously adduce additional evidence before the Tribunal justifying its action. In such a case no inference can be drawn, without anything more, that the management had, given up the enquiry conducted by it; and it is the duty of the Tribunal, in the first instance, to consider whether the enquiry proceedings conducted by the management were valid and proper. If the Tribunal is satisfied that the enquiry was properly held the question of considering the evidence adduced before it on merits does not arise. If the Tribunal holds that the enquiry was not properly held then it has jurisdiction to consider the evidence adduced before it by the management. (emphasis added)

(c) When a domestic inquiry has been held by the management and the management relies on it, the management may request the Tribunal to try the validity of the domestic inquiry as a preliminary issue and also ask for an opportunity to adduce evidence before the Tribunal if the finding on the preliminary issue is against

the management. In such a case if the finding on the preliminary issue is against the management, the Tribunal will have to give the employer an opportunity to adduce additional evidence and also give a similar opportunity to the employee to lead evidence contra. But the management should avail itself of the said opportunity by making a suitable request to the Tribunal before the proceedings are closed. If no such opportunity has been availed of before the proceedings were closed, the employer can make no grievance that the Tribunal did not provide for such an opportunity.

(d) If the employer relies only on the domestic inquiry and does not simultaneously lead additional evidence, or ask for an opportunity during the pendency of the proceedings to adduce such evidence, the duty of the Tribunal is only to consider the validity of the domestic inquiry and the finding recorded therein and decide the matter. It is not its function to suo moto give an opportunity to the management to adduce evidence before it to justify the action taken; B. M/s Lakshmi Rattan Cotton Mills Co. Ltd. v. Its Workmen AIR 1975 SC 1689 - only on the aspect of the right of the employer to establish misconduct of the workman before the Industrial Adjudicator even if the domestic inquiry is found to be vitiated;

C. **Shankar Chakravarti v. Britannia Biscuit Co. Ltd.** (1979) 3 SCC 371 – laying down that there is no obligatory duty of the Industrial Adjudicator to call upon the employer to adduce additional evidence if it so chooses after recording a specific finding on the preliminary issue whether there was no inquiry or the one held was defective. It was held that it is for the employer to seek an opportunity for the said purpose.

D. **Shambhu Nath Goyal v. Bank of Baroda** (1983) 4 SCC 491 – laying down that if the employer chooses to exercise its right to establish misconduct of the workman before the Industrial Adjudicator, such right must be exercised at the earliest.

E. **Bharat Forge Co. Ltd. v. A.B. Zodge** (1996) 4 SCC 374 – laying down that the request as aforesaid to prove misconduct can be made by the employer before the closure of the proceedings before the Industrial Adjudicator.

F. **Karnataka State Road Transport Corporation v. Lakshmidevamma** (2001) 5 SCC 433 observing that the Apex Court in **Cooper Engineering Ltd** (supra) case has held that when the Industrial Adjudicator is called upon to decide the validity of the domestic inquiry, the same has to be tried as a preliminary issue and thereafter if necessary the employer has to be given an option to adduce fresh evidence. It was further held that the employer is to seek permission to lead evidence to prove misconduct, in the event of failing in the issue of inquiry, before the Industrial Adjudicator returns a finding on the domestic inquiry.

13. At this stage, **Workmen of Firestone Tyre & Rubber Co. of India (P) Ltd.** (supra) **& Cooper Engineering Ltd.,** referred to by the learned Amicus Curiae also may be noticed. While in **Workmen of Firestone Tyre & Rubber Co. of India (P) Ltd.** it was held that the mere fact that no inquiry or defective inquiry has been held by the employer does not by itself render the dismissal of workman illegal and the right of the employer to adduce evidence justifying action for the first time in such a case is not taken away by the proviso to Section 11-A of the ID Act, in **Cooper Engineering Ltd.** it was held that the Industrial Adjudicator "should first decide as a preliminary issue whether the domestic inquiry has violated the principles of natural justice" and the question of validity of the inquiry "must be decided as a preliminary issue".

14. Though the language used in the judgments aforesaid undoubtedly supports the two-stage procedure before the Industrial Adjudicator and I am told that the same has been the practice in vogue before the Industrial Adjudicators but what continues to haunt me is the inherent delays in the same. The matter does not appear to have been approached in any of the judgments aforesaid from the said perspective. I have thus enquired from the counsel for the petitioner employer as to what is the prejudice if any which would be suffered by the petitioner employer if evidence is directed to be led on the issue of inquiry as also if the

employer chooses to establish the misconduct of the workman before the Industrial Adjudicator, in one go only rather than in two stages as aforesaid.

15. The counsel for the petitioner has cited two reasons; firstly that as per the judgments aforesaid the Industrial Adjudicator gets no jurisdiction to even record the evidence of misconduct till holds the domestic inquiry to be vitiated and secondly that if the employer before the Industrial Adjudicator is not able to establish the misconduct alleged even though established in the inquiry, the same is likely to colour the finding of the Industrial Adjudicator on the validity of the inquiry also and the likelihood of the Industrial Adjudicator and this Court in exercising power of judicial review in such cases, holding the inquiry to be vitiated would be much more.

16. I am unable to accept either of the aforesaid two contentions. Neither can it be said that the Industrial Adjudicator gets jurisdiction to record evidence on the aspect of misconduct only after holding the inquiry to be vitiated nor can it be said that the Industrial Adjudicator and the Courts are incapable of sifting the evidence of the inquiry from that on the misconduct or that the decision on one issue would be coloured by the evidence on record on the other. Such a narrow & biased vision/ appraisal cannot be attributed to the Industrial Adjudicators and the Courts.

17. The Supreme Court in **Ludh Budh Singh** (supra) did envisage a situation, of the employer without prejudice to its plea that the inquiry was proper, "simultaneously" adducing additional evidence before the Tribunal justifying its action. It was further observed that in such a case no inference can be drawn that the management had given up the inquiry conducted by it and it is the duty of the Tribunal to, in the first instance consider whether the inquiry proceedings were valid or proper and if the Industrial Adjudicator is satisfied that the inquiry was properly held, the question of considering the evidence adduced before it on merits does not arise. Only if the Tribunal holds that the inquiry was not properly held, would it have jurisdiction to consider the evidence on misconduct adduced before it by the management. The said passages in **Ludh Budh Singh** have not been dissented with in any of the subsequent judgments. Once the said option is held to be available, the question of Industrial Adjudicator having no jurisdiction to record evidence on misconduct till holding the inquiry to be vitiated does not arise. In fact I find the question to have been squarely addressed in the concurring judgment of Shivaraj

Patil, J. speaking also for Khare, J. in **Karnataka SRTC** (supra). It was held that the question as to at what stage the management/employer should seek leave of the Industrial Adjudicator to lead evidence justifying its action does not affect the power of the Industrial Adjudicator requiring or directing the parties to produce evidence if deemed fit in a case having regard to the facts and circumstances of that case. It was held that as per Section 11 (1) of the ID Act, the Industrial Adjudicator can follow the procedure which it thinks fit and in accordance with the principles of natural justice; that under Section 11(3), the Industrial Adjudicator has the same powers as are vested in the Civil Court under Civil Procedure Code. It was yet further held that strict rules of evidence are not applicable to the proceedings before Industrial Adjudicator and the Industrial Adjudicators have the powers to call for evidence at any stage of the proceedings if the facts and circumstances of the case demand the same to meet the ends of justice. It was yet further held that there are no fetters on the powers of the Industrial Adjudicator requiring or directing parties to lead evidence to avoid unnecessary delay and multiplicity. The opinion of the majority in the same judgment also records that the management/employer has no right to lead evidence to establish misconduct before the Industrial Adjudicator and the same is permitted only by way of procedure laid down by the Courts to avoid delay and multiplicity. Moreover, the question of jurisdiction of the Industrial Adjudicator to adjudicate on the merits of the disputes is identical to the jurisdiction of a Civil Court where an objection as to the territorial jurisdiction is taken but which objection cannot be decided without evidence. It is the settled principle of law that in such cases the evidence is not to be bifurcated in two stages and evidence on all issues to has to be led together.

18. The only question which thus arises is whether such choice can be left to the employer or the Industrial Adjudicator has a role to play in it. In my view, once the Apex Court has held that such a course of action is permissible, the question of leaving a choice to one of the parties to the lis does not arise and the Industrial Adjudicator/the Court would definitely have jurisdiction in the matter. It cannot be lost sight of that the employer, after dismissing the workman from employment, is in no hurry. There is no provision as contained in Section 17B of the ID Act during the pendency of proceedings before this Court, applicable to the pendency of proceedings before the Industrial Adjudicator. Thus during the pendency of the proceedings before the Industrial Adjudicator,

while the workman is without wages, the employer has no reason to expedite the matter. Owing to the two stage procedure being followed, it is found that disputes remain pending before the Industrial Adjudicator for tens of years with some witnesses being examined twice over. In a number of cases, it is found that the witnesses who had appeared at the stage of evidence on preliminary issue are not even traceable/available at the stage of adducing evidence on the misconduct.

19. I find Deshpande, J. in **Toshniwal Brothers P. Ltd. v. Bir Singh** ILR 1973(1) Delhi 319 to have also observed that the Industrial Adjudicator may find it convenient to record the evidence on misconduct first and then hear the arguments on the whole case and if it finds that the domestic inquiry was valid then the evidence adduced to establish misconduct would not have to be considered at all and would be rendered superfluous; if the Industrial Adjudicator concludes the domestic inquiry to be invalid then it would consider the evidence adduced to establish misconduct and give the final decision.

20. The practice as informed to be prevalent till now before the Industrial Adjudicators of conducting the proceedings in two stages need not continue merely for the reason of having been practiced for long. In today's days when Courts and the Industrial Adjudicators are struggling with docket explosion and are overburdened, need has arisen to have a fresh look at procedures which are found to be causing delays. Law cannot be a fossil. The Supreme Court in **Union of India v. Raghubir Singh** (1989) 2 SCC 754 emphasized the need for adapting the law to new urges in society and quoted with approval the Holmesian aphorism that the "life of the law has not been logic, it has been experience". It was further held that in a developing society such as India, law does not assume its true function when it follows a groove chased amidst a context which has long since crumbled. Similarly in **State of Punjab v. Devans Modern Breweries Ltd.** (2004) 11 SCC 26 it was held that a decision although neither reversed nor overruled may cease to be law owing to changed conditions and changed law, as reflected by the principle "cessante ratione legis cessat ipsa lex" . Recently in **Bhuwalka Steel Industries Ltd. v Bombay Iron and Steel Labour Board** (2010) 2 SCC 273 it was reiterated that the trend of judicial opinion is that stare decisis is not a dogmatic rule allergic to logic and reason; it is a flexible principle of law operating in the province of precedents providing room to collaborate with the demands of changing times dictated by social

needs, State policy and judicial conscience.

21. The Supreme Court in **National Council for Cement & Building Materials v. State of Haryana** (1996) 3 SCC 206 commented on the appalling situation created by such preliminary issues which take long years to settle. The Supreme Court in **Cooper Engineering Ltd.** itself has expressed anguish over such delays and held that the challenge if any to the finding of the Industrial Adjudicator on the validity of the inquiry ought to await the final award if the employer also intends to prove the misconduct before the Industrial Adjudicator. The Constitution Bench of the Supreme Court in **Karnataka SRTC** also held that the opportunity of leading evidence to prove misconduct in alternative ought to be exercised before the decision on the validity of the inquiry. I have had occasion to discuss the said aspect in detail in **Glaxo Smithkline Consumer Healthcare Ltd. v. P.O. Labour Court**-IX 2010 V AD (Del) 832 and need is not felt to reiterate the same.

22. I am therefore of the opinion, that the Industrial Adjudicator upon completion of pleadings is required to proceed in the following manner:

(a) To examine whether a domestic inquiry preceding the punishment is pleaded to have been held and documents in support thereof filed.

(b) If the domestic inquiry is pleaded and documents in support thereof filed and the workman has challenged the validity of the said domestic inquiry, to determine whether such challenge is on any factual or purely legal grounds and frame issues on the same.

(c) However if domestic inquiry is not pleaded or if pleaded but no documents in support thereof filed, the question of framing any issue as to domestic inquiry does not arise.

(d) If an issue as aforesaid to the domestic inquiry has been framed and the employer has also sought opportunity to in the alternative establish misconduct before the Industrial Adjudicator, to frame issue thereon also, simultaneously with framing issues on validity of inquiry.

(e) To, after hearing the parties consider whether in the facts of the case any prejudice (other than as above) is likely

to be caused to either of the parties if evidence on both sets of issues is led together. Only on finding, by a reasoned order, a case of such prejudice or any other reason, is the trial to be bifurcated into two stages. Else, the parties to be directed to lead evidence on both sets of issues together.

(f) To, if the evidence on both sets of issues has been recorded together, to first consider the evidence only on the aspect of validity of the inquiry and without being influenced in any manner whatsoever by the depositions of the witnesses on the merits of the dispute i.e. misconduct with which the workman was charged with. If the inquiry is found to be valid, the question of rendering a finding on the merits does not arise. However if the domestic inquiry is found to be vitiated and a finding in that regard is returned, the Industrial Adjudicator may then proceed to adjudicate on the basis of evidence in that respect, whether misconduct has been established or not.

(g) The Industrial Adjudicator to, on case to case basis, decide whether the arguments on both aspects are to be heard together or at different stages. However as aforesaid an endeavour is to be made to record the evidence of the witnesses on both issues in one go only.

23. Coming back to the facts of the present case, I find that though the Industrial Adjudicator while framing the issues and/or listing the matter for evidence did not specify as to whether the issue as to validity of the inquiry was to be treated as a preliminary issue and as to whether the evidence on all the issues was to be led together or in two stages but the petitioner employer having failed to produce the record of the domestic inquiry, the question of evidence on that aspect only being required to be recorded did not arise. There was thus no reason for the petitioner employer to complain that the issue of validity of the inquiry ought to have been treated as a preliminary issue and/or evidence on that only being led first. The petitioner employer clearly failed to avail the opportunity to cross examine and/or to lead its own evidence and cannot be heard to make any grievance on the same.

24. No error can thus be found with the award.

25. However the respondent workman having not appeared before this Court and having also not enforced the order under Section 17B of the ID Act, the possibility of his being engaged/employed elsewhere is writ large. In the circumstances, it is deemed necessary to modify the award from that of reinstatement with 40% back wages to that of compensation in lieu of reinstatement and back wages.

26. The respondent workman in his affidavit on 25th March, 2010 before this Court pleaded a sum of Rs. 2,59,390/- to be due in terms of the order under Section 17B of the ID Act. For the period from 1999 till the award in 2005 i.e. for approximately six years a sum approximately of ‘2 lacs would be due towards back wages and of which 40% only were awarded by the Industrial Adjudicator. In the circumstances, this Court is of the opinion that compensation of ‘3.25 lacs in lieu of reinstatement, back wages and amounts due under Section 17B of the ID Act would be appropriate.

27. The petition is therefore partly allowed. While upholding the award on merits, the direction for reinstatement with 40% of the back wages is substituted with a direction for payment of compensation in lieu of reinstatement, back wages and Section 17B wages of Rs.3.25 lacs. The same will also incur interest @10% per annum for the delay if any beyond 30 days in payment after demand thereof by the respondent workman from the petitioner employer. Costs of litigation have already been directed/paid.

28. Before parting with the case, I would also like to express my appreciation and gratitude for the invaluable assistance rendered by Mr. Arun Birbal, Advocate who on the request of this Court, and to the prejudice of his otherwise precious time, has rendered exemplary assistance to this Court in deciding the question involved.

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W.P. (C)

UNION OF INDIA AND ANR. ....PETITIONERS

VERSUS

V.K. JAIN ....RESPONDENT

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

W.P. (C) NO. : 7902/2010 DATE OF DECISION: 11.01.2012

Service Matter—Facts: Respondent belonged to the erstwhile Posts and Telegraph Building Works (Group "A") Service, which he joined in the year 1977 as Assistant Executive Engineer (Civil). The new telecom policy introduced in 1997 created a company called Bharat Sanchar Nigam Limited (BSNL). The intention of the Union Government was to transfer the entire telecom service to the newly formed BSNL by retaining the functions of policy formulation, licencing, wireless spectrum management, administrative control of PSUs etc. with the Union Government. A circular dated 24.03.2005 issued by the DoT indicated the *scheme* for calling for options of absorption of Group "A" officers of P&T Building Works (Group "A") Services in MTNL/ BSNL. The respondent exercised the option of being absorbed in BSNL on 06.06.2005. At that point of time, disciplinary proceedings were pending against Respondent. Before his option could be accepted, he sent a letter for withdrawal of the offer on 02.08.2006. However, that was rejected by an order dated 11.08.2006 by the DoT. The Respondent preferred the Original Application before the Central Administrative Tribunal (Tribunal). The Tribunal decided the question in favour of the respondent by holding that the offer made by the respondent could be withdrawn by him inasmuch as the offer had not yet been accepted by the petitioner. Held: The entire issue was held to be contractual and based upon the employees exercising their option to be retained in the parent department or to be absorbed in either MTNL or BSNL. It was further held that the scheme was essentially an invitation to an offer and the option exercised by the employee an offer to an invitation and remained an offer till its acceptance. It is only on the acceptance of the offer that a binding contract would result. In the present case, the respondent had withdrawn the option (offer) prior to its acceptance. There is nothing in law which prevented him from doing so. This is so because the offer had not been accepted and it had not resulted into a binding contract.

After having heard learned counsel for the parties, we see no reason to differ with the view taken by the Tribunal. The learned counsel for the petitioner had contended that the decision of the Supreme Court in the case of **Bank of India v. O.P.Swarnakar** (supra), would not be applicable to the present case because the employment was not contractual one. However, we do not agree with the submission because it is not a question that as to whether the employment was a contractual one or not. The entire issue is whether the scheme was contractual or not. We must also point out that the scheme does not have any statutory flavour. It is entirely contractual and it is based upon the employees exercising their option to be retained in the parent department or to be absorbed in either MTNL or BSNL. In the present case, we find that the scheme is essentially an invitation to an offer and the option exercised by the employee is an offer to an invitation and will remain an offer till its acceptance. It is only on the acceptance of the offer that a binding contract would result. In the present case, the respondent has withdrawn the option(offer) prior to its acceptance. There is nothing in law which prevented him from doing so. This is so because the offer had not been accepted and it had not resulted into a binding contract. **(Para 6)**

Important Issue Involved: Scheme for calling for options of absorption of Group "A" officers of P&T Building Works (Group "A") Services in MTNL/BSNL was essentially an invitation to an offer and the option exercised by the employee is an offer to an invitation and will remain an offer till its acceptance.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. R.V. Sinha.

FOR THE RESPONDENT : Mr. S.K. Das.

CASE REFERRED TO:

1. *Bank of India* vs. *O.P.Swarnakar,* (2003) 2 SCC 721.

RESULT: Writ Petition dismissed.

BADAR DURREZ AHMED (ORAL)

1. This petition is directed against the order dated 01.07.2010 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'the said Tribunal') in O.A. No. 1280/2009. As indicated in the very first paragraph of the impugned order itself, the question for consideration in the said OA was whether an officer of the Department of Telecommunications (DoT) could withdraw his option for absorption in Bharat Sanchar Nigam Limited(BSNL) after having opted for the same. The history with regard to the employment of the respondent No.1 is given in paragraph 2 of the impugned decision which reads as under:-

> "2. The Applicant belongs to the erstwhile Posts and Telegraph Building Works (Group 'A') Service, which he joined in the year 1977 as Assistant Executive Engineer(Civil). Subsequently, the Department of Posts and Telegraph was bifurcated into two departments, i.e., Department of Post and Department of Telecommunications in 1985. It is not contested that the first Respondent decided to continue with the unified cadre at Group 'A' level for both the departments. As a result, Group 'A' officers of civil wing could be posted either to the Department of Posts

> or to the DoT depending on the functional necessity and availability of posts. The Applicant rose in the hierarchy of his cadre and promoted as Supertending Engineer(Civil) on 21.03.1995. The new telecom policy introduced in the year 1997 created a company called BSNL. The intention of the Union Government was to transfer the entire telecom service to the newly formed BSNL by retaining the functions of policy formulation, licencing, wireless spectrum management, administrative control of PSUs etc. with the Union Government. A Circular to this effect was issued on 30.09.2000, which is placed at Annex A-3. By virtue of the order dated 30.09.2000, officers and staff were considered to have been transferred to BSNL along with their posts on as is where is basis, on deemed deputation, without deputation allowance, with effect from 1.10.2000, i.e., the date of taking over of telecom operations by the BSNL. Notwithstanding the fact that the Applicant was on deemed deputation to BSNL, he was transferred by order dated 4.02.2004(Annex.A-4) from the post of SE(P&D), BSNL, Jaipur to the Department of Posts at Delhi as SE(P&A). A chargesheet was issued to the Applicant under Rule 14 of the CCS(CCA) Rules 1965 in the year 2004. By an office order dated 24.03.2005, the Group 'A' officers belonging to Civil, Electrical and Architecture Wings of the DoT were called upon to exercise their options for absorption in BSNL/ MTNL. The general terms and conditions for absorption, *inter alia,* envisaged that :
>
> > "2. The option once exercised shall be final and will not be allowed to be withdrawn by the concerned officer at a later stage. No officer shall give any conditional option."
>
> The clause 3 of the aforesaid circular reads thus:
>
> > "Absorption of officers facing disciplinary/vigilance cases will be decided by the "Allocation Committee" consisting of Member (Services) as Chairman, Member(P), Member(Finance) and Additional Secretary(T) as its members. The office of DDG (Civil) in DoT will service the Allocation committee.""

2. A circular dated 24.03.2005 issued by the DoT indicated the scheme for calling for options of absorption of Group 'A' officers of

P&T Building Works (Group 'A') Services in MTNL/BSNL. Paragraph 9 of the said circular specifically indicated that the option once exercised shall be final and will not be allowed to be withdrawn by the concerned officer at a later stage. Paragraph 10 of the said circular indicated that the officers not exercising any option as prescribed will be deemed to have opted for Government service. It was further stipulated that conditional option shall not be accepted and any such offer shall be treated as if the officer has not exercised the option for absorption in MTNL/BSNL. Appended to the said circular dated 24.03.2005 were general terms and conditions for absorption of Group 'A' officers in MTNL/BSNL which contained similar terms. The relevant terms as mentioned in paragraph Nos. 1 to 5 are reproduced herein below:-

> "1. The option can be exercised by Group A officers borne on the regular establishment of P&T Building Works Services (P& T BWS) belonging to Civil, Electrical and Architecture Wings of DoT.
>
> 2. The option once exercised shall be final and will not be allowed to be withdrawn by the concerned officer at a later stage. No officer shall given any conditional option.
>
> 3. Absorption of officers facing disciplinary/vigilance cases will be decided by the "Allocation Committee" consisting of Member(Services) as Chairman, Member(P), Member(Finance) and Additional Secretary(T) as its members. The Office of DDG(CIVIL) in DoT will service the Allocation Committee.
>
> **Allocation/absorption orders:**
>
> 4. DoT will consider the option given by Group 'A' officers along with the availability of posts in MTNL/BSNL and the personnel requirement of these organizations and make final allocation of officers to MTNL or BSNL. The decision of DOT in this regard shall be final and binding on the officer. MTNL/ BSNL would absorb optees as would be allocated by DoT.
>
> 5. The effective date of absorption will be 1.10.2000."

3. The respondent exercised the option of being absorbed in BSNL on 06.06.2005. At that point of time, disciplinary proceedings were pending insofar as the respondent was concerned. Before his option

could be accepted, he sent a letter for withdrawal of the offer on 02.08.2006. However, that was rejected by an order dated 11.08.2006 by the DoT in the following terms:-

> "I am directed to refer to your letter no.7/2004-CWP dated 4th August, 2006 on the above subject and to say that option once exercised is final and binding. The Presidential Order for absorption in his case could not be issued due to pending vigilance case against him. The officer may kindly be informed accordingly."

4. Another representation was moved by the respondent on 15.09.2008 in respect of the withdrawal of the option which was also rejected by an order dated 24.09.2008 passed by the DoT which is as under:-

> "I am directed to refer to your letter no.4-5/2007-CWP dated 15.9.2008 on the above subject and to say that as per general terms and conditions for absorption of Group 'A' officers in MTNL/BSNL, the option once exercised is final. Presidential Order in respect of Shri V.K.Jain could not be issued due to pending vigilance case against him. The case has already been considered by the Allocation Committee and it was decided to keep the case pending till finalization of the disciplinary/vigilance case against the officer." The officer may kindly be informed accordingly."

5. Being aggrieved by that, the respondent preferred the said OA before the Tribunal. After considering the rival contentions of the parties, the Tribunal relying upon the decision of the Supreme Court in the case of **Bank of India v. O.P.Swarnakar,** (2003) 2 SCC 721 decided the question in favour of the respondent by holding that the offer made by the respondent could be withdrawn by him inasmuch as the offer had not yet been accepted by the petitioner herein. The Tribunal simply relied on the decision of the Supreme Court which was pertaining to the offers made to employees under the Voluntary Retirement Scheme. The Supreme Court in that case observed that the scheme was contractual in nature and that the scheme was an invitation for offers to be made by the employees who could opt for voluntary retirement. In case they had opted and the option had not been accepted, they could also withdraw the said option inasmuch as it would amount to withdrawal of offers

prior to their acceptance. Based on the principles emanating from the Contract Act, 1872, the Supreme Court came to the conclusion that offers made under the said Voluntary Retirement Scheme could be withdrawn prior to their acceptance as they would not have materialized into a binding contract. Employing the same principle in the present case, the Tribunal has come to the conclusion, which reads as under:-

> "8. The Applicant gave his option for absorption under the second Respondent-BSNL. The Respondent failed to take any decision in the matter. It can also not be the case of the Respondents that the Applicant is on deemed deputation to BSNL because the first Respondent transferred the Applicant from BSNL to the Department of Posts by an order adverted to in a foregoing paragraph of this order. In such circumstances, following the ratio laid down by the Honourable Supreme Court in **Bank of India v. O.P.Swarnakar** (supra), we are of the considered opinion that it would be open to the Applicant to withdraw his option for absorption in BSNL."

6. After having heard learned counsel for the parties, we see no reason to differ with the view taken by the Tribunal. The learned counsel for the petitioner had contended that the decision of the Supreme Court in the case of **Bank of India v. O.P.Swarnakar** (supra), would not be applicable to the present case because the employment was not contractual one. However, we do not agree with the submission because it is not a question that as to whether the employment was a contractual one or not. The entire issue is whether the scheme was contractual or not. We must also point out that the scheme does not have any statutory flavour. It is entirely contractual and it is based upon the employees exercising their option to be retained in the parent department or to be absorbed in either MTNL or BSNL. In the present case, we find that the scheme is essentially an invitation to an offer and the option exercised by the employee is an offer to an invitation and will remain an offer till its acceptance. It is only on the acceptance of the offer that a binding contract would result. In the present case, the respondent has withdrawn the option(offer) prior to its acceptance. There is nothing in law which prevented him from doing so. This is so because the offer had not been accepted and it had not resulted into a binding contract.

7. In view of the foregoing reasons, we see no reason to interfere with the impuged order. The Writ Petition is dismissed. There shall be no order as to costs.

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RFA

GHANSHYAM DASS GUPTA ....APPELLANT

VERSUS

MAKHAN LAL ....RESPONDENT

(VALMIKI J. MEHTA, J.)

RFA NO. : 664/2003 DATE OF DECISION: 13.01.2012

Indian Contract Act, 1872—The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for—In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles.

A reading of the written statement shows that the appellant/ defendant has not even taken up a case that the monies paid to him under the Agreement to Sell were forfeited, or that any loss was caused to him. The Constitution Bench of the Supreme Court in the case of **Fateh Chand Vs Balkishan Dass,** (1964) 1 SCR 515; AIR 1963 SC 1405

has held that there cannot be forfeiture of amount under the Agreement to Sell unless loss is pleaded and proved. The relevant paras of the judgment read as under:-

> 8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjusted in the light of Section 74 of the Indian Contract Act, which in its material part provides:- "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for."
>
> The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.
>
> 10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case

> of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.
>
> 15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon

any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

16. There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted. The contact provided for forfeiture of Rs 25,000 consisting of Rs, 1039 paid as earnest money and Rs 24,000 paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs 1000 which was paid as earnest money. We cannot however agree with the High Court that 13 percent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed

by the defendant and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. The plaintiff has been allowed Rs. 1000 which was the earnest money as part of the damages. Besides he had use of the remaining sum of Rs. 24,000, and we can rightly presume that he must have been deriving advantage from that amount throughout this period. In the absence therefore of any proof of damage arising from the breach of the contract, we are of opinion that the amount of Rs. 1000 (earnest money) which has been forfeited, and the advantage that the plaintiff must have derived from the possession of the remaining sum of Rs. 24,000 during all this period would be sufficient compensation to him. It may be added that the plaintiff has separately claimed mesne profits for being kept out possession for which he has got a decree and therefore the fact that the plaintiff was out of possession cannot be taken, into account in determining damages for this purpose. The decree passed by the High Court awarding Rs.11,250 as damages to the plaintiff must therefore be set aside. (Underlining added) **(Para 5)**

Important Issue Involved: There cannot be forfeiture of amount under the Agreement to sell unless the loss is pleaded and proved.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Atul Kumar, proxy counsel.

FOR THE RESPONDENT : None.

CASE REFERRED TO:

1. *Fateh Chand* vs. *Balkishan Dass,* (1964) 1 SCR 515; AIR 1963 SC 1405.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J (ORAL)

1. Proxy counsel appearing for the counsel for the appellant states that the appellant has taken back the brief.

2. The impugned judgment and decree dated 29.3.2003 is a judgment and decree in favour of the respondent/plaintiff for an amount which was paid under an Agreement to Sell. The impugned judgment and decree directs refund of the amount paid inasmuch as it is found that the appellant/defendant was guilty of breach of contract in not having obtained the permission from the Income Tax Authorities viz. the income tax clearance certificate.

3. Some of the relevant paragraphs of the Trial Court decreeing the suit read as under:-

> "5. Plaintiff had filed his affidavit by way of evidence. He was cross examined at length by the Ld. Counsel for the defendant. Similarly, defendant had filed his affidavit as evidence who was cross examined at length by Ld. Counsel for the plaintiff. Final arguments were heard. My issue-wise findings are as under:-
>
> Issue No.4
>
> (i) The agreement to sell Ex.DW1/1 and Ex.DW1/3 are admitted documents. It is the case of both the parties that initially the agreement to sell Ex.DW1/1 was executed between the parties on 3.10.2000 in respect of the property in dispute. Total sales consideration was Rs. 28.00 Lakhs and a total of Rs. 1.25 Lakhs was paid as Byana/Earnest Money. Thereafter on 9.11.2000 again Rs. 1.25 Lakhs was paid and a fresh agreement Ex.DW1/3 was executed. The date fixed for finalisation of the deal was 1.1.2001 in agreement Ex.DW1/1 which was extended to 10.1.2001 in agreement Ex.DW1/3.
>
> (ii) As per the plaintiff, defendant has breached the terms of agreement whereas the case of the defendant is that the plaintiff has breached the terms of agreement to sell Ex.DW1/3. Plaintiff has filed the present suit for recovery of double the amount of Byana/Earnest Money, on the basis of the terms and conditions contained in the agreement. On the other hand the defendant has pleaded that the earnest money stands forfeited since the plaintiff has violated the terms and conditions of the agreement.

> xxxx xxxx xxxx xxxx
>
> (iv) Admittedly, the deal was for '28.00 Lakhs. As per the provisions of Income Tax Act contained in Section 230A and 269UC, specific permission from the Income Tax Authority was required to finalise the deal. It is not the case of any of the party that this permission was ever applied for by them. Since, the permission was neither applied nor obtained, the sale deed could not have been executed on the date fixed in the agreement because of the prohibitory clause in the Income Tax Act. The agreement as such was not capable of performance on the date fixed for finalisation of the sale deed.
>
> (v) The case of defendant is that he had got the sale deed of the property executed in his name only with a view to transfer better title to the plaintiff and it is the plaintiff who has backed out from his deal. The modes opperendi of deceiving the revenue authorities is clear from the copy of the sale deed filed by the defendant on record and marked as D-2. The said sale deed bears date of its execution on 6.11.2000 and total sale consideration shown in Rs.1.50 Lakhs only. On the other hand the agreement to sell dated 3.10.2000 and 9.11.2000 show the sales consideration at Rs. 28.00 Lakhs. In this way the sales transactions are under valued at the time of registration of the sale deed causing loss to the exchequer and by escaping from obtaining the mandatory permission from the Income Tax Department. In the present suit both parties have relied upon the agreement to sell wherein the consideration is admitted to be Rs. 28.00 Lakhs and in the absence of the permission from the Income Tax Authority, the sale deed could not have been executed on the date fixed."

4. I completely agree with the aforesaid findings and conclusions as the appellant/defendant was bound to obtain the income tax clearance certificate, which he failed to obtain, and therefore, was guilty of breach of contract.

5. A reading of the written statement shows that the appellant/ defendant has not even taken up a case that the monies paid to him under

the Agreement to Sell were forfeited, or that any loss was caused to him. The Constitution Bench of the Supreme Court in the case of **Fateh Chand Vs Balkishan Dass,** (1964) 1 SCR 515; AIR 1963 SC 1405 has held that there cannot be forfeiture of amount under the Agreement to Sell unless loss is pleaded and proved. The relevant paras of the judgment read as under:-

> 8. The claim made by the plaintiff to forfeit the amount of Rs 24,000 may be adjusted in the light of Section 74 of the Indian Contract Act, which in its material part provides:- "When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or as the case may be, the penalty stipulated for."
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> The section is clearly an attempt to eliminate the sometime elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.
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> 10. Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages

> in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damage"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.
>
> 15. Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of

contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach.

16. There is no evidence that any loss was suffered by the plaintiff in consequence of the default by the defendant, save as to the loss suffered by him by being kept out of possession of the property. There is no evidence that the property had depreciated in value since the date of the contract provided; nor was there evidence that any other special damage had resulted. The contact provided for forfeiture of Rs 25,000 consisting of Rs, 1039 paid as earnest money and Rs 24,000 paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs 1000 which was paid as earnest money. We cannot however agree with the High Court that 13 percent of the price may be regarded as reasonable compensation in relation to the value of the contract as a whole, as that in our opinion is assessed on an arbitrary assumption. The plaintiff failed to prove the loss suffered by him in consequence of the breach of the contract committed by the defendant and we are unable to find any principle on which compensation equal to ten percent of the agreed price could be awarded to the plaintiff. The plaintiff has been allowed Rs. 1000 which was the earnest money as part of the damages. Besides he had use of the remaining sum of Rs. 24,000, and we can rightly presume that he must have been deriving advantage from that amount throughout this period. In the absence therefore of any proof of damage arising from the breach of the contract, we are of opinion that the amount of Rs. 1000 (earnest money) which has been forfeited, and the advantage that the plaintiff must have derived from the possession of the remaining sum of Rs. 24,000 during all this period would be sufficient compensation to him. It may be added that the plaintiff has separately claimed mesne profits for being kept out possession for which he has got a decree and therefore the fact that the plaintiff was out of possession cannot be taken, into account in determining damages for this purpose. The decree passed by the High Court awarding

Rs.11,250 as damages to the plaintiff must therefore be set aside. (Underlining added)

6. In view of the above, there is no merit in the appeal inasmuch as not only because the appellant/defendant was guilty of breach of contract but also because the appellant/defendant did not plead and prove the forfeiture of earnest money or any loss having been caused to him. The appellant/defendant was, therefore, liable to refund the amount which he received under the Agreement to Sell.

7. In view of the above, there is no merit in the appeal which is accordingly dismissed leaving the parties to bear their own costs.

ILR (2012) II DELHI 386
EX. P.

KLEN & MARSHALLS MANUFACTURERS ....DECREE HOLDER AND EXPORTERS LTD.

VERSUS

POWER GRID CORPORATION ....JUDGMENT DEBTOR INDIA LTD.

(S. MURALIDHAR, J.)

EX. P. NO. : 403/2010 & EA NOS. 734/2010, 735/2010, 353/2011 **DATE OF DECISION: 13.01.2012**

Code of Civil Procedure, 1908—Execution Petition filed by the Decree Holder (hereinafter referred to as DH) seeking direction to the Judgment Debtor (hereinafter referred to as JD) to pay a sum of Rs. 5,99,21,028 in terms of the Arbitral Award and order dated 8th April 2010 wherein JD was to pay the DH US$ 14,35,006 as well as Rs. 45,10,798 within two months from the date

of the Award failing which simple interest @ 12% per annum. However the award was modified to a limited extent by the order passed by the Court on 8th April 2010 while disposing of OMP Nos. 262 of 2003 and 88 of 2006. Issue: Whether the executing Court can modify or alter the decree, which extinguishes the right of the DH to receive the full decretal amount? Decision: The executing Court cannot go behind the decree or seek to modify or alter the decree. Therefore, even while this Court in its order dated 5th August 2010 noted that with the payment of the sum of Rs. 7,12,27,629/- plus interest accrued thereon in the fixed deposit the decree would stand satisfied, it did not extinguish the right of the DH to receive the full decretal amount i.e. the interest at 12% on Award amount (as modified by the order dated 8th April 2010) till the date of payment.

Having considered the above submissions, this Court is of the view that the plea of the DH should succeed. It is settled law that the executing Court cannot go behind the decree or seek to modify or alter the decree. As far as the Award in the instant case is concerned, it was modified to a limited extent by the order passed by this Court on 8th April 2010 while disposing of OMP Nos. 262 of 2003 and 88 of 2006. However, that portion of the Award under which the DH was entitled to receive interest at 12% per annum in the event the awarded amount was not paid by the JD within two months of the date of the Award was left unaltered. This Court could not have, and in fact did not, in Execution Petition No.122 of 2010 modify that portion of the Award. It is not in dispute that when the Court ordered on 5th August 2010 in Execution Petition No. 122 of 2010 that the Registry should release to the DH a sum of Rs. 7,12,27,629/- plus interest accrued thereon, what was paid to the DH was only the interest accrued on the aforementioned sum placed in a fixed deposit with the UCO Bank. This amount was admittedly much lower than the amount constituting interest at 12% per

annum in terms of the Award. Therefore, even while this Court in its order dated 5th August 2010 noted that with the payment of the sum of Rs. 7,12,27,629/-plus interest accrued thereon in the fixed deposit the decree would stand satisfied, it did not extinguish the right of the DH to receive the full decretal amount i.e. the interest at 12% on Award amount (as modified by the order dated 8th April 2010) till the date of payment. **(Para 14)**

Important Issue Involved: (A) Where an execution petition has been closed erroneously by a Court and the Decree Holder is free from blame, the injured Decree Holder has got a right to have that old execution petition revived and proceeded with from the stage immediately before the error.

(B) Mere deposit of the decretal amount in a Court other that an executing Court can never amount to 'payment'.

[Sa Gh]

APPEARANCES:

FOR THE DECREE HOLDER : Mr. abhinav Vashisht, Senior Advocate with Ms. Mohna M. Lal, Advocate.

FOR THE JUDGMENT DEDBTOR : Mr. S.B. Upadhyay, Senior Advocate with Mr. P.K. Mishra, Advocate.

CASES REFERRED TO:

1. *Greater Cochin Development Authority* vs. *Leelamma Valson* (2002) 2 SCC 573.
2. *Delhi Development Authority* vs. *Bhai Sardar Singh* 158 (2009) DLT 8 (DB).
3. *Ponnuru Satyanarayana* vs. *Bolisetti Nagabushanam* AIR (38) 1951 Madras 429.

RESULT: Execution Petition allowed.

S. MURALIDHAR, J.

1. Execution Petition No. 403 of 2010 has been filed by the Decree Holder ('DH'), M/s. Klen & Marshalls Manufacturers and Exporters Limited, seeking a direction to the Judgment Debtor ('JD'), Power Grid Corporation of India Limited, to pay a sum of Rs. 5,99,21,018/-in terms of the arbitral Award dated 9th May 2003 ('Award') and an order dated 8th April 2010 of this Court.

2. The background to the present execution petition is that in terms of the aforementioned Award the JD was to pay the DH US$ 14,35,006 as well as Rs. 45,10,798 within two months from the date of the Award failing which simple interest @ 12% per annum on the aforesaid amount, after converting the dollars into Indian currency on the date of the Award would be payable with effect from 9th July 2003 till the date of payment.

3. On 14th December 2005 the learned Arbitrator in an application filed under Section 33 of the Arbitration & Conciliation Act, 1996 ('Act') passed a further order. The JD filed OMP No. 262 of 2003 challenging the Award dated 9th May 2003 and OMP No. 88 of 2006 challenging the order dated 14th December 2005 passed by the learned Arbitrator. During the pendency of the OMPs, the JD deposited a sum of Rs. 7,14,96,878/-in this Court. Thereafter, by an order dated 8th April 2010 this Court disposed of OMP Nos. 262 of 2003 and 88 of 2006 modifying the Award in the following manner:

> (a) the JD was to refund to the DH liquidated damages in the sum of Rs. 6,33,39,912/-;
>
> (b) the JD was allowed to retain a sum of Rs. 6,36,09,161/-in respect of the performance guarantee that was encashed in September 1998; and
>
> (c) Consequently, the JD was entitled to receive a sum of Rs. 7,12,27,629/- from the JD.

4. The JD did not file an appeal against the order dated 8th April 2010. The DH filed an appeal against the said order which, according to the DH, has no bearing on the present execution petition. The DH filed Execution Petition No. 122 of 2010 which came to be disposed of by this Court on 5th August 2010 by the following order:

> "The Judgment Debtor deposited an amount of Rs. 7,14,96,878/-in the Registry of this Court as per order dated 8th July 2003 passed in OMP No. 262 of 2003 and IA No. 6845 of 2003. Thereafter, the objections of the parties were disposed of by this Court on 8th April 2010. The effect of the said judgment, which has attained finality, is that the awarded amount stands reduced to Rs. 7,12,27,629/-. The Registry is directed to prepare a pay order for the amount of Rs. 7,12,27,629/-plus interest accrued thereon in favour of the decree holder and to deliver the same to the decree holder forthwith. The difference of Rs. 2,69,249/- [Rs. 7,14,96,878/- minus Rs. 7,12,27,629/-] along with interest accrued thereon shall be released to the Judgment Debtor forthwith. With the release of the aforesaid amounts to the Decree Holder, the decree shall stands satisfied.
>
> Execution petition stands disposed of."

5. Pursuant to the above order, on 3rd October 2010 the DH received a sum of Rs. 10,38,71,077/- (after tax deducted at source) from the Registry of this Court.

6. Thereafter, the present execution petition was filed on 7th December 2010 by the DH claiming that in terms of the Award the DH was entitled to receive interest @ 12% per annum on the Award amount if the JD did not make payment thereof within two months from the date of the Award. The JD did not pay the amount within two months and instead filed objections. The amount deposited by the JD in this Court was kept in a fixed deposit and thereafter the amount together with the interest accrued was paid to the DH. This was far less than the interest that the DH was entitled to in terms of the Award. The order passed by this Court in Execution Petition No. 122 of 2010 was limited to the extent of requiring the Registry of this Court to pay to the DH the amount kept in the fixed deposit together with interest in terms of the order dated 5th August 2010 of this Court. It is stated that the DH is now entitled to receive the balance amount of interest in terms of the Award.

7. Notice was issued in the present execution petition on 24th December 2010. On 21st April 2011 when the JD entered appearance, it was directed to make payment of the decretal amount within four weeks. Thereafter, the DH filed EA No. 353 of 2011 seeking attachment of the bank accounts of the JD since it had not complied with the order dated 21st April 2011. On 30th May 2011 this Court passed the following order:

"EA No. 353/2011

This application has been moved by the Decree Holder to seek attachment of the bank accounts of the Judgment Debtor as the Judgment Debtor has not complied with the directions dated 21st April 2011, whereby the Judgment Debtor was required to make payment of the decretal amount within four weeks. Consequently, the bank accounts of the Judgment Debtor with the following banks are attached to the extent of Rs. 50 lakhs each:

(i) Indian Overseas Bank, Jeevan Deep Building, 10 Parliament Street, New Delhi – 110 001;

(ii) Punjab National Bank, ECE House, 28-A, K.G. Marg, New Delhi – 110 001;

(iii) IDBI Bank, Corporate Banking, 12th Floor, IFCI Tower, 61, Nehru Place, New Delhi – 110 019;

(iv) Bank of Baroda, Madhuban, 55, Nehru Place, New Delhi – 110 019;

(v) Indian Bank, Mehrauli Institutional Area Branch, No. 7, Shaheed Singh Marg, New Delhi – 110 016;

(vi) State Bank of Hyderabad, 16, Kundan House, Nehru Place, New Delhi – 110 019.

The concerned bank managers are directed to remit to the extent of Rs. 50 lakhs each to this Court before the next date.

List on 29th July 2011. Dasti."

8. Aggrieved by the above order, the JD filed EFA (OS) No. 24 of 2011 in which an interim order was passed by the Division Bench on 8th June 2011 as under:

"EFA (OS) No. 24/2011 & CM No. 11714/2011 (stay)

Issue notice.

Mr. Mohan M. Lal, Advocate accepts notice on behalf of the Respondent.

After hearing learned counsel for the parties, the Court is of the opinion that the interim order sought, can be conditionally granted. The amount of Rs. 3,05,52,042/-said to be due and payable on

account of balance liability arising out of the decree drawn pursuant to the judgment of the Court, shall be paid to the Respondent/Decree Holder by the Appellant within two weeks. The Respondent shall simultaneously secure the amount released to it through a bank guarantee payable in favour of the Appellant, within four weeks which shall be kept alive till the pendency of the present appeal. Subject to the compliance with these conditions, the operation of the impugned order shall remain suspended. The Court would balance the equities regarding interest and other amounts having regard to the outcome of the Appeal.

List for hearing on 25th July 2011.

Copy of the order be given *dasti*."

9. The above amount of Rs. 3,05,52,042/- was arrived at by calculating the simple interest at 12% on the decretal amount for the period 9th May 2003 till 30th September 2010 less the sum already received by the DH. The said calculation has not been objected to by the JD. Thereafter by way of a demand draft dated 20th June 2011 the JD paid to the DH a sum of Rs. 3,05,52,042/-. The DH also furnished a bank guarantee for the said sum in favour of the JD. Taking note of the above development on 29th July 2011 this Court adjourned the Execution Petition No. 403 of 2010 *sine die* with liberty to the parties to revive the same after disposal of EFA (OS) No. 24 of 2011.

10. The appeal being EFA (OS) No. 24 of 2011 came to be finally disposed of by the Division Bench of this Court on 29th July 2011 by the following order:

"C.M. Appl. 13707/2011

Learned counsel for the parties submit that the relief sought in the present application have been rendered infructuous except to the extent of the prayer made by the Applicant/Appellant for being handed over the bank guarantee as referred to in Prayer Clause (iv). The Appellant has paid the amount directed by the Court -a fact confirmed by the latter's Senior counsel. The bank guarantee in terms of the Court's order has been filed in the Court on 15.07.2011. Since there has been compliance with the order, nothing needs to be recorded except a direction to the Registrar of this Court to hand over the bank guarantee. It is

ordered accordingly.

The application is disposed of in the above terms.

EFA (OS) 24/2011

Learned counsel for the parties submit that since the objections of the Respondents to the execution are to be decided by the learned Single Judge, no further orders are required in the present appeal. It is clarified that in view of the orders made on 08.06.2011, the attachment directed by the learned Single Judge is hereby vacated.

The appeal is disposed of in the above terms; nothing stated in the order shall be construed as comments on the merits of the execution proceeding pending before the Single Judge, who shall decide the same on merits and make restitutionary orders, having regard to the final directions in the execution proceedings. Order dasti."

11. Thereafter, the present petition was revived by an order dated 19th August 2011. Also, the DH has kept the bank guarantee furnished by it renewed for a sum of Rs. 3,05,52,042/-in favour of the JD.

12. Mr. Abhinav Vashisht, learned Senior counsel appearing for the DH submitted that the present execution petition is maintainable notwithstanding the fact that earlier Execution Petition No. 122 of 2010 was disposed of by this Court by order dated 5th August 2010. It is submitted that the executing Court could not have altered the Award which, as modified by the order dated 8th April 2010 in OMP Nos. 262 of 2003 and 88 of 2006, became final. That portion of the Award which required the JD to pay interest at 12% per annum if the JD did not make payment of the awarded amount within two months remained unaltered. The mere fact that the amount deposited in this Court together with interest accrued thereon was directed to be paid to the DH by an order dated 5th August 2010 did not mean that the DH had waived its right to receive the full interest amount in terms of the Award. In support of his plea that a second execution petition to realise the balance amount under the decree was maintainable, Mr. Vashisht relied on the decision of the Madras High Court in **Ponnuru Satyanarayana v. Bolisetti Nagabushanam** AIR (38) 1951 Madras 429, and of this Court in **Delhi Development Authority v. Bhai Sardar Singh** 158 (2009) DLT 8

(DB). He clarified that although the DH had in the present execution petition calculated compound interest @ 12% per annum on the decretal amount and had, therefore, claimed Rs. 5,99,21,018/-, it had subsequently limited its claim to that of simple interest @ 12% per annum for the period between 9th May 2003 and 30th September 2010 which worked out to Rs. 6,31,95,490/-. The total decretal amount (principal + interest) worked out to Rs. 13,44,23,119. After deducting the sum of Rs. 10,38,71,077 received by the DH from the Registry of this Court, the balance amount payable by the DH was Rs. 3,05,52,042. The said amount, as noticed hereinbefore, has since been paid by the JD to the DH subject to the DH furnishing a bank guarantee for the said amount in favour of the JD.

13. Mr. S.B. Upadhyay, learned Senior counsel appearing for the JD 5th submitted that the order passed by this Court on August 2010 in Execution Petition No. 122 of 2010 was final as far as satisfaction of the decree in terms of the Award was concerned. He further submitted that inasmuch as in Execution Petition No. 122 of 2010 the DH had claimed interest at 12% per annum on the awarded amount, the principle of *res judicata* would apply and the present execution petition was not maintainable. Further, the DH had chosen not to appeal against the order dated 5th August 2010 which clearly stated that with the release of the amount of Rs. 7,12,27,629/-plus interest in favour of the DH, "the decree shall stand satisfied". The said order had become final and no further claim in respect of the decree was maintainable. He relied on the decision of the Supreme Court in **Greater Cochin Development Authority v. Leelamma Valson** (2002) 2 SCC 573.

14. Having considered the above submissions, this Court is of the view that the plea of the DH should succeed. It is settled law that the executing Court cannot go behind the decree or seek to modify or alter the decree. As far as the Award in the instant case is concerned, it was modified to a limited extent by the order passed by this Court on 8th April 2010 while disposing of OMP Nos. 262 of 2003 and 88 of 2006. However, that portion of the Award under which the DH was entitled to receive interest at 12% per annum in the event the awarded amount was not paid by the JD within two months of the date of the Award was left unaltered. This Court could not have, and in fact did not, in Execution Petition No.122 of 2010 modify that portion of the Award. It is not in dispute that when the Court ordered on 5th August 2010 in Execution

Petition No. 122 of 2010 that the Registry should release to the DH a sum of Rs. 7,12,27,629/-plus interest accrued thereon, what was paid to the DH was only the interest accrued on the aforementioned sum placed in a fixed deposit with the UCO Bank. This amount was admittedly much lower than the amount constituting interest at 12% per annum in terms of the Award. Therefore, even while this Court in its order dated 5th August 2010 noted that with the payment of the sum of Rs. 7,12,27,629/-plus interest accrued thereon in the fixed deposit the decree would stand satisfied, it did not extinguish the right of the DH to receive the full decretal amount i.e. the interest at 12% on Award amount (as modified by the order dated 8th April 2010) till the date of payment.

15. In Ponnuru Satyanarayana v. Bolisetti Nayabushanami the Madras High Court observed as under (AIR, p.430):

> "(4)...Many rulings of this Court, including the Full Bench ruling quoted above, have held that, where an execution petition has been closed erroneously by a Court either for statistical purposes or under an error, as here, and the Decree Holder is free from blame, the injured Decree Holder has got a right to have that old execution petition revived and proceeded with from the stage immediately before the error, **and that a subsequent execution petition filed by him is only to be treated as a reminder to the Court to revive the old execution petition irregularly and erroneously closed by it."** (emphasis supplied)

16. This Court in Delhi Development Authority v. Bhai Sardar Singh also clarified that the mere deposit of the decretal amount in a Court other than an executing Court can never amount to 'payment'. In para 17 of the judgment it was observed as under (DLT, p.15):

> "17. In our view, the act of making payment to the decree holder under Rule 1 of Order 21 CPC would require a positive act on the part of the judgment debtor of either depositing "into the Court whose duty it is to execute the decree" or to make payment out of Court to the decree holder through a postal money or through a bank or by any other mode "wherein payment is evidenced in writing" unless the Court which made the decree otherwise directs. The payment made under a decree, to fall within the ambit of Order 21 Rule 1 CPC has therefore, necessarily, to be an unconditional payment by the judgment debtor to the decree holder either directly, or indirectly through the medium of the Court whose duty is to execute the decree. Mere deposit of the decretal amount in a Court, other than executing Court can never amount to "payment" and even where the decretal amount is deposited in the executing Court the judgment debtor's liability to pay interest does not cease until notice contemplated by Sub-rule (2) of Rule 1 of Order 21 is given. This is evident from Sub-rule (4) above. Order 21 Rule 1 CPC does not contemplate the decree holder having to chase the judgment debtor to realize the decretal amount by seeking attachment of one or the other accounts of the judgment debtor or the properties of the judgment debtor. If resort to the execution does not of the Court is required to be made by the decree holder, and the decretal amount is recovered in pursuance of the order of attachment of the accounts of the judgment debtor and/or sale of assets of the judgment debtor, such realization of the decretal amount would not amount to payment of the decretal amount under Rule 1 of Order 21."

17. The facts in **Greater Cochin Development Authority v. Leelamma Valson** are distinguishable. In the said case the question of entitlement of the Respondents therein to interest on the decretal amount had been resolved finally by an order passed by the High Court in a petition challenging the Award by making it clear that no future interest was payable on the decree. In the said circumstances the further claim of interest was held to be impermissible. In the present case the order passed by this Court on 8th April 2010 in the petitions under Section 34 of the Act did not modify or alter the requirement of the JD to pay interest at12% per annum to the DH for the period of delay beyond two months after the date of the Award up to the date of payment.

18. For the aforementioned reasons the present execution petition is disposed of by holding that the JD is liable to pay DH the sum of Rs. 3,05,52,042 which already stands paid by the JD to the DH during the pendency of the present petition. Consequently, the bank guarantee furnished by the DH in favour of the JD for the aforementioned amount is discharged and directed to be returned to the DH forthwith.

19. The petition and the pending applications are disposed of in the above terms.

ILR (2012) II DELHI 397
MAC APP.

ORIENTAL INSURANCE CO. LTD. ....APPELLANT

VERSUS

KAVITA SINGAL & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

MAC APP. NO. : 533/2009 DATE OF DECISION: 13.01.2012

Motor Vehicles Act, 1988—Section 163(A)—Motor Accident Claims Tribunal (MACT) awarded a compensation of Rs. 1 lac as personal accident insurance cover to respondents who are LRs of deceased—Order challenged before High Court in Appeal—Held—Finding that accident was caused on account of deceased's own negligence is not disputed as respondents have not filed any appeal or cross objection against judgment—It is clearly mentioned in India Motor Traffic under GR 36 that this personal accident cover is available to owner of insured vehicle holding effective driving license—Anybody driving vehicle with or without permission of owner cannot be taken as owner—Driver—Policy of insurance company is contractual—Impugned order can not be sustained.

Important Issue Involved: As per India Motor Traffic under GR-36 personal accident cover is available to the owner of the insured vehicle holding an effective driving license. Anybody driving the vehicle with or without permission of the owner can not be taken as owner-driver.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Ms. Manjusha Wadhwa, Advocate.

FOR THE RESPONDENTS : Mr. R.M. Bagai, Advocate for R-1 to R-3

CASES REFERRED TO:

1. *New India Assurance Co. Ltd.* vs. *Sadanand Mukhi,* (2009) 2 SCC 417.
2. *Ningamma & Anr.* vs. *United India Insurance Co. Ltd.,* (2009) 13 SCC 710.
3. *Oriental Insurance Co. Ltd.* vs. *Rajni Devi* (2008) 5 SCC 736.

RESULT: Allowed.

G.P. MITTAL, J.

1. The Appellant Oriental Insurance Co. Ltd. impugns the award dated 20.08.2009 passed by the Motor Accident Claims Tribunal whereby a compensation of Rs. 1,00,000/- as personal accident insurance cover was awarded in favour of the Respondents No.1 to 3 who are the legal heirs of deceased Vikas Singhal. He died in an accident, which took place on 19.11.2006. The finding that the accident was caused on account of deceased's own negligence is not disputed as the Respondents No.1 to 3 have not filed any appeal or cross-objection against the judgment. The Tribunal relying on the judgment of the Supreme Court in **Oriental Insurance Co. Ltd. v. Rajni Devi & Ors.,** (2008) 5 SCC 736 and **Ningamma & Anr. Vs. United India Insurance Co. Ltd.,** (2009) 13 SCC 710, held that the deceased stepped into the shoes of the owner i.e. Respondent No.4 Vineet Singhal and was, therefore, entitled to a compensation of Rs. 1,00,000/- as personal accident insurance cover.

2. In my view the Tribunal misinterpreted the judgment in **Ningamma** (supra), it was nowhere laid down in Ningamma that a personal accident cover made in respect of the owner – driver would extend to anybody driving the two wheeler covered by the policy of insurance. **Ningamma and Rajni Devi** (supra) were in the context that compensation under Section 163 (A) cannot be claimed by an owner or anybody driving the vehicle with the permission of the owner (not being his employee) against

his own insurer as in respect of 3rd party risk, the liability of insurance company is to indemnify the owner. The relevant portion of the report in **Nigamma** (supra) is extracted hereunder: -

> "18. However, in the facts of the present case, it was forcefully argued by the counsel appearing for the respondent that the claimants are not the "third party", and therefore, they are not entitled to claim any benefit under Section 163-A of the MVA. In support of the said contention, the counsel relied on the decision of this Court in **Oriental Insurance Co. Ltd. v. Rajni Devi** (2008) 5 SCC 736 and **New India Assurance Co. Ltd. v. Sadanand Mukhi,** (2009) 2 SCC 417.
>
> 19. In **Oriental Insurance Co. Ltd. v. Rajni Devi** (supra) wherein one of us, namely, Hon'ble S.B. Sinha, J. was a party, it has been categorically held that in a case where third party is involved, the liability of the insurance company would be unlimited. It was also held in the said decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the claimant against the insurance company would depend upon the terms thereof.
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> xxxxx xxxxx `xxxxx
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> 21. In our considered opinion, the ratio of the decision in **Oriental Insurance Co. Ltd. v. Rajni Devi** (supra) is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be an employee of the owner of the motorbike although he was authorized to drive the said vehicle by its owner and, therefore, he would step into the shoes of the owner of the motorbike. We have already extracted Section 163-A of the MVA hereinbefore. A bare perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle.
>
> 22. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that event the liability to make payment of the

> compensation is on the insurance company or the owner, as the case may be as provided under Section 163-A. But if it is proved that the driver is the owner of the motor vehicle, in that liability to pay the same is on him. This proposition is absolutely clear on a reading of Section 163-A of the MVA. Accordingly, the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under Section 163-A of the MVA.
>
> 23. When we apply the said principle into the facts of the present case we are of the view that the claimants were not entitled to claim compensation under Section 163-A of the MVA and to that extent the High Court was justified in coming to the conclusion that the said provision is not applicable to the facts and circumstances of the present case."

3. A perusal of the insurance policy placed on record shows that an additional premium of Rs. 50/- was paid for owner-driver under GR-36A. An order dated 11.12.2009 was passed by this Court (in this case); relevant portion of the order is extracted hereunder: -

> "GR.36. Personal Accident (PA) Cover under Motor Policy (not applicable to vehicles covered under Sections E, F and G of Tariff for Commercial Vehicles) A. Compulsory Personal Accident Cover for Owner-Driver Compulsory Personal Accident Cover shall be applicable under both Liability Only and Package policies. The owner of insured vehicle holding an effective driving licence is termed as Owner-Driver for the purposes of this section. Cover is provided to the Owner-Driver whilst driving the vehicle including mounting into/ dismounting from or travelling in the insured vehicle as a co-driver. NB.: This provision deals with Personal Accident cover and only the registered owner in person is entitled to the compulsory cover where he/ she holds an effective driving licence. Hence compulsory PA cover cannot be granted where a vehicle is owned by a company, a partnership firm or a similar body corporate or where the owner-driver does not hold an effective driving licence. In all such cases, where compulsory PA cover cannot be granted, the additional premium for the compulsory P.A. cover for the owner-driver should not be charged and the compulsory P.A. cover provision in the

policy should also be deleted. Where the owner-driver owns more than one vehicle, compulsory PA cover can be granted for only one vehicle as opted by him/ her. The scope of the cover, Capital Sum Insured (CSI) and the annual premium payable under this section are as under: -

TYPE OF VEHICLES	CAPITAL SUM INSURED (Rs.)	PREMIUM (Rs.)	COVER
Motorised Two Wheelers	1 lakh	50/-	i) 100% of CSI for Death, Loss of Two Limbs or sight of both eyes or one limb and sight of one eye. ii) 100% from Permanent Total Disablement for injuries other than named above.
Private Cars	2 lakhs	100/-	i) 100% of CSI for Death, Loss of Two Limbs or sight of both eyes or one limb and sight of one eye.
			ii) 100% for Permanent Total Disablement from injuries other than named above.
Commercial Vehicles	2 lakhs	100/-	i) 100% of CSI for Death, Loss of Two Limbs or sight of both eyes or one

			limb and sight of one eye.
			ii) 50% of CSI for Loss of one Limb or sight of one eye.
			iii) 100% from Permanent Total Disablement from injuries other than named above.

B. Optional Personal Accident Cover for persons other than Owner-Driver

The cover under this section is limited to maximum Capital Sum Insured (CSI) of Rs. 2 lacs per person.

Cover is available only in respect of the following persons:-

1. Private Cars including three wheelers rated as Private cars and motorized two wheelers with or without side car (not for hire or reward): For insured or any named person other than the paid driver and cleaner.

Endorsement IMT – 15 is to be used

2. Private Cars, three wheelers rated as Private cars and Motorsied Two Wheelers (not used for hire or reward) with or without side car: For unnamed passengers limited to the registered carrying capacity of the vehicle other than the insured, his paid driver and cleaner.

Endorsement IMT – 16 is to be used.

3. In respect of all classes of vehicles: For paid drivers, cleaners and conductors.

4. Motorised Two Wheelers with or without side car (used for hire or reward): For unnamed hirer/ driver.

Endorsement IMT – 1 is to be used.

The scope of the cover, Capital Sum Insured and the annual premium payable under this section would be as under: -

DESCRIPTION OF BENEFITS SUM	% OF CAPITAL INSURED	PREMIUM FOR EVERY UNIT OF CSI OF ' 10,000/- OR PART THEREOF (IN Rs.)		
		Pvt. Car Two Wheeler	Mot.	Com. Veh.
i) Death only	100%	5	7	6
ii) Loss of Two Limbs or sight of two eyes or one limb and sight of one eye.	100%	5	7	6
ii) Loss of one Limb or Sight of one eye.	50%	5	7	6
iii) Permanent Total Disablement from injuries other than named above.	100%	5	7	6

4. It is clearly mentioned in India Motor Tariff under GR-36 that this personal accident cover is available to the owner of the insured vehicle holding an effective driving licence. Anybody driving the vehicle with or without permission of the owner cannot be taken as owner-driver. The policy of insurance company is contractual. The compensation of Rs. 1,00,000/- was not payable to Respondents No.1 to 3.

5. The impugned order cannot be sustained and the Insurance Company cannot be made liable to pay the compensation.

6. The Appeal is allowed and the impugned order is set-aside. The amount of Rs. 1,00,000/- along with interest, if any, and the statutory amount shall be refunded to the Appellant Oriental Insurance Co. Ltd.

ILR (2012) II DELHI 404
W.P. (C)

RAJINDER SINGH ....PETITIONER

VERSUS

DTC & ORS. ....RESPONDENTS

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

W.P. (C) NO. : 2744/2011 DATE OF DECISION: 30.01.2012

CCS (Pension) Rules, 1972—Rule 9—Petitioner appointed as Security Guard with Respondent Delhi Transport Corporation (DTC) was promoted as Havaldar and then to the post of Assistant Security Inspector (ASI)—He finally retired after attaining age of superannuation and all his retiral benefits were released to him—After about 7 months of retirement, charge sheet was issued to petitioner seeking explanation from him that why proceedings should not be initiated against him for producing forged educational documents at time of his promotion as ASI—Petitioner conceded that certificate produced by him showing he had passed High School Examination on basis of which he was promoted as ASI was forged but challenged issuance of charge sheet against him as being time barred, Also the period of limitation to initiate the proceedings was 4 years—Tribunal observed, Rule 9 (2)(b)(ii) of Pension Rule prescribing limitation of 4 years did not apply as it did not amount to misconduct and delinquency in performance of his duty, but, also held that his promotion was nonest and set aside his promotion as ASI—Petitioner challenged said order—Held:- When the appointment is obtained by fraud, even if the incumbent had worked for number of years that would not be a mitigating circumstance and such an appointment which is null and void, can

always be terminated—However, finding of the Tribunal that act of seeking promotion by fraud is not a misconduct was set aside and also observed—Departmental proceedings could be initiated when fraud came to notice of Respondents and they should have acted promptly to serve charge sheet before retirement of petitioner—Since misconduct happened more than four years before the institution of departmental proceedings & had become time barred—Departmental proceedings quashed.

This reasoning of the Tribunal appears to be ill founded. We fail to appreciate as to how the act of securing promotion by fraud is not a misconduct in the performance of his duties. If this reasoning is accepted then it is not misconduct at all. However, it is obviously wrong. The petitioner wanted promotion and for this purpose, he submitted forged certificate. This would naturally be an act in the course of employment. No doubt, the event had occurred 24 years ago, at the same time, the DTC came to know thereof well in time when the petitioner was in the employment. He was to retire on 31st July, 2009. The complaint was received on 11th July, 2008. We do not know as to when the action was taken on the basis of this complaint and matter was referred to the Board of Higher Secondary Examination, U.P. for verification as that date is not available on record. It was well within the knowledge of the DTC that the petitioner is going to retire on 31st July, 2009. Therefore, they have not acted on the said complaint immediately. Even if we presume that it was so done, the DTC got the information from the Board on 27th July, 2009, there were still four days for the petitioner to retire. The DTC should have known the rigors of Rule 9. The departmental proceedings could always be instituted while he was in service. Even for an act which occurred 24 years ago as the DTC got the information about the forgery only in the year 2008 and which was verified in July, 2009. Therefore, the DTC should have acted with promptness to serve the chargesheet before the retirement of the petitioner and should have realized that

once it is not done and the petitioner is allowed to retire then limitation of four years would become applicable as the event took place more than four years before the institution of the departmental proceedings. The DTC thus allowed this situation to happen for which it is to blame itself. The petitioner has now retired. We are of the opinion that substantial justice has already been done by treating his promotion to the post of ASI as null and void and treating him to have retired from the post of Havaldar. No doubt for such an act, the petitioner should have been punished as well. However, when law of limitation becomes applicable, the action now taken is clearly time barred. In effect, we have no option but to quash the said action. **(Para 13)**

Important Issue Involved: When the appointment is obtained by fraud, even if the incumbent had worked for number of years that would not be a mitigating circumstance and such an appointment which is null and void can always be terminated.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONERS : Mr. Kishore Kumar Patel, Advocate.

FOR THE RESPONDENTS : Ms. Saroj Bidawat, Advocate with Mr. J.S. Bhasin and Ms. Rashmi Priya, Advocates for the Respondent.

CASES REFERRED TO:

1. *Regional Manager, Central Bank of India* vs. *Madhulika Guruprasad Dahir and others,* (2008) 13 SCC 170.
2. *Raju Ramsing Vasave* vs. *Mahesh Deorao Bhivapurkar and others,* JT 2008 (9) SC 445.
3. *A.P. Public Service Commissioner* vs. *Koneti Venkateswarulu and other,* (2005) 7 SCC 177.
4. *Union of India and another* vs. *J.P. Sharma,* (Writ Petition (C) 6465/2003).

RESULT: Writ petition partly allowed.

A.K. SIKRI, ACTING CHIEF JUSTICE

1. The petitioner herein was appointed as Security Guard on 8th November, 1974 with the respondent Delhi Transport Corporation (DTC). The petitioner was promoted as Havaldar on 4th February, 1983 and thereafter got promoted to the post of Assistant Security Inspector (ASI) on 25th June, 1986. In that position he retired on 31st July, 2009 after attaining the age of superannuation. On 1st September, 2009 he was paid his gratuity and other retiral benefits were released to him on 22nd September, 2009. However, chargesheet was issued to him on 23rd February, 2010 i.e. after about seven months from the date of his retirement asking him to explain why proceedings should not be initiated against him under the CCS (Pension) Rules, 1972 for producing forged educational documents at the time of his promotion.

2. It so happened that when the petitioner was still in the employment, on 11th July, 2008 a complaint was received against him that his educational certificate of having passed High School Examination in 1968 was fake. According to this certificate, he had passed High School Examination in the year 1968 from the Board of Higher Secondary Education, U.P. Inquiry was made and the said Board informed the respondent DTC vide its letter dated 27th July, 2009 that the certificate produced by the petitioner was not genuine and that the name of the candidate appearing against Sl. No. 4182 was not Rajinder Singh s/o Shri Ramphal. Instead, as per the records of the Board, it was one Shri Raghuraj Singh Bisht, s/o Sh. Chandan Singh who was given this certificate.

3. It would be pertinent to mention here that for appointment to the post of Security Guard to which post the petitioner was initially appointed, the educational qualification required is passing of 8th Standard which qualification the petitioner possessed. Same qualification was required for promotion to the post of Havaldar. Therefore, upto this stage, there was no issue. However, the minimum qualification prescribed for promotion to the post of ASI is matric/high school. At the time of promotion to this post, the petitioner had produced the aforesaid certificate showing that he had passed the High School Examination. On this basis he got the promotion. However, now he admits that he did not possess the said qualification and during the course of argument before the Tribunal as

well, he conceded that the certificate produced by him was forged.

4. Notwithstanding the aforesaid position, the petitioner challenged the issuance of chargesheet on technical grounds. His submission was that the certificate was given to the authorities in the year 1986 when he was promoted to the post of ASI. Thus, at the time when he was served with the chargesheet on 23rd February, 2010 there was a delay of 24 years and it was issued after he retired on 31st July, 2009. Therefore, as per the provision of Rule 9 (2)(b) (ii) of the Pension Rule, 1972, no action could be taken against him in respect of the aforesaid even if it occurred 24 years ago, as the limitation provided by that Rule is 4 years. He had relied upon the judgment of this Court in **Union of India and another Vs. J.P. Sharma,** (Writ Petition (C) 6465/2003) to buttress his submission on purported time barred action.

5. The Tribunal has not accepted this plea of the petitioner holding that limitation of four years prescribed in the aforesaid Rule would not apply in the facts and circumstances of this case because the departmental proceedings have not been initiated against the petitioner for any misconduct and delinquency in the performance of his duties and therefore, limitation prescribed in Rule 9 (2)(b) (ii) of the Pension Rule would not apply. The Tribunal held that the promotion to the post of ASI is procured on the basis of false educational certificate which amounts to fraud. Such promotion is nonest and, therefore, the Tribunal has set aside the promotion given to the petitioner as ASI declaring the same as null and void and directed that he would be considered to have retired from the post of Havaldar. Submission in this writ petition remains the same.

6. There are two aspects of the matter which are quite distinctive. One pertains to promotion of the petitioner as ASI. The Tribunal has itself declared the same as nullity directing that the petitioner be treated retired from the post of Havaldar. In this behalf, the approach of the Tribunal is justified and does not call for any interference and in fact this part of the direction was not challenged at the time of arguments. The Tribunal has referred to the judgments of the Supreme Court in the following cases:-

(i) **Regional Manager, Central Bank of India Vs. Madhulika Guruprasad Dahir and others,** (2008) 13 SCC 170;

(ii) **A.P. Public Service Commissioner Vs. Koneti**

Venkateswarulu and other, (2005) 7 SCC 177; and

(iii) **Raju Ramsing Vasave Vs. Mahesh Deorao Bhivapurkar and others,** JT 2008 (9) SC 445.

7. In all these cases, it is held by the Supreme Court that when the appointment is obtained by fraud, even if the incumbent had worked for number of years that would not be a mitigating circumstance and such an appointment which is null and void can always be terminated. In **Madhulika's** case, the appellant was appointed to the post of Clerk w.e.f. 18th March, 1981 against a post reserved for ST category on the strength of a caste certificate issued on 4th December 1979. The Government of India issued instructions on 23rd March, 1992 to all the Public Sector Undertakings to verify the caste certificates. The Scrutiny Committee set up by the Bank initiated inquiries and in the case of the respondent, it was found that the respondent did not belong to ST category and had obtained false certificate. The services were terminated on this ground. The Supreme Court while upholding the action of the employer rejected the plea of rendering service for a long period observing that equity, sympathy or generosity had no place where the original appointment rests on a false caste certificate and such person did not deserve any indulgence of the Court. It was also held that fraud was anathema to all equitable principles and any affair tainted with fraud could not be perpetuated or saved by application of any equitable doctrine.

8. Similarly in **Raju Ramsingh Vasave** (supra) the first respondent had got appointment claiming that he belonged to ST Category which appeared to be wrong as the ST category certificate given to him was cancelled. The action was upheld on the same principle namely fraud vitiates all solemn acts, even the principles of natural justice are not required to be complied with for setting aside the same.

9. The Tribunal in this behalf has rightly remarked that promotion obtained on the basis of false education certificate is to be treated as nonest and could be set aside at any time. The petitioner could not enjoy the promotion obtained fraudulently.

10. Therefore, insofar as cancellation of promotion of the petitioner to the post of ASI and treating him to have retired from the post of Havaldar is concerned, it is justified and the direction of the Tribunal does not call for any interference. In fact, the petitioner did not even questioned the same before us.

11. The second and most vital issue challenged is about the initiation of departmental proceedings. In order to appreciate the controversy, let us first have a look into the Rule 9. It reads as under:-

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

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

"9(2)(a) The departmental proceedings referred to in sub-rule 91), if instituted while the Government servant was in service shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service.

Provided that where the departmental proceedings, if not instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President.

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

(i) shall not be instituted save with the sanction of the President,

(ii) shall not be in respect of any event which took place more than four years before such institution,

(iii) Shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made

in relation to the Government servant during his service." (emphasis added)

12. As mentioned above, as per Rule 9 (2) (b) (ii) of the Pension Rules, the Departmental Proceedings, if not instituted while the employee was in service, whether before his employment or during his employment, "shall not be in respect of any event which took place more than four years before such institution. As noted above, the Tribunal has rejected the contention of the petitioner observing that it is not a misconduct in the performance of his duties and, therefore, the aforesaid Rule does not apply. This is what the Tribunal has to say in this behalf:-

> "The departmental enquiry is for trying to secure promotion by submitting forged certificate, which is not a misconduct in the performance of his duties. In view of this, the limitation prescribed by the aforesaid rule would not apply."

13. This reasoning of the Tribunal appears to be ill founded. We fail to appreciate as to how the act of securing promotion by fraud is not a misconduct in the performance of his duties. If this reasoning is accepted then it is not misconduct at all. However, it is obviously wrong. The petitioner wanted promotion and for this purpose, he submitted forged certificate. This would naturally be an act in the course of employment. No doubt, the event had occurred 24 years ago, at the same time, the DTC came to know thereof well in time when the petitioner was in the employment. He was to retire on 31st July, 2009. The complaint was received on 11th July, 2008. We do not know as to when the action was taken on the basis of this complaint and matter was referred to the Board of Higher Secondary Examination, U.P. for verification as that date is not available on record. It was well within the knowledge of the DTC that the petitioner is going to retire on 31st July, 2009. Therefore, they have not acted on the said complaint immediately. Even if we presume that it was so done, the DTC got the information from the Board on 27th July, 2009, there were still four days for the petitioner to retire. The DTC should have known the rigors of Rule 9. The departmental proceedings could always be instituted while he was in service. Even for an act which occurred 24 years ago as the DTC got the information about the forgery only in the year 2008 and which was verified in July, 2009. Therefore, the DTC should have acted with promptness to serve the chargesheet before the retirement of the petitioner and should have realized that once

it is not done and the petitioner is allowed to retire then limitation of four years would become applicable as the event took place more than four years before the institution of the departmental proceedings. The DTC thus allowed this situation to happen for which it is to blame itself. The petitioner has now retired. We are of the opinion that substantial justice has already been done by treating his promotion to the post of ASI as null and void and treating him to have retired from the post of Havaldar. No doubt for such an act, the petitioner should have been punished as well. However, when law of limitation becomes applicable, the action now taken is clearly time barred. In effect, we have no option but to quash the said action.

14. The writ petition is partly allowed and the order of the Tribunal holding that limitation prescribed by the aforesaid Rule will not apply is set aside. As a result, OA of the petitioner is allowed to the aforesaid extent thereby quashing the impugned chargesheet dated 23rd February, 2010.

ILR (2012) II DELHI 412
W.P.(C)

HUKUM SINGH & ORS. ....PETITIONERS

VERSUS

CENTRAL PUBLIC WORKS DEPARTMENT & ANR. ....RESPONDENTS

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

W.P. (C) NO. : 137/2012 & CM NO. : 270/2012 DATE OF DECISION: 31.01.2012

CCS (CCA) Rules, 1965—Rule 10—Fundamental Rules, 1922—Rule 54B—Petitioner challenged their 25 years long continued suspension by filing O.A. before Tribunal—Respondent contested it alleging that it was

time barred—Tribunal though set aside their suspension but declined to grant them back wages—Aggrieved petitioners challenged said order by way of writ petition—They urged, even though Respondents withdrew their dismissal, however, even after lapse of 27 years they were neither reinstated nor any departmental proceedings were initiated against them so they were entitled for back wages—Held:- The Government servant whose suspension is revoked, is not entitled to get full back wages on reinstatement as an absolute right.

Fundamental Rule 54-B contemplates that when a Govt. servant is reinstated then the competent authority who ordered the said reinstatement shall consider and make a specific order regarding the pay and allowance to be paid to the Govt. servant for the period of suspension ending with the reinstatement and also determine whether or not such period should be treated as spent on duty. Sub Rule (3) of the said Rule contemplates that when the competent authority who ordered the reinstatement is of the opinion that suspension was wholly unjustified, subject to sub Rule (8), such an employee may be paid the full pay and allowance to which he would have been entitled had he not been suspended. The said rules also contemplates that if the reinstating authority is of the opinion that if the proceedings had been delayed due to reasons directly attributable to the Govt. servant, it may after giving an opportunity to such an employee and after considering his representation, pass such order for such amount, not being the whole amount as it may determine. **(Para 14)**

Important Issue Involved: The Government servant whose suspension is revoked, is not entitled to get full back wages on reinstatement as an absolute right.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. A.K. Bajpayee, Mr. G.K. Chauhan & Mr. M.F. Khan, Advocates.

FOR THE RESPONDENTS : Mr. R.N. Singh & Mr. A.S. Singh, Advocates.

CASES REFERRED TO:

1. *Jaipur Vidyut Vitran Nigam Ltd. & Ors.* vs. *Nathu Ram,* 2010 (1) SCC 428.
2. *Hukum Singh* vs. *Central Public Works Department,* OA No.1328 of 2010.
3. *Hira Lal* vs. *DDA & Ors.,* 1995 (2) AD (Del) 466.

RESULT: Petition dismissed.

ANIL KUMAR, J.

1. The petitioners have challenged the order dated 22nd September, 2011 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in OA No.1328/2010, titled as **'Hukum Singh & Ors. v. Central Public Works Department & Anr.'** declining to grant them back wages while setting aside their suspension order dated 4th October, 1986, as the order was challenged by the petitioners after a lapse of about 25 years without disclosing any reason. However the Tribunal did direct the respondents to treat the period of suspension as period spent on duty for the purpose of pensionary benefits but not for any other purpose.

2. Brief facts to comprehend the controversies raised by the petitioners are that they were working as gardeners with the Horticulture Department of Respondent no.1, when at the relevant time since they were members of a Union which was on strike, according to the petitioners, the Management had falsely alleged that the petitioners had beaten up their superior which had led to the filing of an FIR against them. Petitioners further disclosed that in the said criminal case against them, the Metropolitan Magistrate by order dated 26th March, 1988 sentenced the petitioners to undergo imprisonment for three months for the offences punishable under Sections 186 & 335 of Indian Penal Code

and four months for the offence punishable under Section 332 of the Indian Penal Code. The petitioners thereafter, also preferred an appeal against their conviction by order dated 26th March, 1988 being Criminal Appeal No.70/1985 which was partly allowed and the sentence of four months under Section 332 of the Indian Penal code was modified to imprisonment for three months. However, the sentence of three months for the offences punishable under Sections 186 & 335 of the Indian Penal code was maintained.

3. Pursuant to their conviction, the petitioners were dismissed from the service by order dated 24th March, 1986 w.e.f. 15th March, 1986. The order of dismissal was, however, superseded by another order dated 4th October, 1986, on account of a settlement arrived at between the Union and the respondents, whereby instead of dismissal from service, the petitioners were deemed to have been placed under suspension w.e.f. 15th March, 1986 till further orders.

4. Meanwhile the petitioners had also filed a revision petition being Criminal Revision No.76/1986 on 17th March, 1988 against the order passed in the criminal appeal No.70/1985 modifying their sentence to three months for all the offences under Sections 332, 335 & 186 of the Indian Penal Code had. In the said criminal revision petition, the sentence was suspended by order dated 1st April, 1986 though the criminal revision petition remained pending in the High Court. The criminal revision petition was finally decided on 29th May, 2007 holding that it would be appropriate to explore the possibility of placing the petitioners on probation. Consequently, the notices were issued to the probationer officers. Considering the various relevant factors, the Court had granted the benefit of probation to the petitioners under the provisions of the Probations of Offenders Act, 1958 and the petitioners were released on probation for a period of six months by order dated 29th May, 2007.

5. On being granted probation the petitioner filed their representations before the Deputy Director, Horticulture requesting for their reinstatement in their services with full back wages. The petitioners even followed up their representations with legal notices to the respondent no.1 on 9th March, 2009, who thereafter received a reply dated 17th April, 2009 from the respondents stating that their reinstatement would not be possible.

6. Since the suspension of the petitioners had continued for a long time, they challenged their continued suspension by filing an original

application being OA No.1328 of 2010, titled as **'Hukum Singh v. Central Public Works Department',** contending inter-alia that since they had been released on probation, they should be reinstated in service instead of still continuing under suspension and receiving subsistence allowances. It was further contended that even though the respondents had withdrawn their dismissal, however, even after a lapse of 27 years, they were neither being reinstated in the service nor were any departmental proceedings initiated against them, without any justifiable reason.

7. Before the Tribunal, the application was contested by the respondents on the ground that the application is barred by limitation besides other pleas that the application was not in accordance with the rules and that the Central Public Works Department could not be sued through the Deputy Director, Horticulture.

8. The respondents had also disclosed that the petitioners are still under suspension and that they are in the habit of breaking the conduct rules and Govt. directions. It was also pointed out that one of the petitioners had even contested the Lok Sabha Election as a candidate of a political party and consequently had violated the provisions of the CCS(Conduct) Rules, 1964. The respondents further disclosed that the Deputy Director, Horticulture had already recommended the dismissal of the petitioners by letter bearing No.10(15)/86/HSD/EWC/126 dated 2nd August, 2000.

9. The Tribunal while considering the pleas and contentions of the parties noted that the order of dismissal was changed to that of deemed suspension w.e.f. 15th March, 1986 as per an agreement arrived between the Central P.W.D., Mazdoor Union and the Director and Directorate General of Works, Central P.W.D., New Delhi. The order dated 4th October, 1986 reads as under:-

> "In supersession to this office order No. 10(15)/86/HSD/1468-74 dated 24.3.86, Shri Karan Singh, S/o Shri Lal Singh, Mali deem to have suspended from the date of his dismissal from service i.e. 15.3.86 and will be remain under suspension till further order.
>
> These orders are issued as per agreement arrived between Central P.W.D., Mazdoor Union and Director and Directorate General of Works, Central P.W.D., New Delhi. Communicated

to this office vide his officer Memorandum No.9/10/85-EC-V dated 12.9.86."

10. The Tribunal also noticed that after the suspension order dated 4th October, 1986, no disciplinary proceedings were initiated against the petitioner. Rather the subsistence allowances had been paid to the petitioners for a period of 25 years without taking any work from them. The Tribunal also observed that despite the recommendation by the Deputy Director, Horticulture on 2nd August, 2000 recommending the dismissal of the petitioners, some of the officers of the department had extended undue favor/benefit to the petitioners and connived with them whereby their suspension had been continued and the subsistence allowance was also paid to them continuously.

11. In the circumstances, in view of Sub Rule (vii) of Rule 10 of the CCS (CCA) Rules, 1965, the suspension of the petitioners for indefinite period was set aside by the Tribunal. However, as the petitioners had not challenged their suspension for about 25 years, nor had they disclosed any grounds or sufficient cause for not challenging their suspension for 25 years even in their original application and also noticing the fact that they continued getting the subsistence allowances for their entire period of suspension, it was directed by the Tribunal that the petitioners be reinstated. However, the back wages were declined to them, but the benefit of computing the suspension period as the period spent on duty for the purpose of pensionary benefit was given to the petitioners.

12. The Tribunal has also directed the Secretary, Ministry of Urban Development to probe into the matter and fix the responsibility upon the officers who were responsible for the payment of the subsistence allowance to the petitioners for the period of about 25 years without taking any work from them.

13. The petitioners have challenged the non-payment of the entire back wages to them by the impugned order of the Tribunal in the present writ petition on the ground that there was no fault on their part and that it was the duty of the respondents to have revoked their suspension. Though in the writ petition, the petitioners did not plead specifically that they were entitled for full back wages under Fundamental Rule 54-B, however, the learned counsel for the petitioners has contended the same during the course of the arguments. Learned counsel for the petitioners, Mr.A.K.Bajpayee, also relied on a decision of this Court in the matter of

Hira Lal v. DDA & Ors., 1995 (2) AD (Del) 466.Reliance has also been placed on **Jaipur Vidyut Vitran Nigam Ltd. & Ors. v. Nathu Ram,** 2010 (1) SCC 428.

14. Fundamental Rule 54-B contemplates that when a Govt. servant is reinstated then the competent authority who ordered the said reinstatement shall consider and make a specific order regarding the pay and allowance to be paid to the Govt. servant for the period of suspension ending with the reinstatement and also determine whether or not such period should be treated as spent on duty. Sub Rule (3) of the said Rule contemplates that when the competent authority who ordered the reinstatement is of the opinion that suspension was wholly unjustified, subject to sub Rule (8), such an employee may be paid the full pay and allowance to which he would have been entitled had he not been suspended. The said rules also contemplates that if the reinstating authority is of the opinion that if the proceedings had been delayed due to reasons directly attributable to the Govt. servant, it may after giving an opportunity to such an employee and after considering his representation, pass such order for such amount, not being the whole amount as it may determine.

15. Rule 54-B of the Fundamental Rules is as under: "F.R. 54-B. (1) When a Government servant who has been suspended is re-instated or would have been so re-instated but for his retirement on superannuation while under suspension, the authority competent to order re-instatement shall consider and make specific order- (a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with re-instatement or the date of his retirement on superannuation, as the case may be, and (b) whether or not the said period shall be treated as a period spent on duty. (2) Notwithstanding anything contained in rule 53, where a Government servant under suspension dies before the disciplinary or court proceedings instituted against him are concluded, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid. (3) Where the authority competent to order re-instatement is of the opinion that the suspension was wholly unjustified, the Government servant shall subject to the provisions of sub-rule (8), be paid the full pay and allowances to which he would have been entitled had he not been suspended: Provided that

where such authority is of the opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reason directly attributable to the Government servant it may, after giving him an opportunity to make his representation[within 60 days from the date on which the communication in this regard is served in him] and after considering the representation, if any, submitted by him direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay only such [amount (not being the whole)] of such pay and allowances as it may determine. (4) In a case falling under sub-rule (3) the period of suspension shall be treated as a period spent on duty for all purposes. (5) In cases other than those falling under sub-rules (2) and (3) the Government servant shall subject to the provisions of sub-rules (8) and (9) be paid such [amount (not being the whole) of the full pay and allowances] to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period [which in no case shall exceed sixty days from the date on which the notice has been served as may be specified in the notice. (6) Where suspension is revoked pending finalisation of the disciplinary or court proceedings, any order passed under sub –rule (1) before the conclusion of the proceedings, against the Government servant, shall be reviewed on its own motion after the conclusion of the proceedings by the authority mentioned in sub-rule (1) who shall make an order according to the provisions of sub-rule (3) or sub-rule (5) as the case may be. (7) In a case falling under sub-rule (5) the period of suspension shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if the Government servant so desires, such authority may order that the period of suspension shall be converted into leave of any kind due and admissible to the Government servant.

Note.- The order of the competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary for the grant of-

(a) extraordinary leave in excess of three months in the case of temporary Government servants; and

(b) leave of any kind in excess of five years in the case of permanent or quasi-permanent Government servant.

(8) The payment of allowances under sub-rule (2), sub-rule (3) or sub-rule (5) shall be subject to all other conditions under which such allowances are admissible.

(9) The amount determined under the proviso to sub-rule (3) or under sub-rule (5) shall not be less than the subsistence allowance and other allowances admissible under rule 53."

16. Perusal of the above mentioned rule reflects that the Govt. servant whose suspension is revoked is not entitled to get full back wages on reinstatement under the said rule as an absolute right. The rule contemplates giving a notice to the Govt. employee and considering his representation regarding the claim for full back wages and thereafter, the competent officer to pass an order in writing giving reasons as to why such amount is payable to the Govt. servant, if not the whole amount, as may be deemed fit and proper in the facts and circumstances.

17. The Tribunal has considered the case of the petitioners and has also considered the fact that the petitioners have not disclosed any cogent reasons as to why they did not challenge their suspension for almost 25 years and continued to get subsistence allowance without doing any work and without any whisper or protest regarding the violation of any right. Rather one of the petitioners even contested the Elections to the Lok Sabha. Though the respondents have contended that contesting the Election by one of the petitioners, was in violation of the provisions of CCS(Conduct) Rules, 1964, however, this Court does not have to adjudicate whether or not contesting the Lok Sabha Elections by one of the petitioner when under suspension was in violation of CCS(Conduct) Rules, 1964 or not, since in the present writ petition none of the parties have canvassed this point before this Court during the arguments.

18. Considering the facts and circumstances, this cannot be disputed that in restricting the claim for back wages what is contemplated is the consideration of the representation of the suspended employee and an order in writing giving reasons for not allowing the full back wages if that is the case. The Tribunal has held that the petitioners have not disclosed any cogent reasons for not challenging their continued suspension, while they recovered their subsistence allowance for 25 years. Neither in

the petition, nor before this Court during the arguments, has the learned counsel disclosed any grounds for not challenging the suspension order for such a long period. Therefore the only possible inference is that the petitioners were satisfied with the subsistence allowance that they received for not doing any work. In the circumstances, apparently, the petitioners are not entitled for full back wages in accordance with the mandate and requirement of Rule 54–B of the Fundamental Rules, nor have any such grounds been show by the petitioners which would show any illegality, irregularity or perversity in the order of the Tribunal declining them full back wages.

19. The precedents relied on by the petitioners are also distinguishable and do not support the pleas and contentions of the petitioners. In **Jaipur Vidyut Vitran Nigam Ltd.** (supra), the Supreme Court dealt with Regulation 41 of the Rajasthan State Electricity Board holding that when an employee who has been dismissed and thereafter reinstated, the competent authority who made the order of reinstatement shall consider the pay and allowances to be paid to the employee for the period of his absence from duty. In the first instance, the said Regulation 41 of Rajasthan State Electricity Board is not applicable to the petitioners. In any case, the case of the petitioners for the grant of full back wages has been considered by the Central Administrative Tribunal in detail and a reasoned order has been passed for denying the same. Consequently, on the basis of the ratio of the **Jaipur Vidyut Vitran Nigam Ltd.** (supra), the petitioners are not entitled to claim that they should be given full back wages.

20. Similarly, the decision of this Court in the case of **Hira Lal** (supra) is also distinguishable and does not entitle the petitioner for full back wages. In the instant case, the employee had sought quashing of order dated 26th February, 1991 whereby the Delhi Development Authority had declined to treat the period of suspension as period spent on duty and also declined to give anything over and above the subsistence allowance. In the instant case, the suspension of the employee was revoked and he was reinstated on 25th July, 1989 without prejudice to the contemplated disciplinary inquiry against him, however, no order with regard to the payment of pay and allowance for the period of his suspension was passed until February, 1991 when the representation of payment of full pay and allowance was rejected. It was held that Fundamental Rule 54-B does not permit a long and inordinate delay in passing the order relating

to the payment of pay and allowance to the Govt. servant who is reinstated on revocation of his suspension. In the case of the petitioners in the present writ petition their suspension was revoked by the Tribunal by order dated 22nd September, 2011 and by the same order their entitlement under Rule 54-B of the Fundamental Rules has also been adjudicated. In the circumstances, it cannot be held that there is any unreasonable delay in deciding whether the period of their suspension until their reinstatement was to be treated as period spent on duty. It has also been held that the petitioners are not entitled for full back wages under Rule 54-B of Fundamental Rule. The Division Bench in **Hira Lal** (supra) had rather clarified that it should not be understood as holding that in every case where an order for payment of pay and allowance is not passed as soon as an order of reinstatement is made, the employee would be entitled to full pay and allowance during the period of suspension. It was held that each case depends upon its own facts and circumstances. In para 7 of the said judgment the Court had held as under:-

> "7. .....I should, however, not be understood as holding that in every case when an order for payment of pay and allowances is not passed as soon as the order of reinstatement is made, the employee would be entitled to full pay and allowances during the period of suspension. Each case must depend upon its own facts and circumstances. I would also like to clarify that I am taking this view having regard to the peculiar facts and circumstances of the instant case namely that before his reinstatement, the petitioner remained suspended for more than six years without disciplinary proceedings having been commenced against him. The provisional decision to deny him the salary during the period of his suspension was taken after eighteen months of the order of reinstatement. Therefore, the competent authority acted illegally in directing that the petitioner will not be paid full pay and allowances for the period of suspension till the disciplinary proceedings are finalized. In view of the aforesaid discussion, the writ petition succeeds and the rule is made absolute. The respondents are directed to make full payment of pay and allowances to the petitioner to which he would have been entitled for the period between September 1, 1984 to July 25, 1989, had he not been suspended, after deducting the subsistence allowance received by him during the period of

suspension. The payment to the petitioner will, however, be without prejudice to the disciplinary enquiry which has been initiated against him."

21. For the foregoing reasons and in the totality of the facts and circumstances of the case, the petitioners have not been able to show any illegality, irregularity or perversity in the order of the Central Administrative Tribunal dated 22nd September, 2011 declining the full back wages to the petitioners except the subsistence allowance already paid to them and holding that the period of suspension shall be treated as the period spent on duty, which requires any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition is without any merit and therefore, it is dismissed.

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W.P. (C)

UOI **....PETITIONER**

VERSUS

SR TEWARI AND ANR. **....RESPONDENTS**

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

W.P. (C) NO. : 4207/2011 **DATE OF DECISION: 01.02.2012**

Constitution of India, 1950—Respondent no.1 while posted as IG, North Bengal Frontier, on deputation with Border Security Force (BSF), was served with charge memo containing 8 charges followed by Departmental Enquiry into those charges—Inquiry Officer submitted report holding three charges as partially proved and 5 charges not proved—Disciplinary Authority disagreed with report holding out of five charges, two charges fully proved and one charge

partially proved and out of three charges, one charge was totally proved and for remaining charges, Disciplinary Authority concurred with findings given by report of Inquiry Officer—Whereas, Tribunal ruled, none of charges proved or partially proved against Respondent no. 1—Petitioner challenged said order of Tribunal setting aside dismissal order of Respondent no.1 and reinstating him in service with consequential benefits—It urged Respondent no.1 helped one of his native in enrollment in BSF by fraudulent means and also amended the Board proceedings by commenting upon medical fitness which he could not do—Tribunal noted that allegations were not subject matter of charge, therefore, no finding of guilt could be recorded on basis of such allegations—Held:- Inquiry Officer is not permitted to travel beyond charges and any punishment imposed on basis of finding which was not subject matter of charges is wholly illegal.

In a nutshell, the charge is that one Brijesh Kumar was appointed as Follower in BSF on the basis of a domicile certificate showing him to be a resident of PS Matigara, District Darjeeling (West Bengal), whereas actually he was a resident of Balia, District Uttar Pradesh. It is alleged that the respondent No.1 rejected the candidature of one cook, one sweeper, one water carrier and one washer man, recommended by the Board of officers, which included a medical officer, on account of their being overweight/ underweight, despite they having been found fit by the Medical Officer and Shri Brijesh who was earlier found unfit by the Recruitment Board was asked to submit an application for another medical examination in which he was declared fit and later appointed as a sweeper in BSF. The Inquiry Officer held the charge to be not proved. The Disciplinary Authority, however, held the charge to be partly proved and recording the following disagreement note in this regard:-

"The service records of Shri Brijesh Kumar, recruited as a Follower by the Charged Officer show his domicile

as Village Ujanu Shivnagar, Dist. Darjeeling. The residents of North Bengal Districts and Sikkim are only eligible to appear before the Recruitment Board for selection to the post of Followers. The domicile certificate of Shri Brijesh Kumar issued by the SDO, Silliguri shows his domicile as Village-Digilijote, PO-Kadamatala. Neither any examination of SDO staff, Siliguri, nor steps were taken by the Charged Officer for verification of the records of the SDO, Silliguri to confirm the genuineness of domicile of Shri Brajesh Kumar. During the inquiry, the prosection did not produce the evidence to show that Shri Brajesh Kumar belongs to Balia, in U.P."

The Tribunal noted that the Presenting Officer had not pressed this charge and hence, there could be no reason or even justification to examine the evidence and hold the charge to be proved or partly proved. It was further observed that the allegations on which the charge was held to be proved, were not the subject matter of the charge and, therefore, no finding of guilt could have been recorded on the basis of such allegations. The Tribunal, in taking this view relied upon the decision of Supreme Court in **M.V. Bijlani v. Union of India & Ors.:** AIR 2006 SC 3475, where the Apex Court, inter alia, observed as under:-

".....He cannot enquire into the allegations with which the delinquent officer has not been charged with....."

h **Director (Inspection & Quality Control) Export Inspection Council of India and Others v. Kalyan Kumar Mitra & Others:** 1987 (2) CLJ 344 it was held that the Inquiry Officer is not permitted to travel beyond the charges and any punishment imposed on the basis of the finding which was not the subject matter of the charges is wholly illegal.

The ratio of these judgments is that a person cannot be

held guilty of acts which did not form part of the charges served upon him. **(Para 27)**

Important Issue Involved: Inquiry Officer is not permitted to travel beyond charges and any punishment imposed on basis of finding which was not subject matter of charges is wholly illgal.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. M.K. Bhardwaj.

FOR THE RESPONDENT : Mr. Paras Kuhad, Sr. Advocate with Mr. Ravi Prakash, Ms. Avni Singh and Mr. Jitin Chaturvedi.

CASES REFERRED TO:

1. *Ex. Head Constable Manjeet Singh* vs. *Union of India & Ors.* 19.1.2012 in WPC 2431/2011.
2. *State of U.P. and Anr.* vs. *Man Mohan Nath Sinha and Anr.* AIR 2010 SC 137.
3. *Bongaigaon Refinery & P.C. Ltd. & Ors* vs. *Girish Chandra Sarmah:* 2007(7)SCC 206.
4. *M.V. Bijlani* vs. *Union of India & Ors.:* AIR 2006 SC 3475.
5. *Bombay* vs. *Shahsi Kant S. Patil:* 2001 (1) SCC 416.
6. *Yoginath D. Bagde* vs. *State of Maharashtra & Anr.:* (1999) 7 SCC 739.
7. *Zunjarrao Bhikaji Nagarkar* vs. *Union of India:* 1999 (7) SCC 409.
8. *Bank of India* vs. *Degala Suryanarayana:* 1999 (5) SCC 762.
9. *Punjab National Bank and Ors.* vs. *Kunj Behari Mishra* (1998) II LLJ 809 SC.
10. *Union of India* vs. *G. Gunayuthan:* 1997 (7) SCC 463.

11. *Union of India and Anr.* vs. *B.C. Chaturvedi* (1995) 6 SCC 750.

12. *State of Punjab* vs. *Ram Singh Ex-Constable* : 1992 (4) SCC 54.

13. *Director (Inspection & Quality Control) Export Inspection Council of India and Others* vs. *Kalyan Kumar Mitra & Others:* 1987 (2) CLJ 344.

14. *Bareilly Electricity Supply Co. Ltd.* vs. *The Workmen and Ors.* (1971) II LLJ 407 SC.

15. *State of A.P.* vs. *Sree Rama Rao* AIR 1963 SC 1723.

RESULT: Petition partially allowed.

V.K. JAIN, J.

1. This writ petition is directed against the order dated 11th February, 2011, passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as "the Tribunal") in OA No. 3234/2009, whereby the order dated 08th September, 2010, dismissing respondent No. 1 from service, was set aside and he was reinstated in service with consequential benefits.

2. The respondent No.1, an officer of Andhra Pradesh Cadre of Indian Police Service joined Border Security Force (BSF) on deputation and was posted as IG, North Bengal Frontier. A charge memo containing as many as eight charges was issued to him on 23rd March, 2007, followed by a Departmental Enquiry into those charges. The Inquiry Officer, vide report dated 23rd December, 2008, held that Charges No. III, IV and VI were partly proved, whereas the Charges No. I, II, V, VII and VIII were not proved. Even with respect to charges which, in the opinion of the Inquiry Officer, were partly proved, no mala fides on the part of the respondent was involved. The Disciplinary Authority, however, disagreed with the report of the Inquiry Officer in respect of Charges I to V and was of the opinion that Charges No. I to IV were fully proved, whereas Charge No. 5 was partly proved. As regard Charge No. 1, CVC as well as UPSC were of the view that the same stands established, whereas the Inquiry Officer was of the opinion that the same does not stand proved. In respect of Charges No. III, IV and VI, CVC as well as UPSC concurred with the Disciplinary Authority. Regarding Charge No. V, no observation was made by UPSC, whereas CVC was of the opinion

that it does not stand established.

3. With respect to the power of the Tribunal or for that matter this Court to interfere with the finding recorded in a Departmental Inquiry, this Court in a recent judgment dated 19.1.2012 in WPC 2431/2011 **Ex. Head Constable Manjeet Singh v. Union of India & Ors** inter alia observed as under:

> "It is by now a settled proposition of law that the Court, while considering challenge to the orders passed in disciplinary proceedings does not act as an Appellate Authority and does not reassess the evidence led in the course of the inquiry nor can it interfere on the ground that another view in the matter is possible on the basis of the material available on record. If the Court finds that the inquiry has been conducted in a fair and proper manner and the findings rendered therein are based on evidence, the adequacy of evidence or the reliability of the evidence are not the grounds on which the Court can interfere with the findings recorded in the departmental inquiries. It is not open to the Court to interfere with the finding of fact recorded in such inquiries unless it is shown that those findings are based on 'no evidence' or are clearly perverse. A finding would be considered to be perverse if no reasonable person could have recorded such a finding on the basis of material available before him. Another ground on which the Court can interfere with the findings recorded in a disciplinary proceeding is violation of principles of natural justice or statutory rules or if it is found that the order passed in the inquiry is arbitrary, mala fide or based on extraneous considerations. This proposition of law has been reiterated by Supreme Court in a number of cases including **Union of India v. G. Gunayuthan:** 1997 (7) SCC 463, **Bank of India v. Degala Suryanarayana:** 1999 (5) SCC 762 and High Court of Judicature at **Bombay v. Shahsi Kant S. Patil:** 2001 (1) SCC 416."

4. In **State of A.P. v. Sree Rama Rao** AIR 1963 SC 1723, a three Judges Bench of Supreme Court held as under:

> "The High Court is not constituted in a proceeding under Article 226 of the Constitution as a court of appeal over the decision of the authorities holding a departmental enquiry against a public

servant: it is concerned to determine whether the enquiry is held by an authority competent in that behalf, and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Where there is some evidence, which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence. The High Court may undoubtedly interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. But the departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there be some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226 of the Constitution."

In **State of U.P. and Anr. v. Man Mohan Nath Sinha and Anr.** AIR 2010 SC 137 Supreme Court held as under:

"The legal position is well settled that the power of judicial review is not directed against the decision but is confined to the decision making process. The Court does not sit in judgment on merits of the decision. It is not open to the High Court to re-appreciate and reappraise the evidence led before the Inquiry Officer and examine the findings recorded by the Inquiry Officer as a court of appeal and reach its own conclusions. In the instant case, the High Court fell into grave error in scanning the evidence as if it was a court of appeal."

In **Union of India and Anr. v. B.C. Chaturvedi** (1995) 6 SCC 750, a three-Judges Bench of Supreme Court, *inter alia*, observed as under:-

"Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/ Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held that proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case."

5. Since the main contention of the learned senior counsel before us was that this was a case of no evidence at all, it would be appropriate for us to set out the charges which were served upon the respondent No.1 and then consider whether there was some evidence, on the basis of which the respondent No.1 could be held guilty of one or more of these charges. The following were the Articles of Charges against the respondent No.1:-

Article of Charge

Statement of Imputation of misconduct or misbehaviour in support of charge

Article-I That the said Shri S.R. Tiwari, while functioning as Inspector General, Ftr. Hqrs North Bengal, during the period from 23.06.2005 to 14.11.2006, indulged in living with a lady by name Smt. Chandrakala, not being his legally wedded wife.

In the discreet inquiry conducted by the ADG (East), BSF, it was found that Shri S.R. Tiwari and Smt. Chandrakala were living as husband

and wife. Smt. Chandrakala ordinarily lives in Hyderabad, but periodically visited Ftr. Hqrs Kadamtala where she used to stay with Shri Tiwari. Shri Tiwari admitted that he is legally wedded to her and he has a son and a daughter by her. Shri Tiwari also admitted that his first wife is alive and he has one son and two daughters by her. Certain instances, which prove that Smt. Chandrakala stayed with Shri S.R. Tiwari at Ftr. HQ BSF North Bengal as his wife are as under:-

(a) She presided over the welfare meeting of 118 Bn BSF which is located in Kadmtala itself on 24.04.2006. Since such functions are official in nature, therefore only lady wives of Jawan and officer participate in these functions. Smt. Chandrakala presided over above function in the capacity of lady wife of Shri S.R. Tiwari. (b) In the inaugural ceremony of PCO at Ftr. HQ BSF N/Bengal, a Pooja was performed as per Hindu ritual. In this Pooja, Shri S.R. Tiwari and Smt. Chandrakala participate as husband and wife. (c) In the Independence Day ceremony on 15.08.2006 celebrated at Ftr. HQ BSF N/Bengal, Smt. Chandrakala participate in all official functions as wife of Shri S.R. Tiwari. She accompanied Shri S.R. Tiwari to the BSF Hospital and distributed gifts to BSF personnel who were admitted in the hospital

Article-II That during the aforesaid period and while functioning in the aforesaid office, the said Shri S.R. Tiwari, deliberately allowed unauthorized interference by Smt. Chandrakala living with him in official functioning of North Bengal Ftr., causing premature release of four Constables from the Quarter Guard.

As learnt by the ADG (East) in the discreet inquiry, Shri S.R. Tiwari visited SHQ CBR from 22.04.2006 to 23.04.2006. During the above visit, Smt. Chandrakala accompanied him. While the officer was busy in official work, Smt. Chandrakala accompanied by lady wives of the local officers unauthorizedly visited the Quarter Guard of 142 and 182 Bns BSF. There, she spoke to BSF personnel in prison and got premature release of Cost Babu Lal of 142 Bn BSF, Ct. Raja Pal, Ct. Gayan Singh Pawak and Ct. Dalbir Singhùall of 182Bn BSF serving various prison terms, by using her influence. Subsequently, the IG formalized their release by condoning the remaining period of the prison terms.

Article-III That during the aforesaid period and while functioning in the aforesaid office, discharged the discipline propriety and guidelines on

the subject in complete disregard to the rules and without jurisdiction, reviewed punishment awarded and mitigated the sentence awarded to No. 86161306 Const. Prakash Singh by Ftr. Hq. BSF South Bengal.

As per official record No. 86161306 Ct. Prakash Singh, who was a L/NK under 08 Bn BSF, was reduced to the rank of Ct. w.e.f. 16.07.2001 having been found guilty by a Force Court for having "used insubordinate language to his superior officer." On the basis of a prayer submitted by the Const. on 17.05.2006, Shri Tiwari, commuted the sentence "to forfeit pay and allowances for a period of 14 days w.e.f. 17.07.2001 to 30.07.2001" under FTR. HQ NB Order No. 4638-45 dated 06.06.2006. During the time of award for the punishment, the Const was serving under IG SB, whereas the IG NB did not have the jurisdiction to review the punishment awarded to the said Const, grant of Rank Pay also, from same date.

Article-IV That during the aforesaid period and while functioning in the aforesaid office, showed favoritism and manipulated the selection of Headmaster in BSF Primary School Kadmatala even though the candidate did not possess essential qualification and was not eligible.

As alleged by Smt. Sharmistha Saha, Primary Teacher, BSF Primary School Kadamtala, Shri Tiwari had selected and appointed Shri S.S. Majumdar as Headmaster of BSF Primary in complete violation of the rules. Shri Majumdar did not even meet the eligibility standards for the post. While one of the essential qualifications for the post is Graduation with 55 per cent marks in aggregate, Shri Majumdar had secured only 43 per cent marks in the B.Sc examination. The matter was enquired into and the ADG (East), BSF directed Shri Tiwari to cancel the appointment order and arrange for appointment of a qualified person to the post of Headmaster, as per the recruitment rules after issuing fresh advertisement for the purpose. Shri Tiwari instead of issuing formal cancellation order, waited for Shri Majumdar to resign from the post on 03.04.2006. On the same day Shri Tiwari appointed him as a regular primary teacher w.e.f the date he joined as Headmaster of the School. Shri Majumdar was earlier engaged as a temporary teacher. Shri Majumdar was appointed as a regular teacherin the pay scale of Rs 4500-125-7000 in violation of the policies/instructions circulated by the FHQ. No Selection Committee was constituted in regard to the appointment of Shri Majumdar as a regular teacher, nor was the approval of the FHQ taken. Besides Shri Majumdar

had secured only 43 per cent marks in his B.Sc examination, whereas one of the essential qualifications for such appointment is 45 per cent marks in aggregate in the degree examination.

Article-V

That during the aforesaid period and while functioning in the

In one of the anonymous/pseudonymous petitions

aforesaid office, helped one person of his native Distt. Balia, UP in enrolment in BSF by fraudulent means and also amended the Board proceedings by commenting upon medical fitness which he was not qualified to do.

against the IG received at HQ, ADG (East) BSF, following five persons were allegedly recruited as followers, based on fabricated domicile certificates:- (a) Shri Brijesh Kumar, S/o Girja Prasad, Vill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling (b) Shri Panchanan Ram S/o Ganga Ram, Vill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling (c) Shri Munna Prakash Vill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling (d) Shri Ashwani Kumar Singh, S/o Ram Nath Singh, Vill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling (e) Shri Om Prakash Ram, S/o Kasnji Ram, Vill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling However, it was found that only Shri Brijesh Kumar, S/o Girja Prasad, Vill-Ujanushivnagar, PO-Pradhannagar, PS-Matigara, Distt-Darjeeling was recruited as follower in BSF. He was recruited on the basis of domicile certificate which showed him to be a resident of PS Matigara, Distt-Darjeeling (West Bengal), whereas, actually he hails from Balia Distt. of Uttar Pradesh. The recruitment of followers was held at BSF Campus Radhabari (Jalpaiguri, West Bengal) w.e.f 12.012.2005 to 16.12.2005, the Board of Officers, which included a Medical Officer, submitted the proceedings of the recruitment for approval by the IG, NB. Shri S.R. Tiwari in the capacity of the IG of the Ftr rejected the candidature of one cook, one sweeper, one water carrier, one washer man on the basis of overweight/underweight, which he was not competent to do, whereas these candidates were found fit by the Medical Officer of the recruitment board. In place of these rejected candidates, Brijesh Kumar, S/o Girja Prasad, was asked to submit an application for re-medical since he was earlier found unfit by the recruitment board. The re-medial was carried

out by Ftr FQ BSF N/Bengal itself and Shri Brijesh Kumar, S/o Girja Prasad was found medically fit and thus he was issued an appointment order to join BSF as sweeper.

Article-VI

That during the aforesaid period and while functioning in the aforesaid office, Shri S.R. Tiwari had allegedly misused government vehicle, Arms and ammunition and

Vehicle No. WB-74J-4337 (Bolero) was detailed to proceed to THQ 89 BN BSF, which was located in Patna (Bihar). No. 89298601 CT/DVR Ajit Singh of 89 BN BSF along with two

BSF personnel at the time of marriage of his son that was solemnized on 15 February, 2006, at his native place in Balia, UP.

others at FTR HQ BSF N/Bengal left FTR HQ BSF N/Bengal in above vehicle for THQ 89 BN BSF. However the vehicle did not report to THQ 89 BN BSF and instead went to the home place of Shri S.R. Tiwari, located in Balia Distt. of U.P. As brought out in the discreet enquiry by the ADG (East), BSF, the officer has admitted that, he did take the Mahindra Bolero Van of his FTR to his native place during his visit to organize his son's marriage, which was solemnized on 15.02.2006. The officer further stated that he has been declared a "Y" category protectee due to threats from Naxalites. He had taken the vehicle as his escort from Patna to Balia, as he had to travel through Naxalite-infested areas of Bihar. On asking for the copy of the order vide which he was declared a "Y" category protectee, Police intelligence Deptt, AP Hyderabad sent the same through FAX. The Police authority however, clarified that such protectees are ordinarily provided with a house guard and 2 PSOs. Some of them however are also provided with BP Vehicles. No such order has been issued by the BSF authorizing Shri Tewari to use vehicular escort during his private journeys. In any case movement of vehicles beyond the IG's functional jurisdiction, requires the approval of HQrs, which was not taken.

It was further gleaned in the discreet

inquiry that Const. Anil Kumar accompanied the IG to his native place from 08.02.2006 to 21.02.2006 during the latter.s visit to organize his son's marriage. 50 rounds of 9 mm were issued to him from the Ftr.

Kote. Shri Tewari did not admit that Const Anil Kumar had fired some rounds during the ceremony, as part of the fanfare. Actually 41 rounds were fired in such firing and only 9 live rounds were returned to the Kote on his return from tour. The shortage has apparently been made up by manipulating the records of ARCF.

Article-VII That during the aforesaid period and while functioning in the aforesaid capacity, kept two Constables of 47 BN BSF and two Constables of 122 BN BSF at Hyderabad. BSF has no unit in Hyderabad. Apparently the Constables were used for private work of Shri Tiwari.

Information was received at Hq. ADG (East) that Shri S.R. Tiwari had been keeping two Constable of 47 Bn BSF and two Constables of 122 BN BSF at Hyderabad unauthorizedly beyond the jurisdiction of BSF deployment. It was verified during discreet enquiry that No. 87102682 Const B.L. Kamalaiah of 47 Bn BSF and No. 93009473 Const D.V. Ramana of 47 Bn BSF were called to the N/Bengal Ftr HQrs on 06.07.2005 and 25.10.2005 respectively. Both of them were sent to Hyderabad where Const B.C. Kamalaiah stayed up to 02.12.2005 and Const. D.V. Ramaiah till 19.04.2006. Further No. 97009634 Const Sayed Ahmed of 122 BN BSF was sent to the residence of Shri S.R. Tiwari at Hyderabad in the month of August, 2006 and he remained there till 15.12.2006.

It also came to the notice that, No. 99101220 Const T. Bhaskar of 122 BN BSF as sanctioned 15 days C/L w.e.f. 01.08.2006 to 07.09.2006 and was directed by Shri S.R. Tiwari to report his house at Hyderabad after termination of his leave. However, the parent unit of the individual i.e. 122 BN BSF was not informed accordingly. As a result, when the individual did not report for his duty in time, 122 BN BSF sent letters at the home address of Const T. Bhaskar to rejoin his duty without any delay. Const. T. Bhaskar in turn reported the matter to Shri S.R. Tiwari. In order to regularize his OSL period, Ftr HQ BSF N/Bengal informed 122 BN BSF on 14.01.02006 that, Const T. Bhaskar joined the Recruitment Board of North Bengal Frontier which was in Bangalore in connection with the recruitment of Constables in southern States on expiry of his leave. BSF has no unit in Hyderabad, Apparently the constables were used for private purposes of Shri Tiwari.

Article-VIII

That during the aforesaid period and while functioning in the

aforesaid office, discharged the discipline propriety and guidelines on the subject and indulged in favoritism/nepotism by way of attaching Const. Prakash Singh with Ftr. Hq. N/Bengal despite contrary remarks of the PSO, N/Bengal Ftr. On the subject which were based on

As per the official documents, Cost. Prakash Singh was posted to NB Ftr. by Shri Tiwari over-ruling the objection of the PSO. The PSO had objected to posting of Const. Prakash Singh to Ftr. Hq. N/Bengal based on latter's pas record.

the Constable's past record.

Article-I

6. A perusal of the Article of Charge and the Statement of Imputation of Misconduct or misbehaviour in support of the charge would show that the allegation against the respondent No.1 was that he and Smt. Chandrakala were living as husband and wife. This was also the case of the Department that the respondent No.1 had admitted being married to Chandrakala and having a son and a daughter by her. This charge was also sought to be proved from the circumstances (a) Chandrakala presided over the welfare meeting of a battalion of BSF on 24.04.2006, in the capacity of a wife of the respondent No.1; (b) in the inaugural ceremony of a PCO at FTR. Hqr. BSF North Bengal, the respondent No.1 and Smt. Chandrakala participated in a *pooja* as a husband and wife and (c) during Independence Day ceremony in the year 2006, Smt. Chandrakala participated in the official function as the wife of the respondent No.1 and accompanied him to a hospital, where she distributed gifts, to the BSF personnel admitted in the hospital. As noted earlier, the Inquiry Officer held the charge to be "not proved". In the Disagreement Note, the Disciplinary Authority, inter alia observed as under:-

> "During the preliminary inquiry Shri Tiwari has admitted to the allegation but claims that he is legally wedded to Smt. Chandrakala and has a son and daughter by her. He also admitted that his first wife is alive and he has a son and two daughters by her.
>
> The Inquiry Officer has failed in the charge sheet. The circumstantial evidence of photographs and CDs reveal that Smt. Chandrakala was attending the function as a prominent person in the life of the C.O. She was extended courtesies as given to the spouse of the Charged Officer during the function. During the

function she was addressed as Mrs. Tiwari/Madam Tiwari/First lady by different persons during their speeches. This was never corrected by the Charged Officer or by Smt. Chandrakala at any point of time.

Disciplinary Proceedings are quasi-judicial proceedings and Evidence act does not apply to such proceedings. The guiding principle is to take into account the evidence in such disciplinary proceedings on preponderance of probability. In view of the above, this charge against the CO stands proved."

7. Admittedly, no evidence was led by the Department to prove that the respondent No.1 had admitted, in the course of preliminary inquiry, that he had married Chandrakala and has a son and a daughter by her. In fact, as noted by the Tribunal, preliminary inquiry report was not even a listed document and the author of the report, though listed as a witness, was not examined.

We also note that in his representation to the Disciplinary Authority, the respondent No.1 had denied having made any such admission. In view of denial by the respondent No.1, it was incumbent upon the Department to prove the alleged admission in the course of inquiry. Even if such an admission was made during the preliminary inquiry, but, was not proved in the course of the Departmental Enquiry against the respondent No.1, the alleged admission could not have been taken into consideration for holding that the charge against the respondent No.1 stands proved. If the Department was relying upon a document evidencing the admission, alleged to have been made by the respondent No.1, it was incumbent upon it to supply the copy of that document to the respondent No.1, prove that document during the course of inquiry and an opportunity was to be given to the respondent No.1 to cross-examine the witnesses with respect to such a document. No reliance could have been placed by the Disciplinary Authority on a document, copy of which was not made available to the respondent No.1 and which was not proved during the course of Departmental Enquiry.

8. As regards a CD relied upon by the Disciplinary Authority, the Tribunal has noted that no CD was ever relied upon by the Presenting Officer or the Inquiry Officer though it was listed as a document. The contents of the CD were never made known to the respondent No.1, nor was the CD opened or played in his presence. The author of the CD was

not examined. Since no such evidence was either relied upon or proved during the course of inquiry, it was not permissible for the Disciplinary Authority to take the contents of the CD into consideration for holding that the charge against the respondent No.1 stands established.

In **Bareilly Electricity Supply Co. Ltd. v. The Workmen and Ors** (1971) II LLJ 407 SC, Supreme Court, *inter alia*, observed as under:

> "Even if all technicalities of the Evidence Act are not strictly applicable except in so far as Section 11 of the Industrial Disputes Act, 1947 and the rules prescribed therein permit it, it is inconceivable that the Tribunal can act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its award on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witnesses who have executed them, if they are alive and can be produced."

The view taken by the Tribunal is therefore, in consonance with the above-referred decision.

9. As regards the photographs (Ex.S-1 and S-2), relied upon by the Department as circumstantial evidence to prove this charge, the Tribunal noted and, in our view, rightly so, that they would show Smt. Chandrakala attending various functions of BSF, but they do not indicate that she had attended those functions as the wife of IG, BSF North Bengal. The case of the respondent No.1, as disclosed in his representations to the Disciplinary Authority, was that Smt. Chandrakala was a family friend and had stayed in his house in the guest room and attended the function as a guest. As regards distribution of sweets, he had claimed in his written statement of defence, that the functions were attended by Smt. Chandrakala without his knowledge and at the behest of the wife of Commandant 118 Battalion/DIG (PSO). He also stated that some functions in the school were attended by family members of officer, jawans and civilians and being a family friend, Chandrakala also attended the function and after function at the school, he visited the hospital with 20-25 persons and other officers and almost all of them, including Chandrakala were given opportunity to distribute sweets to patients in the hospital. Therefore, the photographs (Ex.S-1 and S-2) by themselves do not indicate any relationship of husband wife between the respondent No.1 and Smt.

Chandrakala. What is important is that there is no evidence of the respondent No.1 having introduced Smt. Chandrakala to anyone as his wife. There is no evidence of anyone having addressed Smt. Chandrakala as the wife of the respondent No.1, in his presence. Obviously, if Chandrakala was not addressed as wife of the respondent No.1 in his presence, there was no occasion for him to rebut such an address. If Smt. Chandrakala accompanied the respondent No.1 to certain functions as his guest and some BSF personnel, attending those functions, merely on account of Chandrakala accompanying the respondent No.1, presumed her to be his wife, the respondent No.1 cannot be blamed for such a wrong impression in the mind of those who saw Chandrakala attending the function with him. There is no evidence of Smt. Chandrakala having presided over any function of BSF as the wife of IG, BSF North Bengal. We are in agreement with the Inquiry Officer and the Tribunal that mere attendance of some functions of BSF and distributing sweets to the patients admitted in a BSF hospital, when other persons who went to the hospital from the school where the functions were held, were also given a similar opportunity, does not prove the relationship of husband and wife between the respondent No.1 and Smt. Chandrakala. There is absolutely no evidence of Smt. Chandrakala having been given a treatment which is normally accorded to the wife of IG, BSF North Bengal, in the presence of the respondent No.1. Had that been done, it could have been said that by keeping silent, despite Chandrakala being accorded treatment and courtesies which are accorded only to the wife of the IG, BSF North Bengal, the respondent No.1 had given an impression that Smt Chandrakala was his wife and, therefore, was entitled to such a treatment.

10. Though it is alleged in the Statement of Imputation of Misconduct of Misbehaviour that the respondent No.1 and Smt. Chandrakala performed pooja as husband wife, the charge was denied by the respondent No.1 and no evidence was led during the course of inquiry, to substantiate the charge.

11. We agree with the Inquiry Officer and the Tribunal that merely on account of Smt. Chandrakala having stayed in the house of the respondent No.1 2-3 times, in the guest room, no relationship of husband and wife between the respondent No.1 and Chandrakala can be presumed, even if the wife of the respondent No.1 was not present in the house during the days Smt. Chandrakala stayed there as a guest.

12. For the reasons given hereinabove, we are entirely in agreement with the view taken by the Tribunal in respect of Article-I and hold that the Disciplinary Authority had no legally admissible evidence before it to prove this charge and the finding recorded by it, to the extent it pertains to this charge, is perverse in law, in the sense that no reasonable person, acting upon the evidence, which was produced during the course of inquiry, could have held the charge to be proved.

Article II

13. In a nutshell, the charge against the respondent No.1 under this Article is that he, acting under influence from Smt. Chandrakala, ordered premature release of Constable Babu Lal, Constable Raja Paul, Constable Gayan Singh Pawak and Constable Dalbir Singh, who were undergoing imprisonment for different terms. The Inquiry Officer held that this charge to be not proved. The Disciplinary Authority, however, recorded the following Disagreement Note with respect to this charge:-

> "The Charged Officer during the preliminary inquiry had admitted that Smt. Chandrakala accompanied him during his visit to SHQ, CBR on 22.04.2006 and 23.04.2006. He also admitted that she visited the BSF Quarter Guard where the prisoners have been kept. After her visit, four Constables were released from the Quarter Guard. Subsequently Shri Tiwari formalized their releases.
>
> The Charged Officer in his defence statement has mentioned that Smt. Chandrakala was his guest. Even if it is so, allowing a guest to visit the BSF Quarter Guard and release the prisoners and release the prisoners undoubtedly establishes interference in the official work functioning of the Charged Officer. This reflects the misconducts on the part of the Charged Officer. The I.O. has not considered this aspect in his findings. This charge against the charged Officer stands proved."

14. Admittedly, no evidence was led by the Department to prove, during the course of the Departmental Enquiry, that the respondent No.1 had in preliminary inquiry admitted that Smt. Chandrakala had accompanied him to SHQ CBR on 22.04.2006 and 23.04.2006. There is no admission on the part of the respondent No.1 that the constables were released by him on account of intervention of Smt. Chandrakala or at her instance. As noted earlier, no copy of the Preliminary Inquiry Report was supplied

to the respondent No.1 and the author of the report was not examined as a witness. Since no such admission was proved by the Department during the course of the Departmental Enquiry, it was not permissible for the Disciplinary Authority to take the alleged admission into consideration to hold the respondent No.1 guilty of this charge. We would like to note that the defence of the respondent No.1 with respect to this charge was that it were the wives of Commandant 142 Battalion and 182 Battalion, who had taken Chandrakala to their Battalion Area, including the Quarter Guard and when these ladies visited the Quarter Guard, the detainees expressed their problems to them and thereupon the wife of the Commandant agreed to look into their grievance and if possible get them released. This, according to the respondent No.1, was conveyed to him in Cooch Behar, where he at that time was, and after ascertaining details and being fully satisfied in the matter, he ordered release of these Constables and later confirmed the release in writing. He specifically stated that Chandrakala had no role to play in the premature release of the Constables and the decision was taken by him on its merits.

15. There is absolutely no evidence of Smt. Chandrakala having visited the Quarter Guard along with the respondent No.1. There is no evidence of Smt. Chandrakala having played any role in the release of these Constables on the orders of the respondent No.1. There is no evidence of the respondent No.1 having allowed Smt. Chandrakala to visit the Quarter Guard. If Chandrakala visited the Quarter Guard with the wives of other BSF officer, on their invitation, the respondent No.1 cannot be faulted for her visit. Therefore, it cannot be said that the respondent No.1 had allowed Smt. Chandrakala to visit a place which was not accessible to an outsider. In fact, the Inquiry Officer has returned a finding that Smt. Chandrakala did not speak to any officer of BSF to get these Constables released. In our view, there was no legally admissible material on record, on the basis of which, the Disciplinary Authority could have held this charge to be proved. We, therefore, agree with the Inquiry Officer and the Tribunal that this Article of Charge does not stand established against the respondent No.1. We, therefore, see no good reason to interfere with the finding returned by the Inquiry Officer and the view taken by the Tribunal with respect to this Article of Charge.

Article III

16. In a nutshell, the charge against the respondent No.1 is that he

commuted the sentence of Constable Prakash Singh, who at the time of award of punishment was serving under IG (South Bengal) and being IG (North Bengal), the respondent No.1 did not have jurisdiction to review the punishment awarded to him. The Inquiry Officer held that the charge was partly proved. The Inquiry Officer held that the respondent No.1 considered the mercy petition of a Constable, who at the time of committing the offence, was outside his jurisdiction and he was not authorized to decide that petition. He, however, on the basis of the evidence on record, felt that the decision taken by the respondent No.1 was in the larger interest of BSF. The Disciplinary Authority, however, felt that the charge stands wholly proved and recorded the following disagreement note in this regard:-

> "Shri Prakash Singh, Constable was serving under IG, South Bengal, BSF when he was awarded the punishment of reduction in rank on 16.07.2001 being found guilty by a Force Court for having used insubordinate language about his superior officers. He was later on posted on attachment basis to North Bengal Frontier, BSF in July 2005 under the command of Shri Tiwari. An officer not below the rank of DIG or the prescribed officer may review the punishment awarded to any person under whose command such person was serving at the time of conviction, as prescribed in Section 128 of the BSF Act.
>
> Shri Prakash Singh was serving under the command of IG, South Bengal at the time of his conviction (July 2001). The Charged Officer was in-charge of North Bengal Frontier, and as such he is not competent to review the punishment awarded to Shri Prakash Singh in his capacity as the Prescribed Officer. This clearly establishes misconduct on the part of the Charged Officer and this charge against him stands proved."

17. Section 128 of BSF Act, to the extent it is relevant, provides that an officer not below the rank of Deputy Inspector General, within whose command a person convicted by a Security Force Court of any offence, was at the time of conviction serving or the Prescribed Officer may pardon the person or remit the whole or any part of the punishment or mitigate the same or commute such punishment for any less punishment mentioned in the Act or release him on parole. Since Constable Prakash Singh was admittedly not working in the command of the respondent

No.1 at the time he was convicted nor is there any evidence of the respondent No.1 having been prescribed as the person who could exercise the power under Section 128 of BSF Act, the respondent No.1 was not competent in law to interfere with the sentence awarded to Constable Prakash Singh. The next question which arises is whether the respondent No.1 can be said to be guilty of 'misconduct' on account of his having exercised the power under Section 128 of BSF Act in respect of Constable Prakash Singh. The Tribunal has noted that the petition of the Constable was processed by law officer of BSF, who indicated that the respondent No.1 had the authority to commute the sentence in question and when the file came up before him for decision, there was no view to the contrary expressed by anyone on the file. The Tribunal also noted that it was not the case of the Department that the respondent No.1 had extended any favour to Constable Prakash Singh by reducing his sentence and in fact the Constable had a case on merit for reduction of the sentence awarded to him. The Inquiry Officer was of the view that the respondent No.1 had exceeded his jurisdiction while reviewing the sentence of Constable Prakash Singh, but, this decision was taken by him in the larger interest of BSF as the BSF Jawans, who work in difficult conditions at Borders should not be penalized vindictively by the seniors on trivial issues. The offence alleged to have been committed by Constable Prakash Singh was of abusing, in a threatening language, Head Constable Jaspal Singh and in the opinion of SCOI, Prakash Singh was harassed and abused by Shri Ram Singh, AC, Company Commander.

18. It is not in dispute that while hearing the mercy petition of Constable Prakash Singh under Section 128 of BSF Act, the respondent No.1 was acting in a quasi-judicial capacity and there was no allegation of mala fide or any culpable negligence against him. The Tribunal, in holding that this charge does not stand proved, relied upon the following observations made by Supreme Court in **Zunjarrao Bhikaji Nagarkar v Union of India:** 1999 (7) SCC 409:

> "If, every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi judicial officers like the appellant. Since in sum and substance misconduct is sought to be inferred by the appellant having committed an error of law, the charge-sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. In other words, to maintain any charge-sheet against a quasi judicial

> authority something more has to be alleged than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi judicial order. Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal. The charge- sheet, if sustained, will thus impinge upon the confidence and independent functioning of a quasi judicial authority. The entire system of administrative adjudication whereunder quasi judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings."

In the aforesaid case, the appellant was posted as Collector of Central Excise, Nagpur in the year 1995. The appellant, while holding adjudication proceedings under Section 33 of Central Excise Act, confirmed the confiscation of the goods of an assessee as well as the excise duty demanded from it. He, however, chose not to impose any penalty. He was, however, served with a charge-sheet on the allegation that he had favoured the assessee M/s Hari Vishnu Packaging Ltd by not imposing penalty on it under Rule 173Q of Central Excise Act, 1944 while passing the Order in Original dated 02nd March, 1995 wherein he had held that that the assessee had clandestinely manufactured and cleared the excisable goods and evaded the excise duty. The order passed by the appellant did not indicate any reason in not imposing the penalty. Challenging the inquiry, it was contended on behalf of the appellant that he could not be subjected to the disciplinary proceedings merely because he had chosen not to impose any penalty in the facts and circumstances of the case. Allowing the appeal filed by the appellant, the Supreme Court observed that negligence in quasi-judicial adjudication is not the negligence perceived as carelessness inadvertence or omission but as culpable negligence. The Supreme Court referred to the view taken by it in an earlier decision in **State of Punjab v. Ram Singh Ex-Constable** : 1992 (4) SCC 54, where it was held that mere error in judgment, carelessness or negligence in performance of duty does not come within the purview of misconduct.

19. The Tribunal, in our view, has applied a correct principle of law in holding that since the respondent No.1 while passing order on the petition of Constable Prakash Singh under Section 128 of BSF Act was acting in a quasi-judicial capacity and there is no allegation of any mala fides nor had it been alleged that he intended to extend a favour to the

Constable by reducing his sentence, the order passed by him could not have been held to be an act of misconduct. If BSF was aggrieved on account of the order passed by the Tribunal under Section 128 of BSF Act, it could have challenged that order in an appropriate forum, but, in the absence of any mala fides or an element of corruption or culpable negligence on his part, it would be difficult to say that the quasi-judicial order passed by the respondent No.1 amounted to misconduct. We, therefore, see no good reason to interfere with the view taken by the Tribunal, with respect to this charge.

Article IV

20. One Shri S.S. Majumdar was working as a teacher in BSF Primary School on a temporary basis. BSF issued an advertisement, inviting applications for appointment to the post of Headmaster of that primary school. The essential qualifications for the aforesaid post were fixed with the approval of the respondent No.1. One of the essential qualifications approved for the post was graduation with 55% marks in aggregate. Four persons, including Shri S.S. Majumdar, applied for the aforesaid post. The Screening Board set up to scrutinize the applications recommended only two candidates, who were found to be fulfilling the eligibility criteria. Since Shri S.S. Majumdar did not have 55% marks in graduation, he was not found eligible and, therefore, was not recommended by the Screening Board. The respondent No.1, however, allowed all the four candidates to appear before the Interview Board. The respondent No.1 was the Chairman of the Board which interviewed the candidates and selected Shri S.S. Majumdar for the post of Headmaster. Representations were made against appointment of Shri S.S. Majumdar and FHQ, New Delhi, asked North Bengal Ftr. for clarification, which was sent under signatures of the respondent No.1. Additional Director General (E) directed Frontier HQ North Bengal to cancel the appointment of Shri S.S. Majumdar, since he did not possess the requisite educational qualification. Shri S.S. Majumdar resigned from the post of Headmaster in April, 2006, but, the respondent No.1 appointed him as a regular teacher, retrospectively from the date he was appointed as the Headmaster. In his letter dated 09.09.2006 sent to Director General, BSF, the respondent No.1 claimed that he was not well-versed with BSF Education Code and after going through the code, it was found that the selection was not in conformity with the same and accordingly Shri S.S. Majumdar was asked to resign. It also came in evidence that in fact none of the four

applicants possessed the required experience of ten years and, therefore, none of them was eligible for the interview. It also came in the deposition of SW-19 that no codal formalities were observed by the respondent No.1 in appointment of Shri S.S. Majumdar, a primary teacher. The respondent No.1 later issued notice terminating the services of seven primary teachers, including Shri S.S. Majumdar, who did not fulfill the qualification as per BSF Education Code. FHQ, New Delhi, however, allowed IG, North Bengal Frontier to keep all the teachers since they were working for a long time. Out of those seven teachers, the respondent No.1 had appointed only Shri S.S. Majumdar whereas the remaining six persons were appointed by the other officers. The Inquiry Officer held that the charge was partly proved but there was no favouritism and manipulation. In taking this view, the Inquiry Officer also noted that the department had failed to produce any evidence to indicate the procedure to be followed for appointment of primary teachers. The Disciplinary Authority, however, held the charge to be proved and recorded the following disagreement note with respect to this charge:

> "The essential qualification prescribed for the post of Head Master, BSF Primary School is graduation with 55% marks in aggregate. Shri Mazumdar, Primary School teacher, BSF had secured only 43% in his graduation (B.Sc.). The Charged Officer has mentioned that he acted upon the notings of the Dy. Commandant, In-charge of BSF Primary School who had indicated that there is no eligibility criteria prescribed in the BSF education code and IG as Chairman of Selection Board, is competent to decide the criteria for selection to the post of Headmaster.
>
> Shri Mazumdar was not fulfilling, the eligibility criteria and he was not recommended by the selection Board to the post of Headmaster. Allowing Shri Mazumdar for the interview though he does not fulfill the criteria, establishes favouritism by the Charge Officer. BSF Headquarters directed the Charged Officer to cancel the appointment of Shri Mazumdar and take action for filling of the post of Headmaster after issuing fresh advertisement. Shri Mazumdar submitted his resignation from the post of Headmaster on 03.04.2006. On the same day, the Charged Officer appointed him as a primary teacher. The above conduct of the Charged Officer establishes favoritism extended by him in selection and appointment of Shri Mazumdar, Headmaster. Thus

the charge against him stands proved."

21. The Tribunal, however, noted that the decision to appoint Shri S.S. Majumdar as Headmaster was a unanimous decision of the Selection Board, the respondent No.1 being only a member of the Board though he also was its Chairman. The decision of the Board being a joint unanimous decision, the Tribunal found it difficult to infer mala fide, favoritism or manipulation. The Tribunal was of the view that when none of the candidates applying for the post of Headmaster was eligible, there was nothing wrong if all of them were called for the interview. The Tribunal relied upon the decision of the Supreme Court in **Bongaigaon Refinery & P.C. Ltd. & Ors v. Girish Chandra Sarmah:** 2007(7)SCC 206. In the aforesaid case, the respondent was a member of the Price Negotiation Committee and the charge against him was that he had failed to assess reasonable price of the land and appointed a valuer, violating the due process of tendering and accepted the fictitious price fixed by the valuer. The Tribunal relied upon the following observations made by the Court :-

> "After going through the report and the finding recorded by the Division Bench of the High Court, we are of the opinion that in fact the Division Bench correctly assessed the situation that the respondent alone was made a scapegoat whereas the decision by all three Committees was unanimous decision by all these members participating in the negotiations and the price was finalized accordingly. It is not the respondent alone who can be held responsible when the decision was taken by the Committees. If the decision of the committee stinks, it cannot be said that the respondent alone stinks; it will be arbitrary. If all fish stink, to pick one and say only it stinks is unfair in the matter of unanimous decision of the Committee."

22. In our view, the finding recorded by the Disciplinary Authority with respect to this charge cannot be said to be based on no evidence nor can it be said to be perverse. The Tribunal, in our view, was not correct in holding that this charge against the respondent No.1 does not stand established on the basis of the material available on record. As noted earlier, the eligibility criterion was fixed by none other than the respondent No.1. Advertisements were issued in the newspaper, inviting applications from those who fulfilled the published eligibility criteria. The

Screening Board found only two out of the four applicants to be eligible and accordingly recommended that only those two who were found eligible by them, to be called for interview. The respondent No.1, however, decided to call all the four applicants for the interview. Once the educational qualifications were fixed and duly notified by way of advertisements in newspapers, it was not permissible to anyone, including the respondent No.1 who himself had approved those educational qualifications, to allow anyone who did not possess the notified qualification, to appear for the interview. If none of the applicants was eligible for the post, on account of none of them having experience of ten years, it was not open to anyone, including the respondent No.1 to permit any or all of them to appear in the interview. If no eligible candidate applied for the post of Headmaster, the only option available to the respondent No.1 was to re-advertise the post either with the same qualification and experience and experience or with revised educational qualification and/or experience. The respondent No.1 could not have allowed any ineligible person to appear in the interview, so long as the educational qualification and/or prescribed experience, if any, were not relaxed and the relaxed qualification and experience were not duly notified to the public. It has to be kept in mind that had the essential qualifications and/or experience been revised and notified to the public, those who did not fulfil the qualifications and experience that were initially notified, but fulfilled the revised qualification and experience, could also have applied for the post. By allowing ineligible persons to appear in the interview and appointing one such person, the respondent No.1 denied opportunity to others, who did not possess the initially prescribed marks in graduation, but possessed as many marks as Shri S. Majumdar possessed, to apply and compete for the post of Head Master in BSF school.

23. The next question which comes up for consideration is as to whether the act of the respondent No.1 in allowing all the four applicants to appear in the interview was a *bona fide*, though wrong, decision or it was an act of favoritism. As noted earlier, the Screening Board had recommended only two persons to be called for the interview and Shri S.S. Majumdar was not one of them. The circumstances of the case indicate that by allowing all the four applicants to appear in the interview, the respondent No.1 clearly favoured Shri S.S. Majumdar. Though the second person who was not recommended by the Screening Board but was allowed to appear in the interview was also a beneficiary of the

decision and in case none of the applicants was eligible to be called for the interview, all of them were beneficiaries of the decision, the subsequent conduct of the respondent No.1 clearly indicates that the aim of the respondent No.1 in allowing all the four candidates to appear in the interview was to favour Shri S.S. Majumdar, by appointing him as the Headmaster. Had the respondent No.1 permitted only Shri S.S. Majumdar while disallowing the fourth candidate to appear for interview, the favour would have been just too obvious and too open. The act of the respondent No.1, firstly, in appointing Shri S.S. Majumdar and then, appointing him as a regular teacher and that too retrospectively, from the date he was appointed as Headmaster, is a clear indicator that he intended to benefit none other than Shri S.S. Majumdar when he allowed all the four applicants to appear in the interview. Therefore, in our view, the act of the respondent No.1 in allowing Shri S.S. Majumdar to appear in the interview for the post of Headmaster in BSF Primary School was an act of favoritism, amounting to misconduct.

24. Had this been a case only of recommendation of an ineligible person for his appointment to the post of Head Master, the decision of Supreme Court in the case of **Bongaigaon Refinery & P.C. Ltd.** (supra), would have been applicable and it could have been said that the decision of the Selection Board, being unanimous, the respondent No.1 could not have been selectively targeted for the disciplinary action, for recommending an ineligible person for appointment to the post. Here, the misconduct on the part of the respondent No.1 is established from a series of acts in (i) his allowing Shri S.S. Majumdar to appear in the interview, despite his being not eligible (ii) his selection by the Selection Board chaired by the respondent No.1 and (iii) his appointment by the respondent No.1 in his capacity as IG, North Bengal, followed by his appointment as a regular teacher with retrospective effect which clearly indicate that the purpose of allowing the ineligible candidates to appear in the interview was to enable Shri S.S. Majumdar to appear in the interview so that he could be selected and appointed as the Head Master of BSF Primary School.

25. We would like to take note of the fact that no codal formalities were observed by the respondent No.1 in appointing Shri S.S. Majumdar as a primary teacher on his resigning from the post of Head Master. The Tribunal has observed that the codal formalities were not brought on record during the course of the inquiry. Even if it is so, since the appointment of Shri S.S. Majumdar as a regular was made without even

constituting a Selection Committee which would be the essential codal formality for any such appointment and he possessed less than 45% marks in his graduation, it cannot be said that the finding recorded by the Disciplinary Authority with respect to this charge was based on no evidence or was perverse in law or on facts. It was contended by the learned counsel for the respondent No.1 that appointment of Shri S.S. Majumdar as a regular teacher was not the charge against the respondent No.1 and, therefore, it was not open to the Disciplinary Authority to hold him guilty for the said appointment. A perusal of the Imputation of Misconduct or misbehaviour with respect to this charge would show that it was clearly alleged therein that on the day Shri S.S. Majumdar resigned from the post of Head Master, he was appointed as a Primary Teacher with effect from the date he had joined as Head Master and his appointment as a regular teacher was in violation of policies/instructions circulate by FHQ. It was also stated that no Selection Committee was constituted with regard to the appointment of Shri S.S. Majumdar as a regular teacher nor was the approval of FHQ taken. Besides that, Shri S.S. Majumdar had secured only 43% marks in his B.Sc., whereas one of the essential conditions for such appointment was 45% in aggregate in the degree examination. In his reply to the charge-sheet, the respondent No.1 stated that Shri S.S. Majumdar was regularized as a school teacher because he was the senior most temporary teacher to be regularized, already having served as temporary teacher for 10 years. In his reply, the respondent No.1 did not dispute that the appointment of Shri S.S. Majumdar as a regular teacher was in violation of policies/instructions circulated by the FHQ since no Selection Board was constituted for his appointment as regular teacher nor was the approval from FHQ taken. He also did not dispute that the essential qualification for appointment as regular teacher was 45% marks in aggregate in the degree examination. He expressly admitted that Shri S.S. Majumdar had 43% marks in his graduation. Since the respondent No.1 did not claim that he had violated the policies/instructions circulated by FHQ in appointment of Shri S.S. Majumdar as a regular teacher nor did he dispute a person could be appointed as a regular teacher only if he had obtained at least 45% marks in graduation, it was not necessary for the Department to prove by producing documentary evidence, during the course of the inquiry, that the aforesaid appointment was contrary to the policies/instructions issued by BSF in this regard. In any case, it can hardly be disputed that setting up a Selection Committee for appointment of a regular teacher would be

an essential codal requirement for any appointment under the Government and appointment of a person who did not possess the minimum prescribed marks in his graduation, would also be illegal. The respondent No.1 claimed that he had regularized Shri S.S. Majumdar as a teacher as he was the senior most teacher and has experience of 10 years. There is no evidence of BSF having formulated a policy for regularization of temporary teachers as regular teachers nor was any such policy alleged by the respondent No.1 in his reply to the charge-sheet. In the absence of any such policy, the respondent No.1 could not have regularized Shri S.S. Majumdar as a school teacher even if he had the experience of 10 years. Added to this, is the fact that on account of his having secured less than 45% marks in the graduation, Shri S.S. Majumdar was not eligible to be appointed as a regular teacher. On the top of it, Shri S.S. Majumdar was appointed as regular teacher with a retrospective effect and not prospectively. These are the circumstances, indicating that the respondent No.1 was determined to favour Shri S.S. Majumdar and that is why he first allowed him to appear in the interview despite his not being an eligible even in terms of the educational qualification fixed by the respondent No.1 himself, then the Interview Board headed by him recommended his appointment, the respondent No.1 accepted the recommendation as IG, BSF and appointed Shri S.S. Majumdar as the Head Master of the primary school and when the matter was reported to the Headquarter and Shri S.S. Majumdar had no option but to resign, the respondent No.1 appointed him as a regular teacher with retrospective effect.

26. It has come in evidence that as many as 7 persons were appointed as teachers, none of whom were eligible and Shri S.S. Majumdar was only one of those teachers. However, the fact remains that as far as the respondent No.1 is concerned, he appointed only Shri S.S. Majumdar. The remaining teachers having been appointed by other officers of BSF and the appointment made by him was an act of favouritism as is evident from the facts and circumstances discussed hereinabove. Even if we proceed on the basis that the respondent No.1 could not have been held guilty of showing favour to Shri S.S. Majumdar in his appointment as a regular teacher, his subsequent conduct in appointing him as a regular teacher, with retrospective effect, without even the basic codal formality of constitution of a Selection Committee and without his possessing the prescribed minimum marks, is a strong circumstance which indicates that the appointment of Shri S.S. Majumdar as the Head

Master of the primary school, Kadamatala was an act of favouritism shown to him by the respondent No.1. It has also come in evidence that later on, when the respondent No.1 sought to terminate the services of all the seven teachers, BSF Headquarter allowed them to continue. This, to our mind, was a decision taken on administrative grounds and does not absolve the respondent No.1 from the act of favour shown by him to Shri Majumdar. We, therefore, disapprove the view taken by the Tribunal with respect to his charge and hold that the finding of the Disciplinary Authority with respect to this charge was justified on facts and in law.

Article-V

27. In a nutshell, the charge is that one Brijesh Kumar was appointed as Follower in BSF on the basis of a domicile certificate showing him to be a resident of PS Matigara, District Darjeeling (West Bengal), whereas actually he was a resident of Balia, District Uttar Pradesh. It is alleged that the respondent No.1 rejected the candidature of one cook, one sweeper, one water carrier and one washer man, recommended by the Board of officers, which included a medical officer, on account of their being overweight/underweight, despite they having been found fit by the Medical Officer and Shri Brijesh who was earlier found unfit by the Recruitment Board was asked to submit an application for another medical examination in which he was declared fit and later appointed as a sweeper in BSF. The Inquiry Officer held the charge to be not proved. The Disciplinary Authority, however, held the charge to be partly proved and recording the following disagreement note in this regard:-

> "The service records of Shri Brijesh Kumar, recruited as a Follower by the Charged Officer show his domicile as Village Ujanu Shivnagar, Dist. Darjeeling. The residents of North Bengal Districts and Sikkim are only eligible to appear before the Recruitment Board for selection to the post of Followers. The domicile certificate of Shri Brijesh Kumar issued by the SDO, Silliguri shows his domicile as Village-Digilijote, PO-Kadamatala. Neither any examination of SDO staff, Siliguri, nor steps were taken by the Charged Officer for verification of the records of the SDO, Silliguri to confirm the genuineness of domicile of Shri Brajesh Kumar. During the inquiry, the prosection did not produce the evidence to show that Shri Brajesh Kumar belongs to Balia, in

U.P."

The Tribunal noted that the Presenting Officer had not pressed this charge and hence, there could be no reason or even justification to examine the evidence and hold the charge to be proved or partly proved. It was further observed that the allegations on which the charge was held to be proved, were not the subject matter of the charge and, therefore, no finding of guilt could have been recorded on the basis of such allegations. The Tribunal, in taking this view relied upon the decision of Supreme Court in **M.V. Bijlani v. Union of India & Ors.:** AIR 2006 SC 3475, where the Apex Court, inter alia, observed as under:-

> ".....He cannot enquire into the allegations with which the delinquent officer has not been charged with....."

In **Director (Inspection & Quality Control) Export Inspection Council of India and Others v. Kalyan Kumar Mitra & Others:** 1987 (2) CLJ 344 it was held that the Inquiry Officer is not permitted to travel beyond the charges and any punishment imposed on the basis of the finding which was not the subject matter of the charges is wholly illegal.

The ratio of these judgments is that a person cannot be held guilty of acts which did not form part of the charges served upon him.

28. On a perusal of the Articles of Charge and Imputation of Misconduct or Misbehaviour served upon the respondent No.1 with the reasons for disagreement recorded by the Disciplinary Authority in the disagreement note, we find that the conclusions drawn by the Disciplinary Authority, with respect to this Article of Charge, were altogether different from the allegations contained in the charge-sheet served upon the respondent No.1. In the charge-sheet, there was no allegation that the respondent No.1 had failed to examine the record of SDO, Siliguri to confirm the genuineness of the domicile of Shri Brijesh Kumar, or that when the discrepancies with respect to his domicile were brought to the notice of the respondent No.1, he failed to take action against Shri Brijesh Kumar. The respondent No.1 therefore, was not subjected to any inquiry with respect to the charges which the Disciplinary Authority held to be proved against him, under Article V of the charge-sheet. In any case, the Inquiry Report does not disclose any evidence on the basis of which such a finding could be recorded by the Disciplinary Authority. With

respect to the allegation contained in the charge-sheet, the Inquiry Officer noted that the Presenting Officer, in his written brief, had stated that the witnesses had failed to prove anything against the respondent No.1, as far as this charge was concerned. It was also noted by the Inquiry Officer that the respondent No.1 had observed 'overweight/underweight', while rejecting the recommendation of the Board in respect of 04 candidates. He also noted that the department had not produced any evidence to show that Shri Brijesh Kumar belonged to Balia. He took note of the fact that in his deposition SW-31 Shri Brijesh Kumar had stated that though his place of birth was Balia, after passing High School in 1995 he had worked in his father's barber shop in Siliguri and the domicile certificate was issued to him by the Councilor from Ward No.46 in Matigara, Siliguri. Shri Brijesh Kumar also stated before the Inquiry Officer that he was found medically unfit due to 'hydrosil' and thereafter he went to Review Medical Board which declared him fit. Another witness Shri Stephen Tirky, in his deposition as SW-30, stated before the Inquiry Officer that Shri Brijesh Kumar was in fact a domicile of West Bengal. No fault, therefore, can be found with the conclusion drawn by the Inquiry Officer with respect to this charge. We are of the view that the finding of the Disciplinary Authority with respect to this charge, besides being beyond the charge-sheet served upon the respondent No.1, was also based on no evidence at all and, therefore, was vitiated in law.

Article No. VI

29. The allegation against the respondent No.1 is that vehicle No. WB-74 J 4337, which was detailed to proceed to THQ 89 Battalion of BSF located in Patna was taken by him to his home place in Balia District of UP. It is also alleged that Constable Anil Kumar, who accompanied him to his native place and who was issued 50 live rounds fired 41 rounds during the marriage function and returned only 09 rounds on his return from the tour and the shortage was made up by manipulating the record.

The respondent No.1, while replying to the charge-sheet, admitted that he had taken the aforesaid vehicle to his native place in Balia on his visit to attend the wedding of his son, solemnized on 15.2.2006. He claimed that since he was a 'Y' category protectee due to threat from Naxalities he had taken the vehicle as his escort vehicle from Patna to

Balia. He also admitted that Constable Anil Kumar had accompanied him to the aforesaid marriage. He further stated that earlier, ADGP (Intelligence) Andhra Pradesh had intimated AFHQ about his security categorization and providing security to him as per 'Y' scale and on the basis of that message AFHQ had asked North Bengal Frontier to take necessary action. According to him, in his honest belief, he thought that the endorsement was enough for him to take security as per the prescribed scale and depending upon the threat and local circumstances. Regarding use of ammunition, he claimed that no government ammunition was used to his knowledge and all the 50 rounds issued to Constable Anil Kumar were deposited by him with the Headquarter.

It is thus, an admitted case that vehicle No. WB-74 J 4337 which was detailed to proceed to THQ-89 Battalion of BSF, did not report at its destination and the respondent No.1 took the aforesaid vehicle to his native place in Balia along with 03 BSF personnel including Constable Anil Kumar. The only question which arises for consideration is whether the respondent No.1 had the permission for using the aforesaid vehicle as an escort vehicle, on his private visit or he was otherwise entitled to an escort vehicle on his private visit without any prior permission from BSF Headquarter. The Inquiry Officer held that though the respondent No.1 was provided 'Y' category security, he was not entitled to an escort vehicle for his road journeys, even under 'Y' category security and therefore use of the aforesaid vehicle by the respondent No.1 was not justified nor was it permitted by the Competent Authority. During the course of arguments before us, the learned Counsel for the respondent No.1 relied upon a letter dated 8.7.2005 purporting to be written by Directorate General of BSF to Inspector General, HQ North Bengal Frontier of BSF stating therein that DGP, Intelligence, Hyderabad had intimated that the respondent No.1 was categorized as 'Y' security and therefore necessary security be provided to him. Annexed to his letter is the copy of a letter dated 1.7.2005 sent by DG of BSF to FTR HQ BSF North Bengal, forwarding a photocopy of the message received from Additional Director General of Police (Intelligence) Andhra Pradesh. A copy of the message sent by Additional Director General (Intelligence) Andhra Pradesh, which is annexed to this letter, would show that vide his message BSF was requested to provide security, as per 'Y' scale category, to the respondent No.1. A list of categorized police officers was also made available to us by the learned Counsel for the respondent No.1. This list

would show that the respondent No.1 was entitled to 'Y' category security with bullet proof car. However, vehicle No. WB-74 J 4337, which the respondent No.1 took to Balia on his private visit was used as an escort vehicle and not as the vehicle in which he travelled to Balia. Though the respondent No.1 was entitled to a bullet proof car, for his personal travel, there is no material on record to show that he was entitled to an escort vehicle. There is no document on record to indicate that the respondent No.1 asked for any permission to take the aforesaid vehicle as an escort vehicle on his private visit to Balia. There is no evidence on record to indicate that a 'Y' class protectee was entitled to an escort vehicle. Therefore, it cannot be disputed that the respondent No.1 misused the government vehicle No. WB-74 J 4337, by using it as an escort vehicle, on his private visit to Balia on the occasion of marriage of his son. The Tribunal felt that the charge was held to be partly proved, without taking into consideration the explanation of the respondent No.1 that as a 'Y' class protectee he was entitled to round-the-clock security, including a bullet proof vehicle and no permission was therefore required to take vehicle, in question, to Balia. The Tribunal was of the view that they had two options available to them in the matter; the first being to remit the matter to the concerned authorities, but, in the peculiar facts and circumstances of the case, they were refraining from doing so, because the charge, to the extent it was held to be proved, was required to be ignored, inasmuch as the respondent No.1 was entitled to take the vehicle and PSOs to Balia and therefore not obtaining prior permission for this purpose, would not be a serious issue. We are, however, not in agreement with the view taken by the Tribunal, for the simple reason that even if we proceed on the assumption that the respondent No.1, being a 'Y' class protectee, was entitled to a bullet proof car even on his private visits, he certainly was not entitled to use a vehicle of BSF as an escort vehicle, whereas, vehicle No. WB-74 J 4337 was used by him as an escort vehicle and not as the vehicle for his personal travel to Balia.

30. It was contended by the learned Counsel for the respondent No.1 that if the Disciplinary Authority disagreed with the findings of the Inquiry Officer, it could have only recorded tentative reasons for the disagreement, whereas in the present case, the Disciplinary Authority concluded in the reasons for the disagreement itself that the charge against the respondent No.1 had stood proved and therefore the order imposing penalty is liable to be struck down, on this ground alone. In

support of his contention, the learned Counsel for the respondent No.1 relied upon **Yoginath D. Bagde v. State of Maharashtra & Anr.:** (1999) 7 SCC 739.

In the case before Supreme Court, the Inquiry Officer had recorded the findings that the charges against the respondent No.1 were not proved. These findings were submitted to the Disciplinary Committee which disagreed with those findings and issued a notice to the appellant requiring him to show-cause why he should not be dismissed from service. The reasons on the basis of which Disciplinary Committee disagreed with the findings of the District Judge were also communicated to the appellant along with the show-cause notice. However, instead of forming a tentative opinion, the Disciplinary Committee had come to final conclusion that the charges against the appellant were established. Allowing the appeal filed by the delinquent, the Supreme Court inter alia held as under:

> "In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Enquiry Officer into the charges leveled against him but also at the stage at which those findings are considered by the Disciplinary Authority and the latter, namely, the Disciplinary Authority forms a tentative opinion that it does not agree with the findings recorded by the Enquiry Officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Enquiry Officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the enquiry proceedings. The enquiry

> proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution.
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> Since the Disciplinary Committee did not give any opportunity of hearing to the appellant before taking a final decision in the matter relating to findings on the two charges framed against him, the principles of natural justice, as laid down by a Three-Judge Bench of this Court in **Punjab National Bank and Ors. v. Kunj Behari Mishra** (1998) II LLJ 809 SC, were violated.
>
> .....a final decision with regard to the charges leveled against the appellant had already been taken by the Disciplinary Committee without providing any opportunity of hearing to him. After having taken that decision, the members of the Disciplinary Committee merely issued a notice to the appellant to show-cause against the major punishment of dismissal mentioned in Rule 5 of the Maharashtra Civil Services (Discipline and Appeal) Rules, 1979. This procedure was contrary to the law laid down by this Court in the case of **Punjab National Bank** (supra) in which it had been categorically provided, following earlier decisions, that if the Disciplinary Authority does not agree with the findings of the Enquiry Officer that the charges are not proved, it has to provide, at that stage, an opportunity of hearing to the delinquent so that there may still be some room left for convincing the Disciplinary Authority that the findings already recorded by the Enquiry Officer were just and proper. Post-decisional opportunity of hearing, though available in certain cases, will be of no avail, at least, in the circumstances of the present case."

In the case before this Court, the Inquiry Officer, in his report in respect of Article IV held that the evidence on record established that the appointment of Shri Mazumdar as primary teacher was not in accordance with BSF Education Code and the charge had been partly proved to the extent of wrong selection of Headmaster and Primary Teacher in BSF

Primary School by the respondent No.1, without any favourtism and manipulation. The only disagreement recorded by the Disciplinary Authority was with respect to the allegations of favourtism and manipulation, which the Inquiry Officer held to be not proved but the Disciplinary Authority held to be proved. As far as Article VI is concerned, the Inquiry Officer held the same to be partly proved and there was no disagreement note recorded by the Disciplinary Authority. A perusal of the letter dated 6.10.2009 whereby the disagreement note was forwarded to the respondent No.1 through the Chief Secretary Government of Andhra Pradesh, would show that the disagreement note along with the copy of CVC's second stage advice was forwarded to the respondent No.1 and he was advised to submit his representation, if any, on the same within 15 days from the date of receipt of the letter. (emphasis supplied). In the case of **Yoginath** (supra) while supplying copy of a disagreement note to the appellant, he was called upon to show-cause against the proposed punishment of dismissal, whereas in the case before this Court no punishment was proposed in the letter dated 6.10.2009 whereby the disagreement note was sent to the respondent No.1. In the case before Supreme Court, no opportunity was given to the appellate to convince the Disciplinary Authority that the findings already recorded by the Inquiry Officer were just and proper and there was no good ground for reviewing, the findings or taking of a contrary view by the Disciplinary Authority. On the other hand, in the case before this Court, the respondent No.1 was particularly advised to submit his representation on the disagreement note and CVC's second stage advice as well as on the report of the Inquiry Officer. The respondent No.1 therefore had adequate opportunity to convince the Disciplinary Authority that the findings recorded by the Inquiry Officer did not call for any review by it, the reasons recorded in the disagreement note were not germane and the finding recorded by the Inquiry Officer was not liable to be interfered with. It is also not in dispute that the respondent No.1 did submit a detailed reply on receipt of communication from the Disciplinary Authority and a perusal of the order dated 8.9.2010 whereby penalty was imposed on the respondent No.1 would show that the submissions made by the respondent No.1 were duly considered by the Disciplinary Authority before concluding that a major penalty needs to be imposed on him. The order would also show that on receipt of submissions of the respondent No.1 the matter was referred to UPSC for its statutory advice and thereafter only a decision was taken to impose a major penalty of dismissal of service on the respondent No.1. Therefore,

though the Disciplinary Authority did not say that the findings recorded in the disagreement note were tentative, the facts and circumstances indicate that the findings were treated by the Disciplinary Authority only as tentative findings and that is why the respondent No.1 was given an opportunity to make a representation against those findings and the submissions made by him were duly considered, in consultation with UPSC, before imposing penalty upon the respondent No.1. Therefore, the findings ultimately recorded by the Disciplinary Authority do not stand vitiated in law on account of findings in the disagreement note not being termed as tentative.

31. For the reasons given in the preceding paragraphs we are of the view that the finding of the Disciplinary Authority in respect of Article IV of the charge-sheet which was held to be fully proved and Article VI which was held to be partly proved cannot be said to have been passed on 'no evidence' or were otherwise perverse inasmuch as it could not be said no reasonable person acting on the basis of the material disclosed during the course of the inquiry could have taken such a view. Therefore, in our view the Tribunal was not justified in interfering with the findings recorded by the Disciplinary Authority in respect of the aforesaid two Articles of Charge.

CONCLUSION

32. In view of the foregoing discussion, we are of the view that the impugned order passed by the Central Administrative Tribunal, to the extent it held that none of the charges against the respondent No.1 was proved or partly proved, cannot be sustained. However, since the order passed by the Disciplinary Authority imposing penalty of dismissal from service upon the respondent No . 1 was based on the premise that Articles I, II, III and IV were fully proved and Articles V & VI were partly proved, it cannot be allowed to stand, and the Disciplinary Authority is required to pass a fresh order on the question of penalty, taking Article No. IV as proved and Article VI as partly proved as indicated in this order. We therefore, while setting aside the impugned order passed by the Tribunal, direct the Disciplinary Authority to pass a fresh order on the quantum of punishment within 06 weeks from the date of this order. In the facts and circumstances in the case, there shall be no order as to costs.