I.L.R. (2014) 2 DELHI

Part-II (April, 2014)
(Pages 1223-1594)

P.S.D. 25.04.2014
600

INDIAN LAW REPORTS
DELHI SERIES
2014

(Containing cases determined by the High Court of Delhi)

VOLUME-2, PART-II

(CONTAINS GENERAL INDEX)

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

Annual Subscription rate of I.L.R.(D.S.) 2014
(for 6 volumes each volume consisting of 2 Parts)

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

for Subscription Please Contact :

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

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

CONTENTS

VOLUME-II, PART-I

APRIL, 2014

Pages

COMPARATIVE TABLE

ILR (DS) 2014 (2) = OTHER JOURNAL

APRIL, PART-II

Page No.	Journal Page No.
1501	No Equivalent
1565	No Equivalent
1449	No Equivalent
1551	No Equivalent
1534	No Equivalent
1545	No Equivalent
1288	2014 (3) RAJ 137 :
1288	2014 (207) DLT 713 :
1288	2014 (57) PTC 495
1237	2014 (2) AD (D) 491 :
1237	2014 (141) DRJ 339
1410	No Equivalent
1555	No Equivalent
1507	No Equivalent
1223	No Equivalent
1276	2014 (3) AD (D) 226 :
1276	2014 (141) DRJ 658
1496	No Equivalent
1591	No Equivalent
1425	No Equivalent
1230	No Equivalent
1246	2014 (207) DLT 78 :
1276	2014 (141) DRJ 295 :
1246	2014 (3) (AD) (D) 329 :
1246	2014 (1) Crimes 571 (SN) :
1276	2014 AIR (DEL) 46

1511	No Equivalent
1395	No Equivalent
1407	No Equivalent
1523	No Equivalent
1469	No Equivalent
1464	No Equivalent
1283	No Equivalent
1442	No Equivalent
1362	2014 (141) DRJ 205:
1276	2014 AIR (DEL) 86
1457	No Equivalent
1489	No Equivalent
1428	No Equivalent

COMPARATIVE TABLE

OTHER JOURNAL = ILR (DS) 2014 (I)

APRIL, PART-II

Journal Name Page No.	ILR (DS) 2014 (II) Page No.
2014 (2) AD (D) 491	ILR (DS) 2014 (II) 1237
2014 (3) AD (D) 226	ILR (DS) 2014 (II) 1276
2014 (3) (AD) (D) 329	ILR (DS) 2014 (II) 1246
2014 AIR (DEL) 46	ILR (DS) 2014 (II) 1276
2014 AIR (DEL) 86	ILR (DS) 2014 (II) 1276
2014 (1) Crimes 571 (SN)	ILR (DS) 2014 (II) 1246
2014 (207) DLT 713	ILR (DS) 2014 (II) 1288
2014 (207) DLT 78	ILR (DS) 2014 (II) 1246
2014 (141) DRJ 339	ILR (DS) 2014 (II) 1237
2014 (141) DRJ 295	ILR (DS) 2014 (II) 1276
2014 (141) DRJ 658	ILR (DS) 2014 (II) 1276
2014 (141) DRJ 205	ILR (DS) 2014 (II) 1362
2014 (57) PTC 495	ILR (DS) 2014 (II) 1288
2014 (3) RAJ 137	ILR (DS) 2014 (II) 1288

NOMINAL-INDEX
VOLUME-2, PART-I
APRIL, 2014

SUBJECT-INDEX
VOLUME-2, PART-II
APRIL, 2014

ADMINISTRATIVE TRIBUNAL ACT, 1985—Section 21—Denial of the benefits under the Assured Career Progression Scheme (ACPS)—Petitioner aggrieved by the violation of Rules by the respondents pension fixation correctly keeping in view his entitlement based on denial of financial benefits under the first ACPS with effect from 9th August, 1999 as well as financial benefits under second ACPS with effect from 1st January 2002-- petitioner did not make any grievance either by way of representations or by way of an application filed within the period specified under Section 21 of the Administrative Tribunal Act, 1985-Relief in respect of the same was hopelessly barred by limitation on 1st May, 2012 When the petitioner had filed the petition before the Tribunal and sought the reliefs of Quashing/Setting aside the impugned order dated 17.7.2006 passed by the Respondent no.1, whereby the appeal was disposed against the appellants, Quashing/Setting aside the order dated 25.8.2003 passed by the Respondent no.3, whereby the penalty of censure was imposed against the appellants, directing the Respondents to grant first ACP under the financial upgradation scheme w.e.f. 9.8.1999 with arrears and further grant second ACP w.e.f. 1.1.2002 from the date of entitlement, directing the Respondents to grant w.e.f. 16.7.2001 instead of 29.1.2004 and count his 3 years seniority towards the financial benefits accruing to the applicant as per the existing rules and directing the Respondents to fix the pension and retirement benefits of the applicant in terms of the reliefs sought for in the aforementioned paras and pay the arrears thereof immediately—However the petitioner restricts the challenge to the denial of the benefits under the ACPs only so far as they effect fixation of his pension. Held: it is trite that so far as claims involving issues of seniority or promotion which effects others are concerned, would be rendered stale and the doctrine of limitation would apply in case of such belated challenges—

So far as the contention that the same have been wrongfully denied is concerned, the Supreme Court in (2008) 8 Supreme Court Cases 648 entitled Union of India and Others vs. Tarsem Singh has held that the court would consider the same—However, the relief of arrears would be restricted to a period of three years prior to the date of invoking remedy before the court of tribunal—The challenge of the petitioner and his prayers in the instant matter has to be considered in the light of these principles—It cannot be disputed that denial of the ACP benefits to the petitioner and wrongful fixation would result in erroneous fixation of all his emoluments and entitlements—In case, such emoluments were correctly fixed, upon superannuation the petitioner's pension may have also been appropriately fixed, perhaps at a figure which is more that the amount to which he has been found entitled by the respondents. The petitioner retired on 31st January, 2005, On application of the principles laid down by the Supreme Court therefore, it would appears that thought the prayers made by the petitioner at sl. nos. (i) to (iv) are concerned, the same are admittedly barred by limitation—However, the factual challenge on which these prayers were made, does survive and would require to be considered as the same is necessary to consider the prayer made at sl. no.(v). This consideration is also essential in order to appropriately mould the relief which the petitioner may be found entitled—In view of the above, the order dated 30th April, 2013 passed by the Central Administrative Tribunal dismissing the O.A No.1659/2012 on the ground of limitations is hereby set aside and quashed — Tribunal directed to consider on merits the challenge to the denial of the first and second ACPS—Even if the Tribunal sustains the challenge, the petitioner shall not be entitled to the grant of financial benefits.

Subhash Chandra v. *Union of India & Anr.* *1442*

CCS (CCA) RULES, 1965—Sub-Rule (1) of Rule 10 & Rule 10 (6) and (7)—Respondents were placed under suspension vide orders dated 17th and 19th July, 2012 in terms of sub-rule (1) of Rule 10 of the CCS (CCA) Rules, 1965—

Suspension was reviewed by the Review Committee extending for another period of three months—Respondents premised their application before the Tribunal on the plea that the review of suspension was due in accordance with law on 17th October, 2012—As such, the suspension not having been reviewed within the time prescribed under Rule 10 (6) and (7) of the CCS (CCA) Rules, 1965, the continued suspension beyond 90 days after the issuance of the order dated 17th July, 2012 and 19th July, 2012 was null and void—This contention of the respondents was accepted by the Tribunal placing reliance upon sub-rule (6) and (7) of Rule 10 of CCS (CCA) Rules, 1965—The Tribunal has also placed reliance on a pronouncement of Supreme Court reported in (2010) 2 SSC 222 entitled Union of India and others vs. Dipak Mali wherein it has been held that by operation of Rule 10 (6), the suspension order would not survive after a period of 90 days unless it stood extended after review—Tribunal directed that the orders of suspension in these cases would be deemed to have been revoked from the expiry of the prescribed period i.e. 17th October, 2012 and 19th October, 2012—The Tribunal directed that the applicants shall be treated on duty on the aforesaid dates with all consequential benefits, including arrears of pay and allowances. The respondents were directed to pass an order in terms thereof within a period of 15 days from the date of receipt of coy of that order—Hence the present petition. Held In compliance of the order of the Tribunal, the petitioner has passed an order dated 21st November, 2013 revoking the suspension of three persons, namely. Smt. Kamal Sharma, Smt. Premlata Gianey and Sh. Dinesh K. Tokas with effect from 17th October, 2012 and has also granted all consequential benefits including arrears of pay and allowances—No reason is forthcoming for why the present respondents are not entitled to the same relief—Petitioners have issued a fresh order of suspension dated 1st August, 2013 against the present respondents which stands challenged before the Tribunal—Given the fact that the order dated 1st August, 2013 is subjudice before the Tribunal, so far as grant of consequential benefits to the respondents is concerned, for

the time being, the same has to be restricted up to 1st August, 2013—Parties shall abide by the adjudication by the Tribunal so far as the petitioners are bound to comply with the order dated 6th November, 2013—Appropriate orders to be passed within 15 days—Writ petition and the stay application dismissed.

CODE OF CIVIL PROCEDURE, 1908—Section 107, 151 r/w Order 41 Rule 27—Additional documents—Brief Facts—Respondents had filed Photocopies of twenty five documents under an index dated 22.05.2002, which was subsequent to their filing the written statement in the trial court—The said list of documents includes copies of the lease deeds dated 11.08.1953 and 11.02.1954 executed by the Delhi improvement Trust in respect of the subject in favour of the respondents No.1 and 2, who were then minors, under the Guardianship of their father, Shri Ram Singh—The said documents also include copies of two sale deeds, both dated 06.09.1940, executed by the legal heirs of Shri Budhu, the original lessee of the subject Premises, in favour of the respondents/defendants No.1 and 2, that have been mentioned at Sr. No. 1 and 10 of the documents—Respondents/defendants No.1 & 2 states that the aforesaid documents are very material for deciding the suit instituted by the appellants/plaintiffs praying inter alia for a decree of partition of the subject plots—However, the counsel who was conducting the case committed a blunder by failing to place on record the original documents or producing the same at the time of admission and denial of documents, so that they could have been exhibited—As a result, the trial court did not have an opportunity to examine the aforesaid documents, the defendants having failed to exhibit them—Respondents state that they ought not to be made to suffer for the folly of their counsel and interest of justice demands that the said documents be permitted to be produced by way of additional evidence and be taken into consideration—In the accompanying appeal,

the appellants/plaintiffs have assailed the judgment dated 25.09.2009 passed by the trial court dismissing their suit for partition and permanent injunction in respect of the subject properties—Now the respondents/defendants have filed the present application seeking leave to produce the original documents, photocopies whereof were already placed on record by them before the trial court, and grant of permission to have the admission and denial thereof conducted so that they can be exhibited in accordance with law and a fresh decision taken by the trial court. Held: Section 107 of the CPC empowers the appellate court "to take additional evidence or to require such evidence to be taken", "subject to such conditions and limitation as may be prescribed"—Rule 27 of Order 41 of the CPC prescribes the conditions and limitations placed on this discretion—Rules starts by laying down that the parties to an appeal shall not be entitled to produce additional whether oral or documentary, in the appellate court—It then proceeds to carve out two circumstances where the appellate court may allow additional evidence to be produced—The first circumstance is where the court appealed from has refused to admit such evidence that ought to have been admitted and the second circumstance is where the appellate court requires such evidence either to enable it to pronounce judgment or for any other substantial cause—As observed by the Supreme Court in the case of Wedi Vs. Amilal & Ors. reported as MANU/0729/2002MANU/SC/0729/2002: 2004 (1) SCALE 82, "invocation of clause (b) does not depend upon the vigilance or negligence of the parties for it is not meant for them—It is for the appellant to resort to it when on a consideration of material on record, it feels that admission of additional evidence is necessary to pronounce a satisfactory judgment in the case. "In the present case, for the issue of title of the subject properties to be established satisfactorily, it was necessary that the ownership documents came on record—For purposes of dispelling the obscurity on the issue of title, which is of paramount consideration in a suit of partition, interest of justice demands that the documents of title relating to the subject premises and in the power and possession of the respondents/

defendants be looked into to arrive at a just and correct decision—Accordingly, the originals of the documents relating to the title of the subject premises, photocopies whereof were filed by the respondents/defendants in the trial court under index 22.5.2002 are permitted to be taken on record as additional evidence—However, considering the fact that it is on account of failure on the part of the respondents/defendants to file the original title documents that had an important bearing on the case and were material for the consideration of the trial court, for purposes of satisfactorily adjudication the present suit, it is deemed appropriate to allow this application subject to payment of Rs. 50,000/- as casts to the other side within four weeks—Resultantly, the appeal is allowed and the impugned judgment is set aside.

Jai Singh & Anr. v. *Man Singh & Ors.* *1237*

— S. 9—Suit—Suit for possession—Order XII Rule 6—Decree on admission—Admission unequivocal—Held—Court cannot base their decision to a decree on the basis of particular pleading or admission—rather overall effect of pleadings and documents of the concerned parties are to be weighed.

Preeti Satija v. *Raj Kumari and Anr.* *1246*

— S. 9—Suit—Suit for partition possession—Hindu Joint Family Property—Co-parcenerary property—Hindu Succession Act—Amendment of S. 6—Appellants were three sisters—filed suit for partition against two brothers and two sisters—Third brother Sudharshan Lal died on 01.02.1978—Father Bakshi Ram died on 10.02.1960—Mother Smt. Chanan Devi died 03.08.1978—Suit dismissed by learned Single Judge—Appellant contended before the partition of the country the family was a Hindu Undivided Family (HUF) and father ran various businesses in the name of Bakshi Ram & Sons in a part of Punjab now in Pakistan—Post partition—Bakshi Ram allotted various properties in lieu of those left properties numbering 08 and various businesses run by using the funds of HUF—Respondent contended—The various properties self acquired properties and not co-parcernery properties—

Secondly the properties already partitioned post the death of Bakshi Ram— Thirdly since partition had already taken place hence the 2005 Amendments of Section 6 of Hindu Succession Act not operation — lastly the properties governed by Succession Rules under Delhi Land Reforms Act and subject matter beyond the jurisdiction of the Court — Held In concurrence with Ld. Single judge that various properties were Hindu Joint Family Property — further held — deemed partition cannot be said to have taken place merely on the death of family member — instead — the operation of S. 6 Amendment would not depend on date of institution of the suit or at the time of intermediate order—But on whether the partition actually took place either through by registered deed of partition or by decree of the court before or after 2005 Amendment—In the present case the partition was yet to take place—Further Held—2005—Amendment to the Hindu Succession Act would be operative and finally held subject matter of Land Reform Act —rural—agriculture properties rather than urban land—The case in present appeal—No limitation on the jurisdiction of the court—Finding and judgment of learned single judge set aside—Suit remitted for further proceedings to carry out partition of the property in accordance with the law—Appeal allowed.

Swaran Lata and Ors. v. *Shri Kulbhushan Lal and Ors.* *1362*

— Order 37—Plaintiff filed suit U/o 37 of Code praying for recovery of amount with pendente lite and future interest on basis of invoices issued by defendant company—Defendant failed to file application seeking leave to defend—Plaintiff prayed for decree of suit. Held:- In the absence of any application for leave to defend, as per Rule 3(5) of Order 37, the suit is to be decreed.

PP Jewellers Pvt. Ltd. v. *Modern New Kapoor Jewellers Pvt. Ltd.* *1425*

— Order 37 Rule 3 (5)—Leave defend—Defendant assailing Petitioners claim on grounds of lack of jurisdiction and

absence of written contract or acknowledged liability—Question as to jurisdiction—In purview of the Loan Agreement stipulating for execution by defendant at Delhi—Loan disbursed from Delhi, promissory note were signed and payable at Delhi—Held—Part cause of action has arisen in Delhi, thereby no merit in defendants contention qua lack of jurisdiction. Leave to Defend—Defendant urged that the statement of accounts sought to be relied upon by the Plaintiff is not signed by the Defendant and that the Promissory not does not contain the liquidated debt due—Without expressing any opinion on the merits of the matter Held—It is triable issue and granted conditional leave to defend.

GE Capital Services India v. *Prasanta Ghose & Anr. B+* *1534*

— Order 37—Suit under Order 37 of CPC for recovery of Rs. 60,36,522/- pendente lite & future interest @ 18% p.a.—Defendant served by publication under order 5 rule 20 of CPC—Plaintiff a partnership firm—Defendant approached at its Delhi office for the supply of Palm Stearine Oil—Contract between the parties for final price & other terms-oil supplied—Cheques received—Owing to the financial crunch the defendant's company has been facing, the cheques not presented on the request of Defendant—Assurance of defendant that cheques could be presented for payment—Cheques dishonoured despite assurances. Held—Invoice/bill not covered within definition of written contract—Defendant failed to enter appearance in the matter despite substituted service also failed to make payments—Suit decreed in favor or plaintiff.

Harakaran Dass Deep Chand v. *Viren Agrotech Pvt. Ltd.* *1545*

— Order 39 Rule 1 & 2 and Order 39 Rule 4—Plaintiff suit for injunction against three defendants i.e. his two brothers and one sister and his maternal uncle was impleaded as defendant no. 4—According to Plaintiff, he along with his minor daughter and deceased mother was in possession of ground floor in

suit property which was owned by his mother-Mother executed will which was registered and defendant no. 4 was named as Executor of will—As per Will, ground floor of suit property was bequeathed to him first floor to defendant no. 1, second floor to defendant no. 2, third floor, if and when constructed, to defendant no. 3 (sister) etc.—Plaintiff also moved application seeking interim injunction which was contested by defendant no. 1 though supported by defendant nos. 2 to 4. Held:- The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining.

CONSTITUTION OF INDIA, 1950—Article 226—Writ Petition—Delhi Kerosene Oil (Export & Price) Control Order, 1962 (Control Order, 1962 in short)—Clause 6 —Cancellation of licence —Conviction—petitioner firm issued licence for distribution of kerosene oil in 1981—Proprietor Sh. Kanahya Lal died on 02.10.2003—on his death, wife Smt. Leela Kumari, Present Proprietor carried on affairs of oil depot after taking permission of the respondent—necessary amendment carried out in official record—licence transferred in the name of present proprietor vide order dated 30.12.2003—licence renewed from time to time till 09.09.2008—on complaint against petitioner since the transfer of licence in the name of the present proprietor —in Sept, 2007 show cause notice issued—based on—conviction order passed against the husband of present Proprietor under Essential Commodities Act, 1955 in the year 1994—Present Proprietor submitted reply —firm under control and supervision of deceased husband when conviction passed—she had no knowledge about conviction and fine—explanation not accepted—licence cancelled on 15.11.2007—preferred writ petition—Contended—order unreasonable—non-application of mind and

arbitrary—similarly situated persons got relief from the court—reliance on the stale material not justified—action arbitrary—Further contended—cancellation proceedings based on conviction order passed against husband in the year 1994—the action not initiated within reasonable time—after—also unjustified—respondent allowed the change of proprietorship—by their own act condoned the act of deceased husband—respondent contested—once the order of conviction passed respondent well within the right to cancel the licence in terms of Clause 6 of Control Order, 1962—the previous committed breach—convicted—the respondent bound to cancel the licence—Held—statutory authority required to act reasonable, fairly and expeditiously—no reasonable explanation for long delay —thus respondent waived their right for taking any action—respondent reliance on Wadhwa Committee constituted by Supreme Court of India also did not entitle the respondent to get the benefit of their own inaction—writ petition allowed.

— Article 226—Writ Petition—Essential Commodities Act, 1955—Delhi Specified Articles (Regulation & Distribution) Order, 1981—Clause 7—Cancellation of authorization of Fair Price Shop (FPS)—Probation of Offenders Act, 1958 (PO Act)—S. 12—Conviction—Disqualification—The licence of FPS granted to Sh. Puran Mal-father of petitioner on 06.06.1977—Puran Mal as sole proprietor carried out business till 09.01.2002-died-petitioner approached the department for transfer of licence in his name—On 14.06.2002 application allowed—Licence renewed from time to time—Lastly renewed from 24.04.2006 to 23.04.2009—Show cause notice issued on 17.08.2007 to petitioner—Alleging—Puran Mal convicted under Essential Commodities Act—Petitioner appeared before Assistant Commissioner-pointed out-father released on probation for one year—Explanation not found satisfactory—Licence cancelled on 29.10.2007—Preferred writ petition—Contended—Once the fine of Rs. 5000/- imposed after

second—Third floor alongwith requisite fees—Respondent did not sanction the plan—Instead issued a show cause notice on 05.03.2012—Petitioner no. 1 and respondent no. 4 to explain as to why demolition of unauthorized and illegal development be not undertaken on 02.04.2012 petitioner submitted reply—Reiterated request for sanction—Aggrieved by inaction on the part of respondent no. 1 and 2—Preferred writ petition—During the hearing submitted by petitioner that respondent no. 3 and 4 not co-operative with petitioner—On account of their non-corporation—Resistance in raising any construction—Respondent no. 2 declined to grant sanction to the proposed building plan—However—Respondent 3 and 4 denied—Submitted building plan may be sanctioned subject to ensuring that the structural strength of the existing built-up structure not adversely affected—Petitioner submitted a tabulated chart in respect of deviation mentioned in the show cause notice—Pointed out deviation in the portion of premises under the occupation of petitioner and mezzanine floor—Either compoundable nature or did not concern them—Chart furnished to respondent no. 1 and 2—Director (Building), DDA directed to take into consideration the chart for an efficacious resolution of the dispute—directed to pass reasoned order dealing with contention raised by petitioner and keeping in mind the decision rendered in WP(C) No.3535/2001 entitled as Ashok kapoor and Ors. v. MCD—An order dated 02.09.2013 Passed by Director Building) for sealing—Cum-Demolition—order challenged by the petitioner—Contending-Contrary to the guidelines laid down in above mentioned case—Court observed—The facts in the case of Ashok Kapoor similar to the present case where the subject property segregated in different portion and mutated in individual names specifying the portion of the property—Held—(A) when segregation of interest of different co—Owner recognized by the MCD by mutation of different portion in individual named of different persons there cannot be any requirement of signature of all the co—Owners in considering the sanction of building plan of one of Co—Owner of the subject property in his/her portion (b) even if there is

embargo on DDA and on civic authority from taking an action in respect of non compoundable deviation/misusers till December, 2014 in terms of National Capital Territory of Delhi Laws (Special Provisions) Bill, 2009—It can hardly be ground of refusing the sanction of building plane submitted by petitioner for their portion of subject property or from preventing them from raising construction in their portion of subject premises in accordance with law—(c) structural safety certificate placed on record shall be duly considered by DDA and if it needs stipulated requirement the same shall be accepted—If there is any requirement of meeting alternation in the building plan on account of structural concern the same shall be intimated to the DDA by petitioner in writing—Petition disposed off.

— Article 226-227—Writ Petition—Service law—Departmental Enquiry (DE)—Dismissal-findings on all charges—Petitioner joined New Bank of India on 01.04.1969—Which merged with Respondent No. 1 was serving as Manager at Defence Colony, New Delhi Branch—Certain loan advances sanctioned under his vigil-approved by superior w.r.t. sanctioning of advances an investigation was conducted and secret report generated by vigilance department qua petitioner—One Sh. P.K. Salia, Chartered Accountant and the Assistant General Manager—Petitioner himself filed two FIRs against some of the borrowers in around 21/22.03.1990—Though petitioner complainant but at some stage arrayed as an accused in the criminal proceedings in the interregnum on 17.07.1990 petitioner placed under suspension-served with charge sheet alongwith six article of charges—First charge—Acted in a manner prejudicial to the interest of bank other five charges related to this each charge independent to each other—Enquiry officer appointed—Submitted report on 26.02.1993—On the basis of the report—Disciplinary authority dismissed the petitioner from the services—The appellate authority sustained the punishment—In the interregnum—The petitioner acquitted in the Criminal

case—Preferred writ petition—Contended—Findings of disciplinary authority perverse—Enquiry officer returned the findings qua the first charge only and not on other charges—Disciplinary authority overlooked this aspect—Proceeded on the basis that all charges had been dealt with by enquiry officer—Further contended—Punishment disproportionate to the gravity of alleged misconduct—Further contended at time sanctioning the loan advanced to the five entities—No practice of conducting a pre-sanction inspection—Practice brought into force much later—Petitioner recommended the loan at the end of the day approved by superior authority AGM—Recommendation of sanction made inter-alia on the basis of opinion rendered by lawyer w.r.t. security furnished by borrowers—Lawyers discharged in criminal proceedings—Respondent contended—Court could not re-appreciate the evidence while exercising jurisdiction under Article 226—The enquiry officer has given findings on the main charge the remaining charges off-short of first charge—The acquittal of the petitioner in the criminal proceedings could not be ground to set aside the departmental proceedings as standard of proof in criminal proceedings is different—Court observed—Court cannot re-appreciate the evidence in a proceedings under Articles 226 unless a case of no evidence or case of perversity—Certainly interdict the proceedings if the authorities below not followed the principles of natural justice or have failed to return the finding qua all charges—Held—Enquiry officer has recorded the findings only on the first charge—Impugned order of disciplinary authority is liable to be set aside—Even if—Accepted that remaining five charges were off shoot of the first charge—The quantum of punishment need modification—Although the standard of proof different in criminal proceedings and departmental proceedings—However acquittal in criminal proceedings relevant for reviewing the quantum of punishment—Observed—Normally such cases remanded back for fresh enquiry—But in view of the facts of the case of prolong litigation of 20 years-advance age of petitioner with the consent of both the parties modified the quantum of punishment of dismissal of the service to

compulsory retirement with all consequential benefit—Writ petition disposed of.

K.L. Bhasin v. *Punjab National Bank and Anr.*..... *1410*

— Article 226-227—Writ Petition—Central Administrative Tribunal (CAT)—Service law—Termination—Education Code of Kendriya Vidyalaya Sangathan (Code)—Article 81 (b)—Termination without right to cross—Examine witnesses—Case of immoral sexual behaviour towards student—Petitioner a Post Graduate Teacher (PGT) posted with Kendriya Vidyalaya Yol Cantonment—Complaints received from students—Lady teachers—Parents in the office of Assistant Commissioner, Regional Office, Jammu—Alleging petitioner indulged in moral turpitude involving in immoral sexual behaviour towards the girls students-Fact finding enquiry ordered—Enquiry Committee conducted the proceedings-Committee interacted with 07 victim girls students—One victim lady parent—Three staff members recorded their statement—Submitted report dated 18.08.2002 to Commissioner, KVS—Prima—Facie finding petitioner guilty of moral turpitude involving immoral sexual behaviour—Commissioner considered entire matter including the enquiry report—Formed an opinion-Finding of enquiry committee substantiated by material on record—Exercising jurisdiction under Article 81 (b) of the code—Opined—not expedient to hold regular enquiry under CCS (CCA) Rules, 1965—Would cause serious embarrassment to the students—Cause trauma to them because of their tender age—Memorandum dated 08.04.2003 setting out charges communicated—Called upon the show case—Why his services be not terminated under Article 81 (b)—with the memorandum—copies of preliminary enquiry and report of the committee served upon the petitioner—given full opportunity to submit his representation—Petitioner submitted his reply dtd. 15.05.2013—On consideration of entire record—commissioner passed order dated 07.01.2004 terminating the services of the petitioner—Petitioner preferred appeal—Rejected being time barred-Filled O.A before CAT-Assailed the order of appellate authority-CAT disposed off holding the

COURT FEES ACT, 1870—Section 16A—Plaintiff filed suit for permanent and mandatory injunction along with damages against defendants—Defendant no. 1 was employed with plaintiff company who resigned and joined defendant no. 2 company of which defendant no. 3 and 4 were Directors—Plaintiff apprehended that defendant no. 1 would share confidential and internal information of plaintiff company with defendant no. 2 company for which he was seeking restrain order— However, parties consented before Court and resolved disputes amicably— Plaintiff, thus, prayed for refund of court fees. Held:- when matter stands resolved before framing of issues, plaintiff entitled to refund of court fees in terms of Act.

DELHI DEVELOPMENT ACT, 1957—S. 30(1)—S. 31(A)—Unauthorized construction—Section of building plans—Structural safety—National Capital Territory of Delhi Laws (Special Provisions) Bill, 2009—One Smt. Shakuntala Devi mother of petitioner no. 2 and Respondent No. 3—Owner of—The Property at Shivalik Malviya Nagar, New Delhi—Shakuntala Devi executed a Gift Deed in respect of basement-ground-mezzanine floor-in-favour of her daughter-in-law Respondent No. 4/ Ms. Manju Agrawala—Registered on 02.06.2005—Also executed gift deed in respect of first floor and terrace in favour of her other daughter-in-law petitioner no. 1—Registered on 26.10.2005—Mutation with respect to first floor and terrace done in favour of petitioner no.1 in the record of MCD—Mutation in respect of basement-ground floor-mezzanine floor carried out in favour of respondent no.4 on 27.10.2011 petitioner submitted plans to respondent no. 1 and 2 for carrying out—Addition—Alteration on the first floor—Construction of proposed second—Third floor alongwith requisite fees—Respondent did not sanction the plan—Instead issued a show cause notice on 05.03.2012—

Petitioner no. 1 and respondent no. 4 to explain as to why demolition of unauthorized and illegal development be not undertaken on 02.04.2012 petitioner submitted reply—Reiterated request for sanction—Aggrieved by inaction on the part of respondent no. 1 and 2—Preferred writ petition—During the hearing submitted by petitioner that respondent no. 3 and 4 not co-operative with petitioner—On account of their non-corporation—Resistance in raising any construction—Respondent no. 2 declined to grant sanction to the proposed building plan—However—Respondent 3 and 4 denied—Submitted building plan may be sanctioned subject to ensuring that the structural strength of the existing built-up structure not adversely affected—Petitioner submitted a tabulated chart in respect of deviation mentioned in the show cause notice—Pointed out deviation in the portion of premises under the occupation of petitioner and mezzanine floor—Either compoundable nature or did not concern them—Chart furnished to respondent no. 1 and 2—Director (Building), DDA directed to take into consideration the chart for an efficacious resolution of the dispute—directed to pass reasoned order dealing with contention raised by petitioner and keeping in mind the decision rendered in WP(C) No.3535/2001 entitled as Ashok kapoor and Ors. v. MCD—An order dated 02.09.2013 Passed by Director Building) for sealing—Cum-Demolition—order challenged by the petitioner—Contending-Contrary to the guidelines laid down in above mentioned case—Court observed—The facts in the case of Ashok Kapoor similar to the present case where the subject property segregated in different portion and mutated in individual names specifying the portion of the property—Held—(A) when segregation of interest of different co—Owner recognized by the MCD by mutation of different portion in individual named of different persons there cannot be any requirement of signature of all the co—Owners in considering the sanction of building plan of one of Co—Owner of the subject property in his/her portion (b) even if there is embargo on DDA and on civic authority from taking an action in respect of non compoundable deviation/misusers till

name—On 14.06.2002 application allowed—Licence renewed from time to time—Lastly renewed from 24.04.2006 to 23.04.2009—Show cause notice issued on 17.08.2007 to petitioner—Alleging—Puran Mal convicted under Essential Commodities Act—Petitioner appeared before Assistant Commissioner-pointed out-father released on probation for one year—Explanation not found satisfactory—Licence cancelled on 29.10.2007—Preferred writ petition—Contended—Once the fine of Rs. 5000/- imposed after releasing his father on probation for one year—Therefore the petitioner could not be punished twice for the same offence—Further contended in view of S. 12 of PO Act—Petitioner could not suffer any disqualification-action initiated has became stale - violation - if any-stood condoned-licence renewed subsequently for 11 years—Respondent contended—Entitled to take action as per Clause 7 of Order of 1981—Once father of petitioner committed breach-convicted-respondent bound to cancel the licence—Delay procedural as many Assistant Commissioner transferred in 10 years—Held—Statutory authority required to act reasonably and expeditiously—Transfer of licence of FPS in the name of the petitioner upon the death of his father condoned the earlier conviction—Further as per the provision of PO Act—The person released on probation shall not suffer from any disqualification attached to the conviction—Writ petition allowed.

Praveen Kumar v. *Govt. of NCT of Delhi & Ors.* . *1230*

DOMESTIC VIOLENCE ACT, 2005 (DV ACT)—Sec. 2(a)—definition—aggrieved person—Sec. 2(f)—domestic relationship—Sec.2.(s)—shared households—Sec.2(q) —repondent—Sec.3(a)—domestic violence—economic abuse—Sec.26(1)—relief in any legal proceedings—terms respondent includes female relatives of husband—right of residence—disowning of sons—through public notice—a mere proclamation—does not have dispositive legal effect—respondent—plaintiff—mother—in—law of the defendent—petitioner—filed a suit for possession/eviction of dependent

daughter in law in respect of one bed room—a bathroom and small kitchen—suit property belong to plaintiff's deceased husband—died on 30.06.2008—leaving behind a registered Will dated 20.11.2006—bequeathed a suit property in favour of the Plaintiff—after her husband's death—She become sole and absolute owner—back Portion of the suit property in the possession of defendent no. 1 her daughter-in-law and defendant no. 2 her son—Alleged—Since the relationship between her and defendants became estranged—She wanted them to vacate the property filed application for decree on admission defendant contested that the plaintiff not absolute owner—WILL had not been granted probate intestate in law without being probated the WILL could not come into force—Ld. Single Judge opined—Not disputed due execution of WILL—No legal effect because it had not been probated—Therefore an admission—Further held—inessential to seek a probate—Thus WILL being admitted remain operative between the parties—Decreed the suit on admission—Court observed—Appellant had relied upon the provision of protection of woman from violence as per DV Act before Ld. Single Judge—Also filed a suit before Civil Judge Rohini Court pending—However—Ld. Single Judge rejected the arguments with respect to applicability of the provision of DV Act—Holding—Suit property could not considered as a shared household preferred appeal against the order of Single Judge—Contended—No unambiguous admission of the kind warranted exercise of discretion under Order XII Rule 6 CPC—Further argued entitled to right to live in the suit property under domestic violence Act, 2005 keeping in mind the proviso to definition of respondent in S.2(q) which included relatives of male respondent in the domestic relationship with aggrieved wife—S. 19 (1) (f) of the Act also allowed grant of residence order against the respondent to provide accommodation equivalent to that enjoyed by aggrieved party in the share household—Plaintiff/respondent contended—Definition of share household was conclusively laid down in previous cases since the husband being disowned had no right of ownership in the household—The wife could not claimed

any right of residence in it—Held—The intent of the Parliament to secure the right of residence in the household of respondent (including his relatives) even if the household is one in which respondent is tenant or one in which he jointly or singly had any right—Title interest in law or equity—Thus enabling a wife of deceased male/estranged male to claim a domestic relationship with the mother-in-law—This right not dependent on husband having any right—Share or title in the premises by secular or Hindu Law—Even if mere fact of residence was sufficient and consequently the aggrieved woman could claim right of residence in any such household of the husband—Appeal allowed.

Preeti Satija v. *Raj Kumari and Anr.* *1246*

ESSENTIAL COMMODITIES ACT, 1955—Delhi Specified Articles (Regulation & Distribution) Order, 1981—Clause 7—Cancellation of authorization of Fair Price Shop (FPS)—Probation of Offenders Act, 1958 (PO Act)—S. 12—Conviction—Disqualification—The licence of FPS granted to Sh. Puran Mal-father of petitioner on 06.06.1977—Puran Mal as sole proprietor carried out business till 09.01.2002-died-petitioner approached the department for transfer of licence in his name—On 14.06.2002 application allowed—Licence renewed from time to time—Lastly renewed from 24.04.2006 to 23.04.2009—Show cause notice issued on 17.08.2007 to petitioner—Alleging—Puran Mal convicted under Essential Commodities Act—Petitioner appeared before Assistant Commissioner-pointed out-father released on probation for one year—Explanation not found satisfactory—Licence cancelled on 29.10.2007—Preferred writ petition—Contended—Once the fine of Rs. 5000/- imposed after releasing his father on probation for one year—Therefore the petitioner could not be punished twice for the same offence—Further contended in view of S. 12 of PO Act—Petitioner could not suffer any disqualification-action initiated has became stale - violation - if any-stood condoned-licence renewed subsequently for 11 years—Respondent contended—Entitled to take action as per Clause 7 of Order of 1981—Once father of petitioner

committed breach-convicted-respondent bound to cancel the licence—Delay procedural as many Assistant Commissioner transferred in 10 years—Held—Statutory authority required to act reasonably and expeditiously—Transfer of licence of FPS in the name of the petitioner upon the death of his father condoned the earlier conviction—Further as per the provision of PO Act—The person released on probation shall not suffer from any disqualification attached to the conviction—Writ petition allowed.

Praveen Kumar v. *Govt. of NCT of Delhi & Ors.*. *1230*

HINDU SUCCESSION (AMENDMENT) ACT. 2005—S.6—Amendment—S.6(1)—not applicable partition or testamentary disposition of property before 20th December, 2004—Prospective in nature—Applicable to pending suits—Preliminary partition decree—Does not amount to partition—Would not apply to partition by way of settlement—Registered instrument of partition-By oral arrangements of the parties—Decree of the court—Held—Amendment applicable as partition yet to take place.

Swaran Lata and Ors. v. *Shri Kulbhushan Lal and Ors.* *1362*

INCOME TAX ACT, 1961—Section 25—F(1), 132, 142, 142-(2)A, 158BE, 245(1), 245—A(b), 245—C, 245—D(4), 245(E), 245—F(2)—On 07-08-1997, search and seizure operations were conducted at residential and business premises in respect of petitioner, his wife and other relatives-Several articles and documents were seized—Upon receipt of notice, petitioner filed a return for period from 01.04.1986 to 07.04.1986—As accounts indicated sufficient complexities, Special Auditor submitted his report-During pendency of these proceedings Settlement Commission entertained application made to it—While Settlement Commission's proceedings were pending petitioner contended that entire proceedings had become time barred—Settlement Commission rejected petitioner's argument—Order challenged before High Court—Plea taken, since Assessing Officer did

not complete assessment within time period permitted by law, Settlement Commission which was invested with his power could not likewise have proceeded further—Per contra plea taken, power of Assessing Authority to make order does not allow applicant approaching Settlement Commission to contend that jurisdiction ceases automatically if assessment is not framed—Held—Pre—Condition for Commission to receive application is that a case should be pending as on date of its presentation-No objection as to jurisdiction of Settlement Commission was made when application was admitted—Observation in impugned order of Commission that to re—Visit order would in effect amount to impermissible review is, in opinion of this Court, sound reasoning—Authority of a Settlement Commission to make such orders as are necessary in regard to matters before it also extends to other matters relating to case not covered by application but referred to in report of Commission—Settlement Commission is empowered to re—Open any proceeding connected with case in respect of which assessment too has been completed—Given these powers, fact as to whether Assessing Officer was in process of making assessment or not becomes irrelevant—A machinery provision in Income Tax Act cannot be subjected to literal or strict rule of construction that is adopted to interpret a charging Section—Consequence of accepting argument of assessee would be that even though there was a search of his premises under Section 132 of Act which yielded incriminating material, proceedings arising out of which he wanted to settle by approaching Settlement Commission, he would still end up not paying any tax, as block assessment became barred by time and there would also be no settlement order under Section 245D(4)—Such a situation could not have been intended by statute-There is no merit in petition and it is accordingly dismissed.

Ashwani Kumar Goel v. *Income Tax Settlement Commission & Ors.* *1449*

INDIAN PENAL CODE, 1860—Section 452/394/398- minor contradictions and discrepancies do not affect the core of the

prosecution case-ocular testimony in consonance with medical evidence-

— Merely because blood was not found on the knife at the time of its production in the court, cogent and credible statement of victim cannot be discarded.

— Use of brick to cause injuries in an attempt to get released co-accused only from the clutches of the victim and to commit robbery, cannot be considered 'use of a deadly weapon' to attract and prove commission of an offence U/ section 398 IPC.

Shekhar @ Chhotu v. *The State (NCT of Delhi)*..... *1283*

— Section 395/397 IPC—Dacoity while armed with deadly weapon—Causing hurt while committing dacoity—Appellant and his associated committed dacoity of 28 bags of plastic raw material—One Salim @ khan found in possession of 28 bags filled with plastic raw material—case FIR no.158/07 u/s,395/397 IPC registered at P.S Civil Lines—Appellant and his associates arrested in case FIR No161/07 u/s. 399/402/34 IPC P.S Civil Lines—made disclosures—Involvement in present case emerged 28 bags recovered—Statements of complainant and witnesses recorded—Charge-sheet filed against all the accused persons—One accused faced proceedings before juvenile justice Board—Accused person duly charged—Prosecution examined 14 witnesses in statement u/s. 313 cr. P.C the accused persons pleaded false implication accused persons convicted of offences u/s 395/97 IPC two accused persons confessed their guilt and their appeals disposed of aggrieved appellant preferred appeal Held—complainant's (PW-3) statement recorder at the earliest point of time—Gave detailed account of the occurrence—Complainant supported his version given to the police without variation—Identified the assailants—Attributed specific role to the appellant—Appellant did not cross examine the witness despite opportunity—Testimony of complainant unchallenged and unrebutted—No motive assigned to complainant to falsely

implicate the appellant—No prior acquaintance or animosity with the appellant—No explanation furnished by the accused to the incriminating circumstance as appearing against him—prosecution established doubt of having committed dacoity—No injuries inflicted on complainant by any weapon—Weapon used in the crime not recovered—No description, size or dimension of knife used give—Broad featured of the weapon used not described—Evidence lacking on possession and use of deadly weapon—Conviction u/s. 397 IPC not permissible—Appellant at par with another convict—Conviction u/s. 397 IPC set aside—Sentence u/s. 395 IPC modified and reduced.

Vikram @ Ganja v. *State* *1457*

— Sections 395—Punishment for dacoity—Section 398 attempt to commit robbery or dacoity when armed with deadly weapon—Arms Act, 1950—Section 27 use of prohibited arm—Complainant a security guard outside the godown of EIT at Alipur—Notices two tempos moving towards godown at about 2:15 am—Raised alarm saying daku daku—Two assailants caught hold of him—Other assailants attacked him with a knife—Two police men arrived on motorcycle—Assailants fled from the spot tempos were stopped after chase—Four accused persons alighted and started running overpowered and apprehended—Knife recovered tempos seized—Statement of the complainant recorded FIR No. 72/08 u/s. 395/397/398 IPC r/w. Section 25/27 Arms Act registered charge-sheet filed—All the accused persons charged and brought to trial—Prosecution examined seven witnesses—Statements u/s. 313 Cr. P.C. of the accused persons recorded—Pleaded false implication—Three accused persons including appellant convicted two accused persons acquitted aggrieved appellant preferred appeal—Held testimony of complainant and police witnesses is similar—No prior animosity with the appellant—No ulterior motive to falsely implicate the appellant—Complainant had no reason to let the real culprit go scot free—Injury on the person of complainant opined to be simple caused by sharp weapon tempos recovered from the possession of assailants—Appellant did not

give explanation for his presence at the spot were armed with various weapons—No theft taken place—No cutting material etc. found or recovered no marks of hammer on the shutter—Mere preparation or attempt to commit house breaking with intention to commit theft—Violence/hurt was unconnected with theft—No property delivered by the complainant under fear of instant hurt—No dacoity conviction u/s. 395/398 IPC not permissible—Offence u/s. 379 r/w s. 511 IPC and section 324 IPC proved—Conviction u/s. 395/398 IPC set aside—Sentence modified.

Sanwar @ Razzak v. *State* *1464*

— Sec. 396—Conviction on the basis of the disclosure statements made by a juvenile Akram about his and others 'Involvement in the dacoity—Certain allegedly recovered articles not mentioned in the crime scene report—Recovery disbelieved—Non holding of the TIP and delay in filing FIR—Non fatal to the prosecution case as witness had sufficient time to watch and observed the culprits and it was not the case of fleeing glimpse—Mere recovery of stolen property from an accused—Not sufficient to prove conviction u/s 396 or 449 or 412 IPC.

Salam Kaviraj @ Chuha v. *State (Govt. of NCT of Delhi)* *1469*

— Appellants convicted u/s 307/34—Conviction challenged—Appellant had stabbed the injured with a 'vegetable knife' in an auto parking of a metro station—Trial Court charged the accused u/s 307/34 IPC—Conviction challenged on ground—No intention to kill and no premeditation. Held—No preparation or motive found to kill injured—Injuries received simple in nature—Alteration of conviction into 324 IPC—Appellate released for the period already undergone.

Wasim (Passa in J.C) v. *State of Delhi* *1489*

— Sec. 307 & Sec. 379—Head constable stabbed at railway track—No eye witness—Appellant arrested and made a disclosure statement which confirmed his involvement in the

the germs to enter the cracks in the skin", unlike the defendant's soap. The appellant argued that, first, Dettol is neither an antiseptic soap (as held in a previous judgment of the Delhi HC) nor an unbranded soap, second, that the respondent neither had a monopoly over the colour, shape or packaging of the soap, nor had registered the shape, contours and curvatures of its soap under the Designs Act to create an exclusive right of use, third, that "totality of impression" (and not either the "test of confusion" applied in passing off actions, or the isolated frame-by-frame approach) must be used as the test of disparagement, so that the intent, manner, story line and message of the advertisement is conveyed, fourth, that the audience of the impugned advertisement must be considered to be the reasonable man with imperfect recollection, and the consumer/user base of the soap, by virtue of being acquainted with what the product looks like, would not have imperfect recollection and fifth, that the test of malice was not fulfilled i.e. nothing was done with the direct object of injuring the other person's business—Appellant/defendant challenged the grant of punitive damages while the respondent/plaintiff argued that general or compensatory damages ought to have been awarded, first.

— Held: Slander of goods is a species or branch of the law of defamation—It is widely accepted that to be defamatory, an imputation must tend to lower the claimant in the estimation of right thinking members of society generally, (i.e., the reference to the 'common' or reasonable' man)—In the present case, the learned Single Judge correctly described the guiding principles after discussing the case law on the subject and even brought home the distinction between passing off actions—Which are concerned with deceptively similarity or confusion between the two marks for which the test of impression gathered by an average woman or man with imperfect recollection is applicable and disparagement—Whilst there can be no quarrel with the fact that a reasonable man and an average man refer to the same metaphor and imperfect

recollection refer to an natural attribute of a reasonable or average man, what needs closer scrutiny is whether the standard applicable in judging disparagement claims is if a particular class of user (in this case the Dettol user) feels that the statement is disparaging—There appears to be an overwhelming consensus of judicial opinion that to determine whether a statement disparages or defames the view point to be considered is that of the general public (the refinements of whether such "right thinking" or "reasonable" persons belong to a "respectable" section of the public, apart). Thus, whenever an argument that sectarian approach (i.e. applying the standpoint of members of a section of the public) is to be adopted, Courts have tended to reject it time and again.

— The first question here is as to the manner in which such advertisements are to be viewed, and secondly, the legal standard against which the advertisement is to be judged—On this question, the advertisement must be seen as a viewer would normally view it in the course of the television programme, and not specifically with a view it in the course of the television programme, and not specifically with a view to catch an infringement—This distinction is thin, but important: in trying to determine whether commercial disparagement has occurred, the relevant consideration is how the viewer (i.e. the individual to whom the alleged disparagement is addressed) would see the advertisement—This consideration is important also because of the manner in which the advertisement is appreciated—Whether as a running reel or frame by frame—The answer to this necessarily is the former, for two clear reasons—First, when deciding such matters, the judge is to consider (as will be discussed below) how an average, reasonable man would view the advertisement as it appears on the television or electronic medium, as in the present case. In order to do this, the endeavour of the Court is to substitute its judgment for that of the average/reasonable man. Undoubtedly, when the advertisement is displayed on the television, it is nor scrutinized in ever detail by the viewers, but rather, taken as a whole as

it is displayed. This simple proposition is of great relevance, since a judge, sits in an adversarial setting with the clear purpose of determining whether commercial disparagement has occurred, and thus, on the look-out for any indication of the same, must equally remain cautious that the advertisement is viewed as viewers normally view it.

— In the present case, the plaintiff (Reckitt) has been able to prove, successfully, that HUL telecast the impugned 30 second advertisement on a large number of occasions (2763 times, to be precise, according to Ex. PW-1/19)—The innuendo was cleverly designed to suggest that Rackitt's DETTOL Original caused damage to the skin—The advertiser, i.e. HUL, was conscious that it was crossing the boundary between permissible "puffing" and what was prohibited in law—The evidence on record, in the form of HUL's witnesses testimony, is that Rs. 2.5 crores was spent in July 2007 alone for advertising its product—HUL also admitted during the trial that the DETTOL Original brand was worth Rs. 200 crores—Such being the case, this Court holds that the Single Judge's reluctance to award general damages was not justified—It would be necessary to mention in this context that it may not be possible for an otherwise successful plaintiff, in a disparagement or slander of goods action to always quantify the extent of loss; there would necessarily be an element of dynamism in this, because of the nature of the product, the season it is sold in, the possible future or long term impact that may arise on account of the advertisement, etc. Therefore, courts the world over have resorted to some rough and ready calculations—In view of the evidence presented before this Court (i.e. the number of times the advertisement was telecast, the quantum of advertisement expenses of HUL, the amount spent by Reckitt, to advertise its product, etc.) this Court is of opinion that the plaintiff is entitled to recover general damages to the tune of Rs. 20 lakhs. The impugned judgment and order is modified to that extent, and the cross objection by Reckitt, is consequently allowed in these terms—As far as punitive damages are concerned, the learned Single

Judge relied in Lokesh Srivastava and certain other rulings. Here, since the Court is dealing with a final decree and a contested one at that (unlike in the case of trademark and intellectual property cases, where the Courts, especially a large number of Single Judge decisions proceeded to grant such punitive damages in the absence of any award of general or quantified damages for infringement or passing off), it would be necessary to examine and re-state the governing principles—Punitive damages should invariably follow the award of general damages (by that the Court meant that it could be an element in the determination of damages, or a separate head altogether, but never completely without determination of general damages)—Impugned judgment fell into error in relying on the decision in *Times Incorporated v. Lokesh Srivastava* 116 (2005) DLT 569—To say that civil alternative to an overloaded criminal justice system is in public interest would be in fact to sanction violation of the law—This can also lead to undesirable results such as casual and unprincipled and eventually disproportionate awards—Consequently, this Court declares punitive damages, based on the ruling in Lokesh Srivastava and Microsoft Corporation v. Yogesh Papat and Another, 2005 (30) PTC 245 (Del) is without authority. Those decisions are accordingly overruled—To award punitive damages, the Courts should follow and categorization indicated in *Rookes* (Supra) and further grant such damages only after being satisfied that the damages awarded for the wrongdoing is inadequate in the circumstances, having regard to the three categories in Rookes and also following the five principles in *Cassel*. The award of general damages through this judgment (although of a figure of Rs. 20 lakhs) is moderate, since the advertisement was aired over 2700 times and seen and intended to be seen by millions of viewers. As observed in John (supra) "The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people..." Having regard to all these circumstances, the Court is of opinion that the award of Rs. 5 lakhs as exemplary damages in the facts of this case was

justified and not disproportionate; it is accordingly upheld—In view of the above discussion, it is held that this appeal has no merit. It is accordingly dismissed, but with costs, quantified at Rs. 55,000/-. The cross objections however succeed and the decree of the learned Single Judge shall be impugned judgment, the plaintiff/Reckitt is also entitled to a decree for Rs. 20 lakhs—Cross objections are allowed to that extent—Plaintiff shall in addition to the costs of the appeal, be also entitled to costs of the cross objection the counsel's fee, assessed at Rs. 25,000/-.

Hindustan Unilever Limited v. *Reckitt Benckiser India Limited* *1288*

PROBATION OF OFFENDERS ACT, 1958 (PO ACT)—S. 12—Conviction—Disqualification—The licence of FPS granted to Sh. Puran Mal-father of petitioner on 06.06.1977—Puran Mal as sole proprietor carried out business till 09.01.2002-died-petitioner approached the department for transfer of licence in his name—On 14.06.2002 application allowed—Licence renewed from time to time—Lastly renewed from 24.04.2006 to 23.04.2009—Show cause notice issued on 17.08.2007 to petitioner—Alleging—Puran Mal convicted under Essential Commodities Act—Petitioner appeared before Assistant Commissioner-pointed out-father released on probation for one year—Explanation not found satisfactory—Licence cancelled on 29.10.2007—Preferred writ petition—Contended—Once the fine of Rs. 5000/- imposed after releasing his father on probation for one year—Therefore the petitioner could not be punished twice for the same offence—Further contended in view of S. 12 of PO Act—Petitioner could not suffer any disqualification-action initiated has became stale - violation - if any-stood condoned-licence renewed subsequently for 11 years—Respondent contended—Entitled to take action as per Clause 7 of Order of 1981—Once father of petitioner committed breach-convicted-respondent bound to cancel the licence—Delay procedural as many Assistant Commissioner transferred in 10 years—Held—Statutory authority required to act reasonably and expeditiously—

Transfer of licence of FPS in the name of the petitioner upon the death of his father condoned the earlier conviction—Further as per the provision of PO Act—The person released on probation shall not suffer from any disqualification attached to the conviction—Writ petition allowed.

Praveen Kumar v. *Govt. of NCT of Delhi & Ors.* . *1230*

SERVICE LAW—Compulsory Retirement—Penalty of compulsory retirement on the basis of admission of guilt—Respondent was subjected to disciplinary proceedings based on the charge that while working as Masalchi/Bearer in the Cafetaria Department, AIIMS, stolen, two gas cylinder from the gas manifold room and taken awayby three wheeler—Respondent disputed the charges levelled against him vide his reply pointing out that prior to the charge sheet dated 7th January, 2008, the petitioner had issued a charge memo dated 11th December, 2006 containing identical allegations which were denied by him vide reply dated 22nd December, 2006 and no further action was taken thereon—However, the enquiry officer submitted a report dated holding that the charged officer had admitted the article of charge and therefore it stood proved—Three years after the submission of the enquiry report, the Disciplinary Authority passed an order dated 15th November, 2011 accepting the report and imposing the penalty of compulsory retirement upon the respondent—His appeal dated 14th December, 2011 was rejected by the order dated 9th May, 2012—The respondent has challenged these orders against him by way of O.A. No. 2047/2013 inter alia on the ground that there was no evidence at all before the enquiry officer and that a communication dated 23rd June, 2008 had been wrongly treated as admission of guilt on his part—Petitioner assails the order dated 26th November, 2013 passed by the Central Administrative Tribunal accepting the O.A. No. 2047/2012 which was filed by the respondent challenging the order of the disciplinary authority dated 15th November, 2011 as well the appellate authority's order dated 9th May, 2012 whereby the respondent's appeal was rejected. Held: Central Administrative Tribunal has considered the import

of the statement made by the respondent in the letter dated 23rd June, 2008 holding that the respondent had not admitted guilt of the charge of theft but had only stated that on 24th April, 2008, he had been asked by another employee Prem Singh to load cylinders in an auto rickshaw—It was stated that these cylinders were unloaded on instructions of Prem Singh at his residence (Prem Singh' residence)—The Tribunal has also noted that even before the enquiry officer on 24th April, 2008, the respondent had stated that he had simply acted as per the instructions of Prem Singh without intention of committing theft—It is an admitted position that other than the said letter dated 23rd June, 2008, the enquiry officer recorded no evidence at all–In his background, it was held that the recommendations of the enquiry officer were based on no evidence and that there was no admission of the charge by the respondent as well—The Tribunal had therefore set aside the inquiry report dated 5th August, 2008, the Disciplinary Authority's order dated 15th November, 2011 and the Appellate Authority's order dated 9th May, 2012—The petitioner has been given liberty to proceed afresh if deem appropriate and pass appropriate orders in accordance with law—Petitioner has not pointed out any material which enables us to take a view different than that taken by the Tribunal—There was no evidence in support of the charge against the petitioner before the enquiry officer—No merit in the writ petition—The writ petition and the application are hereby dismissed.

All India Institute of Medical Sciences & Anr. v. *Ram Kishore & Anr.* *1501*

SPECIFIC PERFORMANCE—Suit for specific performance of an agreement (28.06.2005) & for permanent injunction—Plaintiff filed his evidence by way of affidavit—Despite several opportunities defendant failed to file evidence—Right to lead evidence closed on 06.12.2013. Plaintiff co-owner of the suit property entered into a sale agreement with Defendant—Down payment of Rs. 2.50 lacs—Repeated reminder by the plaintiff

to transfer the title of suit property in the plaintiff—Defendant delayed the matter & did not obtain No Objection Certificate from the Notification Branch of Revenue Department. Defendants also misled the plaintiffs as regards to the real ownership of the property—Suit property originally belonged to the Gaon Sabha of Village Libaspur as against the portrayal of the defendants that the same was purchased by one Sh. Manohar. Held—Plaintiff ready and willing to pay necessary amount—Proof of willingness available—Legal notice was sent to the defendant with regard to the balance payment—Defendant did not obtain the Non-Objection Certificate decreed in the favor of the plaintiff and against the defendant.

Mahesh Chand Aggarwal v. *Mukesh Kalia & Ors.* *1555*

SPECIFIC RELIEF ACT, 1963—Plaintiff filed suit seeking specific performance of agreement to sell, for possession, mandatory and permanent injunction against defendant no. 1 & 2—Due to non-appearance, both defendants proceeded ex-parte—As per plaintiff, she was wiling to perform her part of contract by tendering balance sale consideration amount which was not accepted by defendant no. 1 on pretext suit property to be converted from lease-hold to free-hold. Held: If plaintiff is ready and willing to perform her part of the agreement and defendant neglects to perform his part of agreement, the plaintiff entitled to decree for specific performance of agreement on tendering balance sale consideration to defendant.

Nutan v. *Mukesh Rani & Anr.* *1591*

ILR (2014) II DELHI 1223
W.P. (C)

MIGLANI KEROSENE OIL DEPOT ....PETITIONER

VERSUS

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

(G.S. SISTANI, J.)

W.P. (C) NO. : 8606/2007 & CM NO. : 16222/2007 DATE OF DECISION: 08.01.2014

Constitution of India, 1950—Article 226—Writ Petition—Delhi Kerosene Oil (Export & Price) Control Order, 1962 (Control Order, 1962 in short)—Clause 6 —Cancellation of licence —Conviction—petitioner firm issued licence for distribution of kerosene oil in 1981—Proprietor Sh. Kanahya Lal died on 02.10.2003—on his death, wife Smt. Leela Kumari, Present Proprietor carried on affairs of oil depot after taking permission of the respondent—necessary amendment carried out in official record—licence transferred in the name of present proprietor vide order dated 30.12.2003—licence renewed from time to time till 09.09.2008—on complaint against petitioner since the transfer of licence in the name of the present proprietor —in Sept, 2007 show cause notice issued—based on—conviction order passed against the husband of present Proprietor under Essential Commodities Act, 1955 in the year 1994—Present Proprietor submitted reply —firm under control and supervision of deceased husband when conviction passed—she had no knowledge about conviction and fine—explanation not accepted—licence cancelled on 15.11.2007—preferred writ petition—Contended—order unreasonable—non-application of mind and arbitrary—similarly situated persons got relief from the court—reliance on the

stale material not justified—action arbitrary—Further contended—cancellation proceedings based on conviction order passed against husband in the year 1994—the action not initiated within reasonable time—after—also unjustified—respondent allowed the change of proprietorship—by their own act condoned the act of deceased husband—respondent contested—once the order of conviction passed respondent well within the right to cancel the licence in terms of Clause 6 of Control Order, 1962—the previous committed breach—convicted—the respondent bound to cancel the licence—Held—statutory authority required to act reasonable, fairly and expeditiously—no reasonable explanation for long delay —thus respondent waived their right for taking any action—respondent reliance on Wadhwa Committee constituted by Supreme Court of India also did not entitle the respondent to get the benefit of their own inaction—writ petition allowed.

Admittedly, no action was taken against the petitioner firm for more than a period of 13 years. Thus in my view no action lies against the present proprietor of petitioner firm for the act committed by the previous licence holder. Even otherwise having not taken action for 13 years and on the contrary having renewed licence of the petitioner firm from time to time would amount to condoning the act of the wrong doer; and after 13 years, the respondents are estopped from taking action against the petitioner having waived off their rights by their own conduct. The Government must act in fair, just and expeditious manner. The delay and inaction on the part of the respondent has resulted in creation of valuable rights in favour of the petitioner. **(Para 8)**

It is settled law that a statutory authority is required to act reasonably, fairly and expeditiously. The respondents have not only slept over their right, but also there is no reasonable and plausible explanation for the gross delay, and, thus, the respondents waived their right for taking any action against the petitioner firm. Moreover, the respondents by agreeing

to transfer the licence in the name of the present proprietor of petitioner firm have condoned the act of the previous licence holder of the petitioner firm; further, the respondents have given a reasonable belief to the petitioner that his right and title is good and shall not be disturbed, hence, the licence of the present proprietor cannot be cancelled for the acts of the previous licencee. **(Para 9)**

Counsel for the respondent has placed reliance upon the report of Justice Wadhwa Committee constituted by the Supreme Court of India. In the light of the aforesaid facts and observations, respondents cannot at this stage get benefit of their inaction or the findings of the report. **(Para 10)**

Important Issue Involved: (a) The statutory authority is required to act reasonably, fairly and expeditiously. (b) the delay in taking action amounts to waiving off their right for taking any action (c) delay and inaction on the part of respondent results in creation of valuable right in favour of petitioner.

[Gu Si]

APPEARANCES:

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

FOR THE RESPONDENT : Mr. S.D. Salwan and Mr.Latika Dutta, Advs.

RESULT: Writ Petition allowed.

G.S. SISTANI (ORAL)

1. Rule. With the consent of counsel for the parties, present petition is set down for final hearing. Necessary facts for disposal of this petition are that the petitioner, M/s.Miglani Kerosene Oil Depot was issued a licence No.2302/81 for distribution of kerosene oil. The said Kerosene Oil Depot was being run from the premises bearing No.50 Mansarover Park, Shahdara, Delhi. The petitioner firm is a licence holder for distribution of kerosene oil since 1981. The proprietor of the petitioner

firm (Kanhaiya Lal) died on 02.10.2003 and upon his death, his wife Smt. Leela Kumari (the present proprietor of the petitioner firm) stepped into his shoes and carried on the affairs of M/s.Miglani Kerosene Oil Depot, after taking prior permission from respondent. The necessary amendments were also carried out in the official record of the respondents to this effect. In support of this, counsel for the petitioner has relied upon the office order dated 30.12.2003 bearing No.FAC/NE/F & S/2003/5281 by which the licence was transferred in the name of the present proprietor of the petitioner firm.

2. Counsel for the petitioner has contended that thereafter the licence of the petitioner firm was renewed from time to time, till 09.09.2008. A categorical submission has been made on behalf of the petitioner that since taking over of the depot by Smt.Leela Kumari, upon demise of her husband (Sh.Kanhaiya Lal), there has been no complaint whatsoever against the petitioner. However, in September, 2007, the present proprietor of the petitioner firm was served with a show cause notice, based on a conviction order passed against the husband of the present proprietor under the Essential Commodities Act, in the year 1994, as to why the licence of the petitioner be not cancelled. The present proprietor submitted reply to the show cause in which it was stated that at the time when the order of conviction was passed, the petitioner firm was under the control and supervision of Sh.Kanhaiya Lal (the deceased husband of the present proprietor) and she had no knowledge regarding conviction and fine. However, the respondents did not accept the explanation tendered by the present proprietor and by order dated 15.11.2007 respondent no.2 cancelled the licence of the petitioner with immediate effect, which led to filing of the present petition.

3. It is submitted by counsel for the petitioner that the impugned order suffers from unreasonableness, non-application of mind and is arbitrary. It is also submitted that similarly situated persons had approached this court by filing writ petition bearing No.4030/2006, which was allowed primarily on the ground that reliance on stale material could not be justified and action was arbitrary. It is thus contended that the cancellation proceedings based on order of conviction passed against the husband of the present proprietor in the year 1994, should have been initiated/ passed by the respondents within a reasonable period of time and not after a span of 13 years.

4. It is submitted by counsel for the petitioner that the action of the respondents of cancelling the licence of KOD after a long period is unjustified, in light of the fact that the respondents had allowed the change of the proprietor's name. Even otherwise after issuing a fresh licence in the name of the present proprietor, the respondent by their conduct have condoned the act of the deceased, Sh. Kanhaiya Lal. It is also submitted that no action survives against the present proprietor, as the same is stale and the act stands condoned in light of the fact that the show cause notice was issued after a gap of more than 13 years and during this period the licence was renewed from time to time, moreover in the name of the present proprietor as well. The second argument of the counsel for the petitioner is that once the previous proprietor has been convicted, the petitioner firm cannot be punished twice for the same offence.

5. Mr.Salwan, learned counsel for the respondent has opposed the present petition on the ground that once the order of conviction had been passed, the respondents were well within their right to cancel the licence of the petitioner firm, in terms of Clause 6 of Delhi Kerosene Oil (Export and Price) Control Order 1962, which reads as under:

"6. Contravention of the terms and conditions of licence:

(1) If any licencee or his agent or servant or any other person acting on his behalf contravenes any of the terms and condition or directions or any provisions of this order then without prejudice to any other action that may be taken against licensee according to law, his licence can be suspended by order in writing by the Commissioner.

Proviso to clause 6(1) order vide Dt. 15.2.80.

(2) Without prejudice to the provisions of sub-clause 1 if the Commissioner is satisfied that the licensee has contravened any of the terms and conditions of a licence or the directions issued under clause 3-D or any provision of this order and cancellation of his licence is called for, may after giving the licencee a reasonable opportunity of stating his case against the proposed cancellation by order in writing cancel his licence and shall forward a copy thereof to the licensee.

(3) Notwithstanding anything contains in this clause, where a licencee is convicted by a court of law for breach of the terms and conditions of the licence or contravention of the provision of this order the licensing authority may by order in writing, cancel his licence.

Provided that no such order shall be passed until the appeal, if any, filed against such conviction is dismissed and where no such appeal is filed until the period of limitation for filing an appeal expires."

6. Counsel for the respondent submits that once the previous proprietor had committed breach and was convicted the respondents were bound to cancel the licence of the petitioner firm.

7. I have heard counsel for the parties and also perused the petition as also the annexures filed along with the petition. The basic facts are not in dispute that business of the petitioner firm, M/s.Miglani Kerosene Oil Depot was initially carried out by late Sh. Kanhaiya Lal and he was granted a licence as far back as in the year 1981. The order of conviction in this case against Sh.Kanhaiya Lal was passed in the year 1994. It is also not in dispute that Sh. Kanhaiya Lal expired on 02.10.2003 on which date the order of conviction had already been passed. It is undisputed that as long as the husband of the present proprietor was alive, no action was taken against him in terms of Clause (6) of the Delhi Kerosene Oil (Export and Price) Control Order 1962. However, the respondents who were aware of the order of conviction, at that stage, decided to ignore the same and allowed his wife, Smt.Leela Kumari (the present proprietor of the petitioner firm) to step into the shoes of her husband; and upon her request, the respondents carried out necessary amendments and issued subsequent licence and renewed the same from time to time in favour of Smt.Leela Kumari (the present proprietor of the petitioner firm), who is a separate entity. It is only after a gap of more than 13 years, show cause notice for cancellation of the KOD was issued and the licence was cancelled as according to the respondents, petitioner had incurred a disqualification having been convicted by a criminal court, in terms of the 1962 Order.

8. Admittedly, no action was taken against the petitioner firm for more than a period of 13 years. Thus in my view no action lies against the present proprietor of petitioner firm for the act committed by the

previous licence holder. Even otherwise having not taken action for 13 years and on the contrary having renewed licence of the petitioner firm from time to time would amount to condoning the act of the wrong doer; and after 13 years, the respondents are estopped from taking action against the petitioner having waived off their rights by their own conduct. The Government must act in fair, just and expeditious manner. The delay and inaction on the part of the respondent has resulted in creation of valuable rights in favour of the petitioner.

9. It is settled law that a statutory authority is required to act reasonably, fairly and expeditiously. The respondents have not only slept over their right, but also there is no reasonable and plausible explanation for the gross delay, and, thus, the respondents waived their right for taking any action against the petitioner firm. Moreover, the respondents by agreeing to transfer the licence in the name of the present proprietor of petitioner firm have condoned the act of the previous licence holder of the petitioner firm; further, the respondents have given a reasonable belief to the petitioner that his right and title is good and shall not be disturbed, hence, the licence of the present proprietor cannot be cancelled for the acts of the previous licencee.

10. Counsel for the respondent has placed reliance upon the report of Justice Wadhwa Committee constituted by the Supreme Court of India. In the light of the aforesaid facts and observations, respondents cannot at this stage get benefit of their inaction or the findings of the report.

11. In view of the aforesaid, present proprietor of the petitioner firm cannot be penalized, at this stage even more so since the published act was never committed by the present license holder. A party is bound to act reasonably more so a statutory authority. The authority was under a duty to act reasonably and without prejudice to the rights of the petitioner. Given that the authority has itself renewed the licence of the petitioner, they themselves have condoned the earlier conviction. Further by not acting within a reasonable period of time and by agreeing to renew the licence in the name of the present proprietor of the petitioner firm, the respondents have given her a reasonable cause to believe that a right has accrued in her favour.

12. Taking into consideration the fact that the respondents decided to transfer the licence in the name of the present proprietor of the

petitioner firm, and despite the order of conviction no action was initiated by the respondent against the petitioner during the lifetime of the previous licence holder i.e. Sh.Kanhaiya Lal, the action of the respondents amounts to condoning the offence committed. Accordingly, the impugned order of cancellation is quashed.

13. Rule is made absolute. Petition and the application stand disposed of in above terms. Parties shall bear their own costs.

ILR (2014) II DELHI 1230
W.P. (C)

PRAVEEN KUMAR ....PETITIONER

VERSUS

GOVT. OF NCT OF DELHI & ORS. ....RESPONDENT

(G.S. SISTANI, J.)

W.P. (C) NO. : 8350/2007 DATE OF DECISION: 08.01.2014

Constitution of India, 1950—Article 226—Writ Petition—Essential Commodities Act, 1955—Delhi Specified Articles (Regulation & Distribution) Order, 1981—Clause 7—Cancellation of authorization of Fair Price Shop (FPS)—Probation of Offenders Act, 1958 (PO Act)—S. 12—Conviction—Disqualification—The licence of FPS granted to Sh. Puran Mal-father of petitioner on 06.06.1977—Puran Mal as sole proprietor carried out business till 09.01.2002-died-petitioner approached the department for transfer of licence in his name—On 14.06.2002 application allowed—Licence renewed from time to time—Lastly renewed from 24.04.2006 to 23.04.2009—Show cause notice issued on 17.08.2007 to petitioner—Alleging—Puran Mal convicted under Essential Commodities Act—Petitioner appeared before

Assistant Commissioner-pointed out-father released on probation for one year—Explanation not found satisfactory—Licence cancelled on 29.10.2007—Preferred writ petition—Contended—Once the fine of Rs. 5000/- imposed after releasing his father on probation for one year—Therefore the petitioner could not be punished twice for the same offence—Further contended in view of S. 12 of PO Act—Petitioner could not suffer any disqualification-action initiated has became stale - violation - if any-stood condoned-licence renewed subsequently for 11 years—Respondent contended—Entitled to take action as per Clause 7 of Order of 1981—Once father of petitioner committed breach-convicted-respondent bound to cancel the licence—Delay procedural as many Assistant Commissioner transferred in 10 years—Held—Statutory authority required to act reasonably and expeditiously—Transfer of licence of FPS in the name of the petitioner upon the death of his father condoned the earlier conviction—Further as per the provision of PO Act—The person released on probation shall not suffer from any disqualification attached to the conviction—Writ petition allowed.

It is settled law that a statutory authority is required to act reasonably, fairly and expeditiously. **(Para 12)**

Moreover, in my view father of the petitioner has not incurred the disqualification of grant of license/authorization due to conviction, as it is settled law that a person released on probation under Section 12 of the Probation of Offenders Act shall not suffer any disqualification. In the case of **Gulzar v. State of M.P.,** (2007) 1 SCC 618, it has been held as under:

> "'.While Section 12 of the PO Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the PO Act shall not suffer disqualification, if any, attached to the conviction of an offence under any law'." **(Para 15)**

In view of the aforesaid, present petitioner cannot be penalized, at this stage even more so since the published act was never committed by the present license holder. A party is bound to act reasonably more so a statutory authority. The authority was under a duty to act reasonably and without prejudice to the rights of the petitioner. Given that the authority has itself renewed the license of the petitioner, they themselves have condoned the earlier conviction. Further, by not acting within a reasonable period of time and by agreeing to renew the license in the name of petitioner, the respondents have given the petitioner a reasonable cause to believe that a right has accrued in his favour. Petitioner is also entitled to the benefit of Section 12 of the Probation of Offenders Act. Accordingly, the impugned show cause notice dated 17.8.2007 and cancellation order dated 29.10.2007 are quashed. **(Para 17)**

Important Issue Involved: (a) The statutory authority is required to act reasonably, fairly and expeditiously. (b) convict dealt with under S. 3 & 4 of Probation of Offenders Act, shall not suffer disqualification attached to the conviction under any law.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. Sanjay Goel, Advocate.

FOR THE RESPONDENT : Mr. S.D. Salwan and Ms. Latika Dutta, Advs.

CASE REFERRED TO:

1. *Gulzar* vs. *State of M.P.,* (2007) 1 SCC 618.

RESULT: Writ Petition allowed.

G.S. SISTANI, J. (ORAL)

1. Rule. With the consent of counsel for the parties, the present

petition is set down for final hearing and disposal.

2. In this case licence of Fair Price Shop under the name M/s.Puran Mal Om Prakash, was granted to Sh.Puran Mal (father of the petitioner herein) on 06.06.1977. Sh.Puran Mal, as the sole proprietor continued to carry on his business till 09.01.2002 on which date he expired. Immediately the present petitioner (Sh.Praveen Kumar) approached the department for transfer / change of licence in his own name, in respect of Fair Price Shop. By order dated 14.06.2002, the application of the petitioner was allowed and the licence of Fair Price Shop was transferred in the name of present petitioner. From June, 2002, petitioner continued to carry out his business, without any adverse report from the department. The licence of the petitioner was renewed from time to time and lastly renewed for the further period of three years i.e. from 24.04.2006 to 23.04.2009.

3. On 17.08.2007 a show cause notice was issued to the petitioner, alleging that Sh.Puran Mal was convicted under the Essential Commodities Act. The petitioner appeared before the Assistant Commissioner (SW) on 22.08.2007 and pointed out that his father was released on probation of one year and fine of Rs.5,000/- was imposed upon him. Since the explanation was not found to be satisfactory, by an order dated 29.10.2007, the licence was cancelled.

4. It is submitted by counsel for the petitioner that at the time when the offence was committed, the petitioner was barely 20 years of age and he was studying and had no knowledge about the said incident. It is further submitted that even otherwise, after the order was passed, the licence was renewed from time to time by the respondents; and that the department was aware of all facts.

5. It is further submitted that once in the year 1996 a fine of Rs.5000/- was imposed upon the father of the petitioner, after releasing him on probation of one year, and therefore, the petitioner cannot be punished twice for the same offence. The second argument of counsel for the petitioner is that in view of Section 12 of the Probation of Offenders Act, 1958, petitioner does not suffer any disqualification. The third argument of counsel for the petitioner is that the show cause notice dated 17.8.2007 and cancellation order dated 29.10.2007 are liable to be quashed, as firstly the action initiated has become stale; and secondly,

violation, if any, by the father of petitioner stands condoned, as licence was renewed subsequently for 11 years and moreover in the name of the present petitioner.

6. Mr.Salwan, learned counsel for the respondent submits that in addition to the administrative action, respondents were entitled to take action as per Clause 7 of the 1981 Order dated 12.01.1981, i.e. Delhi Specified Articles (Regulations of Distribution) Order, 1981 which reads as follows, and submits that once the father of the petitioner had committed breach and he was convicted, the respondents were bound to cancel the licence of the petitioner:

> **"7. Cancellation of authorization upon Conviction.-** Notwithstanding anything contained in this clause where an authorized wholesaler or a fair price shop holder has been convicted by a court of law in respect of contravention of any of the provisions of this Order or any other order made under Section 3 of the Essential Commodities Act, 1955 (10 of 1955), the Deputy Commissioner may, by order, in writing cancel his authorization forth with :
>
> Provided that where such conviction is set aside in appeal or revision the Deputy Commissioner may on application by the person whose authorization has been cancelled re-issue the authorization to such person."

7. Counsel for the respondent submits that the delay is procedural, as in the period of 18 years, 24 Assistant Commissioners had been transferred in one zone, and in another zone 12 Assistant Commissioners were transferred in 10 years.

8. In response to the above, the counsel for the petitioner stated that in case the respondents were to rely upon Clause 7 of the order dated 12.1.1981, the same should have been invoked by them within a short period of time from the date of the cause of action and in any case within a reasonable period of time. It is further contended that on account of delay, the respondents are estopped from relying on Clause 7 of the Order dated 12.01.1981 which would be deemed to have been given up by the respondents, by virtue of their conduct; and on the contrary, vested right has been created in favour of the petitioner by continuous renewal of license, which cannot be taken away at this belated stage.

9. I have heard counsel for the parties and also perused the petition as also the annexures filed along with the petition.

10. The basic facts are not in dispute that the license was granted to the father of the petitioner to run a Fair Price Shop. The father of the petitioner was convicted and later on released on probation. It is not in dispute that as long as the father of the petitioner was alive, no action was taken against him as per Clause 7 of the Delhi Specified Articles (Regulations of Distribution) Order 1981. Thereafter, licence was granted in favour of the petitioner, who is a separate entity and further the said licence of the petitioner was renewed from time to time and only after a gap of more than 11 years, show cause for cancellation of the Fair Price Shop was issued and the licence was cancelled as according to the respondent, petitioner had incurred a disqualification by virtue of his predecessor having been convicted by a criminal court, in terms of 1981 Order.

11. Admittedly, no administrative action was taken by the respondent against the petitioner for more than 11 years. In my view no action lies against the present petitioner for the act committed by the previous licence holder. Even otherwise having not taken action for 11 years and on the contrary having renewed licence of the petitioner from time to time would amount to condoning the act of the wrong doer; and after 11 years, the respondents are estopped from taking action against the petitioner having waived off their rights by their own conduct. The Government must act in fair, just and expeditious manner. The delay and inaction on the part of the respondent has resulted in creation of valuable rights in favour of the petitioner.

12. It is settled law that a statutory authority is required to act reasonably, fairly and expeditiously.

13. The respondents have not only slept over their right, but also there is no reasonable and plausible explanation for the gross delay, and, thus, the respondents waived their right to take action against the petitioner. Moreover, the respondents by agreeing to transfer the licence in the name of the petitioner have condoned the act of the predecessor of the petitioner herein, hence, the licence of the present petitioner cannot be cancelled for the acts of the previous licencee.

14. At this belated stage, the action of the respondent has become stale and more so when the authorization of person who was actually convicted has already been transferred to another, which transfer has been carried out by the respondents' department itself and the new proprietor/authorization holder has been continuously running Fair Price Shop for years. The above narration of facts would show that the department has been extremely careless and casual in enforcing the terms of the license, in accordance with law, and, thus, respondents' action cannot be sustained.

15. Moreover, in my view father of the petitioner has not incurred the disqualification of grant of license/authorization due to conviction, as it is settled law that a person released on probation under Section 12 of the Probation of Offenders Act shall not suffer any disqualification. In the case of **Gulzar v. State of M.P.,** (2007) 1 SCC 618, it has been held as under:

> "....While Section 12 of the PO Act states that the person found guilty of an offence and dealt with under Section 3 or 4 of the PO Act shall not suffer disqualification, if any, attached to the conviction of an offence under any law...."

16. Respondents' counsel has placed reliance upon the report of Justice Wadhwa Committee constituted by the Supreme Court of India. Due to the aforesaid facts and observations, respondents cannot at this stage get benefit of their inaction or the findings on the report.

17. In view of the aforesaid, present petitioner cannot be penalized, at this stage even more so since the published act was never committed by the present license holder. A party is bound to act reasonably more so a statutory authority. The authority was under a duty to act reasonably and without prejudice to the rights of the petitioner. Given that the authority has itself renewed the license of the petitioner, they themselves have condoned the earlier conviction. Further, by not acting within a reasonable period of time and by agreeing to renew the license in the name of petitioner, the respondents have given the petitioner a reasonable cause to believe that a right has accrued in his favour. Petitioner is also entitled to the benefit of Section 12 of the Probation of Offenders Act. Accordingly, the impugned show cause notice dated 17.8.2007 and cancellation order dated 29.10.2007 are quashed.

18. Rule is made absolute. The petition stands disposed of in above terms. Parties shall bear their own costs.

ILR (2014) II DELHI 1237
RFA

JAI SINGH & ANR. ....APPELLANTS

VERSUS

MAN SINGH & ORS. ....RESPONDENTS

(HIMA KOHLI, J.)

RFA NO. : 413/2009 DATE OF DECISION: 09.01.2014

Code of Civil Procedure, 1908—Section 107, 151 r/w Order 41 Rule 27—Additional documents—Brief Facts—Respondents had filed Photocopies of twenty five documents under an index dated 22.05.2002, which was subsequent to their filing the written statement in the trial court—The said list of documents includes copies of the lease deeds dated 11.08.1953 and 11.02.1954 executed by the Delhi improvement Trust in respect of the subject in favour of the respondents No.1 and 2, who were then minors, under the Guardianship of their father, Shri Ram Singh—The said documents also include copies of two sale deeds, both dated 06.09.1940, executed by the legal heirs of Shri Budhu, the original lessee of the subject Premises, in favour of the respondents/defendants No.1 and 2, that have been mentioned at Sr. No. 1 and 10 of the documents—Respondents/defendants No.1 & 2 states that the aforesaid documents are very material for deciding the suit instituted by the appellants/plaintiffs praying inter alia for a decree of partition of the

subject plots—However, the counsel who was conducting the case committed a blunder by failing to place on record the original documents or producing the same at the time of admission and denial of documents, so that they could have been exhibited—As a result, the trial court did not have an opportunity to examine the aforesaid documents, the defendants having failed to exhibit them—Respondents state that they ought not to be made to suffer for the folly of their counsel and interest of justice demands that the said documents be permitted to be produced by way of additional evidence and be taken into consideration—In the accompanying appeal, the appellants/plaintiffs have assailed the judgment dated 25.09.2009 passed by the trial court dismissing their suit for partition and permanent injunction in respect of the subject properties—Now the respondents/ defendants have filed the present application seeking leave to produce the original documents, photocopies whereof were already placed on record by them before the trial court, and grant of permission to have the admission and denial thereof conducted so that they can be exhibited in accordance with law and a fresh decision taken by the trial court. Held: Section 107 of the CPC empowers the appellate court "to take additional evidence or to require such evidence to be taken", "subject to such conditions and limitation as may be prescribed"—Rule 27 of Order 41 of the CPC prescribes the conditions and limitations placed on this discretion—Rules starts by laying down that the parties to an appeal shall not be entitled to produce additional whether oral or documentary, in the appellate court—It then proceeds to carve out two circumstances where the appellate court may allow additional evidence to be produced—The first circumstance is where the court appealed from has refused to admit such evidence that ought to have been admitted and the second circumstance is where the appellate court

requires such evidence either to enable it to pronounce judgment or for any other substantial cause—As observed by the Supreme Court in the case of Wedi Vs. Amilal & Ors. reported as MANU/0729/2002MANU/SC/0729/2002: 2004 (1) SCALE 82, "invocation of clause (b) does not depend upon the vigilance or negligence of the parties for it is not meant for them—It is for the appellant to resort to it when on a consideration of material on record, it feels that admission of additional evidence is necessary to pronounce a satisfactory judgment in the case. "In the present case, for the issue of title of the subject properties to be established satisfactorily, it was necessary that the ownership documents came on record—For purposes of dispelling the obscurity on the issue of title, which is of paramount consideration in a suit of partition, interest of justice demands that the documents of title relating to the subject premises and in the power and possession of the respondents/defendants be looked into to arrive at a just and correct decision—Accordingly, the originals of the documents relating to the title of the subject premises, photocopies whereof were filed by the respondents/defendants in the trial court under index 22.5.2002 are permitted to be taken on record as additional evidence—However, considering the fact that it is on account of failure on the part of the respondents/defendants to file the original title documents that had an important bearing on the case and were material for the consideration of the trial court, for purposes of satisfactorily adjudication the present suit, it is deemed appropriate to allow this application subject to payment of Rs. 50,000/- as casts to the other side within four weeks—Resultantly, the appeal is allowed and the impugned judgment is set aside.

Section 107 of the CPC empowers the appellate court "to take additional evidence or to require such evidence to be

taken", "subject to such conditions and limitations as may be prescribed". Rule 27 of Order 41 of the CPC prescribes the conditions and limitations placed on this discretion. The Rules starts by laying down that the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary, in the appellate court. It then proceeds to carve out two circumstances where the appellate court may allow additional evidence to be produced. The first circumstance is where the court appealed from has refused to admit such evidence that ought to have been admitted and the second circumstance is where the appellate court requires such evidence either to enable it to pronounce judgment or for any other substantial cause. As observed by the Supreme Court in the case of Wadi Vs. Amilal & Ors. reported as 2004 (1) SCALE 82, "invocation of clause (b) does not depend upon the vigilance or negligence of the parties for it is not meant for them. It is for the appellant to resort to it when on a consideration of material on record, it feels that admission of additional evidence is necessary to pronounce a satisfactory judgment in the case." **(Para 9)**

In the present case, for the issue of title of the subject properties to be established satisfactorily, it was necessary that the ownership documents come on record. However, in the absence of the best evidence, the trial court had no option but to decide the issue of the locus standi of the appellants/plaintiffs and cause of action on the basis of secondary evidence including entries made in the revenue records dating back to the year 1939-40 and 1943-44, which could only throw light on the status of occupation of the subject properties. For purposes of dispelling the obscurity on the issue of title, which is of paramount consideration in a suit of partition, interest of justice demands that the documents of title relating to the subject premises and in the power and possession of the respondents/defendants be looked into to arrive at a just and correct decision.

(Para 10)

Accordingly, the originals of the documents relating to the title of the subject premises, photocopies whereof were filed by the respondents/defendants in the trial court under index dated 22.5.2002 are permitted to be taken on record as additional evidence. **(Para 11)**

However, considering the fact that it is on account of failure on the part of the respondents/defendants to file the original title documents that had an important bearing on the case and were material for the consideration of the trial court, for purposes of satisfactorily adjudicating the present suit, it is deemed appropriate to allow this application subject to payment of Rs.50,000/- as costs to the other side within four weeks. **(Para 12)**

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mrs. Rekha Palli, Advocate with Ms. Amrita Prakash and Ms. Ankita Patnaik, Advs.

FOR THE RESPONDENT : Mr. Kamal Jit Chhiber, Advocate.

RESULT: Appeal allowed.

HIMA KOHLI, J. (Oral)

CM APPL. 19404/2013 (by the respondents/defendants u/O XLI Rule 27 read with Section 151 CPC and Section 165 of the Indian Evidence Act)

1. The present application has been filed by the respondents/defendants praying inter alia for permission to produce additional documentary evidence.

2. Learned counsel for the respondents/defendants states that his clients had filed photocopies of twenty five documents under an index dated 22.05.2002, which was subsequent to their filing the written statement in the trial court. The said list of documents includes copies of the lease deeds dated 11.08.1953 and 11.02.1954 executed by the Delhi Improvement Trust in respect of the subject premises No.11805-

11806, Gali No.6, Sat Nagar, Karol Bagh, in favour of the respondents No.1 and 2, who were then minors, under the guardianship of their father, Shri Ram Singh. The said documents also include copies of two sale deeds, both dated 06.09.1940, executed by the legal heirs of Shri Budhu, the original lessee of the subject premises, in favour of the respondents/defendants No.1 and 2, that have been mentioned at Sr. No.1 and 10 of the list of documents. Learned counsel states that the respondents/defendants No.1 and 2 had averred in para 9 of the preliminary objection taken in the written statement that they are owners of the subject plots having purchased the same from the sons of late Shri Budhu by virtue of two separate sale deeds, both dated 06.09.1940 and that they are also owners of the built up structures that were constructed on the said plots. The respondents have further averred in para 3 on merits of the written statement that the subject plots were allotted by the Delhi Improvement Trust on the basis of Indentures dated 11.08.1953 and 16.02.1954.

3. Learned counsel for the respondents/defendants No.1 & 2 states that the aforesaid documents are very material for deciding the suit instituted by the appellants/plaintiffs praying inter alia for a decree of partition of the subject plots. However, the counsel who was conducting the case on behalf of the respondents/defendants in the trial court had committed a blunder by failing to place on record the original documents or producing the same at the time of admission and denial of documents, so that they could have been exhibited. As a result, the trial court did not have an opportunity to examine the aforesaid documents, the defendants having failed to exhibit them. He states that his clients ought not to be made to suffer for the folly of their counsel and interest of justice demands that the said documents be permitted to be produced by way of additional evidence and be taken into consideration.

4. Though notice has not been issued on the present application, learned counsel for the appellants/plaintiffs does not deny the fact that the aforesaid documents are necessary for purposes of adjudicating the suit, particularly, in the light of the relief prayed for by them in the suit.

5. It is pertinent to note that in the accompanying appeal, the appellants/plaintiffs have assailed the judgment dated 25.09.2009 passed by the trial court dismissing their suit for partition and permanent injunction in respect of the subject properties. It is the case of the appellants/

plaintiffs that they are entitled to seek partition of the aforesaid properties that were owned by Shri Ram Singh, father of the appellant/plaintiff No.1 and defendants No.6 and 7 (sons from the second wife of Shri Ram Singh, Smt. Krishna Pyari) and defendants No.1 and 2 (sons of Shri Ram Singh from his first wife, Smt. Badami).

6. The aforesaid suit was contested by the respondents/defendants No.1 & 2 on the ground that the suit properties were not owned by Shri Ram Singh, as alleged, but were owned by them. However, as noted above, while filing photocopies of the aforesaid indentures/sale deeds etc., the defendants had failed to file the originals thereof, much less produce the originals at the time of admission and denial. As a result, the trial court did not have the benefit of perusing the said documents for purposes of deciding the issues framed in the suit that are reproduced hereinbelow for ready reference :-

"1. Whether the plaintiffs have no locus standi to file the present suit? OPD

2. Whether the present suit is bad for non-joinder of the necessary party? OPD-7

3. Whether the present suit has not been properly valued for the purpose of court fee? PD-7

4. Whether the plaintiffs have no cause of action to file the present suit? OPD

5. Whether the plaintiffs are entitled to a preliminary decree of partition, as prayed for? OPP

6. Whether the plaintiffs are entitled to a decree of permanent injunction, as prayed for? OPP

7. Relief"

7. The onus in respect of issues No.1 and 4 pertaining to their locus standi and cause of action for the appellants/plaintiffs to institute the suit was placed on the respondents/defendants and after considering the evidence available on record, the aforesaid issues were decided in favour of the respondents/defendants and against the appellants/plaintiffs. The said decision is mainly based on the deposition of PW-1, i.e., the appellant No.1 and on documents exhibited as Ex.PW-1/3 to PW-1/5, which are the Jamabandies of the suit plots pertaining to the years, 1939-

40, 1943, 1944 and 1975-76. The said documents were placed on record by the appellants/plaintiffs but they had claimed that they had been forged and fabricated at the instance of the defendants No.1 and 2. The impugned judgment also took into consideration Ex.PW-1/8, an election identity card of the respondent No.1 and Ex.PW-1/7, the school leaving certificate of the respondent No.2, apart from the testimony of DW-1(defendant No.1) to observe that during his cross-examination, nothing material had come on record to suggest that the subject properties were not owned by the defendants or the construction was not raised with funds arranged by their mother. Consequently, the trial court concluded that the appellants/plaintiffs had failed to prove that they had any right in the subject properties or had the locus standi to institute the suit, much less any cause of action to seek the relief as prayed for. As a result, the suit was dismissed.

8. Now the respondents/defendants have filed the present application seeking leave to produce the original documents, photocopies whereof were already placed on record by them before the trial court, and grant of permission to have the admission and denial thereof conducted so that they can be exhibited in accordance with law and a fresh decision taken by the trial court.

9. Section 107 of the CPC empowers the appellate court "to take additional evidence or to require such evidence to be taken", "subject to such conditions and limitations as may be prescribed". Rule 27 of Order 41 of the CPC prescribes the conditions and limitations placed on this discretion. The Rules starts by laying down that the parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary, in the appellate court. It then proceeds to carve out two circumstances where the appellate court may allow additional evidence to be produced. The first circumstance is where the court appealed from has refused to admit such evidence that ought to have been admitted and the second circumstance is where the appellate court requires such evidence either to enable it to pronounce judgment or for any other substantial cause. As observed by the Supreme Court in the case of *Wadi Vs. Amilal & Ors.* reported as 2004 (1) SCALE 82, "invocation of clause (b) does not depend upon the vigilance or negligence of the parties for it is not meant for them. It is for the appellant to resort to it when on a consideration of material on record, it feels that admission of additional evidence is necessary to pronounce a satisfactory judgment in the case."

10. In the present case, for the issue of title of the subject properties to be established satisfactorily, it was necessary that the ownership documents come on record. However, in the absence of the best evidence, the trial court had no option but to decide the issue of the locus standi of the appellants/plaintiffs and cause of action on the basis of secondary evidence including entries made in the revenue records dating back to the year 1939-40 and 1943-44, which could only throw light on the status of occupation of the subject properties. For purposes of dispelling the obscurity on the issue of title, which is of paramount consideration in a suit of partition, interest of justice demands that the documents of title relating to the subject premises and in the power and possession of the respondents/defendants be looked into to arrive at a just and correct decision.

11. Accordingly, the originals of the documents relating to the title of the subject premises, photocopies whereof were filed by the respondents/defendants in the trial court under index dated 22.5.2002 are permitted to be taken on record as additional evidence.

12. However, considering the fact that it is on account of failure on the part of the respondents/defendants to file the original title documents that had an important bearing on the case and were material for the consideration of the trial court, for purposes of satisfactorily adjudicating the present suit, it is deemed appropriate to allow this application subject to payment of Rs.50,000/- as costs to the other side within four weeks.

13. Resultantly, the appeal is allowed and the impugned judgment is set aside. In view of the fact that the additional evidence has been allowed to be produced by the respondents/defendants, the case is remanded back to the trial court for the parties to appear before the said Court, conduct admission and denial of the original title deeds of the subject properties that shall be filed by the defendants and/or produced on the date that may be fixed and for further proceedings in accordance with law.

14. At this stage, counsel for the appellants/plaintiffs states that during the pendency of the suit before the trial court, an interim order had been operating in favour of the appellants/plaintiffs, restraining the respondents/defendants from transferring, selling or alienating the suit properties and the said protection may be extended to her clients till the trial court adjudicates the suit afresh.

15. In response, counsel for the respondents/defendants states that his clients undertake not to sell, transfer or alienate the suit properties in any manner, till fresh adjudication of the suit is undertaken by the trial court.

16. While binding the respondents to their undertaking as recorded above, the appeal is disposed of.

17. The parties are directed to appear before the trial court on 28th February, 2014, for further proceedings.

18. The trial court record be released forthwith.

ILR (2014) II DELHI 1246
W.P .(C)

PREETI SATIJA **....APPELLANT**

VERSUS

RAJ KUMARI AND ANR. **....RESPONDENT**

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

RFA (OS) NO. : 24/2012, **DATE OF DECISION:15.01.2014**
CM APPL. NO. : 4236/2012,
4237/2012 &5451/2013 &5451/2013

(A) Domestic Violence Act, 2005 (DV Act)—Sec. 2(a)—definition—aggrieved person—Sec. 2(f)—domestic relationship—Sec.2.(s)—shared households—Sec.2(q)—repondent—Sec.3(a)—domestic violence—economic abuse—Sec.26(1)—relief in any legal proceedings—terms respondent includes female relatives of husband—right of residence—disowning of sons—through public notice—a mere proclamation—does not have dispositive legal effect—respondent—plaintiff—mother—in—law of the defendent—petitioner—filed a

suit for possession/eviction of dependent daughter in law in respect of one bed room—a bathroom and small kitchen—suit property belong to plaintiff's deceased husband—died on 30.06.2008—leaving behind a registered Will dated 20.11.2006—bequeathed a suit property in favour of the Plaintiff—after her husband's death—She become sole and absolute owner—back Portion of the suit property in the possession of defendent no. 1 her daughter-in-law and defendant no. 2 her son—Alleged—Since the relationship between her and defendants became estranged—She wanted them to vacate the property filed application for decree on admission defendant contested that the plaintiff not absolute owner—WILL had not been granted probate intestate in law without being probated the WILL could not come into force—Ld. Single Judge opined—Not disputed due execution of WILL—No legal effect because it had not been probated—Therefore an admission—Further held—inessential to seek a probate—Thus WILL being admitted remain operative between the parties—Decreed the suit on admission—Court observed—Appellant had relied upon the provision of protection of woman from violence as per DV Act before Ld. Single Judge—Also filed a suit before Civil Judge Rohini Court pending—However—Ld. Single Judge rejected the arguments with respect to applicability of the provision of DV Act—Holding—Suit property could not considered as a shared household preferred appeal against the order of Single Judge—Contended—No unambiguous admission of the kind warranted exercise of discretion under Order XII Rule 6 CPC—Further argued entitled to right to live in the suit property under domestic violence Act, 2005 keeping in mind the proviso to definition of respondent in S.2(q) which included relatives of male respondent in the domestic relationship with aggrieved wife—S. 19 (1) (f) of the Act also allowed grant of residence

order against the respondent to provide accommodation equivalent to that enjoyed by aggrieved party in the share household—Plaintiff/respondent contended—Definition of share household was conclusively laid down in previous cases since the husband being disowned had no right of ownership in the household—The wife could not claimed any right of residence in it—Held—The intent of the Parliament to secure the right of residence in the household of respondent (including his relatives) even if the household is one in which respondent is tenant or one in which he jointly or singly had any right—Title interest in law or equity—Thus enabling a wife of deceased male/estranged male to claim a domestic relationship with the mother-in-law—This right not dependent on husband having any right—Share or title in the premises by secular or Hindu Law—Even if mere fact of residence was sufficient and consequently the aggrieved woman could claim right of residence in any such household of the husband—Appeal allowed.

(B) Code of Civil Procedure, 1908—S. 9—Suit—Suit for possession—Order XII Rule 6—Decree on admission—Admission unequivocal—Held—Court cannot base their decision to a decree on the basis of particular pleading or admission—rather overall effect of pleadings and documents of the concerned parties are to be weighed.

Courts cannot therefore base their decision to decree (or not to grant a decree) in a suit in terms of Order XII Rule 6 CPC only on the basis of a particular pleading or admission. Rather, the overall effect of the pleadings and documents of the concerned parties are to be weighed. The Court has to be mindful that what seems plainly an admission could well be explained by the litigant making it, during the course of the trial. Moreover, the controlling expression under Order 12 Rule 6 is that Court "may" grant a decree on admissions. It is important to analyze this aspect because admissions

either in the pleadings or in a document or in the course of a statement cannot be viewed in isolation. **(Para 10)**

These decisions, with respect, proceeded on an erroneous understanding of the statute. For this, it would be useful to recollect the decision in **Eveneet Singh v. Prashant Chaudhari,** 177(2011) DLT 124 where it was held that:

> "11. The key to an understanding of the rights flowing from the Domestic Violence Act, are concepts such as "domestic relationship'- which inter alia, is "a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage..."; who is a " Respondent"- a term not confined only to males who had lived with the aggrieved person, i.e. the complainant female, but also - by virtue of proviso to Section 2(q) to "a relative of the husband..." (in the case where the domestic relationship is or was a marriage). This aspect has been noticed, and clarified in several rulings by various High Courts (Ref **Afzalunnisa Begum v. The State of A.P.,** MANU/AP/0206/2009 : 2009 Cri.L.J. 4191; **Archana Hemant Naik v. Urmilaben Naik,** MANU/MH/0994/2009 : 2010 Cri.L.J. 751 and **Varsha Kapoor v. Union of India,** WP (Crl.) No. 638 of 2010, Decided on: 03.06.2010, by a Division Bench of this High Court). It has been held that when a law uses the same word in different parts of the same statute, there is a presumption that that it is used in the same sense throughout (**Suresh Chand v. Gulam Chisti**, : (1990) 1 SCC 593), unless the context indicates otherwise (**Bhogilal Chunnilal Pandya v. State of Bombay,** 1959 Supp (1) SCC 593). Now, the relevant part of Section 19 reads as follows:
>
> "19. Residence orders.-(1) While disposing of an application under Sub-section (1) of Section 12, the Magistrate may, on being satisfied that domestic

> violence has taken place, pass a residence order -
>
> (a) restraining the Respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the Respondent has a legal or equitable interest in the shared household...."
>
> (Emphasis supplied)
>
> The broad and expansive nature of the Court's power to make a residence order is also underlined by the amplitude of the definition of "shared household", which is "where the person aggrieved lives or at any stage has lived-
>
> (i) in a domestic relationship
>
> (ii) either singly or along with the Respondent and includes such a household
>
> (a) whether owned or tenanted either jointly by the aggrieved person and the Respondent, or
>
> (b) owned or tenanted by either of them
>
> (iii) in respect of which either the aggrieved person or the Respondent or both jointly or singly have any right, title, interest or equity and includes
>
> (iv) such a household which may belong to the joint family of which the Respondent is a member, irrespective of whether the Respondent or the aggrieved person has any right, title or interest in the shared household.
>
> It is thus apparent that Parliamentary intention was to secure the rights of aggrieved persons in the shared household, which could be tenanted by the Respondent (including relative of the husband) or in respect of which the Respondent had jointly or singly

any right, title, interest, or "equity". For instance, a widow living with a mother-in-law, in premises owned by the latter, falls within a "domestic relationship"; even if the mother-in-law does not have any right, title or interest, but is a tenant, or entitled to "equity" in those premises, the same would be a "shared household". In such circumstances, the widowed daughter-in-law, can well claim protection from dispossession, notwithstanding that her husband never had any ownership rights, in the premises, because she lived in it; if the mother-in-law, is a tenant, then, on the ground that she is tenant, or someone having equity. It may, however, be noticed here that Section 19, while referring to a " Respondent", lays down a limited exception under the proviso to 19(1)(b), exempting women from being directed to remove themselves from the shared household. However, no such exception has been carved out for the other reliefs under Section 19, especially in respect of protection orders. Clearly, if the legislature had wanted to create another exception in favor of women, it could have done so. The omission here, seems deliberate and in consonance with the rest of the scheme of the Act. Another instance of a domestic relationship may be an orphaned sister, or widowed mother, living in her brother's or son's house; it falls within the definition of domestic relationship, (which is one where the parties are related by consanguinity, or marriage) constitutes a shared household, as the brother is clearly a Respondent. In such a case too, if the widowed mother or sister is threatened with dispossession, they can secure reliefs under the Act, notwithstanding exclusive ownership of the property, by the son or brother. Thus, excluding the right of residence against properties where the husband has no right, share, interest or title, would severely curtail the extent of the usefulness of the right to residence. This was noted by the Bombay High Court in Archana

Hemant Naik (supra) in the following terms:

"If a wife or a woman to whom the proviso is applicable is compelled to seek residence order in respect of a shared household only as against the male relatives of her husband or male partner, as the case may be, the order under Section19 of the said Act will be completely ineffective in as much as the female relatives of the husband or the male partner occupying the shared household will continue to disturb possession of such wife or such female of the shared household, or may continue to prevent entry of such aggrieved wife or female to the shared household."

(Emphasis supplied)

12. The Domestic Violence Act is a secular legislation, akin to Section 125 of the Code of Criminal Procedure, 1973. It was enacted "to provide more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family". The introduction of the remedy of right to residence is a revolutionary and path breaking step, taken to further the objects of the Act, and any attempt at restricting the scope of the remedy would reduce the effectiveness of the Act itself. Therefore, it would be contrary to the scheme and the objects of the Act to restrict its application to only such cases where the husband owns some property or has a share in it, as the mother-in-law can also be a Respondent in the proceedings under the Domestic Violence Act and remedies available under the same Act would necessarily need to be enforced against her.

13. Again, to confine the reference to "joint" family property by bringing in the concept of a HUF would be to restrict the application of the provision, to a point which is contrary to Parliamentary intention that the

law is a non-sectarian one. The "joint" status of a family here obviously is in a generic sense, and importing notions of HUF would unwittingly give greater benefits to one section of the community, which was never the intention of Parliament. In a generic sense, it refers to a group of people, related either by blood or marriage, residing in the same house and instances of that can be found in almost all parts of India. The general practice in India is that the son and his wife reside in the house of the (husband's) parents after marriage. Even though a legal obligation to maintain a child ceases as soon as he attains majority, the jural relationship between the parents and the child continues. The concept of a "joint family" in law is peculiar to Hindu law. No concept of a "joint family' similar to that of an HUF can be found in Muslim Law, Christian Law or any other personal law.

14. The danger of accepting a restricted interpretation of joint family by equating it to a HUF would result in discrimination, because women living in a shared household belonging to HU Fs (and therefore Hindus) would have more security, by reason of their professing the Hindu faith than others who are not Hindus. Also, even among Hindus, women who are married into or live in HUFs, as compared with those living with husbands, whose parents own the property - on an application of Batra -would have the protection of the Act; the latter would not have any protection. It is precisely to avoid this anomaly that Parliament clarified that irrespective of title of the "Respondent" to the "shared household", a protection order can be made under Section 19(1)(a).

15. The definition of "shared household" emphasizes the factum of a domestic relationship and no investigation into the ownership of the said household is necessary, as per the definition. Even if an inquiry is made into the aspect of ownership of the household,

the definition casts a wide enough net. It is couched in inclusive terms and is not in any way,

exhaustive (**S. Prabhakaran v. State of Kerala,** 2009 (2) RCR 883. It states that "...includes such a household whether owned or tenanted either jointly by the aggrieved person and the Respondent or owned or tenanted by either of them in respect of which either the aggrieved person or the Respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the Respondent is a member, irrespective of whether the Respondent or the aggrieved person has any right, title or interest in the shared household

(Emphasis supplied).

16. It would not be out of place to notice here that the use of the term "Respondent" is unqualified in the definition nor is there any qualification to it under Sections 12, 17 or 19. Therefore, there is no reason to conclude that the definition does not extend to a house which is owned by a mother-in-law or any other female relative, since they are encompassed under the definition of "Respondent" under Section 2(q)." (emphasis supplied) **(Para 15)**

The other aspect, which this Court wishes to highlight, is that the 2005 Act applies to all communities, and was enacted "to provide more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family". The right to residence and creation of mechanism to enforce is a ground breaking measure, which Courts should be alive to. Restricting the scope of the remedies, including in respect of the right to reside in shared household, would undermine the purpose of this enactment. It is, therefore, contrary to the scheme and the objects of the Act, as also the

unambiguous text of Section 2(s), to restrict the application of the 2005 Act to only such cases where the husband alone owns some property or has a share in it. Crucially, the mother-in-law (or a father-in-law, or for that matter, "a relative of the husband") can also be a Respondent in the proceedings under the 2005 Act and remedies available under the same Act would necessarily need to be enforced against them. **(Para 21)**

Likewise, the interpretation preferred by some learned single judges that where the husband has some rights (as a member of the HUF, i.e. the Hindu Undivided Family) and if those premises were the shared household, the wife can enforce her right to residence, also constitutes an internally incoherent and restrictive interpretation of the Act. As explained in Evneet Singh, such a construction is contrary to Parliamentary intention that the law is a non-sectarian one. Indeed, the "joint" status of a family referred to under Section 2 (s) is in a generic sense. To equate it with a HUF would result in unintended benefits to one set of respondents, who are Hindus. Speaking generically, "joint family" refers to a group of people, related either by blood or marriage, residing in the same house. Instances of that can be found in almost all parts of India. The general practice in India is that the son and his wife reside in the house of the (husband's) parents after marriage, though the legal obligation to maintain a child ceases as soon as she or he attains majority, the jural relationship between the parents and the child continues. The concept of a "joint family" in law is peculiar to Hindu law. No concept of a "joint family" similar to that of an HUF can be found in Muslim law, Christian law or any other personal law. Therefore, a restrictive interpretation of "joint family" by equating it to a HUF would result in implicit discrimination, because women living in a shared household belonging to an HUF (and therefore, Hindus) would have more security, by reason of their professing the Hindu faith than others who are not Hindus. In fact, even among Hindus, women who are married into or live in HUFs, as compared with those living with husbands,

whose parents own the property – on an application of Batra – would have the protection of the Act, while the latter would not. This inequity was addressed by the Parliament which stated in no uncertain terms that irrespective of title of the "Respondent" to the "shared household", a protection order can be made under Section 19(1)(a). **(Para 22)**

The facts of this case contain the classic elements of a husband seeking to evade his responsibilities upon marital discord breaking out. He allegedly disappeared and was "disowned" by his mother. The appellant's mother-in law then instituted the suit, to dispossess the daughter in law and her grand-children, claiming that she no longer has any relationship with her son or her daughter in law. She based her claim to ownership of the suit property on a will. The daughter in law has not admitted the will. Nor has it been proved in probate proceedings. Often, sons move out, or transfer properties or ownership rights, or shares in immovable properties, at the hint of trouble or discord with their wives, in favour of their relatives. Likewise, the parents of the husband often in such cases "disown" them after the son moves out from the common or "joint" premises owned by either or both his parents, when there is outbreak of marital discord. Courts have to be cautious in their approach, while entertaining and short circuiting suits for possession, which are in effect directed against the plaintiffs' daughter-in law, or else the right of residence in shared households would be a mere chimera, a teasing illusion which the law grandly promises, but is seldom, if ever, able to enforce. In fact, the strategy of "disowning" sons, through public notices or advertisement, is not to be taken lightly. For example, even if a son is disowned by either parent, the death of that parent would, if intestate, still lead to devolution of property upon that son. Indeed, a mere proclamation does not have a dispositive legal effect, breaking all legally relevant familial ties. Thus, absent a deed of relinquishment or other formal deed of partition of the family or separation between the members, the Court must be cautious in denying statutory

rights to wives, as against members of the husband's family, on the basis of such tentative facts. To the contrary, if the Court is to place reliance on such acts, benefits enacted by the 2005 Act in favour of the wife would be bypassed on account of alleged, and possibly fleeting, discords between the husband and his family. Indeed, such an approach is neither legally tenable, nor viable given the scheme of the Act. **(Para 23)**

Important Issue Involved: (a) There must be clear and unequivocal admission of the case on which decree can be drawn on admission (b) the wife is entitled to right of residence in shared households owned by mother-in-law.

[Gu Si]

APPEARANCE:

FOR THE APPELLANT : Sh. Sudhir Mendiratta, Advocate.

FOR THE RESPONDENT : Sh. Nishant Datta and Ms. Garima Hooda, Advocates, for Resp. No.1.

CASES REFERRED TO:

1. *Varsha Kapoor* vs. *UOI & Ors.* 2010 VI AD (Delhi) 472.
2. *Jeevan Diesel & Electricals Limited* vs. *Jasbir Singh Chadha & Another,* (2010) 6 SCC 601.
3. *Sandhya Manoj Wankhade* vs. *Manoj Bhimrao Wankhade,* [2011] 2 SCR 261.
4. *Eveneet Singh* vs. *Prashant Chaudhari* (DB, FAO (OS) 71-72/2011.
5. *Vimalben Ajitbhai Patel* vs. *Vatslabeen Ashokbhai Patel and Ors.,* 2008(4) SCC 649.
6. *S.R. Batra & Anr.* vs. *Smt. Taruna Batra,* (2007) 3 SCC169.
7. *Shumita Didi Sandhu* vs. *Sanjay Singh Sandhu,* 2007 (96) DRJ 697.

8. *Western Coalfields Ltd.* vs. *M/s Swati Industires,* AIR 2003 Bom 369.
9. *Uttam Singh Duggal & Co.* vs. *United Bank of India & Ors* 2000 (7) SCC 120.
10. *Gilbert* vs. *Smith,* 1875-76 (2) Ch 686.

RESULT: Appeal allowed.

S. RAVINDRA BHAT, J.

1. The defendant appeals the judgment and order of a learned Single Judge, who decreed the suit preferred by the respondent- plaintiff, her mother in law, on admission, by invoking Order XII Rule 6, Code of Civil Procedure (CPC). The plaintiff had sought a decree for possession/ eviction of the defendant/daughter-in-law.

2. The plaintiff had filed the suit for possession, permanent injunction and mesne profits against the defendants, her son and mother in-law, in respect of a portion of property bearing No.2245, Hudson Lane, GTB Nagar, Kingsway Camp, Delhi – 110 009 (hereafter referred to as "the suit property"). The first defendant is the plaintiff's daughter-in-law and wife of her disowned son. The son was also arrayed as the second defendant. The suit property belonged to the plaintiff's husband (Shri Tek Chand), who he died on 30.06.2008 leaving behind a registered Will dated 20.11.2006 by which he bequeathed the suit property to her. The plaintiff alleged that after her husband's death, she became the sole and absolute owner of that property. The plaintiff claimed that the back portion of the suit property consisting of one bedroom, a bathroom and a small kitchen is in occupation of the defendants. She alleged that since the relationship between her and the defendants became estranged, she wanted them to vacate the property. During the pendency of the suit, the plaintiff filed an application alleging her entitlement to a decree on alleged admission.

3. The appellant's position in her reply to the application for decree on admission was that the plaintiff was not the absolute owner of the suit property as the Will had not been granted probate and was as yet untested in law and that without it being probated, the Will cannot come into force.

4. The learned Single Judge was of the opinion that since the

defendant/appellant had not disputed the due execution of the Will, and had merely contested that it had no legal effect because it had not been probated, there was in effect an admission. Further, he concluded that it is inessential to seek a probate, and thus, the Will, being admitted, remains operative between the parties. The impugned order also mentioned the two notices issued on behalf of the plaintiff to the defendants and her allegation that they were harassing her and continuing to live in the suit premises. The Court also noticed that the appellant had filed a suit, before the Civil Judge, North West, Rohini Courts, Delhi (Suit No.16/2010) which is still pending. Importantly, the Single Judge was also aware of the fact that the appellant had relied on provisions of the Protection of Women from Domestic Violence Act, 2005 (hereafter "2005 Act").

5. In the impugned judgment, the learned Single Judge rejected the arguments of the appellant with respect to applicability of the provisions of the 2005 Act. It was held that the suit property could not be considered to be "shared household". In view of this conclusion, the Single Judge decreed the suit in part, holding that the defendant was liable to be evicted.

6. The appellant argued that the learned Single Judge failed to consider that there was no unambiguous admission of the kind that warranted exercise of discretion under Order 12, Rule 6. In this regard, it was contended that the written statement had alleged collusion between the plaintiff and her son, the second defendant; it had not admitted due execution of the Will and stated that such circumstances would have to be tested in probate proceedings. In these circumstances, the court should have not exercised its discretion in granting a decree on admission. It was further argued that the Single Judge fell into error in relying on the decision of the Supreme Court in **S.R. Batra &Anr v. Smt. Taruna Batra,** (2007) 3 SCC169 and the ruling of this Court in **Shumita Didi Sandhu v. Sanjay Singh Sandhu,** 2007 (96) DRJ 697. It was contended that those decisions overlooked the crucial definition of "shared household" and that the respondent, was an expression not limited to male relatives of the applicant, but also female relatives, by virtue of proviso to Section 2 (q) and Section 19 (1) (f). It was argued that in the present case the husband had not been served and had not entered appearance; there were matrimonial disputes between him and the first defendant, i.e. the appellant. Counsel urged that the plaintiff and the second defendant colluded; the

son disappeared. At the same time, the plaintiff "disowned" him after the matrimonial disputes started, and proceeded to file the suit. Counsel emphasized that it was precisely to overcome these strategies and devices that "shared household" was defined widely, and the wife, under the 2005 Act, was given the right to reside in such premises, by virtue of Section 17. It was also pointed out that by virtue of Section 26, the provisions of the 2005 Act could be invoked before any court in any stage of the proceeding. It was argued that the appellant is in a pitiable plight, because she has to maintain two school going children, who have been left untended and uncared by her husband and the orders of maintenance granted in her favour by the concerned magistrate have not been implemented. It was also pointed out that the wife has initiated criminal proceedings alleging that the husband had committed offences punishable under Sections 406 and 498-A of the Indian Penal Code (IPC).

7. Counsel for the plaintiff justified the impugned order. He argued that the appellant had made an unambiguous admission entitling the plaintiff to a decree under Order 12 Rule 6. Counsel submitted that the decisions in Shumita Didi Sandhu and S.R. Batra were conclusive as to the limits of the right to residence of the wife in a shared household. Here, the suit premises belonged to the plaintiff and the appellant could not claim the right to reside in it, since her husband had no right – ownership or otherwise in respect of those premises.

8. The first question which this court has to consider is whether there were admissions in the pleadings of the type to enable the court to draw a decree for possession on admission. The suit records were called for and have been gone into by this Court. In the written statement, the appellant had claimed that the suit was not maintainable because the suit premises were her matrimonial home where she was entitled to reside. At more than one place, (especially in reply to the plea that the plaintiff is "absolute owner" of the property), the appellant unequivocally denied the plaintiff's title and stated that she was put to strict proof of the claim of sole ownership. In respect of the allegation that the ownership was on account of testamentary devolution by virtue of late Tek Chand's registered Will, the appellant denied them, stating that such was not the case "as per her knowledge". Since she had no knowledge and the plaintiff was put to strict proof, the appellant went on to state that this could be done by obtaining probate – a course which had not as yet been

resorted to. The gist of these averments, therefore, was that the appellant denied the plaintiff's title. She did not admit the Will, and the clear admission that the written statement contained was as to the relationship of the parties.

9. The question here is whether the pleadings taken as a whole point to an unambiguous and clear admission contemplated by law. The standard spelt out in **Uttam Singh Duggal & Co. v. United Bank of India & Ors** 2000 (7) SCC 120 and **Jeevan Diesel & Electricals Limited v. Jasbir Singh Chadha & Another,** (2010) 6 SCC 601 that the Courts have to adopt, while considering pleadings and considering if a decree on admission is to be drawn, is whether there is a "clear and unequivocal admission of the case" (of the plaintiff, by the party defending the application). It is also not in dispute that there is no golden rule about what constitute as "clear and unequivocal admission". The Court has to proceed on a case fact dependent approach having due regard to the overall effect of the pleadings and documents. This is clear from the decision in **Gilbert v. Smith,** 1875-76 (2) Ch 686, which was relied upon by the Supreme Court in **Jeevan Diesel** (supra). The question was amplified in **Western Coalfields Ltd. v. M/s Swati Industires,** AIR 2003 Bom 369. In **Jeevan Diesel** (supra), it was held that :

> "whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision on this question depends on the facts of the case. This question, namely whether there is a clear admission or not cannot be decided on the basis of a judicial precedent."

10. Courts cannot therefore base their decision to decree (or not to grant a decree) in a suit in terms of Order XII Rule 6 CPC only on the basis of a particular pleading or admission. Rather, the overall effect of the pleadings and documents of the concerned parties are to be weighed. The Court has to be mindful that what seems plainly an admission could well be explained by the litigant making it, during the course of the trial. Moreover, the controlling expression under Order 12 Rule 6 is that Court "may" grant a decree on admissions. It is important to analyze this aspect because admissions either in the pleadings or in a document or in the course of a statement cannot be viewed in isolation.

11. In this case, the appellant's consistent stand in the written

statement as well as in the reply to the application under Order 12 Rule 6 CPC was of denial of the *plaintiff's claim of absolute ownership.* This denial was unequivocal. The appellant also claimed that the plaintiff and her husband had colluded and the suit was a step to achieve the object of that collusion. She relies on the copies of the complaint, criminal proceedings and the orders made towards her maintenance, in support of those submissions. That she added that the plaintiff ought to obtain probate, is a matter of detail, in the written statement, which – with respect to the learned Single judge – was plucked out from the pleadings. Whether a will is probated or not, it requires to be proved, once the ownership of the property is disputed and the claim to such title is solely based on a will. This aspect gains importance because in the event of a trial it would have been necessary for the plaintiff to prove due execution of the will, in tune with provisions of the Indian Succession Act and the Evidence Act. That part of the written statement and reply to the plaintiff's application dealing with the plaintiff's obligation to obtain probate, should not, in our view with respect to the impugned judgment, have been the exclusive basis for holding that the plaintiff was entitled to a decree on admissions. The impugned judgment in effect assumes plaintiff's title to the suit premises on the basis of due execution of the Will, which was not proved. This court, therefore, is of opinion that the appellant's pleadings cannot be considered as unequivocal or unqualified, and admissions, necessitating a decree on admissions.

12. The next question is whether the learned single judge was right in holding that the provisions of the 2005 Act did not aid the appellant and that she could not claim the suit premises to be "shared household".

13. The question has to be examined in view of provisions of the 2005 Act. Section 2(a)of the Act states:

> *"2(a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;"*

Section 2(f) states that:

> *"2(f) " domestic relationship" means a relationship between two persons who live or have, at any point of time, lived*

together in a shared household when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;"

Section 2(s) defines shared household as follows:

"2(s) " shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household"

Section 2 (q) defines who is a respondent: "2(q) "respondent" means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act"

Section 3(a) states that an act will constitute domestic violence in case it

"harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse;" or

(emphasis supplied)

The expression "economic abuse" has been defined to include:

"(a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her

children, if any, stridhan, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance."

An aggrieved person under the Act can approach the Magistrate under Section 12 for the relief mentioned in Section 12(2). Under Section 20(1)(d) the Magistrate can grant maintenance while disposing of the application under Section 12(1). Section 26(1) provides that the relief mentioned in Section 20 may also be sought in any legal proceeding, before a civil court, family court or a criminal court.

14. There are some decisions which have preferred the view that since the ruling in S.R. Batra held that when the premises are not owned by the husband, the applicant/wife cannot claim it to be a shared household (for example, **Neetu Mittal v. Kanta Mittal,** (2008) DLT 691, which held that self-acquired property of the husband's parents are not shared household).

15. These decisions, with respect, proceeded on an erroneous understanding of the statute. For this, it would be useful to recollect the decision in **Eveneet Singh v. Prashant Chaudhari,** 177(2011) DLT 124 where it was held that:

"11. The key to an understanding of the rights flowing from the Domestic Violence Act, are concepts such as "domestic relationship'- which inter alia, is "a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage..."; who is a " Respondent"- a term not confined only to males who had lived with the aggrieved person, i.e. the complainant female, but also - by virtue of proviso to Section 2(q) to "a relative of the husband..." (in the case where the domestic relationship is or was a marriage). This aspect has been noticed, and clarified in several rulings by various High Courts (Ref Afzalunnisa Begum v. The State of A.P., MANU/AP/0206/2009 : 2009 Cri.L.J. 4191; Archana Hemant Naik v. Urmilaben Naik, MANU/MH/0994/2009 : 2010 Cri.L.J. 751 and Varsha Kapoor v. Union of India, WP (Crl.) No. 638 of 2010, Decided on: 03.06.2010, by a Division Bench of this High Court). It has been held that when a law uses the same word in different

parts of the same statute, there is a presumption that that it is used in the same sense throughout (Suresh Chand v. Gulam Chisti, : (1990) 1 SCC 593), unless the context indicates otherwise (Bhogilal Chunnilal Pandya v. State of Bombay, 1959 Supp (1) SCC 593). Now, the relevant part of Section 19 reads as follows:

> *"19. Residence orders.-(1) While disposing of an application under Sub-section (1) of Section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order -*
>
> *(a) restraining the Respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the Respondent has a legal or equitable interest in the shared household...."*
>
> *(Emphasis supplied)*

The broad and expansive nature of the Court's power to make a residence order is also underlined by the amplitude of the definition of "shared household", which is "where the person aggrieved lives or at any stage has lived-

(i) in a domestic relationship

(ii) either singly or along with the Respondent and includes such a household

(a) whether owned or tenanted either jointly by the aggrieved person and the Respondent, or

(b) owned or tenanted by either of them

(iii) in respect of which either the aggrieved person or the Respondent or both jointly or singly have any right, title, interest or equity and includes

(iv) such a household which may belong to the joint family of which the Respondent is a member, irrespective of whether the Respondent or the aggrieved person has any right, title or interest in the shared household.

It is thus apparent that Parliamentary intention was to secure the

rights of aggrieved persons in the shared household, which could be tenanted by the Respondent (including relative of the husband) or in respect of which the Respondent had jointly or singly any right, title, interest, or "equity". For instance, a widow living with a mother-in-law, in premises owned by the latter, falls within a "domestic relationship"; even if the mother-in-law does not have any right, title or interest, but is a tenant, or entitled to "equity" in those premises, the same would be a "shared household". In such circumstances, the widowed daughter-in-law, can well claim protection from dispossession, notwithstanding that her husband never had any ownership rights, in the premises, because she lived in it; if the mother-in-law, is a tenant, then, on the ground that she is tenant, or someone having equity. It may, however, be noticed here that Section 19, while referring to a " Respondent", lays down a limited exception under the proviso to 19(1)(b), exempting women from being directed to remove themselves from the shared household. However, no such exception has been carved out for the other reliefs under Section 19, especially in respect of protection orders. Clearly, if the legislature had wanted to create another exception in favor of women, it could have done so. The omission here, seems deliberate and in consonance with the rest of the scheme of the Act. Another instance of a domestic relationship may be an orphaned sister, or widowed mother, living in her brother's or son's house; it falls within the definition of domestic relationship, (which is one where the parties are related by consanguinity, or marriage) constitutes a shared household, as the brother is clearly a Respondent. In such a case too, if the widowed mother or sister is threatened with dispossession, they can secure reliefs under the Act, notwithstanding exclusive ownership of the property, by the son or brother. Thus, excluding the right of residence against properties where the husband has no right, share, interest or title, would severely curtail the extent of the usefulness of the right to residence. This was noted by the Bombay High Court in Archana Hemant Naik (supra) in the following terms:

> *"If a wife or a woman to whom the proviso is applicable is compelled to seek residence order in respect of a shared household only as against the male relatives of her husband*

or male partner, as the case may be, the order under Section19 of the said Act will be completely ineffective in as much as the female relatives of the husband or the male partner occupying the shared household will continue to disturb possession of such wife or such female of the shared household, or may continue to prevent entry of such aggrieved wife or female to the shared household."

(Emphasis supplied)

12. The Domestic Violence Act is a secular legislation, akin to Section 125 of the Code of Criminal Procedure, 1973. It was enacted "to provide more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family". The introduction of the remedy of right to residence is a revolutionary and path breaking step, taken to further the objects of the Act, and any attempt at restricting the scope of the remedy would reduce the effectiveness of the Act itself. Therefore, it would be contrary to the scheme and the objects of the Act to restrict its application to only such cases where the husband owns some property or has a share in it, as the mother-in-law can also be a Respondent in the proceedings under the Domestic Violence Act and remedies available under the same Act would necessarily need to be enforced against her.

13. Again, to confine the reference to "joint" family property by bringing in the concept of a HUF would be to restrict the application of the provision, to a point which is contrary to Parliamentary intention that the law is a non-sectarian one. The "joint" status of a family here obviously is in a generic sense, and importing notions of HUF would unwittingly give greater benefits to one section of the community, which was never the intention of Parliament. In a generic sense, it refers to a group of people, related either by blood or marriage, residing in the same house and instances of that can be found in almost all parts of India. The general practice in India is that the son and his wife reside in the house of the (husband's) parents after marriage. Even though a legal obligation to maintain a child ceases as soon as he attains majority, the jural relationship

between the parents and the child continues. The concept of a "joint family" in law is peculiar to Hindu law. No concept of a "joint family' similar to that of an HUF can be found in Muslim Law, Christian Law or any other personal law.

14. The danger of accepting a restricted interpretation of joint family by equating it to a HUF would result in discrimination, because women living in a shared household belonging to HU Fs (and therefore Hindus) would have more security, by reason of their professing the Hindu faith than others who are not Hindus. Also, even among Hindus, women who are married into or live in HUFs, as compared with those living with husbands, whose parents own the property - on an application of Batra -would have the protection of the Act; the latter would not have any protection. It is precisely to avoid this anomaly that Parliament clarified that irrespective of title of the "Respondent" to the "shared household", a protection order can be made under Section 19(1)(a).

15. The definition of "shared household" emphasizes the factum of a domestic relationship and no investigation into the ownership of the said household is necessary, as per the definition. Even if an inquiry is made into the aspect of ownership of the household, the definition casts a wide enough net. It is couched in inclusive terms and is not in any way,

exhaustive (S. Prabhakaran v. State of Kerala, 2009 (2) RCR 883. It states that "...includes such a household whether owned or tenanted either jointly by the aggrieved person and the Respondent or owned or tenanted by either of them in respect of which either the aggrieved person or the Respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the Respondent is a member, irrespective of whether the Respondent or the aggrieved person has any right, title or interest in the shared household

(Emphasis supplied).

16. It would not be out of place to notice here that the use of the term "Respondent" is unqualified in the definition nor is

there any qualification to it under Sections 12, 17 or 19. Therefore, there is no reason to conclude that the definition does not extend to a house which is owned by a mother-in-law or any other female relative, since they are encompassed under the definition of "Respondent" under Section 2(q)." (emphasis supplied)

16. The above decision of a single judge was approved by the Division Bench in **Eveneet Singh v. Prashant Chaudhari** (DB, FAO (OS) 71-72/2011, decided on 08.11.2011)

"12. Thus, at best it can be urged that while deciding an issue pertaining to a wife's claim for residence in the shared household the discussion must start with a presumption in favour of the wife that law leans in her favour to continue to reside in the shared household and only upon adequate circumstances being manifestly and objectively disclosed by the opposite party, could an order contemplated by clause (f) of sub-section 1 of Section 10 of the Act be passed.

13. In the instant case the circumstance to take recourse to clause (f) of sub-section 1 of Section 19 of the Act would be the extreme ill health of the mother-in-law of the appellant; medical documents pertaining to whom would show that she suffers from 'tachycardia' with heart muscles functioning at about 20%. The constant strife with the newly married daughter-in-law in her house would certainly have an adverse effect on the mother-in-law. Besides, the husband of the appellant is currently in Hyderabad and not at Delhi.

14. It is apparent that clause (f) of sub-section 1 of Section 19 of the Act is intended to strike a balance between the rights of a daughter-in-law and her in-laws, if a claim to a shared residence by the daughter-in-law pertains to a building in which the matrimonial home was set up belongs to her mother-in-law or father-in-law."

17. In an earlier decision, **Varsha Kapoor v. UOI & Ors.** 2010 VI AD (Delhi) 472 another Division Bench interpreted Section 2(q) of the Act also concluded that "respondent" can include female relatives of the husband. The Division Bench held as under:

"15. Having regard to the purpose which the DV Act seeks to achieve and when we read Section 2(q) along with other provisions, out task is quite simple, which may in first blush appear to be somewhat tricky. We are of the considered view that the manner in which definition of "respondent" is given under Section 2(q) of DV Act, it has to be segregated into two independent and mutually exclusive parts, not treating proviso as adjunct to the main provision. These two parts are:

a) Main enacting part which deals with those aggrieved persons, who are "in a domestic relationship". Thus, in those cases where aggrieved person is in a domestic relationship with other person against whom she has sought any relief under the DV Act, in that case, such person as Respondent has to be an adult male person. Given that aggrieved person has to be a female, such aggrieved person in a domestic relationship can be a mother, a sister, a daughter, sister-in-law, etc.

b) Proviso, on the other hand, deals with limited and specific class of aggrieved person, viz. a wife or a female living in

relationship in the nature of marriage. First time by this legislation, the legislator has accepted live in relationship by giving those female who are not formally married, but are living with a male person in a relationship, which is in the nature of marriage, also akin to wife, though not equivalent to wife. This proviso, therefore, caters for wife or a female in a live in relationship. In their case, the definition of "respondent" is widened by not limiting it to "adult male person" only, but also including "a relative of husband or the male partner", as the case may be.

What follows is that on the one hand, aggrieved persons other than wife or a female living in a relationship in the nature of marriage, viz., sister, mother, daughter or sister-in-law as aggrieved person can file application against adult male person only. But on the other hand, wife or female living in a relationship in the nature of marriage is given right to file complaint not only against husband or male partner, but also against his relatives.

16. Having dissected definition into two parts, the rationale for including a female/woman under the expression "relative of the husband or male partner" is not difficult to fathom. It is common knowledge that in case a wife is harassed by husband, other family members may also join husband in treating the wife cruelty and such family members would invariably include female relatives as well. If restricted interpretation is given, as contended by the Petitioner, the very purpose for which this Act is enacted would be defeated. It would be very easy for the husband or other male members to frustrate the remedy by ensuring that the violence on the wife is perpetrated by female members. Even when Protection Order under Section 18 or Residence Order under Section 19 is passed, the same can easily be defeated by violating the said orders at the hands of the female relatives of the husband.

19. It is also well-recognized principle of law that while interpreting a provision in statute, it is the duty of the Court to give effect to all provisions. When aforesaid provisions are read conjointly keeping the scheme of the DV Act, it becomes abundantly clear that the legislator intended female relatives

also to be Respondents in the proceedings initiated by wife or female living in relationship in the nature of marriage, the same can easily be defeated by violating the said orders at the hands of the female relatives of the husband.

19. It is also well-recognized principle of law that while interpreting a provision in statute, it is the duty of the Court to give effect to all provisions. When aforesaid provisions are read conjointly keeping the scheme of the DV Act, it becomes abundantly clear that the legislator intended female relatives also to be Respondents in the proceedings initiated by wife or female living in relationship in the nature of marriage."

18. This interpretation has been approved in **Sandhya Manoj Wankhade v. Manoj Bhimrao Wankhade,** [2011] 2 SCR 261 by the Supreme Court. The learned Single Judge of the High Court had, in that case, disposed off the writ petition with a direction to the Appellant to vacate her matrimonial house, which was in the name of the second Respondent and also directed the Trial Court to expedite the hearing of the wife's miscellaneous criminal application within six months. A further

direction was given confirming the order relating to deletion of the names of the 'other members' from the complaint filed by the Appellant. The judgment of the High Court was challenged before the Supreme Court. Allowing the appeal, the Supreme Court held:

"13. It is true that the expression "female" has not been used in the proviso to Section 2(q) also, but, on the other hand, if the Legislature intended to exclude females from the ambit of the complaint, which can be filed by an aggrieved wife, females would have been specifically excluded, instead of it being provided in the proviso that a complaint could also be filed against a relative of the husband or the male partner. No restrictive meaning has been given to the expression "relative", nor has the said expression been specifically defined in the Domestic Violence Act, 2005, to make it specific to males only.

14. In such circumstances, it is clear that the legislature never intended to exclude female relatives of the husband or male partner from the ambit of a complaint that can be made under the provisions of the Domestic Violence Act, 2005.

15. In our view, both the Sessions Judge and the High Court went wrong in holding otherwise, possibly being influenced by the definition of the expression "respondent" in the main body of Section 2(q) of the aforesaid Act."

19. The ruling in Shumita Didi Sandhu, in this Court's opinion, with due respect, did not analyze the entirety of the definition of "shared household". Nor did it link the concept and the right to residence granted by the 2005 Act with the definition of "respondent" which includes female relatives of the husband, and not just the male relatives. That decision was rendered much before the ruling in Varsha Kapoor, and the Supreme Court decision in Sandhya Manoj Wankhede. Its absence of any discussion on the rights of women as against female relatives of the husband regardless of whether the respondent had any right, or interest in the property, in this Court's opinion, results in limiting it to deciding the facts of that case. It would be also necessary to notice a decision of the Supreme Court in **Vimalben Ajitbhai Patel v. Vatslabeen Ashokbhai Patel and Ors.,** 2008(4) SCC 649. There, the wife was beneficiary of a maintenance order, which was sought to be enforced through execution, against her mother in law's property. The wife claimed

that since it was a "shared household", the property could be attached. Repelling the argument, the Supreme Court held that the obligation to provide maintenance was of the husband and any order in that regard could be enforced against him, by attachment of his personal assets or properties. It was in this context that the Court held that a shared household belonging to the mother in law could not be subject matter of attachment. The context of that decision was different as the Supreme Court, in this Court's opinion, did not decide that despite the definition of "shared household" enabling a wife the right of residence in premises not owned by the husband, she could not claim to live there. Rather, in proceedings for maintenance, the claim may not lie against the mother-in-law's property – a domain that the present case does not touch upon.

20. Crucially, Parliament's intention by the 2005 Act was to secure the rights of aggrieved persons in the shared household, which could be tenanted by the Respondent (including relative of the husband) or in respect of which the Respondent had jointly or singly any right, title, interest, or "equity". For instance, a widow (or as in this case, a daughter in law, estranged from her husband) living with a mother-in-law, in premises owned by the latter, falls within a "domestic relationship". The obligation not to disturb the right to residence in the shared household would continue even if the mother-in-law does not have any right, title or interest, but is a tenant, or entitled to "equity" (such as an equitable right to possession) in those premises. This is because the premises would be a "shared household". The daughter-in-law, in these circumstances is entitled to protection from dispossession, though her husband never had any ownership rights in the premises. The right is not dependent on title, but the mere factum of residence. Thus, even if the mother-in-law is a tenant, then, on that ground, or someone having equity, she can be injuncted from dispossessing the daughter in law. In case the mother in law is the owner, the obligation to allow the daughter in law to live in the shared household, as long as the matrimonial relationship between her and the husband subsists, continues. The only exception is the proviso to 19(1)(b), which exempts women from being directed to remove themselves from the shared household. No such exception has been carved out for the other reliefs under Section 19, espec ally in respect of protection orders. Had the Parliament intended to create another exception in favor of women, it would have done so. This omission was deliberate and in consonance with the rest of the scheme

of the Act. There can be other cases of domestic relationships such as an orphaned sister, or widowed mother, living in her brother's or son's house. Both are covered by the definition of domestic relationship, as the brother is clearly a Respondent. In such a case too, if the widowed mother or sister is threatened with dispossession, they can secure reliefs under the Act, notwithstanding exclusive ownership of the property by the son or brother. Thus, excluding the right of residence against properties where the husband has no right, share, interest or title, would severely curtail the extent of the usefulness of the right to residence.

21. The other aspect, which this Court wishes to highlight, is that the 2005 Act applies to all communities, and was enacted "to provide more effective protection of the rights of women guaranteed under the Constitution who are victims of violence of any kind occurring within the family". The right to residence and creation of mechanism to enforce is a ground breaking measure, which Courts should be alive to. Restricting the scope of the remedies, including in respect of the right to reside in shared household, would undermine the purpose of this enactment. It is, therefore, contrary to the scheme and the objects of the Act, as also the unambiguous text of Section 2(s), to restrict the application of the 2005 Act to only such cases where the husband alone owns some property or has a share in it. Crucially, the mother-in-law (or a father-in-law, or for that matter, "a relative of the husband") can also be a Respondent in the proceedings under the 2005 Act and remedies available under the same Act would necessarily need to be enforced against them.

22. Likewise, the interpretation preferred by some learned single judges that where the husband has some rights (as a member of the HUF, i.e. the Hindu Undivided Family) and if those premises were the shared household, the wife can enforce her right to residence, also constitutes an internally incoherent and restrictive interpretation of the Act. As explained in Evneet Singh, such a construction is contrary to Parliamentary intention that the law is a non-sectarian one. Indeed, the "joint" status of a family referred to under Section 2 (s) is in a generic sense. To equate it with a HUF would result in unintended benefits to one set of respondents, who are Hindus. Speaking generically, "joint family" refers to a group of people, related either by blood or marriage, residing in the same house. Instances of that can be found in almost all parts of India. The general practice in India is that the son and his wife reside in the house of the (husband's) parents after marriage, though the legal

obligation to maintain a child ceases as soon as she or he attains majority, the jural relationship between the parents and the child continues. The concept of a "joint family" in law is peculiar to Hindu law. No concept of a "joint family" similar to that of an HUF can be found in Muslim law, Christian law or any other personal law. Therefore, a restrictive interpretation of "joint family" by equating it to a HUF would result in implicit discrimination, because women living in a shared household belonging to an HUF (and therefore, Hindus) would have more security, by reason of their professing the Hindu faith than others who are not Hindus. In fact, even among Hindus, women who are married into or live in HUFs, as compared with those living with husbands, whose parents own the property – on an application of Batra – would have the protection of the Act, while the latter would not. This inequity was addressed by the Parliament which stated in no uncertain terms that irrespective of title of the "Respondent" to the "shared household", a protection order can be made under Section 19(1)(a).

23. The facts of this case contain the classic elements of a husband seeking to evade his responsibilities upon marital discord breaking out. He allegedly disappeared and was "disowned" by his mother. The appellant's mother-in law then instituted the suit, to dispossess the daughter in law and her grand-children, claiming that she no longer has any relationship with her son or her daughter in law. She based her claim to ownership of the suit property on a will. The daughter in law has not admitted the will. Nor has it been proved in probate proceedings. Often, sons move out, or transfer properties or ownership rights, or shares in immovable properties, at the hint of trouble or discord with their wives, in favour of their relatives. Likewise, the parents of the husband often in such cases "disown" them after the son moves out from the common or "joint" premises owned by either or both his parents, when there is outbreak of marital discord. Courts have to be cautious in their approach, while entertaining and short circuiting suits for possession, which are in effect directed against the plaintiffs' daughter-in law, or else the right of residence in shared households would be a mere chimera, a teasing illusion which the law grandly promises, but is seldom, if ever, able to enforce. In fact, the strategy of "disowning" sons, through public notices or advertisement, is not to be taken lightly. For example, even if a son is disowned by either parent, the death of that parent would, if intestate, still lead to devolution of property upon that son. Indeed, a mere

proclamation does not have a dispositive legal effect, breaking all legally relevant familial ties. Thus, absent a deed of relinquishment or other formal deed of partition of the family or separation between the members, the Court must be cautious in denying statutory rights to wives, as against members of the husband's family, on the basis of such tentative facts. To the contrary, if the Court is to place reliance on such acts, benefits enacted by the 2005 Act in favour of the wife would be bypassed on account of alleged, and possibly fleeting, discords between the husband and his family. Indeed, such an approach is neither legally tenable, nor viable given the scheme of the Act.

24. In view of the above discussion, the impugned judgment and decree of the learned single judge is hereby set aside; parties are directed to present themselves before the concerned single judge as per roster allocation, on 6th February, 2014 for directions toward further proceedings in the suit. The appeal is allowed, under the above circumstances, without any order as to costs.

ILR (2014) II DELHI 1276
W.P. (C)

MOHD. ASHIKIAN QURESHI ....PETITIONER

VERSUS

D.D.A. THROUGH ITS CHAIRMAN & ORS. ....RESPONDENTS

(HIMA KOHLI, J.)

W.P. (C) NO. : 1364/2013 AND C M APPL. NO. : 6324/2013 DATE OF DECISION: 16.01.2014

Constitution of India 1950—Article 226—Writ Petition —Disputed questions of facts—cannot be taken up in writ petition—civil suit pending on same issue—decision of civil court to be awaited-right of offering *namaz*—raising of boundary wall of colony—do not

amount to restriction of right—petitioner a resident of Kalkaji—had been offering namaz in Madini Masjid near Gate No.7, Alaknanda Apartments, Alaknanda, New Delhi—due to cars illegally parked near Masjid his—ingress—egress—other namajis into the masjid obstructed—car parked in the open courtyard of masjid—not meant for car parking—an unauthorized wall has been constructed near the masjid which ought to be removed—namajis form the adjoining locality facing difficulty in offering namaz due to lack of apace—Respondent DDA contested—filed affidavit—stated that relief prayed in writ petition subject matter of civil suit instituted by local Managing Committee of Madini Masjid and Dargah Pending in the court of Sr. Civil Judge, Saket, New Delhi—said suit after Division Bench of High Court in LPS in case titled *Aravali Residents Welfare Association and Others v. DDA and Others.* had expressed an opinion that there were number of factual disputes raised for consideration which could not be determined in writ proceedings—evidence required to be led before coming to any conclusion—Court observed —having to the facts that civil court seized of the issue being agitated in the petition—court not inclined to entertain the same with respect to relief sought—with regard to relief of removal of illegal wall—observed—wall of 1 1/2 to 2 feet would hardly be treated as obstruction to the petitioner to have free access to the masjid—further there were two gates affixed on the boundary to regulate vehicular and pedestrian traffic—further observed—simply because the petitioner desire free access to the masjid did not mean that safety and security of residents living within gated colony could be compromised—DDA also stated that the wall in question not raised illegally—Held—petition ought to await the decision of civil suit—petition and pending application disposed off accordingly.

When the reliefs sought by the petitioner in the present petition are juxtaposed against those prayed for by the Local Managing Committee of the Masjid in the civil suit, it is apparent that the relief (iii) in the plaint is almost the same as reliefs (i) & (iii) prayed for in the present petition. Having regard to the fact that the Civil Court is seized of the issue that is being agitated in the present petition and that too in a suit instituted by the Local Managing Committee of the Masjid itself, this Court is not inclined to entertain the relief sought by the petitioner at prayer clauses (i) & (iii). **(Para 7)**

In the opinion of this Court, the subject boundary wall cannot be treated as an obstruction to the ingress and egress of namazis to the Masjid for the reason that there are two gates affixed on the said boundary wall to regulate vehicular traffic and pedestrian traffic. Simply because the petitioner desires free access to the Masjid does not mean that the safety and security of the residents living within a gated colony can be compromised. Moreover, learned counsel for the respondent No.1/DDA has stated that the boundary wall in question has not been raised illegally. Therefore, there is no need to issue any directions for its removal. **(Para 9)**

Important Issue Involved: (a) The disputed question of facts cannot be determined in the writ jurisdiction.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. M.M. Kashyap, Advocate

FOR THE RESPONDENT : Mr. Rajiv Bansal, Advocate with Mr. D. Ray Chaudhury, Advocate for R-1/DDA. Mr. G.D. Mishra, Advocate for R-2/SDMC. Ms. Mumtaz Ahmed and Mr. Brij Lal, Advocates for the applicant in CM APPL. 6324/2013.

CASE REFERRED TO:

1. *Aravali Resident Welfare Association and Ors.* vs. *DDA and Ors.* LPA No.535-43/2006.

RESULT: Writ Petition and pending application disposed off.

HIMA KOHLI, J. (Oral)

1. The present petition has been filed by the petitioner praying inter alia for issuance of directions to the respondents No.1 to 3 to restrain all persons from parking their cars in front of Madini Masjid, near Gate No.7, Alaknanda Apartments, Alaknanda, New Delhi, and further, take steps to remove the boundary wall allegedly raised in an illegal manner and without obtaining any permission from the concerned authorities.

2. Learned counsel for the petitioner states that the petitioner who is a resident of Kalkaji, is a Namazi and has been offering Namaz at Madini Masjid for the past several years, but due to cars being illegally parked near the Masjid, his ingress and egress and that of thousands of other Namazis into the Masjid is being obstructed. It is contended by learned counsel for the petitioner that cars are illegally being parked in the open courtyard in front of the Masjid, which is actually not meant for car parking. He also states that there is an unauthorised wall that has been constructed near the Masjid, which ought to be removed as thousands of Namazis from the adjoining localities who visit the mosque in question are facing difficulty in offering their prayers due to lack of space. Hence, the present petition.

3. An affidavit in opposition to the writ petition has been filed by the respondent No.1/DDA, wherein it is stated that the reliefs prayed for in present writ petition are the subject matter of a civil suit that has been instituted by the Local Managing Committee of Madani Masjid and Dargah and the same is pending adjudication in the Court of the Senior Civil Judge, Saket. Learned counsel for the respondent No.1/DDA states that the aforesaid suit came to be instituted by the Managing Committee of the Masjid on 04.10.2010, after an order dated 19.01.2009 was passed by the Division Bench in LPA No.535-43/2006 entitled **Aravali Resident Welfare Association and Ors. vs. DDA and Ors.**

4. A perusal of the aforesaid decision of the Division Bench reveals that in the said case, the Court was considering the submissions made

by the appellants/RWA therein to the effect that the subject Masjid itself was an unauthorised construction and an encroachment on public land. However, after hearing the parties, the Division Bench had expressed an opinion that there were a number of factual disputes raised for consideration, which could not be determined in writ proceedings as evidence was required to be led before coming to any conclusion. The said disputed questions of facts included whether the mosque in question had existed at the site on a particular date and as to what was the stage at which it had come up. The other disputed questions of facts mentioned in the aforesaid decision included the status of an entity by the name of Mulsim Janta Anjuman and its capacity to have proposed any settlement between the parties before the Division Bench. In the concluding para of the aforesaid judgment, the Division Bench had observed as below:-

> "12. We however cannot ignore the fact that mosque exists on a particular area. The Namazis have a right to offer their Namaz at the mosque subject to the determination of the ultimate question in Civil proceedings. Learned counsel for the Wakf Board submits that they will approach the concerned authorities for making arrangements for a large number of Namazis to be accommodated within the precincts of the Masjid by carrying out suitable constructions in accordance with law. This is of course for the Wakf Board to do.
>
> 13. The rights of the Namazis to offer prayers at the mosque however cannot imply a right to spill over into lanes and by-lanes and to occupy the area beyond the precincts of the mosque. The prayers must thus be offered within the boundary of the mosque. This would of course entail possibly restricting the number of Namazis into the mosque because the area itself is limited. It is for the Wakf Board or the concerned authorities to work out as to how best the area can be utilized for purpose of permitting a larger number of Namazis to offer prayers but the same should be restricted to the area of the mosque.
>
> 14. Learned counsel for the appellants submits that periodically police authorities have to be called. The Commissioner of police is impleaded as respondent No.3 and is represented by a counsel. It is the bounden duty of the police authority to ensure that the law of land is obeyed and law and order be maintained. It thus

must be ensured that the areas beyond the boundary of the Masjid are kept clear for the allottees and residents of the area and are not used for any other purpose than easementary rights of passage."

5. Learned counsel for the respondent No.1/DDA states that it was after the aforesaid decision came to be passed in the appeal that the Local Managing Committee of the Masjid had instituted a civil suit for the relief of permanent and mandatory injunction which is similar to the relief prayed for in the present petition. The reliefs prayed for by the petitioner in the present petition are reproduced hereinbelow for ready reference:-

"(i) to give directions to respondents 1 to 3 to take steps to restrain the persons for illegal parking of cars in front of Madini Masjid, near gate no.7, Alaknanda Apartments, Alaknanda, New Delhi.

(ii) to give direction to respondent 1 to 3 to take steps to remove the illegal wall raised at the boundary of courtyard by some persons without any permission of any authority.

(iii) to give direction to respondent no.3 to impound the illegal parked cars so that no car can be parked.

(iv) Pass such other order/orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

6. The reliefs prayed for by the Local Managing Committee of the Masjid in the civil suit instituted by it, are reproduced hereinbelow:-

"(i) Pass a decree for mandatory injunction against the defendant no.1 to 4 to demolish the illegal addition and alteration and unauthorised construction in the flats of Arawali Apartments, Alaknanda, Kalkaji, New Delhi, which caused great hardship to the plaintiffs and other residents of the area for Namaj.

(ii) Pass a decree for mandatory injunction against the defendant no.2 to cancel the lease of the flat holders who have made addition and alteration and additional flats and illegal construction in their flats.

(iii) Pass a decree for permanent injunction against the

defendant no.1 to 3 restraining them for parking their vehicles in the boundary of the masjid.

(iv) Pass such other or further orders may kindly be passed in favour of the plaintiff and against the defendants in view of the facts and circumstances of the case in the interest of justice."

7. When the reliefs sought by the petitioner in the present petition are juxtaposed against those prayed for by the Local Managing Committee of the Masjid in the civil suit, it is apparent that the relief (iii) in the plaint is almost the same as reliefs (i) & (iii) prayed for in the present petition. Having regard to the fact that the Civil Court is seized of the issue that is being agitated in the present petition and that too in a suit instituted by the Local Managing Committee of the Masjid itself, this Court is not inclined to entertain the relief sought by the petitioner at prayer clauses (i) & (iii).

8. Coming to the relief sought by the petitioner at prayer clause (ii) which is for issuance of directions to the respondents to remove an illegal wall raised outside the Masjid, a perusal of the photographs filed by the petitioner on record, particularly at page 21 shows that the same is only a toe wall with the height of approximately one and a half/two feet. The wall of such a height can hardly be treated as an obstruction for the petitioner to have free access to the Masjid in question. As for the submission of learned counsel for the petitioner that the grills installed along the boundary wall of the Aravali Apartment Complex, Alaknanda is an obstruction, learned counsel for the respondent No.1/DDA states on instructions that it is a gated colony having seventeen gates and the boundary wall was constructed for the safety and security of the residents of the area, at the instance of the DDA itself. The aforesaid fact is however disputed by the counsel for the petitioner.

9. In the opinion of this Court, the subject boundary wall cannot be treated as an obstruction to the ingress and egress of namazis to the Masjid for the reason that there are two gates affixed on the said boundary wall to regulate vehicular traffic and pedestrian traffic. Simply because the petitioner desires free access to the Masjid does not mean that the safety and security of the residents living within a gated colony can be compromised. Moreover, learned counsel for the respondent No.1/DDA has stated that the boundary wall in question has not been raised illegally.

Therefore, there is no need to issue any directions for its removal.

10. For the reasons stated above, this Court declines to issue any directions in respect of prayer clause (ii) of the petition. For the remaining reliefs sought by the petitioner, as the said issue is under the active consideration of the Civil Court, in a suit instituted by the Local Managing Committee of the Masjid, pursuant to an order passed by the Division Bench in LPA No.535-43/2006, the petitioner ought to await the decision in the aforesaid suit.

11. Accordingly, the petition is disposed of alongwith the pending application.

ILR (2014) II DELHI 1283

CRL.A.

SHEKHAR @ CHHOTU ....APPELLANT

VERSUS

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

(S.P. GARG, J)

CRL.A. NO. : 1283/2011 & CRL.A. NO. : 1056/2011 **DATE OF DECISION: 31.01.2014**

Indian Penal Code, 1860—Section 452/394/398- minor contradictions and discrepancies do not affect the core of the prosecution case-ocular testimony in consonance with medical evidence-

Merely because blood was not found on the knife at the time of its production in the court, cogent and credible statement of victim cannot be discarded.

Use of brick to cause injuries in an attempt to get released co-accused only from the clutches of the victim and to commit robbery, cannot be considered 'use of a deadly weapon' to attract and prove commission of an offence U/section 398 IPC.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. S.B. Dandapani, Advocate and Mr. Bhupesh Narula, advocate.

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

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Shekhar @ Chhotu (A-1) and Hari Om (A-2) question the legality and correctness of a judgment dated 13.12.2010 in Sessions Case No. 80/10 arising out of FIR No. 45/10 PS Gandhi Nagar by which they were held guilty for committing offences punishable under Sections 452/394/398/34 IPC. A-1 was also held guilty under Section 25 Arms Act. By orders on sentence dated 15.12.2010, A-1 was awarded RI for three years with fine Rs. 200/- under Section 452 IPC; RI for five years with fine Rs. 500/- under Section 394 IPC; RI for seven years with fine Rs. 500/- under Section 398 IPC and RI for one year with fine Rs. 200/- under Section 25 Arms Act. A-2 was awarded similar prison terms under Sections 452/394/398 IPC. The substantive sentences were to operate concurrently.

2. Allegations against the appellants were that on 21.02.2010 at about 08.30 P.M. at Swastik Hosiery, 9/6563, Nehru Gali, Gandhi Nagar, they in furtherance of common intention with their associates (not arrested) committed house trespass and attempted to commit robbery. In the process, they caused injuries to Darshan Jain by a 'deadly' weapon. Both the appellants were apprehended at the spot. Daily Diary (DD) No. 31A was recorded at 2044 hours at PS Gandhi Nagar about the apprehension of two assailants having knives. Daily Diary (DD) No. 32A was recorded at 2048 hours on getting information that the owner of the shop was assaulted with a knife by some assailants. The investigation was assigned

to ASI Zile Singh who with Const. Jaswant went to the spot. Bhushan Jain produced both the assailants to him. Darshan Jain had already been taken to SDN Hospital by PCR. The Investigating Officer lodged First Information Report after recording Darshan Jain's statement (Ex.PW-1/A). During investigation, statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against both the appellants; they were duly charged and brought to trial. The prosecution examined seven witnesses to substantiate the charges. In 313 statements, the accused persons pleaded false implication and claimed that on that day they had gone to purchase pants. A-2 had consumed liquor and was under its influence. They, however, did not examine any witness in defence. The trial resulted in their conviction as aforesaid.

3. I have heard the learned counsel for the parties and have examined the record. The incident took place at around 08.30 P.M. Darshan Jain who was injured in the occurrence was taken to SDN Hospital, Shahdara by PCR. MLC (Ex.PW-2/A) records the arrival time of the patient at 10.05 P.M. DD Nos. 31A and 32A were recorded soon after the incident at 2044 hours and 2048 hours, respectively. The Investigating Officer after recording statement of the victim lodged First Information Report without wasting time at 11.45 P.M. by making endorsement (Ex.PW-6/B). In the complaint, the victim gave vivid description of the incident and narrated as to how and under what circumstances, four intruders had entered inside his factory and one of them was armed with a knife. He was directed to handover the cash at the point of knife. When he declined to do so, he was injured by a knife. The assailant who was armed with a knife was caught hold by him. His associate in an attempt to get him release, hit him on his head with a brick. His neighbor Bhushan Jain succeeded to apprehend the said assailant. Two of their associates escaped from the spot. Since the FIR was lodged without any delay, the complainant had no time to concoct a false story. He had no ulterior motive to fake an incident of robbery. While appearing as PW-1, he identified A-1 and A-2 to be among the four assailants who had committed trespass in his factory at about 08.30 P.M. when he was making accounts for payment to the workers. He attributed specific role to A-1 who had a knife and directed him to handover whatever money he had. On his

declining to part with the money, A-1 again said 'paise deta hai ki nahi' and attacked him with a dagger. He hit him on the palm of his right hand. On his raising alarm, Bhushan Jain arrived there. A-2 asked him to release A-1 and on his refusal, he hit him with a brick on his head. He was also caught hold by Bhushan Jain. The assailants were given beatings by the public. In the cross-examination, he admitted that there was no blood stains on the knife (Ex.P1). He denied the suggestion that the boys who had run away from the spot had caused injuries to him or that the appellants were falsely implicated when they were coming to their house. PW-5 (Bhushan Jain) corroborated PW-1 (Darshan Jain)'s statement on material facts. He also identified A-2 to be the assailant who was overpowered by him. He attributed definite role to A-1 who had the handle of dagger and A-2 who had a brick in his hand. In the cross-examination, he explained that the occurrence took place in one or two minutes. He denied the suggestion that the appellants were wrongly identified by him in the Court at the instance of the police.

4. On scrutinizing the testimonies of PW-1 and PW-5, it reveals that they have given consistent version regarding the incident and have proved the role played by each of the assailants in the occurrence without major variation. Despite cross-examination, no material discrepancies could be elicited or extracted to disbelieve or discard their statements. No ulterior motive was assigned to any of these public witnesses for falsely implicating the appellants with whom they had no prior acquaintance or animosity. The victim who had sustained injuries with a sharp weapon was not expected to let the real culprit go scot free and to falsely implicate and identify innocent ones. The appellants were arrested at the spot and were given beatings by the public. They were taken for medical examination. They have not denied their presence at the spot. They did not adduce any evidence to prove that prior to arrival at the spot, they had purchased pants from a specific shop. No such shopkeeper was examined in defence. Nothing was revealed as to when and where A-2 had consumed liquor as alleged.

5. Minor contradictions and discrepancies highlighted by appellants' counsel do not affect the core of the prosecution case. The ocular testimony is in consonance with medical evidence. PW-2 (Dr.Gangotri

Singh) medically examined Darshan Jain and prepared MLC (Ex.PW-2/A). Nature of injuries was opined as 'simple' caused by sharp weapon. In the cross-examination, she categorically stated that the patient had bruises on his head. She denied the suggestion that the said injury on the head was not possible with brick (Ex.P2). Injury on the palm was described as 'simple' caused by sharp edged weapon. Merely because blood was not found on the knife at the time of its production in the Court, cogent and credible statement of the victim cannot be discarded. The medical evidence is certain that the injuries were caused by a 'sharp' object. In 313 statements, the accused persons did not give plausible explanation to the incriminating circumstances proved against them. No pant or cash was recovered during their search as depicted in their personal search memos. The findings are based upon fair appraisal of the evidence and require no interference.

6. A-2, admittedly, did not have any 'deadly' weapon at the time of occurrence. Only when he attempted to get release A-1 from the clutches of the victim, he hit him with a 'brick' on his head. Under these circumstances, the 'brick' cannot be considered as a 'deadly' weapon to attract section 398 IPC. Conviction under Section 398 IPC qua A-2 is set aside.

7. A-1 has been awarded minimum sentence prescribed under Section 398 IPC which cannot be altered or modified. A-2's nominal roll dated 03.01.2012 reveals that he has suffered custody in this case for one year, ten months and eleven days besides earning remission for four months and four days as on 03.01.2012. Nominal roll further reveals that he is not a previous convict and is not involved in any other criminal case. His overall jail conduct is satisfactory. He was enlarged on bail by an order dated 21.03.2013. Nothing has emerged if he misused the liberty or indulged in any such crime after his release. Considering these mitigating circumstances, the substantive sentence under Section 394 IPC qua A-2 is reduced from five years to four years.

8. In the light of above discussion, appeal filed by A-1 is dismissed. While maintaining A-2's conviction under Section 452/394 IPC, substantive sentence under Section 394 IPC will be RI for four years. Other terms and conditions in the sentence order shall remain unaltered.

9. A-1 and A-2 are directed to surrender before the Trial Court on 7th February, 2014 to serve the remaining period of sentence (if any).

10. Trial Court record be sent back immediately. A copy of the judgment be sent to the Superintendent Jail for information.

ILR (2014) II DELHI 1288
RFA (OS)

HINDUSTAN UNILEVER LIMITED ....PETITIONER

VERSUS

RECKITT BENCKISER INDIA LIMITED ....RESPONDENTS

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

RFA (OS) NO. : 50/2008, DATE OF DECISION: 31.01.2014
CM. APPL. : 17116/2008

Injunction—Appeal directed against a decree for permanent injunction: Brief Facts—Plaintiff (hereafter "Reckitt") sought to restrain the defendent Hindustan Lever Ltd. (hereafter "HUL") by permanent injunction from telecasting the advertisement or otherwise disparaging Reckitt's goodwill and reputation and its product sold under the trade mark DETTOL, in any other advertisements and in all media—Reckitt also sought damages to the tune of Rs.20,00,050/- towards disparagement, denigration and tarnishment of ist goodwill and reputation by the impugned advertisement—A claim for exemplary damages too was made in the suit—Reckitt is involved in the manufacture of the famous antiseptic disinfectant under the trade mark DETTOL for over 70 years. It was averred that the mark DETTOL is synonymous with

good hygience and, today, it is a household name and is the most widely used antiseptic disinfectant in the country—Reckitt became aware that the HUL introduced an advertisement on television, which intentionally and deliberately disparages Reckitt's soap under the trade mark DETTOL and the unique and distinctive packaging —The offending advertisement concerns the defendant's LIFEBUOY soap—Impugned decree for permanent injunction was issued by the learned Single Judge in a claim alleging that the defendant/appellant's advertisement had disparaged the plaintiff's good —The impugned judgment also directed payment of punitive damages to the extent of Rs. 5 lakhs to the plaintiff—Hence Present Appeal—The Plaintiff/respondent argued that the Dettol had been famous as an antiseptic/disinfectant, and had become synonymous with good hygiene as a household name, and that the defendant had subjected the Dettol Toilet soap (in which its the distinctive and unique shape, unique orange colour were clearly visible, albeit without the logo) and the green, distinctive packaging to intentional and deliberate disparagement by depicting it to be the type of "normal antiseptic soaps that make the skin dry..." thereby "permitting the germs to enter the cracks in the skin", unlike the defendant's soap. The appellant argued that, first, Dettol is neither an antiseptic soap (as held in a previous judgment of the Delhi HC) nor an unbranded soap, second, that the respondent neither had a monopoly over the colour, shape or packaging of the soap, nor had registered the shape, contours and curvatures of its soap under the Designs Act to create an exclusive right of use, third, that "totality of impression" (and not either the "test of confusion" applied in passing off actions, or the isolated frame-by-frame approach) must be used as the test of disparagement, so that the intent, manner, story line and message of the advertisement is conveyed, fourth,

that the audience of the impugned advertisement must be considered to be the reasonable man with imperfect recollection, and the consumer/user base of the soap, by virtue of being acquainted with what the product looks like, would not have imperfect recollection and fifth, that the test of malice was not fulfilled i.e. nothing was done with the direct object of injuring the other person's business—Appellant/defendant challenged the grant of punitive damages while the respondent/plaintiff argued that general or compensatory damages ought to have been awarded, first.

Held: Slander of goods is a species or branch of the law of defamation—It is widely accepted that to be defamatory, an imputation must tend to lower the claimant in the estimation of right thinking members of society generally, (i.e., the reference to the 'common' or reasonable' man)—In the present case, the learned Single Judge correctly described the guiding principles after discussing the case law on the subject and even brought home the distinction between passing off actions—Which are concerned with deceptively similarity or confusion between the two marks for which the test of impression gathered by an average woman or man with imperfect recollection is applicable and disparagement—Whilst there can be no quarrel with the fact that a reasonable man and an average man refer to the same metaphor and imperfect recollection refer to an natural attribute of a reasonable or average man, what needs closer scrutiny is whether the standard applicable in judging disparagement claims is if a particular class of user (in this case the Dettol user) feels that the statement is disparaging—There appears to be an overwhelming consensus of judicial opinion that to determine whether a statement disparages or defames the view point to be considered is that of the general public

(the refinements of whether such "right thinking" or "reasonable" persons belong to a "respectable" section of the public, apart). Thus, whenever an argument that sectarian approach (i.e. applying the standpoint of members of a section of the public) is to be adopted, Courts have tended to reject it time and again.

The first question here is as to the manner in which such advertisements are to be viewed, and secondly, the legal standard against which the advertisement is to be judged—On this question, the advertisement must be seen as a viewer would normally view it in the course of the television programme, and not specifically with a view it in the course of the television programme, and not specifically with a view to catch an infringement—This distinction is thin, but important: in trying to determine whether commercial disparagement has occurred, the relevant consideration is how the viewer (i.e. the individual to whom the alleged disparagement is addressed) would see the advertisement—This consideration is important also because of the manner in which the advertisement is appreciated—Whether as a running reel or frame by frame—The answer to this necessarily is the former, for two clear reasons—First, when deciding such matters, the judge is to consider (as will be discussed below) how an average, reasonable man would view the advertisement as it appears on the television or electronic medium, as in the present case. In order to do this, the endeavour of the Court is to substitute its judgment for that of the average/reasonable man. Undoubtedly, when the advertisement is displayed on the television, it is nor scrutinized in ever detail by the viewers, but rather, taken as a whole as it is displayed. This simple proposition is of great relevance, since a judge, sits in an adversarial setting with the clear purpose of determining whether

commercial disparagement has occurred, and thus, on the look-out for any indication of the same, must equally remain cautious that the advertisement is viewed as viewers normally view it.

In the present case, the plaintiff (Reckitt) has been able to prove, successfully, that HUL telecast the impugned 30 second advertisement on a large number of occasions (2763 times, to be precise, according to Ex. PW-1/19)—The innuendo was cleverly designed to suggest that Rackitt's DETTOL Original caused damage to the skin—The advertiser, i.e. HUL, was conscious that it was crossing the boundary between permissible "puffing" and what was prohibited in law—The evidence on record, in the form of HUL's witnesses testimony, is that Rs. 2.5 crores was spent in July 2007 alone for advertising its product—HUL also admitted during the trial that the DETTOL Original brand was worth Rs. 200 crores—Such being the case, this Court holds that the Single Judge's reluctance to award general damages was not justified—It would be necessary to mention in this context that it may not be possible for an otherwise successful plaintiff, in a disparagement or slander of goods action to always quantify the extent of loss; there would necessarily be an element of dynamism in this, because of the nature of the product, the season it is sold in, the possible future or long term impact that may arise on account of the advertisement, etc. Therefore, courts the world over have resorted to some rough and ready calculations—In view of the evidence presented before this Court (i.e. the number of times the advertisement was telecast, the quantum of advertisement expenses of HUL, the amount spent by Reckitt, to advertise its product, etc.) this Court is of opinion that the plaintiff is entitled to recover general damages to the tune of Rs. 20 lakhs. The impugned judgment and order is modified to that extent, and the cross objection by Reckitt, is

consequently allowed in these terms—As far as punitive damages are concerned, the learned Single Judge relied in Lokesh Srivastava and certain other rulings. Here, since the Court is dealing with a final decree and a contested one at that (unlike in the case of trademark and intellectual property cases, where the Courts, especially a large number of Single Judge decisions proceeded to grant such punitive damages in the absence of any award of general or quantified damages for infringement or passing off), it would be necessary to examine and re-state the governing principles—Punitive damages should invariably follow the award of general damages (by that the Court meant that it could be an element in the determination of damages, or a separate head altogether, but never completely without determination of general damages)—Impugned judgment fell into error in relying on the decision in *Times Incorporated v. Lokesh Srivastava* 116 (2005) DLT 569—To say that civil alternative to an overloaded criminal justice system is in public interest would be in fact to sanction violation of the law—This can also lead to undesirable results such as casual and unprincipled and eventually disproportionate awards—Consequently, this Court declares punitive damages, based on the ruling in Lokesh Srivastava and Microsoft Corporation v. Yogesh Papat and Another, 2005 (30) PTC 245 (Del) is without authority. Those decisions are accordingly overruled—To award punitive damages, the Courts should follow and categorization indicated in *Rookes* (Supra) and further grant such damages only after being satisfied that the damages awarded for the wrongdoing is inadequate in the circumstances, having regard to the three categories in Rookes and also following the five principles in *Cassel*. The award of general damages through this judgment (although of a figure of Rs. 20 lakhs) is moderate, since the advertisement was aired over 2700 times and seen

and intended to be seen by millions of viewers. As observed in John (supra) "The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people..." Having regard to all these circumstances, the Court is of opinion that the award of Rs. 5 lakhs as exemplary damages in the facts of this case was justified and not disproportionate; it is accordingly upheld—In view of the above discussion, it is held that this appeal has no merit. It is accordingly dismissed, but with costs, quantified at Rs. 55,000/-. The cross objections however succeed and the decree of the learned Single Judge shall be impugned judgment, the plaintiff/Reckitt is also entitled to a decree for Rs. 20 lakhs—Cross objections are allowed to that extent—Plaintiff shall in addition to the costs of the appeal, be also entitled to costs of the cross objection the counsel's fee, assessed at Rs. 25,000/-.

Slander of goods is a species or branch of the law of defamation. It is widely accepted that to be defamatory, an imputation must tend to lower the claimant in the estimation of right thinking members of society generally, (i.e., the reference to the 'common' or *'reasonable'* man). The standard that the statement must amount to 'disparagement of ... the rep tation in the eyes of right thinking men generally' w spelt out

in **Leetham v. Rank** (1912) 57 SJ 111, and also applied and followed in **Byrne v. Deane,** [1937] 1 KB 818 and in **Campbell v. Toronto Star,** (1990) 73 DLR 190. Whilst the Canadian and Australian approach appears to be largely in tune with the English law [ref **Campbell** (supra), a Canadian decision; and **Reader's Digest Services Pty Ltd v. Lamb** (1982) 150 CLR 500, an Australian decision], the approach of the US Supreme Court appears to be a bit different. In a case where the plaintiff, a teetotaller, sued the publisher of a news item that he used to drink whiskey, in the course of

its judgment, the US Supreme Court held that there could be no general consensus or opinion that to drink whiskey was wrong and yet at the same time observed [ref. **Peck v. Tribune Co** 214, US 185 (1909)] as follows:

> "if the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote... No falsehood is through about or even known by all the world. No conduct is hated by all. That it will be known by a larger number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm... It seems to be impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in her community." **(Para 37)**

This Court is of the opinion that the approach and understanding of the learned Single Judge while discussing the law generally applicable as to disparagement and permissible limits of puffing is correct and does not call for any interference. At the same time, his allusion or reference to "average man with imperfect recollection using Dettol soap" requires some elaboration. Whilst there can be no quarrel with the fact that a reasonable man and an average man refer to the same metaphor and imperfect recollection refer to an natural attribute of a reasonable or average man, what needs closer scrutiny is whether the standard applicable in judging disparagement claims is if a particular class of user (in this case the Dettol user) feels that the statement is disparaging. The learned Single Judge's discussions and conclusions on this are based upon his analysis of what perceptions are discernible from the impugned advertisement. This is elaborately discussed in paragraph 24 of the impugned judgment where two kinds of users, i.e., the Dettol users and those who do not use that soap are noticed. The learned Single Judge held that the

latter, i.e., non-users may be unaware of the unique curvature shape, packaging etc. of the Dettol soap sufficiently to link it with Reckitt's product as to possibly associate the advertised product with Dettol, since the bar of soap in the impugned advertisement is some unbranded soap. However, as far as the former category is concerned, the learned Single Judge held the Dettol users would "immediately recognize the bar of soap shown in the advertisement as referring to the plaintiff original Dettol soap". This was on account of familiarity by reason of use of such soap and knowledge of its shape, colour, size, contours and packaging. **(Para 41)**

There appears to be an overwhelming consensus of judicial opinion that to determine whether a statement disparages or defames the viewpoint to be considered is that of the general public (the refinements of whether such "right thinking" or "reasonable" persons belong to a "respectable" section of the public, apart). Thus, whenever an argument that a sectarian approach (i.e. applying the standpoint of members of a section of the public) is to be adopted, Courts have tended to reject it time and again. In **Tolly v. Fry,** 1931 AC 333, the House of Lords had to decide if the depiction of the plaintiff, an amateur golfer – without his consent – in an advertisement defamed or caused injury to his amateur status (which was during the times regarded as valuable for a golfer). The advertisement contained a limerick and also the plaintiff's picture. It was argued unsuccessfully by the plaintiff that the governing test was whether the knowing public (i.e. those aware about the nature of the game, and the valuable status of an amateur, at that time) would regard the depiction and the statement as defamatory. The House of Lords, which had to decide whether the judgment which left the matter to the judge, instead of the jury, was a correct one, held that the guiding principle was one of perception of the general public and not the golf knowing citizens. This was emphasized in the judgement:

> "The question here does not depend upon a state of

facts known only to some special class of the community, but to the inference which would be drawn by the ordinary man or woman from the facts of the publication."

Similarly, in **Gillick v. Brook Advisory Centres** [2001] EWCA Civ 1263, the following approach was adopted:

> *"the court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naive or unduly suspicious. They should be treated as being capable of reading between the lines and engaging in some loose thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task."*
>
> **(Para 44)**

The first question here is as to the manner in which such advertisements are to be viewed, and secondly, the legal standard against which the advertisement is to be judged. On this question, the advertisement must be seen as a viewer would normally view it in the course of the television programme, and not specifically with a view to catch an 'infringement'. This distinction is thin, but important: in trying to determine whether commercial disparagement has occurred, the relevant consideration is how the viewer (i.e. the individual to whom the alleged disparagement is addressed) would see the advertisement. This consideration is important also because of the manner in which the advertisement is appreciated – whether as a running reel or

frame by frame. The answer to this necessarily is the former, for two clear reasons. First, when deciding such matters, the judge is to consider (as will be discussed below) how an average, reasonable man would view the advertisement as it appears on the television or electronic medium, as in the present case. In order to do this, the endeavour of the court is to substitute its judgment for that of the average/reasonable man. Undoubtedly, when the advertisement is displayed on the television, it is not scrutinized in every detail by the viewers, but rather, taken as a whole as it is displayed. This simple proposition is of great relevance, since a judge, sits in an adversarial setting with the clear purpose of determining whether commercial disparagement has occurred, and thus, on the look-out for any indication of the same, must equally remain cautious that the advertisement is viewed as viewers normally view it.

(Para 49)

In the present case, the plaintiff (Reckitt) has been able to prove, successfully, that HUL telecast the impugned 30 second advertisement on a large number of occasions (2763 times, to be precise, according to Ex. PW-1/19). The innuendo was cleverly designed to suggest that Reckitt's DETTOL Original caused damage to the skin. The advertiser, i.e. HUL, was conscious that it was crossing the boundary between permissible "puffing" and what was prohibited in law. The evidence on record, in the form of HUL's witnesses, testimony, is that Rs.2.5 crores was spent in July 2007 alone for advertising its product. HUL also admitted during the trial that the DETTOL Original brand was worth Rs.200 crores. Such being the case, this Court holds that the Single Judge's reluctance to award general damages was not justified. It would be necessary to mention in this context that it may not be possible for an otherwise successful plaintiff, in a disparagement or slander of goods action to always quantify the extent of loss; there would necessarily be an element of dynamism in this, because of the nature of the product, the season it is sold in, the possible future or long term impact that may arise on account of the advertisement,

etc. Therefore, courts the world over have resorted to some rough and ready calculations. **(Para 63)**

In view of the evidence presented before this Court (i.e. the number of times the advertisement was telecast, the quantum of advertisement expenses of HUL, the amount spent by Reckitt, to advertise its product, etc) this Court is of opinion that the plaintiff is entitled to recover general damages to the tune of Rs. 20 lakhs. The impugned judgment and order is modified to that extent, and the cross objection by Reckitt, is consequently allowed in these terms.

(Para 64)

As far as punitive damages are concerned, the learned Single Judge relied in Lokesh Srivastava and certain other rulings. Here, since the Court is dealing with a final decree – and a contested one at that (unlike in the case of trademark and intellectual property cases, where the courts, especially a large number of Single Judge decisions proceeded to grant such punitive damages in the absence of any award of general or quantified damages for infringement or passing off), it would be necessary to examine and re-state the governing principles. **(Para 65)**

Rookes v. Barnard, [1964] 1 All ER 367, is the seminal authority of the House of Lords, on the issue of when punitive or exemplary (or sometimes alluded to as "aggravated") damages can be granted. The House defined three categories of case in which such damages might be awarded. These are:

> a. Oppressive, arbitrary or unconstitutional action any the servants of the government;
>
> b. Wrongful conduct by the defendant which has been calculated by him for himself which may well exceed the compensation payable to the claimant; and c. Any case where exemplary damages are authorised by the statute.

The later decision in **Cassell & Co. Ltd. v. Broome,** 1972 AC 1027, upheld the categories for which exemplary damages could be awarded, but made important clarificatory observations. Those relevant for the present purpose are reproduced below:

> *"A judge should first rule whether evidence exists which entitles a jury to find facts bringing a case within the relevant categories, and, if it does not, the question of exemplary damages should be withdrawn from the jury's consideration. Even if it is not withdrawn from the jury, the judge's task is not complete. He should remind the jury: (i) that the burden of proof rests on the plaintiff to establish the facts necessary to bring the case within the categories. (ii) That the mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character. They can and should award nothing unless (iii) they are satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium in the sense I have explained and (iv) that, in assessing the total sum which the defendant should pay, the total figure awarded should be in substitution for and not in addition to the smaller figure which would have been treated as adequate solatium, that is to say, should be a round sum larger than the latter and satisfying the jury's idea of what the defendant ought to pay. (v) I would also deprecate, as did Lord Atkin in Ley v. Hamilton, 153 L.T. 384 the use of the word "fine" in connection with the punitive or exemplary element in damages, where it is appropriate. Damages remain a civil, not a criminal, remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that in making such an award they are putting money into a plaintiff's pocket, and not contributing to the rates, or to the revenues of central government." (emphasis supplied).*

The House of Lords, in its discussion, remarked crucially that there is a considerable subjective element in the award of damages in cases involving defamation and similar actions. Courts, it remarked, used terminology to reflect overlapping, and sometimes undesirable ideas underlining the considerations weighing grant of damages:

> "In my view it is desirable to drop the use of the phrase "vindictive" damages altogether, despite its use by the county court judge in Williams v. Settle [1960] 1 W.L.R. 1072. Even when a purely punitive element is involved, vindictiveness is not a good motive for awarding punishment. In awarding "aggravated" damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.
>
> Likewise the use of "retributory" is objectionable because it is ambiguous. It can be used to cover both aggravated damages to compensate the plaintiff and punitive or exemplary damages purely to punish the defendant or hold him up as an example.
>
> As between "punitive" or "exemplary," one should, I would suppose, choose one to the exclusion of the other, since it is never wise to use two quite interchangeable terms to denote the same thing. Speaking for myself, I prefer "exemplary," not because "punitive" is necessarily inaccurate, but "exemplary" better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that "tort does not pay" by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect.
>
> The expression "at large" should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent. It would be convenient if, as the appellants, counsel did at the hearing. it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in **Rookes v. Barnard** [1964] A.C. 1129, 1221, when he defines the phrase as meaning all cases where "the award is not limited to the pecuniary loss that can be specifically proved." But I suspect that he was there guilty of a neologism. If I am wrong, it is a convenient use and should be repeated.
>
> Finally, it is worth pointing out, though I doubt if a change of terminology is desirable or necessary, that there is danger in hypostatising "compensatory," "punitive," "exemplary" or "aggravated" damages at all. The epithets are all elements or considerations which may, but with the exception of the first need not, be taken into account in assessing a single sum. They are not separate heads to be added mathematically to one another." **(Para 66)**

In India, the Supreme Court has affirmed the principles in **Rookes** (supra) and **Cassel** (supra). Interestingly, however, the application in those cases has been in the context of abuse of authority leading to infringement of Constitutional rights or by public authorities (ref. **Ghaziabad Development Authority v. Balbir Singh,** (2004) 5 SCC 6; **Lucknow Development Authority v. M.K. Gupta,** 1994 SCC (1) 243). As yet, however, the Supreme Court has not indicated the standards which are to be applied while awarding punitive or exemplary damages in libel, tortuous claims with economic overtones such as slander of goods, or in respect

of intellectual property matters. The peculiarities of such cases would be the courts. need to evolve proper standards to ensure proportionality in the award of such exemplary or punitive damages. The caution in Cassel that "[d]amages remain a civil, not a criminal, remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that in making such an award they are putting money into a plaintiff's pocket...." can never be lost sight of. Furthermore – and perhaps most crucially –the punitive element of the damages should follow the damages assessed otherwise (or general) damages; exemplary damages can be awarded only if the Court is "satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium". In other words, punitive damages should invariably follow the award of general damages (by that the Court meant that it could be an element in the determination of damages, or a separate head altogether, but never completely without determination of general damages). **(Para 67)**

This court is of the opinion that the impugned judgment fell into error in relying on the decision in **Times Incorporated v. Lokesh Srivastava** 116 (2005) DLT 569. A Single Judge articulated, in his ex parte judgment in a trademark infringement action, as follows:

> "This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trade-marks, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. In **Mathias v. Accor Economy Lodging, Inc.** reported in 347 F.3d 672

> (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a to tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away This Court feels that this approach is necessitated further for the reason that it is very difficult for a plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions since they know that the same are objectionable and unlawful. In the present case, the claim of punitive damages is of Rs.5 lacs only which can be safely awarded. Had it been higher even, this court would not have hesitated in awarding the same. This Court is of the view that the punitive damages should be really punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement."

With due respect, this Court is unable to subscribe to that reasoning, which flies on the face of the circumstances spelt out in Rookes and later affirmed in Cassel. Both those judgments have received approval by the Supreme Court and are the law of the land. The reasoning of the House of Lords in those decisions is categorical about the circumstances under which punitive damages can be awarded. An added difficulty in holding that every violation of statute can result in punitive damages and proceeding to apply it in cases involving economic or commercial causes, such as intellectual property and not in other such matters, would be that even though statutes might provide penalties,

prison sentences and fines (like under the Trademarks Act, the Copyrights Act, Designs Act, etc) and such provisions invariably cap the amount of fine, sentence or statutory compensation, civil courts can nevertheless proceed unhindered, on the assumption that such causes involve criminal propensity, and award "punitive" damages despite the plaintiff's inability to prove any general damage. Further, the reasoning that "one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes" is plainly wrong, because where the law provides that a crime is committed, it indicates the punishment. No statute authorizes the punishment of anyone for a libel- or infringement of trademark with a huge monetary fine- which goes not to the public exchequer, but to private coffers. Moreover, penalties and offences wherever prescribed require the prosecution to prove them without reasonable doubt. Therefore, to say that civil alternative to an overloaded criminal justice system is in public interest would be in fact to sanction violation of the law. This can also lead to undesirable results such as casual and unprincipled and eventually disproportionate awards. Consequently, this court declares that the reasoning and formulation of law enabling courts to determine punitive damages, based on the ruling in Lokesh Srivastava and Microsoft Corporation v. Yogesh Papat and Another, 2005 (30) PTC 245 (Del) is without authority. Those decisions are accordingly overruled. To award punitive damages, the courts should follow the categorization indicated in **Rookes** (supra) and further grant such damages only after being satisfied that the damages awarded for the wrongdoing is inadequate in the circumstances, having regard to the three categories in Rookes and also following the five principles in Cassel. The danger of not following this step by step reasoning would be ad hoc judge centric award of damages, without discussion of the extent of harm or injury suffered by the plaintiff, on a mere whim that the defendant's action is so wrong that it has a "criminal" propensity or the case merely

falls in one of the three categories mentioned in Rookes (to quote Cassel again – such event "does not of itself entitle the jury to award damages purely exemplary in character"). **(Para 68)**

Reverting to the facts of this case, the defendant clearly was aware about its wrong doing and the harm which would ensue to HUL because of the published disparagement. Yet it went ahead and aired it in almost all the national and a large number of regional channels with repetitiveness. The deliberation points at an aim to denigrate the plaintiff's product and harm its reputation. At no stage did it – even in these proceedings – offer to make amends. In the circumstances, the award of punitive damages was warranted. The award of general damages through this judgment (although of a figure of Rs.20 lakhs) is moderate, since the advertisement was aired over 2700 times and seen – and intended to be seen – by millions of viewers. As observed in **John** (supra)

> "The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people.."

Having regard to all these circumstances, the court is of opinion that the award of Rs.5 lakhs as exemplary damages in the facts of this case was justified and not disproportionate; it is accordingly upheld. **(Para 69)**

In view of the above discussion, it is held that this appeal has no merit. It is accordingly dismissed, but with costs, quantified at Rs. 55,000/-. The cross objections however succeed and the decree of the learned Single Judge shall be modified. In addition to injunction and punitive damages assessed by the impugned judgment, the plaintiff/Reckitt is also entitled to a decree for Rs.20 lakhs. The cross objections are allowed to that extent. The plaintiff shall in addition to the costs of the appeal, be also entitled to costs of the cross objection and counsel's fee, assessed at Rs.25,000/-. **(Para 70)**

Important Issue Involved: While puffing i.e. exaggerated/ commendatory advertising without false representations was permitted, the generic disparagement of a class of rival products was objectionable as long as the rival good falls within the class. Slander of goods is to be tested by referring to whether the imputation lowers the claimant in the eyes of the "right thinking members of society generally" and not a section of the public that is the "knowing public"—Advertisement must be viewed in the manner in which advertisements are normally viewed by viewers, and not with a view to detect infringement—Thus the Court found that Dettol was disparaged in the advertisement, because the combined effect of the message with the visuals and was to convey to an ordinary viewer that the soap being disparaged was the Reckitt product, albeit in the nature of a double entendre such that the hidden meaning was intended to impact the viewer more than the obvious facial one.

Defamation entitles a successful plaintiff to recover compensation for damage to reputation without having to show actual monetary damage; damage is presumed once defamation is proved and thus general damages were awarded—Mere fulfilment of the common law criteria for punitive damages, without a satisfaction that a punitive element is met in the compensation awarded in general damages is not enough to award punitive damages—It was stressed that damages are a civil remedy, and that the award of even pecuniary damages (while intended punitively) results in putting money into a plaintiffs pocket, i.e. private hands, and thus must always follow the award of general damages—In doing so, the Court overruled Lokesh Srivastava v. Yogesh Papat, 2005 (30) PTC 245 (Del).

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Sh. Sandeep Sethi, Sr. Advocate with Sh. Aditya Narayan, Sh. Sameer Parekh, Sh. Kumar Shashank and Sh. Nitin Thukral, Advocates.

FOR THE RESPONDENTS : Sh. C.M. Lall with Ms. Ekta Sarin, Advocates.

CASES REFERRED TO:

1. *Interflora Inc* vs. *Marks & Spencer Plc,* 2013 (2) All ER 663.
2. *Robert Crow* vs. *Boris Johnson,* [2012] EWHC 1982 (QB).
3. *Glaxo Smithkline Consumer Healthcare Limited & ors* vs. *Heinz India Private Limited & Anr.,* I.A. No.15233/2008 in CS (OS) No.2577/2008, decided on 12.11.2010.
4. *Petra Ecclestone* vs. *Telegraph Media Group Ltd,* 2009 EWHC 2779 (QB).
5. *Applause Store Productions Limited and Firscht* vs. *Raphael* [2008] EWHC 1781.
6. *Iin Jameel* vs. *Wall Streeet Journal* 2007 (1) AC 379.
7. *Colgate Palmolive* vs. *Mr. Patel* 2005 (31) PTC 583 (Del).
8. *Ghaziabad Development Authority* vs. *Balbir Singh,* (2004) 5 SCC 6.
9. *Dabur India Ltd.* vs. *Colgate Palmolive India Ltd,* 2004 (29) PTC 401 (Del).
10. *Pepsi Co Inc. & Ors.* vs. *Hindustan Coca Cola Ltd & Anr.,* 2003 (27) PTC 305 (Del) (DB).
11. *Reckitt Benckiser India Limited* vs. *Naga Ltd.,* 104 (2003) DLT 490.
12. *DSG Retail Ltd.* vs. *Comet Group,* PLC (2002) EWHC 116 (QBD).
13. *Arab News Network* vs. *Al Khazen* [2001] EWCA Civ 118 at [30]).
14. *Gillick* vs. *Brook Advisory Centres* [2001] EWCA Civ 1263.

15. *Jupiter Unit Trust Managers Trust Ltd.* vs. *Johnson Fry Asset Managers,* (2000) Unreported 19 April, QBD.
16. *Reckitt & Colman of India Ltd.* vs. *M.P. Ramchandran & Anr.,* 1999 PTC (19) 741.
17. *Reckitt & Coleman of India Ltd.* vs. *Jyothi Laboratories Ltd.,* Cal LT 1999 (2) HC 230.
18. *Colgate Palmolive* vs. *Hindustan Lever,* 1999 (7) SCC 1.
19. *Hindustan Lever Ltd.* vs. *Colgate Palmolive (I) Ltd. and Anr.,* 1998 (1) SCC 720.
20. *John* vs. *MGN Ltd* [1997] QB 586.
21. *Vodaphone Group Plc.* vs. *Orange Personal Communications Services Ltd.,* [1997] F.S.R. 34.
22. *Kiam* vs. *Neil,* 1996 EMLR 493.
23. *Lucknow Development Authority* vs. *M.K. Gupta,* 1994 SCC (1) 243).
24. *Skuse* vs. *Grenada,* [1993] EWCA Civ 34.
25. *Keays* vs. *Murdock Magazines,* 1991 (1) WLR 1184.
26. *Campbell* vs. *Toronto Star,* (1990) 73 DLR 190.
27. *Lakhanpal* vs. *MRTP Commission,* AIR 1989 SC 1692.
28. *Reader's Digest Services Pty Ltd* vs. *Lamb* (1982) 150 CLR 500.
29. *Cassell & Co. Ltd.* vs. *Broome,* 1972 AC 1027.
30. *Slim* vs. *Daily Telegraph,* [1968] 2 QB 157.
31. *Rookes* vs. *Barnard,* [1964] 1 All ER 367.
32. *Lewis* vs. *Daily Telegraph* [1963] 2 All E.R. 151.
33. *Cellacite & British Uralite* vs. *Robertson* [The Times, July 23rd, 1957 (CA)].
34. *Story Parchment Co.* vs. *Paterson Parchment Paper Co.,* 282 U.S. 555 (1931).
35. *Tolly* vs. *Fry,* 1931 AC 333.
36. *Imperial Tobacco Company* vs. *Albert Bonnan, A*IR 1928 Cal 1.

37. *Leetham* vs. *Rank* (1912) 57 SJ 111.
38. *Peck* vs. *Tribune Co* 214, US 185 (1909)].
39. *Bubbuck* vs. *Wilkinson*, 1899 (1) OB 86.
40. *Allen* vs. *Flood,* 1898 AC 1.
41. *White* vs. *Mellin,* 1895 AC 154.
42. *South Hetton Coal Company Limited* vs. *North-Eastern News Association Limited,* [1894] 1 QB 133.

RESULT: Appeal dismissed.

S. RAVINDRA BHAT, J.

1. This is a defendant's appeal directed against a decree for permanent injunction issued by the learned Single Judge in a claim alleging that the defendant/appellant's advertisement had disparaged the plaintiff's goods. The impugned judgment also directed payment of punitive damages to the extent of Rs. 5 lakhs to the plaintiff. The parties will be referred to by their original description in the suit for the sake of convenience.

2. The plaintiff (hereafter "Reckitt") sought to restrain the defendant Hindustan Lever Ltd. (hereafter "HUL") by permanent injunction from telecasting the impugned advertisement or otherwise disparaging Reckitt's goodwill and reputation and its product sold under the trade mark DETTOL, in any other advertisements and in all media, from using the depiction of Reckitt's soap or any other soap deceptively similar to that of Reckitt's in its advertisement or in any other manner disparaging the goodwill and reputation of Reckitt and its product sold under the trade mark DETTOL, and finally, from using any other indicia whatsoever to associate with/depict Reckitt or its products in its advertisements issued in any and all media whatsoever including the electronic media. Reckitt also sought damages to the tune of Rs.20,00,050/- towards disparagement, denigration and tarnishment of its goodwill and reputation by the impugned advertisement. A claim for exemplary damages too was made in the suit.

3. Reckitt is involved in the manufacture of the famous antiseptic disinfectant under the trade mark DETTOL for over 70 years. It was averred that the mark DETTOL is synonymous with good hygiene and, today, it is a household name and is the most widely used antiseptic disinfectant in the country. The plaint also mentioned the history of

DETTOL dating back to 1929 when the DETTOL antiseptic liquid was developed. As an antiseptic germ disinfectant, it was argued, DETTOL had an unparalleled reputation in the medical profession and that it continuously evolved to meet modern day demands, and now incorporates a range of innovative antiseptic, disinfectant and cleaning products ranging from antiseptic liquid, hand wash and the DETTOL toilet soap which has been manufactured and sold by Reckitt continuously since 1981. Reckitt relied on the new modern, distinctive and unique shape of the DETTOL toilet soap, which was subjected to intentional and deliberate disparagement by the defendant is identified by the members of the trade and public by its colour. Reckitt stated that on the front of the soap the trade mark "DETTOL" and the sword device is clearly visible. Reckitt contended that consumer-recognition of its products is by the colour and distinctive shape of the soap, and also through its distinctive green coloured packaging. In 1981, the DETTOL soap was launched as a rectangular shaped, orange coloured bar without any curves. Reckitt adopted the present shape with the curves instead of edges in May, 2006. It was argued that this new improved soap with curvature in the middle and curved edges helps consumers to easily identify and distinguish the product from others. Unlike other orange coloured soaps in the market, Reckitt's product is the only one with such distinctive shape. Three variants of the new soap are available in the market, i.e. DETTOL Original; DETTOL Skincare (a white soap) and DETTOL Cool (a blue soap). Of the three variants, the DETTOL Original bar is an orange coloured and is the most popular. According to the plaint, the sale of DETTOL Original constitutes 80% of the total DETTOL soap sales.

4. Reckitt argued that the soap packaging has always been of a distinctive green and white colour combination and such packaging is synonymous with Reckitt's famous DETTOL brand. In this line of argument, Reckitt argues that the purchasing public perceives the orange coloured bar with its distinctive shape and the distinctive green and white packaging to be synonymous with the DETTOL Original soap. Reckitt claims that it continuously and uninterruptedly marketed its DETTOL products with such distinctive green and white colour combination packaging, including the sword device in India since the year 1933. It claims to have announced in a press release that it was contemplating introducing new variants of its flagship brand DETTOL and it launched a new ad campaign – "Surakshit Parivar" – to create awareness of the

practice of hygiene at the family level. Reckitt allocated a budget of about Rs.5 crores for the programme.

5. Reckitt became aware that the HUL introduced an advertisement on television, which intentionally and deliberately disparages Reckitt's soap under the trade mark DETTOL and the unique and distinctive packaging. The offending advertisement concerns the defendant's LIFEBUOY soap. Reckitt alleges that a bare viewing of the said advertisement would convince this Court of the defendant's malicious intent to increase the market share of its LIFEBUOY soap by tarnishing the goodwill and reputation of Reckitt's soap i.e. DETTOL Original Soap. The disparaged soap, alleged Reckitt, is its product. The contours and the curvature in the middle on the toilet soap in the defendant's advertisement are identical to the contours of Reckitt's DETTOL Original soap. The only difference is that Reckitt's product and the logo are not shown in the advertisement. The colour of the soap in the defendant's advertisement is virtually identical to that of the DETTOL Original soap of Reckitt. The packaging of the toilet soap used in the defendant's advertisement is likewise similar to that of Reckitt's soap's packaging. The defendant's advertisement is designed to give an impression to the buyers that the offending soap is Reckitt's DETTOL Original soap. The learned Single Judge describes the disparagement alleged, in the following manner:

> *(i) The advertisement begins with a couple returning home after getting wet in the rain. The wife then proceeds to take a new soap to go and have a bath. The green coloured packaging, the orange coloured soap and the distinctive DETTOL shape is clearly visible in the advertisement. The intention of this scene is to convey to the audience that the offending soap pertains to an established soap i.e., DETTOL Original soap presently being used by the family.*
>
> *(ii) The next frame shows the husband, a medical doctor, and the children telling the lady of the house not to use the soap and the vocals state: "Oh God bachaa lena naadaan ko aql dena....Hum sab ko bachaa lena".*
>
> *It is alleged that the use of a doctor protagonist is once again relevant as DETTOL is an established brand in the medical*

profession.

(iii) The next frame shows the doctor husband explaining to the wife the reason as to why she should not use the offending soap and, instead, should use the Defendant's LIFEBUOY soap by stating that normal antiseptic soaps make the skin dry leading to cracks in the skin thereby permitting the germs to enter the cracks in the skin while the defendant's soap fights germs and keeps the skin protected. According to the plaintiff this scene is clearly intended to give out the message that the Plaintiff's soap is not effective against fighting germs whereas the Defendant's soap is effective against fighting germs. The words used in the advertisement are:- "Dua ki zarurat padegi is dawa ke saath. Aam antiseptic sabun twacha ko rukha kar dete hai jis se dararon mein kitanu ghus jaate hain...isi liye naya Lifebuoy skin guard jo kare kitanuon per waar aur banaye suraksha ki bhi deevar."

According to the plaintiff it is relevant to mention that as DETTOL is used in respect of an extremely well known brand of antiseptic liquid, the use of the term "dawa" (medicine) is clearly intended to draw the attention of the viewer to the Plaintiff's product.

(iv) In the next frame the lady is then shown to go and have a bath with the Defendant's soap and come out very satisfied with the same. According to the plaintiff, this falsely indicates that the defendant's soap is effective against fighting germs while the plaintiff's DETTOL soap is not."

6. Reckitt alleged that the defendant's advertisement is a slanderous attempt to increase the market share of its LIFEBUOY soap by defaming and disparaging the worth and reputation of Reckitt's product. It was also alleged that the said advertisement outreaches the limits of allowed competitive advertising and blatantly denigrates the reputation and goodwill of Reckitt's well established and leading brand. It not only showed that HUL's product was good (i.e. puffery) but also very clearly depicts that Reckitt's product is completely worthless. Further, the use of the soap bar including its unique curved shape and the distinctive packaging which is virtually identical to that of Reckitt's by HUL resulted in dilution and debasement of the hard earned reputation and goodwill of Reckitt's world-known and widely used products. HUL's conduct in filing a caveat dated

16.7.2007 was alleged to indicate its mala fide intentions as against Reckitt's product as HUL was aware that the soap depicted in its advertisement was Reckitt's soap and also knew that Reckitt would initiate action against it.

7. The defendant, in its written statement, denied that Reckitt had any cause of action or that the action could be adjudicated in the civil courts, since the allegations pertained to unfair competition and were properly the subject matter of proceedings under the Monopolies and Restrictive Trade Practices Act, 1969 (hereafter referred to as the 'MRTP Act') and the Consumer Protection Act, 1986. The advertisement, in question, stated the defendant referred to ordinary antiseptic soaps; Reckitt's soap is neither an antiseptic soap, nor an ordinary (unbranded) soap. It relied on the judgment in **Reckitt Benckiser (India) Limited v. Naga Limited & Others:** 2003 (26) PTC 535 (Del.), where it was allegedly held that Reckitt's soap is not an antiseptic soap. The defendant alleged that Reckitt does not have a monopoly over the colour or over the shape of the soap and cannot claim exclusivity over the colour, shape or packaging of the soap. The defendant further stated that the shape, contours and curvatures of Reckitt's orange coloured soap DETTOL was not registered under the Design's Act to give it an exclusive right to use it.

8. The defendant stated that it marketed several toilet soaps including one under the brand name "LIFEBUOY" through an extensive marketing network across the country and that it enjoys considerable goodwill and reputation among the Indian consumers. It is stated that LIFEBUOY is a global brand which was launched in the United Kingdom in 1894 as a product for personal hygiene and that it is India's oldest toilet soap brand and has been synonymous with health and hygiene in India since 1895. The defendant alleged that the said product sold under the brand name LIFEBUOY for over 110 years has acquired substantial goodwill in the market and has become a household name. The defendant denied that its advertisement disparaged Reckitt's product and said that it aims at educating the consumers and public at large to understand the difference between toilet soaps containing glycerine, which have a moisturizing effect on the skin and give a long term benefit on the one hand and ordinary antiseptic soaps in the market on the other which may not contain glycerin and do not give to the consumers the benefit of moisturizing the skin and removing the possibility of formation of cracks

which is a breeding ground for germs. It is further stated that the defendant's claims about its soap being better than any other ordinary antiseptic soap is based on the laboratory test conducted by it.

9. The defendant urged that its TV advertisement had to be seen in totality and not in an isolated and unnatural manner, frame by frame. The defendant contended that the intent, manner, story line and message of its advertisement are that its soap is better than ordinary antiseptic soaps because it is rich in glycerin and vitamin E. Further, the defendant stated that Reckitt's soap, a Rs.200 crore brand, cannot be termed as an ordinary soap and in any event, is not an antiseptic soap. In the entire advertisement, there is no reference whatsoever to the trademark DETTOL or the sword device and, therefore, there is no reference to Reckitt's product, argues the defendant.

10. Denying that the impugned advertisement described Reckitt's soap, the defendant outlined points of distinction. Again, the narration of the Single Judge in this regard is set out below:

> *"(a) The colour of the soap shown in defendant's advertisement is yellow in comparison to the plaintiff's orange soap; (b) The soap shown in defendant's advertisement is taken out of a pale green single-colour packaging, whereas the plaintiff's DETTOL TOTAL is sold in green and white and its other variants are sold in blue and white packaging; (c) There are many other soaps in the market with curvatures and contours similar to the plaintiff's soap. (d) The brand name DETTOL and/or the Sword device are embossed on all the plaintiff's products but the same are admittedly missing from the soap shown in the defendant's advertisement."*

11. Without prejudice to its pleas that the impugned advertisement did not describe or refer to Reckitt's product, the defendant stated, arguendo, if the soap shown in the defendant's advertisement was that of Reckitt, nevertheless a tradesman is entitled to declare his goods to be the best in the world, irrespective of the truth of that statement. It can be said that a tradesman's goods are better than his competitors; though such statement may be untrue. To say that one's goods are the best in the world or are better than that of the competitors one can even spell out the advantages of his goods over that of others. Reckitt itself has been showing that its soap is better than that of the defendant's in its various advertisements, both in India and abroad.

12. The following issues were framed in the suit, for adjudication:

> *"1. Whether the depiction in the advertisement of the defendant of soap refers to the Dettol soap of the plaintiff? (OPP)*
>
> *2. Whether the advertisement of the defendant disparages or denigrates the soap of the plaintiff? (OPP)*
>
> *3. Whether the impugned advertisement seeks only to promote the superiority of the defendant LIFEBUOY soap over an ordinary antiseptic soap? (OPD)*
>
> *4. Whether the plaintiff is guilty of suppression of material facts? If so, its effect? (OPD)*
>
> *5. Whether the impugned advertisement constitutes an attack on the goodwill and reputation of the Dettol brand of the plaintiff? (OPP)*
>
> *6. Whether the present suit is barred on account of the provisions of the MRTP Act, 1969 and/or the Consumer Protection Act, 1986? (OPD)*
>
> *7. Whether the plaintiff is entitled to any damages for disparagement, denigration, loss of goodwill and reputation? If so, the extent thereof? (OPP)*
>
> *8. Whether the plaintiff is entitled to punitive and exemplary damages? If so, the extent thereof ? (OPP)*
>
> *9. Relief."*

13. Reckitt relied on documents, Ext. PW1/1 to PW1/19 and PW1/DX1. HUL relied on Ext. DW1/1 to DW1/18 and DW2/1 to DW2/9. The video clip of the advertisement was filed in a compact disc (Ext. PW1/2). Reckitt produced one witness (PW-1) – Mr. Mohit Marwah, its Brand Manager. The defendant relied on testimonies of three witnesses - (1) Mr. Anuj Kumar Rustagi, Global Marketing Manager, Lifebuoy Soaps (DW1); (2) Dr. Rajan Raghavachari, Regional Senior Product Development Manager of the defendant (DW2) and (3) Dr Hemangi Jerajani, Dermatologist (DW3). Affidavits of the witnesses in the first instance formed their examination in chief and they were subjected to cross-examination by the opposing counsel.

14. The Court had the benefit of considering the suit records, including the video clip of the offending advertisement (Ext. PW1/2). The observations of the Single Judge describing the story board are extracted below:

> *"1. A man and his wife returning home on a rainy day. The wife exclaims "Kya baarish hai" (what rain). The man places his white coat and stethoscope which indicates that he is a doctor. He goes and sits with his children (boy and girl) on the sofa. The children are watching a cricket match on television.*
>
> *2. The next frames show that his wife plans to take a bath saying "chalo main naha leti hoon" (come, let me take a bath). She is then shown taking out an orange bar of soap from a green wrapper.*
>
> *3. On seeing the orange soap in his wife's hand, the husband has a shocked look on his face and says "Oh God, bachaa lena" (Oh God, Save her).*
>
> *4. The next frames show the husband and children pointing at the wife and singing a song in chorus "Naadaan ko aql dena, ham sab ko bachaa lena....." (show reason to the naive, save us all .....).*
>
> *5. The wife has a surprised look on her face and asks "Kya kar rahe ho" (what are you doing?).*
>
> *6. The next frames show the husband displaying the orange soap in his raised right hand and looking at his wife and saying "Dua ki zarurat padegi iss dawaa ke saath" (prayers would be required with this medicine).*
>
> *7. This is followed by a cut to a bathing shot where a woman is shown using the said orange bar of soap. In this cut, there is a male voice-over stating:*
>
> *"Aam antiseptic sabun twacha ko rukha kar dete hain.."*
>
> *(Ordinary antiseptic soaps make the skin dry..).*
>
> *8. Then there is a close-up of the upper-arm under a magnifying glass which reveals skin with cracks and green germs lodged in*

> *the cracks. At this juncture the male voice-over states: "..Jis se dararon me kitanu ghus jate hain" (.. as a result of which, germs get into the cracks). Simultaneously, the following words appear on the bottom left of the screen:- "Aam antiseptic sabun" (ordinary antiseptic soap)*
>
> *9. Then there is a cut to a water shot, where we see a bar of the red LIFEBUOY soap emerging out of the water. On the top left hand corner of the screen, the words "Glycerine" and "vitamin E" appear and the male voice-over states "Isi liye naya Lifebuoy Skin Guard" (that is why, new Lifebuoy Skin Guard).*
>
> *10. Then there is a cut again showing a part of the arm under a magnifying glass and the green germs are seen getting washed away. The male voice-over states that :*
>
> *".. jo kare kitanuon pe waar" (.. which attacks the germs).*
>
> *11. The next frames show a layer of glycerine flowing from left to right under the magnifying glass and the voice-over states: ".. aur banaye suraksha ki bhi deevar" (..and also builds a protective wall).*
>
> *12. The clip then proceeds to a new cut showing the wife, apparently after having had a bath, coming into the living room where the husband and children are watching the cricket match on television. On seeing her they, once again break into the same song "Bachaa lena" (Save us).*
>
> *13. The wife stops them and, referring to the cricket match being shown on TV, says "Aa hah, doctor saheb dua inke liye bachaa lena" (Aa hah, doctor saheb, save the prayers for them).*
>
> *14. The next frames show that the wife joins her husband and children at the sofa and says:*
>
> *"Hame koi dar nahin" (we have no fear).*
>
> *15. The next shot shows the LIFEBUOY Skinguard bar of soap and its package and the LIFEBUOY logo zooms onto the package. At this juncture the male voice-over announces: "Naya Lifebuoy Skin Guard" (new Lifebuoy Skin Guard).*

16. This is followed by a cut to the Hindustan Lever Limited logo and the advertisement ends there."

15. After making a detailed frame by frame description of the offending advertisement, the learned Single Judge held that:

"The new shape of the DETTOL Original toilet soap with the curved edges and the curvature in the middle is clearly displayed on the product packaging, which is further indicative of the importance given to the shape by the plaintiff in its marketing of the product. The packaging (Ext. PW1/8) also establishes the fact that although white is also used, green is the pre-dominant colour. Although, the brand name, logo or the sword device does not appear in the orange bar of soap shown in the advertisement (Ext. PW1/2), there can be no misgiving that the bar of soap which has been shown in the said advertisement is of a colour similar to that of the plaintiff's DETTOL soap. The contours, curvature as well as the overall shape of the orange bar of soap in the advertisement itself, are virtually the same as that of the contours, curvature and overall shape of the plaintiff's DETTOL Original soap. Moreover, the clear impression given in the advertisement is that the said orange bar of soap has been taken out from a green wrapper/ packaging. It must also be noted that the design of the plaintiff's soap has been registered by the plaintiff as indicated by Ext. PW1/DX-1. While it is true that there may be other orange coloured soaps and other soaps sold in the pre-dominantly green packaging and other soaps which have an oval shape, it is also true that it is only the plaintiff's soap which has a combination of all the three elements, i.e., orange colour, curved oval shape and pre-dominantly green packaging. Apart from this, it is only the plaintiff's soap which has contours in the manner indicated in the bar of soap in the said advertisement. No evidence has been produced by the defendant to show that there is any ordinary antiseptic soap with the same combination of the aforesaid elements of colour, shape, design and packaging. I have absolutely no doubt that the orange bar of soap shown in the advertisement refers to the plaintiff's DETTOL Original soap."

16. The learned Single Judge conceded that though Reckitt's soap was not an antiseptic soap, and therefore, facially the defendant was not referring to DETTOL, yet the long association of Reckitt with antiseptic products and medications in the general public's mind led to the belief that the offending soap was that of Reckitt, and an antiseptic one at that. The Single Judge then rejected the defendant's argument that there had to be proof of disparagement through oral testimony of witnesses:

"It has been contended on behalf of the defendant that the plaintiff has not produced any evidence of consumers to indicate that the orange bar of soap in the said advertisement appears to be the plaintiff's DETTOL Original soap. In response the learned counsel for the plaintiff submitted that producing such evidence would be counter-productive and is not necessary. He submitted that the plaintiff could produce witnesses stating that the orange bar of soap shown in the advertisement had reference to the plaintiff's DETTOL Original soap. Similarly, the defendant could also produce witnesses to state the contrary. Ultimately, it would be for the court to make a judgment from the perspective of an average person with imperfect recollection, a test which has been well established, particularly in passing off cases. Though slander of goods and disparaging advertisements stand on a slightly different footing to passing off cases, I find myself to be in agreement with the submissions made by the learned counsel for the plaintiff. Ultimately it is a question of perception and the perception has to be determined from the stand point of an average person man with imperfect recollection but, with a corollary, which shall stated be shortly. One could normally expect that there would be a difference in perception between two distinct classes of persons — (1) Persons who are using DETTOL Original soap and (2) persons who do not use that soap. A person belonging to the latter category may not be aware of the orange coloured bar of soap of the plaintiff with its distinctive shape, curvature and contours. He may also not be aware of the packaging employed by the plaintiff. Therefore, such a person may not link the bar of soap shown in the advertisement with the plaintiff's product when he sees the advertisement or when he comes upon the plaintiff's product in a shop. Such a person, in all likelihood, would perceive the

orange bar of soap shown in the advertisement as being some unbranded bar of soap. On the other hand, a person belonging to the former category, being a user of the plaintiff's DETTOL Original soap, would immediately recognise the bar of soap shown in the advertisement as referring to the plaintiff's DETTOL Original soap. This is because, such a person is familiar with the plaintiff's product. He is "intimately" aware of the look and feel of the soap because he uses it everyday."

After the above analysis, the impugned judgement proceeded to hold as follows:

"The difference in approach in a passing off action and one for disparagement must also be highlighted. In a case of passing off, the question invariably is whether the trade mark or trade dress employed by A for his product is so deceptively similar to the established mark or trade dress of B's product that A's product could be confused by or passed off to consumers as B's product? Here the comparison is of rival products having a similar trade mark, get-up or trade dress. Familiarity with the established mark, trade dress or get-up is presumed. Because, it is this familiarity that the person intending to pass off his goods as those of the famous or more popular, exploits. In the case of disparagement, the one who disparages another's product, does not seek to make his product similar to the disparaged product, but to distinguish it from the disparaged product. The object of disparagement is to make the disparaged product appear to be as near or similar to the competitor's product. The comparisons, therefore, in cases of passing off and in cases of disparagement are different. Consequently, the comparison must be from the perspective of an average person with imperfect recollection but, that person must be picked from the category of users of the product allegedly sought to be disparaged or slandered.

27. Considered from the standpoint of an average man with imperfect recollection who is also a user of the DETTOL Original soap, the inescapable conclusion would be that the soap shown in the advertisement refers to the plaintiff's DETTOL Original soap. Consequently Issue No 1 is decided in favour of the plaintiff and against the defendant."

On the second issue, i.e. whether the impugned advertisement promoted the defendant's product, the Court held that the advertisement could be divided into two parts: one of those disparaged Reckitt's product and the other sought to promote the defendant's product. It was held that though an attempt at promoting the defendant's product – which was permissible – was discernible, yet the net result of the advertisement was to disparage Reckitt's DETTOL Original. The Court held that the materials relied on by Reckitt were insufficient to entitle it to compensatory or general damages. However, Hindustan Lever's conduct was held to be such as to entitle Reckitt to punitive damages, which the learned Single Judge quantified at Rs. 5,00,000/-. Appellant's contentions

17. The appellant/HUL contends that Reckitt could not have maintained the suit since it was guilty of unfair conduct. It was submitted in this regard that though Reckitt concedes that its product is not an antiseptic soap but at the same time it unfairly maintains that the impugned advertisement disparages and denigrates its products. It is submitted in this regard that the advertisement merely cautions the viewers and the members of the public that antiseptic soap tends to injure the skin. It is not Reckitt's contention that its soap is an antiseptic soap. This important aspect escaped the notice of the learned Single Judge. The suit, therefore, was not maintainable at all. Learned counsel in this context relied upon the observations of the learned Single Judge in paragraph 23 of the impugned judgment to the effect that Reckitt's soap – Dettol Original – is not an antiseptic soap whereas the soap in the advertisement is referred to as an "ordinary antiseptic soap". However, it was argued that nevertheless the impugned judgment erroneously held that the public at large carried an impression that all Dettol products are antiseptic. Furthermore, submitted learned counsel, Reckitt even had claimed that its product was recommended by the Indian Medical Association (IMA) – advertised prominently on the cover too.

18. Elaborating on this aspect, learned counsel submitted that Reckitt did not in fact have a cause of action at all because the Dettol Original is a toilet soap, concededly bearing BIS specification IS:2888; 2004. However, the comparison made in the advertisement is against an ordinary antiseptic soap, an entirely different article or product falling within the BIS specification IS:11479; 1985. Learned counsel relied upon the ruling of this Court in **Reckitt Benckiser India Limited v. Naga Ltd.,** 104 (2003) DLT 490. It was argued next that the learned Single Judge did

not apply the proper test applicable in disparagement of goods/products disparagement cases. Learned counsel here submitted that the appropriate test applicable is whether a reasonable man with average intelligence can identify Reckitt's products in the advertisement. It was emphasized that the overall or the totality of impression test in the same medium (of c

mmunication) has to be a

plied in this context. Learned counsel faulted the learned Single Judge for applying the test of confusion, properly applicable in passing-off actions. Reliance was placed upon the meaning of the expression "disparagement" given in the New International Webster's Comprehensive Dictionary, i.e. "to speak of slightingly or undervalue or bring discredit or dishonor upon ..." It was submitted that in considering whether a statement is denigrating or otherwise, the Court should give the statement or material in question its natural and ordinary meaning. In this context, learned counsel relied upon the decision reported as **Gillic v. British Broadcasting Corporation** 1996 EMLR and the discussion in Clerk and Lindsells Treatise or Torts (20th Edition) Common Law Library, published by Sweet & Maxwell, it was emphasized that the question whether the statement is defamatory or disparaging depends on the probability of the case and the natural tendency of the publication, having regard to the surrounding circumstances and not the intention of the defendant. Reliance was placed upon the judgment reported as **Keays v. Murdock Magazines,** 1991 (1) WLR 1184. It was submitted further that the learned Single Judge fell into error in holding that the target group of persons to whom the impugned advertisement was made, was the one who used the product as they would know how it looks. It was stressed that this conclusion was illogical because then it would not be a case of imperfect recollection. Besides, argued counsel, this flies on the face of the well-accepted proposition that words are not defamatory if they may damage the man in the eyes of a section of community unless they amount to disparagement in the eyes of the right-thinking people of the entire general public. Counsel also took exception to what he termed as a minute and elaborate analysis of the impugned advertisement by the learned Single Judge. He argued that the Court should have considered the overall effect, rather than a bits and pieces approach in detailed scrutiny of the various elements of the advertisement. Counsel relied on **Skuse v. Grenada** [1993] EWCA Civ 34, in support of this argument. It was next argued that the learned Single Judge could not have found, upon the fair assessment of the

materials on record, that there was disparagement of Reckitt's Dettol Original soap.

19. Learned Senior counsel, Shri Sandeep Sethi, underlined that to arrive at such a conclusion it was essential for Reckitt to have led evidence by way of oral testimony of some consumers who saw the advertisement of Dettol ordinary and found that its effect was to run-down the reputation and goodwill or cause injury in their eyes. The absence of this material, submitted counsel, undermined the findings of the learned Single Judge. Reliance was placed upon the decision **Colgate Palmolive v. Hindustan Lever,** 1999 (7) SCC 1. Reliance was also placed upon **Reckitt and Coleman of India Ltd. v. Jyothi Laboratories,** 1999 (2) Cal. LT 230. Learned counsel argued that none of the witnesses produced by Reckitt could be characterized as genuine members of the public since they were all either its officials or associated with it.

20. HUL further argued, through senior counsel, Sh. Sandeep Sethi, that the impugned advertisement has not been considered in its totality by the learned Single Judge, but considered it frame-by-frame and in bits and pieces to hold that it disparaged Reckitt's Dettol Original soap. Learned counsel relied upon the decision of the Supreme Court in **Lakhanpal v. MRTP Commission,** AIR 1989 SC 1692. It was next urged that since the impugned findings do not apply the proper test of overall effect but was based upon an intense frame-by-frame analysis of the advertisement, highlighting the soap, the packaging, the colours and the shape, the conclusions were distorted. It was also emphasized that the learned Single Judge fell into error in holding that the impugned advertisement contains a combination of three elements, i.e. orange colour, curved shape and prominently green packaging. Learned counsel relied upon the decision reported as **Colgate Palmolive v. Mr. Patel** 2005 (31) PTC 583 (Del) to say that no one can claim monopoly over colours and consequently Reckitt could neither claim monopoly over the orange colour nor the overall green packaging which were common colours. However, the comparison made in the advertisement was with ordinary antiseptic soap. Learned counsel further stressed that intense frame-by-frame scrutiny has prejudiced the mind of the learned Single Judge since it completely overshadowed the overall effect. The time given for depicting the shape (with colour), packaging of HUL's soap and the so-called disparaging comments having regard to the overall length of the advertisement, was miniscule and disproportionately low – less than five

per-cent. This could not have resulted in disparagement at all – a very important aspect overlooked by the learned Single Judge. Learned counsel also submitted that in this intensive analysis, the impugned judgment overlooked a very significant aspect which was that Reckitt's packaging of its Dettol soap, claimed in the plaint was the white and green colour combination. The impugned judgment, on the other hand, erroneously held that the green packaging depicted in the advertisement was a pointed reference to that of Reckitt's product. In other words, submitted the counsel, Reckitt's case was that its white and green colour combined packaging had attained distinctiveness whereas the impugned advertisement was green and no evidence was led by Reckitt to establish that it packaged its products in that manner.

21. Sh. Sandeep Sethi next argued that the learned Single Judge failed to consider the evidence of HUL and in particular, the affidavit evidence of DW-1 along with the photographs, DW-1/1, DW-1/2 and DW-1/3. These documents were photographs of various branded and unbranded orange coloured soaps (DW-1/1); of various orange coloured antiseptic soaps (DW-1/2) and green and while packaging (DW-1/3). It was argued in this context that orange is a common product colour in the market in both branded and unbranded soaps and that there are several orange coloured antiseptic soaps with green and white packaging.

22. Learned counsel also submitted that Reckitt could have led appropriate survey evidence that consumers involved in all orange coloured soaps in a curvature and green packaging associated them with the Dettol Original toilet soap. There was complete lack of such evidence. In these circumstances, the appropriate course for the learned Single Judge was to draw an adverse inference against Reckitt and not to decide the case on the basis that such evidence or the lack of it was of no consequence. This led to failure of justice because the evidence led by the defendant, i.e. HUL was not taken into consideration. Likewise, submitted learned counsel, the finding that the customer associated the term "ordinary antiseptic soap" referred to in the impugned advertisement with Reckitt's product is based upon an assumption and does not rest on any material or evidence.

23. Learned senior counsel next submitted that to succeed in its suit for disparagement, not only did Reckitt have to prove that the impugned statement was concerning his goods but also that it was false and malicious,

i.e. with intent to cause injury. Reliance was placed upon the decisions reported as **White v. Mellin,** 1895 AC 154; **Imperial Tobacco Company v. Albert Bonnan,** AIR 1928 Cal 1. It was submitted that the learned Single Judge failed to consider the evidence led by HUL to establish that the laboratory test reports produced as DW-2/1, DW-2/2, DW-2/3 and DW-2/7 substantiated the claim that ordinary antiseptic soaps were not of the same standard as HUL's "Skin Guard". Thus, the truth of the statement that Reckitt's advertisement regarding its Skin Guard toilet soap which had moisturizing content was more beneficial than antiseptic soaps which had the tendency to cause injury to the skin. This error, in the submission of HUL's counsel, clearly goes to the root of the matter since Reckitt could not have in these circumstances stated that the claims made in the advertisement were false. Thus, the second element, i.e. the truth of the statement having been proved was established by HUL, the suit had to necessarily fail.

24. Learned counsel faulted the impugned judgment in granting plaintiff's claim for punitive damages even after holding that no special damage had been proved. Reliance was placed upon the decision of the Supreme Court referred to as Organo Chemical Industries v. Union of India, 1979 (4) SCC 1. It was stated that this approves the grant of such punitive damages. Learned counsel also relied upon the judgment of the Court of Appeals in Broome v. Cassel and Co., 1972 AC 1027 to submit that grant of punitive or special damages even while the Court is unable to grant any general or compensatory damages, is without authority of law. Learned counsel further relied upon the decision in **Microsoft Corporation v. Deepak Rawal,** 2007 (35) PTC 478 (Delhi) to say that the rationale of awarding punitive damages is to deter the wrong-doer from indulging in unlawful activities which have a criminal propensity. He submitted that the reliance on Times Corporation v. Lokesh Srivastava, 2005 (30) PTC 3 (Del) by the learned Single Judge was inappropriate. Learned counsel emphasized that the latter decision had discredited the binding judgment of the Supreme Court in **Organo Chemical Industries** (supra).

Contentions of Reckitt Reckitt Benckiser

25. It was argued on behalf of Reckitt Benckiser, the plaintiff, by Mr. C.M. Lall, learned counsel that an overall reading of the rival pleadings, particularly the allegations in paragraph 23 of the plaint and the

corresponding averments in the written statement clearly demonstrate that the claim was in respect of reputation and goodwill of Reckitt soap under the trademark Dettol with its new curved shape, orange colour, distinct green and white packaging and the reputation it enjoyed. Learned counsel emphasized that to establish this claim, adequate evidence in the form of design registration of the soap, Ex. DW-1/DX-1 and the Design Act, conferred exclusivity. However, PW-1, in the deposition clearly stated that the soap, Ex.PW-1/8 and the wrapper served as a trademark and was displayed in the product packaging and that no other soap was available in that unique shape in India or elsewhere. Learned counsel underlined that there was no cross-examination on this issue. Likewise, there was no cross-examination about the sales figures at the time of its launch in May 2006, in the form of statement, Ex.PW-1/10. Likewise, PW-1 had asserted that the orange colour of the soap and the green coloured packaging were identifying features for Reckitt's Dettol toilet soap. On this too, there was no cross-examination.

26. Learned counsel next submitted that in another suit filed by HUL, a copy of which was produced as Ex. PW-1/16, an admission was made that Dettol had launched a toilet soap. That suit claimed relief against the advertisement which were produced in the present case, i.e. DW-1/11, DW-1/12, DW-1/13 and DW-1/14. It was submitted that the orange coloured Dettol soap with unique shape could be seen in the story board in that suit. Learned counsel relied upon the examination-in-chief of DW-1 and the evidence, DW-1/15, produced in the form of sales data collected by an independent agency, IMRB to establish that sales figure of Dettol Original undergo changes in summers and winters. Learned counsel emphasized that the written statement admitted the extensive sales of Reckitt's product, in paragraph 9 and DW-1 had admitted to purchasing Dettol Original soap and thereafter developing the offending advertisement. In this regard, learned counsel relied upon paragraph 11. It was contended that the impugned judgment has adopted the correct approach with respect to proof of disparagement. Learned counsel submitted that the conclusion arrived at by the learned Single Judge, i.e. that evidence of consumers would tend to cancel out the effect of each other, was a common sense and a practical method at resolving what was obviously to be decided by the Court.

27. On the question whether HUL's advertisement disparages or denigrates Reckitt's soap, Shri Lal relies on an admission in the former's

written statement. It reads as:

> *"23 ... It is further submitted that the defendant advertisement is dissuading the public from using the unbranded antiseptic soap" (emphasis supplied)*

This averment, submits Reckitt, is relevant as it establishes that the attack is on the rival product and not mere puffery of HLL's product. Counsel underlined that this constitutes an admission of malice and passes the test of malice set out in Imperial Tobacco Co. (i.e. it is "done with the direct object of injuring the other person's business."). Likewise, the averment in paragraph 20 of the plaint is relied to say that it lists the denigration made and includes the representation that use of DETTOL soap in fact invites germs to the body which are then killed and washed away with the LIFEBUOY soap of the defendant. Counsel highlights that in the story line the husband (a doctor) and the children, the most influential people in the life of a housewife, repeatedly mock at the mother for using DETTOL by use of the term "bacha lena" (save) repeatedly. This clearly constitutes denigration. This is a direct attack on Reckitt's "surakshit parivar" (secure family) advertisement campaign, which is alluded to in paragraph 14 of the plaint. Counsel also relies on the following averments to say that denigration and malice are specifically pleaded in the plaint, in particular:

> *".....a bare viewing of the said advertisement will be sufficient to convince this Hon'ble Court of the malicious intention of the Defendant to increase the market share of its LIFEBUOY soap by tarnishing the goodwill and reputation of the plaintiff's popular product." (paragraph 18)*

> *"....the impugned advertisement is nothing but a slanderous attempt of the defendant to increase market share of its LIFEBUOY soap by defaming and disparaging the worth and reputation of the plaintiff's product." (paragraph 21).*

It is argued that the impugned advertisement not only shows that the defendant's product is good but also very clearly depicts that Reckitt's product is completely worthless.

28. Mr. Lal contends that Reckitt has led positive evidence, Ex.PW-1/13 in the form of a test report of an independent agency to establish

that DETTOL soap is 10 times more efficacious at reducing bacterial and fungal cell counts than LIFEBUOY. It is submitted that PW-1 was cross-examined on this issue and that HUL's representation that DETTOL causes germ formation is therefore completely false. It is urged that HUL too admits that DETTOL is more than 10 times more efficacious than its LIFEBUOY soap with actives, and a reference is made to Ex. PW-1/17, where in a previous judgment, a learned Single Judge of this court recorded that admission (by HUL, plaintiff in that suit) in the following terms:

> *"The statement in the advertisement that DETTOL is 10 times more efficacious is in comparison with those soaps which are without actives. Therefore, this statement would not have any reference to the plaintiff's LIFEBUOY soaps and even otherwise the said statement is claimed to be true by the defendant no.1 and the plaintiff could not dispute that if DETTOL soap is to be compared with soaps without actives, then this statement is factually correct."*

It is stated that HUL itself has led evidence to establish that Reckitt's soap and its soap are comparable in reducing bacterial count; Ex.DW-2/1 and Ex.DW-2/3 are referred to for this purpose. These, submits Reckitt, establish that Dettol Original (0.961%) has higher levels of Trichloro Carbanilide (TCC), which is the ingredient that helps reduce bacterial count, when compared to Lifebuoy Skin Guard (0.227%). That TCC is an anti-microbial active is admitted on in Para (vii) of the written statement. It is argued that the plaintiff, Reckitt, has discharged the onus that the depiction of Dettol, as the standard of proof indicated in **Reckitt & Coleman of India Ltd. v. Jyothi Laboratories Ltd.,** Cal LT 1999 (2) HC 230, has thus been discharged. Counsel additionally submits that Ex.DW-2/7 further establishes that out of a sample of 31 people on whom tests were conducted with the rival products, on four people Dettol Original caused less dryness and irritation to the skin than Lifebuoy Skin Guard. On six people, the irritation levels were the same. On 8 people, the irritation count was less than three. Therefore, they did not get skin irritation from either product. On 12 people HUL's product caused skin irritation of the level of four or above. HUL's own report, therefore, established the falsity of its claims made in the advertisement.

29. It is next urged that HUL's entire written statement is based upon *"laboratory test conducted"* by it. (paragraph 6 of the written statement). DW-1 has admitted that *"prior to the launch of Lifebuoy Skin Guard soap"*, he procured the Dettol Original soap of Reckitt and only *"thereafter"* developed the offending advertisement (paragraph 11). All tests conducted by HUL are after the launch of the impugned advertisement. Reckitt's test report, that DETTOL is 10 times more efficacious was available with HUL. This clearly established malice on its part, it is argued.

30. On the fourth issue, i.e. if Reckitt was guilty of suppress of material facts, it is urged that **Reckitt Benckiser (India) v. Naga Ltd.** [104 (2003) DLT 490] related to a different advertising campaign of Reckitt and against a different defendant and was based on completely different facts and had no relevance to the present proceedings. It is argued that Reckitt has always been careful in ensuring that the distinction between its DETTOL liquid and DETTOL toilet soap is maintained in the plaint and in the market place. The description of DETTOL soap as a toilet soap can be seen in paragraphs 7, 8, 9, 19(i) and 19(iii) of the suit, and discuss how the DETTOL brand has been extended from an antiseptic liquid to a toilet soap. However nowhere is a claim made that DETTOL has any antiseptic quality. On the fifth issue, i.e. whether the impugned advertisement constitutes an attack on Reckitt's goodwill and reputation, the arguments based on HUL's evidence is reiterated.

31. It is argued further that the proceedings in the present case being a civil claim are not barred. Reckitt's counsel relies on Section 9, CPC which outlines jurisdiction of civil courts and states that such power can ousted where cognizance is "expressly or impliedly barred." In this context, Section 4 of the MRTP Act is relied on to say that application of other laws is not barred. Even the provisions of Section 12B of the said Act – points out Mr. Lal – clarify that the powers of the MRTP Commission are "without prejudice to the right of such Government, trader or class of traders or consumer or institute a suit." Reliance is placed on the judgment of a learned Single Judge in **Citicorp. v. Todi Investors**, 2006 (23) PTC 631 (Del). It is, therefore, argued that there is no express or implied bar in the MRTP Act and on the contrary, a specific provision saves the rights under other laws. Furthermore, counsel submits that the common law remedy of false advertising existed prior to the enactment of the MRTP Act which came into existence in 1969. It did not bar the common law remedies. Learned counsel also argues

that the MRTP Act is essentially a consumer protection statute and not a statute designed to protect the rights of one competitor against the other. Such a competitor therefore must only approach the Civil Court and not the MRTP Commission. Consumers on the other hand must approach the MRTP and not the Civil Courts.

Damages: Reckitt's counter claim

32. As to the issue of damages, it is contended that Reckitt established in Issue No.1 and 5 its reputation in its DETTOL soaps. HUL in its written statement admitted to "plaintiff's soap being a Rs.200 crore brand." Therefore, any denigration caused will be caused to at least a Rs. 200 crore brand. This will be the first important consideration for evaluating damages. Reliance is placed on Ex.PW-1/19, a comparative table of the channels in which advertisements of both products appear. This, Mr. Lal argues, establishes how HUL targeted many of channels on which Reckitt advertises. This fact is set out in Para 23 of the examination-in-chief of PW-1. Likewise, counsel relied on Ex.DW-1/12 to DW-1/14, advertisements by Reckitt. In each advertisement a mother is portrayed encouraging her child to bathe with DETTOL soap. The defendant's advertisement has denigrated and undermined this entire advertisement campaign which admittedly was run *'on various TV channels"* and was "viewed by consumers and public at large" *"on almost daily basis during different hours."* Admittedly, these advertisements *"are telecast during children's houses for TV viewing and also shown prominently in between family serials for universal viewing"* (counsel points out that all these are averments from the written statement). HUL's advertisement has seriously damaged Reckitt's campaign by showing the children now mocking at their mother for using DETTOL soap. This fact was spoken to by PW-1 in his examination-in-chief. It is submitted that the extent of damages can be determined by how extensively HUL used the offending advertisement. Ex.DW-1/16 to Ex.DW-1/18 establish the extent of this usage. A channel-wise break-up of the advertisement and the times that it was repeated is clearly set out in Ex.DW-1/18. It is contended that DW-1/17 shows how sales of HUL's soap in the advertisement have increased. A large part of this is attributable to the advertisement in issue. This is specifically mentioned in the evidence of PW-1 at paragraph 26. Mr. Lal also urged the Court to set aside the findings of the learned Single Judge with respect to refusal to grant any general damages and pressed the counter claim of Reckitt, limited to this extent. He submitted

that there were sufficient materials on record, empirically, to realistically evaluate general damages in the manner known to law. Counsel stressed that though the advertisement was for 30 seconds, its impact was widespread, since the defendant HUL had targeted every channel that had been used by Reckitt; it was pointed out that the advertisement was telecast no less than 4441 times between end June and August, 2007. Furthermore Reckitt's DETTOL brand admittedly was worth Rs. 200 crores at that time. It was also urged that a total quantity of 9132 tons of the article, DETTOL Original, was manufactured during the period January to June, 2007 and that the marketing expenses for that soap, in its new shape was Rs. 23.6 crores for the latter half of that year. Counsel pointed out that the admitted advertising expense in respect of LIFEBUOY which was the subject of the impugned advertisement for one month alone (July 2007) was Rs. 2.5 crores, according to the testimony of DW-1. Based on these facts, the learned Single Judge should have awarded general (or compensatory) damages, upon a fair assessment. It was submitted that in disparagement (of products and goods) or slander to title, it is not easy to assess the extent of harm or injury as it might not be always discernible in the short term and may have long term effect, having regard to market forces.

33. HUL argues and its counsel, Mr Sethi, submits that the learned Single Judge correctly evaluated the evidence and held that general damages should not be awarded. Counsel submitted that production figures or amounts spend towards publicity or even the number of times that the impugned advertisement was published has little relevance to the issue of damages. What is important is that the plaintiff has to establish that it suffered injury capable of assessment in monetary terms, which it could not, in the facts of the present case. Therefore, counsel concluded that the findings of the learned Single Judge did not call for interference.

Analysis and conclusions

34. The law recognizes that tradesmen and manufacturers may commend their goods and state that they are better than those of rival traders. Yet this is with an important caution that the publisher or advertiser should not make any false representation as to the quality or character of the rival or competitor's goods or products. If no such false representation (as to the character or quality of the rival's goods) is made, the advertisement of a tradesman howsoever commendatory or

exaggerated cannot result in an actionable claim. Exaggerated claims sans such false representations are known as 'puffing'. This license – to puff – was recognized in **Bubbuck v. Wilkinson,** 1899 (1) OB 86 where the Lindlay MR observed that mere statement that the defendant's goods are better than the plaintiff would not be actionable. This reasoning was upheld in **Allen v. Flood,** 1898 AC 1. Lindlay MR held that mere puffing would not be actionable because it would "open a very wide door to litigation and might expose every man who said its goods were better than another's to the risk of action". This was echoed in **White v. Mellin,** 1895 AC 154 (widely cited by Indian Courts):

> "Indeed the Courts of Law would be turned into machinery for advertising rival productions by obtaining judicial determination which of the two was the better".

The determinative considerations were described in **Cellacite & British Uralite v. Robertson** [The Times, July 23rd, 1957 (CA)] in the following, if one may so term – legal 'catch phrase': 'the general proposition is: Comparison – Yes but Disparagement – No.. In De Beers Abrasive v. International General Electric Co., 1975 (2) All ER 599, the Court elaborated this as follows: "In order to draw the line one must apply this test, namely, whether a reasonable man would take the claim being made as a serious claim."

35. Indian Courts have recognized actions for damages in a claim for slander of goods. In Imperial Tobacco Company v. Albert Bonnan, AIR 1928 Calcutta 1 (DB), the Court held that to succeed in an action of slander of goods, the plaintiff has to allege and prove that the statement complained of was made concerning his goods and that it must be with the direct object of injuring his business. In India, the decisions of various Courts, namely, **Hindustan Lever Ltd. v. Colgate Palmolive (I) Ltd. and Anr.,** 1998 (1) SCC 720, **Pepsi Co Inc. & Ors. v. Hindustan Coca Cola Ltd & Anr.,** 2003 (27) PTC 305 (Del) (DB), **Reckitt & Colman of India Ltd. v. M.P. Ramchandran & Anr.,** 1999 PTC (19) 741, have followed the English precedents on the subject, especially the five guiding principles outlined in **De Beers Abrasive** (supra). In **Dabur India Ltd. v. Colgate Palmolive India Ltd,** 2004 (29) PTC 401 (Del), the peculiarity of generic disparagement of rival products without specifically pin pointing the rival goods was held to be objectionable. The Court noticed that clever advertisement of a rival

tradesman's article without specifically referring or alluding to it and observed that disparagement of a class of goods can result if the rival's goods fall within a class and can be identified. We notice that this judgment was taken into consideration by the learned Single Judge, as also two later English decisions, i.e., **Jupiter Unit Trust Managers Trust Ltd. v. Johnson Fry Asset Managers,** (2000) Unreported 19 April, QBD and **DSG Retail Ltd. v. Comet Group,** PLC (2002) EWHC 116 (QBD).

36. HUL complains that the impugned judgment does not err in its understanding of the law or the guiding principles but as to their application. It is contended that the learned Single Judge even after noticing the law incorrectly concluded that HUL's products disparage Reckitt's Dettol Original. In its argument, HUL mainly contends that a frame by frame analysis of the advertisement coupled with the 'average man with imperfect recollection' test applied by the learned Single Judge has resulted in distorted conclusions. It is also emphasized in this context that the Court overlooked that the plaintiff did not present any or evidence proof and that instead the Single Judge sought to judge the advertisement from the stand point of a common or reasonable man without any witnesses. deposition that could have been tested through cross examination. This Court proposes to address each of these submissions in turn.

37. Slander of goods is a species or branch of the law of defamation. It is widely accepted that to be defamatory, an imputation must tend to lower the claimant in the estimation of right thinking members of society generally, (i.e., the reference to the 'common' or *'reasonable'* man). The standard that the statement must amount to 'disparagement of ... the reputation in the eyes of right thinking men generally' was spelt out in **Leetham v. Rank** (1912) 57 SJ 111, and also applied and followed in Byrne v. Deane, [1937] 1 KB 818 and in **Campbell v. Toronto Star,** (1990) 73 DLR 190. Whilst the Canadian and Australian approach appears to be largely in tune with the English law [ref **Campbell** (supra), a Canadian decision; and **Reader's Digest Services Pty Ltd v. Lamb** (1982) 150 CLR 500, an Australian decision], the approach of the US Supreme Court appears to be a bit different. In a case where the plaintiff, a teetotaller, sued the publisher of a news item that he used to drink whiskey, in the course of its judgment, the US Supreme Court held that there could be no general consensus or opinion that to drink whiskey was wrong and yet at the same time observed [ref. **Peck v. Tribune Co**

214, US 185 (1909)] as follows:

> "if the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote... No falsehood is through about or even known by all the world. No conduct is hated by all. That it will be known by a larger number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm... It seems to be impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in her community."

38. An interesting and fascinating discussion on the subject may be found in Gatley on Libel and Slander (10th Edition) (2004) (the Common Law Library, Sweet & Maxwell, paragraphs 2.10 to 2.14). There, the expression "right thinking person" was described as being "as much an abstraction as the "reasonable man": both serve as metaphors for what is in fact the judge's view of what is capable of being recognized as acceptable public opinion. Perhaps the American approach makes this issue more open to argument.

39. In the present case, the learned Single Judge in our opinion, correctly described the guiding principles after discussing the case law on the subject and even brought home the distinction between passing off actions – which are concerned with deceptively similarity or confusion between the two marks for which the test of impression gathered by an average woman or man with imperfect recollection is applicable – and disparagement. The impugned judgment notices this distinction and comments that

> "in the case of disparagement, the one who disparages another's product, does not seek to make his product similar to the disparaged product, but to distinguish it from the disparaged product. The object of disparagement is to make the disparaged product appear to be as near or similar to the competitor's product. The comparisons, therefore, in cases of passing off and in case of disparagement are different."

40. Nevertheless, thereafter, in paragraph 27 of the impugned

judgment, the test applied in the present case is "stand point of an average man with imperfect recollection who is also a user of Dettol original soap" to hold that Dettol original was disparaged by the impugned advertisement.

41. This Court is of the opinion that the approach and understanding of the learned Single Judge while discussing the law generally applicable as to disparagement and permissible limits of puffing is correct and does not call for any interference. At the same time, his allusion or reference to "average man with imperfect recollection using Dettol soap" requires some elaboration. Whilst there can be no quarrel with the fact that a reasonable man and an average man refer to the same metaphor and imperfect recollection refer to an natural attribute of a reasonable or average man, what needs closer scrutiny is whether the standard applicable in judging disparagement claims is if a particular class of user (in this case the Dettol user) feels that the statement is disparaging. The learned Single Judge's discussions and conclusions on this are based upon his analysis of what perceptions are discernible from the impugned advertisement. This is elaborately discussed in paragraph 24 of the impugned judgment where two kinds of users, i.e., the Dettol users and those who do not use that soap are noticed. The learned Single Judge held that the latter, i.e., non-users may be unaware of the unique curvature shape, packaging etc. of the Dettol soap sufficiently to link it with Reckitt's product as to possibly associate the advertised product with Dettol, since the bar of soap in the impugned advertisement is some unbranded soap. However, as far as the former category is concerned, the learned Single Judge held the Dettol users would "immediately recognize the bar of soap shown in the advertisement as referring to the plaintiff original Dettol soap". This was on account of familiarity by reason of use of such soap and knowledge of its shape, colour, size, contours and packaging.

42. The question which this Court, therefore, has to address itself to is whether the learned Single Judge faulted in his approach towards applying the test of a reasonable man with imperfect recollection as being a particular class of such citizens, i.e., Dettol users and then proceeding to hold that such class can clearly identify the soap in the impugned advertisement as the plaintiff "Dettol original".

43. The previous discussion on the question as to whose perception

is to be considered in an action for defamation or disparagement has revealed that the law of defamation recognizes that it is the standard of the right thinking or reasonable men and women of the community from whose stand point the imputation requires to be judged. In the case of disparagement of a rival's product, it may also be necessary to keep in view the possibility that potential users of the product could be warned away by the advertisement, thus widening the "target group". The American Court's refinement to this is that the standpoint should be that of "respectable men and women" of the community to which the claimant belongs and not to all kinds of people. Not infrequently, Courts have been confronted with the argument that the target audience is not a specific one, but of all reasonable men and women generally. This has been described in **Gatley** (supra), at paragraph 2.15) as follows:

> ".....First, it is plain that to say that the statement must lower the claimant in the estimation of right-thinking persons generally does not mean that the statement must be readily comprehensible to people in general: a defamatory statement may be made in a foreign language or in a highly technical scientific journal. In such cases there must be a publication to persons who do in fact understand the statement in the sense of which the claimant complains but the issue then seems to be "if this were explained to the ordinary citizen would it reflect on the plaintiff's reputation in his eyes? Secondly, in many cases it may be possible to show that a charge of conduct which in itself is obnoxious only to a limited group is defamatory because the statement carries the additional imputation that the claimant is thereby guilty of conduct, such as disloyalty or hypocrisy, which is regarded as discreditable by reasonable people generally even though they may be indifferent to the tenets of the group which is directly offended..."

44. There appears to be an overwhelming consensus of judicial opinion that to determine whether a statement disparages or defames the viewpoint to be considered is that of the general public (the refinements of whether such "right thinking" or "reasonable" persons belong to a "respectable" section of the public, apart). Thus, whenever an argument that a sectarian approach (i.e. applying the standpoint of members of a section of the public) is to be adopted, Courts have tended to reject it time and again. In **Tolly v. Fry,** 1931 AC 333, the House of Lords had to decide if the depiction of the plaintiff, an amateur golfer – without his

consent – in an advertisement defamed or caused injury to his amateur status (which was during the times regarded as valuable for a golfer). The advertisement contained a limerick and also the plaintiff's picture. It was argued unsuccessfully by the plaintiff that the governing test was whether the knowing public (i.e. those aware about the nature of the game, and the valuable status of an amateur, at that time) would regard the depiction and the statement as defamatory. The House of Lords, which had to decide whether the judgment which left the matter to the judge, instead of the jury, was a correct one, held that the guiding principle was one of perception of the general public and not the golf knowing citizens. This was emphasized in the judgement:

> *"The question here does not depend upon a state of facts known only to some special class of the community, but to the inference which would be drawn by the ordinary man or woman from the facts of the publication."*

Similarly, in **Gillick v. Brook Advisory Centres** [2001] EWCA Civ 1263, the following approach was adopted:

> *"the court should give the article the natural and ordinary meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical reasonable readers should not be treated as either naive or unduly suspicious. They should be treated as being capable of reading between the lines and engaging in some loose thinking, but not as being avid for scandal. The court should avoid an over-elaborate analysis of the article, because an ordinary reader would not analyse the article as a lawyer or accountant would analyse documents or accounts. Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader. The court should certainly not take a too literal approach to its task."*

45. In **Petra Ecclestone v. Telegraph Media Group Ltd,** 2009 EWHC 2779 (QB), the imputations against which the claimant sued Telegraph Media Group were that Sir Paul McCartney's public call for "Meat free Mondays" did not impress the plaintiff/claimant who is reported to have said that she was not a "veggie" and did not have time for people like McCartney. The Court rejected the submission of defamatory

imputation and observed that:

> *"It might be that a sector of the public (i.e. those who disapproved of the use of leather or eating animal products) could think the less of the Claimant for taking the opposite stance, and might even do so because of what she is reported to have said about the McCartneys and Annie Lennox. But the test is not whether a sector of the public could think less of the Claimant for what she is alleged to have said (see* ***Arab News Network v Al Khazen*** *[2001] EWCA Civ 118 at [30]), but whether ordinary reasonable people in our society as a whole - or to use Mr Barca's phrase 'the public' generally could do so. In our society people hold different (and sometimes strong) views on any number of issues including the use of animal products. In a democratic society where freedom of expression is a protected right, people are entitled to hold strong views, and to express them within the limits laid down by law."*

The point was again brought home in yet another later decision, **Robert Crow v. Boris Johnson,** [2012] EWHC 1982 (QB), which also cited **Tolley** (supra):

> *"The law can conveniently be taken from the judgment of Thomas LJ in Modi v Clarke [2011] EWCA Civ 937 paras 10 to 12:*
>
> *"12. It was also accepted that there is a distinction between "people generally" and a section of people. The distinction is set out in a number of authorities but the one relied on before the judge was that of Greer LJ in* ***Tolley v Fry*** *[1930] 1 KB 467 at 479 where he said: "Words are not defamatory, however much they may damage a man in the eyes of a section of the community unless they also amount to disparagement of his reputation in the eyes of right thinking men generally. To write or say of a man something that would disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right thinking man is not actionable within the law of defamation."*

46. The discussion may be usefully summed up in the words of the Australian High Court in **Reader's Digest** (supra):

> *"7. Where no true innuendo is pleaded and the published words clearly related to the plaintiff, the issue of libel or no libel can be determined by asking whether hypothetical referees - Lord Selborne's reasonable men (Capital and Counties Bank v. Henty (1882) LR 7 App Cas 741, at p 745) or Lord Atkin's right-thinking members of society generally (Sim v. Stretch (1936) 52 TLR 669, at p671 or Lord Reid's ordinary men not avid for scandal (Lewis v. Daily Telegraph Ltd. (1964) AC, at p 260) - would understand the published words in a defamatory sense. That simple question embraces two elements of the cause of action: the meaning of the words used (the imputation) and the defamatory character of the imputation. Whether the alleged libel is established depends upon the understanding of the hypothetical referees who are taken to have a uniform view of the meaning of the language used, and upon the standards, moral or social, by which they evaluate the imputation they understand to have been made. They are taken to share a moral or social standard by which to judge the defamatory character of that imputation (Byrne v. Deane (1937) 1 KB 818, at p 833 , being a standard common to society generally (Miller v. David (1874) LR 9 CP 118 ; Myroft v. Sleight (1921) 90 LJKB 883 ; Tolley v. J.S. Fry &Sons Ltd. (1930) 1 KB 467, at p 479..."*

47. Thus, the conclusion of the above discussion is that the learned Single Judge's appreciation of the law, i.e. that the perspective of the Dettol users guides the court in considering whether HUL disparaged Reckitt's soap is erroneous, as it is based on a sectarian and "section of the public" point of view and not of the "right thinking" or "reasonable" member of the public generally. As to whether this approach has resulted in a wrong conclusion, is another matter, which the Court would consider presently.

48. The next aspect to be considered is the nature of judicial scrutiny. HUL complains that the learned Single Judge fell into error in making a frame by frame, bit by bit analysis of the impugned advertisement and thereby overlooked the guiding test that the advertisement or publication has to be seen as a whole, rather than in a sectional manner, to decide if it denigrates or disparages a rival product.

49. The first question here is as to the manner in which such

advertisements are to be viewed, and secondly, the legal standard against which the advertisement is to be judged. On this question, the advertisement must be seen as a viewer would normally view it in the course of the television programme, and not specifically with a view to catch an 'infringement'. This distinction is thin, but important: in trying to determine whether commercial disparagement has occurred, the relevant consideration is how the viewer (i.e. the individual to whom the alleged disparagement is addressed) would see the advertisement. This consideration is important also because of the manner in which the advertisement is appreciated – whether as a running reel or frame by frame. The answer to this necessarily is the former, for two clear reasons. First, when deciding such matters, the judge is to consider (as will be discussed below) how an average, reasonable man would view the advertisement as it appears on the television or electronic medium, as in the present case. In order to do this, the endeavour of the court is to substitute its judgment for that of the average/reasonable man. Undoubtedly, when the advertisement is displayed on the television, it is not scrutinized in every detail by the viewers, but rather, taken as a whole as it is displayed. This simple proposition is of great relevance, since a judge, sits in an adversarial setting with the clear purpose of determining whether commercial disparagement has occurred, and thus, on the look-out for any indication of the same, must equally remain cautious that the advertisement is viewed as viewers normally view it.

50. These concerns have been echoed by several courts – for example, in **Skuse v. Grenada,** [1993] EWCA Civ 34, the Court noted that

> "[w]hile limiting its attention to what the defendant has actually said or written, the court should be cautious of an over-elaborate analysis of the material in issue."

Earlier, in **Slim and Others v. Daily Telegraph and Others,** [1968] 2 QB 157, a case concerning libel, Lord Justice Diplock struck an important point:

> *"In the spring of 1964 two short letters appeared in the correspondence columns of the "Daily Telegraph." Written by Mr. Herbert, they formed part of a robust though desultory controversy about the prospective use by motor vehicles of a public footpath forming part of Upper Mall in Hammersmith.*

> *Neither letter can have taken a literate reader of that newspaper more than 60 seconds to read before passing on to some other, and perhaps more interesting, item. Any unfavourable inference about the plaintiffs. characters or conduct which he might have drawn from what he read would have been one of first impression. Yet in this court three lords justices and four counsel have spent the best part of three days upon a minute linguistic analysis of every phrase used in each of the letters. If this protracted exercise in logical positivism has resulted in our reaching a conclusion as to the meaning of either letter different from the first impression which we formed on reading it, the conclusion reached is unlikely to reflect the impression of the plaintiffs. character or conduct which was actually formed by those who read the letters in their morning newspaper in 1964."*

51. The importance of returning to the meaning conveyed at first impression, which for the viewer, at least in so far as advertisements such as the present one are concerned, is also the final impression, is crucial. This was also stated in **McDonalds v. Burger King,** (1986) FSR 45, in noting that:

> "advertisements are not to be read as if they are testamentary provisions in a will or a clause in some agreement with every word being carefully considered and the words as a whole being compared."

52. On this question, we must examine the approach of the learned Single Judge closely – in that the Court applied the legal standard (which will be discussed below) on a frame by frame appreciation of the impugned advertisement. Such approach, with due respect, in this court's opinion, is incorrect. The conclusions apart, the method employed in determining whether disparagement has occurred (and crucially, the effect on the consumer's mind) must be considered by Courts in such cases. The learned Single Judge has, at paragraph 21 of the impugned judgment, considered each frame of the advertisement in detail, and further, in paragraph 22, considered some still pictures from the advertisement where the Dettol soap is alleged to be shown. Relying on these photographs, the learned Single Judge reached the conclusion that the soap displayed in the advertisement does indeed refer to the Dettol soap. This, in the opinion of the Court, cannot be the correct approach; the appropriate method of

viewing the advertisement objected to would be to consider its overall effect.

Was the impugned judgment in error in its appreciation of the evidence

53. HUL complains that the impugned judgment is in error because the learned Single Judge held that in the final analysis the judge has to decide, after considering the advertisement and its effect:

> *"It has been contended on behalf of the defendant that the plaintiff has not produced any evidence of consumers to indicate that the orange bar of soap in the said advertisement appears to be the plaintiff's DETTOL Original soap. In response the learned counsel for the plaintiff submitted that producing such evidence would be counter-productive and is not necessary. He submitted that the plaintiff could produce witnesses stating that the orange bar of soap shown in the advertisement had reference to the plaintiff's DETTOL Original soap. Similarly, the defendant could also produce witnesses to state the contrary. Ultimately, it would be for the court to make a judgment from the perspective of an average person with imperfect recollection, a test which has been well established, particularly in passing off cases."*

HUL relies on Imperial Tobacco and Colgate Palmolive in support of the submissions. As this court reads those authorities, the Courts did not prohibit the judge presiding over the trial to consider the meaning of the term or advertisement in issue, nor stated that as an invariable rule, the ritual of one or a set of witnesses stating that it amounted to slander of goods and another (for the defendants) stating otherwise, had to be ritualistically followed. The learned Single Judge's approach, to a great extent, is based on common sense and pragmatism. So long as the origin of the advertisement or publication (i.e. who caused it to be telecast or broadcast, or published in the print media), its contents, duration etc. are not in dispute (as in the present case) whether the content disparages is a decision that would ultimately depend on the judge's reading and appreciation of the advertisement taken as a whole, based on a proper application of the law on the subject. This view is supported by the decision in **Slim v. Daily Telegraph,** [1968] 2 QB 157, where Lord Justice Diplock expressed the rule in a clear statement:

> *"...Where, as in the present case, words are published to the millions of readers of a popular newspaper, the chances are that if the words are reasonably capable of being understood as bearing more than one meaning, some readers will have understood them as bearing one of those meanings and some will have understood them as bearing others of those meanings. But none of this matters. What does matter is what the adjudicator at the trial thinks is the one and only meaning that the readers as reasonable men should have collectively understood the words to bear. That is 'the natural and ordinary meaning' of words in an action for libel."*

In **Vodaphone Group Plc. v. Orange Personal Communications Services Ltd.,** [1997] F.S.R. 34, the Court held as follows:

> *"The meaning is for the court to determine when a judge sits without a jury. Evidence of the meaning to others is inadmissible. The question:*
>
> *'Is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs ... what the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the word. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning" per Lord Reid in Lewis v The Daily Telegraph'.*

The Court notices that even in recent English decisions (**Cruddas v. Calvert**, 2013 EWHC 1427 (QB) delivered on 5th June, 2013 and **Interflora Inc v. Marks & Spencer Plc,** 2013 (2) All ER 663) – though in analogous cases relating to ad-word and trademark infringement claims- it was held that evidence as to the meaning of common words and phrases in advertisements or their effect, is by and large inadmissible. In **Interflora,** (supra) after an elaborate review of past cases, the Court of Appeal held:

"In previous cases, it had been held that evidence of members of the public could not stand proxy for the legal construct of the average consumer. In the context of Ad-Words, the average consumer had been replaced by the reasonably well-informed and reasonably observant internet user, but the underlying concept, of a legal construct, was the same, BACH and BACH FLOWER REMEDIES Trade Marks [2000] R.P.C. 513 applied (see paras 40-44 of judgment). In cases involving ordinary consumer goods and services, the judge could reach a conclusion from his own experience without evidence from consumers ..."

In view of the above discussion, it is held that there is no merit in HUL's argument that the judge fell into error in not considering oral testimony of the parties as to whether the impugned advertisement amounted to slander of goods, or denigration of Reckitt's DETTOL Original.

Did the impugned advertisement disparage or denigrate Reckitt's DETTOL Original

54. This court has previously observed that the correct test is whether the impugned advertisement, or the publication complained of disparaged the plaintiff's goods in the eyes of the right thinking members of the public or reasonable men and women. The Court had further held that while considering the question of disparagement, the applicable test would not be whether a "target audience" or "target group" i.e. a section of the general public would perceive the advertisement to be disparaging, but if all reasonable men and women would regard it to be so. Now, the all-important question of whether the impugned advertisement in fact disparaged or denigrated the plaintiff's DETTOL Original has to be decided in the light of the evidence.

55. As observed in an earlier part of this judgment, the advertisement was of a total duration of 30 seconds and was telecast at the relevant time, in a multitude of television channels. This Court had the opportunity of viewing the advertisement, a recording of which was filed as part of the record and was also played at the time of the hearing of the appeal. The court finds that the storyline has been accurately described by the learned Single Judge.

56. It would be necessary to briefly summarize the whole advertisement. A doctor and his wife return home on a rainy day. The

wife plans to bathe and the takes out an orange bar of soap from a green wrapper. This part of the film is less than two seconds. The husband, at this stage exclaims that that his wife can only be saved by God; later he and the children sing out that naadan (the ignorant) should be given wisdom and all of them should be saved from naivetT; the wife, surprised at this, questions them. Next, the husband holds up the orange soap (this for about 2 seconds) and says that with such cure, a blessing too would be necessary. In the next scene, a bathing lady is shown raising the said orange bar of soap; it is accompanied by a male voice over which states that ordinary antiseptic soaps dry up the skin; the camera then zooms to the upper arm, shown under a magnifying glass revealing cracked skin with green germs lodged in them The male voice then comments that germs get into the cracks (of the skin). As if to emphasize the idea, the term "ordinary antiseptic soap" appears on the screen. Next in a water shot, a bar of red LIFEBUOY soap emerges out of the water. This scene highlights the words "Glycerine" and "Vitamin E" and the male voice-over states this is why, new Lifebuoy Skin Guard). To underline the idea, the arm under the magnifying glass is shown again, this time with a voice over stating that it (LIFEBUOY) attacks germs; the scene then shows glycerine flowing – and the voice over adding that (LIFEBUOY) also builds a protective wall. The next scenes show that the wife allays the fears of her family, and all of them saying that they have no fear (thus suggesting that the wife accepted the suggestion to stop using the antiseptic soap and had started to use LIFEBUOY). The final part of the advertisement shows a LIFEBUOY Skinguard bar of soap and its package with the LIFEBUOY logo zooming onto the package and the male voice-over announcing "Lifebuoy Skin Guard"; the Hindustan Lever Limited logo is then focused and the advertisement ends then.

57. Facially, HLL's argument that the exposure to the orange coloured soap is for about 5% of the entire advertisement – and the attendant submission that this renders the possibility of any lasting impact improbable, is attractive. That however, is not the main consideration which the court should be alive to. As discussed earlier, it is the overall effect of the advertisement rather than a frame by frame analysis which is relevant. To focus only on the manner that the orange soap bar is shown in the advertisement would therefore, be falling into the same trap which HLL cautioned the court from avoiding. It is not only the total time devoted in the entire advertisement by which the orange bar is shown (in all about

4 seconds, on three occasions) which is to be considered, but its contextual setting. The learned Single Judge accepted Reckitt's argument that though it did not market an antiseptic soap, yet the repeated allusions to antiseptics and how they result in cracks in the skin, provided the powerful contextual background for the entire advertisement. HLL is no doubt right in saying that there were several orange bars of soaps; some with curvature and a few had green coloured packaging. Yet, the one shot (in which one protagonist) holds up the orange soap bar shows the curvature of the orange bar, and the unique indented shape within, which leaves no room for any doubt that it is DETTOL Original. The absence of the Dettol symbol (cross) does not in any manner – in the opinion of the court- detract from this impression (of the ordinary reasonable viewer) as to the identity of the soap bar. This the Court holds because the evidence on record, in the form of the story board in Reckitt's advertisement campaign for DETTOL Original (to which umbrage was taken by HLL, in a previous suit, filed in this Court – produced as Ex. PW-1/16) shows that the soap was launched in May, 2006. HLL filed the suit some-time in June, 2006; interim injunction was refused by a reasoned judgment and order dated 17-11-2006. This story board (i.e concerning Reckitt's DETTOL Original, in the previous suit by HLL) was produced as DW-1/11 and DW-1/12, by HLL's witness, DW-1. This material clearly depicts Reckitt's DETTOL Original advertisement, which contains the same – or identical oval shaped orange soap – as in the impugned advertisement. That advertisement too was published in the same media, in television channels. Reckitt led evidence (PW-1/19) disclosing that the advertisement was widely and extensively telecast in numerous channels, on 2763 occasions, during the whole of July till 11 August, 2007.

58. As this Court understands, the plaintiff's grievance is not that HUL simplistically depicted its DETTOL Original in a bad light or denigrated it. That argument would have been natural if Reckitt alleged that the soap shown in the advertisement alone constituted denigration of its product. However, the overall effect on the viewer – the shape of the soap, the green packaging, the number of times the soap was shown, the suggestion made that antiseptic soaps are bad for the skin, as they allow germ build up – is complained to constitute what is termed as a defamatory innuendo. This court had, earlier in Dabur India, recognized that clever advertising can suggest something which is plainly not said, and create the desired impact in the mind of the viewer. The innuendo, or the suggestion of

something more than what is spoken, is one such device. **Tolley** (supra) was a case which used a pun and a limerick; there have been other instances where different suggestions and innuendos have been held to be slanderous or disparaging. In **Kiam v. Neil,** 1996 EMLR 493, the claimant, a prominent businessman had appeared in advertisements and liked a razor so much that he bought the company. The complained newspaper publication alleged that a Bank stated that the plaintiff had defaulted on a GBP ú 13.5 million loan and that he had filed for bankruptcy, neither of which was true. The newspaper apologized. However, the claimant alleged a libel, based on an innuendo to members of the public who had bought razors relying on a promise of a refund if they were not satisfied, that the plaintiff had induced them to purchase when he was not in a position to fulfil the promise. The innuendo was founded on packaging for the razor which bore a photograph of the plaintiff and a statement about a refund. The defendants did not admit the innuendo. The court upheld the decision that the innuendo was defamatory of the plaintiff. This discussion is best summed up with in the words of Lord Reid in **Lewis v. Daily Telegraph** [1963] 2 All E.R. 151, that the ordinary sense and context of words is not their "legal sense" because:

> *"The ordinary man does not live in an ivory tower and he is not inhibited by the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs ... What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning."* (emphasis supplied)

59. In the present case, the Court has to be sensitive and alive to the fact that viewership of television channels and electronic media is diverse and widespread. The learned Single Judge found, and we see no infirmity in this regard, that DETTOL's market leadership in the antiseptic liquid market made it particularly vulnerable in the impugned advertisement.

In this context, the Court usefully recollects what was stated in a previous disparagement action (**Glaxo Smithkline Consumer Healthcare Limited & ors v. Heinz India Private Limited & Anr.,** I.A. No.15233/2008 in CS (OS) No.2577/2008, decided on 12.11.2010) though in the course of interlocutory injunction proceedings):

> *"This Court is conscious of the powerful and lasting impact that audio visual images have on viewers. Unlike the printed word, which is processed analyzed, and assimilated uniquely by each individual, an advertisement in the electronic media, particularly, has a different impact. First, it has a wider spread; it is perceived aurally through different senses, such as sound, visual, and printed. The suggestive power of this medium is greater. Second, such advertisements use several different tools, like music, dialogue, colors, and other aids, to bring home the message. Advertisements through this medium can, and do operate at conscious and subconscious levels; their power of suggestion extends not just to the discerning, or educated viewer, but to an entire range of viewership, with diverse income earning capacities, educational attainments, tastes, and so on. They influence even children. The impact of a catchy phrase, a well acted skit or story line, or even distinctive sounds or distinctive collocation of colors, can well define the brand or product's image, by imprinting it in the public memory forever."*

Here, though at a superficial level, HUL targeted antiseptic soaps and elaborated the ill-effects of antiseptics on the skin, the combined effect of this message with the three visuals, two distinctly (though briefly) showing Dettol soap, with its unique colour, curvature and shape suggested powerfully to ordinary and reasonable viewer that the soap being spoken against in the advertisement was none other than a Reckitt product. Though not strictly accurate, the innuendo was in the nature of a commercial double entendre where the hidden meaning was intended to impact the viewer more than the obvious, superficial one. This plainly is disparagement, and a slander of Reckitt's DETTOL Original; the Single Judge arrived at the correct finding in that regard and the Court hereby affirms it.

60. As far as HUL's argument with respect to its test reports go, this Court is of opinion that they are of little relevance. HUL may be

justified in saying that antiseptic soaps cause skin damage; however that is not the point it seeks to drive home in the impugned advertisement; the plaintiff Reckitt does not claim that its product is an antiseptic soap, nor does it say that such result can follow from use of such class of soaps. What is relevant is that the message conveyed through the impugned advertisement is loud and clear: that Reckitt's soap (the depiction of an "ordinary antiseptic soap") is bad for the skin. Likewise, though HUL has produced Exhibits DW-1/1, DW1/2 and DW-1/3 to show that other oval shaped, orange coloured and green wrapper packaged soaps exist, it made no attempt to co-relate the shapes and colour with specific products. Nor was its witness, DW-1 able to do so. In these circumstances, the argument that the plaintiff could not complain about being targeted by the impugned advertisement is insubstantial and unpersuasive.

Correctness of the approach of the Single Judge as to damages

61. In this section of the judgment, this court proposes to discuss the correctness of award of damages by the learned Single Judge in the impugned judgment. As noticed previously, the Single Judge felt that the plaintiff, Reckitt had been unable to prove the damages suffered on account of disparagement; yet award of punitive damages were called for. The defendant, HUL questions the grant of punitive damages whereas the plaintiff Reckitt complains that general or compensatory damages ought to have been awarded.

62. It is an accepted principle in English law that general damages are "at large" in the case of defamation, including disparagement, slander, etc. This was first stated in **South Hetton Coal Company Limited v. North-Eastern News Association Limited,** [1894] 1 QB 133 that "if the case be one of libel - whether on a person, a firm, or a company - the law is that damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case." It is important that a successful plaintiff is allowed to recover such damages as would compensate for the loss of its reputation. These principles were re-stated in **John v MGN Ltd** [1997] QB 586, where the Court of Appeal held that:

> *"The successful plaintiff in a defamation action is entitled to recover, as general compensatory damages, such sum as will compensate him for the wrong he has suffered. That sum must*

*compensate him for the damage to his reputation; vindicate his good name; and take account of the distress, hurt and humiliation which the defamatory publication has caused. In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be. The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people. A successful plaintiff may properly look to an award of damages to vindicate his reputation: but the significance of this is much greater in a case where the defendant asserts the truth of the libel and refuses any retraction or apology than in a case where the defendant acknowledges the falsity of what was published and publicly expresses regret that the libellous publication took place. It is well established that compensatory damages may and should compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way." 76. Of course, a company stands in a slightly different position, for it has no feelings to hurt, and it follows that considerations of aggravation which might be relevant if the claimant is an individual do not apply. However, the entitlement of a company to recover general damages has recently been affirmed by the House of Lords: see **Jameel v Wall Street Journal** [2007] 1 AC 359. A company's good name is a thing of value, but it can only be hit in its pocket, and there is no evidence here of actual financial loss. That is not to say that it may not merit vindication. The function of damages for vindication was well explained by Lord Hailsham in **Broome v Cassell** [1972] AC 1027 at 1071c-e in terms of the need, 'in case the libel, driven underground, emerges from its lurking place at some future date', for the claimant (whether personal or corporate) to be able to point to a sum sufficient to convince a bystander of the baselessness of the charge. Of course, those words were spoken in the context of a jury award, and it could fairly be said that the need for vindication by an award of*

damages is less in a case where some vindication is provided by a reasoned judgment."

This was followed in **Applause Store Productions Limited and Firscht v. Raphael** [2008] EWHC 1781, where the plaintiff complained of libel on account of a fake Facebook identity which falsely described the claimant's sexual orientation, his relationship status (that is to say, whether he was single or in a relationship), his birthday, and his political and religious views. Not all this information was truthful or accurate, and besides all of it was private information. The Court of appeal followed **John** (supra) and awarded substantial damages. Earlier, **Iin Jameel v. Wall Streeet Journal** 2007 (1) AC 379, the rule was re-stated as follows:

"...under the current law of England and Wales a trading company with a trading reputation in this country may recover general damages without pleading or proving special damage if the publication complained of has a tendency to damage it in the way of its business."

In the same judgment, the Court also reiterated the existing law that once defamation s proved, the law presumes damage- a proposition which applies to a trading company also. Further, the Court held that:

"The presumption of damage

*119. Defamation constitutes an injury to reputation. Reputation is valued by individuals for it affects their self-esteem and their standing in the community. Where reputation is traduced by a libel "the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights" (Bowen LJ in **Ratcliffe v Evans** [1892] 2 QB 524 at 528). It is accepted that the rule applies and should continue to apply to individuals. But it is argued that it should no longer be applied to corporations. Corporations, it is said, have no feelings to be hurt and cannot feel shame. If they are to sue for libel they should be required to show that the libel has caused them actual damage.*

120. These arguments, in my opinion, miss the point. The reputation of a corporate body is capable of being, and will usually be, not simply something in which its directors and

shareholders may take pride, but an asset of positive value to it. Why else do trading companies pay very substantial sums of money in advertising their names in TV commercials which usually say next to nothing of value about the services or products on offer from the company in question but endeavour to present an image of the company that is attractive and likely to cement the name of the corporation in the public memory? Why do commercial companies sponsor sporting competitions, so that one has the XLtd Grand National or the YLtd Open Golf Championship or the ZLtd Premiership? It is surely because reputation matters to trading companies and because these sponsorship activities, associating the name of the company with popular sporting events, are believed to enhance the sponsor's reputation to its commercial advantage. The organisers of a variety of activities some sporting, some cultural, some charitable, are constantly on the look-out for sponsorship of the activity in question by some commercial company. The choice of sponsor and the reputation of the sponsor matter to these organisers. Who would these days choose a cigarette manufacturing company to sponsor an athletic event or a concert in aid of charity? If reputation suffers, sponsorship invitations may be reduced, advertising opportunities may become difficult, customers may take their custom elsewhere. If trade suffers, profits suffer.

121. It seems to me plain beyond argument that reputation is of importance to corporations. Proof of actual damage caused by the publication of defamatory material would, in most cases, need to await the next month's financial figures, but the figures would likely to be inconclusive. Causation problems would usually be insuperable. Who is to say why receipts are down or why advertising has become more difficult or less effective? Everyone knows that fluctuations happen. Who is to say, if the figures are not down, whether they would have been higher if the libel had not been published? How can a company about which some libel, damaging to its reputation, has been published ever obtain an interlocutory injunction if proof of actual damage is to become the gist of the action?

122. There is no doubt that, as the case law now stands, a libel is actionable per se at the suit of a corporation as it is at the

suit of an individual, without the need to prove that any actual damage has been caused. In the South Hetton Coal Co Ltd case [1894] 1 QB 133 the plaintiff, a colliery company, complained of a libel that had attacked the company in respect of its management of company houses in which some of its colliery workers lived. The Court of Appeal held that the libel was actionable per se and, at p 140, that "... the plaintiffs would be entitled to damages at large, without giving any evidence of particular damage."

In the United States of America, too, the difficulty which a defamed or slandered claimant, particularly a commercial enterprise is put to in proving empirically and accurately the damages or injury to its reputation and enterprise has been recognized. It was thus, held in **Story Parchment Co. v. Paterson Parchment Paper Co.,** 282 U.S. 555 (1931) that:

" Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it is enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise..... If the damage is certain, the fact that its extent is uncertain does not prevent a recovery."

63. In the present case, the plaintiff (Reckitt) has been able to prove, successfully, that HUL telecast the impugned 30 second advertisement on a large number of occasions (2763 times, to be precise, according to Ex. PW-1/19). The innuendo was cleverly designed to suggest that Reckitt's DETTOL Original caused damage to the skin. The advertiser, i.e. HUL, was conscious that it was crossing the boundary between permissible "puffing" and what was prohibited in law. The evidence on record, in the form of HUL's witnesses. testimony, is that Rs.2.5 crores was spent in July 2007 alone for advertising its product. HUL also admitted during the trial that the DETTOL Original brand was worth Rs.200 crores. Such being the case, this Court holds that the Single Judge's reluctance to award general damages was not justified. It would be necessary to mention in this context that it may not be possible for an otherwise successful plaintiff, in a disparagement or slander of

goods action to always quantify the extent of loss; there would necessarily be an element of dynamism in this, because of the nature of the product, the season it is sold in, the possible future or long term impact that may arise on account of the advertisement, etc. Therefore, courts the world over have resorted to some rough and ready calculations.

64. In view of the evidence presented before this Court (i.e. the number of times the advertisement was telecast, the quantum of advertisement expenses of HUL, the amount spent by Reckitt, to advertise its product, etc) this Court is of opinion that the plaintiff is entitled to recover general damages to the tune of Rs. 20 lakhs. The impugned judgment and order is modified to that extent, and the cross objection by Reckitt, is consequently allowed in these terms.

65. As far as punitive damages are concerned, the learned Single Judge relied in Lokesh Srivastava and certain other rulings. Here, since the Court is dealing with a final decree – and a contested one at that (unlike in the case of trademark and intellectual property cases, where the courts, especially a large number of Single Judge decisions proceeded to grant such punitive damages in the absence of any award of general or quantified damages for infringement or passing off), it would be necessary to examine and re-state the governing principles.

66. **Rookes v. Barnard,** [1964] 1 All ER 367, is the seminal authority of the House of Lords, on the issue of when punitive or exemplary (or sometimes alluded to as "aggravated") damages can be granted. The House defined three categories of case in which such damages might be awarded. These are:

> a. Oppressive, arbitrary or unconstitutional action any the servants of the government;
>
> b. Wrongful conduct by the defendant which has been calculated by him for himself which may well exceed the compensation payable to the claimant; and c. Any case where exemplary damages are authorised by the statute.

The later decision in **Cassell & Co. Ltd. v. Broome,** 1972 AC 1027, upheld the categories for which exemplary damages could be awarded, but made important clarificatory observations. Those relevant for the present purpose are reproduced below:

> *"A judge should first rule whether evidence exists which entitles a jury to find facts bringing a case within the relevant categories, and, if it does not, the question of exemplary damages should be withdrawn from the jury's consideration. Even if it is not withdrawn from the jury, the judge's task is not complete. He should remind the jury: (i) that the burden of proof rests on the plaintiff to establish the facts necessary to bring the case within the categories. (ii) That the mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character. They can and should award nothing unless (iii) they are satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium in the sense I have explained and (iv) that, in assessing the total sum which the defendant should pay, the total figure awarded should be in substitution for and not in addition to the smaller figure which would have been treated as adequate solatium, that is to say, should be a round sum larger than the latter and satisfying the jury's idea of what the defendant ought to pay. (v) I would also deprecate, as did Lord Atkin in Ley v. Hamilton, 153 L.T. 384 the use of the word "fine" in connection with the punitive or exemplary element in damages, where it is appropriate. Damages remain a civil, not a criminal, remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that in making such an award they are putting money into a plaintiff's pocket, and not contributing to the rates, or to the revenues of central government." (emphasis supplied).*

The House of Lords, in its discussion, remarked crucially that there is a considerable subjective element in the award of damages in cases involving defamation and similar actions. Courts, it remarked, used terminology to reflect overlapping, and sometimes undesirable ideas underlining the considerations weighing grant of damages:

> *"In my view it is desirable to drop the use of the phrase "vindictive" damages altogether, despite its use by the county court judge in Williams v. Settle [1960] 1 W.L.R. 1072. Even when a purely punitive element is involved, vindictiveness is not a good motive for awarding punishment. In awarding "aggravated" damages the natural indignation of the court at*

the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.

Likewise the use of "retributory" is objectionable because it is ambiguous. It can be used to cover both aggravated damages to compensate the plaintiff and punitive or exemplary damages purely to punish the defendant or hold him up as an example.

As between "punitive" or "exemplary," one should, I would suppose, choose one to the exclusion of the other, since it is never wise to use two quite interchangeable terms to denote the same thing. Speaking for myself, I prefer "exemplary," not because "punitive" is necessarily inaccurate, but "exemplary" better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that "tort does not pay" by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its effect.

The expression "at large" should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent. It would be convenient if, as the appellants. counsel did at the hearing, it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in ***Rookes v. Barnard*** *[1964] A.C. 1129, 1221, when he defines the phrase as meaning all cases where "the award is not limited to the pecuniary loss that can be specifically proved." But I suspect that he was there guilty of a neologism. If I am wrong, it is a convenient use and should be repeated.*

Finally, it is worth pointing out, though I doubt if a change of terminology is desirable or necessary, that there is danger in hypostatising "compensatory," "punitive," "exemplary" or "aggravated" damages at all. The epithets are all elements or considerations which may, but with the exception of the first need not, be taken into account in assessing a single sum. They are not separate heads to be added mathematically to one another."

67. In India, the Supreme Court has affirmed the principles in **Rookes** (supra) and **Cassel** (supra). Interestingly, however, the application in those cases has been in the context of abuse of authority leading to infringement of Constitutional rights or by public authorities (ref. **Ghaziabad Development Authority v. Balbir Singh,** (2004) 5 SCC 6; **Lucknow Development Authority v. M.K. Gupta,** 1994 SCC (1) 243). As yet, however, the Supreme Court has not indicated the standards which are to be applied while awarding punitive or exemplary damages in libel, tortuous claims with economic overtones such as slander of goods, or in respect of intellectual property matters. The peculiarities of such cases would be the courts, need to evolve proper standards to ensure proportionality in the award of such exemplary or punitive damages. The caution in Cassel that "[d]amages remain a civil, not a criminal, remedy, even where an exemplary award is appropriate, and juries should not be encouraged to lose sight of the fact that in making such an award they are putting money into a plaintiff's pocket...." can never be lost sight of. Furthermore – and perhaps most crucially –the punitive element of the damages should follow the damages assessed otherwise (or general) damages; exemplary damages can be awarded only if the Court is "satisfied that the punitive or exemplary element is not sufficiently met within the figure which they have arrived at for the plaintiff's solatium". In other words, punitive damages should invariably follow the award of general damages (by that the Court meant that it could be an element in the determination of damages, or a separate head altogether, but never completely without determination of general damages).

68. This court is of the opinion that the impugned judgment fell into error in relying on the decision in **Times Incorporated v. Lokesh Srivastava** 116 (2005) DLT 569. A Single Judge articulated, in his ex parte judgment in a trademark infringement action, as follows:

"This Court has no hesitation in saying that the time has come when the Courts dealing actions for infringement of trade-marks, copy rights, patents etc. should not only grant compensatory damages but award punitive damages also with a view to

discourage and dishearten law breakers who indulge in violations with impunity out of lust for money so that they realize that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them. In ***Mathias v. Accor Economy Lodging, Inc.*** *reported in 347 F.3d 672 (7th Cir. 2003) the factors underlying the grant of punitive damages were discussed and it was observed that one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes. It was further observed that the award of punitive damages serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and prosecution. If a to tortfeasor is caught only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away This Court feels that this approach is necessitated further for the reason that it is very difficult for a plaintiff to give proof of actual damages suffered by him as the defendants who indulge in such activities never maintain proper accounts of their transactions since they know that the same are objectionable and unlawful. In the present case, the claim of punitive damages is of Rs.5 lacs only which can be safely awarded. Had it been higher even, this court would not have hesitated in awarding the same. This Court is of the view that the punitive damages should be really punitive and not flee bite and quantum thereof should depend upon the flagrancy of infringement."*

With due respect, this Court is unable to subscribe to that reasoning, which flies on the face of the circumstances spelt out in Rookes and later affirmed in Cassel. Both those judgments have received approval by the Supreme Court and are the law of the land. The reasoning of the House of Lords in those decisions is categorical about the circumstances under which punitive damages can be awarded. An added difficulty in holding that every violation of statute can result in punitive damages and proceeding to apply it in cases involving economic or commercial causes, such as intellectual property and not in other such matters, would be that even though statutes might provide penalties, prison sentences and fines (like

under the Trademarks Act, the Copyrights Act, Designs Act, etc) and such provisions invariably cap the amount of fine, sentence or statutory compensation, civil courts can nevertheless proceed unhindered, on the assumption that such causes involve criminal propensity, and award "punitive" damages despite the plaintiff's inability to prove any general damage. Further, the reasoning that "one function of punitive damages is to relieve the pressure on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes" is plainly wrong, because where the law provides that a crime is committed, it indicates the punishment. No statute authorizes the punishment of anyone for a libel- or infringement of trademark with a huge monetary fine-which goes not to the public exchequer, but to private coffers. Moreover, penalties and offences wherever prescribed require the prosecution to prove them without reasonable doubt. Therefore, to say that civil alternative to an overloaded criminal justice system is in public interest would be in fact to sanction violation of the law. This can also lead to undesirable results such as casual and unprincipled and eventually disproportionate awards. Consequently, this court declares that the reasoning and formulation of law enabling courts to determine punitive damages, based on the ruling in Lokesh Srivastava and Microsoft Corporation v. Yogesh Papat and Another, 2005 (30) PTC 245 (Del) is without authority. Those decisions are accordingly overruled. To award punitive damages, the courts should follow the categorization indicated in **Rookes** (supra) and further grant such damages only after being satisfied that the damages awarded for the wrongdoing is inadequate in the circumstances, having regard to the three categories in Rookes and also following the five principles in Cassel. The danger of not following this step by step reasoning would be ad hoc judge centric award of damages, without discussion of the extent of harm or injury suffered by the plaintiff, on a mere whim that the defendant's action is so wrong that it has a "criminal" propensity or the case merely falls in one of the three categories mentioned in Rookes (to quote Cassel again – such event "does not of itself entitle the jury to award damages purely exemplary in character").

69. Reverting to the facts of this case, the defendant clearly was aware about its wrong doing and the harm which would ensue to HUL because of the published disparagement. Yet it went ahead and aired it in almost all the national and a large number of regional channels with repetitiveness. The deliberation points at an aim to denigrate the plaintiff's

product and harm its reputation. At no stage did it – even in these proceedings – offer to make amends. In the circumstances, the award of punitive damages was warranted. The award of general damages through this judgment (although of a figure of Rs.20 lakhs) is moderate, since the advertisement was aired over 2700 times and seen – and intended to be seen – by millions of viewers. As observed in **John** (supra)

> *"The extent of publication is also very relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people.."*

Having regard to all these circumstances, the court is of opinion that the award of Rs.5 lakhs as exemplary damages in the facts of this case was justified and not disproportionate; it is accordingly upheld.

70. In view of the above discussion, it is held that this appeal has no merit. It is accordingly dismissed, but with costs, quantified at Rs. 55,000/-. The cross objections however succeed and the decree of the learned Single Judge shall be modified. In addition to injunction and punitive damages assessed by the impugned judgment, the plaintiff/Reckitt is also entitled to a decree for Rs.20 lakhs. The cross objections are allowed to that extent. The plaintiff shall in addition to the costs of the appeal, be also entitled to costs of the cross objection and counsel's fee, assessed at Rs.25,000/-.

ILR (2014) II DELHI 1362
RFA (OS)

SWARAN LATA AND ORS. ....APPELLANTS

VERSUS

SHRI KULBHUSHAN LAL AND ORS. ....RESPONDENTS

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

RFA (OS) NO. : 11/2010, C.M. NO. : 1950/2010 **DATE OF DECISION: 31.01.2014**

(A) Code of Civil Procedure, 1908—S. 9—Suit—Suit for partition possession—Hindu Joint Family Property—Co-parcenerary property—Hindu Succession Act—Amendment of S. 6—Appellants were three sisters—filed suit for partition against two brothers and two sisters—Third brother Sudharshan Lal died on 01.02.1978—Father Bakshi Ram died on 10.02.1960—Mother Smt. Chanan Devi died 03.08.1978—Suit dismissed by learned Single Judge—Appellant contended before the partition of the country the family was a Hindu Undivided Family (HUF) and father ran various businesses in the name of Bakshi Ram & Sons in a part of Punjab now in Pakistan—Post partition—Bakshi Ram allotted various properties in lieu of those left properties numbering 08 and various businesses run by using the funds of HUF—Respondent contended—The various properties self acquired properties and not co-parcernery properties—Secondly the properties already partitioned post the death of Bakshi Ram— Thirdly since partition had already taken place hence the 2005 Amendments of Section 6 of Hindu Succession Act not operation — lastly the properties governed by Succession Rules under Delhi Land Reforms Act and subject matter

beyond the jurisdiction of the Court — Held In concurrence with Ld. Single judge that various properties were Hindu Joint Family Property — further held — deemed partition cannot be said to have taken place merely on the death of family member — instead — the operation of S. 6 Amendment would not depend on date of institution of the suit or at the time of intermediate order—But on whether the partition actually took place either through by registered deed of partition or by decree of the court before or after 2005 Amendment—In the present case the partition was yet to take place—Further Held—2005—Amendment to the Hindu Succession Act would be operative and finally held subject matter of Land Reform Act —rural—agriculture properties rather than urban land—The case in present appeal—No limitation on the jurisdiction of the court—Finding and judgment of learned single judge set aside—Suit remitted for further proceedings to carry out partition of the property in accordance with the law—Appeal allowed.

(B) Delhi Land Reform Act, 1954 (DLR Act)—S.185—Bar of the jurisdiction of the Civil Court—The Bar only applies to rural—Agriculture properties—The area notified as urbanized—Out of the purview of DLR ACT—Held—Does not bar the jurisdiction of the Civil Court.

(C) Hindu Succession (Amendment) Act. 2005—S.6—Amendment—S.6(1)—not applicable partition or testamentary disposition of property before 20th December, 2004—Prospective in nature—Applicable to pending suits—Preliminary partition decree—Does not amount to partition—Would not apply to partition by way of settlement—Registered instrument of partition-By oral arrangements of the parties—Decree of the court—Held—Amendment applicable as partition yet to take place.

Indeed, this question has been considered by the Supreme Court in **Ganduri Koteshwaramma and Anr. v. Chakiri Yanadi and Anr.,** 2011 (12) SCR 968. There, a suit for family partition was filed prior to the 2005 amendment, and moreover, two preliminary decrees were passed by the Trial Court on 19.03.1999 and 27.09.2003, indicating the shares of the parties. Accordingly, the question before the Supreme Court was:

> *"In light of a clear provision contained in the Explanation appended to Sub-section (5) of Section 6, for determining the non-applicability of the Section, what is relevant is to find out whether the partition has been effected before December 20, 2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. In the backdrop of the above legal position with reference to Section 6 brought in the 1956 Act by the 2005 Amendment Act, the question that we have to answer is as to whether the preliminary decree passed by the trial court on March 19, 1999 and amended on September 27, 2003 deprives the Appellants of the benefits of 2005 Amendment Act although final decree for partition has not yet been passed."* **(Para 27)**

In answering that question, Court held that neither the filing of the suit nor a preliminary decree constitutes a partition within the meaning of the amended Section 6. Thus, the newly created rights would be available to the parties. Specifically, the Court noted:

> "16. The legal position is settled that partition of a Joint Hindu family can be effected by various modes, inter-alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the court. In the present case, admittedly, the partition has not been effected before December 20, 2004 either by a registered instrument of partition or by a decree of the court. The only stage that has reached

in the suit for partition filed by the Respondent No. 1 is the determination of shares vide preliminary decree dated March 19, 1999 which came to be amended on September 27, 2003 and the receipt of the report of the Commissioner.

17. A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation." **(Para 28)**

It is clear from the decisions in **Sai Reddy** (supra), **Ganduri Koteshwaramma** (supra) and **Prema** (supra) that a partition of the Hindu Joint Family – that crystallizes each member's interest, and thus makes the interests immune to further changes in the law – can only take place in the manner prescribed by the HSA. A deemed partition under the proviso to Section 6, HSA is not an actual partition that crystallizes the interest of all members of the HUF, but only a legal construction introduced by the legislature to determine how the interests of the deceased would devolve upon his heirs if a Class I female relative is alive. The purpose of this fiction of deemed partition (as opposed to following the simple rule of survivorship otherwise) is that Class I female heirs also receive a share in the coparcenary property of the deceased male, as they would otherwise be excluded (not being coparcenors themselves, pre the 2005 Amendment). To argue that such deemed partition crystallizes

the interest of the daughters finally, and that any rights accruing to them at a later stage which grant an interest in the coparcenary property are unenforceable, is contrary to the terms and the spirit of the proviso to Section 6 as it existed before the 2005 Amendment and the letter of the amendment itself. **Sai Reddy** (supra), **Prema** (supra) and **Ganduri Koteshwaramma** (supra) have all consistently held that the mere severance in status, sought to be brought about by the institution of a partition suit, does not result in immutable shares. These decisions also took note of **Phoolchand & Anr v. Gopal Lal** AIR 1967 SC 1470 and even an older decision (of the Privy Council) in **Jadunath Roy and Ors. v. Parameswar Mullick and Ors.,** AIR 1940 PC 11, where it was held that even after a preliminary decree in a partition suit is made, the Court is not only powerless, but has the duty to reflect later developments, which could necessitate re-adjustment of shares (of the parties) on account of fluctuation in the coparcenary or the joint family. **(Para 32)**

This matter has been previously considered by this Court. A learned Single Judge in **Trikha Ram v. Sahib Ram,** 69 (1997) DLT 749, held that where an area is urbanized under a notification under Section 507 of the Delhi Municipal Corporation Act, 1957, the provisions of the Delhi Land Reforms Act would cease to apply. This decision was followed by another Single Judge in **Madho Prasad v. Shri Ram Kishan and Ors.,** 2001 (7) AD (Delhi) 72. However, given a contrary opinion in WP(C) No. 4143/2003, dated 25.08.2004, the matter was referred to a Division Bench of this Court, in a decision reported as **Smt. Indu Khorana v. Gram Sabha and Ors.,** MANU/DE/0969/2010, where the reference was categorically answered in the following terms:

"11. We thus hold that once rural area is urbanized by issuance of notification under Section 507(a) of the Delhi Municipal Corporation Act, 1957, provisions of Delhi Reforms Act will cease to apply. The reference stands answered accordingly." **(Para 39)**

That decision was subsequently sought to be impugned and referred to a larger bench in **Narain Singh and Anr. v. Financial Commissioner and Ors.,** in LPA No. 591/2008, decision dated 22.11.2012, where the Division Bench of this Court confirmed the view in **Indu Khorana** (supra), holding that "the very purport of a Notification under Section 507(a) of the DMC Act is to convert the land from agricultural to urban." In view of these consistent findings, it is clear that the effect of the notification under Section 507 in this case were to remove the four properties from the purview of the Delhi Land Reforms Act as the subject-matter of the Act is rural agricultural properties, rather than urban lands. Accordingly, this finding of the learned Single Judge that the four properties in question were not to devolve upon the appellant here in the share ratio above specified is liable to be set aside. **(Para 27)**

Important Issue Involved (a) Neither the filling of the suit nor a preliminary decree constitutes a partition within the meaning of amended S.6 of Hindu Succession Act (b) A partition of the joint Hindu family can be effected by various modes, viz. by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court (c) The Land Reform Act is not applicable to the properties which are urbanized

[Gu Si]

APPEARANCES:

FOR THE APPELLANTS : Sh. Suresh Singh and Sh. Rajneesh Chaudhry, Advocates.

FOR THE RESPONDENTS : Nemo.

CASES REFERRED TO:

1. *Prema* vs. *Nanje Gowda and Ors.,* 2011 (6) SCALE 28.
2. *Ganduri Koteshwaramma and Anr.* vs. *Chakiri Yanadi and Anr.,* 2011 (12) SCR 968.

3. *Smt. Indu Khorana* vs. *Gram Sabha and Ors.,* MANU/DE/0969/2010.
4. *Narain Singh and Anr.* vs. *Financial Commissionerand Ors.,* in LPA No. 591/2008.
5. *Mukesh* vs. *Bharat Singh,* 149 (2008) DLT 114.
6. *D.S. Lakshmaiah and Anr.*vs. *L. Balasubramanyam and Anr.,* 2003 (7) SCALE 1.
7. *Madho Prasad* vs. *Shri Ram Kishan and Ors.,* 2001 (7) AD (Delhi) 72.
8. *Trikha Ram* vs. *Sahib Ram,* 69 (1997) DLT 749.
9. *S. Sai Reddy* vs. *S. Narayana Reddy and Ors.,* (1991) 3 SCC 647.
10. *Phoolchand & Anr* vs. *Gopal Lal* AIR 1967 SC 1470.
11. *Jadunath Roy and Ors.* vs. *Parameswar Mullick and Ors.,* AIR 1940 PC 11.

RESUT: Appeal Allowed.

S. RAVINDRA BHAT, J.

C.M. NO. 1950/2010 (for condonation of delay)

For the reasons mentioned in the application, C.M. No. 1950/2010 is allowed.

RFA (OS) 11/2010

1. This is an appeal from an order of the learned Single Judge, whereby a suit for partition filed by sisters was dismissed. The orders of 19.04.2012 and 11.01.2013 reveal that the first three respondents (contesting parties in the suit) were served, despite which appearance had not been entered by them. The order of 11.01.2013 accordingly recorded that service was complete. It was in these circumstances that the appeal was heard finally and reserved for judgment. Before addressing the specifics of the properties involved in this partition suit, it is useful to record the family structure involved in this case.

2. The plaintiffs, three sisters filed the suit in 1990 [CS (OS) 2400/1990] against two brothers (the first two defendants/respondents) and two sisters (third and fourth defendants). A third brother, Sudarshan Lal,

had died on 1st February, 1978, before the institution of the suit, as a bachelor. The family thus had consisted of five sisters and three brothers. Their father was Bakshi Ram, who died on 10th February, 1960, and their mother was Smt. Chanan Devi, who died on 3rd August, 1978. As regards Sudarshan Lal, the son of Madan Mohan Sharma, the second defendant, one Prem Prakash Sharma claimed that Lal had left a will in his favour, and that under the will so set up, any share in the property Lal had stood bequeathed to him. For this, he relied on Probate Case No. 34/1988, which he had filed before the institution of the present suit in respect of Lal's will. Although the probate case was decided in Prem Prakash Sharma's favour by an order dated 19th August, 2005 (the appeal against which, filed by Swaran Lata, as FAO(OS) 103/2005 was dismissed), the learned Single Judge by order dated 25th April, 2008 did not allow him (Prem Prakash Sharma) to be impleaded in the suit. However, the senior counsel for Prem Prakash Sharma was also heard by the Single Judge.

3. The case of the plaintiffs was that prior to the partition, the late Bakshi Ram and his family were settled in a part of Punjab that is now in Pakistan. At the time, the family was a HUF and Bakshi Ram, as karta, was running various businesses (as a contractor, and running a petrol pump) at the time. These businesses, it is claimed, were being run under the name and style of "Bakshi Ram & Sons". It is alleged that after partition, Bakshi Ram alongwith his family shifted from Pakistan to India, and submitted his claims with the Ministry of Rehabilitation (in India) with regard to various assets and properties concerning his businesses and also houses and other property left behind by him in Pakistan. The name of the applicant was "Bakshi Ram & Sons", through Bakshi Ram as the karta, and the address mentioned was 16/229, Joshi Road, Karol Bagh, New Delhi. Thus, the plaintiff urged that the claim was made by the late Bakshi Ram as the karta on behalf of a HUF.

4. As regards the properties left behind in Pakistan, the plaintiffs claimed that Bakshi Ram had purchased a factory site in the name of the firm *"Bakshi Ram & Sons"* sometime in the year 1930. Further, the plaintiffs state that he was the sole proprietor of a rice flour mill. The plaintiffs also claim that Bakshi Ram owned a petrol pump of the Burmah Shell Company, which he was running in Sheikhpura (which is now in Pakistan). Finally, the plaintiffs state that various business assets as well as various residential properties were acquired/built by Bakshi Ram

"whether in his personal name or in the name of Bakshi Ram & Sons, a Joint Hindu Family firm ..."

5. The suit alleged that post partition Bakshi Ram was allotted various properties in lieu of those left behind in Pakistan. First, the Burmah Shell Company allotted a petrol pump in Badarpur, Tehsil Mehrauli, Delhi to M/s. Bakshi Ram & Sons, a HUF firm, of which Bakshi Ram was karta. In addition, the plaintiffs allege that some compensation amount was also paid to Bakshi Ram, which was used by him to carry various businesses in Delhi and in connection with the improvement of properties in question. These were Plot No. 43 at Badarpur, Tehsil Mehrauli, Delhi (for a consideration of Rs. 950/-), one 'Kutti Machine' at Village Azadpur, Delhi, belonging to the Custodian of Evacuee Property (on a rental basis), and finally Bakshi Ram was also acting as a contractor of "rehra" stand at Farash Khana, GB Road, Delhi. Further, the plaintiffs allege that as against the amounts that Bakshi Ram was entitled to against his assessed claims, by way of compensation, a property – House No. XVI/318-323, Joshi Road, Karol Bagh, New Delhi was acquired by Bakshi Ram by adjusting a part of the compensation amount against the price of the said property. Crucially, the plaintiffs claim that the businesses etc. were run in the name of the HUF firm of Bakshi Ram & Sons, as it was being carried out earlier in Pakistan, till Bakshi Ram died on 10th February, 1960. It is claimed that Sudharshan Lal acted as the karta till his death in 1987.

6. The plaintiffs claim that after the purchase of these various properties (i.e. after migration from Pakistan), the family business (i.e. the Hindu Joint Family as it existed then) gradually prospered, and various other properties were acquired by the family from the funds generated. These were:

> (a) a plot bearing Khasra No. 2609/727-728, situated in Tughlakabad, Tehsil Mehrauli, Delhi, measuring 5 bighas, 1 biswa, was obtained by the family, and is being used to run a petrol pump. This plot,
>
> > *"as far as the plaintiffs know has been obtained by M/s. Bakshi Ram & Sons, a Joint Hindu Family firm and the Petrol Pump that is being run on the said plot also belongs to M/s. Bakshi Ram & Sons."*

(b) a plot, No. B-43, Friends Colony, New Delhi, which was allotted by the DDA in lieu of the DDA having acquired a part of the family land. Thus, the plaintiffs allege that "this plot was allotted by the DDA in lieu of acquisition of the Joint Hindu Family land ..."

(c) a plot bearing Khasra No. 32/28/1 and 32/28/2 measuring 2 bighas, 5 biswas as also a plot No. 32/28/3 were "acquired by the Joint Hindu Family in the name of M/s Bakshi Ram & Sons" in village Badarpur, Tehsil Mehrauli, Distt. Delhi. This plot too, the plaintiffs allege, "belongs to M/s. Bakshi Ram & Sons, the Joint Hindu Family firm."

(d) a plot bearing Khasra No. 231, measuring 2 bighas, 13 biswas, in village Tajpaul, Tehsil Mehrauli, Distt. Delhi, "in the name of M/s. Bakshi Ram & Sons and thus this was also a Joint Hindu Family Property", in the plaintiff's averments.

(e) a plot bearing Khasra No. 36/28/2 and 36/29/2 measuring 15 biswas, which the plaintiffs allege, "was also acquired by the family out of the Joint Hindu family funds in Village Badarpur, Tehsil Mehrauli, Delhi." However, the plaintiffs further aver that out of love and affection, this plot was purchased in the name of Smt. Chanan Devi, the widow of Bakshi Ram, i.e. the mother of the parties before the Court today.

(f) Residential house II-K/44, Lajpat Nagar, New Delhi, was again, the plaintiffs claim, "acquired out of the Joint Hindu Family Funds."

7. Further, the plaintiffs claimed that apart from the family business and income (i.e. the rental income from the above properties, and the income from businesses run), the brothers of the plaintiffs, i.e. the first two defendants, "had not carried on any other business nor they had any other source of income whatsoever." After Bakshi Ram's death, the plaintiffs claim that Sudarshan Lal carried on various businesses, held numerous bank accounts, fixed deposits and shares of various companies, all of which, though in the name of Sudarshan Lal, actually belonged to the HUF. However, the plaintiffs stated as follows:

"10.....The plaintiffs at the moment are not aware of the entire details of the various Bank Accounts/Fixed Deposits etc. standing in the name of late Sudarshan Lal as also the various Bank Accounts and Fixed Deposits etc. in the name of Joint Hindu Family firm M/s. Bakshi Ram & Sons and other firms stated in the suit. The details in this behalf are within the special knowledge of defendants No. 1 and 2. The plaintiffs are trying to ascertain the details in his behalf and shall furnish the same as soon as the same are known to the plaintiffs or are otherwise disclosed by the defendant Nos. 1 and 2....."

8. Based upon these facts alleged in the suit, the plaintiffs claimed that as Class I heirs of Bakshi Ram and Smt. Chanan Devi, under the Hindu Succession Act, 1956 (hereafter "the HSA"), they were entitled to one-seventh equal shares (i.e. sharing between the five sisters, and two brothers, except for Sudarshan Lal, who died as a bachelor), in the HUF properties and in the properties left behind by their mother. Further, as regards Sudarshan Lal's properties, it was argued that the plaintiffs alongwith the defendants, are his Class II legal heirs under the HSA, and thus entitled to a 1/7th share in all properties that stood in his name as well. As an alternative plea, it was argued that the properties of Sudarshan Lal were actually properties belonging to the HUF, and thus, the 1/7th share stood established on that count.

9. Furthermore, the plaintiffs claim that till the death of Bakshi Ram or till the death of Smt. Chanan Devi, or even till the death of Sudarshan Lal, no partition of the family properties had taken place and the properties as such continue to be joint with all the parties having their respective undivided share in the same.

10. The first two defendants (i.e. the two brothers) filed a common written statement; the third and fourth defendants did not appear and were set down ex parte. The two brothers pleaded that: (1) the first two plaintiffs, and non-contesting appellants in the present appeal, were married in 1944 and 1951, i.e. before the HSA in 1956, and thus, as such they were not members of the HUF; (2) that when Bakshi Ram died on 10th February, 1960, subsequently, on 21st February, 1960 all the members of the HUF assembled at the Kriya ceremony and agreed to severe the HUF, and apportion the property. In this connection they made an unambiguous and definite declaration of their intention to separate. Accordingly, it was argued that the plaintiffs, being party to such

agreement, were estopped from questioning the validity of the partition; (3) that the suit was time barred under Article 113, Limitation Act, 1963; (4) as regards the plaintiff's claim over the house No. XVI/318-323, Joshi Road, Karol Bagh, New Delhi, the brothers claimed that in terms of a settlement made between the members of the family (including the plaintiffs), the plaintiffs had relinquished their right/claim over the plot under a registered document in favour of Sudarshan Lal; (5) that the petrol pump in Pakistan belonged not to the HUF but to the partnership firm comprising Bakshi Ram, Sudarshan Lal and Kulbhushan Lal; (6) similarly, that the petrol pump allotted in 1947 by M/s. Burmah Shell in Badarpur by an agreement dated 01.12.1948 was to the partnership firm (and not the HUF); (7) the existence of the kutti machine and the rehra stand was denied; (8) that at the time of the demise of Sh. Bakshi Ram, the joint family properties comprised only of the above mentioned house at Joshi Road, Karol Bagh; plot number 43 of khasra number 36/28/2 and 36/29/2 in village Badarpur, and land bearing khasra numbers 32/28/1 and 32/28/2 in village Badarpur; (9) that the Karol Bagh house was acquired as against the compensation amount payable to Bakshi Ram and his three sons (as the partnership firm) in his name, and after his death, all parties to the present case relinquished their rights in the property in favour of Sudarshan Lal by a registered deed, and further, that the property was thus mutated in favour of Sudarshan Lal in the records of the MCD and the DDA; (9) Plot No.43 (bearing Khasra No.36/28/2 & 36/29/2) at Badarpur was acquired by Bakshi Ram from Ministry of Rehabilitation against the claims. On his demise and dissolution of the HUF the said plot vested in the mother of the parties Smt. Chanan Devi. She had in or about the year 1960 filed a suit in the court of Senior Sub-Judge, Delhi with respect to the plot No.43 seeking declaration of her rights as owner and Bhumidar thereof on the statement of her three sons. A decree for declaration was granted declaring her to be the owner and Bhumidar of the said lands; the said lands were also mutated in her name in the revenue records; (10) the plot in Khasra No.32/28/1 & 32/28/2 vested in terms of the family settlement in the three sons of Bakshi Ram and also mutated in their names; (11) that on the dissolution of HUF, three brothers had agreed to pay '10,000/- to each of the sisters and which stood paid; (12) that since September, 1958 all the brothers had been residing separately; it was denied that any of the businesses were of the HUF; (13) with respect to land admeasuring 5 bighas and 1 biswas in Tuglakabad it was stated that the same had been acquired by Sudarshan Lal out of

his own personal fund and by registered sale deed dated 11th June, 1960 and Bakshi Ram and Sons had nothing to do with the said land. He had leased out a part of the plot to Burmah Shell for the petrol pump and the petrol pump in the name and style of BE-AR Sales (Auto Grit) was functioning there since 1961 in partnership, between Sudarshan Lal and the Defendant No.1; subsequently Prem Prakash Sharma joined the said firm. It was denied that the petrol pump (Auto Grit) belonged to Bakshi Ram and Sons; it was further averred that the land underneath this was acquired and Sudarshan Lal had filed a writ petition in this Court challenging the said acquisition; during the pendency of the writ petition Sudarshan Lal expired and Prem Prakash Sharma was substituted in his place; (14) Sudarshan Lal had with his own monies in the year 1968 acquired the land measuring 2 bighas and 10 biswas at village Tehkhand and the sale deed thereof was in his name only and was his exclusive property; the same was acquired and in lieu thereof plot No. B-43 Friends Colony, New Delhi was allotted to Sudarshan Lal; (15) with respect to the land in Khasra No.32/28/1 & 32/28/2 in village Badarpur it was stated that though it belonged to Bakshi Ram but on his demise the lands were mutated in favour of his three sons under provisions of the Delhi Land Reforms Act; the said lands were acquired; the acquisition was also challenged by the three sons only of Bakshi Ram; (16) that there was no land bearing Khasra No.32/28/3 described by the plaintiffs; (17) land measuring 2 bighas 16 biswas in Khasra No.231, Village Tajpaul, Tehsil Mehrauli was the exclusive property of Sudarshan Lal acquired in 1957 and that in 1968 Sudarshan Lal had formed HUF in the name and style of Bakshi Ram and Sons and was its karta. (18) the house at Lajpat Nagar was in the tenancy of the second defendant since 1958; it was averred that the said house was purchased by Prem Prakash Sharma by sale deed dated 10th August, 1989; the house has since been sold; (18) BE-AR Sales was a partnership of Sudarshan Lal and the first defendant and it was carrying on business in the name and style of Auto Rest, Auto Rink and Auto Grit; subsequently Prem Prakash Sharma too joined the said firm. The petrol pump Auto Yard was the sole proprietary concern of the second defendant since April, 1966 and it had been converted into a partnership firm of the defendant No.2 and his wife since February 1987. The existence of any firm in the name and style of Sharma and Company was denied.

11. On 8th September, 1994, and later, on 11th December, 2001,

the following issues were framed by the Court:

"1. Whether plaintiffs 1 and 2 have any subsisting right and interest in the Joint Family Property despite their marriages in 1994 (1944) and 1951 respectively? OPP

2. Whether plaintiffs have a right to sue for partition of Joint Family Property?

3. Whether the suit is barred by time under Article 113 of the Limitation Act? OPD1D2

4. Whether there was severance of status of Joint Hindu Family of Bakshi Ram & Sons on 21.2.60? OPD1D2

5. What properties were held by Bakshi Ram & Sons at the time of death of Sh. Bakshi Ram on 10.2.60 OPP

6. What was the share of Bakshi Ram in the Joint Family Property at the time of his death? OPP

7. To what share of the share of late Bakshi Ram in the Joint Family Property is each plaintiff entitled? OPP

8. Whether the plaintiffs who alongwith defendant No.4 relinquished their right/claim over house No.XVI/318 and 323, Joshi Road, Karol Bagh, New Delhi, in favour of their brother Sudarshan Lal under registered documents can still lay claim over that house? OPP

9. Whether the plaintiffs can claim any share in lands bearing khasra Nos.32/28/1 and 32/28/2 which were mutated on the death of Bakshi Ram in the name of his three sons under the Delhi Land Reforms Act? OPP

10. Whether the plaintiffs can claim any share in plot No.43 bearing khasra No.36/28/2 and 36/29/2 situated in village Badarpur, Delhi, which was mutated in the name of their mother Chanan Devi on 18.2.63, after she had been declared as Bhumidar? OPP

11. Whether the plaintiffs can claim a share in any other property which was purchased or acquired by defendants 1 and 2 out of their own funds after the death of their father Bakshi Ram?

OPP 11A. Whether the suit is properly valued for the purpose of court fee and jurisdiction? If not its effect?

12. Relief."

12. It would be useful, at this juncture to tabulate the various properties that are sought to be partitioned by the appellant.

Property	Details
Petrol Pump	Badarpur, Tehsil Mehrauli One Kutti Machine Azadpur Rehra Stand Farash Khana, GB Road, Delhi Plot measuring 5 bigha, 1 Village Tughlakabad, Tehsil biswas Mehrauli Plot No. B-43 Friends Colony, New Delhi Plots of land bearing khasra numbers 36/28/1-3 Village Badarpur, Tehsil Mehrauli Plot measuring 15 bighas, bearing khasra number 36/28/2 and 29/2 Village Badarpur, Tehsil Mehrauli House No. II-K/44 Lajpat Nagar, New Delhi Businesses in the name of a) Auto Grit in Tughlakabad, Tehsil Mehrauli; b) Auto Rink at Badarpur, Tehsil Mehrauli, c) Auto Rest at Badarpur, d) Auto Yard on Mathura Road, e) BE AR Sales at Badarpur, f) a business in the name of Sharma and Company in Badarpur. Various other bank accounts, fixed deposits and jewellery, though details of these items have not been provided in the plaint, or the appeal memorandum. House No. 16/229 Joshi Road, Karol Bagh, New Delhi Plot of land bearing number 231 Village Tejpaul, Tehsil Mehrauli, Delhi

13. The learned Single Judge considered the evidence on record, and held that the amendment to Section 6 of the Hindu Succession Act, 1956 in 2005 (that made female members of the HUF members of the coparcenary as well) would not be applicable as the amendment was, in view of the dictum in **Mukesh v. Bharat Singh,** 149 (2008) DLT 114, not retrospective. The learned Single Judge consequently held that as the suit was instituted before the amendment, and further, as the demise of Bakshi Ram was 35 years prior to the amendment, the plaintiffs – as female members of the HUF – would have no right as co-parcenors. Furthermore, the learned Single Judge held that there was a deemed partition on the date of the death of Bakshi Ram, and the shares in the coparcenary property would be decided according to that event. However, the plaintiffs would, the learned Single Judge held, be entitled to a share by way of succession as Class I heirs under Section 8 of the HSA of late Bakshi Ram's share in the coparcenary property. Thus, on this latter ground, it was held that the plaintiffs did have the right to sue, but not

as coparcenors. On the question of limitation, the learned Single Judge held the first two defendants' plea –that the suit was time-barred because partition took place on the demise of Bakshi Ram in 1960 – was incorrect. It was held that this partition was not proved. On the contrary, the first and second defendants admitted existence of the HUF in the partnership deed of 1st April, 1968 and in WP(C) No. 1921/1986. With regard to the various business allegedly run by the HUF, the learned Single Judge noted that it was proved, by way of the partnership deed produced as Ex.P-20, that they were taken out of the HUF with effect from 01.04.1968, nearly 22 years prior to institution of the suit, and carried on in partnership between the male members of the family. With respect to claim to partition and rendition of accounts of these businesses were held to be time-barred.

14. On the question of which properties were part of the HUF at the time of the death of Bakshi Ram, i.e. on 10.02.1960, the learned Single Judge, based on admissions of the first and second defendants in the form of the partnership deed dated 1st April, 1968, held that the following properties were held jointly: a) the house at Joshi Road, Karol Bagh, b) Plot No. 43 comprising khasra number 36/28/2 and 36/29/2 at Village Badarpur, Delhi, c) plot of land bearing khasra number 32/28/1 and 32/28/2 at village Badarpur, Delhi, d) plot of land bearing number 231, village Tejpaul, Tehsil Mehrauli, Delhi and finally, e) a plot of land in Tughlakabad. Of these properties, Bakshi Ram's 1/5th share (the entire share being divided between the five members of the family who would share in the coparcenary, i.e. him, his wife, and three sons) would devolve upon the eight children and late Bakshi Ram's widow. Thus, the learned Single Judge held that each of the plaintiffs would be entitled to a 1/8th share of the 1/5th share of late Bakshi Ram. However, with respect to the house at Joshi Road, Karol Bagh, the Single Judge held that the plaintiffs had, by way of a registered relinquishment deed (which was admitted by the plaintiffs), surrendered any claim over that property to Sudarshan Lal. Further, with respect to Plot No. 43 comprising khasra number 36/28/2 and 36/29/2 at Village Badarpur, Delhi, the Single Judge held that it was admitted and established that the property stand mutated in the name of the mother, Smt. Chanan Devi, as the bhumidar and thus, the provisions of Section 51 of the Delhi Land Reforms Act, 1954 would apply, despite the fact that the land may have been urbanized. Accordingly, the learned Single Judge held that under Section 51, only male members

of the family would be entitled to the land, and the plaintiffs would be excluded from any share. Thus, in conclusion, the learned Single Judge held that the only properties in which the plaintiffs could have a share are those which were admitted in the partnership deed dated 1st April, 1968 minus those over which the claim was relinquished, or that were regulated by the Delhi Land Reforms Act. This, the learned Single Judge noted, left three properties in which the plaintiffs had a share, i.e. a) plot of land bearing khasra number 32/28/1 and 32/28/2 at village Badarpur, Delhi, b) plot of land bearing number 231, village Tejpaul, Tehsil Mehrauli, Delhi and finally, c) a plot of land in Tughlakabad. However, the learned Single Judge held that Section 185 of the Land Reform Act bars the jurisdiction of civil courts with respect to properties governed by the Act, irrespective of whether the lands were mutated in favour of the HUF or any individual family member. Accordingly, the learned Single Judge held that none of the three properties could be partitioned in this suit, given the bar under Section 185.

15. Impugning this order and judgment of the learned Single Judge as erroneous, counsel for the third plaintiff, urged that the finding that the properties in question were coparcenary properties, and not self-acquired properties and regulated by Section 8, HSA was incorrect. Learned counsel argued that there is no basis for holding that the properties are coparcenary, since no proof of their ancestral nature was on record. Further, learned counsel questioned the validity of the relinquishment deed in favour of Sudarshan Lal, urging that there is no citation that the executant signed in the presence of the attesting witnesses and the attesting witnesses signed in the presence of the executant, which is a requirement under law. Next, learned counsel argued that the learned Single Judge did not partition the 1/5th share of the mother, Chanan Devi, without providing any reasoning in the judgment, despite admitting that share. Finally, learned counsel argued that the learned Single Judge fell into error in holding that Section 6, HSA as amended in 2005 was inapplicable, as no partition took place before the institution of the suit, or till the date of the amendment. Counsel relied on proviso to Section 6(1) as well as Section 6(5) and argued that once the statute spelt out the conditions when the legislature had specifically provided as to what class of cases were excluded from the amendment, there was no question of the Single Judge holding that the appellant and other daughter's share in the property was confined to the father's 1/5th share, either on the basis of notional partition, or on

the understanding that a division took place upon the filing of the suit. In other words, as to what categories of partition are deemed to have concluded and become final having been expressly provided, the Court could not have denied the share of the daughters, which fell to them upon the enactment and coming into force of the 2005 amendment. Accordingly, learned counsel argued that since the HUF was intact as on the date of coming in force of the amendment-since no partition, much less a partition arising out of a final decree had been made, the finding of the learned Single Judge that a notional partition took place on the demise of Bakshi Ram and that it crystallized the rights of the first two defendants was contrary to the HSA.

16. Learned counsel also argued that the impugned judgment is unsustainable because several properties had been urbanized on account of notifications issued under Section 507(a) of the Delhi Municipal Corporation Act, 1957. It was submitted that on account of this development, the provisions of Delhi Reforms Act would not apply. Counsel relied on the decision of a Division Bench of this Court, in **Smt. Indu Khorana v. Gram Sabha and Ors.,** MANU/DE/0969/2010.

Analysis and Findings

17. Four questions arise for the consideration of the Court in this case: *first,* whether the various properties in question were coparcenary properties to begin with, or self-acquired properties of Bakshi Ram; *secondly,* whether the properties in question are to be deemed to be partitioned as on the date of the death of Bakshi Ram, or whether they are to be partitioned as on a later date; *thirdly,* whether the 2005 amendment to Section 6 is operative in this case; *consequently,* what are the shares of the parties; *fourthly,* whether any of the properties are governed by the succession rules under the Delhi Land Reforms Act, and thus, beyond the subject-matter jurisdiction of this Court.

18. On the first question, the learned Single Judge proceeded on the finding that the properties were coparcenary properties. The plaintiff's case itself is that Bakshi Ram alongwith his family shifted from Pakistan to India, and submitted his claims with the Ministry of Rehabilitation in India with regard to various assets and properties concerning his businesses, houses and other property left behind by him in Pakistan. In this application, the name of the applicant was "Bakshi Ram & Sons", through Bakshi Ram as the karta, and the address mentioned was 16/229

Joshi Road, Karol Bagh, New Delhi. Indeed, after migration, the plaint alleges that Bakshi Ram was allotted various properties in lieu of those left behind in Pakistan, thus also constituting joint family property. Indeed, it is undisputed that after the purchase of these various properties (i.e. after migration from Pakistan, and compensation paid by the government), the family business (i.e. the Hindu Joint Family as it existed then) gradually prospered, and various other properties were acquired by the family from the funds generated. These were: (a) a plot bearing Khasra No. 2609/727-728, situated in Tughlakabad, Tehsil Mehrauli, Delhi, measuring 5 bighas, 1 biswa, was obtained by the family, and is being used to run a petrol pump. This plot, *"as far as the plaintiffs know has been obtained by M/s. Bakshi Ram & Sons, a Joint Hindu Family firm and the Petrol Pump that is being run on the said plot also belongs to M/s. Bakshi Ram & Sons."* (b) a plot, No. B-43, Friends Colony, New Delhi, which was allotted by the DDA in lieu of the DDA having acquired a part of the family land. Thus, the plaintiffs allege that *"this plot was allotted by the DDA in lieu of acquisition of the Joint Hindu Family land ...*" (c) a plot bearing Khasra No. 32/28/1 and 32/28/2 measuring 2 bighas, 5 biswas as also a plot No. 32/28/3 were *"acquired by the Joint Hindu Family in the name of M/s Bakshi Ram & Sons"* in village Badarpur, Tehsil Mehrauli, Distt. Delhi. This plot too, the plaintiffs allege, *"belongs to M/s. Bakshi Ram & Sons, the Joint Hindu Family firm."* (d) a plot bearing Khasra No. 231, measuring 2 bighas, 13 biswas, in village Tajpul, Tehsil Mehrauli, Distt. Delhi, *"in the name of M/s. Bakshi Ram & Sons and thus this was also a Joint Hindu Family Property"*, in the plaintiff's averments. (e) a plot bearing Khasra No. 36/28/2 and 36/29/2 measuring 15 biswas, which the plaintiffs allege, *"was also acquired by the family out of the Joint Hindu family funds in Village Badarpur, Tehrul Mehrauli, Delhi."* (f) Residential house II-K/44, Lajpat Nagar, New Delhi, was again, the plaintiff's claim, "acquired out of the Joint Hindu Family Funds." Given these averments in the plaint, the Court does not find any reason to interfere with the finding of the learned Single Judge that the properties were not self-acquired properties of Bakshi Ram, but rather, joint family properties at the time.

19. On the second question, the learned Single Judge held that *"there is deemed to be a partition of the said HUF at the moment of the demise of Bakshi Ram..."* and thus, the shares are divided at that time itself. Under the HSA, on the death of a member of coparcenary, neither

the coparcenary nor the HUF is broken. Prior to the 2005 amendment, the coparcenary property continued to remain vested in the remaining coparceners by survivorship, i.e. the remaining surviving coparceners (i.e. male members of the family) hold the property jointly. As Mayne's Hindu Law and Usage records:

> *"The right of male members, which arise by birth are only ascertained on partition; for, no individual member of a family, whist it remains undivided, can predicate of the joint undivided property that he has any definite share. The interest of the member in the undivided property is not individual property but is a fluctuating interest liable to be diminished by births or increased by deaths in the family." (p. 667, 16thedn., Bharat Law House, 2003)* (emphasis supplied)

20. Accordingly, the mere death of a family member does not lead to a division of the coparcenary interest, but rather, a revision of it amongst the remaining coparcenors. This revision of the coparcenary interest was, in 1960, when Bakshi Ram died, regulated by the unamended Section 6 of the HSA, which read as follows:

> *"When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:*
>
> *PROVIDED that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.*
>
> *Explanation I: For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not."*

21. Therefore, in the case of the death of a male relative, without a female Class I heir, no question of a deemed partition arises, and the rule of survivorship was to operate unhindered. However, as in this case, since Bakshi Ram died leaving behind his wife and five daughters, all Class I heirs, the proviso would be applicable, and the Court must conduct a deemed partition to ascertain the interest of the deceased, Bakshi Ram, in the coparcenary property. This exercise does not, however, translate into an actual partition between the family, nor does it affect the continuity of the coparcenary amongst the remaining male members of the family. Rather, in terms of the proviso, the share of the deceased, had a partition taken place, is to be divided as per Section 8 of the HSA, i.e. by succession. The effect of the deemed partition, thus, is limited to ascertaining the share of the deceased, which is then claimed by his Class I heirs, rather than to claim that a partition with respect to the entire coparcenary occurs, which is the import of the order and judgment of the learned Single Judge. While traditional Hindu law did not require such a deemed partition, and the coparcenary property would remain, as Mayne explains above, fluctuating within the remaining coparceners, there is by way of the proviso to the unamended Section 6, a clear statutory departure from this method of division of the property. However, the proviso is limited, in that although the share of the deceased is removed from the coparcenary and vested as an absolute share in the female relatives by way of Section 14 of the HSA, the remaining share of the coparcenary property remains intact, in the same state of jointness as it existed before and subject to the same rules of fluctuating interest. Accordingly, the finding of the learned Single Judge that there was a deemed partition at the time of the death of Bakshi Ram is undoubtedly correct, this does not mean that the shares in the coparcenary property for this suit would be decided according to that event or that the shares would have crystallized and become unalterable. Rather, the coparcenary continued, and the extent of shares would be decided at the time of the actual partition, either through a registered deed of partition or a decree of this Court, as explained below.

22. The third question that arises before this Court is whether the 2005 amendment to Section 6 of the HSA is operative in this case. Before entering this discussion, it is useful to quote the amendment Section 6 in its relevant part:

"6. Devolution of interest in coparcenary property

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-(a) by birth become a coparcener in her own right in the same manner as the son; (b) have the same rights in the coparcenary property as she would have had if she had been a son; (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,-(a) the daughter is allotted the same share as is allotted to a son; (b) the share of the predeceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and (c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the predeceased son or a pre-deceased daughter, as the case may be.

Explanation.-For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004. Explanation.-For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court."

23. The present suit was instituted before the 2005 amendment to Section 6, and the death of Bakshi Ram was even before. The learned Single Judge concluded that the 2005 amendment was not retrospective, relying of the decision of this Court in **Bharat Singh** (supra). In **Bharat Singh,** a Single Judge of this Court held that:

"the Amending Act of 2005 cannot be read retrospectively as the Amending Act has not been given a retrospective operation. Meaning thereby, successions which had taken place prior to the promulgation of the Amendment Act of 2005 cannot be disturbed."

24. This position, however, it has to be considered as qualified in view of the proviso to Section 6(1) and Section 6(5). The proviso to Section 6(1) records:

"that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004."

25. Equally, Section 6(5) notes that

"Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004."

The 2005 amending act, thus, is unambiguous, that no past partition or testamentary disposition of property is to be affected or reopened, in order to include the newly created shares of female members of the HUF in the coparcenary. The intention of Parliament was not to create chaos by reopening previous family

settlement, but rather, to indicate that for all future actions, the rules of succession, and not survivorship, would operate in default, and further, that female members would be entitled to share just as their male counterparts. Equally, however, the amending act clarifies what is meant by 'partition' in terms of Section 6, i.e. *"any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court."* Accordingly, only those partitions made by the execution of a duly registered partition deed or a partition effected by a decree of a Court, i.e. partitions recognized by Section 6 as valid, which have occurred before the cut-off date identified, are saved from the operation of the amended Section 6, which would, if operative, require a redistribution of shares within the HUF. Having defined the expression 'partition' in Section 6, Parliament clarified which partitions are left unaffected by the amendment, and those that are susceptible to this change in the statute, giving the Courts clear and unambiguous direction in this regard. Thus, if a partition, as envisaged under the explanation to Section 6(5) occurred before 20.12.2004, then only may the Courts ignore the amended Section 6.

26. Crucially, since the rights and shares of the parties are decided as on the date of partition, it is important to determine the date of partition. *First,* as discussed above, the notion that a partition occurs as on the date of the death of a male member, and shares crystallize into vested rights at that point in time, as held by the learned Single Judge, is not the correct approach. That event (i.e. the death) only determines how *that person's* share will be divided amongst the family members (either by survivorship or by succession), rather than effecting any broad-based changes in the family holdings or effecting a partition inter se that would hold against subsequent changes in the family composition or changes in the law. *Secondly,* neither is the proposition that the shares are defined at the time of filing of the suit for partition correct. Rather, the HUF, and specifically, the coparcenary, continues even after the filing of the suit. The filing of a suit by itself does not mean that a partition has taken place, until a decree of Court effects partition, or a registered deed of partition is signed *inter se* the parties. Accordingly, the death or birth of family members during the pendency of a suit quite obviously

will affect the shares in partition. Similarly, any change in law during the pendency of the suit, as for example is the case with Section 6 of the HSA, would affect the ultimate shares of the parties. A contrary conclusion would not only fly in the face of the definition of 'partition' in Section 6(5), but would also mean, for example, that no partition suit can be withdrawn after it is filed, a proposition which has been rejected on various occasions.

27. Indeed, this question has been considered by the Supreme Court in **Ganduri Koteshwaramma and Anr. v. Chakiri Yanadi and Anr.,** 2011 (12) SCR 968. There, a suit for family partition was filed prior to the 2005 amendment, and moreover, two preliminary decrees were passed by the Trial Court on 19.03.1999 and 27.09.2003, indicating the shares of the parties. Accordingly, the question before the Supreme Court was:

> *"In light of a clear provision contained in the Explanation appended to Sub-section (5) of Section 6, for determining the non-applicability of the Section, what is relevant is to find out whether the partition has been effected before December 20, 2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. In the backdrop of the above legal position with reference to Section 6 brought in the 1956 Act by the 2005 Amendment Act, the question that we have to answer is as to whether the preliminary decree passed by the trial court on March 19, 1999 and amended on September 27, 2003 deprives the Appellants of the benefits of 2005 Amendment Act although final decree for partition has not yet been passed."*

28. In answering that question, Court held that neither the filing of the suit nor a preliminary decree constitutes a partition within the meaning of the amended Section 6. Thus, the newly created rights would be available to the parties. Specifically, the Court noted:

> *"16. The legal position is settled that partition of a Joint Hindu family can be effected by various modes, inter-alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the court. In the present case, admittedly, the partition has not been effected before December 20, 2004 either by a registered instrument of partition or by a decree of the court. The only stage that has reached in the suit for partition*

filed by the Respondent No. 1 is the determination of shares vide preliminary decree dated March 19, 1999 which came to be amended on September 27, 2003 and the receipt of the report of the Commissioner.

17. A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree redetermining the rights and interests of the parties having regard to the changed situation."

29. Earlier, in **S. Sai Reddy v. S. Narayana Reddy and Ors.,** (1991) 3 SCC 647, the question before the Supreme Court was whether the insertion of Section 29A (by a State amendment to the HSA) meant that the unmarried daughters in the HUF would be entitled to equal shares vis-a-vis their brothers, after the preliminary decree of the Trial Court had been made, and the appeal against it had been dismissed by the High Court. The Trial Court rejected the claim by observing that with the dismissal of the appeal by the High Court, the preliminary decree had become final and the sisters was not entitled to indirectly challenge the same. The High Court reversed this decision, and in concurring, the Supreme Court held as follows:

"... The crucial question, however, is as to when a partition can be said to have been effectedfor the purposes of the amended provision. A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court

Since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women which is a vulnerable section of the society in all its strata's, it is necessary to give a liberal effect to it. For this reason also, we cannot equate the

concept of partition that the legislature has in mind in the present case with a mere severance of the status of the joint family which can be effected by an expression of a mere desire by a family member to do so. The partition that the legislature has in mind in the present case is undoubtedly a partition completed in all respects and which has brought about an irreversible situation. A preliminary decree which merely declares shares which are themselves liable to change does not bring about any irreversible situation. Hence, we are of the view that unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act."

30. The Supreme Court therefore, held that rights created in favour of daughters by the 1956 Act would be operative, even though the Trial Court had made a preliminary decree before the passage of the Act, as the final rights are determined, and the partition effected, only through a final decree. The rationale behind the specific definition of 'partition' – as is clear from the above quote – is that only such partition that results in an irreversible situation should be considered as such. In all other cases, given the beneficial purpose of Section 29A – and in this, of the amended Section 6 – rights created in favour of Hindu women ought to be given effect to. Neither the filing of a partition suit, nor an oral statement by a member of the HUF, and certainly not a deemed partition (created only for a limited effect to determine the rights of the deceased only) create any such irreversible situation.

31. This question also came before the Supreme Court recently in **Prema v. Nanje Gowda and Ors.,** 2011 (6) SCALE 28. In that case, a male member of the family had instituted a suit for partition in 1989, which was decreed in 1992. The female heir's appeal against the preliminary decree to the High Court was dismissed in 1999. Meanwhile, the plaintiff had instituted final decree proceedings in 1999, in which the defendant (female heir) filed an application seeking for an increased share in the property given the amendment to Section 6A, HSA in Karnataka in 1994, i.e. after the institution of the suit and preliminary decree. The Trial Court rejected the application on the ground that the effect of Section 6A was not retrospective. The High Court agreed with the Trial Court, but the decision was overturned by the Supreme Court. Placing reliance on the decision in **Sai Reddy** (supra), the Court overturned the concurrent findings in the following terms:

"Therefore, the proceedings of the suit instituted by Respondent No. 1 cannot be treated to have become final so far as the actual partition of the joint family properties is concerned and in view of the law laid down in **Phoolchand v. GopalLal** (supra) and **S. Sai Reddy v. S. Narayana Reddy** (supra), it was open to the Appellant to claim enhancement of her share in the joint family properties because she had not married till the enforcement of the Karnataka Act No. 23 of 1994. Section 6A of the Karnataka Act No. 23 of 1994 is identical to Section 29A of the Andhra Pradesh Act. Therefore, there is no reason why ratio of the judgment in **S. Sai Reddy v. S. Narayana Reddy** (supra) should not be applied for deciding the Appellant's claim for grant of share at par with male members of the joint family ...

14. We may add that by virtue of the preliminary decree passed by the trial Court, which was confirmed by the lower appellate Court and the High Court, the issues decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit dies, then his/her share is required to be allotted to the surviving parties and this can be done in the final decree proceedings. Likewise, if law governing the parties is amended before conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the Court to take cognizance of the amendment and give effect to the same. If the rights of the parties to the suit change due to other reasons, the Court ceased with the final decree proceedings is not only entitled but is duty bound to take notice of such change and pass appropriate order." (emphasis supplied)

32. It is clear from the decisions in **Sai Reddy** (supra), **Ganduri Koteshwaramma** (supra) and **Prema** (supra) that a partition of the Hindu Joint Family – that crystallizes each member's interest, and thus makes the interests immune to further changes in the law – can only take place in the manner prescribed by the HSA. A deemed partition under the proviso to Section 6, HSA is not an actual partition that crystallizes the interest of all members of the HUF, but only a legal construction introduced

by the legislature to determine how the interests of the deceased would devolve upon his heirs if a Class I female relative is alive. The purpose of this fiction of deemed partition (as opposed to following the simple rule of survivorship otherwise) is that Class I female heirs also receive a share in the coparcenary property of the deceased male, as they would otherwise be excluded (not being coparcenors themselves, pre the 2005 Amendment). To argue that such deemed partition crystallizes the interest of the daughters finally, and that any rights accruing to them at a later stage which grant an interest in the coparcenary property are unenforceable, is contrary to the terms and the spirit of the proviso to Section 6 as it existed before the 2005 Amendment and the letter of the amendment itself. **Sai Reddy** (supra), **Prema** (supra) and **Ganduri Koteshwaramma** (supra) have all consistently held that the mere severance in status, sought to be brought about by the institution of a partition suit, does not result in immutable shares. These decisions also took note of **Phoolchand & Anr v. Gopal Lal** AIR 1967 SC 1470 and even an older decision (of the Privy Council) in **Jadunath Roy and Ors. v. Parameswar Mullick and Ors.,** AIR 1940 PC 11, where it was held that even after a preliminary decree in a partition suit is made, the Court is not only powerless, but has the duty to reflect later developments, which could necessitate re-adjustment of shares (of the parties) on account of fluctuation in the coparcenary or the joint family.

33. From another and more fundamental perspective, if the fluctuation of interests continued between the male coparcenors (the brothers) – after the death of Bakshi Ram in 1960, and a division of his interest to his sons and daughters – there appears no reason why the daughter's interest should be foreclosed. They continued to remain members of the HUF (though not coparcenars), and thus entitled to avail of any rights that accrued in their favour as female members of the family, specifically the 2005 amendment in this case. In this case, till date no final decree has been passed, and neither has any registered partition deed been placed on record or relied upon by any of the parties. Accordingly, the amended Section 6 of the HSA is applicable. The reasoning and findings of the learned Single Judge on this aspect, therefore, cannot be sustained. Similarly, the reasoning and judgment in Bharat Singh (of a learned Single Judge) is held to be no longer good law, in view of **Prema** (supra) and **Ganduri Koteshwaramma** (supra). The said judgment is accordingly overruled.

34. In view of the above discussion, the Court must now determine the shares of the parties to the various properties in question. Before the addressing the sequence of events beginning from the death of Bakshi Ram, it is essential to recollect that Sudarshan Lal died issueless, without any female Class I heirs, and thus, on his demise, the rule of survivorship under the unamended Section 6 applied, and the coparcenary property was redistributed between the remaining coparcenors, his father Bakshi Ram and two brothers. Subsequently, on the death of Bakshi Ram in 1960, as he was survived by his widow, and five daughters (Class I heirs under the Schedule to the HSA), the proviso to the unamended Section 6, as it was in force at the time, applied. Accordingly, if a deemed partition were to take place, Bakshi Ram, his two living sons, Kulbhushan Lal, and Madan Mohan Sharma would each get a 1/3rd share in the coparcenary property. Given the death of Bakshi Ram, and the operation of Section 3 of the Hindu Women's Right to Property Act, 1937 (read along with Section 14, HSA, which makes the life estate granted by the 1937 Act an absolute interest), Bakshi Ram, the two sons and Chanan Devi would have each acquired a 1/4th share. Bakshi Ram's 1/4th share, then, in terms of the proviso, read with Section 8, devolve upon to his class I heirs equally in 8 parts, i.e. his wife, and 7 living children. Thus, the 7 living children received a 1/32 share, and Chaman Devi received a 9/32 share (i.e. 1/4 plus 1/32). Of the remaining 1/2 of the coparcenary share left undivided after Bakshi Ram's death, the 2 living male members shared it equally, i.e. 1/4. Subsequently, as per Section 15(1), HSA, on Chanan Devi's death, her 9/32 share devolved upon her 7 living children in equal proportions, i.e. each held a 9/224 share. Then, with the passage of the 2005 amendment, the 5 daughters each acquired a share in the coparcenary, along with the 2 male members. As noted above, the remaining share in the coparcenary was 1/2, and thus, each of the 7 members hold 1/14 as coparcenors, which by virtue of this suit, is now sought to be divided. In sum, the shares of the parties are as follows: 1/32 share each as succession from the death of Bakshi Ram, 9/224 share each as succession from Chanan Devi, and 1/14 each as coparcenors. Thus, the share of each of the 7 children is 1/32 plus 9/224 plus 1/14, which equals 1/7. In other words, each of the 7 persons has an equal share in the coparcenary properties.

35. At this juncture, the Court must also consider which the properties alleged to be part of the HUF by the appellant herein are indeed so. The

appellant has claimed properties to be part of the HUF, as shown in the table above. The documents concerning compensation paid by the Ministry of Rehabilitation after partition indicate that a HUF was in existence at that time. Further, the partnership deed dated 1st April, 1968 and the averments in WP(C) 1921/1986 both contradict the defendants' claim that there was no HUF. Indeed, no evidence was produced to demonstrate a division of the HUF or a partition of the properties at any time subsequently either. However, as the Supreme Court noted in **D.S. Lakshmaiah and Anr.v. L. Balasubramanyam and Anr.,** 2003 (7) SCALE 1:

> *"9.....Proof of the existence of a joint family does not load to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property is joint to establish the fact....."*

The plaintiffs in the suit, and the appellant herein, have not discharged this burden with regard to any of the properties, other than give properties which were, by admission of the defendants, considered to be part of the HUF: (a) a plot bearing Khasra No. 2609/727-728, situated in Tughlakabad, Tehsil Mehrauli, Delhi, measuring 5 bighas, 1 biswa, b) a plot bearing Khasra No. 32/28/1 and 32/28/2 measuring 2 bighas, 5 biswas, c) a plot bearing Khasra No. 231, measuring 2 bighas, 13 biswas, in village Tajpul, Tehsil Mehrauli, Distt. Delhi, d) a plot bearing Khasra No. 36/28/2 and 36/29/2 measuring 15 biswas; e) a house at Joshi Road, Karol Bagh. Accordingly, this Court finds no reason to interfere with this finding of the learned Single Judge. However, of these 5 properties, rights to the house at Joshi Road were held to have relinquished in favour of Sudarshan Lal, and plots bearing Khasra No. 32/28/1 and 32/28/2 were held to be governed by rules of succession under Section 51 of the Delhi Land Reforms Act, which provides only for succession to the male members of the family, thus excluding the appellant herein. Finally, as regards the remaining properties, the learned Single Judge held that since Section 185 of the Land Reforms Act bars the jurisdiction of civil courts in respect of properties regulated by that act, no decree could be granted.

36. As regards the relinquishment of the Karol Bagh house, the appellant, during the course of trial, admitted the certified copy of the relinquishment deed executed by her and by the fourth defendant with

respect to share in the house at Joshi Road in favour of Sudarshan Lal. Although it was stated that this document was supposed to be a power of attorney, and not a relinquishment deed, no plea of fraud or coercion so as to vitiate the registered document has been put forth, and thus, the Court finds no reason to interfere with this finding of the learned Single Judge.

37. Finally, this Court must consider whether the properties noted above can be partitioned in light of the provisions of Section 185 of the Delhi Land Reforms Act, which bars the jurisdiction of civil courts in respect of matters pertaining to properties regulated by the Act:

> *"185. Cognizance of suits, etc, under this Act.-(1) Except as provided by or under this Act no court other than a court mentioned in column 7 of Schedule I shall, notwithstanding anything contained in the Code of Civil Procedure,1908, take cognizance of any suit, application, or proceedings mentioned in column 3 thereof", Further, Section 51is relevant insofar as it provides a distinct line of succession for properties governed by the Act, as opposed to the rules specified in the HSA.*

38. With respect to the finding of issue of whether the plots bearing Khasra No. 32/28/1 and 32/28/2 are to be considered under Section 51 of the Land Reforms Act or under the HSA, and whether the remaining three properties are similarly to be dealt with under the Delhi Land Reforms Act, this Court notices that all four properties are located in Mehrauli, Tughlakabad and Badarpur. All these areas have been notified as "urbanized villages" that cease to be considered rural areas, by the Municipal Corporation of Delhi (*"MCD"*)under notification under Section 507 of the Delhi Municipal Corporation Act, 1957, by way of notifications F.9(2)/66/Law/Corpn dated 28.05.1966 (Badarpur and Tughlakabad) and 13.06.1962 (Mehrauli). The learned Single Judge held that even if this were the case, properties in these areas would continue to be regulated by the Delhi Land Reforms Act. The question that arises, thus, is whether a land, irrespective of the fact that is it in an urban or a rural area as determined by the MCD continues to be agricultural land and thus, subject to the provisions of the Delhi Land Reforms Act.

39. This matter has been previously considered by this Court. A learned Single Judge in **Trikha Ram v. Sahib Ram,** 69 (1997) DLT 749, held that where an area is urbanized under a notification under

Section 507 of the Delhi Municipal Corporation Act, 1957, the provisions of the Delhi Land Reforms Act would cease to apply. This decision was followed by another Single Judge in **Madho Prasad v. Shri Ram Kishan and Ors.,** 2001 (7) AD (Delhi) 72. However, given a contrary opinion in WP(C) No. 4143/2003, dated 25.08.2004, the matter was referred to a Division Bench of this Court, in a decision reported as Smt. Indu Khorana v. Gram Sabha and Ors.,MANU/DE/0969/2010, where the reference was categorically answered in the following terms:

> *"11. We thus hold that once rural area is urbanized by issuance of notification under Section 507(a) of the Delhi Municipal Corporation Act, 1957, provisions of Delhi Reforms Act will cease to apply. The reference stands answered accordingly."*

40. That decision was subsequently sought to be impugned and referred to a larger bench in **Narain Singh and Anr. v. Financial Commissionerand Ors.,** in LPA No. 591/2008, decision dated 22.11.2012, where the Division Bench of this Court confirmed the view in **Indu Khorana** (supra), holding that "the very purport of a Notification under Section 507(a) of the DMC Act is to convert the land from agricultural to urban." In view of these consistent findings, it is clear that the effect of the notification under Section 507 in this case were to remove the four properties from the purview of the Delhi Land Reforms Act as the subject-matter of the Act is rural agricultural properties, rather than urban lands. Accordingly, this finding of the learned Single Judge that the four properties in question were not to devolve upon the appellant here in the share ratio above specified is liable to be set aside.

41. In view of the above discussion, the findings and judgment of the learned Single Judge are hereby set aside. The suit is remitted for further proceedings to carry out partition of the properties, through metes and bounds, in accordance with law. The suit shall be listed before the concerned Judge in accordance with roster allocation, who shall, after issuing notice to the parties, proceed further in the matter. The appeal is allowed in the above terms. There shall be no order as to costs.

ILR (2014) II DELHI 1395
W.P. (C)

RENU AGRAWAL AND ANR. ....PETITIONERS

VERSUS

DELHI DEVELOPMENT AUTHORITY AND ORS. ....RESPONDENTS

(HIMA KOHLI, J.)

W.P. (C) NO. : 2404/2012 DATE OF DECISION: 03.02.2014

Constitution of India, 1950—Article 226—Writ Petition—Delhi Development Act, 1957—S. 30(1)—S. 31(A)—Unauthorized construction—Section of building plans—Structural safety—National Capital Territory of Delhi Laws (Special Provisions) Bill, 2009—One Smt. Shakuntala Devi mother of petitioner no. 2 and Respondent No. 3—Owner of—The Property at Shivalik Malviya Nagar, New Delhi—Shakuntala Devi executed a Gift Deed in respect of basement-ground-mezzanine floor-in-favour of her daughter-in-law Respondent No. 4/ Ms. Manju Agrawala—Registered on 02.06.2005—Also executed gift deed in respect of first floor and terrace in favour of her other daughter-in-law petitioner no. 1—Registered on 26.10.2005—Mutation with respect to first floor and terrace done in favour of petitioner no.1 in the record of MCD—Mutation in respect of basement-ground floor-mezzanine floor carried out in favour of respondent no.4 on 27.10.2011 petitioner submitted plans to respondent no. 1 and 2 for carrying out—Addition—Alteration on the first floor—Construction of proposed second—Third floor alongwith requisite fees—Respondent did not sanction the plan—Instead issued a show cause notice on 05.03.2012—Petitioner no. 1 and respondent no. 4 to explain as to why demolition of unauthorized and

illegal development be not undertaken on 02.04.2012 petitioner submitted reply—Reiterated request for sanction—Aggrieved by inaction on the part of respondent no. 1 and 2—Preferred writ petition—During the hearing submitted by petitioner that respondent no. 3 and 4 not co-operative with petitioner—On account of their non-corporation—Resistance in raising any construction—Respondent no. 2 declined to grant sanction to the proposed building plan—However—Respondent 3 and 4 denied—Submitted building plan may be sanctioned subject to ensuring that the structural strength of the existing built-up structure not adversely affected—Petitioner submitted a tabulated chart in respect of deviation mentioned in the show cause notice—Pointed out deviation in the portion of premises under the occupation of petitioner and mezzanine floor—Either compoundable nature or did not concern them—Chart furnished to respondent no. 1 and 2—Director (Building), DDA directed to take into consideration the chart for an efficacious resolution of the dispute—directed to pass reasoned order dealing with contention raised by petitioner and keeping in mind the decision rendered in WP

C) No.3535/2001 entitled as Ashok kapoor and Ors. v. MCD—An order dated 02.09.2013 Passed by Director Building) for sealing—Cum-Demolition—order challenged by the petitioner—Contending-Contrary to the guidelines laid down in above mentioned case—Court observed—The facts in the case of Ashok Kapoor similar to the present case where the subject property segregated in different portion and mutated in individual names specifying the portion of the property—Held—(A) when segregation of interest of different co—Owner recognized by the MCD by mutation of different portion in individual named of different persons there cannot be any requirement of signature of all the co—Owners

in considering the sanction of building plan of one of Co—Owner of the subject property in his/her portion (b) even if there is embargo on DDA and on civic authority from taking an action in respect of non compoundable deviation/misusers till December, 2014 in terms of National Capital Territory of Delhi Laws (Special Provisions) Bill, 2009—It can hardly be ground of refusing the sanction of building plane submitted by petitioner for their portion of subject property or from preventing them from raising construction in their portion of subject premises in accordance with law—(c) structural safety certificate placed on record shall be duly considered by DDA and if it needs stipulated requirement the same shall be accepted—If there is any requirement of meeting alternation in the building plan on account of structural concern the same shall be intimated to the DDA by petitioner in writing—Petition disposed off.

In the aforesaid case, the respondent/MCD had taken a stand in its counter affidavit that non-compoundable deviations were existing on the ground and first floors and there was also some misuser of the ground floor. It was further stated that the building plans were required to be signed by all the co-owners insofar as coverage of the building is concerned. Thirdly, it was stated that the FAR is governed by the overall size of the plot and structural safety has to be taken into account. After considering the submissions made by the parties in the aforesaid case, the learned Single Judge had made the following observations, which are relevant for consideration :

> ".....Once the property is segregated into different portions and mutated accordingly, there cannot be any requirement of all the co-owners to sign the building plans. If the plot and the building are both co-owned, then only the requirement for such co-owners to sign may at all arise. **The segregation of interest**

of the different co-owners is recognized by the respondent Corporation by mutation of the different portions in individual names of different persons. The fate of an individual owner cannot be dependent on the pen of a person, who happens to be the owner of a different portion of the building. Thus, there cannot be any requirement of signatures of all the co-owners.

Insofar as non-compoundable deviations and misuse are concerned, it was always open to the respondent Corporation to take action against the same. In fact, it is stated that some action has been taken. The petitioners are not preventing the said action being taken in respect of the ground and first floors. **The inaction on the part of the respondent Corporation to take appropriate action against the ground and first floors cannot deprive the petitioners to the rights of having their plans approved. There is no doubt that the structural aspects of the building have to be considered and the building has to be seen as a whole dependent on the load factor it can take. However, this is not the reasoning for rejection of the building plans.** In case, any alterations are required in the building plans on account of structural requirements, the same can always be intimated to the petitioners.

A Writ of Mandamus is, thus, issued directing the respondent Corporation to consider the building plans of the petitioner de hors the objection of the building plans being signed by all the co-owners and the issue of misuse and deviations in the ground and first floors. A decision be taken within a period of six weeks from today and the petitioners can appear personally before the Executive Engineer (Building), South Zone on 02.04.2003 for any clarification."

(emphasis added) **(Para 15)**

The contention of the counsel for the respondents No.1 & 2/DDA that the provisions of the National Capital Territory of Delhi Laws (Special Provisions) Bill, 2009 has placed an embargo on the DDA and on the civic authorities from taking any action in respect of the non-compoundable deviations/misuser till December, 2014, can hardly be a ground for refusing to sanction the building plans submitted by the petitioners for their portion of the subject property or for preventing them from raising construction in their portion of the subject premises in accordance with law. This Court is of the opinion that the petitioners are well within their rights to approach the respondents No.1 & 2/DDA for getting their plans sanctioned as per the Building Byelaws, without awaiting any action on the part of the DDA in respect of the non-compoundable deviations and/or misuser in the basement, ground and mezzanine floors of the subject premises which are admittedly in the ownership and possession of the respondent No.4. **(Para 22)**

Important Issue Involved: (a) the embargo put by National Capital Territory Delhi Law (Special Provision) Bill, 2009 does not prohibit the authority to sanction building plan for raising construction.

[Gu Si]

APPEARANCES:

FOR THE PETITIONERS : Mr. Sudhanshu Batra, Sr. Advocate with Mr. Arvind Kr. Gupta, Advocate.

FOR THE RESPONDENTS : Mr. M.K. Singh, Advocate for DDA with Mr. Amit Das, Director (Building). Mr. Ankur Arora, Advocate for R-3 & 4 with respondent No.3 in person.

RESULT: Writ Petition Disposed off.

HIMA KOHLI, J. (ORAL)

1. The present petition has been filed by the petitioner praying inter alia for issuance of directions to the respondents No.1 & 2/DDA to sanction addition/alteration plans in respect of the first floor of the premises bearing No.A-225, Shivalik, Malviya Nagar, New Delhi, as submitted on 27.10.2011.

2. The undisputed facts of the case are that late Smt. Shakuntala Devi (mother of the petitioner No.2 and respondent No.3) was the owner of the subject property by virtue of a Sale Deed dated 20.11.1990. During her lifetime, Smt. Shakuntala Devi had executed a gift deed in respect of the basement, ground and mezzanine floors of the subject premises in favour of her daughter-in-law, respondent No.4/Ms. Manju Agrawala, that was registered on 2.6.2005. Similarly, Smt. Shankuntala Devi had executed a gift deed in respect of the first floor and the terrace above the first floor in favour of her other daughter-in-law, the petitioner No.1, registered on 26.10.2005. Thereafter, on 24.11.2006, the first floor and the terrace of the subject premises were got mutated in favour of the petitioner No.1 in the records of the MCD. Similarly, mutation in respect of the basement, ground and mezzanine floors was carried out in favour of the respondent No.4.

3. In the year 2006, Smt. Shakuntala Devi and her husband, Mr. H.S. Agrawala filed a suit for cancellation of the gift deed and for declaration against the respondents No.3 & 4, registered as CS(OS)No.600/2006. During the pendency of the aforesaid suit, the parties arrived at a compromise, as recorded in the Compromise Deed dated 27.8.2007, and based on the said compromise, the suit was disposed of on 20.9.2007.

4. On 27.10.2011, the petitioners submitted a plan to the respondents No.1 & 2/DDA for carrying out additions/alterations on the first floor and construction of the proposed second and third floors on the subject premises, along with the requisite fee, etc. However, the respondents No.1 & 2/DDA did not sanction the building plans and instead, on 5.3.2012, DDA issued a notice to show cause to the petitioner No.1 and respondent No.4 under Sections 30(1) and 31(A) of the DDA Act calling upon them to explain as to why demolition of the unauthorized and illegal development as mentioned in the said notice should not be undertaken. On 2.4.2012,

the petitioners submitted a reply to the aforesaid notice to show cause and reiterated their request for sanction of the building plans in terms of the application submitted by them on 27.10.2011.

5. Aggrieved by the inaction on the part of the respondents No.1 & 2/DDA, the petitioners have filed the present writ petition.

6. It is submitted by Mr.Sudhanshu Batra, Sr.Advocate appearing on behalf of the petitioners that the respondents No.3 & 4 have not been cooperating with the petitioners and it is on account of their non-cooperation and resistance to the petitioners raising any construction on the subject property that the respondent No.2/DDA has been declining to grant sanction to the proposed building plan.

7. The aforesaid submission is however, denied by learned counsel for the respondents No.3 & 4, who states that his clients have no objection to the respondents No.1 & 2/DDA sanctioning the building plan submitted by the petitioners in accordance with law and subject to ensuring that the structural strength of the presently existing built up structure is not adversely affected.

8. When the present petition was listed for admission on 8.7.2012, learned counsel for the respondents No.1 & 2/DDA had stated, on instructions, that the basement of the subject premises was being used by the respondents No.3 & 4 for office-cum-residential purposes and there were deviations on the ground floor, besides extra coverage. It was stated that action had already been initiated against the occupants/owners of the ground floor and the basement and thereafter, a sealing order was passed by the respondents No.1 & 2/DDA on 7.8.2012 in respect of the subject premises.

9. Aggrieved by the aforesaid sealing order, the respondents No.3 & 4 had filed an appeal before the Appellate Tribunal, which was ultimately allowed and the sealing order was quashed on 7.1.2013. On 8.3.2013, the submission of the counsel for the respondents No.1 & 2/DDA was recorded to the effect that inspection of the subject premises was carried out on 23.1.2013 and 12.2.2013 and fresh show cause notices were being issued to the petitioners and respondents No.3 & 4/occupants/ owners of the subject premises and the matter was listed for hearing before the Director (Building), DDA on 21.3.2013.

10. In the order dated 3.4.2013, the statement of the counsel for the petitioners was recorded to the effect that the petitioners had prepared a tabulated chart in respect of the deviations mentioned in the show cause notice issued by the DDA and a bare perusal thereof would demonstrate that the deviations pointed out in the portion of the premises under the occupation of the petitioners and the mezzanine floor are either of a compoundable nature, or do not concern them. The said tabulated chart was duly furnished to the counsel for the respondents No.1 & 2/ DDA and the Director (Building), DDA was directed to take into consideration the aforesaid tabulated chart at the time of passing of the order on the show cause notice dated 8.3.2013, for an efficacious resolution of the dispute between the parties.

11. It is stated by the counsels for the parties that after considering the tabulated chart furnished by the petitioners, the Director (Building), DDA had passed an order dated 6.6.2013. However, when the aforesaid order was placed before the Court, it was noticed that it did not deal with any of the contentions raised by the petitioners in the tabulated chart. As a result, vide order dated 25.7.2013, the order dated 6.6.2013 passed by the Director (Building), DDA was set aside and he was directed to pass a reasoned order dealing with all the contentions raised by the petitioners and keeping in mind the decision rendered in WP(C)No.3535/2001 entitled 'Ashok Kapoor & Ors. vs. MCD'.

12. Pursuant to the aforesaid directions, the respondent/DDA has placed on record a copy of the order dated 2.9.2013 passed by the Director (Building), DDA, wherein it has been observed as under :

> "In view of above given reasons as elaborated under different paras, the submission of one single Building Plan of the entire building under reference is essentially require for sanctioning of addition and alteration from Regulatory Authority point of view. On account of non-compliance of the directions of Speaking Order dt. 03.05.2013, the Regulatory Authority, Director (Bldg.) had no option left except to pass the Sealing-cum-Demolition Order under D.D.Act-1957 on dt. 06.06.2013.
>
> This Order is given under my hand and seal on this 2nd day of September, 2013 in compliance to the Hon'ble High Court Order dt. 25.07.2013."

13. Mr.Sudhanshu Batra, learned Senior Advocate appearing for the petitioners contends that the aforesaid order dated 2nd September, 2013, which the respondent/DDA describes as a fresh reasoned order, is contrary to the guidelines that were laid down in the case of **Ashok Kapoor** (supra).

14. In the case of **Ashok Kapoor** (supra), the petitioners therein had purchased rights over the first floor of a property situated in Green Park, New Delhi and they had submitted their plans to the civic authority for sanction in respect of the proposed second and third floors over the terrace of the first floor. The respondent/Municipal Corporation had pointed out certain deficiencies in the said plans, which the petitioners claimed they had rectified, but yet again the civic authority had rejected the said plans. As a result, the petitioners had filed the aforesaid writ petition for issuance of a writ of mandamus to the MCD for sanctioning the building plans of the subject property.

15. In the aforesaid case, the respondent/MCD had taken a stand in its counter affidavit that non-compoundable deviations were existing on the ground and first floors and there was also some misuser of the ground floor. It was further stated that the building plans were required to be signed by all the co-owners insofar as coverage of the building is concerned. Thirdly, it was stated that the FAR is governed by the overall size of the plot and structural safety has to be taken into account. After considering the submissions made by the parties in the aforesaid case, the learned Single Judge had made the following observations, which are relevant for consideration :

> ".....Once the property is segregated into different portions and mutated accordingly, there cannot be any requirement of all the co-owners to sign the building plans. If the plot and the building are both co-owned, then only the requirement for such co-owners to sign may at all arise. **The segregation of interest of the different co-owners is recognized by the respondent Corporation by mutation of the different portions in individual names of different persons. The fate of an individual owner cannot be dependent on the pen of a person, who happens to be the owner of a different portion of the building. Thus, there cannot be any requirement of signatures of all the co-owners.**

> Insofar as non-compoundable deviations and misuse are concerned, it was always open to the respondent Corporation to take action against the same. In fact, it is stated that some action has been taken. The petitioners are not preventing the said action being taken in respect of the ground and first floors. **The inaction on the part of the respondent Corporation to take appropriate action against the ground and first floors cannot deprive the petitioners to the rights of having their plans approved. There is no doubt that the structural aspects of the building have to be considered and the building has to be seen as a whole dependent on the load factor it can take. However, this is not the reasoning for rejection of the building plans.** In case, any alterations are required in the building plans on account of structural requirements, the same can always be intimated to the petitioners.
>
> A Writ of Mandamus is, thus, issued directing the respondent Corporation to consider the building plans of the petitioner de hors the objection of the building plans being signed by all the co-owners and the issue of misuse and deviations in the ground and first floors. A decision be taken within a period of six weeks from today and the petitioners can appear personally before the Executive Engineer (Building), South Zone on 02.04.2003 for any clarification." (emphasis added)

16. A perusal of the aforesaid decision reveals that in similar facts as are engaging the Court in the present writ petition, where the subject property is segregated in different portions, the first floor and the terrace thereof stand mutated in the name of the petitioner No.1 whereas the basement, ground floor and the mezzanine floor stand mutated in favour of the respondent No.4, the Court had held that there would not be any requirement for all co-owners to sign the building plans. This Court finds no reason to take a different view. The separate interests of the petitioner No.1 and respondent No.4 in the subject property has already been recognized by the Municipal Corporation. 17. Counsel for the respondent Nos.1 & 2 /DDA states, on instructions, that the Department has no objection to sanctioning the building plans in favour of the petitioners as long as the structural safety of the presently existing building is not compromised.

18. In the present case, admittedly, the subject plot, on which the built-up structure exists, is co-owned by the petitioner No.1 and the respondent No.4 in equal shares and counsel for the respondent No.4 has stated that his client has no objection to sanctioning of the building plans subject to the structural safety of the building being kept in mind. The civic authority, namely, South Delhi Municipal Corporation, has admittedly segregated the interest of the petitioners and the respondent No.4 and recognized them by mutating different portions of the subject property in their respective names. In such circumstances, the observations made by the respondent/DDA in the fresh order dated 2nd September, 2013 that the consent of the co-owner is required, loses significance. In the opinion of this court, there does not appear any requirement for the respondent No.4 to sign the building plans or give any no objection to the respondents No.1 and 2/DDA.

19. Coming to the alleged deviations referred to by the respondents No.1 & 2/DDA in the fresh order dated 2nd September, 2013, a perusal thereof reveals that only two deviations mentioned at Sr.No.6 & 7(a) of the tabulated chart relate to the first floor portion owned by the petitioner and all the remaining deviations pertain to the basement, ground and mezzanine floors that are owned by the respondent No.4.

20. Learned Senior Advocate appearing for the petitioners states that the deviations mentioned by the DDA on the first floor are compoundable in nature and the petitioners are ready and willing to get them compounded.

21. Insofar as the non-compoundable deviations and misuser on the basement, ground and the mezzanine floors are concerned, it is open to the respondent/DDA and/or the civic authority to take appropriate action against the same in accordance with law. But that itself cannot be a ground to turn down the building plans submitted by the petitioners.

22. The contention of the counsel for the respondents No.1 & 2/DDA that the provisions of the National Capital Territory of Delhi Laws (Special Provisions) Bill, 2009 has placed an embargo on the DDA and on the civic authorities from taking any action in respect of the non-compoundable deviations/misuser till December, 2014, can hardly be a ground for refusing to sanction the building plans submitted by the petitioners for their portion of the subject property or for preventing them from raising construction in their portion of the subject premises

in accordance with law. This Court is of the opinion that the petitioners are well within their rights to approach the respondents No.1 & 2/DDA for getting their plans sanctioned as per the Building Byelaws, without awaiting any action on the part of the DDA in respect of the non-compoundable deviations and/or misuser in the basement, ground and mezzanine floors of the subject premises which are admittedly in the ownership and possession of the respondent No.4.

23. While considering the building plans, undoubtedly, the structural safety of the built up structure should not be compromised in any manner. Mr.Batra, Senior Advocate states that the petitioners had furnished a structural safety certificate issued by a Government Approved Valuer, Chartered Engineer, Structural Designer and Surveyor to the DDA, wherein it has been certified that the existing structure that was built in the year 1991, is in excellent condition and there is no deterioration and it can take the load of additional second and third floors to achieve the permissible FAR.

24. On an enquiry from the learned counsel for the respondents No.1 & 2/DDA as to whether the DDA has undertaken an independent exercise to establish the structural safety of the building before passing the order dated 2nd September, 2013, the reply is in the negative. There is no reason whatsoever given in the rejection order with regard to the structural safety certificate filed by the petitioners and furnished to the respondent/DDA.

25. As the aforesaid aspect has not even been examined by the respondents No.1 & 2/DDA before passing the order dated 2nd September, 2013, it is directed that the structural safety certificate placed on record by the petitioners at pages 181-182 of the paper book shall be duly considered by the respondents No.1 & 2/DDA and if it meets the stipulated requirements, then the same shall be accepted. If there is any requirement for making alterations in the building plans on account of structural concerns, the same shall be intimated by the respondents No.1 & 2/DDA to the petitioners in writing.

26. Coming to the issue of permissible FAR, as it is a single entity plot, counsel for the petitioners assures the Court that 50% of the permissible FAR shall be consumed as per the Building Byelaws in the structure above the first floor, while the remaining 50% shall enure to the benefit of the respondent No.4.

27. The present petition is accordingly disposed of, while setting aside the order dated 2nd September, 2013 passed by the respondents No.1 & 2/DDA. Directions are issued to the respondents No.1 and 2/DDA to consider the building plans of the petitioners afresh without raising any objection with regard to NOC required to be issued by the co-owners and keeping aside the aspect of non-compoundable deviations and misuser existing in the basement, ground and mezzanine floors of the subject premises, owned and occupied by the respondent No.4, which DDA shall be entitled to deal with in accordance with law.

28. A fresh decision shall be taken by the respondent/DDA within eight weeks from today. To obviate any requirement of any clarification that may be required by the respondents No.1 & 2 /DDA from the petitioners, they are directed to appear before the Deputy Director (Building), DDA on 3.3.2014 at 3.00 PM.

29. The petition is disposed of. Copy of the order be given DASTI to the counsel for the respondents No.1 and 2/DDA under the signatures of the Court Master.

ILR (2014) II DELHI 1407
CS(OS)

SBL PVT. LTD. ....PLAINTIFF

VERSUS

V.B. SHUKLA & ORS. ....DEFENDANTS

(G.S. SISTANI, J.)

CS(OS) NO. : 1782/2012 DATE OF DECISION: 03.02.2014

Court Fees Act, 1870—Section 16A—Plaintiff filed suit for permanent and mandatory injunction along with damages against defendants—Defendant no. 1 was employed with plaintiff company who resigned and

joined defendant no. 2 company of which defendant no. 3 and 4 were Directors—Plaintiff apprehended that defendant no. 1 would share confidential and internal information of plaintiff company with defendant no. 2 company for which he was seeking restrain order—However, parties consented before Court and resolved disputes amicably— Plaintiff, thus, prayed for refund of court fees. Held:- when matter stands resolved before framing of issues, plaintiff entitled to refund of court fees in terms of Act.

Important Issue Involved: When matter stands resolved before framing of issues, plaintiff entitled to refund of court fees in terms of Act.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Manish Srivastava, Advocate and Mr. S.R. Verma, Sr. Manager of plaintiff.

FOR THE DEFENDANTS : Mr. J.C. Mahindroo, Advocate for D=1 Ms. Meenakshi Singh, Mr. Vikram Grover and Ms. Shreye Verma, Advs, for Ds= 2-4.

RESULT: Suit disposed of.

G.S. SISTANI, J. (Oral)

IA.No.2181/2014

This is an application filed by defendant nos.2 to 4 seeking correction in the order dated 15.1.2014. Counsel for the parties submit that this Court had adjourned the matter for 3.2.2014, but inadvertently the date is mentioned as 3.4.2014.

For the reasons stated in the application, the application is allowed. The date of 3.4.2014 is cancelled.

CS(OS) 1782/2012

With the consent of counsel for the parties the matter is taken up for hearing today. The plaintiff has filed the present suit for permanent and mandatory injunction alongwith damages. The defendant no.1 was employed with the plaintiff company. The defendant no.1 resigned on 6.4.2012 and joined the defendant no.2 company of which defendants no.3 and 4 are the directors.

The complaint of the plaintiff is that confidential and internal information was carried away by the defendant no.1 to share the same with defendant no.2, company. An ad interim ex parte injunction was granted on 1.6.2012, when summons were issued in the suit.

Counsel appearing for the defendant no.1 on instructions, submits that defendant no.1 has not used or passed any confidential information to defendants no.2 to 4 nor shall he do so in future. Counsel for defendants no.2 to 4 also submits that neither have they received any confidential information of the plaintiff company, nor do they have any intention either to instigate any of the employee of the plaintiff company to leave the employment of the plaintiff or to seek confidential information from them.

In view of the stand taken by the parties and with the consent of the parties, the present suit is decreed on the following agreed terms:

(i) A decree of permanent injunction restraining the defendant no.1 from, in any manner, directly or indirectly, disclosing any confidential information to the defendant Nos.2, 3 or 4 as mentioned in Paragraph 29 or to any third person, in any manner whatsoever or using the said confidential information for his own personal or business purposes; and

(ii) The defendant no.1 has not disclosed directly or indirectly any confidential information of plaintiff to defendants no.2 to 4, nor shall he do so, except in the ordinary course of business.

(iii) Defendant nos.2 to 4 have neither received, nor instigate nor shall they instigate any employees of the plaintiff company to leave their employment.

(iv) The plaintiff gives up the relief of damages.

Accordingly, the decree-sheet be drawn up, in above terms. The court appreciates the efforts put in by their counsel and the fair stand taken by the parties in resolving the matter. As the matter stands resolved before framing of issues, as prayed, the plaintiff is entitled to refund of the Court fees in terms of Section 16-A of the Court Fees Act.

The suit stands disposed of.

ILR (2014) II DELHI 1410
W.P. (C)

K.L. BHASIN ....PETITIONER

VERSUS

PUNJAB NATIONAL BANK AND ANR. ....RESPONDENTS

(RAJIV SHAKDHER, J.)

W.P.(C) NO. : 7487/2000 DATE OF DECISION: 03.02.2014

Constitution of India, 1950—Article 226-227—Writ Petition—Service law—Departmental Enquiry (DE)—Dismissal-findings on all charges—Petitioner joined New Bank of India on 01.04.1969—Which merged with Respondent No. 1 was serving as Manager at Defence Colony, New Delhi Branch—Certain loan advances sanctioned under his vigil-approved by superior w.r.t. sanctioning of advances an investigation was conducted and secret report generated by vigilance department qua petitioner—One Sh. P.K. Salia, Chartered Accountant and the Assistant General Manager—Petitioner himself filed two FIRs against some of the borrowers in around 21/22.03.1990—Though petitioner complainant but at some stage arrayed as an accused in the criminal proceedings in the interregnum on 17.07.1990 petitioner placed under

suspension-served with charge sheet alongwith six article of charges—First charge—Acted in a manner prejudicial to the interest of bank other five charges related to this each charge independent to each other—Enquiry officer appointed—Submitted report on 26.02.1993—On the basis of the report—Disciplinary authority dismissed the petitioner from the services—The appellate authority sustained the punishment—In the interregnum—The petitioner acquitted in the Criminal case—Preferred writ petition—Contended—Findings of disciplinary authority perverse—Enquiry officer returned the findings qua the first charge only and not on other charges—Disciplinary authority overlooked this aspect—Proceeded on the basis that all charges had been dealt with by enquiry officer—Further contended—Punishment disproportionate to the gravity of alleged misconduct—Further contended at time sanctioning the loan advanced to the five entities—No practice of conducting a pre-sanction inspection—Practice brought into force much later—Petitioner recommended the loan at the end of the day approved by superior authority AGM—Recommendation of sanction made inter-alia on the basis of opinion rendered by lawyer w.r.t. security furnished by borrowers—Lawyers discharged in criminal proceedings—Respondent contended—Court could not re-appreciate the evidence while exercising jurisdiction under Article 226—The enquiry officer has given findings on the main charge the remaining charges off-short of first charge—The acquittal of the petitioner in the criminal proceedings could not be ground to set aside the departmental proceedings as standard of proof in criminal proceedings is different—Court observed—Court cannot re-appreciate the evidence in a proceedings under Articles 226 unless a case of no evidence or case of perversity—Certainly interdict the proceedings if the authorities below not followed the principles of natural justice or have

failed to return the finding qua all charges—Held—Enquiry officer has recorded the findings only on the first charge—Impugned order of disciplinary authority is liable to be set aside—Even if—Accepted that remaining five charges were off shoot of the first charge—The quantum of punishment need modification—Although the standard of proof different in criminal proceedings and departmental proceedings—However acquittal in criminal proceedings relevant for reviewing the quantum of punishment—Observed—Normally such cases remanded back for fresh enquiry—But in view of the facts of the case of prolong litigation of 20 years-advance age of petitioner with the consent of both the parties modified the quantum of punishment of dismissal of the service to compulsory retirement with all consequential benefit—Writ petition disposed of.

A bare perusal of the aforementioned Regulation, would show that the Enquiry Officer has to prepare a report, which is required to contain: a gist of articles of charges and statement of imputations of misconduct or mis-behaviour; a gist of the defence of the officer employee, in respect of, each article of charge; assessment of the evidence in respect of each article of charge; and lastly, finding(s) on each article of charge and, give his reasons thereof. **(Para 9.1)**

Admittedly, the needful has not been done by the Enquiry Officer and, therefore, the conclusion reached by the disciplinary authority and the appellate authority, are clearly flawed. **(Para 9.2)**

As indicated above, therefore, the impugned order of the disciplinary authority will have to be set aside. If that order is set aside, quite naturally, the order of the appellate authority, will also fall. **(Para 9.3)**

Ordinarily, I would have remanded the matter for a fresh

enquiry in the matter with a direction that a report be generated in respect of the remaining charges, framed against the petitioner. However, the fact of the matter is that, charges against the petitioner were framed in 1994. The petitioner, was put under suspension on 17.07.1990. The petitioner, was served with a charge-sheet, on 18.12.1990 and, the impugned order of the disciplinary authority, was passed on 15.01.1994. The petitioner was, thus, dismissed from service in 1994. The petitioner has been involved in litigation; first before the appellate authority and, now, before this court, since 2000. **(Para 9.4)**

Undisputedly, more than two decades have passed since, punishment was imposed, on the petitioner. Moreover, in the interregnum, that is, on 30.10.1999, the petitioner has been acquitted in the criminal proceedings instituted against him. **(Para 9.5)**

While, Mr. Arora, may be correct in his submissions that the criminal proceedings may not have a bearing on the departmental proceedings unless they relate to the same transaction and are based on the same evidence, it is certainly a fact, which may have to be taken into account in taking a decision as to the quantum of punishment to be imposed on the petitioner, even if, fresh proceedings are commenced and, the petitioner, is found guilty of the remaining charges, as well. **(Para 9.6)**

Important Issue Involved: (a) Standard of proof is different in criminal proceedings and departmental proceedings (b) the enquiry officer is required to give findings on all charges separately (c).

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. Ashok Bhalla, Advocate.

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

CASE REFERRED TO:

1. *R.B. Singh* vs. *Punjab National Bank* WP(C) 2895/1997.

RESULT: Writ Petition disposed off.

RAJIV SHAKDHER, J.

1. This writ petition is directed against the order dated 15.01.1994, passed by the disciplinary authority whereby a major penalty had been imposed qua the petitioner. The petitioner has been dismissed from service with an attendant disqualification, which is that, the order of dismissal would impede his future employment. 1.1 The petitioner, being aggrieved, had carried the order of the disciplinary authority in appeal, before the appellate authority, constituted for this purpose.

1.2 The appellate authority vide order dated 07.12.1994, sustained the order of the disciplinary authority. It is though, the stand of the petitioner, that he was not served with order dated 07.12.1994. The respondents, on the other hand, have taken the stand in their counter affidavit that the order was communicated. Nothing though, has been filed with their counter affidavit, suggestive of despatch of the order-in-appeal, either by post or otherwise.

1.3 The petitioner, thus, challenged the basic order, which is, the order of the disciplinary authority dated 15.01.1994.

1.4 Having regard to the above, the onus with regard to receipt of the order of the appellate authority, in that sense, would shift on to the respondents, who are required at least, to show prima facie, a despatch of the order of the appellate authority.

1.5 This could have been done in myriad ways including by bringing on record the contemporaneous record; which would show despatch. This is, specially so, as the order itself seems to indicate that it was despatched by post.

1.6 No evidence with regard to the same by way of even photocopies of entries in the despatch register has been placed on record alongwith the counter affidavit.

1.7 Therefore, the court would have to accept prima facie that, the

stand taken by the petitioner, in this behalf, is correct.

1.8 In any event, the foundational order, which has been sustained by the appellate authority, is, the order dated 15.01.1994 and therefore, if that order was to be set aside, the entire edifice would fall.

1.9 The delay, in that sense, which is, one of the preliminary grounds taken by the respondents to oppose the writ petition is, thus, explained by the fact that the petitioner after having filed the appeal was not served with the copy of the order passed by the appellate authority.

2. The learned counsel for the petitioner in this behalf has drawn my attention to the letter dated 23.10.2000, written by the petitioner to the appellate authority, seeking to know the fate of his appeal.

2.1 It is not disputed by the learned counsel for the respondents that no response was issued by them to the letter dated 23.10.2000. This letter was sent by speed post and a photocopy of the receipt has been appended to the said letter.

2.2 In these circumstances, in my view, the preliminary objection both with regard to: the absence of challenge to the order of the appellate authority and the purported delay in approaching the court will consequently have to be rejected. It is ordered accordingly.

3. This brings me to the merits of the case. Before I do that, let me briefly, sketch out the background facts, in that behalf.

3.1 The petitioner, on 01.11.1969, had joined respondent no.1 bank, which at that point in time, was the New Bank of India. The said bank i.e., the New Bank of India stood merged with respondent no.1 bank i.e., Punjab National Bank.

3.2 During the course of his service with New Bank of India, the petitioner was promoted to the post of the Manager. It is, while the petitioner was serving as a Manager of the Defence Colony, New Delhi branch of the New Bank of India, that certain advances were sanctioned under his vigil; duly approved by his superiors. The accounts, qua which umbrage has been taken by the respondents, are the following :-M/s. Super Plastics, Aakriti Steels Pvt. Ltd., M/s. Bahadur International, Missakki Electronics Pvt. Ltd. and M/s. Swadeshi Exports.

3.3 Based on the role of the petitioner in sanctioning the advances in favour of the aforementioned creditors, an investigation was conducted and a secret report was generated by the Vigilance Department qua : the petitioner; one, Sh. P.K. Saluja, a chartered accountant; and the then Assistant General Manager.

3.4 Ironically, the petitioner himself, in and around 21/22.03.1990, had filed two police complaints against two of the five borrowers i.e., M/s. Super Plastics and Aakriti Steels Pvt. Ltd. with the Defence Colony, New Delhi Police Station.

3.5 These complaints were converted into FIR No.68/90 and FIR No.69/90.

3.6 It may be also relevant to note that though the petitioner was the complainant, he was at some stage arrayed as an accused in the criminal proceedings.

3.7 In the interregnum, on 17.07.1990, the petitioner was placed under suspension.

3.8 It is, in this background, on 18.12.1990, the petitioner was served with the charge-sheet alongwith the articles of charge.

3.9 Since, some, bit, turns on the Articles of charge, I intend to extract the same. These articles of charge were accompanied by a statement of allegations, on which, the said charges were based :-

".. ARTICLES OF CHARGE

Shri K.L.Bhasin, Manager, BO, Defence Colony, New Delhi (under suspension) during his tenure as Manager at BO, Defence Colony, New Delhi, committed various lapses/irregularities, overt acts, omissions/commissions of acts of negligence in discharge of his duties. Shri Bhasin is, therefore, charge sheeted as under:

1. He acted in a manner prejudicial to the interest of the bank;

2. He failed to discharge his duties with utmost integrity, honesty and diligence;

3. He failed to ensure and protect the interest of the bank; 4. He acted otherwise than in his best judgement while discharging his duties;

5. He acted in a manner unbecoming of an officer of the bank;

6. He misused and abused his official status/powers. Each charge is independent of each other.

The aforesaid acts committed by Shri K.L.Bhasin constitute misconduct under New Bank of India Officers' (Conduct) Regulations, 1982, which are punishable under New Bank of India Officer Employees'(Discipline & Appeal) Regulations, 1982..."

4. Qua criminal proceedings I must note here that the petitioner claims that he had himself made a representation, on 31.01.1991, to the Assistant Commissioner of Police, Crime Branch, for expeditious and proper investigation of the aforementioned FIRs.

4.1 As indicated above, post the conclusion of the investigation, vis-a-vis the aforementioned FIRs a charge-sheet was filed against other accused including the petitioner, before the competent criminal court.

4.2 Similarly, in pursuance of the service of the charge-sheet, in the departmental proceedings on the petitioner, the predecessor-ininterest of respondent no.1 bank appointed an Enquiry Officer, who submitted his report, on 26.02.1993.

4.3 On 04.09.1993, as indicated above, the New Bank of India stood merged with Punjab National Bank; propelling the respondents herein to carry forward the proceedings vis-a-vis the petitioner.

4.4 Consequently, based on the recommendations of the Enquiry Officer, the disciplinary authority vide its order dated 15.01.1994, imposed the following punishment on the petitioner : ***"dismissal from service, which shall be a disqualification for future employment".***

4.5 The petitioner, being aggrieved, preferred an appeal with the appellate authority, on 15.03.1994.

4.6 The petitioner claims; an assertion which I dealt with above, that he did not receive a copy of the order of the appellate authority; a situation which finally, propelled him to write to the respondents vide letter dated 23.10.2000, seeking to know from the respondents, the fate of his appeal.

4.7 Importantly, in the interregnum, the judgments, in the criminal proceedings were delivered, and consequent thereto, the petitioner, was acquitted both in the case, which was registered as, No.68/1990 and, the other criminal case, which was registered as, FIR No.69/1990. Both judgments were delivered, on 30.10.1999.

4.8 It is in this background, that the petitioner, approached this court by way of the present writ petition, which was moved on 12.12.2000, when notice was issued in the petition.

4.9 Upon issuance of notice, respondents filed their reply, which was followed by a rejoinder of the petitioner. Consequently pleadings stood completed.

Submissions of counsels

5. Based on the pleadings, arguments on behalf of the petitioner have been advanced by Mr. Ashok Bhalla, while on behalf of the respondents, submissions have been made by Mr. Jagat Arora; ably assisted by Mr. Rajat Arora.

5.1 Mr. Bhalla, apart from trying to demonstrate that finding of the disciplinary authority, was perverse, lay particular emphasis on the fact that while six charges had been framed against the petitioner, the Enquiry Officer returned a finding only qua the first charge.

5.2 Mr. Bhalla submitted that the disciplinary authority, while passing the impugned order, overlooked this aspect of the matter and proceeded on the basis that, all charges, had been dealt with by the Enquiry Officer.

5.3 According to Mr. Bhalla, this was a fatal error in proceedings and therefore, on this short ground, the order of the disciplinary authority, as also, the order of the appellate authority, should be set aside, as even the appellate authority, overlooked this flaw.

5.4 Mr. Bhalla, apart from the aforesaid, also submitted that the punishment accorded to the petitioner was disproportionate to the gravity of the alleged misconduct said to have been committed by him, and that, dismissal with an impediment placed for future employment was uncalled for, in the context of the charges levelled against the petitioner.

5.5 Mr. Bhalla, vehemently argued that at the relevant time when, moneys were advanced to the five entities, named above, there was no

practice of conducting a pre-sanction inspection. He says that this practice was brought into force much later, and that, the petitioner had recommended the loan; which was sanctioned, at the end of the day, by a superior authority, which in this case, was the AGM.

5.6 Mr. Bhalla, also submitted that the recommendation to sanction the loan was made, inter alia, on the basis of opinion rendered by the lawyers, with respect to security furnished by the borrowers; which opinion was, the subject matter of their search reports and valuation reports. He pointed that, as a matter of fact, criminal proceedings against the lawyers, were discharged.

5.7 In respect of the quantum of punishment imposed, Mr. Bhalla sought to place reliance on the judgment of the learned Single Judge of this Court passed in WP(C) 2895/1997, titled **R.B. Singh Vs. Punjab National Bank.**

5.8 Mr. Bhalla submitted that in the said case, the learned Single Judge had modified the order of removal from service to that of compulsory retirement, with all consequential benefits, arising from the said order; in somewhat similar circumstances.

6. On the other hand, Mr. Arora, who appears for the respondents submitted that this court would not re-appreciate the evidence, while exercising jurisdiction under Article 226 of the Constitution.

6.1 He further submitted that, the argument of Mr. Bhalla, that findings had not been returned by the Enquiry Officer qua all charges was misconceived, as the remaining five charges were, an off-shoot of the first charge and, therefore, in sum and substance, after complying with the principles of natural justice, a recommendation had been made by the Enquiry Officer, based on appreciation of the evidence, brought on record, which had been accepted by the disciplinary authority.

6.2 Mr. Arora, thus, submitted that the disciplinary authority looked at the enquiry report in this context and, accordingly, concluded that, viable findings had been returned by the Enquiry Officer, qua all charges.

6.3 The appellate authority, according to Mr. Arora, did likewise.

6.4 It was also Mr. Arora's contention that, the fact that, the petitioner had been acquitted in criminal proceedings, could not be a

ground, to set aside the findings in the departmental proceedings, as the standard of proof in the two proceedings is different.

6.5 In sum, it was Mr. Arora's contention that, the impugned orders, deserved to be sustained.

7. The aspect of maintainability of the petition, on the ground of delay, which was also one of the objections raised by Mr. Arora, need not detain me any further, as I have, already dealt with it, in the foregoing part of my discussion.

Reasons

8. I have heard the learned counsel for the parties and perused the record.

8.1 While I concur with Mr. Arora, the learned counsel for the respondents that under Article 226 of the Constitution, it is not within the domain of the court to re-appreciate the evidence and, to interfere with the findings of the disciplinary authority, which have been sustained by the appellate authority, unless it is a case of no evidence or a case of perversity; this court can certainly interdict the proceedings, if the authorities below have not followed the principles of natural justice or have failed to return findings, qua all charges framed against the delinquent officer.

8.2 In the facts of this case, it cannot be disputed that there were six charges framed against the petitioner. It is also not in dispute that the Enquiry Officer, returned a finding, only qua, Article I. This is evident from the following extracts of the Enquiry Report :

".. F I N D I N G

Article: I :	**Held proved.**
New Delhi	(S.K. ROY)
Dated: 26.2.93	INQUIRY OFFICER & COMMISSIONER FOR DEPARTMENTAL INQUIRIES"

8.3 The fact that, this went unnoticed in the proceedings held before the disciplinary authority, is clearly, made out by the following observations in the impugned order :

" I find that the Enquiry Officer has held all the imputations contained in Annexure II and all the following Articles of Charge contained in Annexure I as proved:

- He acted in a manner prejudicial to the interest of the bank.
- He failed to discharge his duties with utmost integrity, honesty and diligence.
- He failed to ensure and protect the interest of the bank.
- He acted otherwise than in his best judgment while discharging his duties.
- He acted in a manner unbecoming of an officer of the bank.
- He misused and abused his official status/powers.

The points raised by Shri Bhasin in his representation dated 16.12.93 do not merit consideration because the charge sheet was served in terms of provisions of Discipline & Appeal Regulations. The charges framed against Shri Bhasin are specific. Further, the enquiry proceedings have been conducted in terms of Discipline & Appeal Regulations and report of the Enquiry Officer is in terms of provisions of aforesaid Regulations. A close scrutiny of submissions of Shri Bhasin further reveals that in fact he has admitted the charges indirectly by stating that the responsibility of other officials for alleged lapses was much more than the charged officer's.

I concur with the findings of the Enquiry Officer and hold Shri Bhasin guilty of the proven charges..."

(emphasis is mine)

8.4 Furthermore, the fact that even the appellate authority did not notice this flaw, in the order of the disciplinary authority is, borne out from the following extract of its order dated 07.12.1994:

".....The Disciplinary Authority has held Shri Bhasin guilty of the following proven charges:

- He acted in a manner prejudicial to the interest of the Bank.
- He failed to discharge his duties with utmost integrity honesty and diligence.
- He failed to ensure and protect the interest of the Bank.
- He acted otherwise than in his best judgment while discharging his duties. He acted in a manner unbecoming of an officer of the bank.
- He misused and abused his official status/powers."

8.5 Therefore, in my view, the impugned order of the disciplinary authority will have to be set aside on this short ground alone.

8.6 The argument advanced by Mr. Arora that all other charges (charges 2 to 6) were an off shoot of charge no.1, in my view, cannot be accepted for more than one reason. When the delinquent officer / employee is furnished with Articles of charge, it is incumbent upon the Enquiry Officer to return a finding qua each and every charge.

8.7 This is important for the reason that when, a disciplinary authority finally takes up the report of the Enquiry Officer, it needs to consider the matter from various angles, including, as to the quantum of punishment, which is required to imposed, in a given case.

8.8 Even if, I were to accept Mr. Arora's contention that charges 2 to 6 are an off shoot of charge no.1; in deciding the quantum of punishment, the aggravation, if any, of the first charge, would be a relevant criteria to be kept in mind by the disciplinary authority.

8.9 The disciplinary authority, could not have assumed that all charges had been proved, when clearly, the Enquiry Officer had returned a finding only qua Article-1.

9. Apart from the general principle, this is also the requirement of Regulation 6 (21)(i) of the Punjab National Bank Officer Employees' (Discipline and Appeal) Regulation 1977 (in short Regulations). For the sake of convenience, the same is extracted hereinafter.

" ...6. PROCEDURE FOR IMPOSING MAJOR PENALITIES:

x x x x x

x x x x x

(21) (i) On the conclusion of the inquiry, the Inquiring Authority shall prepare a report which shall contain the following:

(a) a gist of the articles of charge and the statement of the imputations of misconduct or misbehaviour;

(b) a gist of the defence of the officer employee in respect of each article of charge;

(c) an assessment of the evidence in respect of each article of charge;

(d) the findings on each article of charge and the reasons therefor..."

(emphasis is mine)

9.1 A bare perusal of the aforementioned Regulation, would show that the Enquiry Officer has to prepare a report, which is required to contain: a gist of articles of charges and statement of imputations of misconduct or mis-behaviour; a gist of the defence of the officer employee, in respect of, each article of charge; assessment of the evidence in respect of each article of charge; and lastly, finding(s) on each article of charge and, give his reasons thereof.

9.2 Admittedly, the needful has not been done by the Enquiry Officer and, therefore, the conclusion reached by the disciplinary authority and the appellate authority, are clearly flawed.

9.3 As indicated above, therefore, the impugned order of the disciplinary authority will have to be set aside. If that order is set aside, quite naturally, the order of the appellate authority, will also fall.

9.4 Ordinarily, I would have remanded the matter for a fresh enquiry in the matter with a direction that a report be generated in respect of the remaining charges, framed against the petitioner. However, the fact of the matter is that, charges against the petitioner were framed in 1994. The petitioner, was put under suspension on 17.07.1990. The petitioner, was served with a charge-sheet, on 18.12.1990 and, the impugned order of the disciplinary authority, was passed on 15.01.1994. The petitioner was, thus, dismissed from service in 1994. The petitioner has been involved in litigation; first before the appellate authority and, now, before this court, since 2000.

9.5 Undisputedly, more than two decades have passed since, punishment was imposed, on the petitioner. Moreover, in the interregnum, that is, on 30.10.1999, the petitioner has been acquitted in the criminal proceedings instituted against him.

9.6 While, Mr. Arora, may be correct in his submissions that the criminal proceedings may not have a bearing on the departmental proceedings unless they relate to the same transaction and are based on the same evidence, it is certainly a fact, which may have to be taken into account in taking a decision as to the quantum of punishment to be imposed on the petitioner, even if, fresh proceedings are commenced and, the petitioner, is found guilty of the remaining charges, as well.

9.7 In these circumstances, I have put to Mr. Bhalla, the learned counsel for the petitioner, as to whether, he would be interested in having the petitioner relegated to a fresh enquiry or, would he, be willing to suffer a lesser punishment.

9.8 The petitioner, is present in court. Mr. Bhalla has obtained instructions from him. Mr. Bhalla says that, in view of the fact that the petitioner is now 70 years of age, if the petitioner is relegated to a fresh enquiry, the proceedings will not perhaps not get concluded, during his lifetime. Mr. Bhalla, has also submitted that the petitioner is suffering from various ailments and requires some financial support, which can only happen if, the punishment is reduced. In these circumstances, Mr.Bhalla says reduction in quantum of punishment will be a preferable option than, the petitioner being asked to participate in a fresh enquiry.

9.9 Mr. Arora, the learned counsel for the respondents cannot but contend that there has been a delay of nearly two decades, in the conclusion of the case.

10. Mr. Arora, quite candidly says that if, fresh proceedings are triggered against the petitioner, it may not get concluded perhaps in the petitioner's lifetime.

11. In the facts and circumstances of this case, Mr. Arora says that he would much rather leave the decision with regard to reduction of the petitioner's punishment, to the discretion of the court.

12. Having regard to the aforesaid circumstances, I am of the view that the interest of justice, would be served if, the punishment of the

petitioner is, converted to compulsory retirement. It is ordered accordingly. It is made clear though that the petitioner will be entitled to all consequential benefits, which would have otherwise followed an order of compulsory retirement, had it been passed on the date, on which, the disciplinary authority passed the impugned order dated 15.01.1994.

13. Mr. Bhalla, at this stage re-emphasizes that his client i.e., the petitioner, will rest with aforesaid direction, which this court has issued, having regard to peculiar facts and circumstances of the case.

14. With the aforesaid directions in place, the captioned petition is disposed of.

ILR (2014) II DELHI 1425
CS (OS)

PP JEWELLERS PVT. LTD. ....PLAINTIFF

VERSUS

MODERN NEW KAPOOR JEWELLERS PVT. LTD. ....DEFENDANT

(G.S. SISTANI, J.)

CS(OS) NO. : 1009/2012 DATE OF DECISION: 04.02.2014

Code of Civil Procedure, 1908—Order 37—Plaintiff filed suit U/o 37 of Code praying for recovery of amount with pendente lite and future interest on basis of invoices issued by defendant company—Defendant failed to file application seeking leave to defend—Plaintiff prayed for decree of suit. Held:- In the absence of any application for leave to defend, as per Rule 3(5) of Order 37, the suit is to be decreed.

In the absence of any application for leave to defend, as per Rule 3 (5) of Order 37 CPC, the present suit is decreed.

Plaintiff will be entitled to interest @8% pendente lite and future interest at the same rate till realization. **(Para 5)**

Important Issue Involved: In the absence of any application for leave to defend, as per Rule 3 (5) of Order 37, the suit is to be decreed.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Karan Jain, Advocate.

FOR THE DEFENDANT : Mr. Manish Srivastava, Advocate.

RESULT: Suit decreed.

G.S. SISTANI, J. (ORAL)

1. Plaintiff has filed the present suit under the provisions of Order 37 CPC for recovery of Rs.81.72 lacs with pendente lite and future interest. As per the plaint, the business transaction between the plaintiff and the defendant took place against plaintiff's two invoices being No.02585 dated 1.7.2010 and the invoice no.02879 dated 14.7.2010. The invoices were signed by the director of the defendant company i.e. Sita Ram Kapoor in acknowledgment of purchasing new ornaments, which were duly described in the invoices which reads as under:

Invoice	Description	Amount
02585 Dated 01.07.2010	New Ornaments – purity 22Cts. Gross Weight (Gms) - 5736.460 Net Weight (Gms)- 5736.460	1,08,59,954/- + Vat @ 1% 1,08,600 Total 1,09,68,554/-
02879 Dated 14.07.2010	New Ornaments – purity 18Cts. Gross Weight (Gms) -1169.040 Net Weight (Gms)- 1169.040 Diamonds (Cts.) – 154.76 New	33,91,960/- 36,93,258/- + Vat @ 1% 70,853/-

Ornaments – Purity 14 Cts.
Gross Weight (Gms) - Total 71,56,071/-
1025.560 Net Weight
(Gms) -1025.560 Diamonds
(Cts.) -215.690

2. Further as per the plaint the defendant made payments against the part invoices by sending remittance through its bank and also by issuing account payee cheques in favour of the plaintiff. The cheques were handed over which were duly encashed, however, further unpaid amount was given through cheque bearing No.981943 dated 29.6.2011 drawn on Barclays Bank, Nehru Place, New Delhi, for the sum of Rs.72.0 lacs. which was handed over to the plaintiff. Upon presentation the aforesaid cheque was returned with the remarks 'Exceeds arrangement'.

3. It is pointed out that the original cheque has been filed under the proceedings of Negotiable Instruments Act, however, a certified copy of the cheque has been placed on record. The defendant was served with the summons in the prescribed form; address for service was filed, however, there is no application for leave to defend on record.

4. It may however, be noticed that on making a statement by counsel for the defendant on 21.10.2013 that an application for leave to defend has been filed by diary no.89066 dated 31.5.2013, the defendant was directed to check up with the Registry and place the application on record after removing the defects. As per the report of the Registry no such application has been filed.

5. In the absence of any application for leave to defend, as per Rule 3 (5) of Order 37 CPC, the present suit is decreed. Plaintiff will be entitled to interest @8% pendente lite and future interest at the same rate till realization.

I.A. 6809/2012 & I.A. 1037/2013

6. In view of order passed in the suit, the applications stand disposed of.

ILR (2014) II DELHI 1428
W.P. (C)

YOGENDRA NATH ....PETITIONER

VERSUS

COMMISSIONER KENDRIYA VIDYALAYA SANGATHAN ....RESPONDENT

(GITA MITTAL AND DEEPA SHARMA, JJ.)

W.P.(C) NO. : 510/2014 & CM NO. 1024/2014 **DATE OF DECISION: 04.02.2014**

Constitution of India, 1950—Article 226-227—Writ Petition—Central Administrative Tribunal (CAT)—Service law—Termination—Education Code of Kendriya Vidyalaya Sangathan (Code)—Article 81 (b)—Termination without right to cross—Examine witnesses—Case of immoral sexual behaviour towards student—Petitioner a Post Graduate Teacher (PGT) posted with Kendriya Vidyalaya Yol Cantonment—Complaints received from students—Lady teachers—Parents in the office of Assistant Commissioner, Regional Office, Jammu—Alleging petitioner indulged in moral turpitude involving in immoral sexual behaviour towards the girls students-Fact finding enquiry ordered—Enquiry Committee conducted the proceedings-Committee interacted with 07 victim girls students—One victim lady parent—Three staff members recorded their statement—Submitted report dated 18.08.2002 to Commissioner, KVS—Prima—Facie finding petitioner guilty of moral turpitude involving immoral sexual behaviour—Commissioner considered entire matter including the enquiry report—Formed an opinion-Finding of enquiry committee substantiated by material on record—Exercising jurisdiction under

Article 81 (b) of the code—Opined—not expedient to hold regular enquiry under CCS (CCA) Rules, 1965—Would cause serious embarrassment to the students—Cause trauma to them because of their tender age—Memorandum dated 08.04.2003 setting out charges communicated—Called upon the show case—Why his services be not terminated under Article 81 (b)—with the memorandum—copies of preliminary enquiry and report of the committee served upon the petitioner—given full opportunity to submit his representation—Petitioner submitted his reply dtd. 15.05.2013—On consideration of entire record—commissioner passed order dated 07.01.2004 terminating the services of the petitioner—Petitioner preferred appeal—Rejected being time barred-Filled O.A before CAT-Assailed the order of appellate authority-CAT disposed off holding the appellate authority rejected again recording reasons—Petitioner filed O.A before CAT—O.A dismissed—Preferred writ petition-Contended -Complaints against petitioner false—had unblemished record for 9 years with Govt. of Himachal Pradesh—25 years service with KVA—entitle to an opportunity to cross—Examine the witnesses-Held the spirit—Purpose—Intent—Of incorporating article 81 (b) of the Code to prevent traumatization of victim of such immoral sexual behaviour—The Commissioner specifically opined that the cross-Examination of witnesses would cause serious embarrassment to the student and would cause trauma to them because of their tender age-Further there was no procedural lacuna in the case—Further held—Tribunal rightly rejected the grievances of the petitioner that punishment of termination of services disproportionate to the charges—Writ petition dismissed.

The construction of the above provisions of Article 81(b) of the Education Code have arisen for consideration in several cases. Our attention has been drawn to the judgment reported as (1997) 2 SCC 534, **Avinash Nagra Vs.**

Navodaya Vidyalaya Samiti & Ors., wherein a similar objection raised by the petitioner was rejected by the Supreme Court. It was held that the fair procedure to be adopted in such cases would be that a show cause notice containing the charge and the facts in support of the charge together with the statements recorded in the preliminary inquiry along with a copy of the report of the preliminary inquiry would be given to the charged person and such charged person would be given an opportunity to submit his explanation, without having the right to cross-examine witnesses.

> "12. It is axiomatic that percentage of education among girls, even after independence, is fatham deep due to indifference on the part of all in rural India except some educated people. Education to the girl children is nation's asset and foundation for fertile human resources and disciplined family management, apart from their equal participation in socio-economic and political democracy. Only of late, some middle class people are sending the girl children to co-educational institutions under the care of proper management and to look after the welfare and safety of the girls. Therefore, greater responsibility is thrust on the management of the schools and colleges to protect the young children, in particular, the growing up girls, to bring them up in disciplined and dedicated pursuit of excellence. The teacher who has been kept in charge, bears more added higher responsibility and should be more exemplary. His/her character and conduct should be more like Rishi and as loco parent is and such is the duty, responsibility and charge expected of a teacher. The question arises: whether the conduct of the appellant is befitting with such higher responsibilities and as he by his conduct betrayed the trust and forfeited the faith whether he would be entitled to the full-fleged enquiry as demanded by him? The fallen standard of the appellant is an ice berg in the discipline of teaching, a noble and learned professing; it is for each teacher and

collectively their body to stem the rot to sustain the faith of the society reposed in them. Enquiry is not a pannacea but a nail on the coffin. It is self-inspection and correction that is supreme. It is seen that the rules wisely devised have given the power to the Director, a highest authority in the management of the institution to take decision, based on the fact situation, whether a summary enquiry was necessary or he can dispense with the services of the appellant by giving pay in lieu of notice. Two safeguards have been provided, namely, he should record reasons for his decision not to conduct an enquiry under the rules and also post with facts the information with Minister, Human Resources Department, Government of India in that behalf. It is seen from the record that the appellant was given a warning of his sexual advances towards a girl student but he did not correct himself and mend his conduct. He went to the girl hostel at 10 p.m. in the night and asked the Hostel helper, Bharat Singh to misguide the girl by telling her that Bio-Chemistry Madam was calling her; believing the statement, she came out of the hostel. It is the admitted position that she was an active participant in cultural activities. Taking advantage thereof, he misused his position and adopted sexual advances towards her. When she ran away from his presence, he persued her to the room where she locked herself inside; he banged the door. When he was informed by her room mates that she was asleep, he rebuked them and took the torch from the room and went away. He admitted his going there and admitted his meeting with the girl but he had given a false explanation which was not found acceptable to an Inquiry Officer, namely. Asstt. Director. **After conducting the enquiry, he submitted the report to the Director and the Director examined the report and found him to be not worthy to be a teacher in the institution. Under those circumstances, the question arises: whether the**

girl and her room-mates should be exposed to the cross-examination and harassment and further publicity? In our considered view, the Director has correctly taken the decision not to conduct any enquiry exposing the students and modesty of the girl and to terminate the services of the appellant by giving one month's salary and allowances in lieu of notice as he is a temporary employee under probation. In the circumstances, it is very hazardous to expose the young girls for tortuous process of cross-examination. Their statements were supplied to the appellant and he was given an opportunity to controvert the correctness thereof......"

(Para 22)

A reading of Article 81(b) of the Education Code also manifests the objective of the framers of the Code to the effect that it is the rights and sensibilities of the victims of the allegations which would guide the Commissioner in arriving at its opinion for dispensing with the regular inquiry and also dictate the procedure which is required to be followed. There is a clear mandate of the Code as well as binding judicial precedents that a person against whom the charges are framed under Article 81 (b) of the Education Code would not be entitled to claim right to cross examine the victims in such proceedings. **(Para 31)**

The Tribunal has given detailed reasons in arriving at a conclusion that due process has been following in proceeding against the petitioner. The Tribunal has also rejected the grievance of the petitioner that the punishment of termination of his services is disproportionate to the charges. Nothing has been placed before us, which would enable us to take a different view. We therefore, find no merit in the present petition, hence the same is dismissed along with pending application. **(Para 32)**

Important Issue Involved: (a) In the cases of immoral sexual behaviour against student, the procedure not permitting the cross—Examination of the witnesses by the delinquent is proper and legal.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. Prabodh Kumar, Adv.

FOR THE RESPONDENT : Mr. S. Rajappa, Adv.

CASES REFERRED TO:

1. *Commissioner, K.V. Sangathan & Ors.* vs. *Rathin Pal,* SLP (C) No. 4627/2008.
2. *Director, Navodaya Vidyalaya Samiti & Ors.,* vs. *Babban Prasad Yadav & Anr.,* (2004) 13 SCC 568.
3. *Avinash Nagra* vs. *Navodaya Vidyalaya Samiti & Ors.,* reported as (1997) 2 SCC 534.

RESULT: Writ Petition dismissed.

GITA MITTAL, J. (Oral)

1. The petitioner before us assails the order dated 28.05.2013 passed in O.A. No. 4605/2011, passed by the Central Administrative Tribunal, Principal Bench, New Delhi whereby the order dated 07.01.2004 passed by the Commissioner, Kendriya Vidyalaya Sangathan under Article 81(b) of the Education Code, terminating the services of the petitioner and the order of the Appellate Authority dated 21.07.2010 were sustained.

2. The facts giving rise to the instant petition are in narrow compass. The petitioner was employed by the Kendriya Vidyalaya Sangathan (KVS) as a post graduate teacher (English) and at the relevant time, posted with the Kendriya Vidyalaya, Yol Cantonment.

3. Complaints were received from the students, lady teachers and parents in the office of the Assistant Commissioner, Kendriya Vidyalaya Sangathan Regional Office, Jammu alleging that the present petitioner had indulged in moral turpitude involving in immoral sexual behaviour towards the girl students of Class-VIII-B, IX-B and XII-B.

4. A fact finding enquiry was consequently ordered into the matter.

5. The Inquiry Committee constituted by the Assistant Commissioner, Jammu vide order dated 31.07.2002, comprised of (i) Shri S.K. Verma, Education Officer, KVS Jammu (ii) Mrs. Manju Sehgal, Principal Kendriya Vidyalaya, Dharmshala (iii) Mr. Anurag Yadav, PGT (Bio), Kendriya Vidyalaya Yol Cantt., (iv) Ms. Vandana, PGT (History) Kendriya Vidyalaya, Yol Cantt.

6. This committee conducted its proceedings on the 17th and 18th August, 2002 wherein they interacted with 07 girl victims of class –VIII-B, IX-B and XII-B, one victim lady parent, two victim girl students of class XII-B, three other staff members and two other parents. Statements were recorded to unravel the truth. The petitioner participated in the summary enquiry and was provided with full opportunity to present his case. His statement was also recorded during the enquiry.

7. The Enquiry Committee submitted a report dated 18.08.2002 to the Commissioner, KVS prima facie finding the petitioner guilty of moral turpitude involving immoral sexual behaviour. The Assistant Commissioner submitted a report thereon to the Commissioner, KVS.

8. The Commissioner considered the entire matter including the enquiry report and formed an opinion that the findings of the enquiry committee were fully substantiated by material which had come on record during the enquiry. Therefore, exercising jurisdiction under Article 81(b) of the Education Code for Kendriya Vidyalaya Sangathan, the Commissioner was of the opinion that it was not expedient to hold a regular enquiry under the CCS (CCA) Rules 1965, as it would serious embarrassment to the students and would also cause a trauma to them because of their tender ages. The Commissioner passed an order dated 7th January, 2004 consequently, holding an enquiry for imposing major penalty in accordance with CCS(CCA) Rules, 1965 was dispensed with.

9. Reliance was placed on the judgment of the Supreme Court dated 30-09-1996 in Civil Appeal No. 14525/1996, **Avinash Nagra vs. Navodaya Vidyalaya Samiti & Ors.,**[reported at (1997) 2 SCC 534], wherein the procedure required to be followed in such matters involving schools has been laid down. The Supreme Court has mandated that upon the Commissioner arriving at such a conclusion with regard to dispensation of the regular enquiry. The Supreme Court has mandated that a show

cause notice containing the charge and the facts in support of the charge together with the statements recorded in the preliminary enquiry, along with a copy of the report of the preliminary inquiry is required to be given to the charged person. Such charged person would be given an opportunity to submit his explanation, without having the right to cross-examine the witnesses. The explanation tendered by the employee would be considered with all other records, before the final order under Article 81(b) of the Education Code was passed.

10. The High Court of Karnataka by judgement dated 01.07.2002 in W.P.(C) No. 23535 also approved the action of the employer who followed such procedure.

11. It appears that the Commission, KVS in compliance of the above procedure mandated by the Supreme Court. A Memorandum dated 8th April, 2003 setting out the following charges against the present petitioner was accordingly communicated to the petitioner. The Commissioner also communicated the following facts in support of the charges:

> "That the said Shri Yogendra Nath while functioning as Post Graduate Teacher (English) in the Kendriya Vidyalaya, Yol Cantt. during the period from 2002-2003, indulged in acts of moral turpitude involving exhibition of immoral sexual behaviour.
>
> **FACTS IN SUPPORT OF THE CHARGE**
>
> That the girls students viz. Surabhi Rana, IX-B, Sheetal Sharma, XII-A, Rashi Thapa, XII-B, Ashima Dogra, XII-B, Laxmi Thapa XII-B, Jyoti Katoch, IX-B and Priya VIII-B have complained that Sri Yogendra Nath, PGT (English), Kendriya Vidyalaya, Yol Cantt. during 2002-03 indulged in acts of moral turpitude involving exhibition of immoral sexual behaviour such as making vulgar statements/gestures like "Go drink water and make water", asking Priya VIII-B "to open her top botton since it was hot". Commenting on the figure and body structure of Shital Sharma, XII-A, demonstrating how a mother feeds her child while teaching the lesson "Maternity" and immoral acts like entering girls/ladies toilets, following girls into their toilet, hiding inside girls toilet etc. and they have substantiated the same with their statements during the summary inquiry on 17/18-08-2002."

12. The petitioner was called upon to show cause as to why his services be not terminated under Article 81(b) of the Education Code.

13. With the Memorandum dated 08.04.2003 issued to the petitioner, copies of preliminary inquiry as well as in the report of the preliminary inquiry were served upon the petitioner.

14. It is not disputed before us that the petitioner was given full opportunity to submit his representation to the show cause notice as to why his services should not be terminated under Article 81(b) of the Education Code of the Kendriya Vidyalaya. Pursuant to such opportunity, the petitioner submitted a reply dated 15th May, 2003.

15. On a consideration of the entire record of the enquiry as well as the statements and reply of the petitioner, the Commissioner in exercise of his jurisdiction conferred under Article 81(b) passed an order dated 07.01.2004, terminating the services of the petitioner with immediate effect.

16. Aggrieved thereby the petitioner preferred an appeal dated 15.02.2009 before the Additional Secretary, MHRD and Vice-Chairman, Kendriya Vidyalaya Sangathan as an Appellate Authority. His appeal was rejected by an order dated 30.06.2009 on the sole ground of it being barred by limitation.

17. The petitioner assailed the order of the Appellate Authority by way of O.A. No. 2783/2009 before the Central Administrative Tribunal, Principal Bench, New Delhi which application was disposed of vide order dated 09.12.2009, holding that the Appellate Authority ought to have recorded the reasons in support of the dismissal of the appeal. The matter was remanded to the Appellate Authority to reconsider the petitioner's appeal on merits and to pass a speaking and reasoned order.

18. It appears that the entire matter was considered afresh by the Appellate Authority which passed afresh order dated 21.07.2010, rejecting the appeal with detailed reasons. The contention of the petitioner that the impugned order was passed in violation of principle of natural justice and the petitioner had been denied fair opportunity to defend the charges against him, which were false was rejected.

19. The petitioner assailed the order dated 21.07.2010 before the Central Administrative Tribunal by way of O.A. No. 4605/11, which

application has culminated in the order dated 28.05.2013 dismissing the petitioner's application.

20. The order dated 28.05.2013, as well as orders dated 07.01.2004 and 21.07.2010 of the respondents have been assailed before us on the ground that the complaint against the petitioner was false; that he has a blemishless record of 9 years service with the Govt. of Himachal Pradesh and 25 years service with Kendriya Vidyalaya Sangathan and that he was entitled to an opportunity to cross-examine the witnesses.

21. Before dealing with the submissions of the petitioner, we may extract Article 81(b) of the Education Code of the Kendriya Vidyalaya Sangathan which reads as under:

> "Where the Commissioner is satisfied after such a summary enquiry as he deems proper and practicable in the circumstances of the case that any member of the Kendriya Vidyalaya is prima facie guilty of moral turpitude involving sexual offence or exhibition of immoral sexual behaviour towards any student, he can terminate the services of that employee by giving him one month's or 3 month's pay and allowances according as the guilty employee is temporary or permanent in the service of the Sangathan. In such cases procedure prescribed for holding enquiry for imposing major penalty in accordance with CCS (CCA) Rules, 1965 as applicable to the employees of the Kendriya Vidyalaya Sangathan, shall be dispensed with, provided that the Commissioner is of the opinion that it is not expedient to hold regular enquiry on account of serious embarrassment to the student or his guardians or such other practical difficulties. The Commissioner shall record in writing the reasons under which it is not reasonably practicable to hold such enquiry and he shall keep the Chairman of the Sangathan informed of the circumstances leading to such termination of service."

22. The construction of the above provisions of Article 81(b) of the Education Code have arisen for consideration in several cases. Our attention has been drawn to the judgment reported as (1997) 2 SCC 534, **Avinash Nagra Vs. Navodaya Vidyalaya Samiti & Ors.,** wherein a similar objection raised by the petitioner was rejected by the Supreme Court. It was held that the fair procedure to be adopted in such cases would be that a show cause notice containing the charge and the facts

in support of the charge together with the statements recorded in the preliminary inquiry along with a copy of the report of the preliminary inquiry would be given to the charged person and such charged person would be given an opportunity to submit his explanation, without having the right to cross-examine witnesses.

> "12. It is axiomatic that percentage of education among girls, even after independence, is fatham deep due to indifference on the part of all in rural India except some educated people. Education to the girl children is nation's asset and foundation for fertile human resources and disciplined family management, apart from their equal participation in socio-economic and political democracy. Only of late, some middle class people are sendign the girl children to co-educational institutions under the care of proper management and to look after the welfare and safety of the girls. Therefore, greater responsibility is thrust on the management of the schools and colleges to protect the young children, in particular, the growing up girls, to bring them up in disciplined and dedicated pursuit of excellence. The teacher who has been kept in charge, bears more added higher responsibility and should be more exemplary. His/her character and conduct should be more like Rishi and as loco parent is and such is the duty, responsibility and charge expected of a teacher. The question arises: whether the conduct of the appellant is befitting with such higher responsibilities and as he by his conduct betrayed the trust and forfeited the faith whether he would be entitled to the full-fleged enquiry as demanded by him? The fallen standard of the appellant is an ice berg in the discipline of teaching, a noble and learned professing; it is for each teacher and collectively their body to stem the rot to sustain the faith of the society reposed in them. Enquiry is not a pannacea but a nail on the coffin. It is self-inspection and correction that is supreme. It is seen that the rules wisely devised have given the power to the Director, a highest authority in the management of the institution to take decision, based on the fact situation, whether a summary enquiry was necessary or he can dispense with the services of the appellant by giving pay in lieu of notice. Two safeguards have been provided, namely, he should record reasons for his decision not to conduct an enquiry under the rules and also post

with facts the information with Minister, Human Resources Department, Government of India in that behalf. It is seen from the record that the appellant was given a warning of his sexual advances towards a girl student but he did not correct himself and mend his conduct. He went to the girl hostel at 10 p.m. in the night and asked the Hostel helper, Bharat Singh to misguide the girl by telling her that Bio-Chemistry Madam was calling her; believing the statement, she came out of the hostel. It is the admitted position that she was an active participant in cultural activities. Taking advantage thereof, he misused his position and adopted sexual advances towards her. When she ran away from his presence, he persued her to the room where she locked herself inside; he banged the door. When he was informed by her room mates that she was asleep, he rebuked them and took the torch from the room and went away. He admitted his going there and admitted his meeting with the girl but he had given a false explanation which was not found acceptable to an Inquiry Officer, namely. Asstt. Director. **After conducting the enquiry, he submitted the report to the Director and the Director examined the report and found him to be not worthy to be a teacher in the institution. Under those circumstances, the question arises: whether the girl and her room-mates should be exposed to the cross-examination and harassment and further publicity? In our considered view, the Director has correctly taken the decision not to conduct any enquiry exposing the students and modesty of the girl and to terminate the services of the appellant by giving one month's salary and allowances in lieu of notice as he is a temporary employee under probation. In the circumstances, it is very hazardous to expose the young girls for tortuous process of cross-examination. Their statements were supplied to the appellant and he was given an opportunity to controvert the correctness thereof......"**

23. This view of the Supreme Court finds reiterated in the judgment of **Director, Navodaya Vidyalaya Samiti & Ors., Vs. Babban Prasad Yadav & Anr.,** (2004) 13 SCC 568 wherein the court held as follows:-

"7. xxx The rule quoted earlier, explicitly deals with such a situation as obtains in the present case. The rule is not under

challenge. All that is required for the court is to be satisfied that the preconditions to the exercise of power under the said rule are fulfilled. These preconditions are:

1. Holding of summary inquiry.
2. A finding in such summary inquiry that the charged employee was guilty of moral turpitude.
3. The satisfaction of the Commissioner on the basis of such summary inquiry that the charged officer was prime – facie guilty.
4. Satisfaction of the Commissioner that it was not expedient to hold an enquiry on account of serious embarrassment to be caused to the student or his guardians or such other practical difficulties and finally. 5. The recording of the reasons in writing in support of the aforesaid."

24. The Court had noted the procedures which were required to be followed in cases involving the charges of immoral sexual behaviour against the employees.

25. A question identical to that principle arose before the Supreme Court in SLP (C) No. 4627/2008, **Commissioner, K.V. Sangathan & Ors. Vs. Rathin Pal,** which was decided by order dated 16.08.2010, holding as under:

"The High Court's observation that appellant No. 1 had not recorded his satisfaction on the desirability of dispensing with the regular inquiry is clearly erroneous. A reading of the order extracted in the earlier part of his judgment shows that appellant No.2 had independently analyzed the statements of the girl students and their parents and came to the conclusion that it was not expedient to conduct regular inquiry because that would embarrass the girl students and their parents and would also vitiate atmosphere of the school. The reasons assigned by appellant No.1 cannot, by any stretch of imagination, be treated as extraneous or irrelevant to the exercise of power under Article 81(b) of the Education Code."

26. The spirit, purpose and intent of incorporating Article 81(b) on the Education Code of the Kendriya Vidyalaya Sangathan is to prevent

traumatisation of the victims of such immoral sexual behaviour.

27. In the present case, as detailed above, a four member committee consisting of a senior officer of the rank of Education Officer of Kendriya Vidyalaya Sangathan; one Pricipal of Kendriya Vidyalaya; and two PGT teachers were appointed as Members of the enquiry committee. The enquiry committee interacted with the complainants as well as the petitioners; recorded the statements of seven victims and other staff persons. The petitioner was given full opportunity to give explanation and his statement was also recorded. It is after consideration of the entire material, which was brought on record that the committee made its recommendations. These recommendations were placed before the Assistant Commissioner who forwarded them to the Commissioner.

28. So far as the opinion of the Commissioner is concerned, the same is found stated in the Memorandum dated 08.04.2003. The Commissioner noted that the opinion that the findings of the enquiry committee in its report stood substantiated by the material facts which had come on record because of which it was necessary to proceed against the petitioner under Article 81(b) of the Education Code and . So far as not holding the regular enquiry under the CCS(CCA) Rules 1965, is concerned, the Commissioner has specifically opined that it would cause serious embarrassment to the students and would also cause trauma to them because of their tender age.

29. Before us, there is no challenge to the opinion formed by the Commissioner dispensing with the regular enquiry. The petitioner has only made a grievance that he was deprived of the opportunity to cross-examine the persons examined by the inquiry committee.

30. So far as this issue is concerned, it was considered and rejected by the Supreme Court of India as noted above.

31. A reading of Article 81(b) of the Education Code also manifests the objective of the framers of the Code to the effect that it is the rights and sensibilities of the victims of the allegations which would guide the Commissioner in arriving at its opinion for dispensing with the regular inquiry and also dictate the procedure which is required to be followed. There is a clear mandate of the Code as well as binding judicial precedents that a person against whom the charges are framed under Article 81 (b) of the Education Code would not be entitled to claim right to cross

examine the victims in such proceedings.

32. The Tribunal has given detailed reasons in arriving at a conclusion that due process has been following in proceeding against the petitioner. The Tribunal has also rejected the grievance of the petitioner that the punishment of termination of his services is disproportionate to the charges. Nothing has been placed before us, which would enable us to take a different view. We therefore, find no merit in the present petition, hence the same is dismissed along with pending application.

ILR (2014) II DELHI 1442
W.P. (C)

SUBHASH CHANDRA ....PETITIONER

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(GITA MITTAL AND DEEPA SHARMA, JJ.)

W.P.(C) NO. : 763/2014 DATE OF DECISION 06.02.2014

Administrative Tribunal Act, 1985—Section 21—Denial of the benefits under the Assured Career Progression Scheme (ACPS)—Petitioner aggrieved by the violation of Rules by the respondents pension fixation correctly keeping in view his entitlement based on denial of financial benefits under the first ACPS with effect from 9th August, 1999 as well as financial benefits under second ACPS with effect from 1st January 2002-- petitioner did not make any grievance either by way of representations or by way of an application filed within the period specified under Section 21 of the Administrative Tribunal Act, 1985-Relief in respect of the same was hopelessly barred by limitation on 1st May, 2012 When the petitioner had filed the petition

before the Tribunal and sought the reliefs of Quashing/ Setting aside the impugned order dated 17.7.2006 passed by the Respondent no.1, whereby the appeal was disposed against the appellants, Quashing/Setting aside the order dated 25.8.2003 passed by the Respondent no.3, whereby the penalty of censure was imposed against the appellants, directing the Respondents to grant first ACP under the financial upgradation scheme w.e.f. 9.8.1999 with arrears and further grant second ACP w.e.f. 1.1.2002 from the date of entitlement, directing the Respondents to grant w.e.f. 16.7.2001 instead of 29.1.2004 and count his 3 years seniority towards the financial benefits accruing to the applicant as per the existing rules and directing the Respondents to fix the pension and retirement benefits of the applicant in terms of the reliefs sought for in the aforementioned paras and pay the arrears thereof immediately—However the petitioner restricts the challenge to the denial of the benefits under the ACPs only so far as they effect fixation of his pension. Held: it is trite that so far as claims involving issues of seniority or promotion which effects others are concerned, would be rendered stale and the doctrine of limitation would apply in case of such belated challenges—So far as the contention that the same have been wrongfully denied is concerned, the Supreme Court in (2008) 8 Supreme Court Cases 648 entitled Union of India and Others vs. Tarsem Singh has held that the court would consider the same—However, the relief of arrears would be restricted to a period of three years prior to the date of invoking remedy before the court of tribunal—The challenge of the petitioner and his prayers in the instant matter has to be considered in the light of these principles—It cannot be disputed that denial of the ACP benefits to the petitioner and wrongful fixation would result in erroneous fixation of all his emoluments and entitlements—In case, such emoluments were correctly

fixed, upon superannuation the petitioner's pension may have also been appropriately fixed, perhaps at a figure which is more that the amount to which he has been found entitled by the respondents. The petitioner retired on 31st January, 2005, On application of the principles laid down by the Supreme Court therefore, it would appears that thought the prayers made by the petitioner at sl. nos. (i) to (iv) are concerned, the same are admittedly barred by limitation—However, the factual challenge on which these prayers were made, does survive and would require to be considered as the same is necessary to consider the prayer made at sl. no.(v). This consideration is also essential in order to appropriately mould the relief which the petitioner may be found entitled—In view of the above, the order dated 30th April, 2013 passed by the Central Administrative Tribunal dismissing the O.A No.1659/2012 on the ground of limitations is hereby set aside and quashed —Tribunal directed to consider on merits the challenge to the denial of the first and second ACPS—Even if the Tribunal sustains the challenge, the petitioner shall not be entitled to the grant of financial benefits.

It is therefore trite that so far as claims involving issues of seniority or promotion which effects others are concerned, would be rendered stale and the doctrine of limitation would apply in case of such belated challenges. So far as the contention that the same have been wrongfully denied is concerned, the Supreme Court has held that the court would consider the same. However, the relief of arrears would be restricted to a period of three years prior to the date of invoking remedy before the court of tribunal.

(paras 7)

The challenge of the petitioner and his prayers in the instant matter has to be considered in the light of these principles. It cannot be disputed that denial of the ACP benefits to the petitioner and wrongful fixation would result in erroneous

fixation of all his emoluments and entitlements. In case, such emoluments were correctly fixed, upon superannuation the petitioner's pension may have also been appropriately fixed, perhaps at a figure which is more than the amount to which he has been found entitled by the respondents. The petitioner before us retired on 31st January, 2005.

(paras 8)

Important Issue Involved: Where a service related claim is based on a continuing wrong relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Anil Shankar Prasad and Mr. Sanjay Kumar Bharti, Advocates.

FOR THE RESPONDENTS : Mr. Hashmat Nabi, Advocate.

CASE REFERRED TO:

1. *Union of India and Others* vs. *Tarsem Singh* (2008) 8 Supreme Court Cases 648.

RESULT: WP Allowed.

GITA MITTAL, J. (Oral)

1. The writ petition has assailed the order dated 30th April, 2013 passed by the Central Administrative Tribunal, Principle Bench, New Delhi dismissing the O.A.No.1659/2012 filed by the petitioner on the ground that the same was barred by limitation. The petitioner had sought the following prayers by way of the O.A.No.1659/2012 before the Tribunal:

> "(i) Quash/Set aside the impugned order dated 17.7.2006 passed by the Respondent no.1, whereby the appeal was disposed against the appellants.
>
> (ii) Quash/Set aside the order dated 25.8.2003 passed by the Respondent no.3, whereby the penalty of censure was imposed against the appellants.
>
> (iii) Direct the Respondents to grant first ACP under the financial upgradation scheme w.e.f. 9.8.1999 with arrears and further grant second ACP w.e.f. 1.1.2002 from the date of entitlement.
>
> (iv) Further direct the Respondents to grant promotion w.e.f. 16.7.2001 instead of 29.1.2004 and count his 3 years seniority towards the financial benefits accruing to the applicant as per the existing rules.
>
> (v) Direct the Respondents to fix the pension and retirement benefits of the applicant in terms of the reliefs sought for in the aforementioned paras and pay the arrears thereof immediately.
>
> (vi) Cost of the application be allowed in favour of the applicant.
>
> (vii) Any other relief (s), which this Hon'ble Tribunal deems fit and proper in the facts and circumstances of this case."

2. Along with the impugned application, the petitioner had filed an application seeking condonation of delay in raising the challenge pleading sickness to justify the delay in making the claim.

3. Before us it is contended on behalf of the petitioner that he is aggrieved by the violation of Rules by the respondents to fix his pension correctly keeping in view his entitlement based on denial of financial benefits under the first Assured Career Progression Scheme with effect from 9th August, 1999 as well as financial benefits under second ACP Scheme with effect from 1st January, 2002.

4. It is not disputed before us that the petitioner did not make any grievance either by way of representations or by way of an application filed within the period specified under Section 21 of the Administrative Tribunal Act, 1985. The relief in respect of the same was hopelessly barred by limitation on 1st May, 2012 when the petitioner had filed the petition before the Tribunal and sought the above reliefs. Learned counsel for the petitioner before us has today submitted that the petitioner today does not seek those financial benefits to which he was entitled. He restricts the challenge to the denial of the benefits under the ACPs only so far as they effect fixation of his pension. It is further submitted that

the above prayer No.(v) which has been set out above before the Tribunal was directly relating to this claim.

5. It is further contended that so far as fixation of pension and denial of the correct amount of pension is concerned, there is no prohibition to consideration and grant of relief qua person by application of law of limitation. In support of this submission reliance is placed on pronouncement of the Supreme Court reported in (2008) 8 Supreme Court Cases 648 entitled **Union of India and Others vs. Tarsem Singh.**

6. The applicable Principle so far as a belated claim is concerned, was laid down in para 7 of this pronouncement which reads as follows:

> "To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."

There are several other prior precedents to the same effect.

7. It is therefore trite that so far as claims involving issues of seniority or promotion which effects others are concerned, would be rendered stale and the doctrine of limitation would apply in case of such belated challenges. So far as the contention that the same have been wrongfully denied is concerned, the Supreme Court has held that the court would consider the same. However, the relief of arrears would be restricted to a period of three years prior to the date of invoking remedy before the court of tribunal.

8. The challenge of the petitioner and his prayers in the instant matter has to be considered in the light of these principles. It cannot be disputed that denial of the ACP benefits to the petitioner and wrongful fixation would result in erroneous fixation of all his emoluments and entitlements. In case, such emoluments were correctly fixed, upon superannuation the petitioner's pension may have also been appropriately fixed, perhaps at a figure which is more than the amount to which he has been found entitled by the respondents. The petitioner before us retired on 31st January, 2005.

9. On application of the principles laid down by the Supreme Court therefore, it would appear that though the prayers made by the petitioner at sl.nos. (i) to (iv) are concerned, the same are admittedly barred by limitation. Learned counsel for the petitioner before us submits that the petitioner would not press these reliefs. The petitioner shall remain bound by this submission and will not be entitled to any relief so far as the prayers at sl.nos.(i) to (iv) are concerned. However, the factual challenge on which these prayers were made, does survive and would require to be considered as the same is necessary to consider the prayer made at sl.no.(v). This consideration is also essential in order to appropriately mould the relief which the petitioner may be found entitled.

10. In view of the above, the order dated 30th April, 2013 passed by the Central Administrative Tribunal dismissing the O.A.No.1659/2012 on the ground of limitation is hereby set aside and quashed. The matter shall be reconsidered by the Tribunal in the context of the above observations and to the extent detailed by us.

11. The challenge made by the petitioner with regard to the denial of the first and second ACP schemes shall be considered on merits even if the tribunal sustains the challenge by the petitioner, the petitioner shall not be entitled to grant of financial benefits.

12. So far as financial benefits are concerned, the consideration shall be confined to the issue of the correctness of the fixation of the petitioner's pension for a period of three years before the petitioner approached the Tribunal by way of the said application.

13. The parties shall appear before the Registrar, Central Administrative Tribunal on 26th February, 2014 for directions.

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

15. Dasti to parties.

ILR (2014) II DELHI 1449
W.P. (C)

ASHWANI KUMAR GOEL **....PETITIONER**

VERSUS

INCOME TAX SETTLEMENT COMMISSION & ORS. **....RESPONDENTS**

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

W.P. (C) NO. : 2347/2008 & C.M. APPL. NO. : 4489/2008 **DATE OF DECISION: 10.02.2014**

Income Tax Act, 1961—Section 25—F(1), 132, 142, 142-(2)A, 158BE, 245(1), 245—A(b), 245—C, 245—D(4), 245(E), 245—F(2)—On 07-08-1997, search and seizure operations were conducted at residential and business premises in respect of petitioner, his wife and other relatives-Several articles and documents were seized—Upon receipt of notice, petitioner filed a return for period from 01.04.1986 to 07.04.1986—As accounts indicated sufficient complexities, Special Auditor submitted his report-During pendency of these proceedings Settlement Commission entertained

application made to it—While Settlement Commission's proceedings were pending petitioner contended that entire proceedings had become time barred—Settlement Commission rejected petitioner's argument—Order challenged before High Court—Plea taken, since Assessing Officer did not complete assessment within time period permitted by law, Settlement Commission which was invested with his power could not likewise have proceeded further—Per contra plea taken, power of Assessing Authority to make order does not allow applicant approaching Settlement Commission to contend that jurisdiction ceases automatically if assessment is not framed—Held—Pre—Condition for Commission to receive application is that a case should be pending as on date of its presentation-No objection as to jurisdiction of Settlement Commission was made when application was admitted—Observation in impugned order of Commission that to re—Visit order would in effect amount to impermissible review is, in opinion of this Court, sound reasoning—Authority of a Settlement Commission to make such orders as are necessary in regard to matters before it also extends to other matters relating to case not covered by application but referred to in report of Commission—Settlement Commission is empowered to re—Open any proceeding connected with case in respect of which assessment too has been completed—Given these powers, fact as to whether Assessing Officer was in process of making assessment or not becomes irrelevant—A machinery provision in Income Tax Act cannot be subjected to literal or strict rule of construction that is adopted to interpret a charging Section—Consequence of accepting argument of assessee would be that even though there was a search of his premises under Section 132 of Act which yielded incriminating material, proceedings arising out of which he wanted to settle by approaching Settlement Commission, he would still

end up not paying any tax, as block assessment became barred by time and there would also be no settlement order under Section 245D(4)—Such a situation could not have been intended by statute-There is no merit in petition and it is accordingly dismissed.

Important Issue Involved: (A) The authority of a Settlement Commission to make such order as are necessary in regard to the matters before it also extends to other matters relating to the case not covered by the application.

(B) A machinery provision in the Income Tax Act cannot be subjected to the literal or strict rule of construction that is adopted to interpret a charging section.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONERS : Ms. Meenakashi Midha with Mr. L.G. Dass, Advocates.

FOR THE RESPONDENTS : Sh. N. P. Sahni, Sr. Standing Counsel with Mr. Nitin Gulati, Jr. Standing Counsel.

CASES REFERRED TO:

1. *Brij Lal & Others* vs. *Commissioner of Income Tax,* (2011) 1 SCC 1.
2. *Capital Cables (India) Private Limited* vs. *ITSE,* 2004 267 ITR 528.
3. *CIT* vs. *Hindustan Bulk Carrier,* (2003) 259 ITR 449 (SC).
4. *CIT* vs. *Damini Brothers,* (2003) 259 ITR 475 (SC).
5. *CIT, Mumbai* vs. *Anjum M.H. Ghaswala & Ors.,* 2001 252 ITR (1).
6. *Calcutta Jute Manufacturing Co.* vs. *CTO,* (AIR 1997 SC 2920).

7. *S.P.A.M. Krishnan Chettiar and Son* vs. *Income-Tax Settlement Commission and Another,* (1993) 202 ITR 81 (Mad.).
8. *Deen Dayal* vs. *Union of India,* (1986) 160 ITR 12.
9. *Commissioner of Income-Tax, (Central), Calcutta* vs. *B.N. Bhattachargee and Anr.,* (1979) 118 ITR 461 (SC).
10. *Jodha Mal Kuthiala* vs. *CIT,* (1971) 82 ITR 570 (SC).

RESULT: Dismissed.

S. RAVINDRA BHAT, J.

1. The petitioner seeks a direction challenging an order of 04.03.2008 issued by the Income Tax Settlement Commission, which rejected the petitioner's application that the assessment for the period 01.04.1986 to 07.04.1987 was time barred. On 07.08.1997, search and seizure operations were conducted at the residential and business premises in respect of the petitioner, his wife and other relatives. Several articles and documents were seized. The last panchnama was drawn on 26.09.1997. Upon receipt of notice, the petitioner filed a return for the period 01.04.1986 to 07.04.1987. After considering this, the Income Tax Authorities were of the opinion that the accounts indicated had sufficient complexities warranting an audit under Section 142-(2)A. An order was accordingly made on15.09.1999. A special auditor submitted the audit report on 14.02.2000. It was contended during the pendency of these proceedings that the Settlement Commission by its order dated 10.08.2000 entertained the application made to it. The order was a speaking one and made after submissions of the parties and was drawn up by the departmental authorities. Whilst the Settlement Commission's proceedings were pending, an order under Section 245 D (4) was contemplated and heard. The petitioner contended that the entire proceedings had to be closed since the block assessment had become time barred on 29.02.2000. It was submitted that by virtue of the then existing Section 158BE, which mandated that assessment were to be completed within a time bound manner which was to expire on 29.02.2000 (the period having been extended by virtue of special audit conducted under Section 142). In the absence of any order by the Settlement Commission admitting the matter or proceeding further, the Assessing Officer had the lost authority to pass any orders. Consequently, the Commission itself did not possess

jurisdiction. The petitioner relied upon the decisions reiterated in **CIT v. Hindustan Bulk Carrier,** (2003) 259 ITR 449 (SC) and **CIT v. Damini Brothers,** (2003) 259 ITR 475 (SC).

2. After hearing counsel for the parties, the Settlement Commission rejected the petitioner's argument. Learned counsel relied upon the ruling of the Supreme Court reported as **Brij Lal & Others v. Commissioner of Income Tax,** (2011) 1 SCC 1, for the following observations :

> *"41. Further, as stated above, the jurisdiction of AO is not fettered merely because the applicant has filed the settlement application. The Act does not contemplate stay of the proceedings during that period i.e. when the Settlement Commission is deciding whether to proceed or reject the settlement application. The jurisdiction of the Settlement Commission to proceed commences only after an order is passed under Section 245-D(1). That, after making an application for settlement the applicant is not allowed to withdraw it [see Section 245-C(3)]. Once the case stands admitted, the Settlement Commission shall have exclusive jurisdiction to exercise the powers of the Income Tax Authority."*

3. It was submitted that the Assessing Officer was always free to complete the assessment within the time period permitted by law, and was not constrained from making any order. Since he did not do so, the Settlement Commission which was invested with his powers could not likewise have proceeded further. It was submitted that the amendment made to Section 158 BE by the Finance Act, 2002 could not be made applicable in the present case as the block assessment had become time barred on 29.02.2000. Counsel reiterated that Settlement Commission did not enjoy exclusive jurisdiction by virtue of Section 25-F(1) prior to the passing of an order under Section 245-D(1) of the Income Tax Act. In support, counsel relied upon the **Damini Brothers** case (supra).

4. Counsel for the Revenue argued that the power of the Assessing Officer to make an order does not allow an applicant approaching the Settlement Commission to contend that jurisdiction ceases automatically if an assessment is not framed. Learned counsel submitted that a careful reading of Hindustan Bulk Carrier would show that mere filing of an application for settlement would not in any manner adversely affect the powers of the Assessing Officer. That formulation of law in no way meant that Settlement Commission was placed under the kind of restrain

as was sought to be suggested. It was argued that in this case even at the stage of the order under Section 245-D(1), the petitioner never contended that the Commission had lost jurisdiction on account of the matter having become time barred under Section 158BE. Counsel also submitted that if the petitioner's argument were to be accepted, the Commission would be conferred with a review power despite conclusiveness provided to its order by Section 245-D(1). He also relied upon the judgment of this Court in **Capital Cables (India) Private Limited v. ITSE,** 2004 267 ITR 528 Delhi.

5. The pre-condition for the Commission to receive an application is that a case as defined under Section 245-A(b) should be pending as on the date of its presentation. Section 245-C spells out the conditions which the applicant has to satisfy and Section 245- D(1) outlines how such applications are to be proceeded with. The Commission after examining the matter and satisfying itself can either allow the case or reject it. It is a matter on record that when the application was admitted on 10.08.2000, the petitioner was represented and heard. At this stage, no objection as to the jurisdiction of the Settlement Commission was made, the observations in the impugned order of the Commission that to re-visit the order of 10.08.2000 would in effect amount to impermissible review is, in the opinion of this Court, sound reasoning. The conclusiveness attached to the order made by the Commission has been emphasized time and again. Section 245 (1) reiterated this in no uncertain terms. The Supreme Court has also underlined this in **CIT, Mumbai v. Anjum M.H. Ghaswala & Ors.,** 2001 252 ITR (1).

6. The decision in **Deen Dayal v. Union of India,** (1986) 160 ITR 12, in our opinion, concludes the issue sought to be urged against the petitioner. In fact the Court visualized the very situation which we are called upon to examine and held that even while upholding the authority of the Assessing Officer to complete assessment, clarify that *"there will be no impediment to the Settlement Commission in exercise its powers if it decides to exercise them. On the other hand this Settlement Commission decides not to proceed with application, there is no distinct possibility of department not being able to realize the taxes in the circumstances of this case."*

7. The authority of a Settlement Commission to make such orders as are necessary in regard to the matters before it also extends to other

matters relating to the case not covered by the application but referred to in the report of the Commission. There is also an element of exclusiveness to the jurisdiction of the Settlement Commission, reiterated by Section 245-F(2). Section 245-E empowers the Settlement Commissions to re-open any proceedings connected with the case in respect of which assessment too has been completed. Given these powers, the fact as to whether the Assessing Officer was in the process of making the assessment or not becomes irrelevant. If indeed the Assessing Officer had completed the assessment, the wide nature of the Commission's jurisdiction, nevertheless, would have allowed to over-ride that assessment order while framing its order under Section 245-D(4).

8. The consequence of accepting the argument of the assessee would be that even though there was a search of his premises u/s 132 of the Act which yielded incriminating material, the proceedings arising out of which he wanted to settle by approaching the Settlement Commission, he would still end up not paying any tax, as the block assessment became barred by time and there would also be no settlement order u/s 245D(4). Such a situation could not have been intended by the statute. Though now the situation has been taken care of by the insertion of the first proviso to Section 245F(2) by the Finance Act, 2007 w. e. f. 01.06.2007, but that cannot prejudice the rights of the revenue prior to that date as it seems to us that it was inserted only "ex abundant cautela". In **Commissioner of Income-Tax, (Central), Calcutta vs. B.N. Bhattachargee and Anr.,** (1979) 118 ITR 461 (SC), Justice Krishna Iyer, dealing with the first case to reach the Supreme Court under Chapter XIX-A, when faced with a situation not specifically provided for in the said chapter, observed as follows: -

> "Be that as it may, fiscal philosophy and interpretative technology must be on the same wavelength if legislative policy is to find fulfilment in the enacted text. That is the challenge to judicial resourcefulness the present appeals offer, demanding, as it does, a holistic perspective and harmonious construction of a whole chapter, especially a complex provision therein, so that a balance may be struck between purpose and result without doing violence to statutory language and social values. The chapter is fresh and the issue is virgin; and that makes the judicial adventure hazardous, compounded by the involved and obscure drafting of the bunch of provisions in Chap. XIXA."

9. In our view, this rule should govern our approach to the situation arising in the case in hand.

10. It is a settled rule of construction that tax laws, like all other laws, shall be interpreted reasonably and in consonance with justice so as to avoid an absurd consequence that may lead to mischief or abuse: (Hegde, J., in **Jodha Mal Kuthiala vs. CIT,** (1971) 82 ITR 570 (SC). A machinery provision in the Income Tax Act cannot be subjected to the literal or strict rule of construction that is adopted to interpret a charging section. In **Calcutta Jute Manufacturing Co. vs. CTO,** (AIR 1997 SC 2920), the Supreme Court held that a machinery provision must be so interpreted as to effectuate its purpose, and the distinction between a charging section and a machinery provision whose function is to effectuate the charge, was pointed out in the context of the rule of interpretation to be adopted. In **S.P.A.M. Krishnan Chettiar and Son vs. Income-Tax Settlement Commission and Another,** (1993) 202 ITR 81 (Mad.), a Division Bench of the Madras High Court ruled that Chapter XIX-A of the Act providing for settlement of cases is a machinery provision; the following observations are relevant: -

> *"Chapter XIX-A in the Act, introduced by the Taxation Laws (Amendment) Act, 1975, was the result of implementing the recommendations of the Wanchoo Committee to arrest the evil of black money and large scale tax evasion. One of the recommendations made was a compromise measure by which a disclosure could be made and the quantum of tax is determined and the assessee not only secured quittance for himself, but also freedom from levy of penalty and prosecution. The machinery, initially conceived of by the Wanchoo Committee to achieve this, was a Tribunal, though, later, it was rechristened the Settlement Commission with full powers to investigate, quantify the amount of tax, penalty as well as interest, etc., and grant immunity from prosecution at its discretion. The details of the application, probe, consideration, hearing and disposal, found in the report, had been incorporated in the statutory provisions in Chapter XIX-A. Thus, a careful study of the anatomy of Chapter XIX-A clearly brings out that it was only in the nature of machinery provisions for the purpose of settlement of tax disputes between the assessee and the Revenue. The provisions do not compel any assessee to resort to section 245C, but that can be availed of, if the assessee*

so chooses. In other words, the remedy provided under section 245C, as a machinery provision for effecting settlement of tax disputes, was only in the nature of a concession or option open to the assessee who desired to settle his tax matters."

We concur with the above view.

12. In view of the above discussion, this Court is of the opinion that there is no merit in the petition and it is accordingly dismissed without any orders as to cost. All pending applications also stand disposed of.

ILR (2014) II DELHI 1457
CRL. A.

VIKRAM @ GANJA **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(S.P. GARG, J.)

CRL A. NO. : 623/2012 **DATE OF DECISION: 17.02.2014**

Indian Penal Code 1860—Section 395/397 IPC—Dacoity while armed with deadly weapon—Causing hurt while committing dacoity—Appellant and his associated committed dacoity of 28 bags of plastic raw material—One Salim @ khan found in possession of 28 bags filled with plastic raw material—case FIR no.158/07 u/s,395/397 IPC registered at P.S Civil Lines—Appellant and his associates arrested in case FIR No161/07 u/s. 399/402/34 IPC P.S Civil Lines—made disclosures—Involvement in present case emerged 28 bags recovered—Statements of complainant and witnesses recorded—Charge-sheet filed against all the accused

persons—One accused faced proceedings before juvenile justice Board—Accused person duly charged—Prosecution examined 14 witnesses in statement u/s. 313 cr. P.C the accused persons pleaded false implication accused persons convicted of offences u/s 395/97 IPC two accused persons confessed their guilt and their appeals disposed of aggrieved appellant preferred appeal Held—complainant's (PW-3) statement recorder at the earliest point of time—Gave detailed account of the occurrence—Complainant supported his version given to the police without variation—Identified the assailants—Attributed specific role to the appellant—Appellant did not cross examine the witness despite opportunity—Testimony of complainant unchallenged and unrebutted—No motive assigned to complainant to falsely implicate the appellant—No prior acquaintance or animosity with the appellant—No explanation furnished by the accused to the incriminating circumstance as appearing against him—prosecution established doubt of having committed dacoity—No injuries inflicted on complainant by any weapon—Weapon used in the crime not recovered—No description, size or dimension of knife used give—Broad featured of the weapon used not described—Evidence lacking on possession and use of deadly weapon—Conviction u/s. 397 IPC not permissible—Appellant at par with another convict—Conviction u/s. 397 IPC set aside—Sentence u/s. 395 IPC modified and reduced.

Important Issue Involved: Section 397 IPC fixed a minimum term of imprisonment.

It is imperative for the trial court to return specific findings that the assailants were armed with deadly weapons and it were used by them before convicting them with the aid of Section 97.

Where no injuries whatsoever inflicted to the complainant by any weapon, and weapon used in the crime not recovered nor the complainant had given description, size or dimension of Knife, it cannot be said that the assailants were armed with deadly weapons and were used by them.

If no property is carried off, by the assailants or no property delivered to the assailants under fear of instant hurt, there is no dacoity.

The essentials of the offence of dacoity are that the theft should be perpetrated by means of either of actual violence or of threatened violence.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Mr. V.K. Shukla, Advocate.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP for the State.

CASES REFERRED TO:

1. *Gulab @ Bablu* vs. *The State (NCT of Delhi)* Crl.A.515/2010.
2. *Sunil @ Munna* vs. *The State (Govt. of NCT),* 2010 (1) JCC 388.
3. *Samiuddin @ Chotu* vs. *State of NCT of Delhi., 175* (2010) Delhi Law Times 27.
4. *Rakesh Kumar* vs. *The State of NCT of Delhi* 2005 (1) JCC 334.
5. *Charan Singh* vs. *The State.,* 1988 Crl.L.J. NOC 28 (Delhi).

RESULT: Appeal disposed of

S.P. GARG, J.

1. This appeal has been preferred by Vikram @ Ganja to challenge the legality of a judgment dated 30.03.2012 in Sessions Case No.122/11

arising out of FIR No.158/07 registered at Police Station Civil Lines by which he and his associates were held perpetrators of the crime under Section 395/397 IPC. By an order dated 03.04.2012, he was awarded RI for seven years with fine Rs. 5,000/- under Section 395 read with Section 397 IPC and in default of payment of fine to further undergo SI for five months.

2. The prosecution case, in brief, as projected in the charge-sheet is that on 26.06.2007 at about 3.15 a.m., at outer ring road, near CNG Pump, Chandgiram Akhara, Delhi, the appellant and his associates Sameer @ Sonu, Raj Kumar, Ashok Kumar and Amit @ Bouncer in furtherance of common intention committed decoity of 28 bags of plastic raw material loaded in a Tempo No.DL-1LH-4864 from the possession of its driver Jahangir Ali. It was further alleged that Vikram @ Ganja used a knife while committing decoity. Saleem @ Khan was found in possession of 28 bags filled with plastic raw material which he received or retained knowing or having reasons to believe to be robbed / stolen property. During the course of investigation, statements of witnesses conversant with the facts were recorded. After completion of investigation a charge-sheet was filed against all of them except Amit @ Bouncer who faced proceedings before Juvenile Justice Board. The accused persons were duly charged and brought to trial. The prosecution examined fourteen witnesses. In 313 statement, the accused persons pleaded false implication and denied their complicity in the crime. The trial resulted in their conviction under Section 395/397 IPC. It is pertinent to mention that Saleem and Ashok in Crl.A.Nos.481/2012 and 480/2012 respectively confessed their guilt and their appeals were disposed of by this Court vide order dated 25.07.2013.

3. Conviction of the appellant is based upon the sole testimony of PW-3 (Jahangir Ali) who lodged First Information Report, soon after the incident. In his statement (Ex.PW-3/A) recorded at the earliest point of time, the complainant gave detailed account of the occurrence and narrated as to how and under what circumstances, he was robbed of 28 bags of plastic raw material by the assailants. He claimed to identify them. In his deposition in the Court, he supported the version given to the police without variation and deposed that he used to drive Tempo No.DL1LC-4864 and on 25.06.2007 he loaded 28 bags of plastic raw material from 1665 Industrial Area, Narela, to unload at Okhla. When he reached at bye-pass, near Majnu Tilla, Red Light at about 09.00 p.m., one of the

tyres got punctured; he replaced the stepney and proceeded further. When he reached near Chandgi Akhara, CNG petrol pump at outer road at 12 night, one of the tyres again punctured and he sided the tempo by the road. Having no means to go ahead, he went to sleep in the tempo. At around 03.00 a.m., an individual came and asked for a screw driver. When he (the complainant) told its non-availability, he went away. After about 15 minutes, he was caught hold of his legs and hairs by the assailants and a knife was put on his neck. They robbed 28 bags containing raw plastic material in the tempo; put these in a RTV and fled towards ISBT. He made telephone call to police at 100. In Court statement, he identified the assailants facing trial before the Court and attributed specific role to Vikram who had put knife on his neck. The appellant did not cross-examine the witness despite availing an opportunity. The facts narrated by the complainant remained unchallenged and unrebutted in the cross-examination. No motive was assigned to the complainant to falsely implicate the appellant with whom he had no prior acquaintance or animosity. PW-4 (Neeraj Jain) claimed ownership of the 28 bags and took these on superdari, vide superdaginama (Ex.PW-4/A). PW-5 (Anil Kumar) produced RTV bearing No.DL-1VA-1402 used to carry away the robbed bags. On 01.07.2007, all the accused persons were apprehended in case FIR No.161/07 under Section 399/402/34 IPC registered at Police Station Civil Lines. Pursuant to disclosure statements recorded in the said proceedings, their involvement in the present case emerged. Saleem pursuant to his disclosure statement (Ex.PW-12/D) recovered four bags of plastic raw material which were seized by seizure memo (Ex.PW-12/G). During police remand, he got 24 bags recovered from house No.E-3/27 seized vide seizure memo (Ex.PW-7/A). PW-7 (SI Manish Kumar) proved the recovery of 24 bags on his instance and his testimony remained unshattered despite cross-examination. PW-8 (Insp.Raj Kumar) also deposed on similar lines and the accused did not opt to cross-examine to challenge his version. PW-11 (Lal Chand) deposed that tempo in question was in possession of Jahangir (the complainant) on the relevant date and time. The accused did not give plausible explanation to the incriminating circumstances appearing against him. They declined to join the Test Identification Proceedings without cogent reasons. The prosecution was able to establish beyond doubt that the appellant was one of the assailants who committed decoity and deprived the complainant of 28 bags of plastic raw material on the day of occurrence.

4. Section 397 fixes a minimum term of imprisonment. It is imperative for the Trial Court to return specific findings that the 'assailants' were armed with 'deadly' weapons and it were used by them before convicting them with the aid of Section 397. In the instant case, the evidence is lacking on this aspect and benefit of doubt is to be given to the appellant.

5. In 'Crl.A.515/2010 **'Gulab @ Bablu vs. The State (NCT of Delhi)',** this court held:

> *"8. A perusal of the aforesaid provision makes it clear that if an offender at the time of committing robbery or dacoity, uses any deadly weapon or causes grievous hurt or attempts to cause death or grievous hurt to any person the imprisonment with which such offender shall be punished shall not be less than seven years. This provision prescribes minimum sentence which shall be handed down to such an offender. In this case neither the victim has sustained grievous hurt nor there is an evidence that attempt was made to cause death or grievous hurt to the victim nor is there any evidence to show that the knife used at the time of committing robbery was a 'deadly weapon'. Simple injuries have been sustained by the victim on his thigh.*
>
> *9. In **'Charan Singh vs. The State',** 1988 Crl.L.J. NOC 28 (Delhi), Single Judge has held as under :*
>
> *"At the time of committing dacoity one of the offenders caused injury by knife on the hand of the victim but the said knife was not recovered. In order to bring home a charge under Section 397, the prosecution must produce convincing evidence that the knife used by the accused was a deadly weapon. What would make knife deadly is its design or the method of its use such as is calculated to or is likely to produce death. It is, therefore, a question of fact to be proved by the prosecution that the knife use by the accused was a deadly weapon. In the absence of such an evidence and particularly, the non-recovery of the weapon would certainly bring the case out of the ambit of Section 397. The accused could be convicted under Section 392."*
>
> *10. In **'Samiuddin @ Chotu vs. State of NCT of Delhi',** 175 (2010) Delhi Law Times 27, a Bench of co-ordinate jurisdiction has held that when a knife used in the commission of crime is*

*not recovered the offence would not fall within the ambit of Section 397 IPC. In '**Rakesh Kumar vs. The State of NCT of Delhi** 2005 (1) JCC 334 and **Sunil @ Munna vs. The State (Govt. of NCT),** 2010 (1) JCC 388, it was observed that in the absence of recovery of the knife used by the appellant at the time of commission of robbery charge under Section 397 IPC cannot be established.*

11. In the present case, indubitably the knife used for commission of crime was not recovered. Accordingly, in my view, appellant could not have been sentenced under Section 397 IPC and Trial Court has erred on this point."

6. In the instant case, admittedly no injuries, whatsoever, were inflicted to the complainant by any weapon. The weapon used in the crime was not recovered from the appellant or at his instance. The complainant did not give description, size or dimension of the knife used in the crime. In his deposition he did not described the broad feature of the weapon used at the time of occurrence. Thus, the conviction of the appellant with the aid of Section 397 was not permissible and is set aside. For sentence under Section 395 IPC, the appellant is to be treated at par with the convict Ashok who was awarded rigorous imprisonment for four years vide order dated 25.07.2013. Accordingly, the sentence qua the present appellant is modified and reduced to rigorous imprisonment for four years. Other terms and conditions of the sentence order are left undisturbed.

7. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith.

ILR (2014) II DELHI 1464
CRL. A.

SANWAR @ RAZZAK ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 1579/2011 DATE OF DECISION: 17.02.2014

Indian Penal Code, 1860—Sections 395—Punishment for dacoity—Section 398 attempt to commit robbery or dacoity when armed with deadly weapon—Arms Act, 1950—Section 27 use of prohibited arm—Complainant a security guard outside the godown of EIT at Alipur—Notices two tempos moving towards godown at about 2:15 am—Raised alarm saying daku daku—Two assailants caught hold of him—Other assailants attacked him with a knife—Two police men arrived on motorcycle—Assailants fled from the spot tempos were stopped after chase—Four accused persons alighted and started running overpowered and apprehended—Knife recovered tempos seized—Statement of the complainant recorded FIR No. 72/08 u/s. 395/397/398 IPC r/w. Section 25/27 Arms Act registered charge-sheet filed—All the accused persons charged and brought to trial—Prosecution examined seven witnesses—Statements u/s. 313 Cr. P.C. of the accused persons recorded—Pleaded false implication—Three accused persons including appellant convicted two accused persons acquitted aggrieved appellant preferred appeal—Held testimony of complainant and police witnesses is similar—No prior animosity with the appellant—No ulterior motive to falsely implicate the appellant—Complainant had no reason to let the

real culprit go scot free—Injury on the person of complainant opined to be simple caused by sharp weapon tempos recovered from the possession of assailants—Appellant did not give explanation for his presence at the spot were armed with various weapons—No theft taken place—No cutting material etc. found or recovered no marks of hammer on the shutter—Mere preparation or attempt to commit house breaking with intention to commit theft—Violence/hurt was unconnected with theft—No property delivered by the complainant under fear of instant hurt—No dacoity conviction u/s. 395/398 IPC not permissible—Offence u/s. 379 r/w s. 511 IPC and section 324 IPC proved—Conviction u/s. 395/398 IPC set aside—Sentence modified.

Important Issue Involved: The testimony of the injured witnesses cannot be discarded without cogent reasons.

In the absence of any command for handing over any valuable property at the point of knife or any other deadly weapon, no offence u/s. 395/398 can be said to have been committed.

Where no force or show of force is found to have been used in committing of the theft, the offence of robbery/ dacoity cannot be said to have been committed.

If no property is carried off, by the assailants or no property delivered to the assailants under fear of instant hurt, there is no dacoity.

The essentials of the offence of dacoity are that the theft should be perpetrated by means of either of actual violence or of threatened violence.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Mr. Sanjay Kumar, Advocate.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP. SI Jaibir, PS Alipur.

RESULT: Appeal disposed of.

S.P. GARG, J.

1. This appeal has been preferred by Sanwar @ Razzak to challenge the legality of a judgment dated 15.11.2011 in Sessions Case No. 60/08 arising out of FIR No. 72/08 registered at Police Station Alipur by which he and his associates were held perpetrators of the crime under Section 395/398 IPC. The appellant was also convicted under Section 27 Arms Act. By an order dated 19.11.2011, he was awarded RI for eight years with fine Rs. 2,000/- under Section 395/398 IPC and RI for three years under Section 27 Arms Act. Both the sentences were to run concurrently.

2. The prosecution case in brief as projected in the charge-sheet was that on the night intervening 03/04.04.2008, Sanjeev Kumar (PW-1) security guard was deputed outside the godown of East India Transport Company located at the Theke Wali gali, Alipur, Delhi and was on duty from 08.00 p.m. to 08.00 a.m. (next morning). At around 02.15 a.m., when he was taking round of the godown, he saw two tempos parked near the shutter. When he put on the torch, he saw four individuals trying to open it. On being challenged, three more individuals got down from the tempos; they were armed with swords, iron rod and knives and threatened him to run away. He raised alarm 'daku-daku' and ran away towards the back side. However, two of the assailants caught hold of him after chase and attacked him. Other miscreants also attacked him with a knife, which struck him on his left thigh and blood started oozing out. In the meanwhile, two police/beat officers arrived there on a motorcycle. On seeing them, the assailants fled the spot and ran towards G.T.Karnal Road. At Sindhu Border, those tempos were stopped after chase and four accused persons after alighting from the tempo started running away; they were overpowered and apprehended. The appellant (Sanwar @ Razzak) was one of them and was caught with a knife along with Amzad Khan, Sheikh Sharaft and Imran @ Rikki. Two tempos bearing registration No.HR55-D-0508 & UP14-AE-9143 were seized. The investigating officer lodged First Information Report after recording statement of the complainant-Sanjeev Kumar. During investigation, statements of the witnesses conversant with the facts were recorded and a charge-sheet was submitted under Section 395/397/398 IPC read with

Section 25/27 Arms Act. Subsequently, Sikandar @ Raja and Jan Mohd.@ Bhola were also arrested and supplementary charge-sheet was filed against them. All of them were duly charged and brought to trial for committing offences under Sections 395/397/398 IPC. The prosecution examined seventeen witnesses to substantiate their charges. In 313 statements, the accused persons pleaded false implication. After considering the rival contentions of the parties, the Trial Court by the impugned judgment convicted Amzad Khan, Imran @ Rikki, Sheikh Sharafat and Sanwar @ Razzak (the appellant) and acquitted Sikandar @ Raja and Jaan Mohd. of all the charges. It is pertinent to note that the State did not challenge their acquittal.

3. Conviction of the appellant is based upon the sole testimony of the complainant-Sanjeev Kumar (PW-1) who identified him in the court as one of the assailants having a knife at the spot. When he challenged the assailants, he was inflicted injury by the appellant by a knife on the thigh. He further deposed that after chase on motorcycle, the accused amongst others was apprehended at Singhu Border and his statement (Ex.PW-1/A) was recorded. Knife recovered from the appellant was seized. Similar is the testimony of the police witnesses. The complainant who had no prior animosity with the appellant had no ulterior motive to falsely identify and implicate him. The complainant had no reasons to let the real culprit go scot free. The victim had sustained injuries and was taken to Satyavadi Raja Harish Chander hospital, Narela. MLC (Ex.PW11/A) was prepared and injuries were opined 'simple caused by sharp weapon.' PW-3 (Dr.Ved Pal) Indrawati Poly clinic, Khasra No.1734, Alipur, Delhi, examined the patient at first instance at around 06.40 p.m. brought by Const.Bhopal Singh with the alleged history of 'a sharp injury by knife on the knee joint and left thigh'. After providing first aid, he referred the patient to a government hospital. The history of the said patient recorded in Ex.PW3/A was in his writing. PW-11 (Dr.Rajesh Kumar) medically examined the complainant-Sanjeev Kumar and prepared MLC (Ex.PW-11/A). The testimony of the injured witness cannot be discarded without cogent reasons. Recovery of tempos from the possession of the assailants further connects him with the crime. The accused did not give specific explanation for his presence at odd hours with tempos at the spot.

4. The prosecution was able to establish that the appellant and his associates arrived at the spot in tempos while armed with various weapons.

When they were found endeavouring to break into the godown, Complainant-Sanjeev Kumar (PW-1) challenged and prevented them from doing so. On that, the complainant was assaulted and injured. Even if the prosecution case is taken on its face value, ingredients of 395/397/398 for which the appellant and his associates were charged, are not attracted or proved. In the cross-examination, the complainant admitted that no 'theft' had taken place and nothing was taken away by the culprits. He also admitted that no cutting material like hammer or any other thing which could cut the shutter was found or recovered. He volunteered to add that the assailants were found present near the shutter and were trying to open it. The locks were not broken and were intact. He further admitted that there were no marks of hammer on the shutter. Apparently, it was a mere preparation or at the most an attempt to commit house-breaking with an intention to commit theft in which they did not succeed. They did not command the complainant to hand over any valuable property at the point of knife or any other deadly weapon. They simply caused injuries when he dared to challenge them to foil their plan. Needless to say, violence or hurt was entirely unconnected with the offence of theft. Where no force or show of force is found to have been used in the committing of the theft, the offence of robbery/decoity cannot be said to have been committed. In the present case, the prosecution was unable to establish commission of theft or robbery as no movable property was taken out of the possession of the complainant. No property was delivered to the assailants by the complainant under fear of instant hurt etc. If no property is carried off, there is no decoity. The essentials of the offence of decoity are that the theft should be perpetrated by means of either of actual violence or of threatened violence which are lacking in the instant case.

5. The conviction of the appellant under Section 395/398 IPC is not permissible; cannot be sustained and is set aside. Nominal roll dated 31.01.2014 reveals that the appellant has undergone five years, eight months and twenty days incarceration besides earning remission for nine months and twenty two days. Since the appellant has already undergone substantial period of substantive sentence for the offences for which he was not legally required to be charged, no further sentence is required to be awarded to the appellant for the offences under Section 379 read with Section 511 IPC and Section 324 IPC proved against him.

6. Appeal is disposed with the direction to set the appellant-Sanwar @ Razzak at liberty forthwith, if not required to be detained in any other case.

7. Trial Court record along with a copy of this order be sent back forthwith. A copy of the order be sent to Jail Superintendent, Tihar Jail for intimation.

ILR (2014) II DELHI 1469
CRL. A.

SALAM KAVIRAJ @ CHUHA ....APPELLANT

VERSUS

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

(SANJIV KHANNA & G.P. MITTAL, JJ.)

CRL.A. NO. : 716/2010, 721, 981, 1056 CM NO. : 11127/2013 DATE OF DECISION: 19.02.2014

Indian Penal Code, 1860—Sec. 396—Conviction on the basis of the disclosure statements made by a juvenile Akram about his and others 'Involvement in the dacoity—Certain allegedly recovered articles not mentioned in the crime scene report—Recovery disbelieved—Non holding of the TIP and delay in filing FIR—Non fatal to the prosecution case as witness had sufficient time to watch and observed the culprits and it was not the case of fleeing glimpse—Mere recovery of stolen property from an accused—Not sufficient to prove conviction u/s 396 or 449 or 412 IPC.

First the facts. On the night intervening 05-06/08.2004, Surender Nath Kural (the deceased) was in deep slumber with the members of his family in his house at B-73,

Mansarovar Park, Delhi. At about 2:30 a.m., Rita Kural's (PW-9's) sleep was disturbed when she noticed that five young persons aged between 18-20 years had sneaked in the room where she was sleeping. Her father Surender Nath Kural was sleeping on a separate cot while her mother was asleep on another cot. She noticed that Appellant Salam Kaviraj @ Chuha (whose name came to be known to PW-9 later on) was standing near the cot of her father whereas Appellants Miraj @ Jakir and Asif @ Naeem stood near the bed of her mother. Appellant Shahin @ Bushle stood at the door of the room. All of them were armed with chhura. One Akram (juvenile and since released) awakened her (PW-9) and simultaneously placed his hand on her mouth and threatened her not to raise voice. The juvenile broke the gold chain from her neck and then proceeded to remove her ring and bangles. Surender Nath Kural protested and wanted to know from the Appellants and their co-accused as to what they wanted. One of the Appellants told the other to tie the deceased Surender Nath Kural. The deceased, however, got up from the cot. Appellant Salam Kaviraj stabbed the deceased with the dagger which he was holding in his hand, three-four times. PW-9 clinged to her father to save him. The deceased, however, fell down on the cot. Akram again shut her mouth forcibly. However, she managed to scream and raised an alarm and also knocked at the door of his brother's bedroom. Her brother Virender Nath Kural (PW-19) woke up and reached there. Her sister-in-law Usha Kural also reached there. She (Usha Kural) also opened the latch of the door of PW-9's younger brother's (Bhupinder Nath Kural's) room which had been bolted from outside by the Appellants. PWs 9 and 19 were able to restrain and hold two of the culprits Akram (A-1) and Salam Kaviraj (A-4). However, Appellant Salam Kaviraj was successful in freeing himself and he as others made good their escape. PW-9's younger brother thereafter called their uncle Mahender Nath Kural (PW-4) who used to stay in the adjacent house. Some neighbours also reached the house of PW-9. The persons of the public thrashed Akram who was also tied down by

them. Bhupinder Nath Kural (PW-5) informed the police. PW-4 along with PW-5 removed Surender Nath Kural to SDN hospital where he was declared brought dead. The local police as well as PCR van reached the spot. Crime team was also summoned. Statement of eye witness Rita Kural marked Ex.PW-9/A was recorded by Inspector Rajender Singh (PW-24), SHO Police Station Mansarover Park. He (PW-24) made his endorsement Ex.PW-24/A on the basis of which the present case was registered. The I.O. prepared site plan Ex.PW-24/B. He seized certain articles including one piece of gold chain from PW-9's bed (the other been removed by the juvenile); two slippers from different pairs; two polythenes containing bloody chance prints; one red and black piece of cloth like pocket of a shirt, a dagger from outside the bathroom in the verandah at the back near hand pump etc. **(Para 2)**

The prosecution heavily relies on the above circumstance to connect the Appellants with the commission of the offence punishable under Section 396 IPC. The prosecution also relies on the recovery of the daggers at the instance of some of the Appellants for which the Appellants were convicted for the offence punishable under Section 27 of the Arms Act, 1959. Apart from the fact that no public or independent witness were joined at the time of the alleged recoveries, there are several other reasons why we are not inclined to place reliance on the recoveries except recovery of a piece of gold chain from Appellant Mohd. Illyas in pursuance of the disclosure statement Ex.20/K made by Appellant Salam Kaviraj. Admittedly, the incident took place at about 2:30 a.m. Deceased Surender Nath Kural was removed to the hospital immediately thereafter at about 2:35 a.m. S.I. Pratap Singh along with other police officials and subsequently Inspector Rajender Singh, SHO, P.S. Mansarover Park also reached the spot. It is the case of the prosecution that S.I. Pratap Singh (PW-27) as also Inspector Rajender Singh (PW-24) along with Constable Satpal reached SDN Hospital after leaving some police officials at the spot. On reaching the hospital, they were informed that the

deceased had been declared brought dead. S.I. Pratap Singh and Inspector Rajender Singh (PW-24) thereupon returned to the spot and proceeded to record the statement Ex.PW-9/A of Rita Kural. PW-24 made his own endorsement Ex.PW24/A on the said statement Ex.PW-9/A for registration of the case. It is also the case of the prosecution that the I.O. (PW-24) summoned the crime team and S.I. Rohtash Singh along with other officials of the crime team reached the spot. It is apparent from the crime scene report (prepared by S.I. Rohtash Singh though he has not been examined as a witness) that the crime scene was inspected by the crime team between 3:30 a.m. to 7:00 a.m. The statement Ex.PW-9/A, the endorsement Ex.PW-24/A (made about 5:00 a.m.) and the crime scene report (available on Trial Court record, but not exhibited) conspicuously do not make any mention about recovery of any dagger inside the house near the hand pump, two slippers (one Suji and one Relaxo) and the piece of cloth purported to be pocket of the shirt which was allegedly recovered at the instance of Appellant Asif. The statement Ex.PW-9/A made by PW-9 Ritu Kural, the endorsement Ex.PW-24/A as also the crime scene report prepared by S.I. Rohtash Singh also do not make any mention of removal of any other article except a piece of gold chain which was snatched by juvenile Akram (whereas the other piece of the gold chain was recovered from the bed of PW-9). Crime scene report only makes mention in the column property stolen as 'jewellery'. Theft of purse, wrist watch etc. belonging to PW-9 as also to PW-19 containing some of their personal articles to establish their identities were important articles which should definitely have been mentioned in the statement Ex.PW-9/A, the endorsement Ex.PW-24/A as also in the crime scene report if they had really been stolen. Similarly, recovery of the dagger should also have been mentioned in all these documents if the dagger had really been found in the open space in front of the room near the hand pump as the scene of the crime was examined for almost three and half hours by the crime team which remained at the spot till 7:00 p.m.

as is mentioned in the crime scene report. We are supported in this view by a judgment of the Division Bench of this Court in **Murari v. State,** (Crl. App. No.10/2011) decided on 24.08.2011 and a Single Bench decision of this Court in **Sudhir Kumar v. State of NCT of Delhi** (Crl. App. No.605/2013) decided on 02.09.2013. We are not inclined to believe the recovery of articles stated above from/at the instance of the Appellants. **(Para 16)**

At the same time, we see no reason to disbelieve the recovery of the piece of the gold chain (Ex. PW-9/Article 27 collectively) from Appellant Mohd. Illyas at the instance of Appellant Salam Kaviraj in pursuance of his disclosure statement Ex. PW-20/K. We do believe the recovery of the piece of gold chain as the same is duly identified by PW-9 and the same also stands corroborated from her statement Ex.PW-9/A made immediately after the occurrence on the basis of which the present FIR was registered and further from recovery of another piece of the same chain from the cot at the crime scene. **(Para 17)**

Important Issue Involved: For the purpose of conviction u/s 411 IPC, the person who retains the stolen property must have knowledge or reason to believe the same to be a stolen property.

Similarly to hold the person guilty u/s 412 IPC, it must be proven that the person concerned knew or had reason to believe that the property was transferred by commission of dacoity was received from a person whom he knew or had reason to believe to belong to gang of persons.

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. Ajay Verma, Adv. with Mr. Shiv Kumar Dwivedi, Adv.

FOR THE RESPONDENT : Ms. Rajdipa Behura, APP for the State. SI Kapil Kumar, PS GTB Enclave.

CASES REFERRED TO:

1. *Sudhir Kumar* vs. *State of NCT of Delhi* (Crl. App. No.605/2013) decided on 02.09.2013.
2. *Sapan Haldar & Anr.* vs. *State,* 191 (2012) DLT 225.
3. *Murari* vs. *State,* (Crl. App. No.10/2011) decided on 24.08.2011.
4. *Munshi Singh Gautam & Ors.* vs. *State of M.P.,* (2005) 9 SCC 631.
5. *Ramanbhai Naranbhai Patel* vs. *State of Gujarat,* (2000) 1 SCC 358.

RESULT: Appeals Partly Allowed.

G.P. MITTAL, J.

1. Appellants Miraj @ Jakir, Asif @ Naeem, Salam Kaviraj @ Chuha, Mohd. Illyas and Shahin @ Bushle impugn the judgment dated 25.01.2010 and the order on sentence dated 29.01.2010 whereby they all were convicted for the offence punishable u/s 396 of the Indian Penal Code, 1860 (IPC) and sentenced to imprisonment for life and payment of fine of Rs. 5,000/- each. In default of payment of fine, all were directed to further undergo five months simple imprisonment. All the Appellants were further convicted u/s 449 IPC r/w Section 34 IPC and were sentenced to undergo rigorous imprisonment for seven years and pay a fine of Rs. 2,000/- each. In default of payment of fine, they were required to further undergo two months simple imprisonment. Appellants Shahin @ Bushle, Asif @ Naeem and Mohd. Illyas were also convicted u/s 412 IPC and were sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 2,000/- each, in default of payment of which they were to undergo further two months simple imprisonment. Appellants Miraj @ Jakir, Asif @ Naeem and Shahin @ Bushle were further sentenced under Section 27 of the Arms Act, 1959 to undergo rigorous imprisonment for a period of three years and pay a fine of Rs.1,000/- each, in default of payment of which they shall further undergo one month simple imprisonment. All sentences were to run

concurrently.

2. First the facts. On the night intervening 05-06/08.2004, Surender Nath Kural (the deceased) was in deep slumber with the members of his family in his house at B-73, Mansarovar Park, Delhi. At about 2:30 a.m., Rita Kural's (PW-9's) sleep was disturbed when she noticed that five young persons aged between 18-20 years had sneaked in the room where she was sleeping. Her father Surender Nath Kural was sleeping on a separate cot while her mother was asleep on another cot. She noticed that Appellant Salam Kaviraj @ Chuha (whose name came to be known to PW-9 later on) was standing near the cot of her father whereas Appellants Miraj @ Jakir and Asif @ Naeem stood near the bed of her mother. Appellant Shahin @ Bushle stood at the door of the room. All of them were armed with chhura. One Akram (juvenile and since released) awakened her (PW-9) and simultaneously placed his hand on her mouth and threatened her not to raise voice. The juvenile broke the gold chain from her neck and then proceeded to remove her ring and bangles. Surender Nath Kural protested and wanted to know from the Appellants and their co-accused as to what they wanted. One of the Appellants told the other to tie the deceased Surender Nath Kural. The deceased, however, got up from the cot. Appellant Salam Kaviraj stabbed the deceased with the dagger which he was holding in his hand, three-four times. PW-9 clinged to her father to save him. The deceased, however, fell down on the cot. Akram again shut her mouth forcibly. However, she managed to scream and raised an alarm and also knocked at the door of his brother's bedroom. Her brother Virender Nath Kural (PW-19) woke up and reached there. Her sister-in-law Usha Kural also reached there. She (Usha Kural) also opened the latch of the door of PW-9's younger brother's (Bhupinder Nath Kural's) room which had been bolted from outside by the Appellants. PWs 9 and 19 were able to restrain and hold two of the culprits Akram (A-1) and Salam Kaviraj (A-4). However, Appellant Salam Kaviraj was successful in freeing himself and he as others made good their escape. PW-9's younger brother thereafter called their uncle Mahender Nath Kural (PW-4) who used to stay in the adjacent house. Some neighbours also reached the house of PW-9. The persons of the public thrashed Akram who was also tied down by them. Bhupinder Nath Kural (PW-5) informed the police. PW-4 along with PW-5 removed Surender Nath Kural to SDN hospital where he was declared brought dead. The local police as well as PCR van reached the spot. Crime team was also

summoned. Statement of eye witness Rita Kural marked Ex.PW-9/A was recorded by Inspector Rajender Singh (PW-24), SHO Police Station Mansarover Park. He (PW-24) made his endorsement Ex.PW-24/A on the basis of which the present case was registered. The I.O. prepared site plan Ex.PW-24/B. He seized certain articles including one piece of gold chain from PW-9's bed (the other been removed by the juvenile); two slippers from different pairs; two polythenes containing bloody chance prints; one red and black piece of cloth like pocket of a shirt, a dagger from outside the bathroom in the verandah at the back near hand pump etc.

3. The juvenile Akram made a disclosure statement Ex.PW-24/C and informed the police about the involvement of the other Appellants. On pointing out by the juvenile, Appellant Miraj @ Jakir (A-2) and Asif @ Naeem (A-3) were arrested on the same evening. They also made disclosure statements Ex.PW-20/B and Ex.PW-20/A respectively. An application was moved by the I.O. (PW-24) for holding a TIP in respect of Appellants Miraj @ Jakir and Asif @ Naeem. They, however, declined to join the TIP. Appellant Miraj @ Jakir led the police party to a place near Shahdara flyover on Loni, Ghaziabad road and produced a shirt having red and black colour strips with it's front pocket and a few buttons missing (the pocket whereof was seized from the crime scene). Appellant Asif @ Naeem in pursuance of his disclosure statement also produced one 'Relaxo' slipper from under the bushes on the right side of the railway track. The same was seized by the I.O. Appellant Asif further got recovered one dagger Ex.24/G, hidden buried in the ground as well as a torn shirt.

4. Appellant Salam Kaviraj @ Chuha (A-4) was arrested on 08.08.2004 on the pointing out of Appellant Akram (juvenile). He got recovered a red colour bloodstained shirt with one arm missing marked Ex.PW-9/12 in pursuance of the disclosure statement made by him marked Ex.PW-20/H. Although, as per CFSL report Ex. PW-13/D, human blood was found on this shirt but the blood group of the blood could not be ascertained. Appellant Salam Kaviraj was produced before the learned MM (PW-28) for the purpose of TIP. He too refused to join the TIP. He (A-4) further led the police party to the house of Appellant Mohd. Illyas (A-5) and on 09.08.2004, Mohd. Illyas produced the stolen articles including a piece of gold chain similar to the one which was seized from the spot as well as a brown coloured woodland ladies purse Ex. PW-9/

Article 27 collectively.

5. On 30.08.2004 at about 6:00 p.m., Appellant Shahin @ Bhushle (A-6) was arrested in pursuance of a secret information and on the pointing out by the juvenile. He also refused to join the TIP. In pursuance of the disclosure statement Ex.PW-20/P made by him, Appellant Shahin @ Bhushle got recovered one dagger buried near a well in Gopalpur. He also got recovered one purse and some other articles from an iron box in the shop of one Kabari in village Gopalpur.

6. On completion of the investigation, a report under Section 173 of the Code of Criminal Procedure, 1973 (the Code) was presented against the Appellants and the juvenile.

7. On Appellants' pleading not guilty to the charge, the prosecution examined 31 witnesses. Rita Kural (PW-9) and Virender Nath Kural (PW-19) are the most crucial witnesses who have deposed about the incident and have also identified the Appellants Salam Kaviraj @ Chuha, Asif @ Naeem, Miraj @ Jakir, Shahin @ Bushle and the juvenile (Akram) as the perpetrators of the crime.

8. PWs 11, 12 and 14 lifted chance prints from the crime scene from two polythene bags whereas PW-17 lifted chance prints (Ex.PW-17/A) from a dagger lying at the spot. The chance prints on the dagger, according to the prosecution have tallied with the specimen finger prints of Appellant Miraj @ Jakir (Ex.PW-17/C) vide report Ex.PW-17/B.

9. In order to afford opportunity to the Appellants to explain the incriminating evidence appearing against them, they were examined under Section 313 of the Code. They denied the prosecution allegations and pleaded false implication. They declined to produce any evidence in defence. On appreciation of evidence, the Additional Sessions Judge (ASJ) found that the prosecution had been able to establish its case against the Appellants for the offence as stated earlier beyond shadow of all reasonable doubt. The Appellants were convicted and sentenced as stated earlier.

10. We have heard Mr. Ajay Verma, *amicus curiae* for Appellants Salam Kaviraj and Mohd. Illyas, Ms. Rakhi Dubey, *amicus curiae* for Appellant Asif @ Naeem, Ms. Saahila Lamba, amicus curiae for Appellant Miraj @ Jakir, Mr. Deepak Vohra, *amicus curiae* for Appellant Shahin @ Bushle and Ms. Rajdipa Behura, APP for the State.

11. The learned counsel for the Appellants urge that the prosecution case against the Appellants was not established beyond shadow of all reasonable doubt. It is contended that they were convicted merely on suspicion. No recovery was effected from them or at their instance. Recoveries shown were planted as no public or independent witness were joined at the time of alleged recoveries. PW-9 did not give the detailed description of the culprits in her statement Ex.PW-9/A made to the police after the incident. In her deposition in the Court also, she failed to give the description of the clothes worn by the culprits. Further, since the Appellants were shown to the witnesses in the police station, they were justified in refusing to take part in the TIP arranged by the I.O. and therefore, the Appellants' identification in the dock much after the incident cannot be attached any importance.

12. It is very strenuously canvassed that the articles claimed to have been recovered at the instance of the Appellants were planted by the police as they did not find any mention either in the statement Ex.PW-9/A made by PW-9 or in the crime scene report prepared by SI Rohtash Kumar, Incharge of the crime team or in the report Ex.PW-14/A prepared by ASI Sajid Hassan (PW-14) at the time of lifting the chance prints from two polythenes. It is argued that the specimen finger prints of Appellants were not taken by the I.O. in accordance with the provisions of Section 4 and 5 of the Identification of Prisoners Act, 1920 and therefore report Ex.PW-17/B showing that the chance print Ex.PW-17/A lifted from the dagger seized from the crime scene tallied with the specimen finger prints of Appellant Miraj @ Jakir Ex.PW-17/C is not admissible in evidence. In support of their contention, the learned counsel for the Appellants places reliance on a Full Bench decision of this Court in **Sapan Haldar & Anr. v. State,** 191 (2012) DLT 225. It is further urged that the ASJ erred in convicting Appellant Mohd. Illyas for the offence punishable under Section 396 IPC. Mohd. Illyas was not identified by PWs 9 and 19 as one of the persons who had participated in the dacoity. The recovery of the piece of chain, ladies purse and other articles at the instance of Appellant Mohd. Illyas is also doubtful. In any case, it is urged that there was no material whatsoever to convict him for the offence punishable under Section 396 IPC.

13. Per contra, Ms. Rajdipa Behura, APP for the State contends that PWs 9 and 19 were in a state of shock therefore they could not give the description of all the stolen articles and hence their testimonies in

Court regarding theft of other articles which were recovered from the Appellants cannot be doubted. Additional Public Prosecutor urges that the Appellants were shown to the witnesses only after they refused to join the TIP just to confirm if the police investigation was proceeding in the right direction. The dock identification is a substantive evidence which is corroborated by the testimonies of PW-9 and PW-19 with regard to the previous identification in the Police Station. APP for the State thus states that the charge against the Appellants is fully established and the judgment passed by the ASJ does not warrant any interference.

14. We have bestowed our thoughtful consideration to the contentions raised on behalf of the parties. Apart from the dock identification, the prosecution has relied on the following circumstances to connect the Appellants with commission of crime.

15. We shall be dealing with the circumstances and the material produced by the prosecution one by one:

(i) Recovery of three slippers, one *Suji* (Ex.PW-9/Article 3) and one *Relaxo* (Ex.PW-9/Article 1) from the spot and recovery of another slipper *Relaxo* (Ex.PW-9/Article 2) at the instance of Appellant Asif @ Naeem;

(ii) Recovery of one piece of cloth with red and black strips (Ex.PW-9/Article 5) and recovery of one red and black colour shirt (Ex.PW-9/Article 4) at the instance of Appellant Miraj @ Jakir;

(iii) Recovery of one bloodstained shirt with one arm missing at the instance of Appellant Salam Kaviraj.

(iv) Recovery of a Woodland brown colour ladies purse containing Rs.1100/- and a piece of gold chain (Ex.PW-9/Article 27 collectively) from Appellant Mohd. Illyas at the instance of Appellant Salam Kaviraj;

(v) Recovery of one purse (Ex.PW-9/Article 29) containing some visiting cards, one pocket book of Hanuman Chalisa in an iron box from one Kabari shop at Gopalpur at the instance of Appellant Shahin @ Bushle.

16. The prosecution heavily relies on the above circumstance to connect the Appellants with the commission of the offence punishable under Section 396 IPC. The prosecution also relies on the recovery of

the daggers at the instance of some of the Appellants for which the Appellants were convicted for the offence punishable under Section 27 of the Arms Act, 1959. Apart from the fact that no public or independent witness were joined at the time of the alleged recoveries, there are several other reasons why we are not inclined to place reliance on the recoveries except recovery of a piece of gold chain from Appellant Mohd. Illyas in pursuance of the disclosure statement Ex.20/K made by Appellant Salam Kaviraj. Admittedly, the incident took place at about 2:30 a.m. Deceased Surender Nath Kural was removed to the hospital immediately thereafter at about 2:35 a.m. S.I. Pratap Singh along with other police officials and subsequently Inspector Rajender Singh, SHO, P.S. Mansarover Park also reached the spot. It is the case of the prosecution that S.I. Pratap Singh (PW-27) as also Inspector Rajender Singh (PW-24) along with Constable Satpal reached SDN Hospital after leaving some police officials at the spot. On reaching the hospital, they were informed that the deceased had been declared brought dead. S.I. Pratap Singh and Inspector Rajender Singh (PW-24) thereupon returned to the spot and proceeded to record the statement Ex.PW-9/A of Rita Kural. PW-24 made his own endorsement Ex.PW24/A on the said statement Ex.PW-9/A for registration of the case. It is also the case of the prosecution that the I.O. (PW-24) summoned the crime team and S.I. Rohtash Singh along with other officials of the crime team reached the spot. It is apparent from the crime scene report (prepared by S.I. Rohtash Singh though he has not been examined as a witness) that the crime scene was inspected by the crime team between 3:30 a.m. to 7:00 a.m. The statement Ex.PW-9/A, the endorsement Ex.PW-24/A (made about 5:00 a.m.) and the crime scene report (available on Trial Court record, but not exhibited) conspicuously do not make any mention about recovery of any dagger inside the house near the hand pump, two slippers (one Suji and one Relaxo) and the piece of cloth purported to be pocket of the shirt which was allegedly recovered at the instance of Appellant Asif. The statement Ex.PW-9/A made by PW-9 Ritu Kural, the endorsement Ex.PW-24/A as also the crime scene report prepared by S.I. Rohtash Singh also do not make any mention of removal of any other article except a piece of gold chain which was snatched by juvenile Akram (whereas the other piece of the gold chain was recovered from the bed of PW-9). Crime scene report only makes mention in the column property stolen as 'jewellery'. Theft of purse, wrist watch etc. belonging to PW-9 as also to PW-19 containing some of their personal articles to establish their identities were important articles which should

definitely have been mentioned in the statement Ex.PW-9/A, the endorsement Ex.PW-24/A as also in the crime scene report if they had really been stolen. Similarly, recovery of the dagger should also have been mentioned in all these documents if the dagger had really been found in the open space in front of the room near the hand pump as the scene of the crime was examined for almost three and half hours by the crime team which remained at the spot till 7:00 p.m. as is mentioned in the crime scene report. We are supported in this view by a judgment of the Division Bench of this Court in **Murari v. State,** (Crl. App. No.10/2011) decided on 24.08.2011 and a Single Bench decision of this Court in **Sudhir Kumar v. State of NCT of Delhi** (Crl. App. No.605/2013) decided on 02.09.2013. We are not inclined to believe the recovery of articles stated above from/at the instance of the Appellants.

17. At the same time, we see no reason to disbelieve the recovery of the piece of the gold chain (Ex. PW-9/Article 27 collectively) from Appellant Mohd. Illyas at the instance of Appellant Salam Kaviraj in pursuance of his disclosure statement Ex. PW-20/K. We do believe the recovery of the piece of gold chain as the same is duly identified by PW-9 and the same also stands corroborated from her statement Ex.PW-9/A made immediately after the occurrence on the basis of which the present FIR was registered and further from recovery of another piece of the same chain from the cot at the crime scene.

18. Further, as per the CFSL report Ex. PW-13/D, it can be inferred that the deceased's blood group was AB, since the blood of AB group was found on the gauze piece, through which the blood was lifted from the spot. The blood group on the two bed sheets as well as the pillow and also on the lungi of the deceased was found to be of AB group only. However, on the piece of shirt (Ex. 2C), blood of B group, and on two other shirt pieces (Exs.9 and 10), certain blood was detected. These shirts have not been collated by the I.O. specifically with any of the Appellant and since the blood of AB group has not been detected thereon, the alleged recovery of the shirts at the instance of the Appellants is hardly of any consequence.

19. Since we are not inclined to believe the recovery of the dagger from the spot, matching of the chance print (Q3) thereon with the specimen finger print (S1) of Appellant Miraj @ Jakir vide CFSL report Ex.PW-17/B is also of no consequence.

20. Coming to the testimonies of the eye witnesses, PWs 9 and 19 have given a very vivid account of the incident. PW-9 testified as under:-

"In (sic) on the intervening night of 5th and 06.08.2004 at about 1.00 a.m. we were at our house. My mother was not feeling well. I and my father were attending my ailing mother in latter's room. Rest of family members had gone to sleep in their respective rooms. Doors of varandha were opened to allow fresh air to come due to my ailing mother. Between 2.00 – 2.30 a.m. five unknown boys aged between 18-20 years entered in our house. One of them came near to me. Two near the bed of my mother. Both of them were having 'churas' in their hands. One stood near my father and one near the gates having armed with similar 'chura'. The boy who was standing near me shut my mouth by hands and forbade me to raise any voice. The same boy snatched a golden chain from my neck which I was wearing that time. He also started putting off my golden bangles and finger ring. Meanwhile my father opposed the same asking them as what they wanted from us. One of those boys asked his other associates to tie my father. The boy who was standing near my father stabbed the latter on his back by that chura 3-4 times. I enarmed my father to save him. He fell down on the cot. That boy again shut my mouth by his hand forcibly. Despite the same I was able to raise an alarm. Apart from that I knocked at the doors of my brother's bed room. After hearing same, my brother Mr. Virender woke up and came there. I along with latter overpowered two of those boys. One of them succeeded in escape. The boy which was overpowered by us came to know later on as Akram. (PW pointed towards accused Akram correctly). My sister-in-law opened the doors of my younger brother which were latched from outside by those offenders. On his return my brother called my uncle Mahender Nath Kural, who is residing in an adjoining house. He with the assistance of my brother namely Virender Nath Kural to the SDN hospital. Police came to our house. I was interrogated and my statement was recorded by the police. Public persons gathered at our house after hearing commotion. They gave beatings to accused Akram. My statement/complaint is Ex.PW-9/A....."

21. In the later part of her testimony, PW-9 identified the Appellants, namely, Salam Kaviraj @ Chuha, Asif @ Naeem, Miraj @ Jakir, Shahin @ Bushle and the juvenile (Akram) and assigned specific roles to each one of them. PW-19 Virender Nath Kural corroborated PW-9's testimony in all material particulars. He also identified the said Appellants and deposed about the part played by each one of them. Both these witnesses in their examination-in-chief have also stated to have identified the Appellants in the Police Station.

22. Referring to this part of their testimonies, the learned counsel for the Appellants have urged that since the Appellants were shown to the witnesses in the Police Station, they were justified in refusing to take part in the TIP. It is thus contended that the Appellants' identification for the first time in the Court after a lapse of 3-4 years is valueless and cannot be relied upon to base their conviction particularly when the witnesses have not given a detailed description in their statements under Section 161 of the Code recorded by the police.

23. Obviously, PWs 9 and 19 were not called to take part in the TIP. In fact, as soon as the application was moved by the IO (PW-24), the Appellants refused to join the same. The testimonies of PWs 9 and 19 have to be read with the testimony of PW-24, I.O. of the case.

24. Admittedly, Akram (juvenile) was apprehended at the spot. PW-24 testified that police custody remand of Akram was obtained. He was interrogated and in the evening at the instance of Akram, Appellants Asif @ Naeem and Miraj @ Jakir were arrested. He deposed that on the next date i.e. 07.08.2004 they were produced in muffled faces in the Court and an application for TIP was moved. He testified that both of them (Asif and Miraj) refused to participate in the TIP. It is very important to note that it was only thereafter that purported recoveries were effected and the Appellants were brought back to the Police Station. PW-24 deposed that thereafter PW-9 Rita Kural and PW-19 Virender Nath Kural met them near railway crossing at Shahadra, Loni, Ghaziabad. They also came to the Police Station after knowing about the recovery and identified the Appellants (Miraj @ Jakir and Asif @ Naeem) in the Police Station. Thus, Appellants Miraj @ Jakir and Asif @ Naeem were shown to the witnesses only after they refused to join the TIP.

25. Similarly, PW-24 deposed that after Appellant Salam Kaviraj @ Chuha was arrested, he was advised to keep his face muffled. He was

produced in the Court on 09.08.2004. Here also PW-24 testified that on an application for holding TIP, Appellant Salam Kaviraj refused to join the same. It was thereafter that three days' police custody remand of Appellant Salam Kaviraj was granted and again purported recoveries were effected from him and while they were returning to the Police Station, PWs 9 and 19 met them near Shahdara flyover and they identified Appellant Salam Kaviraj as one of the offenders. With regard to Appellant Shahin @ Bushle, he refused to join the TIP on an application moved on 31.08.2004. It was two days thereafter that Appellant Shahin @ Bushle was identified by PWs 9 and 19. Thus, the Appellants' contention that they refused to join the TIP as they had been earlier shown to the witnesses cannot be believed. It may be noticed that the steps for holding the TIP were taken by the I.O. at the earliest opportunity. Moreover, PW-9 had sufficient time to watch and observe the Appellants. It is not a case where the witnesses just had a glimpse of fleeing culprits.

26. In **Munshi Singh Gautam & Ors. v. State of M.P.,** (2005) 9 SCC 631, it was held that the identification of the accused in the Court is a substantive evidence and relevant under Section 9 of the Evidence Act, 1872. As a rule of prudence, the Courts normally ask for corroboration to the dock identification by prior test identification. It was observed that in appropriate cases, where the Court is impressed by a particular witness, it can safely rely on his/her testimony without such corroboration. Similarly, in **Ramanbhai Naranbhai Patel v. State of Gujarat,** (2000) 1 SCC 358, the Supreme Court observed that where the witnesses had sufficient time to see the face of the assailants, the absence of test identification parade was inconsequential.

27. It is important to note that PWs 9 and 19 did not prefer to rope in any false person. Although Appellant Mohd. Illyas was also arrested and recovery of certain stolen property was also effected from him and he was also sent up to the Court to face trial under Section 396 IPC, but PWs 9 and 19 did not identify him as one of the persons who participated in the dacoity. Thus, in the instant case, PWs 9 and 19's testimonies have been corroborated by their own depositions with regard to the Appellants' earlier identification before the police after they had refused to participate in the TIP arranged by the I.O. Relying on PWs 9 and 19's testimonies, we have no manner of doubt that juvenile Akram and Appellants Miraj @ Jakir, Asif @ Naeem, Salam Kaviraj @ Chuha and Shahin @ Bushle had committed dacoity and that Appellant Salam Kaviraj had

committed the murder of Surender Nath Kural while committing the dacoity. This evidence by itself is sufficient to convict the Appellants for the offence punishable under Section 449 read with Section 34 IPC as also under Section 396 IPC. Moreover, the testimonies of PWs 9 and 19 find corroboration from the recovery of piece of gold chain (Ex.PW-9/ Article 27 collectively) from Appellant Mohd. Illyas in pursuance of the disclosure statement made by Salam Kaviraj. The piece of chain has been duly identified by PWs 9 and 19 and also finds corroboration from the *rukka* Ex.PW-9/A registered on the statement of PW-9 immediately after the incident.

28. A feeble attempt ha s been made by the learned counsel for the Appellants to urge that there was some delay in lodging the FIR in as much as although the incident took place between 2:30 a.m. to 2:45 a.m., the FIR was registered only at 5:10 a.m. It may be noted that immediately after the incident, the police was informed by DD No. 42-A in the Police Station at 2:36 a.m. The DD was transmitted to S.I. Pratap Singh and information was also passed on to Inspector Rajender Singh, SHO of the Police Station. They immediately proceeded to the spot. When they noticed that the injured had already been removed to the hospital, while leaving some members of the team, the I.O. (Inspector Rajender Singh) proceeded to the SDN hospital where he obtained the MLC of the injured who had been declared brought dead. He returned to the spot, inspected the same, recorded the statement of PW-9, made his own endorsement Ex.PW-24/ A thereon and then transmitted it to the Police Station at 5:00 a.m. Thus, there cannot be said to be any unexplained delay in recording of the FIR at 5:10 a.m. Moreover, delay in recording FIR otherwise cannot be of any importance in such a case as one of the culprits i.e. the juvenile was apprehended at the spot and his name was mentioned in the FIR. Hence, there was no scope of any padding in the FIR.

29. In view of the foregoing discussion, we are of the opinion that the recovery of the daggers Ex.PW-24/G and Ex.PW-24/H from the spot as also at the instance of Appellants Asif @ Naeem and Miraj @ Jakir respectively is doubtful. The recovery of the ladies purse and '1100/- from Appellant Mohd. Illyas is a also little doubtful as in any case the currency notes have no mark of identification and recovery of sum of '1100/- does not in any way connect Appellants Mohd. Illyas or Salam Kaviraj with the commission of the crime. We are not inclined to take the same into consideration for holding the Appellants guilty as the same

could be the result of padding by the police in view of our earlier observation. We are also not inclined to believe the recovery of the dagger and recovery of the piece of red and black striped piece of cloth which allegedly matched with the red and black coloured striped shirt got recovered by Appellant Miraj @ Jakir. We are also not going to attach much importance to the recovery of the dagger and one Relaxo slipper at the instance of Appellant Asif @ Naeem and recovery of one purse containing Hanuman Chalisa and Timestar wrist watch and the dagger at the instance of Appellant Shahin @ Bushle as all these articles were not mentioned either in the statement Ex.PW-9/A or in the crime scene report prepared between 3 a.m. to 7 a.m. and are otherwise debatable. We do believe the recovery of the broken piece

of gold chain from Appellant Mohd. Illyas at the instance of Appellant Salam Kaviraj in pursuance of the disclosure statement ade by him. However, Appellant Mohd. Illyas on the basis of recovery of piece of gold chain cannot be convicted for the offence punishable under Section 396 IPC or for that matter for the offence punishable under Section 449 IPC read with Section 34 IPC. He has not been identified as one of the five intruders.

30. It is very disturbing to note that although there was no evidence, perhaps it was not even the case of prosecution that Appellant Mohd. Illyas was one of the persons who committed dacoity in question, yet merely on the recovery of a piece of gold chain and certain other articles, he has not only been convicted and sentenced for the offence punishable under Section 412 IPC but also under Section 396 IPC. PWs 9 and 19 were specific that five persons, i.e., the juvenile and four Appellants (Salam Kaviraj, Asif, Miraj and Shahin) were responsible for committing dacoity. It is not even the case of the prosecution that during investigation, Appellant Mohd. Illyas was found to have committed dacoity in association with other accused persons or that he was present outside to guard the spot. Thus, conviction of Appellant Mohd. Illyas for the offence punishable under Section 396 IPC or for that matter, under Section 449 IPC read with Section 34 IPC is not tenable. The same is accordingly liable to be set aside.

31. We have already held above that we are inclined to believe the recovery of gold chain (Ex.PW-9/Article 27 collectively) from Appellant Mohd. Illyas at the instance of Appellant Salam Kaviraj. The question for

consideration is whether Appellant Mohd. Illyas can be convicted for the offence punishable under Section 412 IPC merely on the basis of recovery of this piece of gold chain. Admittedly, Appellant Mohd. Illyas has not come forward with any explanation with regard to possession of the piece of gold chain. He has simply denied the recovery. Mere possession of stolen property or a property belonging to a gang of dacoits is not sufficient to hold a person guilty of an offence punishable under Sections 411/412. At this stage, it would be appropriate to extract Sections 411 and 412 IPC hereunder:

"411. Dishonestly receiving stolen property

Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

412. Dishonestly receiving property stolen in the commission of a dacoity

Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to a gang of dacoity, property which he knows or has reason to believe to have been stolen, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

32. Thus, to bring a case within the four corners of Section 411 IPC, the person who retains the stolen property must have knowledge or reason to believe the same to be a stolen property. Similarly, to hold a person guilty under Section 412 IPC, the prosecution must prove that the person concerned knew or had the reason to believe that the property was transferred by commission of dacoity or was received from a person whom he knew or had reason to believe to belong to a gang of dacoits. No evidence whatsoever has been produced by the prosecution to show that Appellant Mohd. Illyas knew or had reason to believe that the piece of gold chain (Ex.PW-9/Article 27 collectively) had been obtained by

commission of dacoity or he knew that Appellant Salam Kaviraj belonged to a gang of dacoits. At the same time, no explanation has been given by Appellant Mohd. Illyas as to how he came in possession of the piece of gold chain. Therefore, an inference can definitely be drawn that Appellant Mohd. Illyas knew or had reason to believe that the piece of chain was stolen property. Thus, instead of Section 412 IPC, Appellant Mohd. Illyas is liable to be convicted for the offence punishable under Section 411 IPC.

33. Therefore, while maintaining the conviction of Appellants Miraj @ Jakir, Asif @ Naeem, Salam Kaviraj @ Chuha and Shahin @ Bushle for the offence punishable under Section 449 IPC read with Section 34 IPC and Section 396 IPC, they are acquitted for rest of the offences. Similarly, Appellant Mohd. Illyas is convicted for the offence punishable under Section 411 IPC and is acquitted of rest of the offences.

34. The sentence awarded by the ASJ to Appellants Miraj @ Jakir, Asif @ Naeem, Salam Kaviraj @ Chuha and Shahin @ Bushle for the offence punishable under Section 449 read with Section 34 IPC and 396 IPC is maintained. Whereas, Appellant Mohd. Illyas is sentenced to undergo RI for a period of three years and to pay fine of Rs.5,000/- or in default to undergo simple imprisonment for three months for the offence punishable under Section 411 IPC, which he has already undergone. He will be released, if not required in any other case.

35. The appeals are partly allowed in above terms.

36. Pending applications also stand disposed of.

37. A copy of the order be transmitted to the Trial Court for information.

ILR (2014) II DELHI 1489
CRL. A.

WASIM (PASSA IN J.C) ....APPELLANT

VERSUS

STATE OF DELHI ....RESPONDENT

(DEEPA SHARMA, J.)

CRL. A. NO. : 1278/2012 DATE OF DECISION: 20.02.2014

Indian Penal Code, 1860—Appellants convicted u/s 307/34—Conviction challenged—Appellant had stabbed the injured with a 'vegetable knife' in an auto parking of a metro station—Trial Court charged the accused u/s 307/34 IPC—Conviction challenged on ground—No intention to kill and no premeditation. Held—No preparation or motive found to kill injured—Injuries received simple in nature—Alteration of conviction into 324 IPC—Appellate released for the period already undergone.

The appellant along with two other persons was tried for the offence punishable under Section 307/34 IPC. The appellant was convicted for the offence punishable under Section 307/34 IPC vide judgment dated 19th July, 2012 and was sentenced to undergo R.I. for seven years and fine of Rs.5000/- and in default S.I. for six months vide order dated 23rd July, 2012. The other co-accused were however convicted for the offence under Section 323/34 IPC and sentenced for a period already undergone. **(Para 1)**

The incident had taken place on 29th November, 2009 at 7.50 p.m. in Auto Parking Shahdara Metro Station. The injured PW1 Firoz was declared fit to make the statement by the doctor in the hospital and the FIR for the offence under Section 324/34 IPC was registered on the statement of the

injured PW1 Firoz. The doctor who had examined the injured had opined the injuries of simple nature. Subsequently, during the investigation another doctor had given the opinion on the MLC of the injured PW1 and opined that the injuries were of grievous nature and supplementary statement of PW1 was also recorded by Investigative Officer and accordingly the charge sheet was filed by the prosecution for the offence under Section 307 IPC. All the three accused (including the appellant) were charged for offence under Section 307/34 IPC. On the basis of the evidence recorded during the trial, while appellant was convicted for the offence under Section 307/34 IPC, the other to co-accused were convicted only for the offence under Section 323 IPC. **(Para 2)**

The conviction has been challenged by the appellant mainly on the ground that there is no evidence on record to prove that the appellant had any intention to kill PW1 Firoz. It is also argued that the knife, allegedly used by the appellant was the knife which is used for cutting vegetables and fruits and it was not a dangerous weapon. He has relied upon the sketch of the knife Ex.PW2/F. It is submitted that the length of the blade 7.5 c.m., width of the blade is 2 c.m. and length of handle is 10 c.m. Total length of knife is 17.5 c.m. It is further argued that the injuries were on the face, finger and left dorsal side of thigh and no injuries had been received by the injured PW1 Firoz on any vital portion of his body and it clearly shows that there is no intention on the part of the appellant to kill PW1. It is also argued that the quarrel had taken place on the spur of moment and there was no pre meditated act on the part of the appellant. It is argued that the appellant cannot be convicted for the offence under Section 307/34 IPC when his co-accused have been convicted for the offence under Section 323/34 IPC. **(Para 3)**

From the above discussion, it is apparent that at the time of the incident there was no preparation or motive on the part of the appellant to kill the injured PW1 and also injuries received by the injured were simple in nature although

caused with a sharp weapon. The appellant had not approached the injured PW1 with intention to kill. The appellant in fact approached the injured PW1, when PW1 demanded Rs.150. In view of the above, conviction of the appellant under Section 307 IPC is not sustainable. The conviction and sentence of appellant under Section 307/34 IPC is therefore set aside. I convict the appellant for the offence under Section 324 IPC as it stands proved on record that the appellant had voluntarily caused hurt with the help of a knife on the person of PW1. **(Para 11)**

The offence is punishable with imprisonment upto three years or with fine or both. In the facts and circumstance and in the view of the fact that the appellant has already undergone sentenced for about more than two years, I hereby sentence him for the period already undergone by him. **(Para 12)**

Important Issue Involved: Intention to Kill—Section 307 contemplates intention/knowledge of causing death and doing an act towards it. It is a state of mind & inter alia can be gathered from motive, severity of blows and preparation for the crime.

[As Me]

APPEARANCES:

FOR THE APPELLANT : Mr. M.L. Yadav, Advocate

FOR THE RESPONDENT : Mr. O.P. Saxena APP for the State with Inspector Anand Lakra, P.S. Shastri Park.

RESULT: Application disposed off.

DEEPA SHARMA, J.

1. The appellant along with two other persons was tried for the offence punishable under Section 307/34 IPC. The appellant was convicted for the offence punishable under Section 307/34 IPC vide judgment dated

19th July, 2012 and was sentenced to undergo R.I. for seven years and fine of Rs.5000/- and in default S.I. for six months vide order dated 23rd July, 2012. The other co-accused were however convicted for the offence under Section 323/34 IPC and sentenced for a period already undergone.

2. The incident had taken place on 29th November, 2009 at 7.50 p.m. in Auto Parking Shahdara Metro Station. The injured PW1 Firoz was declared fit to make the statement by the doctor in the hospital and the FIR for the offence under Section 324/34 IPC was registered on the statement of the injured PW1 Firoz. The doctor who had examined the injured had opined the injuries of simple nature. Subsequently, during the investigation another doctor had given the opinion on the MLC of the injured PW1 and opined that the injuries were of grievous nature and supplementary statement of PW1 was also recorded by Investigative Officer and accordingly the charge sheet was filed by the prosecution f r the offence under Section 307 IPC. All the three accused (including the appellant) were charged for offence under Section 307/34 IPC. On the basis of the evidence recorded during the trial, while appellant was convicted for the offence under Section 307/34 IPC, the other to co-accused were convicted only for the offence under Section 323 IPC.

3. The conviction has been challenged by the appellant mainly on the ground that there is no evidence on record to prove that the appellant had any intention to kill PW1 Firoz. It is also argued that the knife, allegedly used by the appellant was the knife which is used for cutting vegetables and fruits and it was not a dangerous weapon. He has relied upon the sketch of the knife Ex.PW2/F. It is submitted that the length of the blade 7.5 c.m., width of the blade is 2 c.m. and length of handle is 10 c.m. Total length of knife is 17.5 c.m. It is further argued that the injuries were on the face, finger and left dorsal side of thigh and no injuries had been received by the injured PW1 Firoz on any vital portion of his body and it clearly shows that there is no intention on the part of the appellant to kill PW1. It is also argued that the quarrel had taken place on the spur of moment and there was no pre meditated act on the part of the appellant. It is argued that the appellant cannot be convicted for the offence under Section 307/34 IPC when his co-accused have been convicted for the offence under Section 323/34 IPC.

4. It is argued on behalf of learned APP for the State that weapon used is a knife and is a dangerous weapon and that there were all

intensions to kill PW1 and the conviction under Section 307 IPC of the appellant is justified.

5. I have heard arguments and perused the record.

6. Section 307 IPC contemplates an intention or knowledge of causing death and also doing an act towards it. Intention is a state of mind and can be gathered only from all the circumstances of the case. The nature of weapon used, the place where the injuries were inflicted, the motive for the crime, severity of blows and preparation for the crime are few of the important factors that may be taken into consideration for determination of factum of intention to cause death.

7. In the present case, it is an established fact that the injured PW1 was found fit for making the statement on the day of incident when the investigating officer had approached him in the hospital. On the basis of the statement of injured PW1, the FIR was registered for the offence punishable under Section 324 IPC. Injured PW1 Firoz has deposed as under:

> "I was sitting in the parking of aforesaid metro station after closing my day work. I noticed, accused Wasim @ Passa present in the court (correctly identified) was coming towards parking, who is known to me previously being the resident of same locality, I called him and demanded a sum of Rs.150/- against selling of fruits to him for Rs.100/- and had borrowed Rs.50/- from me three months prior of this incident. Accused Wasim @ Passa refused to pay Rs.150/- and abused me.... .... I was caught hold by accused – Harish Pathania and Sagar Sharma @ Vishwa Kirti Sharma and accused-Wasim @ Passa took out one sharp-edge object and caused me injuries by using that object on my face, left hand and back side of left thigh with an intention to kill me."

8. This testimony of the injured clearly indicates that appellant had approached the injured PW1 only when PW1 had called him and demanded his money. It is not a case where the appellant had approached the injured PW1 with intention to cause death. There is, also, no previous preparation on the part of the appellant. There is no evidence that appellant had reached the spot with pre-meditated plan to kill PW1. The motive or preparation is therefore absent. No doubt, a knife had been used in the

incident, but the nature of injuries, suggest that knife was not used with intention to kill PW1. Following injuries were received by PW1:

1. Deep incised wound	- 7 X 1.5 c.m. (left side of face)
2. Ample incised wound	- 2 X 0.3 c.m. (left nostril)
3. Incised wound	-
Left hand's index finger	- 1 X 0.5 c.m.
Ring finger	- 1.5 X 0.3 c.m.
4. Wound in Dorsal side of thigh	- 4 X 1 c.m.

9. From the above, it is clear that none of the injury was on the vital part of the body of PW1. Injuries received were on left side of face, left nostril, left hand's index finger, ring finger and left dorsal side of thigh.

These facts clearly negate any intention on the part of the appellant to kill PW1.

10. The prosecution also does seem to be sure about the nature of injuries on the person of PW1. While Dr.Rajender Kumar had opined the nature of the injuries as simple, Dr.Animesh Basak opined the nature of injuries as grievous on 12.1.2010. Dr.Animesh Basak had been examined as PW11. He was not sure if before giving his opinion about the nature of injuries as grievous on MLC he had examined the patient Mohd. Firoz. He had certainly not examined the appellant Mohd Firoz PW1 on his admission in the hospital on the date of incident. As per his statement he had examined the patient only on 12.1.2010 and on the same date opined the nature of injuries as grievous. It is strange that the doctor who had initially examined the injured PW1, when the injuries were fresh on his body, had given his opinion about injuries as simple in nature, while a doctor who had examined PW1 after two and a half months has opined that the injuries were grievous in nature. There is no mention if the injuries had healed during this period or not. It is cardinal principle of criminal law that when there are testimonies of contrary nature, the evidence which is in the favour of the accused has to be accepted and the benefit goes to the accused. In the present case, the second opinion of the doctor regarding grievous injuries on the person of injured being found or observed after two and a half months of the incident is not

acceptable to this court because it is not based on actual examination of injured on the date of incident. Opinion of the doctor who had examined the injured initially and immediately after the incident is more trustworthy and believable.

11. From the above discussion, it is apparent that at the time of the incident there was no preparation or motive on the part of the appellant to kill the injured PW1 and also injuries received by the injured were simple in nature although caused with a sharp weapon. The appellant had not approached the injured PW1 with intention to kill. The appellant in fact approached the injured PW1, when PW1 demanded Rs.150. In view of the above, conviction of the appellant under Section 307 IPC is not sustainable. The conviction and sentence of appellant under Section 307/ 34 IPC is therefore set aside. I convict the appellant for the offence under Section 324 IPC as it stands proved on record that the appellant had voluntarily caused hurt with the help of a knife on the person of PW1.

12. The offence is punishable with imprisonment upto three years or with fine or both. In the facts and circumstance and in the view of the fact that the appellant has already undergone sentenced for about more than two years, I hereby sentence him for the period already undergone by him.

13. Copy of this order be sent to the trial court. Registry is directed to supply a copy of the order to the appellant.

14. The appellant be released forthwith, if not wanted in any other case.

15. The appeal is disposed of in the above terms.

ILR (2014) II DELHI 1496
W.P. (C)

NATIONAL COUNCIL OF EDUCATION RESEARCH AND TRAINING ....PETITIONER

VERSUS

PARASH RAM & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 1183/2014 DATE OF DECISION: 21.02.2014

CCS (CCA) Rules, 1965—Sub-Rule (1) of Rule 10 & Rule 10 (6) and (7)—Respondents were placed under suspension vide orders dated 17th and 19th July, 2012 in terms of sub-rule (1) of Rule 10 of the CCS (CCA) Rules, 1965—Suspension was reviewed by the Review Committee extending for another period of three months—Respondents premised their application before the Tribunal on the plea that the review of suspension was due in accordance with law on 17th October, 2012—As such, the suspension not having been reviewed within the time prescribed under Rule 10 (6) and (7) of the CCS (CCA) Rules, 1965, the continued suspension beyond 90 days after the issuance of the order dated 17th July, 2012 and 19th July, 2012 was null and void—This contention of the respondents was accepted by the Tribunal placing reliance upon sub-rule (6) and (7) of Rule 10 of CCS (CCA) Rules, 1965—The Tribunal has also placed reliance on a pronouncement of Supreme Court reported in (2010) 2 SSC 222 entitled Union of India and others vs. Dipak Mali wherein it has been held that by operation of Rule 10 (6), the suspension order would not survive after a period of 90 days unless it stood extended after review—Tribunal directed that

the orders of suspension in these cases would be deemed to have been revoked from the expiry of the prescribed period i.e. 17th October, 2012 and 19th October, 2012—The Tribunal directed that the applicants shall be treated on duty on the aforesaid dates with all consequential benefits, including arrears of pay and allowances. The respondents were directed to pass an order in terms thereof within a period of 15 days from the date of receipt of coy of that order—Hence the present petition. Held In compliance of the order of the Tribunal, the petitioner has passed an order dated 21st November, 2013 revoking the suspension of three persons, namely. Smt. Kamal Sharma, Smt. Premlata Gianey and Sh. Dinesh K. Tokas with effect from 17th October, 2012 and has also granted all consequential benefits including arrears of pay and allowances—No reason is forthcoming for why the present respondents are not entitled to the same relief—Petitioners have issued a fresh order of suspension dated 1st August, 2013 against the present respondents which stands challenged before the Tribunal—Given the fact that the order dated 1st August, 2013 is subjudice before the Tribunal, so far as grant of consequential benefits to the respondents is concerned, for the time being, the same has to be restricted up to 1st August, 2013—Parties shall abide by the adjudication by the Tribunal so far as the petitioners are bound to comply with the order dated 6th November, 2013—Appropriate orders to be passed within 15 days—Writ petition and the stay application dismissed.

Mr. Shankar Raju, learned counsel appearing on behalf of the private respondents in this writ petition has informed us that in compliance of the order of the Tribunal, the petitioner has passed an order dated 21st November, 2013 revoking the suspension of three persons, namely, Smt.Kamal Sharma, Smt.Premlata Gianey and Sh.Dinesh K.Tokas with effect

from 17th October, 2012 and has also granted all consequential benefits including arrears of pay and allowances. No reason is forthcoming for why the present respondents are not entitled to the same relief. **(Para 7)**

The petitioners have issued a fresh order of suspension dated 1st August, 2013 against the present respondents which stands challenged before the Tribunal. Given the fact that the order dated 1st August, 2013 is subjudice before the Tribunal, so far as grant of consequential benefits to the respondents is concerned, for the time being, the same has to be restricted up to 1st August, 2013. Parties shall abide by the adjudication by the Tribunal so far as the challenge to the order dated 1st August, 2013 is concerned. However, the petitioners are bound to comply with the order dated 6th November, 2013.

Appropriate orders in this regard shall be passed within 15 days from today. **(Para 8)**

Important Issue Important: CCS (SSA) Rules, 1965: Sub-rule (1) of the Rule 10 & 10 (6) and (7)—By operation of Rule 10 (6), the suspension order would not survive after a period of 90 days unless it stood extended after review.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Anand Nandan, Advocate.

FOR THE RESPONDENT : Mr. Shankar Raju and Mr. Nilansh Gaur, Advocates.

CASE REFERRED TO:

1. *Union of India and others* vs. *Dipak Mali* (2010) 2 SSC 222.

RESULT: Writ Petition dismissed.

GITA MITTAL, J. (Oral)

Caveat 185/2014

Since the Caveator/respondents has been represented through counsel and has been heard, the caveat stands discharged.

C.M.No.2472/2014 (for exemption)

Exemption is allowed subject to just exceptions.

Application is disposed of.

W.P.(C) 1183/2014 & C.M.No.2471/2014 (for stay)

1. The writ petitioner assails the order dated 6th November, 2013 passed by the Central Administrative Tribunal allowing the O.A.No.1007/2013 which was filed by the respondents.

2. It is noteworthy that O.A.No.1007/2013 was filed by seven persons (including the respondents herein) namely, Mr.Parash Ram, Mr.Ravinder Singh, Mr.Ranbir S.Parashar, Mr.Dinesh K.Tokas, Smt.Kamal Sharma, Smt.Prem Lata Gianey and Mr.Ved Prakash contending that they were placed under suspension vide orders dated 17th and 19th July, 2012 in terms of sub-rule (1) of Rule 10 of the CCS (CCA) Rules, 1965. The suspension was reviewed by the Review Committee vide order dated 25th October, 2012 whereby it was extended for another period of three months.

3. The respondents premised their application before the Tribunal on the plea that the review of suspension was due in accordance with law on 17th October, 2012 but it took place only on 25th October, 2012. As such, the suspension not having been reviewed within the time prescribed under Rule 10 (6) and (7) of the CCS (CCA) Rules, 1965, the continued suspension beyond 90 days after the issuance of the order dated 17th July, 2012 and 19th July, 2012 was null and void.

4. This contention of the respondents was accepted by the Tribunal placing reliance upon sub-rule (6) and (7) of Rule 10 of CCS (CCA) Rules, 1965. The Tribunal has also placed reliance on a pronouncement of Supreme Court reported in (2010) 2 SSC 222 entitled **Union of India and others vs. Dipak Mali** wherein it has been held that by operation of Rule 10 (6), the suspension order would not survive after a period of

90 days unless it stood extended after review.

* The Tribunal has concluded that the explanation of the present petitioner was not convincing. Reference has been given to three other orders passed by the Coordinate Benches in similar circumstances, accepting challenges to extension of suspension on a similar ground.

5. In this background, by the order dated 6th November, 2013, the Tribunal accepted the challenge by the applicants and held that the order dated 17th July, 2012 and 19th July, 2012 had become invalid due to non-compliance of sub-rule (6) and (7) of Rule 10 of CCS (CCA) Rules, 1965. The Tribunal directed that the orders of suspension in these cases would be deemed to have been revoked from the expiry of the prescribed period i.e. 17th October, 2012 and 19th October, 2012. The Tribunal directed that the applicants shall be treated on duty on the aforesaid dates with all consequential benefits, including arrears of pay and allowances. The respondents were directed to pass an order in terms thereof within a period of 15 days from the date of receipt of coy of that order.

6. We may note that the petitioners herein had sought review of the order dated 6th November, 2013 by way of R.A.No.193/2013 which was rejected by the Tribunal vide order dated 24th December, 2013.

7. Mr.Shankar Raju, learned counsel appearing on behalf of the private respondents in this writ petition has informed us that in compliance of the order of the Tribunal, the petitioner has passed an order dated 21st November, 2013 revoking the suspension of three persons, namely, Smt.Kamal Sharma, Smt.Premlata Gianey and Sh.Dinesh K.Tokas with effect from 17th October, 2012 and has also granted all consequential benefits including arrears of pay and allowances. No reason is forthcoming for why the present respondents are not entitled to the same relief.

8. The petitioners have issued a fresh order of suspension dated 1st August, 2013 against the present respondents which stands challenged before the Tribunal. Given the fact that the order dated 1st August, 2013 is subjudice before the Tribunal, so far as grant of consequential benefits to the respondents is concerned, for the time being, the same has to be restricted up to 1st August, 2013. Parties shall abide by the adjudication by the Tribunal so far as the challenge to the order dated 1st August, 2013 is concerned. However, the petitioners are bound to comply with the order dated 6th November, 2013.

Appropriate orders in this regard shall be passed within 15 days from today.

9. This writ petition and the stay application are dismissed in the above terms.

ILR (2014) II DELHI 1501
W.P. (C)

ALL INDIA INSTITUTE OF MEDICAL SCIENCES & ANR. **....PETITIONERS**

VERSUS

RAM KISHORE & ANR. **....RESPONDENTS**

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 1188/2014 **DATE OF DECISION: 21.02.2014**

Service Law—Compulsory Retirement—Penalty of compulsory retirement on the basis of admission of guilt—Respondent was subjected to disciplinary proceedings based on the charge that while working as Masalchi/Bearer in the Cafetaria Department, AIIMS, stolen, two gas cylinder from the gas manifold room and taken awayby three wheeler—Respondent disputed the charges levelled against him vide his reply pointing out that prior to the charge sheet dated 7th January, 2008, the petitioner had issued a charge memo dated 11th December, 2006 containing identical allegations which were denied by him vide reply dated 22nd December, 2006 and no further action was taken thereon—However, the enquiry officer submitted a report dated holding that the charged officer had admitted the article of charge and therefore it stood proved—Three years after the submission of the

enquiry report, the Disciplinary Authority passed an order dated 15th November, 2011 accepting the report and imposing the penalty of compulsory retirement upon the respondent—His appeal dated 14th December, 2011 was rejected by the order dated 9th May, 2012—The respondent has challenged these orders against him by way of O.A. No. 2047/2013 inter alia on the ground that there was no evidence at all before the enquiry officer and that a communication dated 23rd June, 2008 had been wrongly treated as admission of guilt on his part—Petitioner assails the order dated 26th November, 2013 passed by the Central Administrative Tribunal accepting the O.A. No. 2047/2012 which was filed by the respondent challenging the order of the disciplinary authority dated 15th November, 2011 as well the appellate authority's order dated 9th May, 2012 whereby the respondent's appeal was rejected. Held: Central Administrative Tribunal has considered the import of the statement made by the respondent in the letter dated 23rd June, 2008 holding that the respondent had not admitted guilt of the charge of theft but had only stated that on 24th April, 2008, he had been asked by another employee Prem Singh to load cylinders in an auto rickshaw—It was stated that these cylinders were unloaded on instructions of Prem Singh at his residence (Prem Singh' residence)—The Tribunal has also noted that even before the enquiry officer on 24th April, 2008, the respondent had stated that he had simply acted as per the instructions of Prem Singh without intention of committing theft—It is an admitted position that other than the said letter dated 23rd June, 2008, the enquiry officer recorded no evidence at all–In his background, it was held that the recommendations of the enquiry officer were based on no evidence and that there was no admission of the charge by the respondent as well—The Tribunal had therefore set aside the inquiry report dated 5th August, 2008, the

Disciplinary Authority's order dated 15th November, 2011 and the Appellate Authority's order dated 9th May, 2012—The petitioner has been given liberty to proceed afresh if deem appropriate and pass appropriate orders in accordance with law—Petitioner has not pointed out any material which enables us to take a view different than that taken by the Tribunal—There was no evidence in support of the charge against the petitioner before the enquiry officer—No merit in the writ petition—The writ petition and the application are hereby dismissed.

It is an admitted position that other than the said letter dated 23rd June, 2008, the enquiry officer recorded no evidence at all. In this background, it was held that the recommendations of the enquiry officer were based on no evidence and that there was no admission of the charge by the respondent as well. The Tribunal has therefore set aside the inquiry report dated 5th August, 2008, the Disciplinary Authority's order dated 15th November, 2011 and the Appellate Authority's order dated 9th May, 2012. The petitioner has been given liberty to proceed afresh if deem appropriate and pass appropriate orders in accordance with law. **(Para 7)**

The petitioner has not pointed out any material which enables us to take a view different than that taken by the Tribunal. There was no evidence in support of the charge against the petitioner before the enquiry officer. We therefore find no merit in the writ petition. The writ petition and the application are hereby dismissed.

Needless to say that liberty granted by the Tribunal shall remain with the petitioner. **(Para 8)**

Important Issue Involved: When the recommendations of the enquiry were based on no evidence and there was no admission of the charge by the respondent as well, Tribunal has committed no wrong in setting aside the inquiry report.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sumit Babbar and Mr. Sahil S. Chauhan, Advocates for Mr. Mehmood Pracha, SLC.

FOR THE RESPONDENT : Mr. A.P. Singh, Advocate for R-2.

RESULT: Writ petition dismissed.

GITA MITTAL, J. (Oral)

C.M.No.2481/2014 (for exemption)

Exemption is allowed subject to just exceptions.

Application is disposed of.

W.P.(C) 1188/2014 & C.M.No.2480/2014 (for stay)

1. The writ petitioner assails the order dated 26th November, 2013 passed by the Central Administrative Tribunal accepting the O.A.No.2047/2012 which was filed by the respondent challenging the order of the disciplinary authority dated 15th November, 2011 as well the appellate authority's order dated 9th May, 2012 whereby the respondent's appeal was rejected.

2. It appears that the respondent was subjected to disciplinary proceedings based on the following charge:

> "That the said Shri Ram Kishore while working as Masalchi/Bearer in the Cafetaria Department AIIMS stolen, two gas cylinder from the gas manifold room and taken away by three wheeler (Auto rickshaw) on 23.07.2006 in between 8.30 P.M. to 9.00 P.M.
>
> Shri Ram Kishore is thus responsible for gross misconduct, misbehaviour and has failed to maintain absolute integrity, devotion to duty and has acted in a manner unbecoming of an Institute employee; thereby contravening Rule 3 (1) (ii) & (iii) of the CCS (Conduct) Rules, 1964 as applicable to the employees of the Institute."

3. The respondent disputed the charges levelled against him vide his reply dated 23rd June, 2008. It was pointed out that prior to the charge sheet dated 7th January, 2008, the petitioner had issued a charge memo dated 11th December, 2006 containing identical allegations which were denied by him vide reply dated 22nd December, 2006 and no further action was taken thereon.

4. However, the enquiry officer submitted a report dated 5th August, 2008 holding that the charged officer had admitted the article of charge and therefore it stood proved. Three years after the submission of the enquiry report, the Disciplinary Authority passed an order dated 15th November, 2011 accepting the report and imposing the penalty of compulsory retirement upon the respondent. His appeal dated 14th December, 2011 was rejected by the order dated 9th May, 2012.

5. The respondent has challenged these orders against him by way of O.A.No.2047/2013 inter alia on the ground that there was no evidence at all before the enquiry officer and that a communication dated 23rd June, 2008 had been wrongly treated as admission of guilt on his part. Given the stand of the petitioner, we may set out the letter dated 23rd June, 2008 wherein the respondent has stated as follows:

"To

The Inquiry Officer

AIIMS

Sub:- Departmental Inquiry against Sh.Ram Kishore, Masalchi/ Bearer under Rule 14 of the CCS (CCA) Rules, 1965.

Sir,

With reference to letter No.F.Security/June, 2008 dated 12th June, 2008 received from Sh.R.S.Rawat, Security Officer/ Presenting Officer on the subject cited above, I am to state that I was present on 23.7.2006 upto 9.00 PM. Sh.Prem Singh asked me to bring auto rickshaw at Kitchen Gate (Exit Gate). I was influenced of heavy liquor and asked by Sh.Prem Singh to help him for loading of two LPG Cylinder in auto rickshaw. Since I was under influence of liquor, two LPG Cylinder from gas manifold room were loaded in auto rickshaw and I unloaded two cylinders at the residence i.e. A-77, East Kidwai Nagar, New

Delhi of Sh.Prem Lal.

Further, it is staed that I committed my mistake and I request in your honour that I may be excused this time and also I am stated that in future, I will not repeat such activities therefore, the case may kindly be considered on sympathetic ground.

Thanking you,

Yours faithfully,
Sd/-
(RAM KISHORE)
Masalchi/Bearer
Cafetaria, AIIMS

Dated 23.6.2008"

6. The Central Administrative Tribunal has considered the import of the statement made by the respondent in the letter dated 23rd June, 2008 holding that the respondent had not admitted guilt of the charge of theft but had only stated that on 24th April, 2008, he had been asked by another employee Prem Singh to load cylinders in an auto rickshaw. It was stated that these cylinders were unloaded on instructions of Prem Singh at his residence (Prem Singh's residence).

The Tribunal has also noted that even before the enquiry officer on 24th April, 2008, the respondent had stated that he had simply acted as per the instructions of Prem Singh without intention of committing theft.

7. It is an admitted position that other than the said letter dated 23rd June, 2008, the enquiry officer recorded no evidence at all. In this background, it was held that the recommendations of the enquiry officer were based on no evidence and that there was no admission of the charge by the respondent as well. The Tribunal has therefore set aside the inquiry report dated 5th August, 2008, the Disciplinary Authority's order dated 15th November, 2011 and the Appellate Authority's order dated 9th May, 2012. The petitioner has been given liberty to proceed afresh if deem appropriate and pass appropriate orders in accordance with law.

8. The petitioner has not pointed out any material which enables us to take a view different than that taken by the Tribunal. There was no

evidence in support of the charge against the petitioner before the enquiry officer. We therefore find no merit in the writ petition. The writ petition and the application are hereby dismissed.

Needless to say that liberty granted by the Tribunal shall remain with the petitioner.

ILR (2014) II DELHI 1507
W.P. (C)

MAHIPAL SINGH ....PETITIONER

VERSUS

THE COMMISSIONER, MUNICIPAL CORPORATION OF DELHI & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 1190/2014 DATE OF DECISION: 21.02.2014

Delhi Municipal Corporation Act, 1957—Section 95 (2) (a): Dismissal of an employee—Brief Facts—Petitioner stands convicted by judgment dated 24th January, 2012 passed by Special Judge, Anti corruption Branch, Delhi for commission of offence under Sections 7 and 13 (i) (d) of Prevention of Corruption Act, 1988—In view of the conviction of the petitioner, the respondents proceeded to take action the petitioner under Section 95 (2) (a) of the Delhi Municipal Corporation Act, 1957 which empowers the Municipal Corporation of Delhi to dismiss an employee on the ground of conduct which led to his conviction on a criminal charge—Vide an order dated 9th July, 2012, the petitioner was thus dismissed from service—Petitioner challenged his dismissal by way of O.A. No. 2811/2013—Tribunal rejected the challenge on the

ground that the respondents had proceeded in accordance with law in exercise of Statutory power—Hence the present petition primarily on the ground that no opportunity order and that his special circumstances including the responsibility of three children and wife etc. deserved to be compassionately considered. Held: Under the proviso to sub-Section (2) of Section 95 of the Delhi Municipal Corporation Act, it is specifically provided that where an officer or employee is dismissed on the ground of conduct which has led to his conviction on a criminal charge, no opportunity of showing cause against the proposed action to be taken is required to be given—Provisions contained in Regulation 9 (i) of the DMC Services (Control & Appeal) Regulations, 1959 which also provide that no departmental enquiry is essential for imposition of penalty upon the municipal employee on the ground of conduct leading to his conviction in a criminal case—The challenge by the petitioner on the ground of denial of opportunity to show cause is therefore contrary to the specific statutory prescription and is untenable—Tribunal has not given liberty to the petitioner that in the event of his success in the criminal appeal preferred by him against his conviction, he would be entitled to work out his claim of reinstatement in accordance with law and dismissal of his case would not come in the way of consideration of his request—In view of the above, the impugned order of respondents and the Tribunal cannot be faulted on any legally tenable ground—The writ petition and the application are hereby dismissed.

We may note that the Tribunal has not given liberty to the petitioner that in the event of his success in the criminal appeal preferred by him against his conviction, he would be entitled to work out his claim of reinstatement in accordance with law and dismissal of his case would not come in the way of consideration of his request.

In view of the above, the impugned order of respondents and the Tribunal cannot be faulted on any legally tenable ground.

The writ petition and the application are hereby dismissed. **(Para 7)**

Important Issue Involved: Delhi Municipal Corporation Act, 1957—Section 95 (2) (a): Dismissal of an employee—When it is specifically provided that no opportunity of showing cause against an action to be taken is required to be given where an officer or employee is dismissed on the ground of conduct which had led to his conviction of a criminal charge, challenge by the petitioner on this ground is untenable.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Subhash Chand Tomar and Mr. Yatendra Nagar, Advocates.

FOR THE RESPONDENT : Mr. Suryadeep Singh, Adv. for Ms. Prabhsahay Kaur, Adv.

RESULT: Writ Petition dismissed.

GITA MITTAL, J. (Oral)

1. The writ petitioner assails the order dated 10th September, 2013 whereby his O.A.No.2811/2013 was dismissed in limine by the Central Administrative Tribunal.

2. It appears that the petitioner stands convicted by judgment dated 24th January, 2012 passed by the Special Judge, Anti Corruption Branch, Delhi for commission of offence under Sections 7 and 13 (i) (d) of Prevention of Corruption Act, 1988.

The petitioner has assailed the said conviction by way of the Criminal Appeal No.146/2012 before this court which is stated to be pending.

3. It appears that in view of the conviction of the petitioner, the

respondents proceeded to take action against the petitioner under Section 95 (2) (a) of the Delhi Municipal Corporation Act, 1957 which empowers the Municipal Corporation of Delhi to dismiss an employee on the ground of conduct which led to his conviction on a criminal charge. Vide an order dated 9th July, 2012, the petitioner was thus dismissed from service. His representation dated 28th September, 2012 against the dismissal did not meet any favourable consideration.

4. The petitioner thereafter challenged his dismissal by way of O.A.No.2811/2013. The Tribunal rejected the challenge by the petitioner on the ground that the respondents had proceeded in accordance with law in exercise of statutory power.

5. The order dated 9th July, 2012 of the respondent and the order dated 10th September, 2013 passed by the Tribunal have been assailed before us primarily on the ground that no opportunity to show cause was given to the petitioner before passing the impugned order and that his special circumstances including the responsibility of three children and wife etc. deserved to be compassionately considered.

6. We may note that the Tribunal has extracted Section 95 of the Delhi Municipal Corporation Act, 1957. Under the proviso to sub-Section (2) of Section 95 of the Delhi Municipal Corporation Act, it is specifically provided that where an officer or employee is dismissed on the ground of conduct which has led to his conviction on a criminal charge, no opportunity of showing cause against the proposed action to be taken is required to be given. The Tribunal also adverted to the provisions contained in Regulation 9 (i) of the DMC Services (Control & Appeal) Regulations, 1959 which also provide that no departmental enquiry is essential for imposition of penalty upon the municipal employee on the ground of conduct leading to his conviction in a criminal case.

The challenge by the petitioner on the ground of denial of opportunity to show cause is therefore contrary to the specific statutory prescription and is untenable.

7. We may note that the Tribunal has not given liberty to the petitioner that in the event of his success in the criminal appeal preferred by him against his conviction, he would be entitled to work out his claim of reinstatement in accordance with law and dismissal of his case would not come in the way of consideration of his request.

In view of the above, the impugned order of respondents and the Tribunal cannot be faulted on any legally tenable ground.

The writ petition and the application are hereby dismissed.

ILR (2014) II DELHI 1511
CRL. A.

RANJEET **....PETITIONER**

VERSUS

STATE (NCT OF DELHI) **....RESPONDENT**

(DEEPA SHARMA, J.)

CRL. A. NO. : 684/2012 **DATE OF DECISION: 03.03.2014**

Indian Penal Code, 1860—Sec. 307 & Sec. 379—Head constable stabbed at railway track—No eye witness—Appellant arrested and made a disclosure statement which confirmed his involvement in the case—Appellant refused Test Identification Parade (TIP) on the ground that he had been shown to the injured in the hospital—Trial Court held him guilty u/s 307/309 IPC—Appeal by the accused on the ground that he is falsely implicated and that conviction is solely based on identification of the PW7—No adverse inference can be drawn against him on account of his refusal to participate in TIP—No recovery of stolen article and knife from him. Held—The plea taken by the appellant is contrary to the proven facts and also the other plea taken by the appellant stand falsified at the face of the proven facts and therefore adverse inference can be drawn on his refusal to participate in TIP—Nature of injuries and the wounds on the vital body parts of the accused prove that the injured had intention to kill—

Convicting the appellant u/s 307 IPC suffers no infirmity & Based on cogent evidence.

Falsely implicated—Disclosure statement of the appellant is hit by section 24 of the Indian Evidence Act—No evidence to connect the appellant with the commission of offence of theft—Conviction of appellant not sustainable u/s 379 IPC—The appellant is a drug addict and a habitual criminal previously involved in 11 cases—The amount of punishment and conviction u/s 307 is maintained—Acquitted of the charges u/s 379 IPC.

In this case the investigative agency of police was set into motion on 20th December, 2010. On that day, Constable Babu Lal of PS Bara Hindu Rao along with Constable Vinod, Members of Quick Reaction Team (QRT) were on duty at Azad Market red light. At about 7 p.m. HC Ved Prakash came to them in injured condition and told that he had been stabbed at Railway track. This information was supplied to Duty Officer, PS Bara Hindu Rao on mobile phone and a DD No.20A was recorded. Both of them thereafter shifted the injured to Hindu Rao hospital in QRT vehicle and the injured was admitted in the hospital. SI Ganga Dhar and SI Rohit reached at the hospital. Injured was declared unfit for statement. SI Ganga Dhar collected MLC of the injured. SHO/Inspector Satish Bhardwaj also reached at the hospital. They thereafter reached at the railway track. No eye witness was found there. It was dark. An endorsement was made on DD no.22A and the rukka was prepared and the FIR was registered in this case. The injured HC Ved Prakash was in a bad condition and needed operation immediately. Consent to the operation was given by PW1 Constable Babu Lal. Certain parcels/pulandas were seized from the hospital. On 23.12.2011, statement of injured was recorded. He had not named the appellant in his statement. Thereafter on 25th December, 2010 the appellant was arrested by ASI S.K.Srivastava along with Constable Sajjan and HC Narender

who were posted at AATS Central District under Section 41.1 (A) Cr.PC. Appellant made a disclosure statement. In his disclosure statement he disclosed about this incident. He had also disclosed that one of his friend was also involved who took up the article which the injured had kept on the railway line and ran away and he also followed his friend. On the disclosure statement of the appellant he was found involved in this case. He was arrested on 26th December, 2010 in this case and was remanded to the judicial custody. He was in judicial custody when an application for holding Test Identification Parade (TIP) was moved on 3.1.2011. Appellant refused to participate in the TIP on the plea that he had been shown to the injured in the hospital. He had been given the statutory warning that his statement of refusal to TIP shall be used as a piece of evidence against him. Even despite the statutory warning, the appellant refused to participate in the TIP. Thereafter police custody remand of the appellant was sought on that day and he was taken to Hindu Rao hospital where the injured was admitted. At about 5.30 p.m. the injured was shifted from Intensive Care Unit to the Ward. The appellant was shown to the injured. The injured identified the appellant as his assailant and an identification memo was prepared. **(Para 1)**

The main contention of the appellant before the court is that he has been falsely implicated, and that conviction is solely based on identification of the appellant by PW7 in court. That no adverse inference can be drawn against him on account of his refusal to participate in TIP as he had been shown to injured in hospital on 28.12.2010. It is further argued that there is no recovery of knife and that of stolen article from him. Hence, his conviction is bad in law. **(Para 4)**

It is settled law that refusal on the part of the appellant without any just reason, leads to an adverse inference against the appellant unless it is shown by the appellant that holding of a TIP was a futile exercise because he had been shown to the witness. Applying the said principle, it is

required to be seen whether the refusal on the part of the appellant to participate in TIP on the ground that he had been shown to the witness on 28.12.2010 is justified. Whether he had actually been shown to the witness PW7 (injured) on 26.12.2010. This plea of the appellant is contrary to the facts proved on record. It stands proved from the first judicial remand paper of the appellant that he was arrested on 26.12.2010 in this case and on the same day he was remanded to judicial custody. He remained in judicial custody till 3.1.2011 when his police custody remand was sought after his refusal to participate in TIP. These facts show that on 28.12.2010 appellant was in judicial custody and thus there was no occasion for the police to take the appellant to the hospital to show him to the injured. The uncontradictory evidence of PW7 that he was shifted from ICU to ward only at 5.30 p.m. on 3.1.2011 and so also there was no occasion for injured to see appellant before that day. **(Para 13)**

Another ground given by the appellant for refusal to participate in TIP is that his photographs were taken by the police before his arrest and were shown to the injured. This plea was not taken by the appellant at the time of his refusal to participate in TIP. The appellant has nowhere stated to the learned MM that his photographs had been taken and had been shown to the appellant. His statement to learned MM was "I do not want to participate in TIP because I have been seen by the witnesses at hospital". This plea of the appellant therefore is an after-thought. His plea also stands falsified by the fact that no suggestion to this effect had been put to the injured. The appellant has failed to justify his refusal to participate in TIP. **(Para 14)**

The next argument of the appellant is that he has been falsely implicated for the offence under Section 379 IPC. I have carefully perused the statement of the injured and from his statement it is clear that it was not the appellant who had taken away the inverter. He himself had stated that some other boy had taken away inverter. The inverter had not been recovered at the instance of the appellant. There

is nothing on record except the disclosure statement of the appellant to the effect that the boy who had removed the stolen article was his accomplice. The disclosure statement is hit by Section 24 of the Indian Evidence Act. From the testimony of PW7 it is also apparent that the boy who had stolen the inverter, had not assisted the appellant in stabbing. There is thus no evidence that the appellant and that boy were acting as accomplices, or in furtherance of common intention. There is thus no evidence on record to connect the appellant with the commission of offence of theft. The conviction of the appellant is not sustainable for the offence punishable under section 379 IPC and set aside.**(Para 18)**

As regards amount of punishment awarded to the appellant by the trial court is concerned, it is clear from the order on sentence that the learned trial court had taken into consideration the age, social background, responsibilities of the appellant while awarding sentence. From the status report, PS Bara Hindu Rao, it is apparent that the appellant is a drug addict and habitual criminal and previously involved in 11 cases. He has been declared Bad Character in P.S. Deshbandhu Gupta Road, New Delhi. **(Para 19)**

In view these, I find no reason to interfere with the amount of sentence awarded to the appellant for the offence punishable under Section 307 IPC. **(Para 20)**

Important Issue Involved: Refusal to the test identification parade can lead to an adverse inference against the accused if the refusal is without any just reason or shown by the accused that it is a futile exercise as he had been shown to the accused.

[As ma]

APPEARANCES:

FOR THE PETITIONER : Mr. S.D. Dixit, Advocate.

FOR THE RESPONDENT : Mr. O.P. Saxena, APP for the State with SI Khalid Akhtar, PS Bara Hindu Rao.

CASES REFERRED TO:

1. *State of Maharashtra* vs. *Suresh* 7 (2000) 1 SCC 471.
2. *Hari Nath* vs. *State of U.P.,* AIR 1988 SC 345.
3. *Sk Hasib* vs. *State of Bihar* AIR 1972 SC 283.
4. *Rameshwar Singh* vs. *State of J & K* (1971) 2 SCC 715.

RESULT: Application Partly Allowed.

DEEPA SHARMA, J.

1. In this case the investigative agency of police was set into motion on 20th December, 2010. On that day, Constable Babu Lal of PS Bara Hindu Rao along with Constable Vinod, Members of Quick Reaction Team (QRT) were on duty at Azad Market red light. At about 7 p.m. HC Ved Prakash came to them in injured condition and told that he had been stabbed at Railway track. This information was supplied to Duty Officer, PS Bara Hindu Rao on mobile phone and a DD No.20A was recorded. Both of them thereafter shifted the injured to Hindu Rao hospital in QRT vehicle and the injured was admitted in the hospital. SI Ganga Dhar and SI Rohit reached at the hospital. Injured was declared unfit for statement. SI Ganga Dhar collected MLC of the injured. SHO/Inspector Satish Bhardwaj also reached at the hospital. They thereafter reached at the railway track. No eye witness was found there. It was dark. An endorsement was made on DD no.22A and the rukka was prepared and the FIR was registered in this case. The injured HC Ved Prakash was in a bad condition and needed operation immediately. Consent to the operation was given by PW1 Constable Babu Lal. Certain parcels/pulandas were seized from the hospital. On 23.12.2011, statement of injured was recorded. He had not named the appellant in his statement. Thereafter on 25th December, 2010 the appellant was arrested by ASI S.K.Srivastava along with Constable Sajjan and HC Narender who were posted at AATS Central District under Section 41.1 (A) Cr.PC. Appellant made a disclosure statement. In his disclosure statement he disclosed about this incident. He had also disclosed that one of his friend was also involved who took up the article which the injured had kept on the railway line and ran away and he also followed his friend. On the disclosure statement of the appellant he was found involved in this case. He was arrested on 26th

December, 2010 in this case and was remanded to the judicial custody. He was in judicial custody when an application for holding Test Identification Parade (TIP) was moved on 3.1.2011. Appellant refused to participate in the TIP on the plea that he had been shown to the injured in the hospital. He had been given the statutory warning that his statement of refusal to TIP shall be used as a piece of evidence against him. Even despite the statutory warning, the appellant refused to participate in the TIP. Thereafter police custody remand of the appellant was sought on that day and he was taken to Hindu Rao hospital where the injured was admitted. At about 5.30 p.m. the injured was shifted from Intensive Care Unit to the Ward. The appellant was shown to the injured. The injured identified the appellant as his assailant and an identification memo was prepared.

2. The accomplice of the appellant who had stolen the inverter of the injured, could not be arrested. After completion of the investigation, the challan was filed under Section 307/379/34 IPC against the appellant.

3. Charges for these offences were framed against the appellant. He pleaded not guilty to the charges. Prosecution had examined 15 witnesses. All the prosecution witnesses had supported the prosecution case. Statement of the appellant under Section 313 Cr.PC was also recorded. He had denied all the evidence against him as incorrect and had taken the plea that he had been falsely implicated and that he was innocent. He had taken the plea that he had not gone to the railway track and that he did not make any disclosure statement and that his signatures were obtained on blank papers under coercion; that he was shown to the injured before being produced in the court and that HC Ved Prakash injured had falsely implicated him as he failed to satisfy his illegal demand. The appellant has examined Shri Pushpender Kumar Sharma as defence witness. This witness has stated that at Kishan Ganj railway station, where he had gone to see off his friend Sunny, he witnessed a quarrel between an old man aged about 40-42 years and a boy aged about 27-28 years who was holding a knife in his hand. He reached near them and he saw the boy stabbing the old man. After considering all the evidence on record and taking into consideration the defence produced by the appellant, the learned trial court had reached to the conclusion that the charges under Section 307/379 IPC stands proved against the appellant and returned the guilt of the appellant under these two sections.

4. The main contention of the appellant before the court is that he has been falsely implicated, and that conviction is solely based on identification of the appellant by PW7 in court. That no adverse inference can be drawn against him on account of his refusal to participate in TIP as he had been shown to injured in hospital on 28.12.2010. It is further argued that there is no recovery of knife and that of stolen article from him. Hence, his conviction is bad in law.

5. It is argued on behalf of learned APP for the State that the appellant was never shown to the injured before 3.1.2011. His refusal to participate in TIP an adverse inference can be drawn against him and he has been identified by the injured PW7 in court and there is nothing to suggest false implication of accused in this case.

6. I have heard the arguments and perused the relevant record.

7. The facts which stand proved on record are that HC Ved Prakash was stabbed on 20.12.2010 at 6.30 p.m. at railway track between Kishan Ganj and Old Delhi Railway Station. The injured PW7 has clearly stated this fact and there is nothing on record to doubt the veracity of his statement. His MLC Ex.PW4/A corroborates his testimony regarding the injuries received by him. PW7 has also deposed that at the time when he was attacked, he was coming on the railway track, carrying the inverter which he had bought from the market. He was in uniform as he was returning after completing his duty. He saw a person standing with a knife in his hand. In order to prevent that person from committing any offence, he went towards that person and tried to snatch the knife from his hand. That person started stabbing him. Even the defence witness DW1 has deposed about an incident of stabbing on 20.12.2010 at railway track. The sole question is who is assailant of PW7.

8. The sole contention of the appellant is that he has been falsely implicated and no adverse inference can be drawn on his refusal to participate in TIP as he had been shown to injured.

9. In the case AIR 1988 SC 345 entitled **Hari Nath vs. State of U.P.,** the apex court has observed that evidence of test identification is admissible under Section 9 of the Indian Evidence Act. The apex court has further observed in the case AIR 1972 SC 283 entitled **Sk Hasib vs. State of Bihar** that the evidence of identification merely corroborates and strengthen the oral testimony in court which alone is the primary and

substantive evidence as to identity. Te court has observed as under:

> *'... the purpose of test identification is to test that evidence, the safe rule being that the sworn testimony of the witness in court as to the identity of the accused who is a stranger to him, as a general rule, requires corroboration in the form of an earlier identification proceeding.'*

10. The Apex court has further discussed in its pronouncements the purpose of holding the test identification. In the case (1971) 2 SCC 715 entitled **Rameshwar Singh vs. State of J & K** has observed as under:

> *'... it may be remembered that the substantive evidence of a witness is his evidence in court, but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the former's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial.'*

11. The apex court has further laid down the purpose of identification parade and in the case 7 (2000) 1 SCC 471 entitled **State of Maharashtra vs. Suresh** has observed as under:

> *"We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence."*

12. It is an admitted fact that the injured did not know the appellant before the date of incident. It is also a proven fact that on 20.12.2010 and subsequent dates the injured was found unfit for the statement. Investigating officer of this case has clearly stated that he could record the statement of the injured Ved Prakash only on 23.12.2010 under Section 161 CR.PC in the hospital. In the cross-examination, Inspector

Satish Bhardwaj who had recorded the statement of the injured on 23.12.2010, has made it clear that he recorded the said statement in the Intensive Care Unit ward of the hospital. He has also clearly stated that only on that day, after recording the statement of the injured police had come to know the sequence of the incident. In his statement under Section 161 Cr.P.C. the injured has not disclosed the name of his assailant and has referred him only as a boy. It is thus clear that the investigative agency was unaware of the identity of the assailant of PW7 till 25.12.2010 when ASI S.K.Srivastava (PW11) of AATS had arrested the appellant under Section 41.1. (A) Cr.PC and recorded his statement. It was the appellant who had disclosed in his disclosure statement Ex.PW11/A about the incident of 20.12.2010 in detail. This information was passed on to PS Bara Hindu Rao. It was only then, that the investigative officer of this case had come to know that the assailant of PW7 is appellant. Thereafter the appellant was formally arrested in this case on 26.12.2010 and his remand paper shows that on the same day he was remanded to judicial custody and he remained in judicial custody till 3.1.2011. On the application for holding TIP the appellant refused to participate in the TIP before learned Metropolitan Magistrate (MM). The record of TIP (Ex.PW13/A) clearly shows that the appellant had been produced in judicial custody on that day. After the refusal of the TIP by the appellant, his police custody remand was sought and he was taken to Hindu Rao hospital to be identified by the injured. Injured duly identified the appellant as his assailant and a memo Ex.PW3/C to this effect was recorded.

The injured PW7 has also duly identified the appellant as his assailant. There was no delay in holding the TIP. The appellant was arrested on 26.12.2010. An application for holding TIP was made on 3.1.2011. The appellant had however refused to participate in the TIP. He has argued that he had refused to participate in the TIP because he had been shown to PW7 on 28.12.2010. A suggestion to this effect was given by him to the injured, in his cross-examination, although in his refusal to participate in TIP Ex.PW13/A he has not disclosed the date on which PW7 had seen him in hospital. Plea of the appellant is that since he was shown to the injured on 28.12.2010 so he refused to participate in TIP and thus his refusal does not lead to an adverse inference against him.

13. It is settled law that refusal on the part of the appellant without any just reason, leads to an adverse inference against the appellant unless it is shown by the appellant that holding of a TIP was a futile exercise

because he had been shown to the witness. Applying the said principle, it is required to be seen whether the refusal on the part of the appellant to participate in TIP on the ground that he had been shown to the witness on 28.12.2010 is justified. Whether he had actually been shown to the witness PW7 (injured) on 26.12.2010. This plea of the appellant is contrary to the facts proved on record. It stands proved from the first judicial remand paper of the appellant that he was arrested on 26.12.2010 in this case and on the same day he was remanded to judicial custody. He remained in judicial custody till 3.1.2011 when his police custody remand was sought after his refusal to participate in TIP. These facts show that on 28.12.2010 appellant was in judicial custody and thus there was no occasion for the police to take the appellant to the hospital to show him to the injured. The uncontradictory evidence of PW7 that he was shifted from ICU to ward only at 5.30 p.m. on 3.1.2011 and so also there was no occasion for injured to see appellant before that day.

14. Another ground given by the appellant for refusal to participate in TIP is that his photographs were taken by the police before his arrest and were shown to the injured. This plea was not taken by the appellant at the time of his refusal to participate in TIP. The appellant has nowhere stated to the learned MM that his photographs had been taken and had been shown to the appellant. His statement to learned MM was "I do not want to participate in TIP because I have been seen by the witnesses at hospital". This plea of the appellant therefore is an after-thought. His plea also stands falsified by the fact that no suggestion to this effect had been put to the injured. The appellant has failed to justify his refusal to participate in TIP.

15. In such circumstances, adverse inference can be drawn on his refusal. It can be presumed that the injured PW7 would have identified the appellant in case he had agreed to join the identification parade. The refusal can be used as corroborative evidence to the identification of the appellant by the injured in the dock. Further no motive has been assigned to the injured to wrongly identify his assailant. The appellant has failed to bring to my notice any piece of evidence which can suggest even remotely his false implication in this case.

16. Following injuries had been received by PW7 as per his MLC:

1. Incised wound 2 inch long on left knee.

2. Incised wound 8 inch long on left thigh.

3. Incised wound 2 inch long on left palm below thumb

4. Incised wound 3 inch long below mandible (lower jaw) right side.

5. Incised wound 1 inch long on neck.

6. Two wounds on abdomen with exposed intestine.

17. It is in evidence that there was urgency to operate PW7 and without any delay on the consent of PW1 Babu Lal the operation was performed. Doctor, it seems did not want to wait for arrival of family members of PW7 and waste precious time. The nature of injuries has been opined as dangerous and stated to have been caused with sharp object. The use of knife, the severity of injuries, the stab on vital parts of body, all point out to one conclusion that the appellant had the intention to kill. The findings of learned MM, convicting the appellant under Section 307 IPC therefore suffers with no infirmity and based on cogent evidence.

18. The next argument of the appellant is that he has been falsely implicated for the offence under Section 379 IPC. I have carefully perused the statement of the injured and from his statement it is clear that it was not the appellant who had taken away the inverter. He himself had stated that some other boy had taken away inverter. The inverter had not been recovered at the instance of the appellant. There is nothing on record except the disclosure statement of the appellant to the effect that the boy who had removed the stolen article was his accomplice. The disclosure statement is hit by Section 24 of the Indian Evidence Act. From the testimony of PW7 it is also apparent that the boy who had stolen the inverter, had not assisted the appellant in stabbing. There is thus no evidence that the appellant and that boy were acting as accomplices, or in furtherance of common intention. There is thus no evidence on record to connect the appellant with the commission of offence of theft. The conviction of the appellant is not sustainable for the offence punishable under section 379 IPC and set aside.

19. As regards amount of punishment awarded to the appellant by the trial court is concerned, it is clear from the order on sentence that the learned trial court had taken into consideration the age, social background, responsibilities of the appellant while awarding sentence.

From the status report, PS Bara Hindu Rao, it is apparent that the appellant is a drug addict and habitual criminal and previously involved in 11 cases. He has been declared Bad Character in P.S. Deshbandhu Gupta Road, New Delhi.

20. In view these, I find no reason to interfere with the amount of sentence awarded to the appellant for the offence punishable under Section 307 IPC.

21. While the appellant stands convicted for offence under Section 307 IPC and order of sentence is maintained, he is acquitted for offence under Section 379 IPC.

22. The copy of the order be sent to learned trial court.

23. Registry is directed to send copy of the order to the Superintendent, Central Jail, Tihar to supply the same to the appellant.

ILR (2014) II DELHI 1523
W.P. (C)

S.K. MATHUR ....PETITIONER

VERSUS

THE PRESIDENT SECRETARIAT REPRESENTED BY THE SECRETARY AND ANR. ....RESPONDENTS

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

W.P. (C) NO. : 8417/2011 DATE OF DECISION: 03.03.2014

Constitution of India, 1950—Article 226-227—Writ Petition—Central Administrative Tribunal (CAT)—Service law-equal pay for equal work pay scale-equivalent to his counterpart in the cadre of origin—Petitioner an Assistant Director (Horticulture), CPWD

sent on deputation to DDA in same capacity sent to President's Secretariat at the President's Garden, Rashtrapati Bhawan on 19.12.1970 as Garden Superintendent on 08.04.1974 permanently to Deputy Director (Horticulture) in CPWD—Post upgraded to Director in the pay scale of 3700-5000 on 30.04.1996 as per 4th Central Pay Commission—Order passed by President's Secretariat on 30.04.1996 to this effect mentioned upgraded scale purely personal to petitioner as and when he would leave the post—Pay scale of the post would be brought down to its earlier level—On 5th Pay Commission Report President's Secretariat revised the pay scale for the post of Superintendent at 12000-16500—Petitioner granted the scale—Retired on 01.04.1998 dues calculated on the said scale in the meantime revised recommendation made by 5th Central Pay Commission for the post of Director (Horticulture) and Additional Director (Horticulture) on their representation pay scale upgraded to 14300-18300 w.e.f. 01.01.1996—Office order passed on 06.10.1999 and 28.08.2001—Petitioner made several representation based on revised recommendation to calculate the retirement benefit on this basis-representation rejected by President's Secretariat by several order-last order dated 13.06.2008 preferred O.A. before CAT for issuance of appropriate order to refix the revised pay scale and pay the consequential benefit including retirement benefit alongwith interest @ 10% per annum on the basis of pay scale 14300-18300—Tribunal rejected the application—Tribunal observed nature of work carried by the petitioner as Garden Superintendent in President's Secretariate not similar to nature or function of Director/Additional Director (Horticulture) or Superintendent Engineer working in CPWD pay parity pre-supposes the work equal and inexplicable pay difference alone can be looked upon as discriminatory against an employee-absent in the present case-prerogative of the executive which has

considered the representation and rejected the same would upset the constitutional principle of separation of power among the three organs of the State—Petitioner preferred writ petition—Contended-post of Garden Superintendent in the President's Secretariate is equivalent to that of Deputy Director (Horticulture), CPWD upgradation recommended by 3rd and 4th Central Pay Commission awarded to the petitioner no reason to withhold the revised recommendation of 5th Central Pay Commission upgrading the pay scale from 12000-16500 to 14300-18300—Respondent contended—Requirement of pay parity both groups should not only work in the indentical condition but should also discharge the same duty—Held—Granting earlier pay scale in 4th and 5th Pay Commission—Implicitly recognition of the fact that nature of duties and responsibilities of both petitioner and Additional Director (Horticulture) in CPWD same—Revision of that pay scale on 02.07.2001 to 14300-18300 should logically followed and could not be denied—Respondent directed to calculate to retirement benefit of the petitioner accordingly pay 10 % interest as due on the date of payment—Writ Petition allowed.

The respondents rely on the letter dated 16.4.2002 issued by the President's Secretariat to the petitioner which says that the pre-revised scale of pay of Rs.3,700 which was granted to him with effect from 30.4.1996 was "on personal basis and not on functional basis". It therefore says that his pay in the corresponding revised scale of pay of Rs.12,000-16,500- has been correctly fixed and that the upgraded pay scale of Rs.14,300-18,300 payable to the Superintending Engineers are not applicable to him as Superintendent of the President's Garden. According to the memorandum, the post held by the petitioner cannot be equated with the Superintending Engineer or Director of Horticulture in CPWD. We are unable to see the logic of the memorandum. The fixation of the petitioner's pay scale at Rs.3,700-5,000, if it

is on personal basis and not on functional basis, ought to have been taken to its logical conclusion. The petitioner was also given the corresponding revised pay scale of Rs.12,000-16,500 on the basis of the 5th Pay Commission Report. But when this pay scale was upwardly revised to Rs.14,300-18,300, the respondents have refused to calculate the retiral benefits of the petitioner on that basis which is un-understandable. The respondents rely on annexure R-2 which is a communication dated 17.1.2003 in which the Ministry of Finance was requested to consider the representation of the petitioner. From this communication, it is seen that earlier the Ministry of Finance had rejected the petitioner's representation on the ground that the issue has to be examined on the basis of comparison of the post held by the petitioner with the post existing in CPWD, having due regard to the provisions of the recruitment rules of both the posts and the duties and responsibilities attached to them. In response to the aforesaid view of the Ministry of Finance, the President's Secretariat in the communication dated 17.1.2003 enclosed copies of the recruitment rules relating to the post of Superintendent, President's Garden and made a request to the Ministry of Finance to examine whether the request of the petitioner can be considered. By a communication issued on 7.7.2003 the Ministry of Finance intimated the President's Secretariat that the proposal has been considered and "it has, however, not been found feasible to agree to the proposed". Subsequent representations had also met the same fate. When once the petitioner was given the pay scale equivalent to that of the pay scale of the Additional Director of Horticulture (i.e., 12,000-16,500), we are inclined to think that there was implicit recognition of the fact that the nature of the duties and responsibilities of both the petitioner and the Additional Director of Horticulture in CPWD was the same. If that is so, the revision of that pay scale on 2.7.2001 to Rs.14,300-18,300 should logically follow and cannot be denied.

(Para 13)

Important Issue Involved: (a) Grant of pay scale by earlier pay commission similar to similar to counterpart in another department implicitly recognized that the nature of duties and responsibilities of the two posts are similar and entitle to same pay scale.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Ms. Jyoti Singh, Sr. Advocate with Mr. Vaibhav Kalra, Advocate.

FOR THE RESPONDENTS : Mr. M.K. Bhardwaj, Advocate.

RESULT: Writ petition Allowed.

R.V. EASWAR, J.

1. The petitioner in these proceedings taken under Article 226 of the Constitution of India challenges the order passed by the Central Administrative Tribunal, Principal Bench, New Delhi on 02.02.2010 in O.A. No.2788/2008.

2. The petition has been filed this way. The petitioner was appointed as Assistant Director (Horticulture), CPWD. He was thereafter sent on deputation to DDA in the same capacity, i.e. Assistant Director (Horticulture). He was then sent to the President's Secretariat at the President's Garden, Rashtrapati Bhawan on 19.12.1970, in the capacity of Garden Superintendent. On 08.04.1974, he was permanently absorbed in the President's Secretariat as Superintendent in the President's Garden which is equivalent to that of the Deputy Director of Horticulture in CPWD. The post was upgraded to the rank and pay scale of Director, CPWD in the pay scale of Rs.3700-5000 w. e. f. 30.04.1996 as recommended by the 4th Central Pay Commission. An order was passed on 30.04.1996 by the President's Secretariat to this effect and it is common ground that the order mentioned that upgraded scale was purely personal to the petitioner and as and when he would leave the post, the pay scale of the said post would be brought down to its earlier level.

3. When the 5th Central Pay Commission's report came, the President's Secretariat vide office order dated 22.10.1997 revised the pay

scale for the post of Superintendent at Rs.12000-16500 w. e. f. 01.01.1996. As per this order, the petitioner was granted the pay scale of Rs.12000-16500 and this is also not in dispute.

4. The petitioner retired from service on 01.04.1998 and his retirement dues were calculated on the basis of pay scale of Rs.12000-16500. In the meantime pursuant to certain representations, a revised recommendation was made by the 5th Central Pay Commission according to which the pay scale for the post of Director of Horticulture and Additional Director of Horticulture in CPWD was upgraded to Rs.14300-18300 w. e. f. 01.01.1996 as per the decision taken by the Ministry of Finance. Office orders were accordingly passed on 06.10.1999 and 28.08.2001.

5. The petitioner, based on the revised recommendation of the 5th Central Pay Commission and the aforesaid office orders made several representations to the President's Secretariat seeking upgradation of his pay scale to Rs.14300-18300 w. e. f. 01.01.1996 and for calculation of his retirement dues on that basis. These representations were rejected by the President's Secretariat by several orders, the last of which was dated 13.06.2008.

6. Aggrieved by the same, the petitioner filed O.A. No.2788/2008 before the CAT under Section 19 of the Administrative Tribunal's Act, 1985 praying for a declaration that the order passed by the first respondent was null and void and for issuance of appropriate orders to the respondents to refix the revised pay scale of the petitioner at Rs.14300-18300 w. e. f. 01.01.1996 and to pay all consequential benefits, including retirement benefits on the basis of the revised pay scale and pay the same along with interest @ 10% per annum from 01.01.1996 till payment.

7. The Central Administrative Tribunal vide the impugned order rejected the application filed by the petitioner and dismissed the same. The reasoning of the Tribunal runs like this. It is the prerogative of the executive to fix the pay scale on the basis of the recommendation of the Pay Commission and the power to interfere with the same is limited to ensuring that there is no hostile discrimination. The nature of the work carried out by the petitioner as Garden Superintendent in the President's Secretariat is not similar to the nature of the functions of the Director/ Additional Director of Horticulture or the Superintending Engineer working in the CPWD. Pay-parity presupposes that the work is equal and an

inexplicable pay differentiation alone can be looked upon as discrimination against an employee which is absent in the present case because of the difference in the nature of the duties. The argument of the petitioner that on upgradation of the scale of the Director/ Additional Director, Horticulture, CPWD to the higher scale of Rs.14300-18300 w.e.f. 01.01.1996 automatically upgrades the pay scale of the petitioner also, to that scale, is not correct because mere classification of an earlier pay scale would not entitle the petitioner automatically to a higher scale and cannot be the basis for claiming pay-parity. There is no complete and wholesale identity between the two posts and merely because the petitioner and the Director/ Additional Director of Horticulture were carrying on identical work, they cannot be paid equally if there is no complete or wholesale identity. Moreover, the executive has considered the representation of the petitioner twice and turned it down and the prerogative of the executive cannot be interfered with lightly as it would upset the constitutional principle of separation of powers between the three organs of the State. On this reasoning the OA was dismissed by the Tribunal.

8. In support of its conclusion the Tribunal relied upon several judgments of the Supreme Court.

9. Counsel for the petitioner submitted before us that the post of Garden Superintendent in the President Secretariat is equivalent to that of a Deputy Director in the CPWD and both were similarly situated and involved identical work. It is pointed out that the upgradation benefit which inured to the Additional Director of Horticulture at CPWD as per the revised recommendations of the Central Pay Commission, were withheld in the case of the petitioner despite the identity between the nature of the functions of the two posts. It is further pointed out that the upgradation recommended by the 3rd and 4th Central Pay Commissions were awarded to the petitioner too and there was, therefore, no reason to withhold the revised recommendation of the 5th Central Pay Commission upgrading the pay scale from Rs.12000-16500 to Rs.14300-18300.

10. Counsel for the respondents submitted that judicial restraint must be employed in matters of upgradation of pay scales, paying due regard to the theory of separation of powers as held by the Supreme Court in **S. C. Chandra & Ors. Vs. State of Jaharkhand & Ors.,** (2007) 8 SCC 279. It is submitted that mere classification and grant of

earlier pay scale is no criterion for pay parity and that a mere difference in the pay scale does not amount to discrimination. It is stated that the requirement for pay parity is that both the groups should not only work in identical conditions, but should also discharge equal and same duties as held by the Supreme Court in **State of Haryana vs. Tilak Raj,** (2003) 6 SCC 123. It is accordingly contended that the Tribunal rightly dismissed the application.

11. We have carefully considered the facts and material on record in the light of the rival contentions.

12. The facts are not in dispute, except for the aspect that whether the nature of duties of the petitioner is the same as those of the superintending engineer who is working in the CPWD. That however, should not be allowed to come in the way of granting relief to the petitioner as prayed for because there are other overriding aspects compelling the grant of relief to the petitioner. The petitioner's services were requisitioned by the President's Secretariat in 1970. Had he continued in the CPWD itself, which is his parent department, he would have become Director (Horticulture) there. A letter dated 21st October, 1991 was written by the Director of Horticulture, CPWD, New Delhi to the Under-Secretary (Admn.), President's Secretariat, Rashtrapati Bhawan. This letter refers to the steps for the advancement of the career of the petitioner herein. The letter brings out the following facts in favour of the petitioner: -

(a) the petitioner being a Class-I officer, his services rendered as such are normally to be given weightage as the post of the Garden Superintendent in the President's Secretariat is not a cadre service;

(b) the comparison between the engineering services and agricultural scientists may not be justified since these services have their cadre; moreover, persons who had joined DDA as Section Officers (Horticulture) after 1959 have become Directors of Horticulture at least two years prior to the date of the letter – names of such persons have been given in the letter which is Annexure P-2 (colly);

(c) Assistant Directors who were selected after the petitioner in the DDA have also become Directors (Horticulture)

and normally the petitioner would have also become Director (Horticulture) in DDA but for the President of India requisitioning his services by name; had the petitioner joined DDA at that time he would have become Director of Horticulture at least 5 to 6 years prior to the date of the letter;

(d) The petitioner was promoted as Deputy Director in 1974 and normally 5 years of service are required to become Director of Horticulture – the petitioner has served as Deputy Director for more than 15 years (three times more than the minimum period required for becoming Director of Horticulture).

Highlighting these aspects the letter makes out a case for the promotion of the petitioner as Director of Horticulture. The request however could not be acceded to for the only reason that the President's Secretariat is governed by its own rules-President's Secretariat (Recruitment and Conditions of Service) Rules, 1976 and there is no post of Director (Horticulture). The correspondence also indicates that the scale of the petitioner was upgraded to that of Rs.3700-5000 which is the scale of pay of the post of Superintendent's Gardens. Consequent upon the recommendation of the 5th Central Pay Commission, the pay scale of the Superintendent, President's Gardens was revised to Rs.12000-16500. This pay scale was further revised to Rs.14300-18300 w.e.f. 1.1.1996 on 28.8.2001 by the CPWD where the petitioner was earlier working. The petitioner retired on 1.4.1998 after 27 years of meritorious service in the Rashtrapati Bhawan and his pension benefits were calculated on the basis of the scale of Rs.12000-16500. No plausible reason has been given by the respondents as to why the pensionary benefits available to the petitioner should not be computed on the basis of the pay-scale of Rs.14300-18300 which is nothing but a revision of the earlier pay scale of Rs.12000-16500 to which the petitioner was undoubtedly entitled and on the basis of which his retirement benefits were calculated and given. In the representation given by the petitioner to the President's Secretariat, Rashtrapati Bhawan, a copy of which is available on record (Annexure P9-colly), the petitioner has set out a chart at para 20 from which it is seen that Addl. Directors of Horticulture who were given the scale of Rs.3700-5000 (pre-revised) were given the revised pay scale of Rs.12000-16500 as recommended by the 5th Central Pay Commission

w.e.f. 1.1.1996 and they were further given the revised pay scale of Rs.14300-18300 pursuant to the revision orders dated 23.9.1999 and 2.7.2001, again with retrospective effect from 1.1.1996. It is the petitioner's claim that these Additional Directors and Directors were junior to him in service and had he continued in the CPWD, there would have been no objection to the grant of the pensionary benefits on the basis of the upgraded and revised pay scale of Rs.14300-18300 w.e.f. 1.1.1996. The petitioner, in our opinion, cannot be placed in a worse position despite his services being specifically requisitioned by the President's Secretariat. It is not irrelevant to note that the work of the petitioner has been commended by the President of India. The petitioner had put in 27 years of service in the President's Garden. Even his lien with the Horticulture Department, CPWD was terminated on 8.4.1974.

13. The respondents rely on the letter dated 16.4.2002 issued by the President's Secretariat to the petitioner which says that the pre-revised scale of pay of Rs.3,700 which was granted to him with effect from 30.4.1996 was "on personal basis and not on functional basis". It therefore says that his pay in the corresponding revised scale of pay of Rs.12,000-16,500- has been correctly fixed and that the upgraded pay scale of Rs.14,300-18,300 payable to the Superintending Engineers are not applicable to him as Superintendent of the President's Garden. According to the memorandum, the post held by the petitioner cannot be equated with the Superintending Engineer or Director of Horticulture in CPWD. We are unable to see the logic of the memorandum. The fixation of the petitioner's pay scale at Rs.3,700-5,000, if it is on personal basis and not on functional basis, ought to have been taken to its logical conclusion. The petitioner was also given the corresponding revised pay scale of Rs.12,000-16,500 on the basis of the 5th Pay Commission Report. But when this pay scale was upwardly revised to Rs.14,300-18,300, the respondents have refused to calculate the retiral benefits of the petitioner on that basis which is un-understandable. The respondents rely on annexure R-2 which is a communication dated 17.1.2003 in which the Ministry of Finance was requested to consider the representation of the petitioner. From this communication, it is seen that earlier the Ministry of Finance had rejected the petitioner's representation on the ground that the issue has to be examined on the basis of comparison of the post held by the petitioner with the post existing in CPWD, having due regard to the provisions of the recruitment rules of both the posts

and the duties and responsibilities attached to them. In response to the aforesaid view of the Ministry of Finance, the President's Secretariat in the communication dated 17.1.2003 enclosed copies of the recruitment rules relating to the post of Superintendent, President's Garden and made a request to the Ministry of Finance to examine whether the request of the petitioner can be considered. By a communication issued on 7.7.2003 the Ministry of Finance intimated the President's Secretariat that the proposal has been considered and "it has, however, not been found feasible to agree to the proposed". Subsequent representations had also met the same fate. When once the petitioner was given the pay scale equivalent to that of the pay scale of the Additional Director of Horticulture (i.e., 12,000-16,500), we are inclined to think that there was implicit recognition of the fact that the nature of the duties and responsibilities of both the petitioner and the Additional Director of Horticulture in CPWD was the same. If that is so, the revision of that pay scale on 2.7.2001 to Rs.14,300-18,300 should logically follow and cannot be denied.

14. In the aforesaid circumstances, we are of the view that the petitioner's writ petition has to succeed. We hold accordingly and direct the respondents to calculate the retirement benefits of the petitioner on the basis of the pay scale of Rs.14,300-18,300 and also grant him arrears of pay on that basis from 1.1.1996 to 31.03.1998 (i.e. date of retirement). The petitioner would also be entitled to interest on such arrears from 1.1.1996 till the date of realisation of the amount of the arrears, @ 10% p.a.. The writ petition is allowed in the aforesaid terms.

ILR (2014) II DELHI 1534
CS (OS)

GE CAPITAL SERVICES INDIA ....PLAINTIFF

VERSUS

PRASANTA GHOSE & ANR. B+ ....DEFENDANTS

(G.S. SISTANI, J.)

CS(OS) NO. : 2840/2011 DATE OF DECISION: 10.03.2014

Civil Procedure Code, 1908—Order 37 Rule 3 (5)—Leave defend—Defendant assailing Petitioners claim on grounds of lack of jurisdiction and absence of written contract or acknowledged liability—Question as to jurisdiction—In purview of the Loan Agreement stipulating for execution by defendant at Delhi—Loan disbursed from Delhi, promissory note were signed and payable at Delhi—Held—Part cause of action has arisen in Delhi, thereby no merit in defendants contention qua lack of jurisdiction. Leave to Defend—Defendant urged that the statement of accounts sought to be relied upon by the Plaintiff is not signed by the Defendant and that the Promissory not does not contain the liquidated debt due—Without expressing any opinion on the merits of the matter Held—It is triable issue and granted conditional leave to defend.

Brief facts of the case, as stated in the plaint, are that defendant no.1 had approached the plaintiff in and around May, 2004, for obtaining finance for purchasing certain medical equipment for use in commercial purposes. Relying on the representations and assurances given by defendants, the following Equipment Master Security and Loan Agreement No(s) were entered into by the plaintiff with the defendants:

i) Old No.W11293 (New No.AI 20643), dated 23-May-2004.

ii) Old No.W11283 (New No.AI20634) dated 23-May-2004.

iii) Old No.W11283(A) (New No.AI20635) dated 23-May-2004. (Hereinafter "Agreement") **(Para 6)**

In terms of the loan agreement it was also agreed that in case of default committed by defendant no.1 in paying any instalment of the loan amount as per the schedule, the entire amount of the term loan or balance then due including the outstanding penal interest would become due forthwith and payable by defendant no.1. In consideration of and as security for the loan and due repayment thereof and as security, defendant no.1 had created on 23.5.2004 first charge secured by way of pledging the medical equipments as collateral security in favour of the plaintiff. Additionally, defendant no.1, as proprietor, also executed demand Promissory Note dated 23.5.2004 in favour of the plaintiff, acknowledging thereby its liability to pay on demand to the plaintiff an amount of Rs.20.00 lakhs along with interest at the rate of 11%, per annum. In the Promissory Note, defendant also acknowledged and unconditionally promised to pay a late payment charge at the rate of 36%, per annum, over and above the applicable rate of interest on the defaulted amount until realisation of the same. **(Para 11)**

The second argument raised by learned counsel for the defendant is that there is no liquidated debt as the Statement of Accounts are not signed by the defendants nor the Promissory Notes contain a liquidated debt. Without expressing any opinion on the merits of the matter, in my view, this is a triable issue, which requires consideration. Accordingly, it is a fit case where the defendants should be granted conditional leave to defend. **(Para 23)**

Important Issue Involved: Territorial Jurisdiction is ascertained form the accrual of cause of action in a particular State.

[As Ma]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Gaurav Gaur, Adv.

FOR THE DEFENDANTS : Mr. Aniruddha Deshmukh and Mr. Aniruddha Rajput, Advs. for defendants.

CASES REFERRED TO:

1. *Satyendra Jain* vs. *M/s Omway Buildestate Pvt. Ltd.* 199 (2013) DLT 710.
2. *M/s GE Capital Services India* vs. *Dr.Mohan Chatubhuj Jamvar and Ors,* CS(OS)2031/2011, decided on 1.7.2013.
3. *GE Capital Services India* vs. *May Flower Healthcare Private Limited,* CS(OS)2859/2011, decided on 31.8.2012.
4. *Rashtriya Mahila Kosh* vs. *The Dale View and Anr.,* reported at 2007 (95) DRJ 418.
5. *GE Capital Services India* vs. *G. Neuromed Diagnostic Centre Pvt. Ltd.,* reported at 2007 (98) DRJ 74.
6. *National Horticulture Board* vs. *M/s Flora Continental Limited & Ors.,* reported at 2004 I AD (DELHI) 81.

RESULT: Application stands disposed off.

G.S. SISTANI, J. (ORAL)

I.A. 13599/2013

1. This is an application filed by defendants seeking condonation of 430 days' delay in re-filing I.A. 13598/2013.

2. For the reasons stated in the application and in view of the stand taken by counsel for the plaintiff/non-applicant before the Joint Registrar of this Court on 23.1.2014 that he does not wish to oppose the present application, this application is allowed. Delay in re-filing I.A. 13598/2013

stands condoned. Let I.A. 13598/2013 be taken on record. 3. Application stands disposed of.

I.A. 13598/2013

4. Present application has been filed by the defendants under Order XXXVII Rule 3(5) of CPC seeking leave to defend in the present suit, which has been filed under the provisions of Order XXXVII of CPC.

5. As per the plaint, defendant no.1 had approached the plaintiff for financial assistance. Defendant no.2 executed a personal guarantee dated 23.5.2004 in favour of the plaintiff for due repayment of all and every sum payable by defendant no.1.

6. Brief facts of the case, as stated in the plaint, are that defendant no.1 had approached the plaintiff in and around May, 2004, for obtaining finance for purchasing certain medical equipment for use in commercial purposes. Relying on the representations and assurances given by defendants, the following Equipment Master Security and Loan Agreement No(s) were entered into by the plaintiff with the defendants:

i) Old No.W11293 (New No.AI 20643), dated 23-May-2004.

ii) Old No.W11283 (New No.AI20634) dated 23-May-2004.

iii) Old No.W11283(A) (New No.AI20635) dated 23-May-2004. (Hereinafter "Agreement")

7. Terms and conditions of the said Agreement were fully accepted by the defendant(s) in respect of the said loan for all matters, inter alia, relating to documents, disbursement, recovery, etc.

8. Further, according to the plaint, the agreement was negotiated, deliberated upon, concluded, and executed in New Delhi. The plaintiff sanctioned and disbursed the said loan amount from Delhi. As per the Loan Agreement, Rs.20.00 lakhs were financed to defendant no.1, which were, inter alia, used for the purchase of medical equipments i.e. one number of Logiq 3 Pro Ultrasound Scanner along with its accessories, one number of GE DX200 medical diagnostic imaging equipment and one number of 24 Channel Digital EEG Machine model NP 2400p/Digital EMG Machine model NP 2300 and Spirowin Spirometry Machine. The said term loan was sanctioned upon the terms and conditions as contained and agreed upon in the Agreement dated 23.5.2004.

9. Further, as per the terms and conditions of the Agreement, the loan amount so disbursed by the plaintiff company was repayable in the following manner:

Particulars	**Old No.W11293 (New No.AI 20643)**	Old No.W11283 (New No.AI 20634)	Old No.W11283 (New No.AI 20635)
Principal Amount	Rs.5,20,000/-	Rs.11,36,000/-	Rs.3,44,000/-
Tenor/EMI	60 EMI	60 EMI	60 EMI
Rate of Interest	11.00 %	11.00 %	11.00 %
First Instalment Due Date	07.07.2004	27.06.2004	27.06.2004

10. In case of default/delay defendants were liable to pay interest at the rate of 36%, per annum. Defendant no.1 issued post-dated cheques, comprising of the interest payment plus the part-payment of principle amount in accordance with the agreement.

11. In terms of the loan agreement it was also agreed that in case of default committed by defendant no.1 in paying any instalment of the loan amount as per the schedule, the entire amount of the term loan or balance then due including the outstanding penal interest would become due forthwith and payable by defendant no.1. In consideration of and as security for the loan and due repayment thereof and as security, defendant no.1 had created on 23.5.2004 first charge secured by way of pledging the medical equipments as collateral security in favour of the plaintiff. Additionally, defendant no.1, as proprietor, also executed demand Promissory Note dated 23.5.2004 in favour of the plaintiff, acknowledging thereby its liability to pay on demand to the plaintiff an amount of Rs.20.00 lakhs along with interest at the rate of 11%, per annum. In the Promissory Note, defendant also acknowledged and unconditionally promised to pay a late payment charge at the rate of 36%, per annum, over and above the applicable rate of interest on the defaulted amount until realisation of the same.

12. In order to further secure the term loan so advanced by the plaintiff to defendant no.1, an irrevocable and unconditional personal guarantee dated 23.5.2004 was executed by defendant no.1. Defendant no.1 also executed a demand Promissory Note dated 23.5.2004 in favour of the plaintiff acknowledging thereby its liability to pay on demand to the plaintiff an amount of Rs.20.00 lakhs along with interest at the rate of 11%, per annum. In the Promissory Note, defendant no.1 also acknowledged and unconditionally promised to pay a late payment charge at the rate of 36%, per annum, over and above the applicable rate of interest on the defaulted amount until realisation of the same.

13. An irrevocable and unconditional personal guarantee dated 23.5.2004 was also executed by defendant no.2 in favour of the plaintiff for the due repayment of the loan, interest and all other charges accrued in terms of the loan agreement. Defendant no.2 also executed demand Promissory Note dated 23.5.2004 in favour of the plaintiff acknowledging thereby their liability to pay on demand to the plaintiff an amount of Rs.20.00 lakhs along with interest at the rate of 11%, per annum. In the Promissory Note defendants have acknowledged and unconditionally promised to pay a late payment charge at the rate of 36%, per annum, over and above the applicable rate of interest on the defaulted amount until realisation of the same. It is also the case of the plaintiff that after the loan was disbursed only few installments were paid by the defendants.

14. Learned counsel for the defendants submits that the defendants seek unconditional leave to defend primarily on the ground that, firstly, this Court has no territorial jurisdiction to try and entertain the present suit. Reliance is placed by counsel for the defendants on the documents placed on record by the plaintiff, which would show that stamp papers were purchased in Karnataka. Counsel further submits that it is further the case of the defendants that the defendants signed the loan document at West Bengal and no part of cause of action has arisen within the territorial jurisdiction of this Court. Hence Clause 10(g) of the Agreement, cannot confer jurisdiction on this Court.

15. Learned counsel for the plaintiff submits that since the documents were signed at New Delhi, the loan was disbursed from New Delhi, Promissory Notes were signed and payable at New Delhi, and even the installments were payable at New Delhi, thus, this Court would have territorial jurisdiction to try and entertain this matter.

16. In support of his submission counsel for the plaintiff has relied upon **GE Capital Services India v. G. Neuromed Diagnostic Centre Pvt. Ltd.,** reported at 2007 (98) DRJ 74, more particularly paras 14, 16 to 18, which read as under:

> 14. In **L.N. Gupta and Ors. v. Smt. Tara Mani** (supra), this Court held:
>
> Under Section 20, Clause (c), CPC, a suit can be filed in a Court in whose jurisdiction the cause of action, wholly or in part arises. Place of performance in full or in part of the contract and therefore, the place of payment or of part payment will give rise to a cause of action in that place. Such place can be specified at the time of making the contract, may be appointed later on, or may be implied. Indian Contract Act, 1872, Sections 47, 48 and 49 deal with the place of performance. So far as the stipulated place is concerned, there should ordinarily be no problem.
>
> 16. Even if it were to be assumed that the loan agreement was executed in Kanpur (though this fact is disputed by the plaintiff), the fact of the matter is that the loan agreement itself states that the Courts in Delhi would have exclusive jurisdiction.
>
> 17. I find force in the submission of the plaintiff that the present is not a case of conferring jurisdiction on a Court which otherwise has none. This Court has jurisdiction to entertain the present suit, since the loan was repayable at Delhi. This is clear from a mere reading of the Loan Agreement coupled with the promissory notes executed by the defendant Nos. 1 to 4. The promissory notes have been executed by the defendants in pursuance of the terms of the loan agreement itself, and are not independent of it. It is not the case of the defendants that the liability of the defendants under the Promissory Notes are in addition to their liability under the loan agreement. The loan agreement has to be read in conjunction with the promissory notes. Even though loan agreement itself does not state that the same is to be repaid at Delhi, or at any other designated place, a reading of the same along with promissory notes leaves no manner of doubt that the repayment of loan had to take place at Delhi. Even otherwise it is settled that it is for the debtor to find the creditor. see **L.N. Gupta** (supra) The loan agreement by itself does not, expressly

or impliedly, provide that the repayment of loan would be in Lucknow or at any other place other than Delhi. In such a situation, the aforesaid legal principle would become applicable that the loan was repayable at the place where the plaintiff has its principle place of business, i.e., in Delhi.

18. The parties have expressly confined jurisdiction in this Court, which it is even otherwise possessed of."

17. Counsel for the plaintiff has further relied upon **M/s GE Capital Services India v. Dr.Mohan Chatubhuj Jamvar and Ors,** CS(OS)2031/2011, decided on 1.7.2013, more particularly paras 5, 6 and 8, which read as under:

5. The Agreement dated 31.01.2007 between the plaintiff and the defendant no.1, execution whereof is not denied, nowhere in the recitals thereof records the defendant no.1 having agreed to buy the machine on finance from the plaintiff on account of any representation by the plaintiff as to the quality or performance of the machine; rather the said Agreement nowhere refers to M/s Bausch & Lomb and only describes the machine which is financed thereunder; similarly the same does not require the plaintiff to, upon default, first attempt to recover the monies due by repossession or sale of the machine and rather empowers the plaintiff to immediately recover the monies due without being required to repossess or sell the machine. In the face of such Agreement in writing between educated commercial persons (as discussed in **Satyendra Jain Vs. M/s Omway Buildestate Pvt. Ltd.** 199 (2013) DLT 710 and in judgment dated 1st February, 2013 in CS(OS) No.1480/2009 titled **Chemical Systems Technologies (India) Pvt. Ltd. Vs. Simbhaoli Sugar Mills Ltd.**) leave cannot be granted on grounds urged in contravention thereof.

6. As far as the objection to the territorial jurisdiction is concerned, Clause 10(g) of the Agreement admittedly executed by the defendants records the execution thereof by the authorized representative of the plaintiff at Delhi; there is no contravention of the said fact in the application for leave to defend; it thus cannot be said that no part of cause of action has accrued at Delhi for the agreement of the parties also contained in the

Agreement dated 31.01.2007 as to the exclusive jurisdiction of the Courts at Delhi to be of no avail. Not only so, the address of the plaintiff in the Agreement is of Delhi only and the plaintiff is correct in relying on the principle of debtor must seek the creditor for vesting the Courts at Delhi with territorial jurisdiction over the matter. Similarly, the defendant no.2 also has addressed the personal guarantee to the plaintiff at Delhi and thus undertaken to make the payments thereunder to the plaintiff at Delhi. Thus the grounds urged by both the defendants of this Court lacking territorial jurisdiction have no merit.

8. The ground urged by the defendants no.1 and 2 of the claim being barred by limitation also has no substance. The date of signing of the Agreement is of no relevance. The defendants in the application for leave to defend have expressly admitted the loan of Rs.1.20 crores being repayable in 60 installments commencing from February, 2007 and to run till January, 2012; it is further not disputed that installments were paid till December, 2008. The suit has been instituted within three years therefrom, on 12.08.2011."

18. Learned counsel for the defendants in support of his submission that this court does not have territorial jurisdiction has relied upon **National Horticulture Board v. M/s Flora Continental Limited & Ors.,** reported at 2004 I AD (DELHI) 81, more particularly para 11, which reads as under:

11. But in the instant application for leave to defend the applicants have also contended that this court has no territorial jurisdiction since the defendant No. 1 had already shifted its registered office from Pushpanjali, Delhi to the State of Haryana and at the time of the filing of the suit the defendant was neither carrying on business nor was working for gain within the jurisdiction of this court. Admittedly the loan agreement, promissory note, the undertaking and other documents were executed by the defendants No. 1 to 5 in the State of Haryana. No part of the project was to be executed in Delhi. The argument advanced on behalf of the plaintiff is that no intimation of the shifting of the registered office from Delhi to Haryana was given to the plaintiff, therefore, the defendants No. 1 to 5 have raised a bonafide defense which

may be established by them at the trial.

19. Counsel for the defendants has further relied upon **GE Capital Services India v. May Flower Healthcare Private Limited,** CS(OS)2859/2011, decided on 31.8.2012. Counsel has also relied upon **Rashtriya Mahila Kosh v. The Dale View and Anr.,** reported at 2007 (95) DRJ 418, more particularly paras 15 and 16, which read as under:

> "15. Having heard learned Counsels for the parties, I find that the present suit is based on agreements, guarantee deeds and pronotes which were executed by the defendants. The documents have been executed on the stamp papers and have been procured at Kerala. These documents also prima facie reflect that they have been executed at Kerala. The pronotes and guarantee deeds relied upon by the plaintiff also show that they have been signed by the defendants at Kerala. The payments which have been made by the plaintiff have admittedly been made through bank drafts. The copies of the bank drafts which have been placed on record show that the bank drafts are payable at Kerala. Therefore, so far as the contention of the plaintiff that these documents were executed at Delhi is concerned, the same is the matter which cannot be decided by a mere examination of the documents but would require evidence in support of the respective contentions. There is also no dispute that the loans have been issued to poor women needing micro-finance at Kerala as per the scheme of the plaintiff.
>
> 16. It is further noteworthy that the agreement dated 12th October, 1994 executed by defendant no. 1 stated that interest on the dues would be as was specified in the letter of sanction of the facility. The amount of the loan was sanctioned vide letter dated 30th September, 1994 wherein the rate of interest which the plaintiff could charge was 8% per annum. The plaintiff has based the suit claim on a demand made on the defendants by its legal notice dated 19th September, 2003 wherein it has been stated that repayment of the loan amount was to be effected by the defendants to the plaintiff with interest at the rate of 8% per annum with quarterly rates. The suit claim is based on such computation of the interest. I find that the suit also contains a prayer for a demand of future interest at the rate of 16% per annum from the date of filing of the suit."

20. I find no force in the submission made by counsel for the defendants for the reason that even assuming that the loan agreements were not signed in Delhi, it is not in dispute that the loan amount was repayable at Delhi, which is evident from the reading of the document in question. Moreover, since the payments were to be made at Delhi, place of performance in full or part of the contract is in Delhi, therefore place of payment or any part will give rise to a cause of action in that place. Moreover, parties have agreed to confer jurisdiction on the Courts at Delhi. This Court cannot lose track of the fact that Promissory Notes were executed by the defendants in pursuance of the terms of the loan agreement and reading of the loan agreement shows that the amount was to be repaid at Delhi.

21. On reading of the loan agreement it can safely be said that parties have expressly conferred jurisdiction on this Court, which it has even otherwise. Three Single Judges of this Court while dealing with identical matters have held that Courts at Delhi would have jurisdiction in the matter. I have no reason to differ. 22. The second ground urged in this application by the defendants is that the Promissory Note does not contain the liquidated debt due and the statement of accounts, sought to be relied upon by the plaintiff, is not signed by the defendants and, thus, in the absence of a liquidated debt, a suit under the provisions of Order XXXVII of CPC would not be maintainable.

23. The second argument raised by learned counsel for the defendant is that there is no liquidated debt as the Statement of Accounts are not signed by the defendants nor the Promissory Notes contain a liquidated debt. Without expressing any opinion on the merits of the matter, in my view, this is a triable issue, which requires consideration. Accordingly, it is a fit case where the defendants should be granted conditional leave to defend.

24. Accordingly, present application is allowed, subject to defendants' depositing 50% of the suit amount i.e. Rs.35,96,810/- with the Registrar General of this Court, within six weeks from today, which amount shall be kept in a fixed deposit, to be renewed periodically till further orders from this Court. In case, the order passed today is not complied with, the suit shall stand decreed in favour of the plaintiff and against the defendants in the sum of Rs.35,96,810 together with pendente lite and

future interest at the rate of 8%, per annum.

25. Application stands disposed of.

CS(OS) 2840/2011

26. Let written statement be filed within thirty days from today. Replication, if any, be filed within thirty days thereafter. Parties, shall file documents, which are in their possession and power, within the same period.

27. List the matter before Joint Registrar for admission/denial of documents on 12.5.2014.

28. List the matter before Court for framing of issues on 21.7.2014, when parties shall bring suggested issues to Court.

ILR (2014) II DELHI 1545
CS (OS)

HARAKARAN DASS DEEP CHAND ....PLAINTIFF

VERSUS

VIREN AGROTECH PVT. LTD. ....DEFENDANT

(G.S. SISTANI, J.)

CS (OS) NO. : 2377/2010 DATE OF DECISION: 21.03.2014

Code of Civil Procedure, 1908—Order 37—Suit under Order 37 of CPC for recovery of Rs. 60,36,522/- pendente lite & future interest @ 18% p.a.—Defendant served by publication under order 5 rule 20 of CPC—Plaintiff a partnership firm—Defendant approached at its Delhi office for the supply of Palm Stearine Oil—Contract between the parties for final price & other terms-oil supplied—Cheques received—Owing to the financial crunch the defendant's company has been facing, the cheques not presented on the request of Defendant—Assurance of defendant that cheques could be presented for payment—Cheques dishonoured despite assurances. Held—Invoice/bill not covered within definition of written contract—Defendant failed to enter appearance in the matter despite substituted service also failed to make payments—Suit decreed in favor or plaintiff.

Plaintiff has filed the present suit under the provisions of Order XXXVII of the Code of Civil Procedure for recovery of Rs.60,36,522/- along with pendente lite and future interest at the rate of 18%, per annum. **(Para 1)**

Summons in the suit were issued to the defendant Under Order XXXVII CPC in Form 4 of Appendix B CPC. Since, the defendant could not be served in the ordinary way, the plaintiff filed an application under Order V Rule 20 CPC for substituted service. Defendant has since been served by publication. Despite substituted service defendant has failed to enter appearance in the matter. **(Para 2)**

Learned counsel for the plaintiff submits that before the cheques could be presented for realisation, the defendant requested the plaintiff not to present the aforesaid cheques as the defendant company was facing a financial crunch, however, all the cheques were presented by the plaintiff after 20.5.2012 on the assurance given by the defendant that the said cheques would be encashed on presentation. It is contended by counsel for the plaintiff that despite assurance given by the defendant the said five cheques were dishonoured due to insufficient funds. **(Para 6)**

It is no longer res intigra that invoices/bills are covered within the definition of written contract. In the case of **KLG Systel Ltd. V. Fujitsu ICIM Ltd.,** reported at 92 (2001) DLT 88 it was held as under:

"1. The defendant/applicant has also challenged the maintainability of the suit under Order XXXVII of the C.P.C., stating that "there is no debt or liquidated demand in money payable to defendant-Company (sic. Read plaintiff) and/or based on a written contract". It is no longer res integra that invoices/bills are 'written contracts' within the contemplation of this Order. Reference is directed to **Messrs. Punjab Pen House v. Samrat Bicycle Ltd.,** AIR 1992 Delhi 1; **Corporate Voice (Pvt.) Ltd. V. Uniroll Leather India Ltd.,** 60 (1995) DLT 321; and **Beacon Electronics v. Sylvania and Laxman Ltd.,** 1998 (3) Apex Decisions (Delhi) 141. There is, thus, no hesitancy in holding that the present suit is a suit which should be tried under the summary procedure of Order XXXVII of the CPC." **(Para 8)**

Important Issue Involved: It is no longer res integra that invoice/bills are covered within the definition of written contract.

[As Ma]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Amit Punj, Adv.

FOR THE DEFENDANT : None.

CASES REFERRED TO:

1. *KLG Systel Ltd.* vs. *Fujitsu ICIM Ltd.,* reported at 92 (2001) DLT 88
2. *Beacon Electronics* vs. *Sylvania and Laxman Ltd.,* 1998 (3) Apex Decisions (Delhi) 141.
3. *Corporate Voice (Pvt.) Ltd.* vs. *Uniroll Leather India Ltd.,* 60 (1995) DLT 321.
4. *Messrs. Punjab Pen House* vs. *Samrat Bicycle Ltd.,* AIR 1992 Delhi 1.

RESULT: Suit decreed in favor of plaintiff.

G.S. SISTANI, J. (ORAL)

1. Plaintiff has filed the present suit under the provisions of Order XXXVII of the Code of Civil Procedure for recovery of Rs. 60,36,522/- along with pendente lite and future interest at the rate of 18%, per annum.

2. Summons in the suit were issued to the defendant Under Order XXXVII CPC in Form 4 of Appendix B CPC. Since, the defendant could not be served in the ordinary way, the plaintiff filed an application under Order V Rule 20 CPC for substituted service. Defendant has since been served by publication. Despite substituted service defendant has failed to enter appearance in the matter.

3. Learned counsel for the plaintiff prays for passing of a decree while relying on Order XXXVII Rule 2 (3) of CPC.

4. As per the plaint, plaintiff is a partnership firm and defendant is a company. The defendant, through its Directors and other officials, had approached the plaintiff at its Delhi office for supply of Palm Stearine Oil. A detailed discussion and deliberation with respect to the said purchase, including the final price and other terms, was held at plaintiff's Delhi office and thereafter contract between the parties was finalised at Delhi. As per the contract, the plaintiff supplied Palm Stearine Oil to the defendant vide Invoice at Sl.No.1444, Book No.29 dated 11.3.2010, for a sum of RS.10,57,920/-; Invoice at Sl.No.1452, Book No.30, dated 25.3.2010 for a sum of Rs.10,49,534/-; Invoice at Sl.No.1454, Book No.30, dated 30.03.2010 for a sum of Rs.11,20,558/-; Invoice at Sl.No.1456, Book No.30, dated 31.03.2010 for a sum of Rs.12,08,952/-; Invoice at Sl.No.1457, Book No.30, dated 02.04.2010 for a sum of Rs.11,01,128/-; total amounting to Rs.55,38,092/-. Reliance is placed on copy of C Forms, which would evidence quantum of goods supplied by the plaintiff to the defendant.

5. As per the terms and conditions settled between the parties for the abovesaid supply, the defendant made payments to the plaintiff by way of five cheques, details of which read as under:

SL.NO.	CHEQUE NO.	DATE	AMOUNT
i.	965348	12.4.2010	Rs.10,56,400/-
ii.	965358	15.4.2010	Rs.10,49,534 /-
iii.	965371	25.4.2010	Rs.11,20,558/-
iv.	965372	26.04.2010	Rs.11,00,148/-
v.	965373	27.04.2010	Rs.11,01,776/-
vi.		**TOTAL**	**Rs.54,28,416/-**

6. Learned counsel for the plaintiff submits that before the cheques could be presented for realisation, the defendant requested the plaintiff not to present the aforesaid cheques as the defendant company was facing a financial crunch, however, all the cheques were presented by the plaintiff after 20.5.2012 on the assurance given by the defendant that the said cheques would be encashed on presentation. It is contended by counsel for the plaintiff that despite assurance given by the defendant the said five cheques were dishonoured due to insufficient funds.

7. I have heard learned counsel for the plaintiff, perused the plaint and the certified copies of all the documents, which have been placed on record in support of the pleas raised by the plaintiff in the suit. Present suit is based on dishonour of five cheques and invoices.

8. It is no longer res intigra that invoices/bills are covered within the definition of written contract. In the case of **KLG Systel Ltd. V. Fujitsu ICIM Ltd.,** reported at 92 (2001) DLT 88 it was held as under:

> "1. The defendant/applicant has also challenged the maintainability of the suit under Order XXXVII of the C.P.C., stating that "there is no debt or liquidated demand in money payable to defendant-Company (sic. Read plaintiff) and/or based on a written contract". It is no longer res integra that invoices/bills are 'written contracts' within the contemplation of this Order. Reference is directed to **Messrs. Punjab Pen House v. Samrat Bicycle Ltd.,** AIR 1992 Delhi 1; **Corporate Voice (Pvt.) Ltd. V. Uniroll Leather India Ltd.,** 60 (1995) DLT 321; and **Beacon Electronics v. Sylvania and Laxman Ltd.,** 1998 (3) Apex Decisions (Delhi)

> 141. There is, thus, no hesitancy in holding that the present suit is a suit which should be tried under the summary procedure of Order XXXVII of the CPC."

9. Order XXXVII Rule 2 (3) reads as under:

> "(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith."

10. Having regard to the submissions made and taking into consideration that the defendant has failed to make the payment and the fact that despite substituted service defendant has failed to enter appearance in the matter, present suit is decreed in favour of the plaintiff and against defendant in the sum of Rs.60,36,522/- together with pendente lite and future interest at the rate of 8%, per annum. Let a decree sheet be drawn up accordingly.

I.A. 5890/2013 (u/S 151 CPC).

11. Application stands dismissed in view of the order passed in the suit.

ILR (2014) II DELHI 1551
CRL. A.

CHANDAN @ BABAR ....APPELLANT

VERSUS

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

(S.P. GARG, J.)

CRL.A. NO. : 974/2011 DATE OF DECISION: 24.04.2014

Indian Penal Code, 1860—Section 120B/392/397—Conviction—Appeal against. Held, evidence of prosecution on the aspect of use of deadly weapon at the time of committing robbery deficient. PW1 & 4 not certain if knife was used by the appellant at the time of robbery. No knife recovered in presence of the witnesses. The knife allegedly recovered in another case not shown to the witnesses to ascertain if it was the same knife used by the appellant. Witnesses did not give particulars i.e. size, dimension etc of the knife to establish that it was a deadly weapon. No injuries inflicted with any weapon to the victims. Conviction with the aid of Sec. 397 unsustainable and appellant deserves benefit of doubt on that score. Conviction under section 120 B/392 IPC however maintained.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Adit S. Pujari, Advocate for Mr. Siddharth Aggarwal, Advocate.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP.

S.P. GARG, J.

1. Chandan @ Babar impugns conviction in Sessions Case No.39/2008 arising out of FIR No.64/2008 registered at Police Station Bara Hindu Rao by which he was held guilty for committing offences punishable under Section 120-B/392/397 IPC and sentenced to undergo RI for seven years.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that on 13.06.2008 at about 05.00 A.M. opposite shop No.T-736, Tyre Market, Azad Market, DCM Road in pursuance of criminal conspiracy, Chandan @ Babar and his associates -Mukesh @ Mukka, Karan Singh @ Deva and Mohd.Wasim robbed Rs. 2,500/-, visiting cards and mobile phone no.9212421161 from the complainant -Manoj Kumar. They also robbed Rs. 3,500/-, railway tickets from Deepak Sharma (PW-1). They were armed with knives at the time of committing robbery and used deadly weapons to deprive the complainant -Manoj Kumar and Deepak of their valuable articles. During the course of investigation, statements of witnesses conversant with facts were recorded. The accused persons were arrested. The Investigating Officer moved applications for conducting Test Identification Parade. The accused declined to participate in the TIP. Robbed articles were recovered at the instance of the accused. After completion of investigation a charge-sheet was submitted against them in the Court. They were duly charged and brought to trial. The prosecution examined 26 witnesses. In their statement under Section 313 Cr.P.C. the accused pleaded false implication. On appreciating the evidence and considering the rival submissions of the parties, the Trial cour , by the impugned judgment convicted the appellant – Chandan @ Babar and his associates Mukesh @ Mukka and Karan Singh @ Deva. Mohd. Wasim was acquitted of all the charges. Being aggrieved, the appellant has preferred the appeal.

3. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective. The accused were shown to the prosecution witnesses. In the police station, their sketches were prepared and photographs were shown to witnesses. The accused were justified to decline participation in Test Identification Parade. The witnesses gave inconsistent version as to which of the accused used knife to rob them. The TSR was found abandoned. PW-12 (Mukesh Chand Sharma) turned hostile and did not support the prosecution. The robbed articles were not recovered in the presence of the complainant and Deepak. There was no specific mark of identification on the recovered

currency notes. Allegations against the appellant were that he sat with the driver of the TSR in which the victims were travelling. He did not attempt to rob the victims. He was arrested in some other case and was falsely implicated in the instant case. Learned APP for the State urged that the accused was identified by the complainant and PW-1 (Deepak Sharma) in the court. They had no animosity to implicate the accused falsely in the case.

4. I have considered the submissions of the parties and have examined the record. It is pertinent to note that co-convict Karan Singh @ Deva had preferred Crl.A.No. 411/2011 which was disposed of vide order dated 07.03.2013 by this Court. Conviction of the appellant – Karan Singh @ Deva under Sections 392/120-B IPC was sustained. Sentence order was modified and substantive sentence was reduced to five years. Other sentences were left undisturbed. The appellant's case stands on similar footings. The reasons for conviction in the said appeal are equally and fully applicable in the present appeal. At the outset, it may be mentioned that the learned counsel for the appellant did not challe ge the incident of robbery. His only plea is that appellant was not one of the perpetrators of the crime. PW-1 (Deepak Sharma) and PW-4 (Manoj Kumar) had no animosity to implicate the accused in the incident of robbery in which they were deprived of valuable articles including cash when they were travelling in TSR No.DL 1 RE 9747 from Old Delhi Railway Station to Anand Parbat. Police machinery came to motion when DD No.8/B (Ex.PW15/A) was recorded at Police Station Bara Hindu Rao at 05.27 hours on getting information that three boys travelling in TSR No.DL 1RF 1454 committed robbery of cash and valuable articles. In his statement (Ex.PW-4/A) the complainant -Manoj Kumar gave vivid description of the occurrence. He also disclosed broad features of the assailants. The complainant had no acquaintance with the assailants to falsely rope them in the incident. First Information Report was lodged at 06.30 A.M. vide rukka (Ex.PW23/A). There was no delay in lodging the First Information Report and it ruled out the possibility of any false fabrication.

5. During investigation, Chandan @ Babar was arrested in case FIR No.239/2008 registered at Police Station Mandavali and was lodged in Tihar Jail No.8. The Investigating Officer moved an application for issuance of production warrants. He was interrogated and his disclosure statement (Ex.PW9/B) was recorded. The application was moved for conducting

TIP. PW-26 (Ashish Aggarwal, Metropolitan Magistrate) conducted Test Identification Proceedings on 17.07.2008 in which the accused declined to participate. An adverse inference is to be drawn against the accused for not participating in the TIP proceedings. PW-4 (Manoj Kumar) in his deposition before the court recognized and identified Chandan @ Babar without hesitation to be amongst the assailants. He was categorical in his identification and stated that the appellant was the assailant who sat with a knife on their TSR driver's seat. In the cross-examination, he further stated that after the accused refused to participate in TIP proceedings, he identified him in the police station Bara Hindu Rao. PW-1 (Deepak Sharma) was also certain that the accused – Chandan @ Babar present in the court was one of the assailants. These independent public witnesses had no prior ill-will against the accused to falsely implicate him and to let the real culprits go scot free. The police witnesses also testified that some robbed articles were recovered at the instance of the accused and were identified by PW-1 and PW-4 in their deposition in the court. Acquittal of co-accused Wasim is of no benefit to the appellant. Co-accused Wasim was TSR driver and did not come down from the TSR. Consequently, PW-1 and PW-4 had no direct confrontation with him. Wasim was given benefit of doubt as PW-1 and PW-4 were unable to recognize and identify him as one of the assailants. The photographs of the culprits were shown to the prosecution witnesses in the Police Station to ascertain and find out real the assailants. The accused was not in picture at that time. It is not on record that any photograph of the accused was shown to PW-1 and PW-4 before moving application for TIP. The complainant had given the description of the assailants and had claimed to identify them. Identification of the accused in the court by PW-1 and PW-4 is crucial and cannot be discarded. Merely because PW-12 (Mukesh Chand Sharma) did not identify the assailants in the court, otherwise cogent and reliable deposition of independent witnesses PW-1 and PW-4 cannot be discredited. The accused did not give plausible explanation to the incriminating circumstances proved against them. The findings of the Trial Court that the accused was one of the assailants in committing the robbery are based upon fair appraisal of the evidence and need no interference.

6. The accused was convicted with the aid of Section 397 IPC whereby he allegedly used 'deadly' weapon at the time of committing robbery. The evidence of the prosecution on this aspect is deficient.

PW1 and PW-4 were not certain if knife was used by the appellant at the time of committing robbery. No knife was recovered from the accused or at his instance in the presence of the witnesses. In their deposition before the court, the knife allegedly recovered in other case was not shown to them to ascertain that if was the same knife used by the accused for committing robbery. The prosecution witnesses did not give any detail particulars i.e. size, dimension etc. of the knife to establish that it was a 'deadly' weapon. No injuries were inflicted with any weapon to the victims. Conviction of the appellant with the aid of Section 397 cannot be sustained and he deserves benefit of doubt on that score.

7. In the light of the above discussion, conviction of the appellant under Section 392/120-B IPC is maintained. Order on sentence is modified and the substantive sentence awarded to the appellant to undergo RI for seven years under Section 392 read with Section 397 IPC is reduced to Rigorous Imprisonment for five years. Other sentences are left undisturbed.

8. The appeal stands disposed of in the above terms. A copy of the order be sent to the appellant through Superintendent, Tihar Jail.

9. Trial Court record be sent back forthwith.

ILR (2014) II DELHI 1555
CS(OS)

MAHESH CHAND AGGARWAL ....PLAINTIFF

VERSUS

MUKESH KALIA & ORS. ....DEFENDANTS

(G.S. SISTANI, J.)

CS(OS) NO. : 464/2008 DATE OF DECISION: 25.03.2014

Specific Performance—Suit for specific performance of an agreement (28.06.2005) & for permanent injunction—Plaintiff filed his evidence by way of affidavit—Despite several opportunities defendant failed to file evidence—Right to lead evidence closed on 06.12.2013. Plaintiff co-owner of the suit property entered into a sale agreement with Defendant—Down payment of Rs. 2.50 lacs—Repeated reminder by the plaintiff to transfer the title of suit property in the plaintiff—Defendant delayed the matter & did not obtain No Objection Certificate from the Notification Branch of Revenue Department. Defendants also misled the plaintiffs as regards to the real ownership of the property—Suit property originally belonged to the Gaon Sabha of Village Libaspur as against the portrayal of the defendants that the same was purchased by one Sh. Manohar. Held—Plaintiff ready and willing to pay necessary amount—Proof of willingness available—Legal notice was sent to the defendant with regard to the balance payment—Defendant did not obtain the Non-Objection Certificate decreed in the favor of the plaintiff and against the defendant.

The plaintiff has filed his evidence by way of affidavit, which has been exhibited as Ex.PW-1/A. On 21.7.2011, PW-1, who was to be cross-examined by counsel for the defendants, was discharged on account of the absence of the defendants. On 16.5.2012 evidence of the plaintiff was closed. Despite opportunities having been granted, defendants have failed to file affidavit by way of evidence, resultantly their right to lead evidence was closed on 6.12.2012. Defendants thereafter filed an application, being I.A. No.6597/2013 under Order XVIII R 17 CPC, however, the said application was dismissed as withdrawn on 29.8.2013. **(Para 3)**

In the affidavit filed by the only witness i.e. PW-1, Sh.Mahesh Chand Aggarwal, plaintiff herein, has deposed that the defendants claimed themselves to be a lawful co-owners of a built up property, measuring 600 sq. yards, situated at Gali No.22, Libaspur, Delhi, comprising in Khasra No.26/24 and 17, Village Libaspur, Delhi (hereinafter referred to as the suit property). He has further deposed that since the

defendants wanted to sell the abovesaid suit property, the parties entered into an Agreement to sell on 28.6.2005. The Agreement to Sell dated 28.6.2005 has been exhibited as Exhibit PW-1/1. The sale consideration was fixed at Rs.24,21,000/-. As per the terms of the agreement, Rs.2.50 lakhs were paid by plaintiff to the defendants on 29.6.2005 and the balance sale consideration, in the sum of Rs.21,71,000/-, was agreed to be paid to the defendants on or before 25.9.2005. Another sum of Rs.2.50 lakhs was paid by the plaintiff to the defendants on 6.8.2005, out of which Rs.1.50 lakhs were paid in cash and Rs.1.00 lakh was paid vide two cheques bearing no.018499 and 018500 both dated 6.8.2005, drawn on Canara Bank, Model Town, Delhi, for Rs.50,000/-, each. Receipt thereof was duly executed by the defendants, which has been exhibited as Exhibit PW-1/2. This witness has further deposed that a sum of Rs.2.20 lakhs was paid in in cash again to the defendants on 7.11.2005. This amount was duly acknowledged by the defendants on the top of page no.2 of the Agreement to Sell dated 28.6.2005 at point A. Another sum of Rs.2.40 lakhs (Rs.1.20 lakhs, each) was paid by the plaintiff to the defendants by two separate pay orders bearing nos.103837 and 103838, both drawn on South Indian Bank Limited, Sector 8, Rohini, Delhi, favouring defendants no.1 and 2, respectively. As per PW-1, a total sum of Rs.9.60 lakhs was paid to the defendants upto 7.11.2005. **(Para 4)**

As per PW-1, relying on the terms and conditions of the Agreement dated 28.6.2005, the terms were to be fulfilled by 25.9.2005, however, the said date was extended with the consent of both the parties upto 15.10.2005 and thereafter upto 7.11.2005. PW-1 has further deposed that he has always been ready and willing to pay the balance consideration of Rs.14.61 lakhs to the defendant. He had been repeatedly reminding the defendants to execute the sale deed and transfer the title of the suit property in his favour but the defendants kept delaying the matter and seeking further time. It has also been deposed that the sale

deed could not have been executed without seeking prior No Objection Certificate from the Notification Branch of the Revenue Department and the No Objection Certificate can only be granted to the recorded owner and not to the purchaser. Thus, PW-1 was not in a position to obtain the necessary NOC without the cooperation of the defendants, however, no steps were taken by the defendants towards obtaining the said No Objection Certificate in order to transfer the title. **(Para 6)**

PW-1 has further deposed that on the assurance given by the defendants in the month of September, 2005, that they would obtain No Objection Certificate, PW-1 purchased stamp papers of Rs.38,400/- on 21.9.2005. Thereafter PW-1 informed the defendants with regard to purchase of the stamp papers, but the defendants did not hand over the No Objection Certificate to execute the sale deed. A copy of stamp papers purchased have been marked A (Collectively). **(Para 7)**

I have heard learned counsel for the plaintiff and also perused the evidence by way of affidavit filed by PW-1. Onus to prove issues no.1, 3 and 4 are on the defendants. Since the defendants have failed to lead evidence issues no.1, 3 and 4 are decided against the defendants. Issues no.2, 5 and 6 can be decided together. The plaintiff has proved the agreement to sell entered into between the parties on 28.6.2005 (Ex.PW-1/1). As per the agreement to sell the sale consideration for the built up property, measuring 600 sq. yards, situated at Gali No.22, Libaspur, Delhi, comprising in Khasra No.26/24 and 17, Village Libaspur, Delhi was fixed at Rs.24,21,000/-, out of which a sum of Rs.2,50,000/- was paid by the plaintiff to the defendants on 29.6.2005 and the balance sale consideration in the sum of Rs.21,71,000/- was agreed to be paid by the plaintiff to the defendants on or before 25.9.2005. The plaintiff has also proved that another sum of Rs.2,50,000/- was paid by the plaintiff to the defendants on 6.8.2005 (Rs.1.50 lacs was paid in cash and Rs.1.0 lac was paid vide two cheques

bearing no.018499 and 018500 both dated 6.8.2005, drawn on Canara Bank, Model Town, Delhi, for Rs.50,000/-, each). The receipt has also been exhibited as PW-1/2. Another sum of Rs.2,20,000/- was paid in cash, which was duly acknowledged by the defendant at page 2 of the agreement to sell itself. Plaintiff has also been able to prove payment of another sum of Rs.2.40 lakhs, which was paid by the plaintiff to the defendants by two separate pay orders of Rs.1.20 lakhs, each, bearing nos.103837 and 103838, both drawn on South Indian Bank Limited, Sector 8, Rohini, Delhi, favouring defendants no.1 and 2, respectively. Thus, the plaintiff has been able to establish payment of Rs.9.60 lakhs to the defendant upto 7.11.2005. PW-1 has deposed that he has always been ready and willing to pay the balance consideration of Rs.14,61,000/- to the defendants, but the defendants did not produce the no objection certificate from the revenue department. Plaintiff has also proved purchase of stamp papers, photocopies of which have been placed on record. Plaintiff has also proved his readiness and willingness by showing that a legal notice was issued to the defendants on 04.12.2005 (Ex.PW-1/3). Accordingly, I am of the view that based on the evidence of PW-1, issues No.2, 5 and 6 stand proved in favour of the plaintiff and against the defendants. As the issues No.2, 5 and 6 are decided in favour of the plaintiff, it is not necessary to decide issue no.7. Accordingly, suit is decreed in favour of the plaintiff and against the defendants. In case, the defendants do not obtain a No Objection Certificate and do not execute the Sale Deed in favour of the plaintiff within one month, the plaintiff will be entitled to execute the decree in accordance with law. **(Para 11)**

Important Issue Involved: For the suit of Specific Performance it is essential that one party to the contract shall be ready & willing to perform its part in entirety. If even then the other party resists performance as per the agreed terms, it shall be compelled to do the same.

[As Ma]

APPEARANCES:

FOR THE PLAINTIFF : Mr. V.P. Rana, Adv.

FOR THE DEFENDANT : Nemo.

RESULT: Suit Decreed in favor of the Plaintiff.

G.S. SISTANI, J (ORAL)

1. Plaintiff has filed the present suit for specific performance of an Agreement dated 28.6.2005 and for permanent injunction.

2. Summons in the suit were issued on 14.3.2008. Defendants entered appearance on 14.5.2008. Written statement has been filed by defendants on 30.5.2008. Following issues were framed by the Court on 22.1.2009:

"(1). Whether the suit is bad for non-joinder of necessary parties ? OPD

(2). Whether the plaintiff was ready and willing to perform his part of Contract dated June 28, 2005 ? OPP

(3). Whether the suit of the plaintiff is without cause of action? OPD

(4). Whether the defendants were owners and competent to execute sale deed in respect of suit property on the date of execution of agreement to sell dated June 28, 2005 or thereafter ? OPD

(5). Whether the defendants can be directed to execute the sale deed or GPA etc. and to put the plaintiff into possession of the suit property after payment of balance consideration amount as agreed in the agreement to sell ? OPP

(6). Whether the plaintiff is entitled for a decree of permanent injunction against the defendants as prayed for ? OPP

(7). Whether the plaintiff is entitled as an alternative relief for a sum of Rs. 9,60,000/- along with interest @ 18% p.a. and damages of Rs.5,00,000/- with interest @ 18% per annum from

the defendants from the date of execution of the agreement till its realization ? OPP

(8). Relief."

3. The plaintiff has filed his evidence by way of affidavit, which has been exhibited as Ex.PW-1/A. On 21.7.2011, PW-1, who was to be cross-examined by counsel for the defendants, was discharged on account of the absence of the defendants. On 16.5.2012 evidence of the plaintiff was closed. Despite opportunities having been granted, defendants have failed to file affidavit by way of evidence, resultantly their right to lead evidence was closed on 6.12.2012. Defendants thereafter filed an application, being I.A. No.6597/2013 under Order XVIII R 17 CPC, however, the said application was dismissed as withdrawn on 29.8.2013.

4. In the affidavit filed by the only witness i.e. PW-1, Sh.Mahesh Chand Aggarwal, plaintiff herein, has deposed that the defendants claimed themselves to be a lawful co-owners of a built up property, measuring 600 sq. yards, situated at Gali No.22, Libaspur, Delhi, comprising in Khasra No.26/24 and 17, Village Libaspur, Delhi (hereinafter referred to as the suit property). He has further deposed that since the defendants wanted to sell the abovesaid suit property, the parties entered into an Agreement to sell on 28.6.2005. The Agreement to Sell dated 28.6.2005 has been exhibited as Exhibit PW-1/1. The sale consideration was fixed at Rs.24,21,000/-. As per the terms of the agreement, Rs.2.50 lakhs were paid by plaintiff to the defendants on 29.6.2005 and the balance sale consideration, in the sum of Rs.21,71,000/-, was agreed to be paid to the defendants on or before 25.9.2005. Another sum of Rs.2.50 lakhs was paid by the plaintiff to the defendants on 6.8.2005, out of which Rs.1.50 lakhs were paid in cash and Rs.1.00 lakh was paid vide two cheques bearing no.018499 and 018500 both dated 6.8.2005, drawn on Canara Bank, Model Town, Delhi, for Rs.50,000/-, each. Receipt thereof was duly executed by the defendants, which has been exhibited as Exhibit PW-1/2. This witness has further deposed that a sum of Rs.2.20 lakhs was paid in in cash again to the defendants on 7.11.2005. This amount was duly acknowledged by the defendants on the top of page no.2 of the Agreement to Sell dated 28.6.2005 at point A. Another sum of Rs.2.40 lakhs (Rs.1.20 lakhs, each) was paid by the plaintiff to the defendants by two separate pay orders bearing nos.103837 and 103838, both drawn on South Indian Bank Limited, Sector 8, Rohini, Delhi, favouring

defendants no.1 and 2, respectively. As per PW-1, a total sum of Rs.9.60 lakhs was paid to the defendants upto 7.11.2005.

5. It is also deposed that another sum of Rs.40,000/- was again paid to defendants vide two different pay orders bearing no.248405, favouring Mr.Mukesh Kalia, and no.248406, favouring Mr.Sunil Kalia, however, the said pay orders were not encashed by the defendants.

6. As per PW-1, relying on the terms and conditions of the Agreement dated 28.6.2005, the terms were to be fulfilled by 25.9.2005, however, the said date was extended with the consent of both the parties upto 15.10.2005 and thereafter upto 7.11.2005. PW-1 has further deposed that he has always been ready and willing to pay the balance consideration of Rs.14.61 lakhs to the defendant. He had been repeatedly reminding the defendants to execute the sale deed and transfer the title of the suit property in his favour but the defendants kept delaying the matter and seeking further time. It has also been deposed that the sale deed could not have been executed without seeking prior No Objection Certificate from the Notification Branch of the Revenue Department and the No Objection Certificate can only be granted to the recorded owner and not to the purchaser. Thus, PW-1 was not in a position to obtain the necessary NOC without the cooperation of the defendants, however, no steps were taken by the defendants towards obtaining the said No Objection Certificate in order to transfer the title.

7. PW-1 has further deposed that on the assurance given by the defendants in the month of September, 2005, that they would obtain No Objection Certificate, PW-1 purchased stamp papers of Rs.38,400/- on 21.9.2005. Thereafter PW-1 informed the defendants with regard to purchase of the stamp papers, but the defendants did not hand over the No Objection Certificate to execute the sale deed. A copy of stamp papers purchased have been marked A (Collectively).

8. It has further been deposed by PW-1 that at the time of entering into the agreement to purchase the suit property, the defendants had disclosed that they purchased the suit property from Sh.Manohar, s/o Sh.Shiv Chand and Sh.Azad Singh, s/o Sh.Dulichand vide sale deed dated 28.02.1984, registered vide document No.1707, in Addl. Book No.1, Volume No.4315 at pages 128 to 130. The defendants had also handed over a copy of Khatoni dated 11.1.1985, showing their bhoomidari rights in the record of rights. Copy of the said Khatoni has been marked as

Mark-B. It has also been deposed by PW-1 that he issued a legal notice to the defendants on 4.12.2005, which was replied to by the defendants through their counsel. Copy of the notice and reply have been exhibited as Exhibits PW-1/3 and PW-1/4 respectively. Postal receipts have been exhibited as Exhibit PW-1/5 and the site plan of the suit property has been exhibited as Exhibit PW-1/6.

9. Mr.Aggarwal has also deposed that on account of the conduct of the defendants, he became suspicious and further inquired into the title of the defendants, when he learnt that in fact the suit property vests with Gaon Sabha of Village Libaspur. A copy of Khatoni from Halka Patwari of Village Libaspur was obtained which revealed that it was the gaon sabha, who was the khatedar/bhoomidar of the entire property comprising of Khasra No.26/17 and 24 and the same with a built up property is in the possession of the defendants on the spot. Copy of Khatoni dated 14.12.2005 has been exhibited as Exhibit PW-1/7. PW-1 further deposed that he had filed a criminal complaint against the defendants on 15.12.2005, a copy of which has been exhibited as Exhibit PW-1/8.

10. Learned counsel for the plaintiff submits that the plaintiff has learnt that the land has been divested on account of the fact that all the areas are built up.

11. I have heard learned counsel for the plaintiff and also perused the evidence by way of affidavit filed by PW-1. Onus to prove issues no.1, 3 and 4 are on the defendants. Since the defendants have failed to lead evidence issues no.1, 3 and 4 are decided against the defendants. Issues no.2, 5 and 6 can be decided together. The plaintiff has proved the agreement to sell entered into between the parties on 28.6.2005 (Ex.PW-1/1). As per the agreement to sell the sale consideration for the built up property, measuring 600 sq. yards, situated at Gali No.22, Libaspur, Delhi, comprising in Khasra No.26/24 and 17, Village Libaspur, Delhi was fixed at Rs.24,21,000/-, out of which a sum of Rs.2,50,000/- was paid by the plaintiff to the defendants on 29.6.2005 and the balance sale consideration in the sum of Rs.21,71,000/- was agreed to be paid by the plaintiff to the defendants on or before 25.9.2005. The plaintiff has also proved that another sum of Rs.2,50,000/- was paid by the plaintiff to the defendants on 6.8.2005 (Rs.1.50 lacs was paid in cash and Rs.1.0 lac was paid vide two cheques bearing no.018499 and 018500 both dated 6.8.2005, drawn on Canara Bank, Model Town, Delhi, for Rs.50,000/-

, each). The receipt has also been exhibited as PW-1/2. Another sum of Rs.2,20,000/- was paid in cash, which was duly acknowledged by the defendant at page 2 of the agreement to sell itself. Plaintiff has also been able to prove payment of another sum of Rs.2.40 lakhs, which was paid by the plaintiff to the defendants by two separate pay orders of Rs.1.20 lakhs, each, bearing nos.103837 and 103838, both drawn on South Indian Bank Limited, Sector 8, Rohini, Delhi, favouring defendants no.1 and 2, respectively. Thus, the plaintiff has been able to establish payment of Rs.9.60 lakhs to the defendant upto 7.11.2005. PW-1 has deposed that he has always been ready and willing to pay the balance consideration of Rs.14,61,000/- to the defendants, but the defendants did not produce the no objection certificate from the revenue department. Plaintiff has also proved purchase of stamp papers, photocopies of which have been placed on record. Plaintiff has also proved his readiness and willingness by showing that a legal notice was issued to the defendants on 04.12.2005 (Ex.PW-1/3). Accordingly, I am of the view that based on the evidence of PW-1, issues No.2, 5 and 6 stand proved in favour of the plaintiff and against the defendants. As the issues No.2, 5 and 6 are decided in favour of the plaintiff, it is not necessary to decide issue no.7. Accordingly, suit is decreed in favour of the plaintiff and against the defendants. In case, the defendants do not obtain a No Objection Certificate and do not execute the Sale Deed in favour of the plaintiff within one month, the plaintiff will be entitled to execute the decree in accordance with law.

ILR (2014) II DELHI 1565
CS (OS)

AMAN NATH ....PETITIONER

VERSUS

ATUL NATH AND ORS. ....DEFENDANTS

(G.S. SISTANI, J.)

CS (OS) NO.: 2250/2013 DATE OF DECISION: 28/03/2014

Code of Civil Procedure, 1908—Order 39 Rule 1 & 2 and Order 39 Rule 4—Plaintiff suit for injunction against three defendants i.e. his two brothers and one sister and his maternal uncle was impleaded as defendant no. 4—According to Plaintiff, he along with his minor daughter and deceased mother was in possession of ground floor in suit property which was owned by his mother-Mother executed will which was registered and defendant no. 4 was named as Executor of will—As per Will, ground floor of suit property was bequeathed to him first floor to defendant no. 1, second floor to defendant no. 2, third floor, if and when constructed, to defendant no. 3 (sister) etc.—Plaintiff also moved application seeking interim injunction which was contested by defendant no. 1 though supported by defendant nos. 2 to 4. Held:- The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining.

Principles laid down for grant of interlocutory injunction have

been discussed by the Supreme Court in the case of **Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan & Anr.** reported at (2002) 5 SCC 760. Relevant paragraphs of the judgment read as under:-

> "7. It is elementary that grant of an interlocutory injunction during the pendency of the legal proceeding is a matter requiring the exercise of discretion of the court. While exercising the discretion the court normally applies the following tests:
>
> (i) whether the plaintiff has a prima facie case;
>
> (ii) whether the balance of convenience is in favour of the plaintiff; and
>
> (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.
>
> 8. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the exercise of the legal right asserted by the plaintiff and its alleged violation are both contested and remain uncertain till they are established on evidence at the trial. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before which that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where "the balance of

convenience" lies.

9. In **Dorab Cawasji Warden v. Coomi Sorab Warden** (1990) 2 SCC 117 this Court, discussing the principles to be kept in mind in considering the prayer for interlocutory mandatory injunction, observed:

"16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above

guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as a prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion." **(Para 44)**

It would also be useful to refer to the decision reported at (1983) 4 SCC 31 **Gangubai Bablya Chaudhary & Ors. v. Sitaram Bhalchandra Sukhtankar & Ors.** Relevant paragraph of the judgment reads as under:-

"6. When an interim injunction is sought, the Court may have to examine whether the party seeking the assistance of the court was at any time in lawful possession of the property and if it is so established one would prima facie ask the other side contesting the suit to show how the plaintiffs were dispossessed? We pin-pointed this question and heard the submission. We refrain from discussing the evidence and recording our conclusions because evidence is still to be led and the contentions and disputes have to be examined in depth and any expression of opinion by this Court may prejudice one or the other party in having a fair trial and uninhibited decision. Having given the matter our anxious consideration, we are satisfied that this is not a case in which interim injunction could be refused. Similarly we are of the opinion that if respondents are allowed to put up construction by the use of FSI for the whole of the land including the land involved in dispute, the situation may become irreversible by the time the dispute is decided and would preclude fair and just decision of the matter. If on the contrary injunction is granted as prayed for the respondents are not likely to be inconvenienced because they are in possession of about 9000 sq. metres of land on which they can put up construction." **(Para 45)**

Important Issue Involved: The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final fearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Ms. Shobhana Takiar, Adv.

FOR THE DEFENDANTS : Mr. Sandeep Sethi, Sr. Adv. with Mr. Salman Hashmi and Mr. Zeeshan Hashmi, Advs. along with Mr.Ashish Nath, son of defendant no.1.

CASES REFERRED TO:

1. *Hindustan Petroleum Corpn. Ltd.* vs. *Sriman Narayan & Anr.* reported at (2002) 5 SCC 760.
2. *Mulji Umershi Shah & etc.* vs. *Paradisia Builders Pvt. Ltd., Mumbai & Ors.* AIR 1998 Bombay 87.
3. *Dorab Cawasji Warden* vs. *Coomi Sorab Warden* (1990) 2 SCC 117.
4. *Gangubai Bablya Chaudhary & Ors.* vs. *Sitaram Bhalchandra Sukhtankar & Ors.* reported at (1983) 4 SCC 31.

RESULT: Interim application allowed.

G.S. SISTANI, J.

IA.No.18453/2013 (u/O.39 Rs=1 & 2 CPC filed by plaintiff)

IA.No.18860/2013 (u/O.39 R=4 CPC filed by defendant no.1)

1. A mother forgets the pain she suffers at child's birth, the moment she hears the cries and sees the face of her child. A mother's sleepless nights and countless sacrifices are not uncommon for her children.

Smt.Sheela Ashok Nath gave birth to four children (three sons and one daughter). This mother even on her death has given a share of her property to each of her four children, in a residential house worth crores of rupees. In a wildest of her dreams she would not have expected that her dead body would lie in the Veranda of her own house and would not be placed in her living room which was locked on account of inter se disputes between her children.

2. This order shall dispose of IA No.18453/2013 & IA No.18860/2013.

3. Plaintiff has filed the present suit for injunction. Plaintiff is the brother of defendants no.1 to 3. Defendant no.4 is the maternal uncle of the plaintiff i.e. plaintiff's mother's brother. Plaintiff and defendants no.1 to 3 are the children of late Sh.Ashok Nath and Smt.Sheela Ashok Nath (hereinafter referred to as the 'mother'). Smt.Sheela Ashok Nath died on 17.11.2013. The mother executed a Will dated 24.4.2009, which was presented before the Sub-Registrar–V, Delhi for registration on 27.4.2009. The Will was registered vide registration No.2630 in additional book no.3, volume no.1716 on pages 5 to 10 on 28.4.2009. The defendant no.4 has been named as the executor of the Will. Further as per the plaint, the immovable property bearing No.A-51, Nizamuddin East, New Delhi (hereinafter referred to as 'the suit property'), which consists of ground floor, first floor and the second floor has been bequeathed in the following manner:

Ground Floor	Mr.Aman Nath (Plaintiff)
First Floor	Mr.Atul Nath (Defendant no.1)
Second Floor	Mr.Achal Nath (Defendant No.2)
Terrace of Second floor	Mr.Achal Nath and Smt.Anshu Chopra (Defendant No.2 and Defendant no.3)
If and when Constructed third floor	Smt.Anshu Chopra (Defendant No.3)
Third floor terrace (after construction of third floor)	Mr.Achal Nath and Smt.Anshu Chopra (Defendant No.2 and Defendant no.3)
Front & Back garden	Common area between Aman Nath and Mr.Atul Nath (Plaintiff and Defendant No.1)

Access to their respective portion	From the front and rear stair case.

4. The Will is yet to be accepted by all the parties.

5. It is further stated in the plaint that at present the property comprises of ground floor (including a store-room in the basement), first floor and the second floor. The suit property was initially owned by the father of the plaintiff and defendants no.1 to 3, who expired on 6.1.1994, leaving behind a Will dated 15.9.1988 by which he bequeathed the suit property to his wife. A probate was granted with respect to the aforesaid Will on 8.7.1995. The matter remained uncontested. Consequent to the grant of probate, the name of Smt.Sheela Ashok Nath was substituted in the records of the Land and Development Officer on 5.12.1996; the property was also got mutated in her name in the records of Municipal Corporation of Delhi on 29.1.1997 and pursuant to the mutation house tax was being paid by her. Further as per the plaint during the life-time of the mother, the plaintiff along with his daughter (Aadya Nath) was and is in occupation and possession of the entire ground floor of the suit property. The plaintiff along with defendant no.2 was taking care of their ailing mother and serving her. The defendant no.1 was and is in possession of the first floor, and he was allowed to use one kitchen on the ground floor by the deceased mother. The defendant no.2 was and is in possession of the second floor.

6. It is the case of the plaintiff that since the contents of the Will were known to all the parties, they were occupying their respective portions in the suit property and plaintiff, defendants no.1 and 2 had given effect to the Will, even during the life-time of their mother. An averment has also been made in the plaint that when the health of the mother started deteriorating and since the plaintiff was running between the hospital and the house, the defendant no.1 with ulterior motives and mala fide intentions unauthorizedly started using the living room on the ground floor. In order to maintain peace and to avoid mental agony or tension to the mother, the plaintiff tolerated the mala fide activities of the defendant no.1. However, an apprehension had started to build up in the mind of the plaintiff that after the demise of the mother, the defendant no.1 would deprive the plaintiff by unauthorizedly usurping the living room on the ground floor, in addition to the first floor which he is

exclusively enjoying.

7. It is also averred in the plaint that on 17.11.2013 morning, the plaintiff along with the defendant no.2, as usual took some clothes in the morning for their mother who was in the I.C.U. in the Moolchand Hospital. After reaching the hospital, the plaintiff and the Defendant no.2 called up defendant no.1 and others and informed them about the sad demise of their mother and that they would be shortly bringing the body to her house, after completing the hospital formalities. It is also averred in the plaint that when the plaintiff along with defendant no.2 brought the body of their mother back home, to their utter shock, they found the living room on the ground floor locked. No answer was given by defendant no.1, who admittedly had locked the same. The dead body was put in the Verandah outside the living room, as the defendant no.1 along with his two major sons and wife did not open the living room, however, after one hour and with the intervention of the Police the defendant no.1 was made to open the living room on the ground floor where the body was placed.

8. Apprehending that the defendant no.1 would again try to create disturbance and unauthorizedly make an attempt to occupy the living room, the present suit has been filed.

9. Ms.Shobhna Takiar, counsel for the plaintiff submits that the plaintiff being the beneficiary under the Will and as per the arrangement made during the life time of the mother, has every right to claim the continued free use and occupation of the entire ground floor to the exclusion of the others. It is also contended by Ms.Takiar that the mother was admitted in Mool Chand Khairati Ram Hospital on 14.11.2003 in a critical condition and only the plaintiff, defendant nos.2 and 3 attended to her in hospital. It is also submitted that the defendant no.1 took advantage of the situation. He did not visit the ailing mother in the hospital, and instead made a plan to usurp the ground floor while the plaintiff, defendants No.2 and 3 were busy in attending to the mother round the clock. It is submitted that in furtherance of his evil design, defendant no.1 stole the keys of the living room on the ground floor and when the dead body was brought from the hospital, he locked the same. It is further contended that the mother expired on 17.11.2013. The plaintiff along with defendant Nos.2 and 3 made all necessary arrangements for her last rites. On the same day after the funeral, copy of the registered

Will of the mother was duly supplied to the defendant no.1 along with all the other legal heirs of late Smt.Sheela Ashok Nath by defendant no.4, who is the executor of the Will.

10. It is also the case of the plaintiff that he has always been and has remained a permanent resident of the ground floor of the suit property. During the period when his mother was extremely unwell, out of two bed-rooms on the ground floor one bed-room was being used by the mother and another bed-room was being occupied by the nurses.

11. It is also the submission of counsel for the plaintiff that plaintiff along with the entire family has been living in the suit property since the year 1959. The plaintiff being a bachelor continued to live with his mother on the ground floor of the suit property, while the second floor was constructed by the defendant no.2 out of his own funds in the year 1995-96 and defendant no.1 was living on the first floor. In the year 2002 the plaintiff adopted an infant and continued to live on the ground floor with his mother.

12. It has also been submitted by Ms.Takiar that the plaintiff along with defendant nos.2 and 3 continuously looked after their ailing mother including catering to all her medical requirements and bearing all her medical expenses and hospital bills. On the contrary defendant no.1 never cared about his mother, nor did he meet any of her expenses. It is clarified that the suit property is one of the many properties owned by the plaintiff and he has been staying in his own properties from time to time as per his necessity, convenience and suitability. The defendant no.1 also owns various residential properties including two properties in New Friends Colony and one property in Gurgaon. In support of her submission that the plaintiff is a permanent resident of the suit property and in settled possession thereof, reliance is placed on the passport issued since 1972, election card, driving licence since 1988, joint account along with the mother in Central Bank of India and the plaintiff's bank account, all of which reflect the address of the suit property.

13. Attention of the Court is also drawn to some of the documents of other properties purchased by the plaintiff to show the address of the plaintiff as A-51, Nizamuddin East, New Delhi. Besides other documents, Ms.Takiar has drawn attention of the Court to official documents issued in the name of the adopted daughter of the plaintiff, who was raised by the plaintiff and his mother which include the Bus Card issued by the

Vasant Valley School, ID card issued by the School, birth certificate issued by the school, passport and Aadhar card and various receipts issued by the professional institutes, all of which bear the address of the suit property.

14. In support of her plea that the dead body of the mother was lying in the Verandah, photographs dated 17.11.2013 have been placed on record.

15. It is also submitted by counsel for the plaintiff that even otherwise each floor of the house has a separate dwelling unit and the plaintiff along with his mother and daughter were residing on the ground floor, defendant no.1 was residing on the first floor and the defendant no.2 was residing on the second floor. It has also been submitted that the first floor of the suit property is a complete dwelling unit and thus the defendant no.1 cannot be permitted to interfere in the possession of the plaintiff on the ground floor including the living room.

16. In the light of the above facts, Ms.Takiar submits that it is clearly established that the plaintiff is in settled possession of the ground floor of the suit property. Besides actual physical possession, he is also in constructive possession, as per the Will dated 24.04.2009. Moreover, the defendant no.1 cannot be permitted to deprive the plaintiff of his possession of the entire ground floor, including the living room and thus during the pendency of the suit the possession of the plaintiff should be protected. It is also submitted that all belongings of the plaintiff are lying on the ground floor of the suit property.

17. Another argument raised by counsel for the plaintiff is that after the demise of the mother, the status of the parties is that of co-sharers, hence, a single party cannot be granted exclusive possession.

18. Reliance is placed on **Hindustan Petroleum Corpn. Ltd. Vs. Sriman Narayan & Anr.** (2002) 5 SCC 760 by counsel for the plaintiff that while dealing with an application for interim relief, the Court must take into consideration the existence of a prima facie case and must not deal with the matter, as if the suit is to be decided finally.

19. Written statement has been filed by the defendant No.1 who is the contesting defendant. As per the written statement, the plaintiff has made a false averment with regard to his residing at the suit property. As per the defendant No.1, the plaintiff resides at property bearing No.12,

First Floor, Jaipur Esate, New Delhi which fact, according to defendant No.1, is established from a bare scrutiny of the directory of the Nizamuddin East Residents. Welfare Society of the years 2009 and 2011. As per the defendant No.1, the plaintiff has been living at the said property for more than 10 years which is also evident from their address mentioned in the directory of the Delhi Golf Club, electricity, telephone and water bills and other documents pertaining to the property No.12, First Floor, Jaipur Esate, New Delhi. It is further stated that the defendant No.2 is residing on the second floor of the suit property. It is also the case of the defendant No.1 that the fact that the plaintiff has not been residing at the suit property is further established by the fact that hours before the death of their mother the plaintiff tried to break the locks of the door leading to the ground floor after locking the living room in the mother's portion. It has also been stated that even before the dead body of the mother could reach the property, the plaintiff was able to break open one door and in case he had been in possession of the living room the plaintiff would not have attempted to break the lock of the aforesaid door. It is also the stand of defendant No.1 that on 17.11.2013, the plaintiff along with other defendants i.e. defendants No.2 and 3 forcibly tried to enter the ground floor of the property by breaking the locks and tried to dispossess the defendant No.1 and his family. It has also been stated that the plaintiff along with defendants No.2 and 3 locked the living room in the mother's portion and refused to open the door for receiving the body of the mother and plaintiff and defendants No.2 and 3 threatened the defendant No.1 and his family with dire consequences in case he refused to part with possession of the suit property. Reliance is placed on photographs taken by the defendant No.1. It is also the stand of the defendant No.1 that he was constrained to approach the police authorities who arrived at the spot and on their assurance the defendant No.1 opened the ground floor of the suit property and further the DD Entry dated 17th November 2013 shows that the plaintiff did not have the key to open the door of the drawing room from any entrance and the same was produced by the defendant No.1. It is also submitted that after the demise of their mother the plaintiff tried to take possession of the ground floor. The defendant No.1 found that the plaintiff No.1 was trying to forcibly gain entry into the living room with the help of a carpenter. The police was called. The plaintiff did not open the living room No.5 where the body could have been placed. It is submitted that the plaintiff in collusion with the defendants No.2 and 3 is trying to create false evidence.

He is trying to get his addresses changed in order to gain entry into the ground floor of the suit property. It is submitted that the plaintiff wants to forcibly gain entry into the ground floor of the suit property with a view to harass the defendant No.1. It is also the case of the defendant No.1 that he along with his deceased mother, wife, children and granddaughter are residing and have been in exclusive possession of the ground floor along with gardens and first floor of the property for more than 30 years. It is also the case of the defendant No.1 that after the demise of his father the defendant No.1 has been taking care of his mother i.e. she has been living under his care and protection on the ground floor. Earlier the defendant No.1 had allowed the plaintiff and other defendants to visit their mother without any restriction. However, on account of forgeries committed by the plaintiff in connivance with defendant No.2 and the consequential discord and dispute, the defendant No.1 allowed the plaintiff and other defendants to visit their mother through the side entrance without entering the other areas of the ground floor such as drawing room, dining room which are in his exclusive possession. It is also the case of the defendant No.1 that the ground floor and the first floor of the property are of a duplex form and as the first floor does not have a kitchen and the only kitchen is situated on the ground floor, it would stand proved beyond doubt that the defendant No.1 herein is in possession of both the floors as a single unit and his mother was living under the care and protection of the defendant No.1. Besides, defendant No.1 has been paying the electricity bills, telephone bills and water bills with respect to the suit property. Defendant No.1 has also disputed the execution of the will by their mother.

20. Mr.Sethi, learned senior counsel appearing for defendant No.1 has contended that there are sufficient documents on record filed by defendant No.1 to show that the plaintiff was not residing in the suit property. Even as per the plaint it is an uncontested position that the defendant was using the living room on the ground floor and the defendant No.1 cannot be removed either from the kitchen of the ground floor or the living room. It is also submitted that it is not the case of the plaintiff that he has other properties or that he is not residing anywhere else. It is also contended that it is the case of the plaintiff that defendant No.1 is using the living room and the kitchen on the ground floor and based on these admissions itself no injunction can be granted in favour of the plaintiff. It is also submitted that the cause of action for filing the present

suit as per the plaint is only the locking of the living room and not using the living room which is admitted even by the plaintiff in the plaint. The order of injunction cannot change the last contested position with regard to possession of the parties.

21. I have heard the learned counsel for the parties and perused the plaint, applications, documents filed along with plaint. Before the rival submission of the parties can be considered it may be noticed that on 18th November 2013 while issuing summons in the suit the defendant No.1 was restrained from interfering with the plaintiff's access and possession to the living room on the ground floor of the suit property. On 22nd November 2013 an application under Order XXXIX Rule 4 CPC filed by defendant No.1 was listed where the following order was passed:-

> "After hearing learned counsel for the parties, it is directed that after the conclusion of the ceremonies associated with the demise of the mother on 29th November 2013, neither the plaintiff nor any other party will use the ground floor of the premises at A-51, Nizamuddin East, New Delhi -110 013, except to the limited extent that the defendant No.1 will be permitted to use the kitchen on the ground floor, which is currently being used by him. Both the plaintiff and defendant No.1 are permitted to remove their respective belongings from the ground floor before 29th November 2013. This order be scrupulously followed till the next date."

22. On 29th November 2013, on an application filed by the plaintiff being IA No.19309/2013 a local commissioner was appointed. The operative portion of the order reads as under:-

> "6. There is a dispute as to which of the two kitchens in the ground floor is currently being used by defendant No.1. Be that as it may, the Court considers it appropriate to appoint Mr.K.G.Malik, Court Officer (Mob.9971988890) as CC to visit the premises at A-51, Nizamuddin East, New Delhi at 11 am on 30th November 2013. One representative each of the plaintiff and each of the defendants are permitted to remain present along with their respective counsel during the visit of the CC. Defendant No.1 will indicate to the CC one of the kitchens that he has been using. The other kitchen and the entire ground floor will be secured by the CC placing locks on the doors leading into them. The requisite number of locks will be procured for that purpose by the CC. The keys will be deposited forthwith by the CC with Registrar (O) of this Court and will be kept in a sealed cover. A report will be submitted by the CC to the Court within a week thereafter enclosing photographs. The fee of the CC is fixed at Rs.20,000 which will be paid by the plaintiff to the CC tomorrow itself. This is apart from incidental expenses and transport charges, including costs of the locks which will be borne by the plaintiff. 7. This order is passed without prejudice to the rights and contentions of either party. It is made clear that defendant No.1 will have access to the kitchen which is opted to be used by him from the rear side and there will be no hindrance to his ingress and egress from thereon."

23. By the order of 29th November 2013, except for one kitchen on the ground floor the entire ground floor stands locked.

24. During the course of hearing arguments on 26.02.2014 it was submitted by counsel for the defendant no.1 that the ground floor and the 1st floor is a single unit and there is no living room on the 1st floor. The order dated 26.02.2014 reads as under:-

> "Counsel for defendant No.1 submits that defendant No.1 was using the living room on the ground floor as there is no living room or dining room on the first floor of the suit property. Counsel for the plaintiff and defendants No.2 to 4 dispute this submission. Counsel for the plaintiff submits that a Local Commissioner may be appointed at the expense of the plaintiff to visit the first floor of the property No.A-51, Nizamuddin East, New Delhi today itself and give a report as to whether there is a dining room and a drawing room on the first floor of the property or not.
>
> Ms.Priyam Mehta, Advocate, (Mobile No.9953032272), who is present in Court, is appointed as a Local Commissioner to visit the first floor of the property bearing No.A-51, Nizammudin (East), Delhi, today itself, without waiting for formal orders of this Court, and ascertain as to whether there is any drawing/ living room and dining room on the first floor of the suit property. The Local Commissioner will be entitled to take photographs.

This order is being passed in the presence of the parties. The parties will cooperate with the Local Commissioner. In case any of the parties do not cooperate or obstruct the proceedings of the Local Commissioner, this Court would be forced to take a serious view of the matter, taking into consideration the previous allegations made by the plaintiff against the defendant No.1 when the proceedings of the earlier Local Commissioner were obstructed. The fee of the Local Commissioner is fixed at Rs.40,000/-, which shall be borne by the plaintiff, besides all out of pocket expenses.

Post lunch the matter has been taken up. Further arguments have been addressed. Local Commissioner should file her report along with photographs within 2 weeks from today. List on 11.03.2014. Copy of the order be given dasti to the Local Commissioner under signatures of the Court Master."

25. Written statement has also been filed by defendant No.4 who is the brother of the deceased mother and uncle of the plaintiff and defendants No.1 to 3. In his written statement the defendant No.4 has supported the case of the plaintiff. The defendant No.4 has stated in his written statement that plaintiff and defendants No.1 to 3 have been given a share in the suit property as per the desire and will of their mother dated 24.04.2009 registered on 29.04.2009. The will was executed in the presence of two witnesses and videographed. The defendant No.4 had accompanied his sister along with two witnesses to the office of the Sub-Registrar, Mehrauli for registration. He has been named as executor and administrator in the will. Defendant No.4 has further stated in the preliminary submissions in the written statement as under:-

"(I) Before giving parawise reply to the plaint, the defendant No.4 who is the brother of the deceased Smt.Sheela Ashok Nath and maternal uncle of the plaintiff and the defendant No.1 to 3, submits that he supports the case of the plaintiff who is seeking decree of injunction against the defendant No.1 his representatives, assigns and agents from interfering in the peaceful possession, occupation and enjoyment of the entire ground floor with storeroom in the basement, including the living room on the ground floor of the suit property i.e. A-51 Nizamuddin East, New Delhi-11013.

(II) The plaintiff, defendant No.1 and 2 are sons of the deceased Smt.Sheela Ashok Nath. The defendant No.3 is the daughter of the deceased and sister of the plaintiff and the defendant No.1 and 2.

(III) It is significant to state that each of the plaintiff and defendant No.1 to 3 are having share in the suit property as per the desire of their mother who had executed a will dated 24th April 2009. It was registered on 29th April 2009. The Will dated 24th April 2009 is a solemn document. Entire execution of the will dated 24.04.2009 in the presence of two of the witnesses was videographed at the behest of the defendant No.4. The defendant No.4 accompanied his sister along with two witnesses to the office of the Sub-Registrar, Mehrauli for its registration.

(IV) That the defendant No.4 has been named as an Executor and Administrator in the Will of his deceased sister. The defendant No.4 is the legal representative of the deceased sister. As an Executor of Will dated 24th April 2009 at present the defendant No.4 is a legal representative of the deceased Sheela Ashok Nath for all purposes and representing the person of testator after her death.

(V) It is significant to state that the deceased during her lifetime had made necessary arrangements in respect of enjoyment of her assets to avoid any misunderstandings against her children. She unconditionally bequeathed the ground floor including the store cum utility room below ground floor to the plaintiff. First floor to the defendant No.1, second floor to the defendant No.2 and terrace third floor to her daughter the defendant No.3 with the right to use or build a floor on the same and on construction by the defendant No.3 the said third floor shall be owned and possessed by her. However, the terrace above will be shared and used jointly by the defendant No.2 and 3. Therefore, all the four children of the deceased Sheela Ashok Nath are co-owners without any hindrance whatsoever.

(VI) It is pertinent to mention that the defendant No.4 came to know about the severe sickness of his sister on 12.11.2013, as such he was planning to come to Delhi. On 17.11.2013, the sister of the defendant No.4 breathed her last. In the evening of

17.11.2013, the defendant No.4 reached Delhi and attended the funeral of his sister at Nizamuddin Cremation ground. The defendant No.4 was extremely pained to see the behaviour of the defendant No.1 and his family at the cremation ground when the purohit announced 13th day as the last day of ceremony of the mother but the defendant No.1 contrary to that and contrary to the decision of the family announced 4th day as the last day of the ceremony. This incident was noticed by the other visitors and relatives who had attended the cremation.

(VII) That after coming from the cremation ground the defendant No.4 who was in possession of the will dated 24.04.2009 of his sister handed over a copy of the same to all the four children of the deceased. Even at that time the defendant No.1 without any reason had thrown the Will back by saying that he knows about it. The defendant No.4 was astonished at the behaviour of the defendant No.1."

26. It would also be not out of place to reproduce para 9 of the reply on merits in the written statement of defendant No.4. It reads as under:-

"9. That the contents of para 9 of the plaint are admitted and need no reply. It is admitted that the plaintiff and the defendant No.2 was taking care of their ailing mother. Both the brothers were serving her in all manner from her day to day needs, medication, hospitalization etc. It may be noted that the defendant No.1 had a kitchen on the first floor. It was later on converted into a bedroom and toilet. Thereafter the defendant No.1 unauthorizedly started using a room below the staircase of the first floor from rear side of the house as kitchen for himself. The sister of the defendant No.4 objected to this several times. Subsequently when she was totally bed ridden, the defendant No.1 took advantage of her sickness and continued to use the said room as kitchen. It is pertinent to mention that all the three sons of the deceased Smt.Sheela Ashok Nath were using the premises in question as mentioned in the Will during her lifetime. The desire of the deceased was given effect to during her lifetime. Plaintiff along with his daughter Aadya were using the ground floor along with the deceased Smt. Sheela Ashok Nath. Cook as employed by the defendant No.2 was taking care of the meals of the plaintiff and his daughter, the defendant No.2 and their mother by cooking the food

in the kitchen attached to the living room. Till her last breath, the food was cooked in the same kitchen."

27. Counsel for defendants No.2 to 4 have supported the case of the plaintiff.

28. The arguments of learned counsel for the plaintiff can be summarized as under:-

(1) The entire ground floor except one kitchen has been in continuous possession of the plaintiff, his deceased mother and daughter. The defendant No.1 i.e. the contesting defendant has been in possession of the entire first floor. Reliance is placed on various independent documents to show that the plaintiff has been a resident of the ground floor of the suit property.

(2) The first floor has been in occupation of the defendant No.1 along with his family with the use of kitchen on the ground floor. The second floor has been in continuous use of defendant No.2. The plaintiff and defendants No.2 and 3 have been looking after the ailing mother including all expenses for her maintenance, hospital expenses and medical expenses have been borne by the plaintiff and defendants No.2 and 3. On learning about the demise of the mother with a view to grab possession of the living room on the ground floor the defendant No.1 locked the same illegally.

(3) Even as per the Will of the deceased the ground floor portion is to fall to the share of the plaintiff and the first floor to the share of the defendant No.1. The defendant No.1 was never in possession of any part of the ground floor except one kitchen. The balance of convenience is in favour of the plaintiff, in case the order is not modified it is the plaintiff who will suffer irreparable loss and injury as the defendant No.1 has a full floor for his use.

29. The submissions of learned counsel for defendant No.1 can be summarized as under:-

(1) The plaintiff has not been residing at the suit premises but

his permanent place of residence is property No.12, First Floor, Jaipur Esate, New Delhi. The plaintiff is attempting to forcibly take possession of the ground floor. Even as per the plaint the defendant No.1 has been using a kitchen on the ground floor and the living room. Various independent documents show the address of the plaintiff as property No.12, First Floor, Jaipur Esate, New Delhi. It is only the defendant No.1 who looked after the mother including her medical expenses and the electricity bills of the ground floor were paid by the defendant No.1. The fact that the key of the living room was with the defendant No.1 would establish his possession over the living room. In the absence of any living room on the first floor it was natural for the defendant No.1 to be using the living room on the ground floor along with kitchen.

30. It is well settled that while deciding an application under Order XXXIX Rule 1 and 2 CPC the Court must apply the following three established tests of prima facie case, balance of convenience and whether the plaintiff would suffer an irreparable loss and injury if an injunction is declined. It is also a well established principle that while deciding an application for injunction the Court must not deal with the matter as if it were finally deciding the suit. It is also a well established principle that the Court must also consider as to whether grant of injunction is likely to cause inconvenience to the defendant. It is also not necessary for the Court while deciding an application for grant of injunction to go into the question of title to establish that the plaintiff has been in continuous possession of the entire ground floor except the kitchen.

31. The first argument of counsel for the plaintiff is that the plaintiff has been in continuous possession of the ground floor of the suit property along with his minor daughter and mother (since deceased) for which learned counsel for the plaintiff has drawn attention of the Court to various documents [Bus Card issued by the Vasant Valley School, ID card issued by the School, birth certificate issued by the school, passport and Aadhar card and various receipts issued by the professional institutes]. It is also the case of the plaintiff that the plaintiff along with the defendants no.2 and 3 have been continuously looking after their old ailing mother in the house and thereafter when she was hospitalized.

32. Ms.Takiar, counsel for the plaintiff has laboured hard to show that when the mother was in the house, nurses were employed who were occupying one room on the ground floor; and all the medical expenses have been borne by the plaintiff and defendant no.2.

33. Per contra, counsel for the defendant No.1 has argued that the plaintiff has been residing at 12, Jaipur Estate, Nizamuddin (East), New Delhi. In support of his submission counsel for the defendant no.1 has placed reliance on documents including directory of Delhi Golf Club, Residents. Directory and certain other documents, where 12, Jaipur Estate, Nizamuddin (East), New Delhi, has been shown as the residence of plaintiff. It is also the case of the defendant no.1 that defendant no.1 is in possession of the entire first floor along with possession of ground floor, including one living room and a kitchen. Counsel for the defendant no.1 has also refuted the submission of Ms.Takiar, counsel for the plaintiff that the plaintiff and defendants no.2 and 3 were looking after the old ailing mother.

34. It is contended that the defendant no.1 was looking after the old ailing mother and was paying the electricity bills of the ground floor portion.

35. The plaintiff has placed on record a copy of his pass-port, which shows the suit property as the address of the plaintiff. Copy of the documents, such as, driving licence, copy of the pass-book of Central Bank Account No.1027445965, Identity Card of Vasant Valley School of the daughter of the plaintiff, Voter Identity Card of the plaintiff, the directory of Nizamuddin (East) Association Members and various other documents, have been filed, in support of the address of the plaintiff.

36. On the contrary Mr.Sethi, counsel for the defendant no.1 has also drawn attention of the Court to numerous documents of the plaintiff, wherein plaintiff has given his address as 12, Jaipur, Estate Nizamuddin (East), New Delhi.

37. It is not in dispute that the plaintiff is also the owner of 12, Jaipur Estate, Nizamuddin (East), New Delhi as well. The documents relied upon by the plaintiff are independent documents and cannot be termed as self-serving documents or documents procured after filing of the present suit or procured soon before the filing of the present suit. In my view the possession of the plaintiff in the present suit cannot be

ascertained simply on the basis of documents filed by either of the parties, but the surrounding circumstances are also to be considered, which according to me supports the case of the plaintiff. Defendant no.1 claims that he was exclusively looking after his ailing mother, which prima facie appears to be incorrect. Voluminous documents have been filed on record by the plaintiff, which includes a large number of bills for payments made to nurses and the bills of the hospitals, would show that it is the plaintiff who was looking after his ailing mother and not the defendant no.1.

38. A large number of bills showing payments made to Suraj Nurses Bureau from 31.7.2011 (81 bills) and details provided, evidencing payments together with bills; so many bills of chemist, bills of laboratories, bills of Moolchant Hospital, would show that it is the plaintiff, who was looking after his mother and the stand of the defendant no.1 is prima facie to be disbelieved at this stage and in case the defendant no.1 was exclusively looking after his ailing mother, the bills would have been with him.

39. It is also the stand of defendant no.1 that there is no living room on the first floor and thus the defendant no.1 was in occupation and possession of the entire first floor along with the living room and kitchen on the ground floor. Mr.Sethi, counsel for the defendant no.1 strongly contended that the kitchen on the ground floor is not disputed even by the plaintiff and if the kitchen can be on the ground floor then it is to be presumed that defendant no.1 alone was using the first floor and the ground floor.

40. This court was forced to test this argument that there is no living room on the first floor, by appointing a Local Commissioner during the course of hearing. Ms.Priya Mehta, who was present in court was directed to visit the suit premises including first floor without waiting for a formal order from the court and give a report as to whether there is any living room on the first floor of the suit property or not. The Local Commissioner has, along with the report, filed photographs and a site plan. The site plan shows that the area marked 'A. and 'B. of 16.8" x 28. comprising of 470 sq.ft. is the sitting room available on the first floor in addition to 4 bedrooms. The scanned site plan filed by the Local Commissioner is as under:-

41. Photographs 5, 6, 7 and 8 annexed along with the report of the Local Commissioner also show the living room, although strangely a cloth-stand and a bucket has been shown in photographs No.1, 2 and 3 by the defendant No.1. The report of the Local Commissioner along with the site plan and photographs leave no room for doubt that there is a huge living room on the first floor and the argument of defendant No.1 that the first floor has no living room and thus the defendant No.1 was using the living room of the ground floor is patently false.

42. To say that the plaintiff has admitted in para 10 of the plaint that the living room was being used by the defendant No.1, in my view, is a misreading of para 10 of the plaint. Para 10 reads as under:-

> "10. That recently when the health of the mother of the plaintiff started deteriorating and the plaintiff was running around between the hospital and the house, the defendant No.1 with ulterior motives and malafide intentions had unauthorisedly started using the living room in the absence of the plaintiff.
>
> However, in order to maintain peace and not to do anything which would cause mental agony, tension and pain to his mother, and in order to maintain harmony and peace within the family, the plaintiff was tolerating the malafide activities of the defendant No.1."

43. A reading of this paragraph would show that the plaintiff has averred that on account of the deteriorating health of his mother, he was running between the house and the hospital and defendant No.1 with ulterior motives and malafide intentions has unauthorizedly started using the living room and in order to avoid mental agony and tension to his

mother the plaintiff No.1 was tolerating this act of defendant No.1. The defendant No.1 cannot take advantage of his illegality and thus no benefit can accrue to defendant No.1 on the basis of averment made by the plaintiff in the plaint.

44. Principles laid down for grant of interlocutory injunction have been discussed by the Supreme Court in the case of **Hindustan Petroleum Corpn. Ltd. v. Sriman Narayan & Anr.** reported at (2002) 5 SCC 760. Relevant paragraphs of the judgment read as under:-

> "7. It is elementary that grant of an interlocutory injunction during the pendency of the legal proceeding is a matter requiring the exercise of discretion of the court. While exercising the discretion the court normally applies the following tests:
>
> (i) whether the plaintiff has a prima facie case;
>
> (ii) whether the balance of convenience is in favour of the plaintiff; and
>
> (iii) whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.
>
> 8. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the exercise of the legal right asserted by the plaintiff and its alleged violation are both contested and remain uncertain till they are established on evidence at the trial. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before which that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The court must weigh one need against another and determine where "the balance of convenience" lies.
>
> 9. In **Dorab Cawasji Warden v. Coomi Sorab Warden** (1990)

> 2 SCC 117 this Court, discussing the principles to be kept in mind in considering the prayer for interlocutory mandatory injunction, observed:
>
> "16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:
>
> (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
>
> (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
>
> (3) The balance of convenience is in favour of the one seeking such relief.
>
> 17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as a prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

45. It would also be useful to refer to the decision reported at (1983) 4 SCC 31 **Gangubai Bablya Chaudhary & Ors. v. Sitaram Bhalchandra Sukhtankar & Ors.** Relevant paragraph of the judgment reads as under:-

"6. When an interim injunction is sought, the Court may have to examine whether the party seeking the assistance of the court was at any time in lawful possession of the property and if it is so established one would prima facie ask the other side contesting the suit to show how the plaintiffs were dispossessed? We pin-pointed this question and heard the submission. We refrain from discussing the evidence and recording our conclusions because evidence is still to be led and the contentions and disputes have to be examined in depth and any expression of opinion by this Court may prejudice one or the other party in having a fair trial and uninhibited decision. Having given the matter our anxious consideration, we are satisfied that this is not a case in which interim injunction could be refused. Similarly we are of the opinion that if respondents are allowed to put up construction by the use of FSI for the whole of the land including the land involved in dispute, the situation may become irreversible by the time the dispute is decided and would preclude fair and just decision of the matter. If on the contrary injunction is granted as prayed for the respondents are not likely to be inconvenienced because they are in possession of about 9000 sq. metres of land on which they can put up construction."

46. It would also be useful to refer to the decision reported at AIR 1998 Bombay 87 **Mulji Umershi Shah & etc. v. Paradisia Builders Pvt. Ltd., Mumbai & Ors.**

"The contention that in a suit for injunction based primarily on possession, question of title cannot be gone into and therefore while considering the application for temporary injunction the only consideration before the Court was possession and not the title of plaintiff is neither impressive nor sound. In the suit for perpetual injunction the Court may be called upon to hold inquiry in title, right, interest or status, as the case may be, of the plaintiff to find out whether plaintiff is entitled to protection of his possession by decree of injunction. The same consideration, prima facie, is required to be seen while considering an application for temporary injunction. The question of possession presupposes lawful possession and for adjudication of that question whether finally or at interlocutory stage, the inquiry into title, right, interest

or status of plaintiff is not foreign to the subject-matter."

47. Applying the settled law to the facts of the present case, in my view the plaintiff has been able to make out a strong prima facie case in the light of the documents placed on record. The stand taken by the defendant no.4 in his written statement duly supported by defendants no.2 and 3, the voluminous bills from Suraj Nurses Bureau from 31.7.2011 onwards (81 bills placed on record), would show that the plaintiff was looking after his mother in the house and not the defendant no.1. Supporting hospital bills, the bills of Chemist, the existence of four bed rooms and a large living room on the first floor, all lean in favour of the plaintiff to establish a strong prima facie case and balance of convenience, and in case the plaintiff is deprived of exclusive use of the ground floor, including the living room except Kitchen, the plaintiff would suffer irreparable loss. Accordingly, the defendant No.1, his servants, agents, relatives, or anyone acting through him are restrained from using any portion of the ground floor except access to the kitchen. The defendant No.1 is further restrained from causing any hindrance, inconvenience or obstruction to the peaceful enjoyment of the plaintiff of the entire ground floor except kitchen. The key deposited with the Registrar (Original) shall be handed over to the counsel for the plaintiff forthwith.

48. The application filed by the plaintiff [IA.No.18453/2013 (under Order 39 Rules 1 & 2 CPC)] is allowed and the application filed by the defendant no.1 [IA.No.18860/2013 (under Order 39 Rule 4 CPC), is dismissed.

CS(OS) 2250/2013

49. List the matter before Joint Registrar for admission/denial of documents on 22.7.2014.

50. List the matter before Court for framing of issues on 28.8.2014, when parties shall bring suggested issues to Court. Mr.Ashish Nath will remain present in Court on the next date of hearing in terms of the order dated 6.12.2013.

ILR (2014) II DELHI 1591
CS(OS)

NUTAN **.... PLAINTIFF**

VERSUS

MUKESH RANI & ANR. **....DEFENDANT**

(G.S. SISTANI, J.)

CS (OS) NO. : 2169/2010 & I.A. NO. : 14301/2010 **DATE OF DECISION: 28.03.2014**

Specific Relief Act, 1963—Plaintiff filed suit seeking specific performance of agreement to sell, for possession, mandatory and permanent injunction against defendant no. 1 & 2—Due to non-appearance, both defendants proceeded ex-parte—As per plaintiff, she was wiling to perform her part of contract by tendering balance sale consideration amount which was not accepted by defendant no. 1 on pretext suit property to be converted from lease-hold to free-hold. Held: If plaintiff is ready and willing to perform her part of the agreement and defendant neglects to perform his part of agreement, the plaintiff entitled to decree for specific performance of agreement on tendering balance sale consideration to defendant.

It has also been deposed that on 12.8.2009 the plaintiff requested the defendant no.1 to accept the balance sale consideration, however, defendant no.1 declined to accept the same on the pretext that she was awaiting certain documents regarding conversion of the suit property to free-hold. A legal notice was issued to the defendant no.1 on 13.8.2009, copy whereof has been filed and exhibited as Ex.PW-1/3. Reply to the same has also been filed and exhibited as Ex.PW-1/4. **(Para 6)**

Accordingly, the present suit is decreed in favour of the plaintiff and against the defendant no.1. Plaintiff will tender the balance sale consideration to the defendant no.1 within one week from the date of receipt of the judgment. Thereafter the defendant no.1 will execute the sale deed in favour of the plaintiff. In case the sale deed is not executed by the defendant no.1 in favour of the plaintiff, it will be open for the plaintiff to seek execution of the decree passed. Decree-sheet be drawn up accordingly. **(Para 10)**

Important Issue Involved: If plaintiff is ready and willing to perform her part of the agreement and defendant neglects to perform his part of agreement, the plaintiff entitled to decree for specific performance of agreement on tendering balance sale consideration to defendant.

[Sh Ka]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Alok Singh, Advocate along with the plaintiff in person.

FOR THE DEFENDANT : None.

RESULT: Suit decreed.

G.S. SISTANI, J. (ORAL)

1. Plaintiff has filed the present suit for specific performance of an agreement of sell dated 13.5.2009 and for possession, mandatory and permanent injunction. Defendant no.2 entered appearance and filed his written statement and thereafter he stopped appearing. Defendant no.2 was proceeded ex parte on 19.11.2013. Defendant no.1 was served by way of publication. Defendant no.1 was proceeded ex parte on 2.5.2013.

2. The plaintiff is present in court. Counsel for the plaintiff prays that her additional statement be recorded, as inadvertently the documents [receipt dated 13.5.2009, legal notice dated 13.8.2009 and reply dated 20.8.2009 to the legal notice] could not be exhibited during the course of her evidence. Statement of the plaintiff has been recorded in court

today. Plaintiff has proved the original receipt dated 13.5.2009, as Ex.PW-1/2, copy of the legal notice dated 13.8.2009 as Ex.PW-1/3 and reply dated 20.8.2009 as Ex.PW-1/4.

3. Plaintiff has filed ex parte evidence. As per the affidavit of plaintiff, Nutan Ex.PW-1/A, she entered into an agreement to sell with defendant no.1 on 15.12.2008, a copy of which has been placed on record (marked '-'). It has been deposed that the original agreement was retained by defendant no.1. As per the agreement dated 15.12.2008, the total sale consideration was fixed at Rs.27.0 lacs with respect to the sale of suit property bearing flat No.C-506, 1st floor, Yojana Vihar, New Delhi. The plaintiff paid Rs.1.0 lac as earnest money on 15.12.2008 and thereafter another agreement to sell was entered into between the parties on 13.5.2009, which is exhibited as Ex.PW-1/1. In the agreement to sell dated 13.5.2009 it was agreed that the defendant no.1 would get the property converted into free-hold and another sum of Rs.50,000/- was paid in cash to the defendant no.1 on 13.5.2009.

4. Plaintiff, has further deposed that defendant no.1 also signed a receipt dated 13.5.2009, acknowledging receipt of Rs.1.50 lacs, ex PW-1/2.

5. It has further been deposed that the plaintiff approached the defendant no.1 on several occasions and requested her to get the property converted into free-hold but the defendant no.1 failed to do so. It has also been deposed that the plaintiff has sufficient funds and she has always been ready and willing to purchase the suit property and perform her part of the agreement, however, defendant no.1 has neglected to perform her part of the agreement.

6. It has also been deposed that on 12.8.2009 the plaintiff requested the defendant no.1 to accept the balance sale consideration, however, defendant no.1 declined to accept the same on the pretext that she was awaiting certain documents regarding conversion of the suit property to free-hold. A legal notice was issued to the defendant no.1 on 13.8.2009, copy whereof has been filed and exhibited as Ex.PW-1/3. Reply to the same has also been filed and exhibited as Ex.PW-1/4.

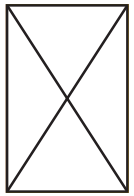
7. Counsel for the plaintiff relies on the reply dated 20.8.2009 to the legal notice, wherein further time was sought to get the property converted from lease-hold to free-hold.

8. I have heard counsel for the plaintiff. There is no rebuttal to the evidence of the plaintiff. The original agreement to sell, Ex.PW-1/1 has been placed on record, which shows that a sum of Rs.1.50 lacs was received by the defendant no.1 towards part payment of the sale consideration; the receipt dated 13.5.2009, Ex.PW-1/2 shows acknowledgement of Rs.1.50 lacs, legal notice issued by the plaintiff, Ex.PW-1/3 and the reply thereto, Ex.PW-1/4 show that the defendant no.1 has not disputed the agreement to sell and her obligation to sell the suit property to the plaintiff at the price fixed, however, only sought further time to get the property converted into free-hold.

9. The defendant no.2 has been impleaded as a party, as he claims to be in possession of the suit property. As per the written statement of defendant no.2, he has no title over the property and he was occupying the suit property only for some time. The defendant no.2, however, has vacated the suit property.

10. Accordingly, the present suit is decreed in favour of the plaintiff and against the defendant no.1. Plaintiff will tender the balance sale consideration to the defendant no.1 within one week from the date of receipt of the judgment. Thereafter the defendant no.1 will execute the sale deed in favour of the plaintiff. In case the sale deed is not executed by the defendant no.1 in favour of the plaintiff, it will be open for the plaintiff to seek execution of the decree passed. Decree-sheet be drawn up accordingly.

11. In view of the fact that the suit has been decreed, the interim order dated 26.10.2010 is confirmed. The application [I.A. 14301/2010] also stands disposed of.



INDIAN LAW REPORTS
DELHI SERIES
2014

(Containing cases determined by the High Court of Delhi)

VOLUME-2, PART-II

(CONTAINS GENERAL INDEX)

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

INDIAN LAW REPORTS
DELHI SERIES
2014 (2)
VOLUME INDEX

CONTENTS

PART-II

MARCH AND APRIL, 2014

LIST OF HON'BLE JUDGES OF DELHI HIGH COURT
During March and April, 2014

1. Hon'ble Mr. Justice G. Rohini Chief Justice (w.e.f. 21.04.2014)
2. Hon'ble Mr. Justice Badar Durrez Ahmed (ACJ from 17.02.14 Till 20.04.2014)
3. Hon'ble Mr. Justice Pradeep Nandrajog
4. Hon'ble Ms. Justice Gita Mittal
5. Hon'ble Mr. Justice S. Ravindra Bhat
6. Hon'ble Mr. Justice Sanjiv Khanna
7. Hon'ble Ms. Justice Reva Khetrapal
8. Hon'ble Mr. Justice P.K. Bhasin
9. Hon'ble Mr. Justice Kailash Gambhir
10. Hon'ble Mr. Justice G.S. Sistani
11. Hon'ble Dr. Justice S. Muralidhar
12. Hon'ble Ms. Justice Hima Kohli
13. Hon'ble Mr. Justice Vipin Sanghi
14. Hon'ble Mr. Justice Sudershan Kumar Misra
15. Hon'ble Ms. Justice Veena Birbal
16. Hon'ble Mr. Justice Siddharth Mridul
17. Hon'ble Mr. Justice Manmohan
18. Hon'ble Mr. Justice V.K. Shali
19. Hon'ble Mr. Justice Manmohan Singh
20. Hon'ble Mr. Justice Rajiv Sahai Endlaw
21. Hon'ble Mr. Justice J.R. Midha
22. Hon'ble Mr. Justice Rajiv Shakdher
23. Hon'ble Mr. Justice Sunil Gaur
24. Hon'ble Mr. Justice Suresh Kait
25. Hon'ble Mr. Justice Valmiki J. Mehta
26. Hon'ble Mr. Justice V.K. Jain
27. Hon'ble Ms. Justice Indermeet Kaur
28. Hon'ble Mr. Justice A.K. Pathak
29. Hon'ble Ms. Justice Mukta Gupta
30. Hon'ble Mr. Justice G.P. Mittal
31. Hon'ble Mr. Justice R.V. Easwar (Retired on 28.04.2014)
32. Hon'ble Ms. Justice Pratibha Rani
33. Hon'ble Ms. Justice S.P. Garg
34. Hon'ble Mr. Justice Jayant Nath
35. Hon'ble Mr. Justice Najmi Waziri
36. Hon'ble Mr. Justice Sanjeev Sachdeva
37. Hon'ble Mr. Justice Vibhu Bakhru
38. Hon'ble Mr. Justice V.K. Rao
39. Hon'ble Ms. Justice Sunita Gupta
40. Hon'ble Ms. Justice Deepa Sharma
41. Hon'ble Mr. Justice V.P. Vaish

LAW REPORTING COUNCIL
DELHI HIGH COURT

1.	Hon'ble Mr. Justice Vipin Sanghi	*Chairman*
2.	Hon'ble Mr. Justice Rajiv Sahai Endlaw	*Member*
3.	Hon'ble Mr. Justice J.R. Midha	*Member*
4.	Mr. Nidesh Gupta, Senior Advocate	*Member*
5.	Ms. Rebecca Mammen John, Senior Advocate	*Member*
6.	Mr. Arun Birbal Advocate	*Member*
7.	Ms. Sangita Dhingra Sehgal, Registrar General	*Secretary*

NOMINAL-INDEX
VOLUME-2, PART-II
MARCH AND APRIL, 2014

Pages

SUBJECT-INDEX
VOLUME-2, PART-II
MARCH AND APRIL, 2014

convenience not in favour of Petitioner—Township required minimum contiguous land of 50-55 acres—Whether it was obligation of petitioner or respondent for that contiguous land, a matter of trial—Respondents refunded Rs. 1.76 Crores—Therefore, interim order not granted to Petitioner. Petition dismissed.

Herman Properties Ltd. v. *Rupali Singla & Ors.* *943*

— Sec. 34—Delay in re-filing of the petition U/s 34 of the Act after objections were raised by the Registry—Delay of 149 days—Two reasons given seeking condonation—First that the lawyer of petitioner had to be changed and second that the lawyer was ill. Held, both the events occurred in March 2013—There is no explanation for the period which occurred prior to March and for the delay which occurred in the month of April and May—Objections were finally removed in July 2013. Held, that Courts does have the power to condone the delay in re-filing if the initial filing is within the period prescribed U/s 34 (3) of the Act, but the result would depend on facts & circumstances of each case—The reasons advanced by the petitioner does not supply sufficient cause—Application rejected.

INX News Pvt. Ltd. v. *Pier One Construction Pvt. Ltd.* *965*

— Sec. 34—Challenge to rejection of Counter Claim of the petitioner by the Arbitrator—No infirmity in conclusions of Ld. Arbitrator, which were based on record. Held Sec. 31(7)(b) of the Act permits recovery of interest, post award, @ 18% per annum, provided the arbitrator has not stated anything to the contrary. The petitioner failed to take advantage of time granted by the arbitrator—No interference. So far as costs are concerned, Ld. Arbitrator allowed one fourth of the total costs incurred by the respondents—Conclusion of arbitrator fair and equitable—Challenge rejected.

Gail (India) Ltd. v. *Gangotri Enterprises Ltd.* *972*

— Petition U/s. 9 seeking injunction qua encashment of the performance bank guarantee—Bank guarantee was unconditional—Bank was required to pay, merely on a demand, to the beneficiary. The terms of the bank guarantee envisages two scenarios; first, where the beneficiary by virtue of breach suffered injury and also quantified the loss; secondly, the breach has resulted

in an injury but the loss was not yet quantified. Held, it is trite to say that bank quarantee is an independent contract. The bank is not to look to the terms of the underlying or the main contract entered into between the contractor and the beneficiary. The examination by the Court has to be from the point of view of the concerned bank furnishing bank guarantee and not independent to it. The only exceptions are the exceptions of fraud or whether the invocation of bank guarantee is in terms of the bank guarantee. The tests adopted by the Courts are: Is the fraud "egregious"? Is it an established fraud of the beneficiary known to the bank? Or whether independent of the bank, the aggrieved party sets up a case of special equity. A broad test would be that, would an aggrieved party find it difficult to realize or recover the amounts reflected in bank guarantee from the opposite party, if the aggrieved party were to ultimately succeed in the principal action. Held, in the present case, the case of petitioner does not come within the ambit of any exception—Petition dismissed.

Indu Projects Ltd. v. *Union of India* *987*

— Sec. 34—Delay—Ld. Arbitrator dispatched signed copies of award through registered post to the General Manager, Head quarter and, Senior Divisional Commercial Manager of Railways on 4.11.2010. Copies received by GM and Head Quarter on 8.11.2010—Senior DCM denying having received copy on 8.11.2010. Held, once it is shown that document was sent properly addressing, prepaying and posting by registered post to addressee than the presumption provided U/s 27 of General Clauses Act read with Sec. 114 Illustration (f) of Indian Evidence Act gets triggered. A noting on the award reflected that it was received on 8.11.2010 in the office of Senior DCM—No cogent explanation why the copy received in the Office of GM & HQ not transmitted to Office of Sr. DCM. Held, from 8.11.2010 the petition was beyond period of 3 months and 30 days and the court has no power to condone the delay where the initial filing is beyond the prescribed period U/s 34 (3) of the Act.

SR Divisional Commercial Manager v. *Shriram Food & Fertilizer Industries* *1014*

— Section 7, 16(2) and 37—Code of Civil Procedure, 1908—Order 1 Rule 10—Respondent No. 1 filed suit against petitioner and respondent no. 2 to 5 for recovery challenging action of petitioner in encashing a bank guarantee issued by respondent no.1 to

petitioner in respect of certain purchase orders placed by petitioner on respondent no.1—Petitioner entered appearance in suit and raised a preliminary issue as to jurisdiction of Court to try suit in view of existence of arbitral clause/s in purchase orders—Respondent No. 1 sought to contend at that juncture that matter is not arbitrable inasmuch as it has raised issues of fraud against petitioner and respondents no.2 to 5—A joint application filed by parties for compromise whereunder parties agreed to refer controversy in suit to arbitration was allowed by Lok Adalat and respondent no.1 proceeded to file its claim before Sole Arbitration praying for substantially same relief as in suit, against petitioner and respondent no.2 to 5—Application of petitioner to delete respondent no.2 to 5 from array of parties in claim allowed by arbitrator—Order of arbitrator set aside by learned Additional District Judge in appeal of respondent no. 1—Order of learned Additional District Judge challenged before High Court—Plea taken, order of lok adalat cannot bind respondents no.2 to 5, given that they never appeared before Lok Adalat nor were they party to joint compromise application—Per contra plea taken, given that order of Lok Adalat referred all parties to arbitration, logical sequitur thereof is that respondents no.2 to 5 were also referred to arbitration—Held—Scope of a reference has to be decided on basis of terms of arbitration agreement—Respondents no.2 to 5 are not party to any agreement embodied in document with respondent no.1 agreeing to refer their disputes to arbitration—Nor is it case of respondent no.1 that there has been exchange of statements of claims and defence in which it had alleged existence of arbitration agreement and same has been accepted and not denied by respondent no.2 to 5 in their defence statement—It is also not case of respondent no.1 that any exchange of letters, telex, telegrams, or other means of telecommunication referred to provide a record of any arbitration agreement between parties—Respondents no.2 to 5 are not party to purchase orders—Respondent no.1 has not led any evidence or even pleadings to contend that respondents no.2 to 5 had consented before Lok Adalat that matter be referred to arbitration—Findings in impugned order that order of Lok Adalat is binding upon respondents no.2 to 5 is in excess of jurisdiction and patently illegal being contrary to records—Consequently, impugned order deserves to be and is accordingly set aside.

Bharat Heavy Electrical Ltd. v. *Ashutosh Engineering Industries & Ors.*..... *1128*

— National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED) decree holder—Kripa Overseas—M/s. Rital Impex Ltd.—Collectively referred as judgments debtors—involved in arbitral proceedings—NAFED preferred petition under Section 9 of the Arbitration and Conciliation Act—Resulted in an order of injunction restraining the sale of several properties, including the property in question (A-13, Block B-1, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi, 110044)—Subsequently, the three parties entered into a settlement dated 03.05.2007 Rs. 20 Cr. shall be paid within next 60 days upon raising loan by mortgaging the property in question - property in question was mortgaged with ICICI Bank against advance of Rs. 1.5 crores other properties subject matter of attachment, in Section 9 proceedings, were released from the attachment order of the Court on 14.12.2007—The Order dated 14.12.2007, did not refer to the property in question; it described another property—Subsequently corrected and previous order modified through an order of 18.412.2007—Property in question was allowed to be sold by the owner/judgment debtor—Sale deed was executed by one of the judgment debtors in favour of the objector total consideration of Rs. 3.5 crores payment of Rs. 1.5 crores made to ICICI Bank to clear the mortgage and recover the title deeds remainder to the owner/judgment debtor arbitration proceedings between NAFED, and the two judgment debtors award dated 24.09.2009 was made in terms of the settlement dated 03.05.2007 modified by the subsequent order dated 04.04.2008 holding, inter alia, that NAFED is (sic) held entitled to the outstanding amount by sale of the properties, mentioned in the deed of settlement dated 3.5.2007, by public auction—NAFED instituted execution proceedings property in question was attached—NAFED instituted execution proceedings property in question was attached appellant, preferred objections contending that he had clear title to the property sold without any precondition learned Single Judge concluded—Court in its order dated 14.12.2007 did not permit an unconditional sale by the respondents/judgment debtors condition respondents shall deposit Rs. 18 crores by the sale of two properties including the one in question, within 75 days of the sale to satisfy a part of the petitioner/decree holders claim—To acquire a clear and unencumbered title to the property in question, the objector/applicant should have ensured that the said condition was complied with by the respondents/judgment debtors sale deed in question is clearly in contravention of the order dated 14.12.2007 and is subject to Section 52 of the Transfer of Property

Act property in question was not released from the lot of properties under the cover of attachment sale consideration of Rs. 3.5 crores to the objector for the property gross undervaluation judicial notice of this fact in holding that such a transfer would also violate Section 53 of the Transfer of Property Act—Hence the present appeal. Held: Conjoint reading of the two orders 16.05.2007 and 18.12.2007 clarify that whereas the first order lifted or vacated the attachment made earlier in respect of two properties did not include the property in question the second order specifically vacated the attachment in respect of the property in question—NAFED never chose to apply for its modification or recall—No conditions or restrictions of the kind—Applicable to the sale of the title documents in respect of the property in question.

— Applicability of Section 52—A transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law recognizes the doctrine of lis pendens—Rule 102 of Order XXI of the Code take into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending unfair, inequitable or undeserved protection is afforded to a transferee pendente lite, a decree holder will never be able to realize the fruits of his decree—In the present case, NAFES'S claim was one for money in arbitral proceedings—Pending adjudication it sought for attachment of the judgment debtor's properties—But in no manner enlarge the scope of its claim into one encompassing any right to immovable property "directly" or "specifically—Absence of any restriction as to the marketability of the title, or direction by the Court, amounting to an encumbrance or charge order of 18.12.2007 operated to lift the attachment—This was done to facilitate sale direction in the previous order of 14.12.2007 that NAFED could retain the title deeds till it was paid Rs. 18 crores was meaningless and inapplicable because the title deeds were with ICICI Bank, which were later redeemed by the purchaser objector who was made aware of the mortgage in favour of that bank.

— Applicability of Section 53—In the present case, far from discharging the onus of proving want of good faith—NAFED merely relied on a textual interpretation of the orders dated 14.12.2007 and 18.12.2008 argued that the property was sold for inadequate consideration impugned order is based on "judicial notice" having been taken about the prices of land law casts a burden on the decree holder (NAFED), who has gotten its rights crystallized subsequently in the award—Till then, it had no claim

in respect of the suit property faced attachment for a brief period attachment was lifted, to enable its sale, in order to satisfy NAFED's claims sale ought to have proceeded in a particular manner, nothing prevented it from insisting upon imposition of conditions—Having failed to do so, its mere allegation of undervaluation of the property could not have resulted in the impugned finding.

Baldev Raj Jaggi v. *National Agricultural Cooperative Marketing Federation of India Ltd. & Ors.* *1022*

— Sec. 34—Condonation of delay in re-filing the petition U/s 34 of Arbitration & Conciliation Act, 1996—After deducting 30 days which is maximum cumulative period permissible for removing the objections, under Delhi High Court Rules., the net delay in re-filing of 138 days. Held the Court is empowered to condone the delay in re-filing, provided there is no neglect and sufficient causes shown to explain the delay. The sufficiency of cause would depend facts & circumstances of the case. Held further that the span of delay as well as bonafides/quality of the explanation tendered seeking condonation are both relevant factors, especially in the context of the Arbitration Act, 1996, where as per Sec. 34 (3) of the Act Sec. 5 of the Limitation Act 1963 would have no applicability. Held a large number of time spent in refiling would itself tend to demonstrate negligence, unless a credible explanation is set forth. The reason put forth in this case was that paper book was inadvertently placed in a file by the clerk of the counsel and was not traceable. The negligence and callousness on the part of FCI in prosecuting the matter is clear from the fact that FCI did not seek to know from its counsel about status of its petition—Petition for condonation of delay in re-filing dismissed.

Food Corporation of India v. *Pratap Rice & General Mills* *1064*

— Section 34—Arbitral Tribunal awarded Rs. 2,29,50,919/- on account of the fact that during execution of the work, certain items of the bill of quantities were omitted resulting in loss of overheads and profits to the respondent—The claim thus pertains to reimbursement sought on the account. Held, the contract between the parties required no interpretation as the plain language of the clauses signified intent of the parties—No compensation was to be paid so long as variations do not cross 15% of the contract price—Held, ignoring this intent of the parties and granting

compensation for losses at a certain percentage point of the value of omitted item, is contrary to the plain intent of the parties. Held that, interpretation of provisions of contracts is within the exclusive domain of the arbitrator. Unless the interpretation is implausible or absurd, the Courts will not interdict a decision of the arbitrator. In other words, if only one interpretation is possible and the arbitrary tribunal chooses to ignore the same, the Court is not obliged to accept the interpretation given by the arbitral tribunal. The arbitral tribunal is not to ignore the law or misapply the law. The arbitrator cannot ignore the specific terms of the contract. Scope of interpretation arises only if there is ambiguity in the terms of the contract. In absence of such a situation, there is no scope of interpretation. However, the route of interpretation is not available, when words are plain and unambiguous.

— Impugned award set aside partially.

National Highways Authority of India v. *PCL Suncon (JV)* *1138*

— Section 34—Cost of Rs. 6 Lakhs awarded by the Arbitrator which included expenses incurred towards fare, lodging, food and local travel—Proprietor of respondent no. 1 visited Delhi from Darjeeling on various occasions during arbitral sittings in the matter—Respondent no. 1 did not file any documents, such as, air or railway tickets, verifiable bills and invoices qua expenses incurred on lodging, food and local travel etc. Held in absence of such verifiable proof, one has to adopt measure which would appear to be reasonable, based on the arbitrator's own experience. Held—Amount of cost granted by arbitrator cannot be said to be excessive, by taking recourse to his experience, by Ld. Arbitrator.

Xerox India Limited v. *Computers Unlimited and Ors.* *1166*

— Section 28(3), 33, 34, 37—Appellant challenged order of learned Single judge dismissing OMP of appellant under Section 34 of Act as not disclosing any ground warranting interference with award of Arbitral Tribunal—Plea taken, award was in excess of contract that came into existence upon award of tender by appellant to respondent for four laning of part of National Highway 31 in State of West Bengal—Award fell into error in holding that clause 507.2.2. of MoRTH specifications permitted using aggregate based on shingles—Arbitral tribunal had misapplied contra proferentem

principle in facts of case—Per contra plea taken, interpretation placed on clause 507.2.2. of MoRTH specifications by arbitral tribunal is not only a plausible interpretation, it is only interpretation—Limited jurisdiction under Section 34 and Section 37 of Act does not permit Court of decide present appeal—Held—Arbitral tribunal has considered terms of MoRTH specifications and also considered fact that provisions of 507.2.2 of MoRTH specifications to specify word shingle while clause 1004 read with clause 1007 thereof does not, and consequently held that same indicates that shingle being retained in clause 507.2.2 is not erratum—This is a plausible interpretation of contract, it is apparent that it follows principle enunciated in maxim expression uninus est exclusion alterius (Expression of one is exclusion of other) a well established rule of interpretation qua deeds and other instruments—So long as interpretation placed by arbitral tribunal upon a contract is plausible, this Court shall not interfere with same—It is a well established principle of construction of contract that if terms employed by one party are unclear, interpretation against that party will be preferred—Given that no argument as to error in law has been pursued, interpretation placed on contract is a matter within jurisdiction of arbitral tribunal, and thus, even if error exists, this is error of fact within jurisdiction, which cannot be re-appreciated by Court under sections 34 or 37 of Act—This Court finds no reasons to interfere with impugned order.

National Highways Authority of India v. *Lanco Infratech Ltd.* *1187*

ARMS ACT, 1959—A1 and A2 convicted for offence u/S 392/34 IPC—In addition A1 convicted u/S 397 IPC.

— Held, It is well settled that substantive evidence of the witness is his evidence identification in the court—Complainant who had direct confrontation with the assailants for sufficient duration had ample opportunity to observe and grasp the broad features of the culprits—No ulterior motive assigned to the complainant for falsely identifying the accused—No conflict between ocular and medical evidence—recovery of robbed articles from the possession of assailants is a vital incriminating circumstance to connect them with the crime—Police will plant substantial amount of Rs. 12,000/- to implicate falsely is unbelievable—Minor contradiction and discrepancies not material when presence of complainant at the

spot was natural and probable and he was also injured.

Zarar Khan @ Mulla v. *State (Govt. of NCT of Delhi)* *960*

CCS (CCA) RULES, 1965—Sub-Rule (1) of Rule 10 & Rule 10 (6) and (7)—Respondents were placed under suspension vide orders dated 17th and 19th July, 2012 in terms of sub-rule (1) of Rule 10 of the CCS (CCA) Rules, 1965—Suspension was reviewed by the Review Committee extending for another period of three months—Respondents premised their application before the Tribunal on the plea that the review of suspension was due in accordance with law on 17th October, 2012—As such, the suspension not having been reviewed within the time prescribed under Rule 10 (6) and (7) of the CCS (CCA) Rules, 1965, the continued suspension beyond 90 days after the issuance of the order dated 17th July, 2012 and 19th July, 2012 was null and void—This contention of the respondents was accepted by the Tribunal placing reliance upon sub-rule (6) and (7) of Rule 10 of CCS (CCA) Rules, 1965—The Tribunal has also placed reliance on a pronouncement of Supreme Court reported in (2010) 2 SSC 222 entitled Union of India and others vs. Dipak Mali wherein it has been held that by operation of Rule 10 (6), the suspension order would not survive after a period of 90 days unless it stood extended after review—Tribunal directed that the orders of suspension in these cases would be deemed to have been revoked from the expiry of the prescribed period i.e. 17th October, 2012 and 19th October, 2012—The Tribunal directed that the applicants shall be treated on duty on the aforesaid dates with all consequential benefits, including arrears of pay and allowances. The respondents were directed to pass an order in terms thereof within a period of 15 days from the date of receipt of coy of that order—Hence the present petition. Held In compliance of the order of the Tribunal, the petitioner has passed an order dated 21st November, 2013 revoking the suspension of three persons, namely. Smt. Kamal Sharma, Smt. Premlata Gianey and Sh. Dinesh K. Tokas with effect from 17th October, 2012 and has also granted all consequential benefits including arrears of pay and allowances—No reason is forthcoming for why the present respondents are not entitled to the same relief—Petitioners have issued a fresh order of suspension dated 1st August, 2013 against the present respondents which stands challenged before the Tribunal—Given the fact that the order dated 1st August, 2013 is subjudice before

the Tribunal, so far as grant of consequential benefits to the respondents is concerned, for the time being, the same has to be restricted up to 1st August, 2013—Parties shall abide by the adjudication by the Tribunal so far as the petitioners are bound to comply with the order dated 6th November, 2013—Appropriate orders to be passed within 15 days—Writ petition and the stay application dismissed.

National Council of Education Research and Training v. *Parash Ram & Ors.* *1496*

CCS (PENSION) RULES, 1972—Rule 48-A—Petitioner challenged order of CAT directing it to consider applicant's letter dated 31.08.2007 requesting for voluntary retirement as per provisions of Rule 48-A and also to release retiral benefits—Plea taken, letter dated 31.08.2007 is unambiguous in its language and meaning—Letter firstly requests for a voluntary retirement, failing which, it offers resignation with immediate effect—Respondent/applicant did not wait even for a day to receive any response from Government and proceeded to join UN Mission—Aforesaid letter could not be treated as a request under Rule 48-A (1) for being considered for voluntary retirement—Per contra plea taken, under Rule 48-A (3-A) (b) it was always open for Government to curtail period of three months on merits and on appointing authority being satisfied that period of notice would not cause any administrative inconvenience, period could be relaxed (on condition that Government servant would not apply for commutation of a part of his pension before expiry of notice period)—Respondent/applicant had categorically offered to Government that three months, salary be recovered in lieu of three months, mandatory notice for voluntary retirement from leave due to him—Respondent/applicant had duly complied with requirement for Rule 48-A but appellant had failed to act diligently, fairly and responsibly—Held—Requirement under Rule 48-A (1) is that Government servant, upon being eligible for voluntary retirement, must first give a notice in writing under to appointing authority, of not less than three months—It is only after this specific request is made, that applicant could invoke benefit of sub-rule (3-A) (a) whereby "government servant referred to in Sub-rule (1) may make a request in writing to appointing authority to accept notice of voluntary retirement of less than three months giving reasons therefor"—So it is only upon application being made three months prior to intended date of retirement that request for lessening or

waiving period of waiting for three months could be made—When request is made in this manner, Appointing Authority could exercise discretion, based upon exigencies of case, for relaxation of three months period under Rule 48-A (3-A) (b)—In present case, just exact opposite was done, i.e., application for voluntary retirement was made to be with immediate effect and three months, notice period was sought to be adjusted against pay for subsequent three months; respondent/applicant had misconstrued relevant Rule—Insofar as respondent/applicant had not made any request in writing three months earlier, and had instead notified government to accept his resignation with immediate effect from 31.08.2007, aforesaid provision for relaxation of three months period would not be available to him—In circumstances, government was well within its rights to accept resignation as was done in instant case.

Union of India v. *Deepak Sharma*..... *824*

CODE OF CIVIL PROCEDURE, 1908—Order 9 Rule 13—Appeal against dismissal of application u/o 9 r 13 for setting aside ex parte decree. Held—An ex parte decree can be set aside when a Defendant satisfies the Court that the summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called for hearing. Appellant had admitted the service of summons. Appellant was aware of the pendency for the suit and had sufficient time to appear and answer the claim of respondent no. 1. Only reason given by Appellant for not appearing in Court is the alleged assurance given by Respondent no. 2 that the Appellant would be duly represented in the matter. This reason cannot constitute a sufficient cause for non-appearance of Appellant. Appellant has been willfully negligent, recourse to Or. 9 R. 13 not available. Appeal Dismissed.

Sudarshan Sareen v. *National Small Industries Corporation Ltd. and Anr.* *933*

— Order VII Rule 11—'Associateship' agreement dated 02.12.2011—STC and Millennium import of continuous cast copper rods—Millennium importing such rods from two Synergic companies (Synergic, Singapore and Synergic, Malaysia)—Letter of Credit (LC) opened by STC through Allahabad Bank payable to the two Synergic companies through foreign bank plaintiffs, Millennium and STC contended before the learned Single Judge that the two Synergic companies had defrauded STC documents concerning shipment of the products

were false and fabricated learned Single Judge rejected plaint on two grounds first, LC constitutes an independent transaction, obligations are not contingent on the intricacies of the underlying contract rather, on the presentation of the necessary documents to the bank in question second limited exception in interfering with LC is that of fraud played upon by the seller on the purchaser and the paying bank was has notice of such fraud—Comprised solely of allegations of fraud learned single judge rejected the suit under Order VII Rule 11 CPC—Hence this appeal. Held: Payment under LC injuncted first, there is a possibility of irretrievable damage second, were there is fraud in the underlying transaction which is brought to the notice of the bank contract of the bank guarantee or the LC is independent of the main contract between the seller and the buyer irrevocable bank guarantee or LC the buyer cannot obtain injunction against the banker on the ground that there was a breach of the contract by the seller—Documents constitute complying presentation of LC is solely that of the issuing bank (Allahabad Bank) bank does so determine, the non-acceptance by the buyer (STC/Millennium) is not determinative issuing bank accepted the documents considerable lapse of time, informed the foreign bank about the discrepancy which could not be done in view of Article 16 UCP notice to be given no later than the close of the fifth banking day fraud exception to honouring an LC foreign bank must have notice or knowledge of such fraud before making payment evidence must be clear both as to the fact of fraud and as to the bank's knowledge plaint in this case disclosed sufficient pleadings as to the alleged fraud played upon STC/Millennium by the two Synergic companies only reference to the foreign bank's knowledge of such fraud plaint refers casually and vaguely, without referring to any details, to the question of notice of fraud on the foreign bank, which forms a crucial part of the cause of action absence of any particulars pleaded, or any evidence to support, the claim that the foreign bank colluded with the Synergic companies, or even had notice of such fraud, the claim as disclosed in the plaint is bound to fail, as the cause of action pleaded does not entitle STC to the remedy it prays for.

State Trading Corporation of India Ltd. v. *Millennium Wires (P) Ltd. & Ors.* *1045*

— Section 151, Order VII Rule 14 (3) and Order VIII Rule 1A(3)—Applications filed by petitioner for placing documents on record and for leading secondary evidence qua photocopies of documents

so filed dismissed by Trial Court—Order challenged before High Court—Plea taken, Trial Court has failed to exercise jurisdiction vested in it by not granting leave to file documents—Petitioner was always diligent in prosecuting case and in any event, respondent would not be prejudicially affected if documents were placed on record—Documents were necessary for effective adjudication of dispute before Trial Court and hence they ought to be allowed to be exhibited—Held—Appropriate time for filing a document in support of a defendant's defence is when written statement is filed—A document that is not produced along with written statement or entered in list filed with written statement ought not to be received in evidence without leave of Court—Injunction of law under Order VIII Rule 1A(1) is not one to be lightly ignored, a fortiori and especially in matters such as present case, where excessive delay of over 11 years, has been caused by defendant in eventually approaching Court under said provision—For exercise of discretion by Court under Order VIII Rule 1A(3) of Code in Favour of a defendant, defendant would have to satisfy Court to qualifying criteria (i) that documents were earlier not within knowledge of party; or (ii) that documents could not be produced despite exercise of diligence on part of defendant —Petitioner has failed to provide sufficient and cogent reasons for allowing documents to be filed—It is not case of petitioner that documents were not within his power nor has petitioner made out any case of exercise of diligence, despite which documents could not be filed—To the contrary, impugned order observes lack of diligence on part of petitioner, as documents had not been filed for a period of eleven years from date of filing of written statement and not even adverted to in evidence filed later—Only explanation proffered by petitioner is inadvertence which cannot be regarded as a ground for exercise of discretion under Order VIII Rule 1A(3)—Impugned order does not suffer from material irregularity warranting interference of this Court in its revisionary jurisdiction.

Shri Ramesh Kumar & Anr. v. *Sangeeta Khanna 1106*

— O. VII Rule 11(a), (b) & (c). Held, while deciding an application U/O.7 R. 11 CPC, Court is not required to take into consideration the defence set up by the defendant in his written statement—The question whether plaint discloses any cause of action, is to be decided from the averments of plaint itself. Strength and weakness of the case of plaintiff cannot be weighed for deciding such application. Assertions in the plaint must be assumed to be

correct and Court cannot take into consideration whether the plaintiff may ultimately succeed or not.

Sureshta Malhotra v. *Urmila Rani Chadha & Ors. 1151*

— O.VII Rule 11(a), (b) & (c). Held, While deciding an application U/o.7 R. 11 CPC, Court is not required to take into consideration the defence set up by the defendant in his written statement. The question whether plaint discloses any cause of action, is to be decided from the averments of plaint itself. Strength and weakness of the case of plaintiff cannot be weighed for deciding such application. Assertions in the plaint must be assumed to be correct and Court cannot take into consideration whether the plaintiff may ultimately succeed or not.

Abhishek Vohra v. *Sureshta Malhotra & Ors. 1159*

— Order 1 R. 10—Plaintiff filed a suit for specific performance to enforce an agreement to sell entered into with the defendant—Defendant informing that the suit property was sold before filing of the suit to proposed defendant—Application U/o. 1 R.10 CPC filed by the plaintiff to impaled buyer as proposed defendant. Held, since property was sold prior to filing of the suit the doctrine of the Lis - pendent would not be applicable.

— Also held, that the claim of proposed defendant that Section 19(b) of Specific Relief Act would be applicable is a question of trial as it's a question of evidence whether proposed defendant had knowledge of the previous agreement or not and also whether he purchased the property benefice or mollified. The proposed defendant who is a subsequent purchaser and who is not claiming adverse title to the seller, therefore, is a necessary party irrespective or the fact whether he purchased the property with or without notice of the prior agreement, as he would be affected by the final outcome of the case between plaintiff and defendant.

Dharampal Satyapal Ltd. v. *Sanmati Trading and Investment Ltd. and Ors. 1204*

— Section 107, 151 r/w Order 41 Rule 27—Additional documents—Brief Facts—Respondents had filed Photocopies of twenty five documents under an index dated 22.05.2002, which was subsequent to their filing the written statement in the trial court—The said list of documents includes copies of the lease deeds dated 11.08.1953 and 11.02.1954 executed by the Delhi improvement

Trust in respect of the subject in favour of the respondents No.1 and 2, who were then minors, under the Guardianship of their father, Shri Ram Singh—The said documents also include copies of two sale deeds, both dated 06.09.1940, executed by the legal heirs of Shri Budhu, the original lessee of the subject Premises, in favour of the respondents/defendants No.1 and 2, that have been mentioned at Sr. No. 1 and 10 of the documents—Respondents/defendants No.1 & 2 states that the aforesaid documents are very material for deciding the suit instituted by the appellants/plaintiffs praying inter alia for a decree of partition of the subject plots—However, the counsel who was conducting the case committed a blunder by failing to place on record the original documents or producing the same at the time of admission and denial of documents, so that they could have been exhibited—As a result, the trial court did not have an opportunity to examine the aforesaid documents, the defendants having failed to exhibit them—Respondents state that they ought not to be made to suffer for the folly of their counsel and interest of justice demands that the said documents be permitted to be produced by way of additional evidence and be taken into consideration—In the accompanying appeal, the appellants/plaintiffs have assailed the judgment dated 25.09.2009 passed by the trial court dismissing their suit for partition and permanent injunction in respect of the subject properties—Now the respondents/defendants have filed the present application seeking leave to produce the original documents, photocopies whereof were already placed on record by them before the trial court, and grant of permission to have the admission and denial thereof conducted so that they can be exhibited in accordance with law and a fresh decision taken by the trial court. Held: Section 107 of the CPC empowers the appellate court "to take additional evidence or to require such evidence to be taken", "subject to such conditions and limitation as may be prescribed"—Rule 27 of Order 41 of the CPC prescribes the conditions and limitations placed on this discretion—Rules starts by laying down that the parties to an appeal shall not be entitled to produce additional whether oral or documentary, in the appellate court—It then proceeds to carve out two circumstances where the appellate court may allow additional evidence to be produced—The first circumstance is where the court appealed from has refused to admit such evidence that ought to have been admitted and the second circumstance is where the appellate court requires such evidence either to enable it to pronounce judgment or for any other substantial cause—As observed by the Supreme Court

in the case of Wedi Vs. Amilal & Ors. reported as MANU/0729/2002MANU/SC/0729/2002: 2004 (1) SCALE 82, "invocation of clause (b) does not depend upon the vigilance or negligence of the parties for it is not meant for them—It is for the appellant to resort to it when on a consideration of material on record, it feels that admission of additional evidence is necessary to pronounce a satisfactory judgment in the case. "In the present case, for the issue of title of the subject properties to be established satisfactorily, it was necessary that the ownership documents came on record—For purposes of dispelling the obscurity on the issue of title, which is of paramount consideration in a suit of partition, interest of justice demands that the documents of title relating to the subject premises and in the power and possession of the respondents/defendants be looked into to arrive at a just and correct decision—Accordingly, the originals of the documents relating to the title of the subject premises, photocopies whereof were filed by the respondents/defendants in the trial court under index 22.5.2002 are permitted to be taken on record as additional evidence—However, considering the fact that it is on account of failure on the part of the respondents/defendants to file the original title documents that had an important bearing on the case and were material for the consideration of the trial court, for purposes of satisfactorily adjudication the present suit, it is deemed appropriate to allow this application subject to payment of Rs. 50,000/- as casts to the other side within four weeks—Resultantly, the appeal is allowed and the impugned judgment is set aside.

Jai Singh & Anr. v. *Man Singh & Ors.* *1237*

— S. 9—Suit—Suit for possession—Order XII Rule 6—Decree on admission—Admission unequivocal—Held—Court cannot base their decision to a decree on the basis of particular pleading or admission—rather overall effect of pleadings and documents of the concerned parties are to be weighed.

Preeti Satija v. *Raj Kumari and Anr.* *1246*

— S. 9—Suit—Suit for partition possession—Hindu Joint Family Property—Co-parcenerary property—Hindu Succession Act—Amendment of S. 6—Appellants were three sisters—filed suit for partition against two brothers and two sisters—Third brother Sudharshan Lal died on 01.02.1978—Father Bakshi Ram died on 10.02.1960—Mother Smt. Chanan Devi died 03.08.1978—Suit dismissed by learned Single Judge—Appellant contended before

the partition of the country the family was a Hindu Undivided Family (HUF) and father ran various businesses in the name of Bakshi Ram & Sons in a part of Punjab now in Pakistan—Post partition—Bakshi Ram allotted various properties in lieu of those left properties numbering 08 and various businesses run by using the funds of HUF—Respondent contended—The various properties self acquired properties and not co-parcernery properties—Secondly the properties already partitioned post the death of Bakshi Ram—Thirdly since partition had already taken place hence the 2005 Amendments of Section 6 of Hindu Succession Act not operation — lastly the properties governed by Succession Rules under Delhi Land Reforms Act and subject matter beyond the jurisdiction of the Court — Held In concurrence with Ld. Single judge that various properties were Hindu Joint Family Property — further held — deemed partition cannot be said to have taken place merely on the death of family member — instead — the operation of S. 6 Amendment would not depend on date of institution of the suit or at the time of intermediate order—But on whether the partition actually took place either through by registered deed of partition or by decree of the court before or after 2005 Amendment—In the present case the partition was yet to take place—Further Held—2005—Amendment to the Hindu Succession Act would be operative and finally held subject matter of Land Reform Act — rural—agriculture properties rather than urban land—The case in present appeal—No limitation on the jurisdiction of the court—Finding and judgment of learned single judge set aside—Suit remitted for further proceedings to carry out partition of the property in accordance with the law—Appeal allowed.

Swaran Lata and Ors. v. *Shri Kulbhushan Lal and Ors.* *1362*

— Order 37—Plaintiff filed suit U/o 37 of Code praying for recovery of amount with pendente lite and future interest on basis of invoices issued by defendant company—Defendant failed to file application seeking leave to defend—Plaintiff prayed for decree of suit. Held:- In the absence of any application for leave to defend, as per Rule 3(5) of Order 37, the suit is to be decreed.

PP Jewellers Pvt. Ltd. v. *Modern New Kapoor Jewellers Pvt. Ltd.* *1425*

— Order 37 Rule 3 (5)—Leave defend—Defendant assailing Petitioners claim on grounds of lack of jurisdiction and absence of written contract or acknowledged liability—Question as to

jurisdiction—In purview of the Loan Agreement stipulating for execution by defendant at Delhi—Loan disbursed from Delhi, promissory note were signed and payable at Delhi—Held—Part cause of action has arisen in Delhi, thereby no merit in defendants contention qua lack of jurisdiction. Leave to Defend—Defendant urged that the statement of accounts sought to be relied upon by the Plaintiff is not signed by the Defendant and that the Promissory not does not contain the liquidated debt due—Without expressing any opinion on the merits of the matter Held—It is triable issue and granted conditional leave to defend.

GE Capital Services India v. *Prasanta Ghose & Anr. B+* *1534*

— Order 37—Suit under Order 37 of CPC for recovery of Rs. 60,36,522/- pendente lite & future interest @ 18% p.a.—Defendant served by publication under order 5 rule 20 of CPC—Plaintiff a partnership firm—Defendant approached at its Delhi office for the supply of Palm Stearine Oil—Contract between the parties for final price & other terms-oil supplied—Cheques received—Owing to the financial crunch the defendant's company has been facing, the cheques not presented on the request of Defendant—Assurance of defendant that cheques could be presented for payment—Cheques dishonoured despite assurances. Held—Invoice/bill not covered within definition of written contract—Defendant failed to enter appearance in the matter despite substituted service also failed to make payments—Suit decreed in favor or plaintiff.

Harakaran Dass Deep Chand v. *Viren Agrotech Pvt. Ltd.* *1545*

— Order 39 Rule 1 & 2 and Order 39 Rule 4—Plaintiff suit for injunction against three defendants i.e. his two brothers and one sister and his maternal uncle was impleaded as defendant no. 4—According to Plaintiff, he along with his minor daughter and deceased mother was in possession of ground floor in suit property which was owned by his mother-Mother executed will which was registered and defendant no. 4 was named as Executor of will—As per Will, ground floor of suit property was bequeathed to him first floor to defendant no. 1, second floor to defendant no. 2, third floor, if and when constructed, to defendant no. 3 (sister) etc.—Plaintiff also moved application seeking interim injunction which was contested by defendant no. 1 though supported by

defendant nos. 2 to 4. Held:- The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining.

Aman Nath v. *Atul Nath and Ors.* *1565*

COMPANIES ACT, 1956—Appeal U/s 10 F of the impugning order of CLB dismissing application for rectification of register of members—Petition filed after 16 years from when the name of appellant was omitted from the register.

Dinesh Sud v. *Stitchwell Qualitex Pvt. Ltd. & Ors.* *831*

CONSTITUTION OF INDIA, 1950—Article 14—Respondent employees has filed writ petition and had sought entitlement to pension as was available to other employees of Visa Bharati University who had completed ten years of continuous service—Learned Single Judge quashed notification of respondent University that had stopped pension by its order to AERC staff of University—Impugned order challenged before Division Bench in appeal—Plea taken, Allahabad High Court had dismissed a claim for a similar relief which was sought against Allahabad University by members of AERC attached to that University—Held—Learned Single Judge distinguished facts of cited was with present case and found that ruling to be inapplicable to present case—Language employed in Memorandum of Understanding is clear as daylight and requires no interpretation with respect to its intent and import—Objective was clearly that employees of AERC attached to respondent University should be merged with and treated at par with other employees of said University and all benefits would be available to these newly merged employees entering into a larger pool of employees as it were—A perusal of language used in MOU would clearly set out intent of Union of India to first merge and integrate employees of AERC and put them at par with those of University—Having done so on its own, appellants would be estopped from subsequently disowning them or denying them pensionary benefits that were otherwise guaranteed under MOU—Although said employees were not party to MOU, benefits having been granted to them w.e.f. 1995 cannot be unilaterally withdrawn from or

denied to them thirteen years later in 2008—Responsibility towards post retirement benefits with respect to employees of AERC was settled between Government and respondent University by transferring same to latter on assurance that former would give grants-in-aid and adequate annual budgetary allocation to meet responsibility and relevant contingencies—Employees were never consulted for a part of shift in such responsibility—They were content in fact that their terms of employment had not been altered to their detriment and had indeed been improved—This cannot be altered unilaterally now, to their detriment—Withdrawing benefits as per impugned order would be to leave them in lurch and to virtually disown them by subterfuge—This act would be unfair and impermissible and would warrant to be quashed.

Union of India & Ors. v. *Radharanjan Pattanaik & Ors.* *818*

— Petitioners preferred writ petitions aggrieved by non-payment of Bhutan Compensatory Allowance (BCA)—It was alleged by them, they were compensated under DANTAK in Bhutan but were not paid as per rules and regulations—As per respondent, petitioners did not fulfill eligibility criteria for posting to BCA, thus, not entitled to BCA—Petitioners received without any objection payment of Dearness Allowance and House Rent Allowance during alleged periods .

— Held:- Petitioners not entitled to BCA as neither posted to 504 SS & TC under BCA criteria nor physically served in the area where BCA was applicable for their entire posting—Moreover, no complaint or representation was made by them promptly and they also received amounts of Dearness Allowance and House Rent Allowance.

Harish Chander v. *Union of India and Ors.* *845*

— Article 14, 19 (1) (g) and 21—Navy Act, 1957—Regulation 159, 161, 163, 169—petitioner by way of writ petition challenged order dated 01/11/1990 in terms of Regulation 156 of Act convening court martial of petition on 27 charges—He also challenged order dated 15/03/1991 of Court Martial finding him guilty of commission of 8 charges and order of sentence awarding him sentence of 24 months RI, dismissal from service and fine of Rs. 1,000/- or 6 months imprisonment in default of payment of fine—Petitioner further challenged order dated 27/08/1991 passed by

Chief of Naval for maintaining conviction of petitioner on all charges except on Charge 20 and reducing sentence of imprisonment to period already undergone by him—Also, order dated 08/12/2010 and 23/12/2010 passed by Armed Forces Tribunal was challenged by petitioner whereby findings of guilty of Court Martial on all charges other than charge no. 7 was set aside—According to petitioner, he had illustrious, unblemished career of over 20 years of service with Indian Navy and was committed soldier till he was wrongly implicated in the case—It was urged on behalf of petitioner that court martial was convened without application of mind on the material placed before Convening Authority as documents were so voluminous which could not have been considered on the same day by Authority to pass order to convene court martial.

Avtar Singh v. *Union of India and Ors.* *850*

— Article 14, 19 (1) (g) and 21—Navy Act, 1957—Regulation 159, 161, 163, 169—Petitioner urged summary of evidence along with charge sheet placed before Convening Authority did not contain iota of evidence on charge no. 7 for which petitioner was found guilty by Armed Forces Tribunal. Held:- Convening Authority is required to satisfy himself not only that the charges are properly framed but also that the evidence if uncontradicted or unexplained would probably suffice to ensure a ' conviction'.

Avtar Singh v. *Union of India and Ors.* *850*

— Article 226, General Conditions of the CCS (Leave Rules), Rule 7 of Chapter 2, 25: Petitioner has filed writ aggrieved by order rejecting Petitioner's candidature for appointment as SI in the Limited Departmental Competitive Examination (LDCE) and older. Further aggrieved by order whereby sanctioned casual leave was cancelled and the period was regularized as earned leave. Petitioner applied for 10 days of casual leave in April, 2010 and was supposed to report back on 15.04.2010—Ongoing Kumbh Mela caused disruption in transport—Causing Petitioner to report back to work one day late. The said explanation was acception as bonafide. Respondents passed an order on 03.05.2010 converting the Petitioner's casual leave to half pay leave without salary and allowances, and that the same would be treated as a break in service rendering the Petitioner ineligible for the LDCE. Held: Respondents failed to communicate order dated 03.05.2010—Burden of disclosing the same lay on the respondents—In the present case

by adjusting the absence of the petitioner against leave admissible, respondents have treated the petitioner's leave as bonafide—No order has been passed treating the period as a break in service, thus the same cannot be so treated—Further, scheme of the examination does not stipulate 4 continuous years of service preceding the LDCE—Order converting petitioner's casual leave to earned leave is quashed and the said period shall be treated as casual leave—Respondents directed to consider petitioner's candidature for appointment as Sub-Inspector—Petitioner entitled to notional seniority, but not backwages or arrears in salary.

Dhiraj Bhatt v. *Union of India and Ors.* *921*

— Article 227—Indian Evidence Act, 1872—Section 63—Code of Civil Procedure, 1908—Section 151, Order VII Rule 14 (3) and Order VIII Rule 1A(3)—Applications filed by petitioner for placing documents on record and for leading secondary evidence qua photocopies of documents so filed dismissed by Trial Court—Order challenged before High Court—Plea taken, Trial Court has failed to exercise jurisdiction vested in it by not granting leave to file documents—Petitioner was always diligent in prosecuting case and in any event, respondent would not be prejudicially affected if documents were placed on record—Documents were necessary for effective adjudication of dispute before Trial Court and hence they ought to be allowed to be exhibited—Held—Appropriate time for filing a document in support of a defendant's defence is when written statement is filed—A document that is not produced along with written statement or entered in list filed with written statement ought not to be received in evidence without leave of Court—Injunction of law under Order VIII Rule 1A(1) is not one to be lightly ignored, a fortiori and especially in matters such as present case, where excessive delay of over 11 years, has been caused by defendant in eventually approaching Court under said provision—For exercise of discretion by Court under Order VIII Rule 1A(3) of Code in Favour of a defendant, defendant would have to satisfy Court to qualifying criteria (i) that documents were earlier not within knowledge of party; or (ii) that documents could not be produced despite exercise of diligence on part of defendant —Petitioner has failed to provide sufficient and cogent reasons for allowing documents to be filed—It is not case of petitioner that documents were not within his power nor has petitioner made out any case of exercise of diligence, despite which documents could not be filed—To the contrary, impugned order

observes lack of diligence on part of petitioner, as documents had not been filed for a period of eleven years from date of filing of written statement and not even adverted to in evidence filed later—Only explanation proffered by petitioner is inadvertence which cannot be regarded as a ground for exercise of discretion under Order VIII Rule 1A(3)—Impugned order does not suffer from material irregularity warranting interference of this Court in its revisionary jurisdiction.

Shri Ramesh Kumar & Anr. v. *Sangeeta Khanna 1106*

— Article 226— Writ Petition—Delhi Kerosene Oil (Export & Price) Order, 1962—Clause 6—Cancellation of licence—Conviction-transfer of licence in the name of petitioner upon the death of father—Petitioner firm was issued a licence for distribution of kerosene oil in the year 1977-on 28.04.1995 inspection staff of respondent found shortage of 1233 litres for the period from 01.04.1995 to 28.04.1995 an FIR registered deceased father of the petitioner proprietor of the firm at that time on 07.06.1995 an Assistant Commissioner (East) suspended the licence on the basis of report on 16.08.1995 Assistant Commissioner (Judicial) after considering the facts and circumstances-material placed on record revoked the order of suspension imposed the penalty of forfeiture of security amount-ground-actual shortage 68 litres within permissible limit not on higher side—Meanwhile proceedings initiated upon filing of FIR—Additional Sessions Judge vide judgment dated 03.04.2001 convicted the father of the present proprietor and sentenced him to undergo imprisonment till rising of the Court and imposed fine of Rs. 2000/- after conviction the father continue to run the kerosene depot till his death on 24.02.2006-in June, 2006 present proprietor applied for change of the name of the proprietor in the licence due to death of his father—Assistant Commissioner vide order dated 13.06.2006 allowed the change of the name—directed to deposit security amount on 17.08.2007 show cause notice issued as to why authorization may not be cancelled under Clause 6 (3) of Delhi Kerosene Oil (Export & Price) Control Order, 1962—Reply filed—Respondent dissatisfied with reply cancelled the licence vide order dated 01.09.2007—Appeal preferred—dismissed preferred writ petition—Contended act of respondent cancelling the licence after long period-unjustified—Respondent allowed change of proprietor name in 2006—No action survives against present petitioner same stale act of previous proprietor condoned—Show

cause notice issued after gap of 6 years licence renewed from time to time—Penalty of forfeiture of security amount already imposed—Punishment of the same offence cannot be imposed again on the present proprietor-per contra- the respondent well within their right to take action in terms of Control Order—Delay procedural due to transfer of Assistant Commissioner—Held—Statutory authority required to act reasonable, fairly and expeditiously no reasonable or plausible explanation for gross delay—Respondent waived their right to take action—Respondent agreed to transfer the licence in the name of present proprietor condoned the act of previous licencee—Licence of present proprietor cannot be canceled for the act of previous proprietor—Cancellation quashed—Writ petition allowed.

Madan Lal Pawan Kumar v. *Govt. of NCT of Delhi & Ors. 1106*

— Article 227—Arbitration and Conciliation Act, 1996—Section 7, 16(2) and 37—Code of Civil Procedure, 1908—Order 1 Rule 10—Respondent No. 1 filed suit against petitioner and respondent no. 2 to 5 for recovery challenging action of petitioner in encashing a bank guarantee issued by respondent no.1 to petitioner in respect of certain purchase orders placed by petitioner on respondent no.1—Petitioner entered appearance in suit and raised a preliminary issue as to jurisdiction of Court to try suit in view of existence of arbitral clause/s in purchase orders—Respondent No. 1 sought to contend at that juncture that matter is not arbitrable inasmuch as it has raised issues of fraud against petitioner and respondents no.2 to 5—A joint application filed by parties for compromise whereunder parties agreed to refer controversy in suit to arbitration was allowed by Lok Adalat and respondent no.1 proceeded to file its claim before Sole Arbitration praying for substantially same relief as in suit, against petitioner and respondent no.2 to 5—Application of petitioner to delete respondent no.2 to 5 from array of parties in claim allowed by arbitrator—Order of arbitrator set aside by learned Additional District Judge in appeal of respondent no. 1—Order of learned Additional District Judge challenged before High Court—Plea taken, order of lok adalat cannot bind respondents no.2 to 5, given that they never appeared before Lok Adalat nor were they party to joint compromise application—Per contra plea taken, given that order of Lok Adalat referred all parties to arbitration, logical sequitur thereof is that respondents no.2 to 5 were also referred to arbitration—Held—Scope of a reference has to be decided on basis of terms of arbitration agreement—

Respondents no.2 to 5 are not party to any agreement embodied in document with respondent no.1 agreeing to refer their disputes to arbitration—Nor is it case of respondent no.1 that there has been exchange of statements of claims and defence in which it had alleged existence of arbitration agreement and same has been accepted and not denied by respondent no.2 to 5 in their defence statement—It is also not case of respondent no.1 that any exchange of letters, telex, telegrams, or other means of telecommunication referred to provide a record of any arbitration agreement between parties—Respondents no.2 to 5 are not party to purchase orders—Respondent no.1 has not led any evidence or even pleadings to contend that respondents no.2 to 5 had consented before Lok Adalat that matter be referred to arbitration—Findings in impugned order that order of Lok Adalat is binding upon respondents no.2 to 5 is in excess of jurisdiction and patently illegal being contrary to records—Consequently, impugned order deserves to be and is accordingly set aside.

Bharat Heavy Electrical Ltd. v. *Ashutosh Engineering Industries & Ors.*..... *1128*

— Article 226—Writ Petition—Delhi Kerosene Oil (Export & Price) Control Order, 1962 (Control Order, 1962 in short)—Clause 6—Cancellation of licence —Conviction—petitioner firm issued licence for distribution of kerosene oil in 1981—Proprietor Sh. Kanahya Lal died on 02.10.2003—on his death, wife Smt. Leela Kumari, Present Proprietor carried on affairs of oil depot after taking permission of the respondent—necessary amendment carried out in official record—licence transferred in the name of present proprietor vide order dated 30.12.2003—licence renewed from time to time till 09.09.2008—on complaint against petitioner since the transfer of licence in the name of the present proprietor—in Sept, 2007 show cause notice issued—based on—conviction order passed against the husband of present Proprietor under Essential Commodities Act, 1955 in the year 1994—Present Proprietor submitted reply —firm under control and supervision of deceased husband when conviction passed—she had no knowledge about conviction and fine—explanation not accepted—licence cancelled on 15.11.2007—preferred writ petition—Contended—order unreasonable—non-application of mind and arbitrary—similarly situated persons got relief from the court—reliance on the stale material not justified—action arbitrary—Further contended—cancellation proceedings based on conviction order passed against husband in the year 1994—the action not

initiated within reasonable time—after—also unjustified—respondent allowed the change of proprietorship—by their own act condoned the act of deceased husband—respondent contested—once the order of conviction passed respondent well within the right to cancel the licence in terms of Clause 6 of Control Order, 1962—the previous committed breach—convicted—the respondent bound to cancel the licence—Held—statutory authority required to act reasonable, fairly and expeditiously—no reasonable explanation for long delay —thus respondent waived their right for taking any action—respondent reliance on Wadhwa Committee constituted by Supreme Court of India also did not entitle the respondent to get the benefit of their own inaction—writ petition allowed.

Miglani Kerosene Oil Depot v. *Govt. of NCT of Delhi & Ors.* *1223*

— Article 226—Writ Petition—Essential Commodities Act, 1955—Delhi Specified Articles (Regulation & Distribution) Order, 1981—Clause 7—Cancellation of authorization of Fair Price Shop (FPS)—Probation of Offenders Act, 1958 (PO Act)—S. 12—Conviction—Disqualification—The licence of FPS granted to Sh. Puran Mal-father of petitioner on 06.06.1977—Puran Mal as sole proprietor carried out business till 09.01.2002-died-petitioner approached the department for transfer of licence in his name—On 14.06.2002 application allowed—Licence renewed from time to time—Lastly renewed from 24.04.2006 to 23.04.2009—Show cause notice issued on 17.08.2007 to petitioner—Alleging—Puran Mal convicted under Essential Commodities Act—Petitioner appeared before Assistant Commissioner-pointed out-father released on probation for one year—Explanation not found satisfactory—Licence cancelled on 29.10.2007—Preferred writ petition—Contended—Once the fine of Rs. 5000/- imposed after releasing his father on probation for one year—Therefore the petitioner could not be punished twice for the same offence—Further contended in view of S. 12 of PO Act—Petitioner could not suffer any disqualification-action initiated has became stale - violation - if any-stood condoned-licence renewed subsequently for 11 years—Respondent contended—Entitled to take action as per Clause 7 of Order of 1981—Once father of petitioner committed breach-convicted-respondent bound to cancel the licence—Delay procedural as many Assistant Commissioner transferred in 10 years—Held—Statutory authority required to act reasonably and expeditiously—Transfer of licence of FPS in the

name of the petitioner upon the death of his father condoned the earlier conviction—Further as per the provision of PO Act—The person released on probation shall not suffer from any disqualification attached to the conviction—Writ petition allowed.

Praveen Kumar v. *Govt. of NCT of Delhi & Ors.* *1230*

— Article 226—Writ Petition —Disputed questions of facts—cannot be taken up in writ petition—civil suit pending on same issue—decision of civil court to be awaited-right of offering *namaz*—raising of boundary wall of colony—do not amount to restriction of right—petitioner a resident of Kalkaji—had been offering namaz in Madini Masjid near Gate No.7, Alaknanda Apartments, Alaknanda, New Delhi—due to cars illegally parked near Masjid his—ingress—egress—other namajis into the masjid obstructed—car parked in the open courtyard of masjid—not meant for car parking—an unauthorized wall has been constructed near the masjid which ought to be removed—namajis form the adjoining locality facing difficulty in offering namaz due to lack of apace—Respondent DDA contested—filed affidavit—stated that relief prayed in writ petition subject matter of civil suit instituted by local Managing Committee of Madini Masjid and Dargah Pending in the court of Sr. Civil Judge, Saket, New Delhi—said suit after Division Bench of High Court in LPS in case titled *Aravali Residents Welfare Association and Others v. DDA and Others.* had expressed an opinion that there were number of factual disputes raised for consideration which could not be determined in writ proceedings—evidence required to be led before coming to any conclusion—Court observed —having to the facts that civil court seized of the issue being agitated in the petition—court not inclined to entertain the same with respect to relief sought—with regard to relief of removal of illegal wall—observed—wall of 1 1/2 to 2 feet would hardly be treated as obstruction to the petitioner to have free access to the masjid—further there were two gates affixed on the boundary to regulate vehicular and pedestrian traffic—further observed—simply because the petitioner desire free access to the masjid did not mean that safety and security of residents living within gated colony could be compromised—DDA also stated that the wall in question not raised illegally—Held—petition ought to await the decision of civil suit—petition and pending application disposed off accordingly.

Mohd. Ashikian Qureshi v. *D.D.A. Through Its Chairman & Ors.* *1276*

— Article 226—Writ Petition—Delhi Development Act, 1957—S. 30(1)—S. 31(A)—Unauthorized construction—Section of building plans—Structural safety—National Capital Territory of Delhi Laws (Special Provisions) Bill, 2009—One Smt. Shakuntala Devi mother of petitioner no. 2 and Respondent No. 3—Owner of—The Property at Shivalik Malviya Nagar, New Delhi—Shakuntala Devi executed a Gift Deed in respect of basement-ground-mezzanine floor-in-favour of her daughter-in-law Respondent No. 4/ Ms. Manju Agrawala—Registered on 02.06.2005—Also executed gift deed in respect of first floor and terrace in favour of her other daughter-in-law petitioner no. 1—Registered on 26.10.2005—Mutation with respect to first floor and terrace done in favour of petitioner no.1 in the record of MCD—Mutation in respect of basement-ground floor-mezzanine floor carried out in favour of respondent no.4 on 27.10.2011 petitioner submitted plans to respondent no. 1 and 2 for carrying out—Addition—Alteration on the first floor—Construction of proposed second—Third floor alongwith requisite fees—Respondent did not sanction the plan—Instead issued a show cause notice on 05.03.2012—Petitioner no. 1 and respondent no. 4 to explain as to why demolition of unauthorized and illegal development be not undertaken on 02.04.2012 petitioner submitted reply—Reiterated request for sanction—Aggrieved by inaction on the part of respondent no. 1 and 2—Preferred writ petition—During the hearing submitted by petitioner that respondent no. 3 and 4 not co-operative with petitioner—On account of their non-corporation—Resistance in raising any construction—Respondent no. 2 declined to grant sanction to the proposed building plan—However—Respondent 3 and 4 denied—Submitted building plan may be sanctioned subject to ensuring that the structural strength of the existing built-up structure not adversely affected—Petitioner submitted a tabulated chart in respect of deviation mentioned in the show cause notice—Pointed out deviation in the portion of premises under the occupation of petitioner and mezzanine floor—Either compoundable nature or did not concern them—Chart furnished to respondent no. 1 and 2—Director (Building), DDA directed to take into consideration the chart for an efficacious resolution of the dispute—directed to pass reasoned order dealing with contention raised by petitioner and keeping in mind the decision rendered in WP(C) No.3535/2001 entitled as Ashok kapoor and Ors. v. MCD—An order dated 02.09.2013 Passed by Director Building) for sealing—Cum-Demolition—order challenged by the petitioner—Contending-Contrary to the

guidelines laid down in above mentioned case—Court observed—The facts in the case of Ashok Kapoor similar to the present case where the subject property segregated in different portion and mutated in individual names specifying the portion of the property—Held—(A) when segregation of interest of different co—Owner recognized by the MCD by mutation of different portion in individual named of different persons there cannot be any requirement of signature of all the co—Owners in considering the sanction of building plan of one of Co—Owner of the subject property in his/her portion (b) even if there is embargo on DDA and on civic authority from taking an action in respect of non compoundable deviation/misusers till December, 2014 in terms of National Capital Territory of Delhi Laws (Special Provisions) Bill, 2009—It can hardly be ground of refusing the sanction of building plane submitted by petitioner for their portion of subject property or from preventing them from raising construction in their portion of subject premises in accordance with law—(c) structural safety certificate placed on record shall be duly considered by DDA and if it needs stipulated requirement the same shall be accepted—If there is any requirement of meeting alternation in the building plan on account of structural concern the same shall be intimated to the DDA by petitioner in writing—Petition disposed off.

Renu Agrawal and Anr. v. *Delhi Development Authority and Ors.*..... *1395*

— Article 226-227—Writ Petition—Service law—Departmental Enquiry (DE)—Dismissal-findings on all charges—Petitioner joined New Bank of India on 01.04.1969—Which merged with Respondent No. 1 was serving as Manager at Defence Colony, New Delhi Branch—Certain loan advances sanctioned under his vigil-approved by superior w.r.t. sanctioning of advances an investigation was conducted and secret report generated by vigilance department qua petitioner—One Sh. P.K. Salia, Chartered Accountant and the Assistant General Manager—Petitioner himself filed two FIRs against some of the borrowers in around 21/22.03.1990—Though petitioner complainant but at some stage arrayed as an accused in the criminal proceedings in the interregnum on 17.07.1990 petitioner placed under suspension-served with charge sheet alongwith six article of charges—First charge—Acted in a manner prejudicial to the interest of bank other five charges related to this each charge independent to each other—

Enquiry officer appointed—Submitted report on 26.02.1993—On the basis of the report—Disciplinary authority dismissed the petitioner from the services—The appellate authority sustained the punishment—In the interregnum—The petitioner acquitted in the Criminal case—Preferred writ petition—Contended—Findings of disciplinary authority perverse—Enquiry officer returned the findings qua the first charge only and not on other charges—Disciplinary authority overlooked this aspect—Proceeded on the basis that all charges had been dealt with by enquiry officer—Further contended—Punishment disproportionate to the gravity of alleged misconduct—Further contended at time sanctioning the loan advanced to the five entities—No practice of conducting a pre-sanction inspection—Practice brought into force much later—Petitioner recommended the loan at the end of the day approved by superior authority AGM—Recommendation of sanction made inter-alia on the basis of opinion rendered by lawyer w.r.t. security furnished by borrowers—Lawyers discharged in criminal proceedings—Respondent contended—Court could not re-appreciate the evidence while exercising jurisdiction under Article 226—The enquiry officer has given findings on the main charge the remaining charges off-short of first charge—The acquittal of the petitioner in the criminal proceedings could not be ground to set aside the departmental proceedings as standard of proof in criminal proceedings is different—Court observed—Court cannot re-appreciate the evidence in a proceedings under Articles 226 unless a case of no evidence or case of perversity—Certainly interdict the proceedings if the authorities below not followed the principles of natural justice or have failed to return the finding qua all charges—Held—Enquiry officer has recorded the findings only on the first charge—Impugned order of disciplinary authority is liable to be set aside—Even if—Accepted that remaining five charges were off shoot of the first charge—The quantum of punishment need modification—Although the standard of proof different in criminal proceedings and departmental proceedings—However acquittal in criminal proceedings relevant for reviewing the quantum of punishment—Observed—Normally such cases remanded back for fresh enquiry—But in view of the facts of the case of prolong litigation of 20 years-advance age of petitioner with the consent of both the parties modified the quantum of punishment of dismissal of the service to compulsory retirement with all consequential benefit—Writ petition disposed of.

K.L. Bhasin v. *Punjab National Bank and Anr.* *1410*

— Article 226-227—Writ Petition—Central Administrative Tribunal (CAT)—Service law—Termination—Education Code of Kendriya Vidyalaya Sangathan (Code)—Article 81 (b)—Termination without right to cross—Examine witnesses—Case of immoral sexual behaviour towards student—Petitioner a Post Graduate Teacher (PGT) posted with Kendriya Vidyalaya Yol Cantonment—Complaints received from students—Lady teachers—Parents in the office of Assistant Commissioner, Regional Office, Jammu—Alleging petitioner indulged in moral turpitude involving in immoral sexual behaviour towards the girls students-Fact finding enquiry ordered—Enquiry Committee conducted the proceedings-Committee interacted with 07 victim girls students—One victim lady parent—Three staff members recorded their statement—Submitted report dated 18.08.2002 to Commissioner, KVS—Prima—Facie finding petitioner guilty of moral turpitude involving immoral sexual behaviour—Commissioner considered entire matter including the enquiry report—Formed an opinion-Finding of enquiry committee substantiated by material on record—Exercising jurisdiction under Article 81 (b) of the code—Opined—not expedient to hold regular enquiry under CCS (CCA) Rules, 1965—Would cause serious embarrassment to the students—Cause trauma to them because of their tender age—Memorandum dated 08.04.2003 setting out charges communicated—Called upon the show case—Why his services be not terminated under Article 81 (b)—with the memorandum—copies of preliminary enquiry and report of the committee served upon the petitioner—given full opportunity to submit his representation—Petitioner submitted his reply dtd. 15.05.2013—On consideration of entire record—commissioner passed order dated 07.01.2004 terminating the services of the petitioner—Petitioner preferred appeal—Rejected being time barred-Filled O.A before CAT-Assailed the order of appellate authority-CAT disposed off holding the appellate authority rejected again recording reasons—Petitioner filed O.A before CAT—O.A dismissed—Preferred writ petition-Contended -Complaints against petitioner false—had unblemished record for 9 years with Govt. of Himachal Pradesh—25 years service with KVA—entitle to an opportunity to cross—Examine the witnesses-Held the spirit—Purpose—Intent—Of incorporating article 81 (b) of the Code to prevent traumatization of victim of such immoral sexual behaviour—The Commissioner specifically opined that the cross-Examination of witnesses would cause serious embarrassment to the student and would cause trauma to them because of their tender age-Further there was no procedural

lacuna in the case—Further held—Tribunal rightly rejected the grievances of the petitioner that punishment of termination of services disproportionate to the charges—Writ petition dismissed.

— Article 226-227—Writ Petition—Central Administrative Tribunal (CAT)—Service law-equal pay for equal work pay scale-equivalent to his counterpart in the cadre of origin—Petitioner an Assistant Director (Horticulture), CPWD sent on deputation to DDA in same capacity sent to President's Secretariat at the President's Garden, Rashtrapati Bhawan on 19.12.1970 as Garden Superintendent on 08.04.1974 permanently to Deputy Director (Horticulture) in CPWD—Post upgraded to Director in the pay scale of 3700-5000 on 30.04.1996 as per 4th Central Pay Commission—Order passed by President's Secretariat on 30.04.1996 to this effect mentioned upgraded scale purely personal to petitioner as and when he would leave the post—Pay scale of the post would be brought down to its earlier level—On 5th Pay Commission Report President's Secretariat revised the pay scale for the post of Superintendent at 12000-16500—Petitioner granted the scale—Retired on 01.04.1998 dues calculated on the said scale in the meantime revised recommendation made by 5th Central Pay Commission for the post of Director (Horticulture) and Additional Director (Horticulture) on their representation pay scale upgraded to 14300-18300 w.e.f. 01.01.1996—Office order passed on 06.10.1999 and 28.08.2001—Petitioner made several representation based on revised recommendation to calculate the retirement benefit on this basis-representation rejected by President's Secretariat by several order-last order dated 13.06.2008 preferred O.A. before CAT for issuance of appropriate order to refix the revised pay scale and pay the consequential benefit including retirement benefit alongwith interest @ 10% per annum on the basis of pay scale 14300-18300—Tribunal rejected the application—Tribunal observed nature of work carried by the petitioner as Garden Superintendent in President's Secretariate not similar to nature or function of Director/Additional Director (Horticulture) or Superintendent Engineer working in CPWD pay parity pre-supposes the work equal and inexplicable pay difference alone can be looked upon as discriminatory against an employee-absent in the present case-prerogative of the executive which has considered the representation and rejected the same would upset

the constitutional principle of separation of power among the three organs of the State—Petitioner preferred writ petition—Contended-post of Garden Superintendent in the President's Secretariate is equivalent to that of Deputy Director (Horticulture), CPWD upgradation recommended by 3rd and 4th Central Pay Commission awarded to the petitioner no reason to withhold the revised recommendation of 5th Central Pay Commission upgrading the pay scale from 12000-16500 to 14300-18300—Respondent contended—Requirement of pay parity both groups should not only work in the indentical condition but should also discharge the same duty—Held—Granting earlier pay scale in 4th and 5th Pay Commission—Implicitly recognition of the fact that nature of duties and responsibilities of both petitioner and Additional Director (Horticulture) in CPWD same—Revision of that pay scale on 02.07.2001 to 14300-18300 should logically followed and could not be denied—Respondent directed to calculate to retirement benefit of the petitioner accordingly pay 10 % interest as due on the date of payment—Writ Petition allowed.

S.K. Mathur v. *The President Secretariat Represented by the Secretary and Anr.* *1523*

COURT FEES ACT, 1870—Section 16A—Plaintiff filed suit for permanent and mandatory injunction along with damages against defendants—Defendant no. 1 was employed with plaintiff company who resigned and joined defendant no. 2 company of which defendant no. 3 and 4 were Directors—Plaintiff apprehended that defendant no. 1 would share confidential and internal information of plaintiff company with defendant no. 2 company for which he was seeking restrain order— However, parties consented before Court and resolved disputes amicably—Plaintiff, thus, prayed for refund of court fees. Held:- when matter stands resolved before framing of issues, plaintiff entitled to refund of court fees in terms of Act.

SBL Pvt. Ltd. v. *V.B. Shukla & Ors.* *1407*

CUSTOMS ACT, 1962—Section 18, 25, 27—Present writ petition filed impugning Custom Circular and Notification and seeking quashing of orders passed by Commissioner of Customs and refund of provisional duty paid-Central issue arising in the petition is whether the Central Government while imposing conditions for grant of exemption u/s 25(1) of the Act can lay down conditions in derogation to the specific statutory provisions and stipulations in section 27.

— Impugned Circular No. 23/2010—Customs dated 29th July, 2010 and Circular No. 93/2008 dated 1st August, 2008 sought to prescribe a time limit whereby an importer was entitled to a refund only if claim was made with one year of payment of actual duty—Whether paid on provisional or final assessment thereby rendering date of finalization of assessment inconsequential.

— Petitioner imported electric goods-present transaction contained three sets of bill of exchanges—Petitioner's three separate claims for refund were rejected on the ground that they were filed beyond the stipulated period of one year—Therefore, the present petition wherein the Petitioner claims that u/s 27 limitation period is prescribed from the period of final assessment, and the impugned notification seeks to change the period prescribed under the statute.

— Respondent contends that section 27 had no application in the present case, and that u/s 25 the Government had the power to grant exemption, subject to certain conditions—Further application for refund had to be made within time period stipulated in the notification.

Pioneer India Electronics (P) Ltd. v. *Union of India & Anr.* *791*

DELHI DEVELOPMENT ACT, 1957—S. 30(1)—S. 31(A)—Unauthorized construction—Section of building plans—Structural safety—National Capital Territory of Delhi Laws (Special Provisions) Bill, 2009—One Smt. Shakuntala Devi mother of petitioner no. 2 and Respondent No. 3—Owner of—The Property at Shivalik Malviya Nagar, New Delhi—Shakuntala Devi executed a Gift Deed in respect of basement-ground-mezzanine floor-in-favour of her daughter-in-law Respondent No. 4/ Ms. Manju Agrawala—Registered on 02.06.2005—Also executed gift deed in respect of first floor and terrace in favour of her other daughter-in-law petitioner no. 1—Registered on 26.10.2005—Mutation with respect to first floor and terrace done in favour of petitioner no.1 in the record of MCD—Mutation in respect of basement-ground floor-mezzanine floor carried out in favour of respondent no.4 on 27.10.2011 petitioner submitted plans to respondent no. 1 and 2 for carrying out—Addition—Alteration on the first floor—Construction of proposed second—Third floor alongwith requisite fees—Respondent did not sanction the plan—Instead issued a show cause notice on 05.03.2012—Petitioner no. 1 and respondent no. 4 to explain as to why demolition of unauthorized

and illegal development be not undertaken on 02.04.2012 petitioner submitted reply—Reiterated request for sanction—Aggrieved by inaction on the part of respondent no. 1 and 2—Preferred writ petition—During the hearing submitted by petitioner that respondent no. 3 and 4 not co-operative with petitioner—On account of their non-corporation—Resistance in raising any construction—Respondent no. 2 declined to grant sanction to the proposed building plan—However—Respondent 3 and 4 denied—Submitted building plan may be sanctioned subject to ensuring that the structural strength of the existing built-up structure not adversely affected—Petitioner submitted a tabulated chart in respect of deviation mentioned in the show cause notice—Pointed out deviation in the portion of premises under the occupation of petitioner and mezzanine floor—Either compoundable nature or did not concern them—Chart furnished to respondent no. 1 and 2—Director (Building), DDA directed to take into consideration the chart for an efficacious resolution of the dispute—directed to pass reasoned order dealing with contention raised by petitioner and keeping in mind the decision rendered in WP(C) No.3535/2001 entitled as Ashok kapoor and Ors. v. MCD—An order dated 02.09.2013 Passed by Director Building) for sealing—Cum-Demolition—order challenged by the petitioner—Contending-Contrary to the guidelines laid down in above mentioned case—Court observed—The facts in the case of Ashok Kapoor similar to the present case where the subject property segregated in different portion and mutated in individual names specifying the portion of the property—Held—(A) when segregation of interest of different co—Owner recognized by the MCD by mutation of different portion in individual named of different persons there cannot be any requirement of signature of all the co—Owners in considering the sanction of building plan of one of Co—Owner of the subject property in his/her portion (b) even if there is embargo on DDA and on civic authority from taking an action in respect of non compoundable deviation/misusers till December, 2014 in terms of National Capital Territory of Delhi Laws (Special Provisions) Bill, 2009—It can hardly be ground of refusing the sanction of building plane submitted by petitioner for their portion of subject property or from preventing them from raising construction in their portion of subject premises in accordance with law—(c) structural safety certificate placed on record shall be duly considered by DDA and if it needs stipulated requirement the same shall be accepted—If there is any

requirement of meeting alternation in the building plan on account of structural concern the same shall be intimated to the DDA by petitioner in writing—Petition disposed off.

Renu Agrawal and Anr. v. *Delhi Development Authority and Ors.* *1395*

DELHI KEROSENE OIL (EXPORT & PRICE) ORDER, 1962—Clause 6—Cancellation of licence—Conviction-transfer of licence in the name of petitioner upon the death of father—Petitioner firm was issued a licence for distribution of kerosene oil in the year 1977-on 28.04.1995 inspection staff of respondent found shortage of 1233 litres for the period from 01.04.1995 to 28.04.1995 an FIR registered deceased father of the petitioner proprietor of the firm at that time on 07.06.1995 an Assistant Commissioner (East) suspended the licence on the basis of report on 16.08.1995 Assistant Commissioner (Judicial) after considering the facts and circumstances-material placed on record revoked the order of suspension imposed the penalty of forfeiture of security amount-ground-actual shortage 68 litres within permissible limit not on higher side—Meanwhile proceedings initiated upon filing of FIR—Additional Sessions Judge vide judgment dated 03.04.2001 convicted the father of the present proprietor and sentenced him to undergo imprisonment till rising of the Court and imposed fine of Rs. 2000/- after conviction the father continue to run the kerosene depot till his death on 24.02.2006-in June, 2006 present proprietor applied for change of the name of the proprietor in the licence due to death of his father—Assistant Commissioner vide order dated 13.06.2006 allowed the change of the name—directed to deposit security amount on 17.08.2007 show cause notice issued as to why authorization may not be cancelled under Clause 6 (3) of Delhi Kerosene Oil (Export & Price) Control Order, 1962—Reply filed—Respondent dissatisfied with reply cancelled the licence vide order dated 01.09.2007—Appeal preferred—dismissed preferred writ petition—Contended act of respondent cancelling the licence after long period-unjustified—Respondent allowed change of proprietor name in 2006—No action survives against present petitioner same stale act of previous proprietor condoned—Show cause notice issued after gap of 6 years licence renewed from time to time—Penalty of forfeiture of security amount already imposed—Punishment of the same offence cannot be imposed again on the present proprietor-per contra- the respondent well within their right to take action in terms of Control

Order—Delay procedural due to transfer of Assistant Commissioner—Held—Statutory authority required to act reasonable, fairly and expeditiously no reasonable or plausible explanation for gross delay—Respondent waived their right to take action—Respondent agreed to transfer the licence in the name of present proprietor condoned the act of previous licencee—Licence of present proprietor cannot be canceled for the act of previous proprietor—Cancellation quashed—Writ petition allowed.

Madan Lal Pawan Kumar v. *Govt. of NCT of Delhi & Ors.* *1106*

DELHI LAND REFORMACT, 1954 (DLRACT)—S.185—Bar of the jurisdiction of the Civil Court—The Bar only applies to rural—Agriculture properties—The area notified as urbanized—Out of the purview of DLR ACT—Held—Does not bar the jurisdiction of the Civil Court.

Swaran Lata and Ors. v. *Shri Kulbhushan Lal and Ors.* *1362*

DELHI MUNICIPAL CORPORATION ACT, 1957—Section 95 (2) (a): Dismissal of an employee—Brief Facts—Petitioner stands convicted by judgment dated 24th January, 2012 passed by Special Judge, Anti corruption Branch, Delhi for commission of offence under Sections 7 and 13 (i) (d) of Prevention of Corruption Act, 1988—In view of the conviction of the petitioner, the respondents proceeded to take action the petitioner under Section 95 (2) (a) of the Delhi Municipal Corporation Act, 1957 which empowers the Municipal Corporation of Delhi to dismiss an employee on the ground of conduct which led to his conviction on a criminal charge—Vide an order dated 9th July, 2012, the petitioner was thus dismissed from service—Petitioner challenged his dismissal by way of O.A. No. 2811/2013—Tribunal rejected the challenge on the ground that the respondents had proceeded in accordance with law in exercise of Statutory power—Hence the present petition primarily on the ground that no opportunity order and that his special circumstances including the responsibility of three children and wife etc. deserved to be compassionately considered. Held: Under the proviso to sub-Section (2) of Section 95 of the Delhi Municipal Corporation Act, it is specifically provided that where an officer or employee is dismissed on the ground of conduct which has led to his conviction on a criminal charge, no opportunity of showing cause against the proposed action to be taken is

required to be given—Provisions contained in Regulation 9 (i) of the DMC Services (Control & Appeal) Regulations, 1959 which also provide that no departmental enquiry is essential for imposition of penalty upon the municipal employee on the ground of conduct leading to his conviction in a criminal case—The challenge by the petitioner on the ground of denial of opportunity to show cause is therefore contrary to the specific statutory prescription and is untenable—Tribunal has not given liberty to the petitioner that in the event of his success in the criminal appeal preferred by him against his conviction, he would be entitled to work out his claim of reinstatement in accordance with law and dismissal of his case would not come in the way of consideration of his request—In view of the above, the impugned order of respondents and the Tribunal cannot be faulted on any legally tenable ground—The writ petition and the application are hereby dismissed.

Mahipal Singh v. *The Commissioner, Municipal Corporation of Delhi & Ors.* *1507*

DELHI RENT CONTROL ACT, 1958—Section 25B—Petitioner filed revision petition challenging order of learned ACJ-cum-CCJ-cum-ARC (E) dismissing application of petitioner-tenant seeking leave to defend and passing order of eviction against tenant in Eviction Petition—Plea taken, landlord already possesses a chamber, which has been allotted to him in Rohini District Courts and this fact has been suppressed from learned ARC and by stating that he is not in possession of any chamber—Shop adjoining suit property would be more suitable for running a lawyer's chamber out of, in view of its on looking a wider road than suit property and hence requirement of landlord is not bona fide—Per contra plea taken, document now sought to be relied upon by tenant list issued by Rohini Courts Bar Association was not before learned ARC and hence cannot be considered—In any case, list does not indicate that landlord is in possession of any chamber—Held—This Court, in exercise of its power under proviso to Section 25-B of Act acts only as a Court of revision, and not of appellate Court—Not being appellate Court, this Court cannot, at this stage, consider fresh evidence that was not before learned ARC—It would not be a proper exercise of power under Section 25-B of Act if Court were to now decide this petition on basis of said document—Learned ARC has, in fact, given a reasoned order in this regard and held that it is a bona fide request of landlord, which is reasonable and well within his prerogative—Issue of whether another property

in possession of landlord is more suitable than suit property and whether requirement of landlord is bona fide are issues of fact that this Court would abstain from getting into—All that this Court is mandated to do is to satisfy itself as to whether impugned order is in accordance with law i.e., whether finding that requirement of landlord is bona fide is a finding in accordance with law—This Court finds no merit in petition requiring exercise of its jurisdiction under Section 25-B of Act.

Narender Kumar Jain v. *R.S. Sewak* *1090*

— Section 25B—Revision petition filed challenging order of learned SCJ-cum-RC dismissing application of petitioner-tenant seeking leave to defend and passing order of eviction against tenant in eviction petition—Plea taken, site plan of ground floor clearly shows four shops and landlord would have demolished one wall between two shops to make it seem like one shop—Held—Jurisdiction of this Court in exercise of its powers under Section 25B has to be to a limited extent and only to ensure that findings of fact are in accordance with law—Tenant, by this petition, is praying that Court upset reasoned findings of learned ARC in impugned order—Findings of learned ARC on basis of documents on record is a possible interpretation and is reasonable, based on documents on record—Given same, this Court does not find it appropriate to substitute reasoned findings of learned ARC with any other possible opinion.

Pawan Pathak v. *Chhajju Ram*..... *1099*

DELHI SPECIFIED ARTICLES (REGULATION & DISTRIBUTION) ORDER, 1981—Clause 7—Cancellation of authorization of Fair Price Shop (FPS)—Probation of Offenders Act, 1958 (PO Act)—S. 12—Conviction—Disqualification—The licence of FPS granted to Sh. Puran Mal-father of petitioner on 06.06.1977—Puran Mal as sole proprietor carried out business till 09.01.2002-died-petitioner approached the department for transfer of licence in his name—On 14.06.2002 application allowed—Licence renewed from time to time—Lastly renewed from 24.04.2006 to 23.04.2009—Show cause notice issued on 17.08.2007 to petitioner—Alleging—Puran Mal convicted under Essential Commodities Act—Petitioner appeared before Assistant Commissioner-pointed out-father released on probation for one year—Explanation not found satisfactory—Licence cancelled on 29.10.2007—Preferred writ petition—Contended—Once the fine of Rs. 5000/- imposed after releasing his father on probation for

one year—Therefore the petitioner could not be punished twice for the same offence—Further contended in view of S. 12 of PO Act—Petitioner could not suffer any disqualification-action initiated has became stale - violation - if any-stood condoned-licence renewed subsequently for 11 years—Respondent contended—Entitled to take action as per Clause 7 of Order of 1981—Once father of petitioner committed breach-convicted-respondent bound to cancel the licence—Delay procedural as many Assistant Commissioner transferred in 10 years—Held—Statutory authority required to act reasonably and expeditiously—Transfer of licence of FPS in the name of the petitioner upon the death of his father condoned the earlier conviction—Further as per the provision of PO Act—The person released on probation shall not suffer from any disqualification attached to the conviction—Writ petition allowed.

Praveen Kumar v. *Govt. of NCT of Delhi & Ors.*..... *1230*

DOMESTIC VIOLENCE ACT, 2005 (DV ACT)—Sec. 2(a)—definition—aggrieved person—Sec. 2(f)—domestic relationship—Sec.2.(s)—shared households—Sec.2(q) —repondent—Sec.3(a)—domestic violence—economic abuse—Sec.26(1)—relief in any legal proceedings—terms respondent includes female relatives of husband—right of residence—disowning of sons—through public notice—a mere proclamation—does not have dispositive legal effect—respondent—plaintiff—mother—in—law of the defendent—petitioner—filed a suit for possession/eviction of dependent daughter in law in respect of one bed room—a bathroom and small kitchen—suit property belong to plaintiff's deceased husband—died on 30.06.2008—leaving behind a registered Will dated 20.11.2006—bequeathed a suit property in favour of the Plaintiff—after her husband's death—She become sole and absolute owner—back Portion of the suit property in the possession of defendent no. 1 her daughter-in-law and defendant no. 2 her son—Alleged—Since the relationship between her and defendants became estranged—She wanted them to vacate the property filed application for decree on admission defendant contested that the plaintiff not absolute owner—WILL had not been granted probate intestate in law without being probated the WILL could not come into force—Ld. Single Judge opined—Not disputed due execution of WILL—No legal effect because it had not been probated—Therefore an admission—Further held—inessential to seek a

probate—Thus WILL being admitted remain operative between the parties—Decreed the suit on admission—Court observed—Appellant had relied upon the provision of protection of woman from violence as per DV Act before Ld. Single Judge—Also filed a suit before Civil Judge Rohini Court pending—However—Ld. Single Judge rejected the arguments with respect to applicability of the provision of DV Act—Holding—Suit property could not considered as a shared household preferred appeal against the order of Single Judge—Contended—No unambiguous admission of the kind warranted exercise of discretion under Order XII Rule 6 CPC—Further argued entitled to right to live in the suit property under domestic violence Act, 2005 keeping in mind the proviso to definition of respondent in S.2(q) which included relatives of male respondent in the domestic relationship with aggrieved wife—S. 19 (1) (f) of the Act also allowed grant of residence order against the respondent to provide accommodation equivalent to that enjoyed by aggrieved party in the share household—Plaintiff/respondent contended—Definition of share household was conclusively laid down in previous cases since the husband being disowned had no right of ownership in the household—The wife could not claimed any right of residence in it—Held—The intent of the Parliament to secure the right of residence in the household of respondent (including his relatives) even if the household is one in which respondent is tenant or one in which he jointly or singly had any right—Title interest in law or equity—Thus enabling a wife of deceased male/estranged male to claim a domestic relationship with the mother-in-law—This right not dependent on husband having any right—Share or title in the premises by secular or Hindu Law—Even if mere fact of residence was sufficient and consequently the aggrieved woman could claim right of residence in any such household of the husband—Appeal allowed.

Preeti Satija v. *Raj Kumari and Anr.* *1246*

ESSENTIAL COMMODITIES ACT, 1955—Delhi Specified Articles (Regulation & Distribution) Order, 1981—Clause 7—Cancellation of authorization of Fair Price Shop (FPS)—Probation of Offenders Act, 1958 (PO Act)—S. 12—Conviction—Disqualification—The licence of FPS granted to Sh. Puran Mal-father of petitioner on 06.06.1977—Puran Mal as sole proprietor carried out business till 09.01.2002-died-petitioner approached the department for transfer of licence in his name—On 14.06.2002 application allowed—Licence renewed from time to time—Lastly renewed

from 24.04.2006 to 23.04.2009—Show cause notice issued on 17.08.2007 to petitioner—Alleging—Puran Mal convicted under Essential Commodities Act—Petitioner appeared before Assistant Commissioner-pointed out-father released on probation for one year—Explanation not found satisfactory—Licence cancelled on 29.10.2007—Preferred writ petition—Contended—Once the fine of Rs. 5000/- imposed after releasing his father on probation for one year—Therefore the petitioner could not be punished twice for the same offence—Further contended in view of S. 12 of PO Act—Petitioner could not suffer any disqualification-action initiated has became stale - violation - if any-stood condoned-licence renewed subsequently for 11 years—Respondent contended—Entitled to take action as per Clause 7 of Order of 1981—Once father of petitioner committed breach-convicted-respondent bound to cancel the licence—Delay procedural as many Assistant Commissioner transferred in 10 years—Held—Statutory authority required to act reasonably and expeditiously—Transfer of licence of FPS in the name of the petitioner upon the death of his father condoned the earlier conviction—Further as per the provision of PO Act—The person released on probation shall not suffer from any disqualification attached to the conviction—Writ petition allowed.

Praveen Kumar v. *Govt. of NCT of Delhi & Ors.* *1230*

EVIDENCE ACT, 1872—Appreciation of Evidence—Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of the version.

— Evidence Act—Appreciation of Evidence—The testimony of the injured witness is accorded a special status in law.

— Evidence Act—TIP Adverse inference is to be drawn against the appellants for declining to participate in the Test Indentification Proceedings. It is settled legal preposition that Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that accused in the case are actual culprits. It is trite to say that substantive evidence is the evidence of identification in Court.

Amar Kumar Gupta v. *State of Delhi* *1007*

— Section 63—Code of Civil Procedure, 1908—Section 151, Order VII Rule 14 (3) and Order VIII Rule 1A(3)—Applications filed

by petitioner for placing documents on record and for leading secondary evidence qua photocopies of documents so filed dismissed by Trial Court—Order challenged before High Court—Plea taken, Trial Court has failed to exercise jurisdiction vested in it by not granting leave to file documents—Petitioner was always diligent in prosecuting case and in any event, respondent would not be prejudicially affected if documents were placed on record—Documents were necessary for effective adjudication of dispute before Trial Court and hence they ought to be allowed to be exhibited—Held—Appropriate time for filing a document in support of a defendant's defence is when written statement is filed—A document that is not produced along with written statement or entered in list filed with written statement ought not to be received in evidence without leave of Court—Injunction of law under Order VIII Rule 1A(1) is not one to be lightly ignored, a fortiori and especially in matters such as present case, where excessive delay of over 11 years, has been caused by defendant in eventually approaching Court under said provision—For exercise of discretion by Court under Order VIII Rule 1A(3) of Code in Favour of a defendant, defendant would have to satisfy Court to qualifying criteria (i) that documents were earlier not within knowledge of party; or (ii) that documents could not be produced despite exercise of diligence on part of defendant — Petitioner has failed to provide sufficient and cogent reasons for allowing documents to be filed—It is not case of petitioner that documents were not within his power nor has petitioner made out any case of exercise of diligence, despite which documents could not be filed—To the contrary, impugned order observes lack of diligence on part of petitioner, as documents had not been filed for a period of eleven years from date of filing of written statement and not even adverted to in evidence filed later—Only explanation proffered by petitioner is inadvertence which cannot be regarded as a ground for exercise of discretion under Order VIII Rule 1A(3)—Impugned order does not suffer from material irregularity warranting interference of this Court in its revisionary jurisdiction.

Shri Ramesh Kumar & Anr. v. *Sangeeta Khanna 1106*

HINDU SUCCESSION (AMENDMENT) ACT. 2005—S.6—Amendment—S.6(1)—not applicable partition or testamentary disposition of property before 20th December, 2004—Prospective in nature—Applicable to pending suits—Preliminary partition

decree—Does not amount to partition—Would not apply to partition by way of settlement—Registered instrument of partition-By oral arrangements of the parties—Decree of the court—Held—Amendment applicable as partition yet to take place.

Swaran Lata and Ors. v. *Shri Kulbhushan Lal and Ors. 1362*

INCOME TAX ACT, 1961—Section 25—F(1), 132, 142, 142-(2)A, 158BE, 245(1), 245—A(b), 245—C, 245—D(4), 245(E), 245—F(2)—On 07-08-1997, search and seizure operations were conducted at residential and business premises in respect of petitioner, his wife and other relatives-Several articles and documents were seized—Upon receipt of notice, petitioner filed a return for period from 01.04.1986 to 07.04.1986—As accounts indicated sufficient complexities, Special Auditor submitted his report-During pendency of these proceedings Settlement Commission entertained application made to it—While Settlement Commission's proceedings were pending petitioner contended that entire proceedings had become time barred—Settlement Commission rejected petitioner's argument—Order challenged before High Court—Plea taken, since Assessing Officer did not complete assessment within time period permitted by law, Settlement Commission which was invested with his power could not likewise have proceeded further—Per contra plea taken, power of Assessing Authority to make order does not allow applicant approaching Settlement Commission to contend that jurisdiction ceases automatically if assessment is not framed—Held—Pre—Condition for Commission to receive application is that a case should be pending as on date of its presentation-No objection as to jurisdiction of Settlement Commission was made when application was admitted—Observation in impugned order of Commission that to re—Visit order would in effect amount to impermissible review is, in opinion of this Court, sound reasoning—Authority of a Settlement Commission to make such orders as are necessary in regard to matters before it also extends to other matters relating to case not covered by application but referred to in report of Commission—Settlement Commission is empowered to re—Open any proceeding connected with case in respect of which assessment too has been completed—Given these powers, fact as to whether Assessing Officer was in process of making assessment or not becomes irrelevant—A machinery provision in Income Tax Act cannot be subjected to literal or strict rule of

construction that is adopted to interpret a charging Section—Consequence of accepting argument of assessee would be that even though there was a search of his premises under Section 132 of Act which yielded incriminating material, proceedings arising out of which he wanted to settle by approaching Settlement Commission, he would still end up not paying any tax, as block assessment became barred by time and there would also be no settlement order under Section 245D(4)—Such a situation could not have been intended by statute-There is no merit in petition and it is accordingly dismissed.

Ashwani Kumar Goel v. *Income Tax Settlement Commission & Ors.* *1449*

INDIAN PENAL CODE, 1860—Section 394/396/307/120B/34—Section 25-27—Arms Act, 1959—A1 and A2 convicted for offence u/S 392/34 IPC—In addition A1 convicted u/S 397 IPC.

— Held, It is well settled that substantive evidence of the witness is his evidence identification in the court—Complainant who had direct confrontation with the assailants for sufficient duration had ample opportunity to observe and grasp the broad features of the culprits—No ulterior motive assigned to the complainant for falsely identifying the accused—No conflict between ocular and medical evidence—recovery of robbed articles from the possession of assailants is a vital incriminating circumstance to connect them with the crime—Police will plant substantial amount of Rs. 12,000/- to implicate falsely is unbelievable—Minor contradiction and discrepancies not material when presence of complainant at the spot was natural and probable and he was also injured.

Zarar Khan @ Mulla v. *State (Govt. of NCT of Delhi)* *960*

— Sec. 302, 304(II)—FIR is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at trial. The object to insist prompt lodging of FIR is to obtain the earliest information regarding the circumstances in which the crime committed.

— There is no such universal rule as warrant rejection of the evidence of a witness merely because he/she was related to or interested in the parties to either side. If the presence of such a witness at the time of occurrence is proved or considered to be natural and the evidence tendered by such witness is found in the light of surrounding circumstance and probabilities of the case to be true,

it can provide a good and sound basis for conviction.

— Prior to the occurrence, there was no animosity of these with the appellant to falsely implicate him in the incident.

Ram Parshad v. *The State (Govt. of NCT of Delhi)* *981*

— Section 301-embodies doctrine of transfer of malice and is attracted when accused causes death of a person whose death he neither intends nor knows will be the result of his act.

— Evidence Act—There is no legal hurdle in convicting a person on the sole testimony of a single evidence if his version is clear and reliable, for the principle that the evidence has to be weighed and not counted.

Anil Taneja & Anr. v. *State of Delhi*..... *1000*

— Section 308—Attempt to commit culpable homicide—Section 34—Common intention—Appellant and one Harish inflicted injuries to the victim fled the spot after causing injuries—Injured removed to hospital by brother—Information given to the police station DD No. 63B recorded at PS Najafgarh police reached hospital FIR No. 189/1998 u/s. 308/34 IPC lodged making endorsement DD No. 63B—Statement of injured recorded injuries opined to be grievous accused persons arrested charge sheet filed accused persons charged prosecution examined eight witnesses statement of accused persons recorded denied involvement and pleaded false implication examined one witness in defence appellant convicted for offence u/s. 308 IPC accused Harish convicted for offence u/s. 323 IPC and released on probation appellant sentenced to substantive sentence aggrieved appellant preferred appeal contended injured in the habit of teasing the women folk and was beaten report not lodged immediately soon after the incident unexplained delay of three days crime weapon not recovered blood stained clothes of the injured not seized no independent public witness associated name of the assailant not disclosed to the doctor—Doctor who declared injured unfit for statement not examined APP contended no strong reasons to discard the testimony of injured grievous injuries inflicted on vital organs testimony corroborated by medical evidence Held:- No challenge to the injuries sustained by victim testimony of PW2 remained unchallenged injuries opined to be grievous causes by blunt object testimony of doctors remained unchallenged presence at the crime

scene at the time of incident not denied by the appellant not disclosed whom the victim used to tease no complaint lodged against the victim for teasing no reason for victim falsely implicate the accused persons material facts deposed by injured remained unchallenged cogent and reliable testimony of victim cannot be brushed aside on account of delay in recording his statement non examination of independent public witness of no consequence non recovery of weapon of offence not fatal discrepancies/omissions in injured's statement do not affect the prosecution case testimony of victim in consonance with medical evidence no vital discrepancy in cross examination to doubt his version specific motive attributed to the appellant all relevant contentions taken into consideration judgment warrants no interference substantive sentence modified compensation awarded appeal disposed of.

Deep Chand v. *State & Anr.* *1038*

— Section 394 voluntarily causing hurt in robbery—Section 397 robbery with attempt to cause death or grievous hurt—Section 120B criminal conspiracy—Section 302 murder—Section 34 common intention complainant informed police about looting in his house DD No. 51B recorded police reached the spot wife and servant of the complainant found in injured condition household articles scattered in the house injured sent to hospital complainant declared fir for statement on statement of complainant FIR no. 539/2003 PS New Friends Colony under sections 395/396/397/ 120B/412/307/34 IPC and 27 Arms Act recorded complainant wife caught by two boys hands of the servant tied and made to lie down hands of the another person (PW-15) also tied up behind his back one of the boys hit the complainant-complainant started raising hue and cry one of the witnesses caused injuries to the complainant, his wife and servant two boys threatened other two ransacked and looted the house disconnected telephone lines complainant gave description of the boys wife of the complainant declared brought dead cause of death asphyxia as a result of smothering list of missing/stolen articles prepared blood stained rope, blood stained pillow, blood stained guaze, blood stained muffler blood stained cushion cover seized appellants Pradeep and Mohd. Shamim arrested jewellery articles, watch and mobile phone recovered at their instance one desi katta also recovered made disclosure statement led to recovery of stolen property appellant Kanhaiya Lal arrested on the pointing out of appellant Shamim made disclosure produced a pulanda containing jewellery articles a knife

also produced appellant Sonu arrested at the pointing our of appellants made disclosure produced a bag containing ornaments knife also recovered from the bag accused Kanhaiya Lal s/o. Shri Laxmi Narain arrested at the pointing of appellants made disclosure statement ornaments recovered from his house appellants refused to join TIP jewellers to whom jewellery articles sold arrested the person who sold country made pistol also surrendered TIP of recovered articles conducted charge sheet filed charges for offence u/s. 120B/302/394/395/396 IPC framed against all the appellants and for offence u/s. 390 IPC against appellant Mohd. Shamim for offence u/s. 412 IPC against jewellers u/s. 27 Arms Act against appellant Kanhaiya Lal framed prosecution examined 23 witnesses statement of appellants recorded u/s. 313 Cr. P.C. appellants examined witnesses in their defense appellants convicted of offences under section 120B, 394 r/w.397 and u/s. 302/34 IPC aggrieved appellants preferred appeals contended secret information, disclosure statements, arrests and recoveries implausible and not believable identification of appellants improper no injuries on the body of the deceased no eye-witnesses to strangulation by any of the appellants doctor who conducted post mortem nor examined gagging of mouth was done only to silence her no intention to cause such injury as may cause death. Held: Witnesses identified appellants as intruders having weapon during examination challenge to disclosure statements and recoveries misconceived jewellery items recovered at the instance of and from the appellants identified as stolen articles appellants armed with pistol, dagger barged into the house in pursuance of criminal conspiracy of committing robbery disconnected telephone lines immobilised the occupants mouth of the PW 15 and others gagged not allowing them to raise alarm rooms ransacked and jewellery stolen mouth of the wife of the complainant gagged—She was unable to breath and suffered asphyxia appellants deemed to have knowledge that injuries are such as would cause her death done in pursuance of conspiracy all appellants liable no evidence of intention of appellants to cause her death-death of the lady cannot be murder act do.

Mohd. Shamim & Ors. v. *The State Through Govt. of NCT of Delhi* *1071*

— Section 392/397—Conviction—Appeal against. Held, no ulterior motive assigned to the witnesses, who had no prior acquaintance with appellant, to falsely implicate him. Non-examination of the

person who was instrumental in apprehending the appellant is of no consequence as the appellant identified without hesitation by material witnesses who had direct confrontation with the appellant in the bus. Acquittal of co-accused due to lack of evidence and lapses on the part of investigation is inconsequential to give benefit to appellant. Appellant did not give any plausible explanation qua incriminating circumstances against him. Appellant did not give any reasonable explanation about this presence with a knife inside the bus at the relevant time. He was arrested soon after the incident, therefore, TIP was not necessary.

Shyambir v. *State Govt. of NCT of Delhi* *1218*

— Section 452/394/398- minor contradictions and discrepancies do not affect the core of the prosecution case-ocular testimony in consonance with medical evidence-

— Merely because blood was not found on the knife at the time of its production in the court, cogent and credible statement of victim cannot be discarded.

— Use of brick to cause injuries in an attempt to get released co-accused only from the clutches of the victim and to commit robbery, cannot be considered 'use of a deadly weapon' to attract and prove commission of an offence U/section 398 IPC.

Shekhar @ Chhotu v. *The State (NCT of Delhi)*..... *1283*

— Section 395/397 IPC—Dacoity while armed with deadly weapon—Causing hurt while committing dacoity—Appellant and his associated committed dacoity of 28 bags of plastic raw material—One Salim @ khan found in possession of 28 bags filled with plastic raw material—case FIR no.158/07 u/s,395/397 IPC registered at P.S Civil Lines—Appellant and his associates arrested in case FIR No161/07 u/s. 399/402/34 IPC P.S Civil Lines—made disclosures—Involvement in present case emerged 28 bags recovered—Statements of complainant and witnesses recorded—Charge-sheet filed against all the accused persons—One accused faced proceedings before juvenile justice Board—Accused person duly charged—Prosecution examined 14 witnesses in statement u/s. 313 cr. P.C the accused persons pleaded false implication accused persons convicted of offences u/s 395/97 IPC two accused persons confessed their guilt and their appeals disposed of aggrieved appellant preferred appeal Held—complainant's (PW-3) statement recorder at the earliest point of time—Gave detailed account of the occurrence—Complainant supported his version

given to the police without variation—Identified the assailants—Attributed specific role to the appellant—Appellant did not cross examine the witness despite opportunity—Testimony of complainant unchallenged and unrebutted—No motive assigned to complainant to falsely implicate the appellant—No prior acquaintance or animosity with the appellant—No explanation furnished by the accused to the incriminating circumstance as appearing against him—prosecution established doubt of having committed dacoity—No injuries inflicted on complainant by any weapon—Weapon used in the crime not recovered—No description, size or dimension of knife used give—Broad featured of the weapon used not described—Evidence lacking on possession and use of deadly weapon—Conviction u/s. 397 IPC not permissible—Appellant at par with another convict—Conviction u/s. 397 IPC set aside—Sentence u/s. 395 IPC modified and reduced.

Vikram @ Ganja v. *State* *1457*

— Sections 395—Punishment for dacoity—Section 398 attempt to commit robbery or dacoity when armed with deadly weapon—Arms Act, 1950—Section 27 use of prohibited arm—Complainant a security guard outside the godown of EIT at Alipur—Notices two tempos moving towards godown at about 2:15 am—Raised alarm saying daku daku—Two assailants caught hold of him—Other assailants attacked him with a knife—Two police men arrived on motorcycle—Assailants fled from the spot tempos were stopped after chase—Four accused persons alighted and started running overpowered and apprehended—Knife recovered tempos seized—Statement of the complainant recorded FIR No. 72/08 u/s. 395/397/398 IPC r/w. Section 25/27 Arms Act registered charge-sheet filed—All the accused persons charged and brought to trial—Prosecution examined seven witnesses—Statements u/s. 313 Cr. P.C. of the accused persons recorded—Pleaded false implication—Three accused persons including appellant convicted two accused persons acquitted aggrieved appellant preferred appeal—Held testimony of complainant and police witnesses is similar—No prior animosity with the appellant—No ulterior motive to falsely implicate the appellant—Complainant had no reason to let the real culprit go scot free—Injury on the person of complainant opined to be simple caused by sharp weapon tempos recovered from the possession of assailants—Appellant did not give explanation for his presence at the spot were armed with

70 years. It was averred that the mark DETTOL is synonymous with good hygience and, today, it is a household name and is the most widely used antiseptic disinfectant in the country—Reckitt became aware that the HUL introduced an advertisement on television, which intentionally and deliberately disparages Reckitt's soap under the trade mark DETTOL and the unique and distinctive packaging —The offending advertisement concerns the defendant's LIFEBUOY soap—Impugned decree for permanent injunction was issued by the learned Single Judge in a claim alleging that the defendant/appellant's advertisement had disparaged the plaintiff's good —The impugned judgment also directed payment of punitive damages to the extent of Rs. 5 lakhs to the plaintiff—Hence Present Appeal—The Plaintiff/respondent argued that the Dettol had been famous as an antiseptic/disinfectant, and had become synonymous with good hygiene as a household name, and that the defendant had subjected the Dettol Toilet soap (in which its the distinctive and unique shape, unique orange colour were clearly visible, albeit without the logo) and the green, distinctive packaging to intentional and deliberate disparagement by depicting it to be the type of "normal antiseptic soaps that make the skin dry..." thereby "permitting the germs to enter the cracks in the skin", unlike the defendant's soap. The appellant argued that, first, Dettol is neither an antiseptic soap (as held in a previous judgment of the Delhi HC) nor an unbranded soap, second, that the respondent neither had a monopoly over the colour, shape or packaging of the soap, nor had registered the shape, contours and curvatures of its soap under the Designs Act to create an exclusive right of use, third, that "totality of impression" (and not either the "test of confusion" applied in passing off actions, or the isolated frame-by-frame approach) must be used as the test of disparagement, so that the intent, manner, story line and message of the advertisement is conveyed, fourth, that the audience of the impugned advertisement must be considered to be the reasonable man with imperfect recollection, and the consumer/user base of the soap, by virtue of being acquainted with what the product looks like, would not have imperfect recollection and fifth, that the test of malice was not fulfilled i.e. nothing was done with the direct object of injuring the other person's business—Appellant/defendant challenged the grant of punitive damages while the respondent/ plaintiff argued that general or compensatory damages ought to have been awarded, first.

Hindustan Unilever Limited v. *Reckitt Benckiser India Limited* *1288*

LAND ACQUISITION ACT, 1894—Section 4, 5A, 6, 9, 10, 17 (1) and (4)—Petition filed challenging Notification issued by respondent under Section 4 and 17 (1) and (4) of L.A. Act dispensing with hearing under Section 5A of Act as well as Notification under Section 6 of Act, declaring that land was required for 'public purpose'—Plea taken, notification under Section 6 was issued merely four days before expiry of one year statutory period for Section 6 declaration—Lackadaisical approach of Government shows that there was no real urgency for acquisition of property and it was only for denying a fair hearing under Section 5A that notification under Section 17 (4) was issued—Per contra plea taken, there was actually no delay in matter and that time taken in processing of file was on account of official movement of same and issuance of notifications was in ordinary course—Held—Power under Section 17(4) to dispense with hearing under Section 5-A must not only be exercised sparingly and only in cases where public purpose for which acquisition is sought brooks no delay, but Government ought to exhibit such urgency in its actions as well—During process of acquisition—Both pre and pose notification—While it cannot be held that delays by Government, whether by pre or post notification would, by itself be good ground for courts to interfere with State's invocation of power under Section 17(4), Court would rightly exercise its power of judicial review and restore to land owner his/her right to be heard under Section 5A where delay is of such a nature as to negate very urgency claimed for invoking Section 17(4)—Perusal of file pertaining to property shows that subsequent to issuance of a letter to LAC on 13th May, 2009, there is a perplexing silence of inactivity till 20th April, 2010—This stares in face of aforesaid urgency which was otherwise vigorously emphasized by respondent for sake of invocation of Section 17(4)—It is evident that although acquisition was requisitioned in February, 2009 to remove paraneal traffic bottleneck coupled with sense of urgent for a smooth of traffic especially in view of then ensuing CWG in October, 2010 yet respondent itself took about 19 months to issue Section 4 notification—This , by no stretch of imagination, can be said to demonstrate any urgency—There was clearly no justification for invocation of urgency provision of Section 17 (4) and consequent denial to petition of valuable right of hearing under Section 5 A—Consequently notification under Section 17 (40 as well as under Section 6 along with notice issues under Sections 9 & 10 of Act

quashed.

Bhola Ram v. *GNCTD* *909*

LIMITATION ACT, 1963—Sec. 5—Arbitration and Conciliation Act, 1996—Sec. 34—Condonation of delay in re-filing the petition U/s 34 of Arbitration & Conciliation Act, 1996—After deducting 30 days which is maximum cumulative period permissible for removing the objections, under Delhi High Court Rules., the net delay in re-filing of 138 days. Held the Court is empowered to condone the delay in re-filing, provided there is no neglect and sufficient causes shown to explain the delay. The sufficiency of cause would depend facts & circumstances of the case. Held further that the span of delay as well as bonafides/quality of the explanation tendered seeking condonation are both relevant factors, especially in the context of the Arbitration Act, 1996, where as per Sec. 34 (3) of the Act Sec. 5 of the Limitation Act 1963 would have no applicability. Held a large number of time spent in refiling would itself tend to demonstrate negligence, unless a credible explanation is set forth. The reason put forth in this case was that paper book was inadvertently placed in a file by the clerk of the counsel and was not traceable. The negligence and callousness on the part of FCI in prosecuting the matter is clear from the fact that FCI did not seek to know from its counsel about status of its petition—Petition for condonation of delay in re-filing dismissed.

Food Corporation of India v. *Pratap Rice & General Mills* *1064*

NARCOTICS DRUGS AND PSYCHOTROPIC SUBSTANCES ACT—Section 21 (c) of Appellant convicted—Conviction primarily based no statement of complainant PW1 and confessional statement u/S 67 of the Act—Held, the panchnama merely reflects name of the two public witnesses without further details about their addresses and parentage—No sincere attempts made to serve summons upon them at specific addresses and prosecution dropped them without valid reasons.—Complainant version remained uncorroborated from independent sources. Joining of independent public witnesses is not a mere formality and sincere attempts were required to be made before apprehension of accused.—Complainant was evasive as to who were other members in the raiding team.—Other members of raiding team not examined.—Secret informer was not a member in the raiding team.—The driver of vehicle in which the raiding team went to

New Delhi Railway Station not joined.—Steps of log book of vehicle not filed.—No information given to security guards/RPF personnel present at the station and no railway official/vendors/stall owners joined in the proceedings.—No proceeding conducted at the spot and no material came out on record to infer that the place of apprehension was not conducive to conduct the proceedings.

— Also held, that the contents of disclosure statement of accused was found incorrect during investigation and remained unproved—It is now well Settled that the court must seek corroboration of the purported confession from independent sources—Accused acquitted.

Mohd. Irfan v. *Directorate of Revenue Intelligence* *953*

NAVY ACT, 1957—Regulation 159, 161, 163, 169—petitioner by way of writ petition challenged order dated 01/11/1990 in terms of Regulation 156 of Act convening court martial of petition on 27 charges—He also challenged order dated 15/03/1991 of Court Martial finding him guilty of commission of 8 charges and order of sentence awarding him sentence of 24 months RI, dismissal from service and fine of Rs. 1,000/- or 6 months imprisonment in default of payment of fine—Petitioner further challenged order dated 27/08/1991 passed by Chief of Naval for maintaining conviction of petitioner on all charges except on Charge 20 and reducing sentence of imprisonment to period already undergone by him—Also, order dated 08/12/2010 and 23/12/2010 passed by Armed Forces Tribunal was challenged by petitioner whereby findings of guilty of Court Martial on all charges other than charge no. 7 was set aside—According to petitioner, he had illustrious, unblemished career of over 20 years of service with Indian Navy and was committed soldier till he was wrongly implicated in the case—It was urged on behalf of petitioner that court martial was convened without application of mind on the material placed before Convening Authority as documents were so voluminous which could not have been considered on the same day by Authority to pass order to convene court martial.

— Held: Convening Authority is required to satisfy himself not only that charges are properly framed but also that evidence if uncontradicted or unexplained would probably suffice to ensure

conviction should have sufficient time to scrutinize requisite records before taking a decision.

Avtar Singh v. *Union of India and Ors.* *850*

PROBATION OF OFFENDERS ACT, 1958 (PO ACT)—S. 12—Conviction—Disqualification—The licence of FPS granted to Sh. Puran Mal-father of petitioner on 06.06.1977—Puran Mal as sole proprietor carried out business till 09.01.2002-died-petitioner approached the department for transfer of licence in his name—On 14.06.2002 application allowed—Licence renewed from time to time—Lastly renewed from 24.04.2006 to 23.04.2009—Show cause notice issued on 17.08.2007 to petitioner—Alleging—Puran Mal convicted under Essential Commodities Act—Petitioner appeared before Assistant Commissioner-pointed out-father released on probation for one year—Explanation not found satisfactory—Licence cancelled on 29.10.2007—Preferred writ petition—Contended—Once the fine of Rs. 5000/- imposed after releasing his father on probation for one year—Therefore the petitioner could not be punished twice for the same offence—Further contended in view of S. 12 of PO Act—Petitioner could not suffer any disqualification-action initiated has became stale - violation - if any-stood condoned-licence renewed subsequently for 11 years—Respondent contended—Entitled to take action as per Clause 7 of Order of 1981—Once father of petitioner committed breach-convicted-respondent bound to cancel the licence—Delay procedural as many Assistant Commissioner transferred in 10 years—Held—Statutory authority required to act reasonably and expeditiously—Transfer of licence of FPS in the name of the petitioner upon the death of his father condoned the earlier conviction—Further as per the provision of PO Act—The person released on probation shall not suffer from any disqualification attached to the conviction—Writ petition allowed.

Praveen Kumar v. *Govt. of NCT of Delhi & Ors.*..... *1230*

SERVICE LAW—Compulsory Retirement—Penalty of compulsory retirement on the basis of admission of guilt—Respondent was subjected to disciplinary proceedings based on the charge that while working as Masalchi/Bearer in the Cafetaria Department, AIIMS, stolen, two gas cylinder from the gas manifold room and taken awayby three wheeler—Respondent disputed the charges levelled against him vide his reply pointing out that prior to the charge sheet dated 7th January, 2008, the petitioner had issued a

charge memo dated 11th December, 2006 containing identical allegations which were denied by him vide reply dated 22nd December, 2006 and no further action was taken thereon—However, the enquiry officer submitted a report dated holding that the charged officer had admitted the article of charge and therefore it stood proved—Three years after the submission of the enquiry report, the Disciplinary Authority passed an order dated 15th November, 2011 accepting the report and imposing the penalty of compulsory retirement upon the respondent—His appeal dated 14th December, 2011 was rejected by the order dated 9th May, 2012—The respondent has challenged these orders against him by way of O.A. No. 2047/2013 inter alia on the ground that there was no evidence at all before the enquiry officer and that a communication dated 23rd June, 2008 had been wrongly treated as admission of guilt on his part—Petitioner assails the order dated 26th November, 2013 passed by the Central Administrative Tribunal accepting the O.A. No. 2047/2012 which was filed by the respondent challenging the order of the disciplinary authority dated 15th November, 2011 as well the appellate authority's order dated 9th May, 2012 whereby the respondent's appeal was rejected. Held: Central Administrative Tribunal has considered the import of the statement made by the respondent in the letter dated 23rd June, 2008 holding that the respondent had not admitted guilt of the charge of theft but had only stated that on 24th April, 2008, he had been asked by another employee Prem Singh to load cylinders in an auto rickshaw—It was stated that these cylinders were unloaded on instructions of Prem Singh at his residence (Prem Singh' residence)—The Tribunal has also noted that even before the enquiry officer on 24th April, 2008, the respondent had stated that he had simply acted as per the instructions of Prem Singh without intention of committing theft—It is an admitted position that other than the said letter dated 23rd June, 2008, the enquiry officer recorded no evidence at all–In his background, it was held that the recommendations of the enquiry officer were based on no evidence and that there was no admission of the charge by the respondent as well—The Tribunal had therefore set aside the inquiry report dated 5th August, 2008, the Disciplinary Authority's order dated 15th November, 2011 and the Appellate Authority's order dated 9th May, 2012—The petitioner has been given liberty to proceed afresh if deem appropriate and pass appropriate orders in accordance with law—Petitioner has not pointed out any material which enables us to take a view different than that taken by the Tribunal—There was no evidence in support

of the charge against the petitioner before the enquiry officer—No merit in the writ petition—The writ petition and the application are hereby dismissed.

All India Institute of Medical Sciences & Anr. v. *Ram Kishore & Anr.* *1501*

SPECIFIC PERFORMANCE—Suit for specific performance of an agreement (28.06.2005) & for permanent injunction—Plaintiff filed his evidence by way of affidavit—Despite several opportunities defendant failed to file evidence—Right to lead evidence closed on 06.12.2013. Plaintiff co-owner of the suit property entered into a sale agreement with Defendant—Down payment of Rs. 2.50 lacs—Repeated reminder by the plaintiff to transfer the title of suit property in the plaintiff—Defendant delayed the matter & did not obtain No Objection Certificate from the Notification Branch of Revenue Department. Defendants also misled the plaintiffs as regards to the real ownership of the property—Suit property originally belonged to the Gaon Sabha of Village Libaspur as against the portrayal of the defendants that the same was purchased by one Sh. Manohar. Held—Plaintiff ready and willing to pay necessary amount—Proof of willingness available—Legal notice was sent to the defendant with regard to the balance payment—Defendant did not obtain the Non-Objection Certificate decreed in the favor of the plaintiff and against the defendant.

Mahesh Chand Aggarwal v. *Mukesh Kalia & Ors.* *1555*

SPECIFIC RELIEF ACT, 1963—Plaintiff filed suit seeking specific performance of agreement to sell, for possession, mandatory and permanent injunction against defendant no. 1 & 2—Due to non-appearance, both defendants proceeded ex-parte—As per plaintiff, she was wiling to perform her part of contract by tendering balance sale consideration amount which was not accepted by defendant no. 1 on pretext suit property to be converted from lease-hold to free-hold. Held: If plaintiff is ready and willing to perform her part of the agreement and defendant neglects to perform his part of agreement, the plaintiff entitled to decree for specific performance of agreement on tendering balance sale consideration to defendant.

Nutan v. *Mukesh Rani & Anr.* *1591*

TRANSFER OF PROPERTY ACT, 1882—Sections 52 and 53 of

Legality of attachment of Property—Section 9—Arbitration and Conciliation Act, 1996—National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED) decree holder—Kripa Overseas—M/s. Rital Impex Ltd.—Collectively referred as judgments debtors—involved in arbitral proceedings—NAFED preferred petition under Section 9 of the Arbitration and Conciliation Act—Resulted in an order of injunction restraining the sale of several properties, including the property in question (A-13, Block B-1, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi, 110044)—Subsequently, the three parties entered into a settlement dated 03.05.2007 Rs. 20 Cr. shall be paid within next 60 days upon raising loan by mortgaging the property in question - property in question was mortgaged with ICICI Bank against advance of Rs. 1.5 crores other properties subject matter of attachment, in Section 9 proceedings, were released from the attachment order of the Court on 14.12.2007—The Order dated 14.12.2007, did not refer to the property in question; it described another property—Subsequently corrected and previous order modified through an order of 18.412.2007—Property in question was allowed to be sold by the owner/judgment debtor—Sale deed was executed by one of the judgment debtors in favour of the objector total consideration of Rs. 3.5 crores payment of Rs. 1.5 crores made to ICICI Bank to clear the mortgage and recover the title deeds remainder to the owner/judgment debtor arbitration proceedings between NAFED, and the two judgment debtors award dated 24.09.2009 was made in terms of the settlement dated 03.05.2007 modified by the subsequent order dated 04.04.2008 holding, inter alia, that NAFED is (sic) held entitled to the outstanding amount by sale of the properties, mentioned in the deed of settlement dated 3.5.2007, by public auction—NAFED instituted execution proceedings property in question was attached—NAFED instituted execution proceedings property in question was attached appellant, preferred objections contending that he had clear title to the property sold without any precondition learned Single Judge concluded—Court in its order dated 14.12.2007 did not permit an unconditional sale by the respondents/judgment debtors condition respondents shall deposit Rs. 18 crores by the sale of two properties including the one in question, within 75 days of the sale to satisfy a part of the petitioner/decree holders claim—To acquire a clear and unencumbered title to the property in question, the objector/applicant should have ensured that the said condition was complied with by the respondents/judgment debtors sale deed in question is clearly in contravention of the order

dated 14.12.2007 and is subject to Section 52 of the Transfer of Property Act property in question was not released from the lot of properties under the cover of attachment sale consideration of Rs. 3.5 crores to the objector for the property gross undervaluation judicial notice of this fact in holding that such a transfer would also violate Section 53 of the Transfer of Property Act—Hence the present appeal. Held: Conjoint reading of the two orders 16.05.2007 and 18.12.2007 clarify that whereas the first order lifted or vacated the attachment made earlier in respect of two properties did not include the property in question the second order specifically vacated the attachment in respect of the property in question—NAFED never chose to apply for its modification or recall—No conditions or restrictions of the kind—Applicable to the sale of the title documents in respect of the property in question.

— Applicability of Section 52—A transferee from a judgment debtor is presumed to be aware of the proceedings before a Court of law recognizes the doctrine of lis pendens—Rule 102 of Order XXI of the Code take into account the ground reality and refuses to extend helping hand to purchasers of property in respect of which litigation is pending unfair, inequitable or undeserved protection is afforded to a transferee pendente lite, a decree holder will never be able to realize the fruits of his decree—In the present case, NAFES'S claim was one for money in arbitral proceedings—Pending adjudication it sought for attachment of the judgment debtor's properties—But in no manner enlarge the scope of its claim into one encompassing any right to immovable property "directly" or "specifically—Absence of any restriction as to the marketability of the title, or direction by the Court, amounting to an encumbrance or charge order of 18.12.2007 operated to lift the attachment—This was done to facilitate sale direction in the previous order of 14.12.2007 that NAFED could retain the title deeds till it was paid Rs. 18 crores was meaningless and inapplicable because the title deeds were with ICICI Bank, which were later redeemed by the purchaser objector who was made aware of the mortgage in favour of that bank.

— Applicability of Section 53—In the present case, far from discharging the onus of proving want of good faith—NAFED merely relied on a textual interpretation of the orders dated 14.12.2007 and 18.12.2008 argued that the property was sold for inadequate consideration impugned order is based on "judicial notice" having been taken about the prices of land law casts a burden on the decree holder (NAFED), who has gotten its rights

crystallized subsequently in the award—Till then, it had no claim in respect of the suit property faced attachment for a brief period attachment was lifted, to enable its sale, in order to satisfy NAFED's claims sale ought to have proceeded in a particular manner, nothing prevented it from insisting upon imposition of conditions—Having failed to do so, its mere allegation of undervaluation of the property could not have resulted in the impugned finding.