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encourage unscrupulous persons who actuated by dishonest intention, use the well-reputed trademark of another person, so as to encash on the good will and reputation which that mark enjoys in the market, with impunity and then avoid payment of damages by remaining absent from the Court, thereby depriving the plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark, which can be computed only on the basis of his account books—This would, therefore, amount to putting premium on dishonesty is and give an unfair advantage to unscrupulous infringer over those who have a bona fide defence to make and therefore come forwarded to contest the suit and place their case before the Court—Defendant No. 1 restrained from manufacturing, selling storing for sale or advertising auto components under the trademark TOYOTA or any other mark identical or similar to the registered trademark TOYOTA of the plaintiff company—Defendant no.1 also directed to pay punitive damages amounting to Rs. 50,000/- to the plaintiff company.

— Section 96—Order XII Rule 6—Appellant filed a suit for declaration and injunction to protect the possession of property no. 10/7, Yog Maya Mandir, Mehrauli—Possession was inherited by him from his late father Pt. Badlu Ram—Smt. Ram Pyari widow of Shri Trikha gave possession of premises to his father fifty years ago for performing puja and seva—Owner being in adverse possession for the last more than 12 years—Suit contested by defendants—Badlu Ram was permitted to use the said accommodation as a paid employee of Yog Maya Mandir, as Badlu Ram used to serve water to the worshippers and clean the Mandir—The said licence came to an end on the death of Shri Badlu Ram—From the date of

death of Shri Badlu Ram, the possession of appellant became illegal—Respondent filed a suit for possession and recovery of mesne profits from the appellant and his brother—Appellant defended the suit—Suit property was gifted to his father by Smt. Ram Pyari, wife of Shri Trikha—The brother of appellant admitted the claim of the respondent—Respondent moved application under Order XII Rule 6—Trial Court decreed the suit of the respondent—Dismissed the suit of appellant—Appeal—Held—The appellant has himself admitted that possession of the property was given to his father by one Smt. Ram Pyari, who was the widow of one of the pujaris of the Temple and it was given while his father was doing puja and seva in the Temple—The said occupation was thus a permissive user—In the written statement in Suit No. 85/03, the appellant has raised the plea of ownership by virtue of gift—The gift of immovable property cannot be proved by oral evidence without a written and registered gift deed—There is not even a whisper that such gift deed was executed or registered by Smt. Ram Pyari in favour of Badlu Ram or the appellant herein—The appellant who admits permissive possession/occupation in the same breath cannot be allowed to plead adverse possession in the other, and that too without any hostile assertion made by him in denial of the title of the true owner—It is also noted that the defendant no. 2 Sant Lal Kaushik, who is the brother of the appellant, has admitted the case of plaintiff in toto—The appellant sought to brush this aside by asserting active collusion between the respondents and his brother—In the face of the admissions made by the appellant himself which have been culled out from his pleadings and inferred there from, this assertion must fall to the ground—Consequently, judgment of the trial Court affirmed.

— Section 96—State Bank of India Employees Provident Fund Rules—Rules 33 & 359—Payment of Gratuity Act, 1972—Section 7—Respondent filed suit for recovery against appellant bank on ground it failed to pay interest on Provident Fund amount and gratuity amount of her deceased husband employed as officer with appellant bank—Suit decreed—Aggrieved appellant bank urged in appeal, Respondent failed to produce relevant documents for release of terminal dues of her husband due to inter se dispute between legal heirs of deceased which prevented appellant bank from releasing terminal dues—Held:- Rule 359 is a beneficial rule framed for the expeditious settlement of the provident fund dues and pension claims of bank employees and to burden the bank with the interest liability in the event of any delay—Interest is a compensation payable when the money is unnecessarily withheld by one whose obligation was to pay the same at a given time and the same is not paid in breach of legal rights of creditor—The appellant bank cannot be blamed for not making the refund of terminal benefits to the Respondent which is attributed only to the Respondent.

State Bank of India v. *Smt. Vijay Lakshmi Thakral 329*

COMPANIES ACT, 1956—Section 433, 434—Petitioner a Company registered under the laws of Czech Republic—Owned 100% shares in a Company SP of W, a.s—A Czech Republic Company—Executed a stock purchase and sale Agreement for the sale of 100% equity interest of SP of W, a.s at the purchase price of CZK 230,000,000, with another Company M/s Newco Prague, s.r.o (purchaser) sale price was to be paid in four installements—Respondent a Company registered with Registrar of Companies, Delhi stood as guarantor by a guarantee declaration for the payment of the said unpaid installments—Purchaser made only part payment—Petitioner approached respondent demanding payment of

unpaid installments—Subsequently gave statutory winding up notice to the respondent for making payment—Respondent raised objections such as no debt could arise in favour of the petitioner until a decree on the basis of alleged declaration of guarantee is obtained against the respondent; no Power of Attorney executed in favour of Mr. Ravi Chilkuri the executant of guarantee declaration does not bear stamp or seal of respondent Company—Mr. Ravi Chilukuri neither a Director nor a shareholder at the relevant time; guarantee declaration was null and void as no mandatory permission was obtained under FEMA or FERA and; winding up notice was pre mature as the notice could have been issued only if the payment had not been made within the stipulated time—Held—Question of Mr. Ravi Chilukuri having no Power of Attorney in his favour or guarantee declaration not bearing the stamp/seal of respondent not available as defence to respondent in view of the principle of internal management—Defence also clearly mentioned no criminal proceedings initiated against Mr. Ravi Chilukuri—Since the notice of winding up was issued only after the respondent did not make the payment in terms of declaration, neither winding up notice nor petition for winding up pre mature—If the guarantee declaration was executed in breach of provisions of FEMA or FERA respondent could be prosecuted for the same—It, however, cannot be said that guarantee is null and void or cannot be enforced on this ground—Gurantee declaration is a contract enforceable under law—Not necessary for the petitioner to wait to obtain a decree from Civil Court on the basis of guarantee declaration—Thus, respondent owe debt to petitioner which it defaulted in paying—Defence set up moonshine and sham—Provisional liquidator appointed.

N&S&N Consultants S.R.O v. *SRM Exploration Private Limited 281*

CONSTITUTION OF INDIA, 1950—Article 226—Wakf Act, 1995—Section 9—Central Wakf Council Rules 1998—Rule 7 and 13—Petitioner seeking to quash the order passed by respondent no. 3 dated 10.03.2010, whereby the respondent no. 1 was directed to retire the petitioner from the post of Secretary to Central Wakf Council on 31.03.2010—Terms and conditions of the service of the petitioner were to be determined by the Council and not by the Central Government or the Ministry—Rule 7 empowers the Council to fix the terms and conditions of the appointment—Rule 13 has no applicability—Respondent asked that Chair Person is acting only as an Appointing Authority—Central Government actually appointed the Secretary—Rule 13 is applicable to regulate the terms and conditions of services of the petitioner—When Rule 7 is read along with Rule 13, same makes clear that Rule 13 will govern each and every post in the Council, wherein the Central Government and rules applicable to the Central Government employees shall operate—Held—The Rules in Central Wakf Rules, 1998 thus provides for distinct posts which can be categorized under the Rules—The said posts include that of the members, Secretary and Chairperson and recognized posts as against the post which have been created from time to time which is mandated under Rule, 13 (1)—Thus, the Rules relating to the staff of the Council which is created post from time to time cannot be pressed into service so far it relates to recognized post of Secretary (who has separate allocated powers within rules also) which is governed by Rule 7 of the Rules—When there is specific provision enacted under the Rules for carrying out specific purpose, the said provision must be given its effect against the provision which can only be used by way of interpretative tools to render the specific provision ineffective—Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails

over the general provision and the general provision applies only to such cases which are not covered by the special provision, appointment of the Secretary and its terms and conditions of the employment shall be governed by Rule 7 which means the same which has been fixed by the Council a is against Rule 13 which deals with creating posts.

Dr. Mohammad Rizwanul Haque v. *Central Wakf Council & Ors.* *1*

— Article 226—Interference in contractual agreements permissible when instrumentality of State party to contract and acts in an unreasonable and arbitrary manner—Petitioner No.1 engaged in business of design, manufacture, installation and servicing of power generation equipment—Petitioner No.2 director and shareholder of Petitioner No.1—Petitioner No.1 entered into agreement on 27.04.2007 for Onshore Services with Gujarat State Electricity Corporation Ltd ("GSECL") for commissioning of power plant in Surat—GSECL also entered into agreement with Alstom Switzerland Ltd for providing Offshore Equipment and Spare Parts supply on CIF basis pertaining to Surat power plant—Respondent issued marine Policy and Erection All Risk Insurance ("EARI") Policy—Petitioner No.1 paid requisite premium under EARI Policy in six agreed installments—Last installment paid on 08.11.2007—On 06.07.2009, Petitioner No.1 received notice fro Respondent raising demand of Rs.1.50 crores—Comptroller and Auditor General ("CAG") objected to alleged excess discount given by Respondent to Petitioner—Respondent had allegedly allowed discount of more than 51.25% limit prescribed by Insurance Regulatory and Development Authority ("IRDA")—Petitioner claimed that demand for additional premium without legal basis—Respondent contended that CAG demanding immediate compliance and recovery of differential premium amount—Respondent stated that if premium not paid

when her juniors were promoted without claiming any monetary benefits—Her case for promotion was considered along with other candidates—She was superseded despite being the senior most Deputy Registrar—She made representations—Representation rejected—Subsequently appointed as Joint Registrar with effect from 21.03.2009—Petitioner Contention—According to OM No. 35034/7/97—Estt. (D) dated 08.2.2002 once the persons to be appointed on the basis of merit-cum-seniority meet the bench mark, no super-session in selection/promotion is permissible—Respondent no.1 contends that the selection in question being merit-cum-seniority, the subjective findings of the Selection Committee dated 04.08.2008 which have taken the comparative merit into consideration ought not to be interfered with—Application of OM No. 35034/7/97—Estt. (D) dated 08.02.2002 not disputed—Private respondent opposed the petition—OM No. 35034/7/97—Estt. (D) is not applicable in view of the provisions of Article 229 of the Constitution of India—Held—We are unable to accept the said contention for the reason that the said Rules have been issued under Article 229 of the Constitution of India and provide for Rules and Orders of Central Government to be made applicable when no provision or insufficient provision has been made in the said Rules—Other than stating that the criteria is merit-cum-seniority, nothing else was sent out in the Rules and thus OM No. 35034/7/97—Estt. (D) dated 08.02.2002 was made applicable—There is little doubt over the application of the OM No. 35034/7/97—Estt. (D) dated 08.02.2002 when the office note itself proceeds by relying on OM No. 35034/7/97—Estt. (D) dated 08.02.2002 which office note resulted in the case being put up for consideration before the Selection Committee for promotion of the petitioner R-2 and R-3 and other officers—OM No. 35034/7/97—Est. (D) dated 08.02.2002 would apply to the present case and would entitle petitioner

to be promoted prior to promotion of R-2 and R-3—The petitioner is entitled to be placed in seniority above R-2 and R-3 and would be entitled to all the consequential benefits from the date when she ought to have been promoted to the post of Joint Registrar i.e. 07.08.2008 without the benefit of actual pay for the period she has not worked on the post of Joint Registrar till her appointment as Joint Registrar vide order dated 03.06.2009 with effect from 21.03.2009.

— Article 226—Petition claiming ‘Liberalized Family Pension; Late Mukhtiar Singh, husband of the petitioner was attached to 5th Battalion, ITBP which was stationed near Pantha Chowk, Srinagar—While on duty at the Unit Quarter Guard on 15.6.1999 late Mukhtiar Singh suffered Myocardial Infarction—Respondent denied that the place where Mukhtiar Singh died, was an operation area—It was a disturbed area—It was denied that ITBP was involved in war fought at the Line of Control—Held—Admittedly, late husband of the petitioner was not on combat duty; as were the late husband of Smt. Manju Tewari and Smt. Kanta Yadav—The petitioner asserted that her husband was in an operational area, a fact denied by respondents No. 1 to 3 who assert that petitioner's husband was in a ‘Disturbed Area’ and not in an ‘Operational Area’—It is settled law that the onus lies upon the party who asserts a fact—That apart, we can take judicial fact of the matter that Kargil war was fought on the Line of Control between India and Pakistan and not in Srinagar Town—The admission by the petitioner that her husband was attached to the 5th Battalion of ITBP which was stationed at Pantha Chowk near Srinagar in the State of Jammu & Kashmir entitles this Court to presume that the husband of the petitioner was not in an ‘Operational Area’—Under category ‘E’ of the OM, the

child got 2/9th share each—Understanding arrived at between daughters and Defendant for sale of share—Said sale not materialized—Suit for specific performance against daughters filed—Dismissed—Appeal pending—One daughter entered into agreement to sell her share to outsider—Defendant filed suit against daughter under Section 44, Transfer of Property Act, 1882—Defendant also acquired 2/9th share of son—Entire ground floor in in occupation of Official Liquidator appointed by Company Court—Plaintiffs filed suit for specific performance of Agreement to Sell—Application for permanent injunction also made—Total sum of Rs. 1 crore already paid by Plaintiffs—Application under Order 39 dismissed—Defendant directed to deposit sum of Rs. 7 crore with Registrar General—Defendant restrained from parting with share in suit property—Hence two appeals filed—Plaintiff claiming injunction and Defendant alleging Rs. 7 crore to be excessive.

— Parties specifically agreed that Plaintiff entitled to negotiate with daughters without affecting sale price as soon as possible—Parties further agreed that after purchase of share of daughters, transaction with Defendant to be completed within three months—Consideration to remain 7 crores irrespective of transaction amount with daughters—Purchase of share of daughters condition precedent for implementation of agreement—Intention of parties to complete transaction within shortest possible period—However no agreement reached between daughters and Plaintiffs—Four year elapsed since original Agreement to Sell.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Rightly held that essence of clause providing for shortest possible time had already elapsed—Period of four years rightly held to be too long—Defendant, *prima facie* entitled to say that sale price had become unrealistic—Defendant rightly

unwilling to suffer transaction at earlier price—Factum of increase in price of suit property admitted by both parties.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Restraining Defendant from dealing with suit premises—Reliance placed on ratio of KS Vidyandan—When delay makes specific performance inequitable even where time not essence of contract—Contract to be performed with reasonable time—Reasonable time determined by looking at surrounding circumstances.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Period of four years lapsed—Prices of suit premises have arisen—Co owners have created third party interests in their shares—Completion of original transaction beyond implementation and unenforceable—Defendant cannot be made to suffer the transaction.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

— Injunction—Rightly not granted—In given circumstances neither prima facie case nor balance of convenience lies in favour of Plaintiff—Irreparable loss—Defendant offered to deposit sum of Rs. 7 crore—Offer made by Defendant herself—No infirmity in the same.

Smt. Rani Sharma v. *Ms. Sangeeta Rajani & Others*..... *75*

INDIAN EVIDENCE ACT, 1873—Section 165—Plaintiff filed review application seeking review of order whereby notice was issued to Post Master, Post Office, Tis Hazari Court, Delhi, to produce relevant records with respect to postal receipts filed by plaintiff—As per plaintiff, summoning of Post Master amounted to commencing inquiry under Section 340 of Code of Criminal Procedure which shall cause serious prejudice to

plaintiff—Held:- Section 165 provides plenary powers to the judge to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant—It is intended to arm the judge with the most extensive power possible for the purpose of getting at the truth—The effect of this section is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever and thus possibly acquire valuable indicative evidence which may lead to other evidence striclty relevant and admissible—Notice issued to Post Master to find truth in exercise of power under the Act.

— Section 34—Entires made in books of accounts—Admissible as relevant evidence—One M/s JC Enterprises a partnership firm—Dissolved vide dissolution deed on 01.04.1997—Thereafter, Plaintiff running firm as proprietorship concern—Entered into oral agreement with Defendant—Defendant appointed as stockist of lotteries on whole sale rate basis—Plaintiff required to dispatch lottery tickets to Defendant as per requirement of Defendant—Defendant required to make payment within one week from date of draw—In default Plaintiff entitled to interest—Plaintiff alleged that Defendant is liable to pay total sum of Rs. 43,82,473- Hence present suit for recovery. Held:

— Section 34—Entries made in books of accounts—Admissible as relevant evidence—Rationale—Regularity of habit, difficulty of falisification, fair certainty of ultimate detection—However, entries alone not sufficient to charge person with liability—

Must be corroborated.

INDIAN PENAL CODE, 1860—Section 302 and 34—All five appellants challenged their conviction under Section 302 IPC read with Section 34 IPC—It was urged on behalf of four appellants, they cannot be made liable for acts of others with aid of Section 34 IPC as prosecution version was that quarrel took place all of a sudden on spur of moment without any pre concert or pre planning and they were not armed with any weapon—On other hand, it was contended on behalf of the State, there were some minor variations and discrepanies here and there in testimonies of three eye witnesses which do not affect the main substratum of prosecution version—Held:- In criminal law, every accused is responsible for his own act of omission or ommission—This rule is subject to exception of vicarious liability enshrined under Section 34 IPC—Direct proof of common intention is seldom available and therefore such intention can only be inferred from the facts and circumstances of each case.

— Section 307—Aggrieved by judgment of conviction under Section 307 of Act and order on sentence to undergo rigorous imprisonment for 10 years and fine of Rs.5,000/-, in default of payment of fine to undergo rigorous imprisonment for one year, appellant has challenged order only qua quantum of sentence—It was urged period of sentence be modified to period already undergone as case of appellant does not fall within ambit of an ‘intention’ to commit an act that is likely to cause death but an intention to cause an injury which may probably cause death—Held:- To justify a conviction under

this section it is not essential that bodily injury capable of causing death should have been inflicted—Although nature of injury actually caused may often give considerable assistance in coming to a finding as to intention of deceased, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds—Section makes a distinction between an act of accused and its result, if any—Such an act may not be attended by any result so far as person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section—It is not necessary that injury actually caused to victim of assault should be sufficient under ordinary circumstances to cause death of person assaulted—Intention of appellant was clear from fact that after shooting once at thigh of PW1, appellant again shot him and also asked his accomplice to shoot him and it was mere co-incidence that both bullets did not hit Complainant as he ran into house—Order of sentence modified, appellant to undergo Rigorous Imprisonment for a period of 8 years and fine of Rs.30,000/- out of which if realised Rs. 25,000/- be given as compensation to complainant.

Harish Chawla v. *State* *447*

MINIMUM WAGES ACT, 1948—Section 2(h)—Payment of Bonus Act, 1965—Section 2(21) (ii)—Petition challenging Award dated 16.09.2002 passed by Industrial Tribunal—Contention—Workman is entitled to payment of bonus on the wages minus the house rent allowance and not on the entire amount of wages—Held—When reading the definition of salary or wages as found in the Payment of Bonus Act, 1965, we must also take into account the intention and purpose of the legislature in enacting the Payment of Bonus Act and the observation of the Supreme Court in Airfreights Ltd. (Supra) case that the minimum wages ought not to be broken up—In

view of the above, I hold that the minimum wage is a figure which is to be taken as a whole and when bonus is paid on the same, the petitioner/Management is not entitled to break up this figure of minimum wage by stating that the minimum wage includes the figure of house rent allowance which should be deducted from the minimum wage and bonus is then payable only on such reduced figure of wages after removing the alleged figure of house rent allowance—Petition dismissed.

Globe Detective Agency (P) Ltd. v. *Presiding Officer Industrial Tribunal No. III & Anr.* *44*

MOTOR VEHICLE ACT, 1988—Appellant suffered grievous injuries in accident occurring on 27.04.1993—Appellant standing near front gate of bus—Driver abruptly applied brakes—Appellant fell out of bus and right foot crusted under wheels—Under treatment from 27.04.1992 to 11.06.1993—Right forefoot amputated and skin grafting done—Motor Accidents Claims Tribunal awarded total compensation of Rs. 1,55,000/-—Appellant seeks enhancement of compensation—Hence instant appeal—Held—Appellant aged 28 years at time of accident—Working as Machine Operator drawing salary of Rs.3,469 Though no loss of earning capacity—Appellant suffered 60% disability—Appellant transferred to administrative department as Junior Assistant after accident—No loss of earning capacity—However promotions delayed due to transfer—Lump sum of Rs.50,000/- awarded for loss of income due to delayed promotions—Compensation enhanced to Rs.3,30,000/-—Appeal allowed.

Purshotam Dass v. *New India Asso. Co. Ltd. & Ors.* .. *355*

PAYMENT OF BONUS ACT, 1965—Section 2(21) (ii)—Petition challenging Award dated 16.09.2002 passed by Industrial Tribunal—Contention—Workman is entitled to payment of

bonus on the wages minus the house rent allowance and not on the entire amount of wages—Held—When reading the definition of salary or wages as found in the Payment of Bonus Act, 1965, we must also take into account the intention and purpose of the legislature in enacting the Payment of Bonus Act and the observation of the Supreme Court in Airfreights Ltd. (Supra) case that the minimum wages ought not to be broken up—In view of the above, I hold that the minimum wage is a figure which is to be taken as a whole and when bonus is paid on the same, the petitioner/Management is not entitled to break up this figure of minimum wage by stating that the minimum wage includes the figure of house rent allowance which should be deducted from the minimum wage and bonus is then payable only on such reduced figure of wages after removing the alleged figure of house rent allowance—Petition dismissed.

TRANSFER OF PROPERTY ACT, 1882—Renewal of lease deeds—Plaintiffs leased the property to defendant no.1 by lease deed dated 18.9.1986—Defendant no.1 sub-let the property to defendants no.2 to 4—Defendants no. 1 to 4 further sub-letted the property to Defendant no. 5—Suit for possession filed—Decree in favour of Plaintiffs by Single Judge—Appeal preferred—Plea inter-alia before Appellate Court—Clause 4 of Lease Agreement constituted complete waiver of right to seek possession—Lease was perpetual, Plaintiff had no right to terminate—Clause 2 of the Agreement provided renewal of lease for five years at the option of the tenant subject to increase in rent under Rent Control Act or increase of 25% at each renewal—Clause 4 provided that premises was covered under Delhi Rent Control Act—If the

Delhi Rent Control Act was to be amended giving additional rights to landlords, landlord herein would not exercise or enforce any such right and in particular the rights to evict the tenant accept for the breach of terms of perpetual lease dated 20.7.1937—Submitted on behalf of Appellants Clause 4 constituted a complete waiver of right to seek possession on the part of plaintiffs—Held, Clause 2 though provided for renewal of lease but such renewals to take effect, would have to be by way of registered lease deeds—Since lease was not renewed in terms of Clause 2 by executing a Lease Deed, the question of waiver under Clause 4 did not arise as a lease itself no longer subsisted.

— Mutual account—Must be transactions on each side which create independent obligations—Not merely transactions which create obligations on one side—Real question if whether transactions gave rise to independent obligations or whether merely mode of liquidation—However, no allegation that parties having mutual, open current account and reciprocal demands between parties—Present suit based only on part payment last made by Defendant—No plea of parties maintaining mutual, open and current account—Hence Article 1 not applicable.

— Territorial jurisdiction—Contracts—Jurisdiction depends on situs of contract and cause of action arising through connecting factors—Suit for breach of contract can always be filed at place where contract was to be performed or where performance completed—Part of cause of action arises where

1998—Rule 7 and 13—Petitioner seeking to quash the order passed by respondent no. 3 dated 10.03.2010, whereby the respondent no. 1 was directed to retire the petitioner from the post of Secretary to Central Wakf Council on 31.03.2010—Terms and conditions of the service of the petitioner were to be determined by the Council and not by the Central Government or the Ministry—Rule 7 empowers the Council to fix the terms and conditions of the appointment—Rule 13 has no applicability—Respondent asked that Chair Person is acting only as an Appointing Authority—Central Government actually appointed the Secretary—Rule 13 is applicable to regulate the terms and conditions of services of the petitioner—When Rule 7 is read along with Rule 13, same makes clear that Rule 13 will govern each and every post in the Council, wherein the Central Government and rules applicable to the Central Government employees shall operate—Held—The Rules in Central Wakf Rules, 1998 thus provides for distinct posts which can be categorized under the Rules—The said posts include that of the members, Secretary and Chairperson and recognized posts as against the post which have been created from time to time which is mandated under Rule, 13 (1)—Thus, the Rules relating to the staff of the Council which is created post from time to time cannot be pressed into service so far it relates to recognized post of Secretary (who has separate allocated powers within rules also) which is governed by Rule 7 of the Rules—When there is specific provision enacted under the Rules for carrying out specific purpose, the said provision must be given its effect against the provision which can only be used by way of interpretative tools to render the specific provision ineffective—Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special

provision, appointment of the Secretary and its terms and conditions of the employment shall be governed by Rule 7 which means the same which has been fixed by the Council a is against Rule 13 which deals with creating posts.

— Section 9—Central Wakf Council Rules 1998—Rule 7 and 13—Petition seeking to quash the order passed by respondent no. 3 dated 10.03.2010, whereby the respondent no. 1 was directed to retire the petitioner from the post of Secretary to Central Wakf Council on 31.03.2010—Order is bad—Terms and conditions of the service of the petitioner shall be determined by the Council and not by the Central Government or the Ministry—Appointment of the petitioner was made under Rule 7—Chairman/Chairperson is appointing authority on the terms and conditions fixed by the Council in accordance with Rule 7—Appointment letter leaves no room for any ambiguity, so far as the appointing authority is concerned; Central Government is appointing authority—Held—Terms of service of petitioner is governed by Rule 7 of Central Wakf Council Rules, 1998 and the Council has its final say in the matter rather than the respondent no.3; the term of retirement of the petitioner fixed by the Council in exercise of its power under Rule 7 cannot be rendered inoperative due to the impugned order passed by respondent no. 3—Order dated 10.03.2010, quashed being in violation of Rule 7.

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WP (C)

DR. MOHAMMAD RIZWANUL HAQUE ....PETITIONER

VERSUS

CENTRAL WAKF COUNCIL & ORS. ....RESPONDENTS

(MANMOHAN SINGH, J.)

WP (C) NO. : 2001/2010 DATE OF DECISION: 07.01.2011

(A) Constitution of India, 1950—Article 226—Wakf Act, 1995—Section 9—Central Wakf Council Rules 1998—Rule 7 and 13—Petitioner seeking to quash the order passed by respondent no. 3 dated 10.03.2010, whereby the respondent no. 1 was directed to retire the petitioner from the post of Secretary to Central Wakf Council on 31.03.2010—Terms and conditions of the service of the petitioner were to be determined by the Council and not by the Central Government or the Ministry—Rule 7 empowers the Council to fix the terms and conditions of the appointment—Rule 13 has no applicability—Respondent asked that Chair Person is acting only as an Appointing Authority—Central Government actually appointed the Secretary—Rule 13 is applicable to regulate the terms and conditions of services of the petitioner—When Rule 7 is read along with Rule 13, same makes clear that Rule 13 will govern each and every post in the Council, wherein the Central Government and rules applicable to the Central Government employees shall operate—Held—The Rules in Central Wakf Rules, 1998 thus provides for distinct posts which can be categorized under the Rules—The said posts include that of the members, Secretary and Chairperson and recognized posts as against the post which have been created from time to time which is mandated under Rule, 13 (1)—Thus,

the Rules relating to the staff of the Council which is created post from time to time cannot be pressed into service so far it relates to recognized post of Secretary (who has separate allocated powers within rules also) which is governed by Rule 7 of the Rules—When there is specific provision enacted under the Rules for carrying out specific purpose, the said provision must be given its effect against the provision which can only be used by way of interpretative tools to render the specific provision ineffective—Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, appointment of the Secretary and its terms and conditions of the employment shall be governed by Rule 7 which means the same which has been fixed by the Council a is against Rule 13 which deals with creating posts.

The Rules in Central Wakf Rules, 1998 thus provides for distinct posts which can be categorized under the rules. The said posts including that of the members, Secretary and Chairperson are recognized posts as against the post which have been created from time to time which is mandated under Rule 13 (1). Thus, the Rules relating to the staff of the Council which is created post from time to time cannot be pressed into service so far it relates to recognized post of Secretary (who has separate allocated powers within rules also) which is governed by Rule 7 of Rules.

(Para 30)

I find merit in the submission of Mr. Sandeep Sethi, learned Senior counsel for the petitioner that when there is specific provision enacted under the rules for carrying out specific purpose, the said provision must be given its effect against the provision which can only be used by way of interpretative tools to render the specific provision ineffective. Applying

this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, I must hold that appointment of the Secretary and its terms and conditions of the employment shall be governed by Rule 7 which means the same which has been fixed by the Council as against the Rule 13 which deals with creating posts. **(Para 31)**

(B) Constitution of India, 1950—Article 226—Wakf Act, 1995—Section 9—Central Wakf Council Rules 1998—Rule 7 and 13—Petition seeking to quash the order passed by respondent no. 3 dated 10.03.2010, whereby the respondent no. 1 was directed to retire the petitioner from the post of Secretary to Central Wakf Council on 31.03.2010—Order is bad—Terms and conditions of the service of the petitioner shall be determined by the Council and not by the Central Government or the Ministry—Appointment of the petitioner was made under Rule 7—Chairman/ Chairperson is appointing authority on the terms and conditions fixed by the Council in accordance with Rule 7—Appointment letter leaves no room for any ambiguity, so far as the appointing authority is concerned; Central Government is appointing authority—Held—Terms of service of petitioner is governed by Rule 7 of Central Wakf Council Rules, 1998 and the Council has its final say in the matter rather than the respondent no.3; the term of retirement of the petitioner fixed by the Council in exercise of its power under Rule 7 cannot be rendered inoperative due to the impugned order passed by respondent no. 3—Order dated 10.03.2010, quashed being in violation of Rule 7.

After the aforementioned discussion, it can be concluded that the terms of the service of the petitioner is governed by

Rule 7 of Central Wakf Council Rules, 1998 and the Council has its final say in the matter rather than the respondent No.3, it can be also be said without hesitation that the term of retirement of the petitioner fixed by the Council in exercise of its power under Rule 7 cannot be rendered inoperative due to the impugned order passed by respondent No. 3. **(Para 51)**

Important Issue Involved: The appointment of Secretary in the Central Wakf Council and the terms and conditions of employment are governed by Rule 7 as fixed by the Council.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Sandeep Sethi, Sr, Advocate with Mohd. Irshad Hanif, Advocate.

FOR THE RESPONDENTS : Mr. A.S. Chandhiok, ASG with Mr. A.K. Bhardwaj, Mr. M.P. Singh, Advocates for UOI.

CASES REFERRED TO:

1. *Captain Sube Singh and Ors.* vs. *Lt. Governor of Delhi and Ors.,* (2004) 6 SCC 440.
2. *Chief Forest Conservator (Wild Life) and Ors.* vs. *Nisar Khan,* [2003]2SCR196.
3. *High Court of Gujarat and Anr.* vs. *Gujarat Kishan Mazdoor Panchayat and Ors.,* [2003]2SCR799.
4. *C.I.T. Mumbai* vs. *Anjum M.H. Ghaswala and Ors.,* (2002) 1 SCC 633.
5. *Frick India Ltd* vs. *Union of India,* (1990) 1 SCC 400.
6. *Reserve Bank of India* vs. *Peerless Co,* [1987] 2 SCR 1.
7. *State of U.P.* vs. *Singhara Singh and Ors.,* (1964) 4 SCR 485.
8. *The J.K. Cotton Spinning and Weaving Mills Co. Ltd* vs.

The State of Uttar Pradesh & Others, AIR 1961 SC 1170.

9. *R.* vs. *Electricity Commissioners* [1924] 1 K.B. 171.

10. *Taylor* vs. *Taylor* 1876 (1) Ch.D. 426.

RESULT: Petition allowed.

MANMOHAN SINGH, J.

1. This order shall dispose of the petition filed by the petitioner under Article 226 of Constitution of India challenging the order passed by the respondent No. 3 on 10.3.2010 whereby the respondent No. 1 through its chairman is directed to retire the petitioner from the post of the secretary to the Central Wakf Council (hereinafter referred to as Council) on 31.3.2010. The petitioner has challenged the said order by way of this petition on several counts. The brief factual matrix of the matter leading to filing of this petition are enunciated as under:

(a) The petitioner is stated to be working as a Secretary to the Central Wakf Council after meeting the due qualification. The respondent No. 1 Central Wakf Council (for short CWC) is a statutory body constituted by Government of India under section 9(1) of the Wakf Act, 1995 for the various purposes and matters concerning the working of the boards and due administration of Wakfs. The respondent No. 1 Council comprises of several members inter alia, Union Minister Incharge of Wakf is the ex- officio Chairperson, other members include nominated members of Government of India, representatives of Muslim Organization, persons of national eminence, Judges of Supreme Court or High Court, Advocate of national eminence etc.

(b) The petitioner has stated that in the year 1997, the advertisement for the post of Secretary appeared in the Employment News and pursuant to the same, petitioner applied for the said post and was appointed as Secretary to the respondent No. 1 by way of the appointment letter dated 03.07.1997.

(c) The petitioner was initially appointed for the period of 1 year from the date of the appointment letter and subsequently on 22.8.2000 the Ministry moved the proposal to absorb the petitioner permanently which was ratified by the respondent Council in its 43rd meeting held on 29.08.2000 which provided that the petitioner shall be absorbed

permanently.

(d) The petitioner has averred in the petition that in the year 2008, the petitioner was served with a charge sheet relating to some departmental inquiry alleging that the petitioner during his tenure in 2001- 2002 had made some appointments acting as administrator of Punjab Wakf Board in contravention to rule 3 (i) and (iii) of CCS (conduct) Rules 1964. The petitioner has filed the detailed reply denying such charges.

(e) On 01.09.2009, the Planning and Advisory Committee of the Council has made following resolution:

> "Recruitment rules for the post of secretary, Central Wakf Council approved in the 27th Meeting of the council held on 10th July 1988 simply says that the applicant for the post should be "not below 45 years and not exceeding 60 years on the date of application relaxable on the discretion of chairperson in case of otherwise exceptionally qualified candidate". This indicates that the council wanted the secretary to continue in the service of the council beyond 60 years. The Rule 7 (1) of Central Wakf Rules, 1998 (corresponding to Rule 5 of the Central Wakf Council Rules, 1965) states "there shall be a secretary to the council, who shall be Muslim appointed by the chairperson on such terms and conditions as may fixed by the council". Therefore, it is the prerogative of the council to decide the age of retirement of its secretary.
>
> In case of the present secretary, Dr. M.R. Haque , the retirement age has not yet been decided, therefore, the committee in view of Rule 7 (1) of the Central Wakf Council Rules 1998 recommended that his retirement age may be fixed at 62 years. It can be further extended on the discretion of the council"

(f) The said resolution dated 01.09.2009 was placed and approved by the Council in its 55th meeting held on 05.10.2009. The minutes of meeting was duly approved by the Chairman and was circulated on 7.10.2009.

(g) Pursuant to the said meeting, the office order dated 7.10.2009 No.12 (1)/97– CWC was issued which provided that the age of retirement of the present petitioner has been extended to 62 years. The petitioner

submitted that the minutes of the said meeting was also sent to joint secretary, Ministry of Minority affairs, respondent No.3. There was no objection received from the government at the time when the decision was taken by the Council to extend the retirement age of the petitioner.

(h) The petitioner submitted that he wrote to the enquiry officer in the disciplinary enquiry demanding the documents which were not supplied to him in support of the charges leveled against him. The said letter was written by the petitioner on 12.01.2010. Thereafter on 20.01.2010, the Chief Vigilance Officer of the Ministry of Minority Affairs wrote to the enquiry officers and to other officers of the Ministry to ensure that the petitioner is not posted on sensitive post on the ground that the petitioner was issued a major charge sheet. The said letter recommended necessary action and status report by 27.01.2010.

(i) The petitioner also filed a representation to the Chairman on February 19, 2010 explaining the legal position regarding distinction of the appointment of Secretary as against the other staff. The said letter also referred to the resolution and decision taken by the respondent no. 1 in 55th meeting in the year 2009.

(j) That Respondent No. 3 vide letter dated 10.3.2010 explained the regarding the Central Vigilance Commission's direction regarding the disciplinary case against the petition wherein the letter dated 20.01.2010 was also enclosed. It was also mentioned that the petitioner who will be 60 years of age by March 2010 should be allowed to retire on 31.3.2010 as per the government rules in absence of duly approved rules of CWC. The said letter also called upon the respondent No.1 to reconsider the decision regarding the extension of tenure of the petitioner.

(k) The respondent No. 2 wrote the letter on behalf of the respondent No.1 on 16.3.2010 informing the orders passed by the respondent No.3 by enclosing the copy of the letter dated 10.3.2010 received from ministry addressed to Chairman.

2. The petitioner filed the present writ petition seeking to quash the orders passed by the respondent No. 3 on 10.3.2010 on various grounds. The petition was listed before this court on 23.3.2010 when this Court while issuing notice stayed the operation of the impugned order. The petitioner has urged several grounds in the petition which can be stated as under:

(a) Firstly, the petitioner contends that the impugned order is bad in as much as the terms and conditions of the service of the petitioner shall be determined by the Council and not by the Central Government or the Ministry and the same is the mandate of Section 9 of the Wakf Act and Rule 7 of the Central Wakf Council Rules 1998. Thus, the appointing authority and the authority to determine the terms and conditions of the service and for that matter the retirement age is the council and not the government which makes the impugned order bad at the inception.

(b) Secondly the petitioner submitted that the Rule 7 of the Wakf Rules, 1998 clearly empowers the Council to fix the terms and conditions of the appointment. In terms of Rule 7, the Council vide its 55th meeting dated 05.10.2009 has already approved and implemented the suggestion of the Planning and Advisory Committee and thereby caused to extend the age of retirement of the petitioner to 62 in contradistinction to 60 years which is mentioned in the order dated 10.3.2010. Thus, the said impugned order being contradictory to the age fixed by the Council is bad and liable to be quashed and the terms of the appointment fixed by the Council shall prevail.

(c) The reasons mentioned in the impugned order are incorrect which is that in the absence of the recruitment rules duly approved, the rules relating to ordinary Government employee shall apply. The said reasoning is erroneous according to the petitioner in as much as the Rule 7 itself empowers the Council to determine the terms and conditions of the appointment of the Secretary. Once, the said power is given to the Council, the Central Government Rules cannot be pressed into service.

(d) The Respondent No. 1 and 3 have deliberately misinterpreted the provisions of Rule 7 and Rule 13 which are applicable in different fields. Rule 7, as per the petitioner is meant for the post of Secretary which is reserved for a member of a particular religion in the present case a Muslim and Rule 13 will be applicable to other posts of

the staff of the Council which are non reserved category.

(e) The impugned order suffers from malice as the respondent No. 1 and respondent No. 3 acted in malice as no objection to the Council's decision dated 05.10.2009 was raised by the Government for more than 5 months of the communication. Secondly, the intimation to review the decision regarding the retirement age of the petitioner was referred to Council only on 16.3.2010 with council given no time to act knowing well that the Council is going to complete its term on 17.03.2010.

(f) The passing of the impugned order is arbitrary and without due authority of law and also against the principles of natural justice.

3. The Respondent No. 2 Mr. Ghazi Ul Islam has filed his counter affidavit stating as under :

(a) That the respondent No.2 is the development officer of the respondent No.1. The respondent No. 2 acknowledges that resolution dated 1.9.2009 was placed and approved by the Council and it was resolved that the retirement age of the present Secretary may be fixed at 62 years.

(b) The respondent No.2 also stated that in the 55th Meeting held by the Council on 05.10.2009 presided by the Chairman, the minutes of the Planning and Advisory Committee meeting were approved and confirmed. The office order dated 7.10.2009 was also issued pursuant thereto.

(c) The respondent No.2 stated that on 17.3.2010, he received a call from the office of the Ministry of Minority affairs to come at the premises to sign some letters. The respondent Mo. 2 stated that he was asked to sign the letter dated 16.3.2010 already typed on the letter head of the Council addressed to all members of the Central Wakf Council forwarding the letter dated 10.3.2010 of Ministry of Minority affairs addressed to Chairman which was regarding the retirement of the petitioner.

(d) It is also stated by the respondent No. 2 that similarly on

23.3.2010 he was called by the ministry to sign order office memorandum on 23.3.2010 again typed on the letter head of the council stating that the petitioner will be retiring on 31.3.2010 and so would be handing over the charge to Shri Mohammad Afzal, Deputy Secretary Ministry of Minority Affairs.

(e) The respondent no. 2 has stated that he has acted under the direction of the senior officers of the Ministry of Minority affairs and none of the above decision was made by him independently.

Further, the respondent No. 3 has filed the detailed counter affidavit wherein the respondent has sought to justify the impugned order by bringing into light the following facts:

(a) The respondent no. 3 submitted that the Ministry and Government has its role in appointment and setting out terms and conditions of the appointment of the petitioner. The respondent No.3 corroborates the said facts by highlighting the following:

The panel of selection committee recommended the name of the petitioner.

Vide order w.e.f. 14.07.1997, the Government of India, Ministry of Welfare offered the appointment to the petitioner for the post of secretary, CWC.

The petitioner sent a communication dated 7.7.1997 to Joint Secretary to Government of India, Ministry of Welfare accepting offer of appointment as per the terms and conditions mentioned in the letter of Deputy Secretary, Government of India.

The petitioner made a representation dated 6.2.1998 to the Secretary to Government of India, Ministry of Welfare expressing his willingness to continue as Secretary to CWC wherein he had sought for continuation.

On 2.6.1998, the petitioner herein had again made the representation for fixation of his pay to the Government/ respondent No.3.

On 24.6.1998, the petitioner was given his letter of appointment detailing and fixing his pay scale.

The respondent No. 3 by narrating the abovesaid events has argued that it is actually the respondent No. 3 which is the competent authority to decide the terms and conditions of the service of the petitioner and when the respondent No. 3 has directed the respondent Nos.1 and 2 to ask the petitioner to retire by 31.3.2010, the said decision was done by the competent authority and no interference is called for by this court as there is no fault in the decision making.

(b) The respondent No. 3 has stated in the counter affidavit that the appointment of the petitioner shall be regulated by the respondent No.3 only and to substantiate the argument, the respondent No. 3 relied upon Rule 13 (3) Central Wakf Council Rules, 1998 which reads as under:

> "Rule 13 (3) Except as otherwise provided by the Council, with the prior concurrence of the Central Government, the scale of pay, leave, conduct rules and other terms and conditions of the service for the various categories of posts shall be the same as may for the time being in force be applicable to the officers and servants, holding posts of corresponding scale of pay under the Central Government."

The respondent No.3 thus stated that it is central Government which can regulate the terms of service of the petitioner and the petitioner is trying to take contrary stand after being duly appointed on the terms fixed by the respondent No. 3. The said Rule 13 (3) as per the respondent No. 3 operates and empowers the Central Government to take such decision and thereby the impugned order is in consonance with the Rule 13.

(c) The respondent No. 3 also negated the applicability of Rule 7 on the ground that it was all the time Central Government which played the active role in the appointment of the petitioner and fixation of pay and other terms of the petitioner, nowhere in the appointment letter of the petitioner, it is stated that the petitioner is appointed in

exercise of the powers under Rule 7 of the CWC Rules.

Further respondent No. 3 argued that Rule 13 provides specifically about the pay scales and other terms of service and also provides for terms and conditions for various categories of posts which mean that the same shall have an overriding effect over and above Rule 7 whereby the Central Government will have the powers to regulate the terms of conditions of service as mentioned in Rule 13 and not the Council and thus Rule 7 has no applicability in the present case.

4. Mr. Sandeep Sethi, learned senior counsel appearing on behalf of the petitioner has made submissions to support his case which can be summarized in the following manner:

(a) Mr. Sethi has argued that the petitioner's appointment has been made as per Rule 7 of CWC Rules 1998. Learned counsel for the petitioner has read the contents of the appointment letter to draw the support to his argument that it is the Chairman/ Chairperson which is the appointing authority on the terms and conditions fixed by the Council which is wording of the Rule 7. The appointment letter when read in consonance with Rule 7 and other rules will leave no room for any ambiguity so far as appointing authority is concerned.

(b) Mr. Sethi, learned Senior counsel for the petitioner contended that Rule 13 has no applicability when it comes to regulating the terms and conditions of the Secretary which is sole prerogative of the Council as per Rule 7. Learned counsel for the petitioner has argued that there is a fine distinction between the Rule 7 and Rule 13 of the CWC Rules 1998 and both operate in a different fields. Learned counsel for the petitioner has supported his argument by relying upon judgment passed by Hon'ble Apex Court in **The J.K. Cotton Spinning and Weaving Mills Co. Ltd vs. The State of Uttar Pradesh & Others,** AIR 1961 SC 1170 ,wherein the Apex Court observed that within the same statute itself, there may be provisions which may operate generally and specifically. The special/ specific provision enacted for specific purpose will override

the general provision to the extent to serve the purpose for which it is enacted.

Applying the said principle, the learned counsel submitted that the provision relating to the Secretary (including appointment etc.) is Rule 7 as against Rule 13 which relates to staff of the Council. Thus, both the provisions operate in a separate fields and thus Rule 13 cannot be pressed in to service when it comes to regulating the terms and condition of service of Secretary of the Council.

(c) Learned Senior counsel for the petitioner as argued that the Council from time to time has fixed the age limit of Secretaries who have worked for the Council for the past. Earlier there was a 27th Council meeting held on 10.07.1988 which resolved the age limit of the secretary would be 60 years. However, in 55th meeting, the said age was extended to 62 years and it was resolved and decided that the petitioner's retirement age is fixed at 62 years. Learned counsel for the petitioner thus argued that the respondent No. 3 direction cannot be in conflict with the council decision to fix the age of the petitioner and the same is thus ultra vires the Rules of the Council.

(d) Learned Senior counsel further submitted that there are several other Secretaries in the past who have retired after the age limit and at the discretion of the Council which further makes it clear that it is the Council which has the role to play in fixing the terms and conditions of the Secretary and not the Government. The petitioner has given instances in the petition along with the names of the earlier Secretaries.

(e) Lastly, Mr. Sethi learned Senior counsel for the petitioner has argued that the order of the respondent No. 3 besides being ultra vires also suffers from malice as the said decision was made in haste and with the knowledge that the Council is going to dissolve on 17.03.2010 and cannot have its say thereafter. Accordingly, the respondent no.3 order through respondent No. 2 without proper approval of Chairman as well as on the last day of the Council when the council in exercise of powers under Rule 7 has

already fixed the age of the petitioner suffers from malice, arbitrariness.

5. Learned counsel for the petitioner summed up his arguments by stating the present case is a fit case for this court to interfere as the respondent No. 3 has acted contrary to Rule 7 and attempted to override the decision making of the Council. Further, the respondent No. 3 acted in malice and therefore the order passed by the respondent No. 3 is liable to quashed.

6. Per Contra, learned ASG Mr. Chandhiok appearing on behalf of the respondent No.3 has made his submissions which can be enumerated as under:

(a) Mr. Chandhiok, learned ASG firstly argued that the petitioner has not properly disclosed the complete facts before this court as the respondent No. 3 has written on 10.3.2010 to the council stating that the matter was put up before the competent authority in the Ministry and it has been decided that Dr. Haque, who will attain the age of 60 years should be allowed to retire on 31.03.2010. Thus, the there is no malice or malafide on the part of the respondent No. 3 and rather the said decision has been made by the competent authority as per the Rules.

(b) Learned ASG strenuously argued that it is the respondent No. 3 which is the competent authority and not the CWC. Learned ASG relied upon Rule 7 and Rule 13 which reads as under:

Relying upon both the rules, learned ASG has sought to made a distinction between the language of Rule 7 and Rule 13 wherein the words Chairperson and Chairman are used. He submitted that the Chairperson is only acting as an appointing authority and it is actually the Central Government which makes the actual appointment of the Secretary. Learned ASG submitted that Rule 13 will be applicable to regulate the terms and conditions of service of the petitioner.

(c) Learned ASG further submitted in practical sense also, it is the respondent No. 3 which has made the appointment of the petitioner. Learned ASG relied upon several instances pleaded in the reply/counter affidavit to urge that the

Ministry has its role in appointment of the petitioner which are again reproduced hereinafter;

(d) Learned ASG replying to the argument of the petitioner submitted that once Rule 7 is read along with Rule 13, the same makes it clear that Rule 13 will govern each and every post in the Council wherein the Central Government and Rules applicable to Central Government employees shall operate. Learned ASG has sought to amplify his argument by referring to Rule 13 (3) which talks about various categories of the posts.

8. Learned ASG submitted that once the said Rules talks about various categories of posts and not to the staff, the operation of the said Rule 13(3) cannot be circumscribed to staff only and must be given its fullest effect by interpreting in widest amplitude.

9. Learned counsel further argued that heading of Rule 13 which talks about staff of the Council cannot take away the plain words mentioned under Rule 13 (3) and thus this Court should not merely be convinced by the headings or marginal note of the provision.

10. Learned ASG has relied upon the judgment passed by Supreme Court of India in **Frick India Ltd Vs. Union of India,** (1990) 1 SCC 400, the excerpts of the judgment are reproduced herein after:

> " 8. It is well settled that the headings prefixed to sections or entire cannot control the plain words of the provision; they cannot also be referred for the purpose of construing the provision when the words of the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt, the heading or subheading may be referred to as an aid in construing the provision but even in such a case, it could not be used for cutting down the wide application of clear words used in the provision".

11. Relying upon the aforementioned paragraph of the judgment, learned ASG submitted that clear applicability of Rule 13(3) will resolve the issue which can be answered straightway in following manner:

(a) Central Government/respondent No.3 is the actual appointing authority which in practice too has an active role in appointing the petitioner.

(b) By applicability of Rule 13(3) no prior concurrence has been taken by the Council even if the council has provided otherwise in case of the petitioner.

(c) There is no discretion left with the council without the prior concurrence of the Central Government to extend the age of the petitioner.

(d) The later part of Rule 13 (3) will take care of the applicability of Central Government employees Rules in case of Secretary.

Thus, as per the learned ASG, no ambiguity remains when Rule 13 is applied in decision making process and the impugned order is passed within the framework of Rule 13.

(e) Learned ASG lastly argued that even assuming for the sake of argument Rule 7 is applicable, even then the said Rule talks about that terms and conditions as may be fixed by the Council which as per ASG means the terms already fixed and the subsequent resolution passed in 55th meeting cannot be given the retrospective effect and thus even then the said Rule 7 even if applicable does not improve the case of the petitioner and the writ petition is liable to be dismissed.

12. I have gone through the submissions made by the learned counsel for the parties and also perused through the petition and the counter affidavits filed by the respondents. I shall now proceed to deal with the contention of the parties point wise.

13. First and foremost is the discussion which relates to the applicability of Rule 7 or Rule 13 of the Central Wakf Council Rules 1998 so far it relates to the appointment of secretary/petitioner and its terms and conditions of the service. The same can be done by looking into the framework and scheme of The Wakf Act, 1995 and its corresponding Rules meticulously. The relevant Sections and Rules are reproduced hereinafter.

14. Section 3 in the definition clause defines Council under Section 3(e) which provides that Council means the Central Wakf Council established under Section 9. Section 9 of the Act provides for the establishment and constitution of Central Wakf Council which reads as under:

"9. Establishment and constitution of Central Wakf Council.- (1) For the purpose of advising it, on matters concerning the working of Boards and the due administration of wakfs, the Central Government may, by notification in the Official Gazette, establish a Council to be called the Central Wakf Council

(2) The Council shall consist of –

(a) the Union Minister in charge of wakfs-ex officio Chairperson;

(b) the following members to be appointed by the Central Government from amongst Muslims, namely :-

(i) three persons to represent Muslim organisations having all India character and national importance;

(ii) four persons of national eminence of whom two shall be from amongst persons having administrative and financial expertise;

(iii) three Members of Parliament of whom two shall be from the House of the People and one from the Council of States;

(iv) Chairperson of three Boards by rotation;

(v) two persons who have been Judges of the Supreme Court or a High Court;

(vi) one advocate of national eminence;

(vii) one person to represent the mutawallis of the wakf having a gross annual income of rupees five lakhs and above;

(viii) three persons who are eminent scholars in Muslim Law.

(3) The term of office of, the procedure to be followed in the discharge of their functions by, and the manner of filling casual vacancies among, members of the Council shall be such as may be prescribed by rules made by the Central Government."

15. Section 12 empowers the Central Government to make Rules which reads that the Central Government may, by the notification in the official gazette make rules to carry out the purposes of this chapter. Relevant sub-section 2 of Section 12 reads as under :

"(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

(a) the term of office of, the procedure to be followed in the discharge of their functions by, and the manner of filling casual vacancies among, the members of the Council;

(b) control over and application of the Central Wakf Fund;

(c) the form and manner in which accounts of the Council may be maintained."

17. In exercise of the Rule making power as envisaged under section 12, the Central Government has made The Central Wakf Council Rules, 1998. The definition clause provides for the definition of Chairperson, Council, Secretary and Member which reads as under:

"2. Definitions.-In these rules, unless the context otherwise requires -

a) .....

b) "Chairperson" means the Chairperson of the Council;

(c) "Council" means the Central Wakf Council established under Section 9 of the Act;

(d) .....

(e) "Member" means a member of the Council;

(f) "Secretary" means the Secretary of the Council."

18. Rule 3 and 4 provides for the Register of Members, term of office, resignation and removal of members which are mostly done by the Central Government as mentioned in the Rules.

19. Rule 5 deals with the filling of casual vacancies. Rule 6 provides for the committees of the Council. The Rule 7 which is relevant for the

purposes of the present proceedings provides the provisions relating to Secretary to the Council. For the sake of convenience, the said Rule 7 is reproduced hereunder:

"7. Secretary to the Council.-

(1) There shall be a Secretary to the Council, who shall be a Muslim, appointed by the Chairperson on such terms and conditions as may be fixed by the Council.

(2) The Secretary shall be the Chief Executive Officer of the Council and shall exercise powers of control, supervision and management over the office and staff of the Council.

(3) The Secretary shall give effect to the decisions of, and carry out the instructions that may, from time to time, be given by the Council or the Chairperson :

Provided that when Council is in the process of reconstitution or unable to meet for reasons beyond its control, the Secretary may seek the orders or approval of the Chairperson on an urgent matter :

Provided further that all such orders or approval of the Chairperson shall be placed before the Council for its decision, as soon as the Council meets.

(4) The Secretary shall ensure that all the records of the Council are properly maintained and kept in safe custody.

(5) The Secretary shall be responsible for the presentation of the annual statement of accounts of the Council duly authenticated in the proper form to the auditor appointed by the Central Government for this purpose."

20. Rule 13 is the Rule which provides for the staff of the Council which reads as under:

"13. Staff of the Council.-

(1) The Council shall, from time to time, and on the recommendation of the Secretary, create such posts as are necessary for the efficient performance of the functions of the Council.

(2) (i) The Chairperson shall make appointments to the posts

in the category of Upper Division Clerk or its equivalent and above.

(ii) The Secretary shall make appointments to the posts in the category of Lower Division Clerk or its equivalent and below.

(iii) The appointing authority of the employees of the Council shall be the disciplinary authority and shall be competent to impose all kinds of punishments including dismissal as per the Central Civil Services (Classification, Control and Appeal) Rules, 1965, as amended from time to time.

(iv) In case of disciplinary proceedings against the employees of the Council, where the disciplinary authority is the Chairperson, the Council shall be the appellate authority and where the disciplinary authority is the Secretary, the Chairperson shall be the appellate authority.

(3) Except as otherwise provided by the Council, with the prior concurrence of the Central Government, the scale of pay, leave, conduct rules, and other terms and conditions of service for the various categories of posts shall be the same as may for the time being in force be applicable to the officers and servants, holding posts of corresponding scale of pay under the Central Government."

21. Rule 15 provides for the power to sanction expenditure by Chairperson and Secretary. Rule 17 provides for the powers of Secretary in respect of staff and contingent expenditure.

22. A careful analysis of the Act and the rules from the aforesaid provisions makes it clear that the council under the act has been constituted under Section 9 of the Act. The Central Government has been empowered to make rules to carry out the purposes of the Act under Section 12 of the Act.

23. Further the rules have been enacted by the Central Government which defines Chairperson, Council Member and Secretary. The definition clause itself makes it clear that rules are defining and recognizing the posts under it separately. Pursuant thereto the entire scheme of the rules

deals with the aforementioned posts separately, this can be seen by reading Rule 3 and 4 deals with members of the Council, Rule 6 provides for the appointment of committees within the Council, Rule 7 deals with the secretary to the Council, Rule 13 provides for the staff of the Council etc.

24. The said scheme of the rules makes it abundantly clear that each rule is intending to define and make distinction of the various posts recognized under the rules. The said rules provide for the appointments, term of offices, the removal and other terms separately in their respective rules. It can be said that the said rules are self contained codes for the respective recognized posts under the Act.

25. For Instance, the Council may appoint amongst the members the committees under the rules. The terms of the office of the Committees shall be as specified by the Council. As against the same, the Secretary shall be appointed by the Chairperson on such terms and conditions as may be fixed by the Council. These are the distinctions which are apparent after reading of Rule 6 and 7 of the Rules. Thus, the said rules laid down the appointing authority and provides for the other terms to be regulated by the respective authority as mentioned in the rule.

26. It is also not necessary that it is only the appointing authority which shall be decisive of the terms and conditions of the employment. For instance, Rule 6 gives appointing power as well as the term of the office of members of Committee to the Council as against the Rule 7 where the Appointing Authority is chair person but the terms and conditions of the appointment shall be fixed by the Council. Likewise under Rule 13 staff of various categories is appointed by Chairperson or by the Secretary depending upon the cadre. However, the terms of the office shall be regulated by the Central Government under the Rule 13 (3) except where the Council has otherwise provided with the prior concurrence of the Central Government. Thus, the said rules provide and prescribe for separate appointments with different modes and their terms of offices etc are also regulated separately as per the rules.

27. It is well settled principle of law that the rules made under the Act operate with the same force as that of the Act and are to be adhered to with the same spirit as that of the Act unless the said rules are in conflict with any provisions of the Act wherein the court can declare any rule to be ultra vires the Act. (Kindly see **Chief Forest Conservator (Wild Life) and Ors. v. Nisar Khan,** [2003]2SCR196 wherein Apex Court held that it is well settled that when rules are validly framed, they should be treated as a part of the Act.)

28. It is also the cardinal principle of administrative law that the things which are to be performed in the manner prescribed under the delegated legislation has to be performed in the manner prescribed to the exclusion of other. (The said Rule laid down in **Taylor v. Taylor** 1876 (1) Ch.D. 426 that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden.)

29. It is the normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. This principle has been reiterated in **C.I.T. Mumbai v. Anjum M.H. Ghaswala and Ors.,** (2002) 1 SCC 633; **Captain Sube Singh and Ors. v. Lt. Governor of Delhi and Ors.,** (2004) 6 SCC 440 and **State of U.P. v. Singhara Singh and Ors.,** (1964) 4 SCR 485.

30. The Rules in Central Wakf Rules, 1998 thus provides for distinct posts which can be categorized under the rules. The said posts including that of the members, Secretary and Chairperson are recognized posts as against the post which have been created from time to time which is mandated under Rule 13 (1). Thus, the Rules relating to the staff of the Council which is created post from time to time cannot be pressed into service so far it relates to recognized post of Secretary (who has separate allocated powers within rules also) which is governed by Rule 7 of Rules.

31. I find merit in the submission of Mr. Sandeep Sethi, learned Senior counsel for the petitioner that when there is specific provision enacted under the rules for carrying out specific purpose, the said provision must be given its effect against the provision which can only be used by way of interpretative tools to render the specific provision ineffective. Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, I must hold that appointment of the Secretary and its terms and conditions of the

employment shall be governed by Rule 7 which means the same which has been fixed by the Council as against the Rule 13 which deals with creating posts.

32. The submissions of the learned ASG on this aspect has been dealt with as under:

(1) Firstly the learned ASG argued that the combined reading of Rule 7 and Rule 13 will make it clear that the Rule 13 deals with various categories of the post and the same will be applicable for regulating the post of Secretary also. I find that the combined reading of both the rules suggest that both operate in different fields and the same cannot be said to be in conflict with each other. There is a complete legislative harmony rather than disharmony when it comes to operation of the said rules. The same cannot be used interchangeably under any circumstances.

(2) Secondly learned ASG has contended that the rule 13 (3) is framed in such a language which has to be given the interpretation of widest amplitude. This is more so due to the wordings of the said rule which encompasses several categories of the posts and also talks about the scale of pay, conduct Rules and other terms of the conditions. Learned ASG also stressed that as the Rules begins with the wordings except as otherwise provided by the Council with the prior concurrence of the Central Government, the powers are vested with the Central Government save as otherwise provided by the Council to govern each and every post and the same may be given overriding effect.

33. To further substantiate this argument, learned ASG also relied upon dicta of **Frick India Ltd** (supra) which states that the marginal note of the provision cannot curtail the plain language of the section or the provision. Thus, the said rule 13 (3) as per learned ASG must not be given restrictive interpretation merely because of the marginal note of the Rule 13 provides for the staff of the Council.

34. I have carefully examined the submissions made by ASG and I am in disagreement with the submission made by ASG due to following reasons:

(a) Firstly it is not only due to the marginal note of Rule 13, it is concluded that the terms and conditions of the appointment of Secretary shall be governed by Rule 7 not by Rule 13. But after a careful examination of scheme of rules, definitions of various posts and reading of rules which prescribe separate modes of appointment for several posts along with the respective authorities which shall determine the terms and conditions of the service of the posts under the Act, I have come to the conclusion that it is not Rule 13 which shall govern the terms and conditions of the service of the petitioner but Rule 7.

(b) Secondly, there is no res integra to the proposition that the marginal note of the provision cannot be taken recourse into for curtailing the plain language of the main provision and the said proposition stands a good law as held by the Apex Court in **Frick India Ltd** (supra). But I am doubtful as to how this would aid the case of the respondent as not merely the marginal note is speaking the intent of the provision but the plain language of the Rule itself makes it clear that the same will be applicable to the created posts and not to the other posts. The same can be explained as under:

Rule 13 (1) provides for that the council shall from time to time and on the recommendation of secretary create such posts as are necessary for efficient performance of the functions of the council.

Rule 13(2) explains the appointments to the posts shall be made by chairperson or by secretary depending upon the category.

Rule 13(3) provides that

> "Rule 13(3) Except as otherwise provided by the Council, with the prior concurrence of the Central Government, the scale of pay, leave, conduct rules, and other terms and conditions of service for the various categories of posts shall be the same as may for the time being in force be applicable to the officers and servants, holding posts of corresponding scale of pay under the Central

Government."

35. Thus the meaningful and pragmatic reading and plain wording of Rules/ sub Rules under Rule 13 makes it clear that when sub Rule 3 talks about posts, then same has to be a post which has been created under this rule from time to time by the Council. Also when sub Rule 3 provides for various categories of the posts, the same gets immediately connected with the previous sub Rule 2 where the appointments to the post were either made by the Chairperson or by Secretary depending upon the category of the posts. Thus the various categories of the posts are same posts which have been created under Rule 13 and cannot relate to the statutory recognized posts when the other Rules provides for different modes of appointment and different terms of office.

36. All these factors are clear indicators that the sub-rule 3 has its operation solely for the purposes of the posts which has been created under the said Rule and not in the manner as sought to be interpreted by the learned ASG.

37. Thirdly, the interpretation sought to be given by the learned ASG to Rule 13 (3) to its wide amplitude leads to absurdity or inconvenience and renders the Rule 7 ineffective.

38. It is trite that the construction which leads to harmony between the provisions should be upheld and the interpretation which renders the operation of the provision otiose must be eschewed. This has consistently been the view of the courts as the presumption always goes in favour that the rules have been framed by the rule makers purposefully and each and every clause has its meaning to it.

39. In **High Court of Gujarat and Anr. v. Gujarat Kishan Mazdoor Panchayat and Ors.,** [2003]2SCR799, the Supreme Court held as under:

> "35. The Court while interpreting the provision of a statute, although, is not entitled to rewrite the statute itself, is not debarred from "ironing out the creases". The court should always make an attempt to uphold the rules and interpret the same in such a manner which would make it workable.
>
> 36. It is also a well-settled principle of law that an attempt should be made to give effect to each and every word employed in a statute and suchinterpretation which would render a particular

> provision redundant or otiose should be avoided"

40. In **Reserve Bank of India v. Peerless Co,** [1987] 2 SCR 1 , the Supreme Court said:-

> "Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute maker, provided by such context, its scheme, the sections clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to any as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation, Statutes have to be construed so that every word has a place and everything is in its place....."

41. Thus, by using the interpretative tools and giving the interpretation to Rule 13(3) as giving over riding effect will render the Rule 7 which is a specific Rule meant for Secretary otiose which cannot be done. Thus, this is the only harmonious interpretation possible under the existing rules.

42. Fourthly, It has also to be seen that where the rule makers intended to provide the terms and conditions of the service to be in parity with that of the Central Government employees, the rule makers have consciously provided so in the form of Rule 13(3). However, if the interpretation accorded by the learned ASG is accepted, then even the members of the council and committee members within the council whose terms and conditions of service are governed by Rules 3, 4 and 6 will also be governed by the pay scale and other terms and conditions of Central Government employees as the same is also one of the categories

of posts in the Council. This will render the purpose of the Rule making and providing the different posts, their appointment procedure and terms of the office nugatory. Thus, the said interpretation again leads to inconvenience and renders several rules inoperative.

43. Fifthly, The appointment letter dated 05.08.1997 itself stated that the Chairperson of Central Wakf Council is appointing the petitioner on the terms and conditions mentioned in appointment offer dated 3.7.1997. The said appointment offer dated 3.7.1997 provides for different terms and condition and wherever it is necessary, the appointment terms dated 3.7.1997 provides that the terms are same as that of the Central Government employees. In relation to pay and allowance, accommodation etc, the Central Government scale and rates are respectively applicable. However, in relation to the tenure of appointment, it specifically provides that the appointment of the petitioner shall be for the period of one year to be extended at the discretion of the Chairperson, Central Wakf Council and does not provide for the role of the Central Government. This again shows that the tenure of appointment is intended to be treated differently as against the ordinary post of the staff stated in the Rule 13.

44. Further it is again noteworthy to state that while absorbing the petitioner permanently, the letter dated 22.08.2000 issued by the respondent No. 3 again refers to Rule 7 of CWC Rules, 1998 and confirms the petitioner employment permanently in exercising the powers as a Chairperson. The contents of the said letters are reproduced hereinafter:

> "As per Section 7 (1) of Central Wakf Rules, 1998 Secretary of the Central Wakf Council is to be appointed by the Chairperson, on such terms and conditions, as may be fixed by the Council. It appears that the Central Wakf Council had approved the recruitment rules for the post of Secretary in its 27th meeting held on 17.7.1988. Clause 3(3) of the said Rules provides that the mode of recruitment shall be by open public advertisement. Dr. Haque was appointed as Secretary, CWC, against the advertisement issued by this Ministry on 19th December, 1996. Clause (8) of the said advertisement indicates that the tenure of appointment shall be initially for a period of one year to be extended for further period at the discretion of Chairperson. Keeping in view the facts that the recruitment rules as well as the advertisement are silent about the maximum period of

> appointment rules as well as the advertisement are silent about the maximum period of appointment, Dr. Haque has requisite qualifications, experience and has rendered excellent service, the Minister of State for Social Justice and Empowerment in her capacity as Chairperson of the Council, has considered and approved the appointment of Dr. Haque to the post of Secretary, CWC, on permanent basis."

45. From the content of the said letter it is evident that even the respondent No. 3 is aware of the fact that the appointment for the post of the Secretary is governed by Rule 7 of the Rules and Chairperson in exercise of the powers under Rule 7 can exercise his powers by extending the tenure of the petitioner on terms and conditions fixed by the Council. It also becomes further clear after reading the later part of the letter dated 22.08.2000 which reads as under :

> "These have been decided by the MOS and Chairperson, subject to the ratification by the Central Wakf Council. Accordingly, the above may be placed before the council in its next meeting and the decision of the Council may be intimated to this Ministry….."

46. The said wordings emanating from the respondent No. 3 are clarificatory in nature and rather put an end to the conflict as the respondent No. 3 is aware that its decision as therwise or Minister's decision as chair person is subject to the ratification by the Council. It is the Council which has its final say in fixing terms and conditions of the service of the Secretary. This is also the mandate of Rule 7 and thus to be followed in its letter and spirit as followed by the respondent No. 3 from time to time.

47. It is thus too late for respondent No. 3 to argue that the petitioner's terms of service is governed by Rule 13 and not under Rule 7.

48. The submission of learned ASG also stands answered so far as it relates to prior concurrence of the Central Government, the contents of the letter dated 22.08.2000 itself answer the said submission. It is the Council which has its final say as against the Central Government/Ministry and the respondent No. 3 has itself written letter to the Council for its final ratification. Thus, the said submission is rejected being devoid of any merit.

49. The submission of the learned ASG that the terms and conditions fixed by the Council cannot be given retrospective operation assuming the Rule 7 is applicable is also rejected as meritless. This is so as the appointment letter itself appoints the petitioner for one year which shall be further extended by Chairperson of Central Wakf Council. It is thus all the more incumbent upon the Council and Chairperson to fix the terms and conditions of the employment of Secretary in accordance with the Rules for proper administration of the Council and its working. The said terms if remain static, the fixation of terms and conditions by the Council cannot be put into operation. Thus, the said argument is without any substance.

50. For all above reasons, it can be safely be said that the terms of the appointment of the petitioner are governed by Rule 7 and not by Rule 13 of Central Wakf Council Rules, 1998.

51. After the aforementioned discussion, it can be concluded that the terms of the service of the petitioner is governed by Rule 7 of Central Wakf Council Rules, 1998 and the Council has its final say in the matter rather than the respondent No.3, it can be also be said without hesitation that the term of retirement of the petitioner fixed by the Council in exercise of its power under Rule 7 cannot be rendered inoperative due to the impugned order passed by respondent No. 3.

52. The Central Wakf Council in its 55th Meeting held on 05.10.2009 had fixed the retirement age of the petitioner in exercise of the powers under Rule 7 of the Central Wakf Council Rules. The copy of the said decision was also conveyed to the respondent No. 3. The contents of the said office order are reproduced hereinafter:

> "I am directed to convey the decision of the Central Wakf Council taken in its 55th meeting held on October 5, 2009 (Monday), fixing the retirement age of the present Secretary, CWC, Dr. M.R. Haque at 62 years, which can be further extended on the discretion of the Council.
>
> The above decision was taken by the Council, under the Rule 7(1) of the Central Wakf Council Rules, 1998 (corresponding to Rule 5(1) of the Central Wakf Council Rules, 1965), on the recommendation of the Planning and Advisory Committee made in its meeting held on September 1, 2009.

> The above decision of the Council may be noted for record and necessary action."

53. Once the Council has fixed the terms of the retirement of the present petitioner on October 7, 2009 and the same was communicated to Chairperson, Central Wakf Council as well as to respondent No. 3. The compliance of Rule 7 was done fully by the Council, the Chairperson is left with no option but to act upon the decision of the Council which is as per the Rule 7 of the Central Wakf Council Rules, 1998. It is not open to the Ministry/respondent No. 3 to pass a separate decision by writing letters to Chairperson on 10.03.2010 by superimposing its decision on Chairperson as well as upon the Council. The Chairperson in such a situation has to abide by the decision of the Council and not be influenced by the decision of the respondent No. 3 as per Rule 7 of the Central Wakf Council Rules 1998. In the present case, the Chairperson has remained silent and Ministry/respondent No. 3 has acted in contravention of Rules by passing the said order dated 10.03.2010. Thus, the impugned order dated 10.03.2010 passed by the respondent No. 3 is ultra vires the Rule 7 and ought to be quashed warranting interference by this court.

54. It is a well settled law that whenever any administrative order or quasi judicial order is passed in violation of the main act and the rules, the same is termed as ultra vires and ought to be corrected by this Court in exercise of the powers of the writ. The often quoted excerpt from the Judgment of Lord Atkin L. J. in **R. v. Electricity Commissioners** [1924] 1 K.B. 171 is reproduced here:

> "Whenever any body of persons having legal authority to determine questions affecting rights of subjects, and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

55. Thus I find that the respondent No. 3 has acted beyond the legal bounds as envisaged under the Wakf Act and Rules made there under. The respondent Nos.1 and 2 have wrongly acted upon the same and therefore the case is made out warranting interference by this Court. The impugned order dated 10.03.2010 is, therefore, quashed being in violation of Rule 7 of the Central Wakf Council Rules. The decision of the council taken on 05.10.2009 is upheld.

56. As regards the office memorandum issued by the respondents on 22.03.2010 are concerned, it has been clarified in the counter affidavit filed by the respondent No.2 that the said office memorandum has been passed by the respondents without the knowledge of the stay orders passed by this court on 23.03.2010. By this office memorandum it was observed that the petitioner would hand over the charges on 31.3.2010. Without going into any controversy raised by the parties as to whether official memorandum was issued by the respondents before or after passing the interim order passed by the Court on 23.03.2010 since the main order dated 10.3.2010 is quashed, the order dated 22/23.03.2010 also become infructuous.

57. The respondents are directed to allow the petitioner to resume office with effect from 15.01.2011. It is directed that the said decision passed by the Council shall be implemented and respondent No. 3 is also directed to pass all its orders strictly within the rules. The writ petition is thus allowed.

58. CM No.4020/2010, CM No.9657/2010 and CM No.10070/2010 are also disposed of accordingly. No costs.

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PUNCHIP ASSOCIATES P. LTD. & ORS. ....APPELLANTS

VERSUS

S. RAJDEV SINGH DECD. & ORS. ....RESPONDENTS

(BADAR DURREZ AHMED & MANMOHAN SINGH, JJ.)

RFA (OS) NO. : 84/2007 DATE OF DECISION: 11.01.2011

Transfer of Property Act, 1882—Renewal of lease deeds—Plaintiffs leased the property to defendant no.1 by lease deed dated 18.9.1986—Defendant no.1 sub-let the property to defendants no.2 to 4—Defendants no. 1 to 4 further sub-letted the property to Defendant no. 5—Suit for possession filed—Decree in favour of Plaintiffs by Single Judge—Appeal preferred—Plea inter-alia before Appellate Court—Clause 4 of Lease Agreement constituted complete waiver of right to seek possession—Lease was perpetual, Plaintiff had no right to terminate—Clause 2 of the Agreement provided renewal of lease for five years at the option of the tenant subject to increase in rent under Rent Control Act or increase of 25% at each renewal—Clause 4 provided that premises was covered under Delhi Rent Control Act—If the Delhi Rent Control Act was to be amended giving additional rights to landlords, landlord herein would not exercise or enforce any such right and in particular the rights to evict the tenant accept for the breach of terms of perpetual lease dated 20.7.1937—Submitted on behalf of Appellants Clause 4 constituted a complete waiver of right to seek possession on the part of plaintiffs—Held, Clause 2 though provided for renewal of lease but such renewals to take effect, would have to be by way of registered lease deeds—Since lease was not renewed in terms of Clause 2 by executing a Lease Deed, the question of waiver under Clause 4 did not arise as a lease itself no longer subsisted.

We now come to the interpretation of Clause 4 of the lease deed dated 18.09.1986. Before we go on, it would be relevant to examine both Clause 2 as well as Clause 4 of the lease deed. The same read as under:-

> "2. That the Tenant or his successors in interest shall be entitled to renew the lease in respect of the tenancy premises for similar terms of Five Years each subject to such increase in the rent as permitted by the Rent Control Acts or increase of 25% (Twenty Five percent) at each renewal in case the Rent Control Act does not apply to the said premises."

"4. That the demised premises are presently covered under Delhi Rent Control Act, 1958 and the Landlords undertake that if Delhi Rent Control Act, 1958 is amended and by virtue thereof the landlords acquire any additional rights, the Landlords will not exercise or enforce any such rights and in particular shall not exercise or enforce any right to evict the Tenant from the demised premises on any ground except for the breach of the terms of the perpetual lease dated 20th July 1937 or breach of the terms of this deed during the duration of the lease or any extension thereof." **(Para 14)**

A plain reading of Clause 2 of the lease deed makes it absolutely clear that the lessee or his successors in interest were entitled to renew the lease in respect of the suit property for similar terms of five years each subject to such increase in the rent as was permitted by the Rent Control Acts or increase of 25% at each renewal in case the Rent Control Act did not apply to the suit property. Two things are abundantly clear from this Clause. The first is that the lease as such was only for a period of five years. This is also confirmed by a reference to Clause (1) to the habendum wherein the expression used is:-

"to hold the same for a term of five years….."

The second point is that the lease could be renewed at the option of the lessee or his successors in interest for similar terms of five years each subject to the increase in rent stipulated therein. This clearly meant that the lease was for five years and could be renewed by the lessee. However, such renewals, to take effect in law, would have to be by way of registered lease deeds. It is an admitted position in this case that there was no renewal of the lease deed inasmuch as no registered lease or for that matter even any unregistered lease was executed in the present matter after the expiry of the five-year period. **(Para 15)**

This was referred to in the context of there being a difference

between an extension of lease and a renewal of a lease. He submitted that Clause 4 of the lease deed in the present case did not refer to a renewal of the lease deed but only to an extension thereof and consequently any period beyond the initial period of five years would be regarded as an extension of the lease although there may not have been a renewal of the lease in the strict sense. We are unable to see as to how the aforesaid decision of the Supreme Court is of any help to the appellants. The interpretation of the lease would depend on the facts and circumstances of each case. The said decision itself makes it clear that where a lease contains a covenant for renewal, the option must be exercised consistently with the terms of such covenant. And, if exercised, a fresh deed of lease shall have to be executed between the parties, failing which, another lease for a fixed term shall not come into existence. In the present case, we find that it is only Clause 2 which contains the covenant for renewal. Clause 4, by itself, does not at all permit any renewal or extension of the lease. Clause 4 of the lease deed, to our minds, only indicates that the landlords had waived their rights to enforce any additional rights which may arise through amendments of the Delhi Rent Control Act, 1958, during the currency of the lease or during any extension thereof. The reference to 'extension thereof' can only mean renewal under Clause 2 of the lease deed as there is no other clause or covenant providing for extension of period of the lease. Since, admittedly, the lease has not been renewed in terms of Clause 2 by executing a fresh lease, the question of waiver under Clause 4 does not arise as the lease itself no longer subsists. **(Para 17)**

Important Issue Involved: Where a lease contains covenant for renewal, the option must be exercised consistently with the terms of such covenant and if exercised, a fresh lease shall have to be executed between the parties, failing which, another lease for a fixed term shall not come into existence.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Sandeep Sethi, Sr. Advocate with Mr. Saif Mahmood and Mr. A.K. Mehta, Advocates for Appellant Nos. 1, 2 & 4. Mr. Ashok Bhasin, Sr. Advocate with Mr. Anshul Arora and Ms. Aanchal, Advocates for Appellant No. 3.

FOR THE RESPONDENTS : Mr. Sanjeev Sachdeva, Advocate with Mr. Vibhu Verma and Mr. Preet Pal Singh, Advocates for Respondent Nos. 1-4, Mr. Vishnu Mehra, Advocate with Mr. R.L. Kadamb, Advocate for Respondent No.5.

CASES REFERRED TO:

1. *State of U.P.* vs. *Lalji Tandon:* 2004 (1) SCC 1.
2. *Krishna Bahadur* vs. *Purna Theatre and Ors.:* 2004 (8) SCC 229.
3. *P.S. Jain Company Ltd.* vs. *Atma Ram Properties (P) Ltd & Ors:* 1997 (65) DLT 308.
4. *Atma Ram Properties (P) Ltd* vs. *P.S. Jain Company Ltd:* 1995 (57) DLT 131.
5. *Baker* vs. *Merckel* (1960) 1 All ER 668.

RESULT: Appeal dismissed with costs.

BADAR DURREZ AHMED, J (ORAL)

1. This appeal is directed against the judgment and order dated 19.09.2007 passed a learned Single Judge of this Court in CS(OS) No.2842/1995. The plaintiffs (the respondent Nos. 1 to 4 herein) in the said suit had sought recovery of possession from the defendants (the appellant Nos.1 to 4 and respondent No.5 herein) in respect of the first floor of the premises bearing No.G-72, Connaught Circus, New Delhi, (hereinafter referred to as 'the suit property') which belonged to the respondent Nos.1 to 4 who had by a lease deed dated 18.09.1986, which was duly registered on 20.09.1986, leased the suit property to the appellant

No.1 on a monthly rent of Rs.189.05. At the outset, it may be mentioned that the entire case revolves around the interpretation of the said lease deed.

2. On the pleadings of the parties, the following four issues were framed by the learned Single Judge by an order dated 27.02.2007:-

"1. What is the effect of the Lease Deed dated 18.9.1986 not being renewed or its specific performance not being sought by the defendants? OP Parties

2. Whether any notice of termination of tenancy was required to be served on the sub-tenants? If so, its effect? OPD-2 to 4

3. Whether the plaintiff is entitled to possession of the suit property? OPP

4. Relief."

3. By virtue of the impugned judgment, the learned Single Judge decided all the issues in favour of the plaintiffs (respondent Nos.1 to 4 herein) and against the defendants (the appellant Nos.1 to 4 and respondent No.5 herein) and as a consequence thereof passed a decree for possession in favour of the plaintiffs (respondent Nos.1 to 4 herein) and against the defendants (the appellant Nos.1 to 4 and respondent No.5 herein) in respect of the suit property. A decree for costs was also passed in favour of the said respondent Nos.1 to 4.

4. The appellants have only taken two pleas before us in the course of arguments. The first plea is that Clause 4 of the lease deed dated 18.09.1986 has not been duly considered by the learned Single Judge. It was submitted that Clause 4 constituted a complete waiver of the right to seek possession on the part of the landlords i.e., respondent Nos. 1 to 4. It was also contended that the lease was a perpetual lease and the landlords had no right to terminate the same.

5. The second and only other point urged before us on the part of the appellants is that the learned Single Judge did not consider the question of issuance of a notice under Section 106 of the Transfer of Property Act, 1882. This contention was based on the premise that even if Clause 4 is interpreted against the appellants and in favour of respondent Nos.1 to 4 and it is held that the tenancy had become a month to month

tenancy, the same had to be terminated in law by issuance of a notice under Section 106 of the Transfer of Property Act, 1882, before the respondent Nos.1 to 4 would be entitled to recover possession of the suit property from the appellant Nos.1 to 4 and respondent No.5. According to the learned counsel for the appellants, no such notice has in fact been served upon them and apart from the lease deed dated 18.09.1986 no other document was admitted by the said appellants before the learned Single Judge. Consequently, it was submitted that the learned Single Judge had committed an error by ignoring the provisions of Clause 4 of the lease deed and also in not requiring the respondent Nos.1 to 4 to establish that the tenancy had been terminated by a notice under Section 106 of the Transfer of Property Act, 1882.

6. In response to these arguments, the learned counsel for the respondent Nos.1 to 4 submitted that Clause 4 of the lease deed would operate only during the existence of the lease period. This, he said, would be apparent from a plain reading of Clause 4 itself. It was submitted that the lease was admittedly for an initial period of five years and was subject to renewals in terms of Clause 2 of the lease deed. He submitted that it is a matter of fact that the lease was not renewed in terms of Clause 2 of the lease deed after the initial period of five years had elapsed on 17.09.1991. The lease could only be renewed by virtue of another registered lease deed and that has not happened as a matter of fact. He submitted that it is because of this that the issue No.1 referred to above was framed in the manner it was.

7. The learned counsel for the respondent Nos.1 to 4, with regard to the submission concerning the issuance of a notice under Section 106 of the Transfer of Property Act, 1882, submitted that this ground is not available to the appellants inasmuch as no issue was framed on this nor was such issue sought to have been framed on the part of the appellants even though they had sufficient opportunity for the same. He referred to the chronology of events to substantiate this argument. The said events shall be referred to herein below.

8. Taking up the question of issuance of notice under Section 106 of the Transfer of Property Act, 1882, we are in agreement with the learned counsel for the respondent Nos.1 to 4 that this question cannot, now, be agitated at the appellate stage when no issue was framed before the learned Single Judge. The learned counsel for the respondent Nos.1

to 4 is also correct in his submission that the appellants had ample opportunity and they never sought to include the question of issuance of notice under Section 106 of the Transfer of Property Act, 1882 as a specific issue because it was always assumed that such a notice had been issued. This would be apparent from the chronology of events which we shall refer to presently.

9. On 18.09.1986, the said lease deed was executed for a period of five years. The lease was in favour of appellant No.1, who sublet the suit property to appellant Nos.2 to 4. On 09.07.1987 appellant Nos.1 to 4, together, sublet the suit property to respondent No.5, which is a bank, at a rental far in excess of Rs3,500/- per month. In the year 1991, the respondent Nos. 1 to 4 filed a petition under Section 14(1)(b) of the Rent Control Act, 1958 for alleged unauthorized subletting. The plea taken by the appellant Nos.1 to 4 in that petition was that the subletting was authorized. During the pendency of the said petition under Section 14(1)(b) of the Delhi Rent Control Act, 1958, a decision was rendered by a learned Single Judge of this Court in the case of **Atma Ram Properties (P) Ltd v. P.S. Jain Company Ltd:** 1995 (57) DLT 131 wherein it was held that even those properties, where the main tenant pays less than Rs3,500/- per month rent but where it has been sublet for a rental of more than Rs3,500/- per month, would be outside the purview of the Delhi Rent Control Act. After this decision was rendered, the respondent Nos. 1 to 4 issued a notice on 09.04.1995 under Section 106 of the Transfer of Property Act, 1882, to the appellant No.1. It would be pertinent to point out that the decision of the learned Single Judge in **Atma Ram Properties** (supra) was confirmed by a Division Bench of this Court in **P.S. Jain Company Ltd. v. Atma Ram Properties (P) Ltd & Ors:** 1997 (65) DLT 308 and ultimately the Special Leave Petition, being SLP (C) 8762/1997, was also dismissed on 29.04.1997 by the Supreme Court.

10. Going back to the petition filed by the respondent Nos.1 to 4 which was pending before the Additional Rent Controller, it appears that the same was dismissed on 04.10.1995 by the said Additional Rent Controller on the ground that the Delhi Rent Control Act would not apply to the tenancy in question and therefore, he had no jurisdiction to entertain the same. It is specifically recorded in the order dated 04.10.1995 passed by the Additional Rent Controller in paragraph 3 that the notice dated

09.04.1995 marked as Ex. P-X was served by and on behalf of the petitioners (respondent Nos.1 to 4 herein) on the respondent No.1 (appellant No.1 herein) wherein it was asserted that the suit property was covered by the exception under Section 3(6) of the Delhi Rent Control Act and that the appellant No.1 was liable to be evicted under the provisions of the Transfer of Property Act, 1882. Paragraph 5 of the said order goes further and it is observed that through the said notice, the petitioners (the respondent Nos.1 to 4 herein) had terminated the tenancy of respondent No.1 (the appellant No.1 herein) from the end of 31.05.1995.

11. It is, therefore, clear that the position had been accepted by the parties that a notice dated 09.04.1995 under Section 106 of the Transfer of Property Act, 1882, had been served by the respondent Nos.1 to 4 on the appellant No.1 terminating the tenancy from the end of 31.05.1995. It is because of this that no specific issue was even sought to be raised by the appellants at the time the issues were framed by the learned Single Judge. We are clearly of the view that this was so because the question of issuance and service of notice dated 09.04.1995 under Section 106 of the Transfer of Property Act was a non issue in view of the admitted position as recorded above.

12. We may also point out that four issues, which have been referred to in the earlier part of this judgment, had been framed by virtue of the learned Single Judge's order dated 27.02.2007. The appellant Nos.1 to 4 were not happy with the issues as framed and they filed a review application being RA No.4721/2007 seeking review of the said order dated 27.02.2007. In that application also, although they set out certain proposed issues, there was no issue sought in respect of the notice under Section 106 of the Transfer of Property Act. It is another matter that the review application was dismissed by virtue of the order dated 25.04.2007 and even the appeal therefrom being FAO(OS) 281/2007 was dismissed by a Division Bench of this Court on 30.07.2007. It may also be pertinent to note that the Division Bench while dismissing the said appeal had remarked that the plea for further issues and for leading oral evidence was an afterthought which could not be permitted. The Special Leave Petition, being SLP (C) 1379/2007, filed by the appellants was also dismissed as withdrawn on 20.08.2007.

13. The above discussion makes it clear that the question of notice under Section 106 of the Transfer of Property Act, 1882, was not raised

as an issue by the appellants before the learned Single Judge. Even when they sought further issues to be framed they did not seek any issue on this aspect of the matter. It is obvious that they did not do so because the entire question was a non issue in view of the accepted and admitted position as noted in the order of the Additional Rent Controller dated 04.10.1995.

14. We now come to the interpretation of Clause 4 of the lease deed dated 18.09.1986. Before we go on, it would be relevant to examine both Clause 2 as well as Clause 4 of the lease deed. The same read as under:-

> "2. That the Tenant or his successors in interest shall be entitled to renew the lease in respect of the tenancy premises for similar terms of Five Years each subject to such increase in the rent as permitted by the Rent Control Acts or increase of 25% (Twenty Five percent) at each renewal in case the Rent Control Act does not apply to the said premises."
>
> "4. That the demised premises are presently covered under Delhi Rent Control Act, 1958 and the Landlords undertake that if Delhi Rent Control Act, 1958 is amended and by virtue thereof the landlords acquire any additional rights, the Landlords will not exercise or enforce any such rights and in particular shall not exercise or enforce any right to evict the Tenant from the demised premises on any ground except for the breach of the terms of the perpetual lease dated 20th July 1937 or breach of the terms of this deed during the duration of the lease or any extension thereof."

15. A plain reading of Clause 2 of the lease deed makes it absolutely clear that the lessee or his successors in interest were entitled to renew the lease in respect of the suit property for similar terms of five years each subject to such increase in the rent as was permitted by the Rent Control Acts or increase of 25% at each renewal in case the Rent Control Act did not apply to the suit property. Two things are abundantly clear from this Clause. The first is that the lease as such was only for a period of five years. This is also confirmed by a reference to Clause (1) to the habendum wherein the expression used is:-

> "to hold the same for a term of five years….."

The second point is that the lease could be renewed at the option of the lessee or his successors in interest for similar terms of five years each subject to the increase in rent stipulated therein. This clearly meant that the lease was for five years and could be renewed by the lessee. However, such renewals, to take effect in law, would have to be by way of registered lease deeds. It is an admitted position in this case that there was no renewal of the lease deed inasmuch as no registered lease or for that matter even any unregistered lease was executed in the present matter after the expiry of the five-year period.

16. A reading of Clause 4 does indicate that the landlords had waived any additional rights if acquired by way of amendment to the Delhi Rent Control Act, 1958 and the landlords had covenanted that such additional rights, if any, would not be enforced by them to evict the lessee from the suit property on any ground except for the breach of a term of the perpetual lease dated 20.07.1937 (between the President of India and the landlords) or breach of the terms of the deed dated 18.09.1986 during the duration of the lease or any extension thereof. The learned counsel for the appellants referred to the decision in the case of **State of U.P. v. Lalji Tandon:** 2004 (1) SCC 1 and, in particular, to paragraph 13 thereof. The said paragraph reads as under:-

> "13. In India, a lease may be in perpetuity. Neither the Transfer of Property Act nor the general law abhors a lease in perpetuity. (Mulla on The Transfer of Property Act, Ninth Edition, 1999, p.1011). Where a covenant for renewal exists, its exercise is, of course, a unilateral act or the lessee, and the consent of the lessor is unnecessary. (**Baker v. Merckel** (1960) 1 All ER 668, also Mulla, ibid, p. 1204). Where the principal lease executedbetween the parties containing a covenant for renewal, is renewed in accordance with the said covenant, whether the renewed lease shall also contain similar clause for renewal depends on the facts and circumstances of each case regard being had to the intention of the parties as displayed in the original covenant for renewal and the surrounding circumstances. There is a difference between an **extension of lease** in accordance with the covenant in that regard contained in the principal lease and renewal of lease, again in accordance with the covenant for renewal contained in the original lease. In the case of extension

> it is not necessary to have a fresh deed of lease executed; as the extension of lease for the term agreed upon shall be a necessary consequence of the clause for extension. **However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execution of a fresh deed of lease, another lease for a fixed term shall not come into existence though the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year or month by month, as the case may be.**
>
> (emphasis supplied)"

17. This was referred to in the context of there being a difference between an extension of lease and a renewal of a lease. He submitted that Clause 4 of the lease deed in the present case did not refer to a renewal of the lease deed but only to an extension thereof and consequently any period beyond the initial period of five years would be regarded as an extension of the lease although there may not have been a renewal of the lease in the strict sense. We are unable to see as to how the aforesaid decision of the Supreme Court is of any help to the appellants. The interpretation of the lease would depend on the facts and circumstances of each case. The said decision itself makes it clear that where a lease contains a covenant for renewal, the option must be exercised consistently with the terms of such covenant. And, if exercised, a fresh deed of lease shall have to be executed between the parties, failing which, another lease for a fixed term shall not come into existence. In the present case, we find that it is only Clause 2 which contains the covenant for renewal. Clause 4, by itself, does not at all permit any renewal or extension of the lease. Clause 4 of the lease deed, to our minds, only indicates that the landlords had waived their rights to enforce any additional rights which may arise through amendments of the Delhi Rent Control Act, 1958, during the currency of the lease or during any extension thereof. The reference to 'extension thereof' can only mean renewal under Clause 2 of the lease deed as there is no other clause or covenant providing for extension of period of the lease. Since, admittedly, the lease has not been renewed in terms of Clause 2 by executing a fresh lease, the question of waiver under Clause 4 does not arise as the lease itself no longer subsists.

18. The learned counsel for the appellants referred to the decision of the Supreme Court in the case of **Krishna Bahadur v. Purna Theatre and Ors.:** 2004 (8) SCC 229 and, in particular, to paragraphs 9 and 10 thereof. The same read as under:-

> "9. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.
>
> 10. A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."

19. The said decision reiterates the well-known principle that waiver is contractual and estoppel is only a rule of evidence. There is no difficulty with this principle. The only question is that the waiver that is referred to in Clause 4 of the lease deed would only apply during the currency of the lease. It is not as if the landlords had waived their rights till eternity even if the lease is not renewed.

20. Paragraph 16 of the impugned judgment has aptly set out the key issue. The said paragraph 16 reads as under:-

> "16. The important issue, however, is that it being a lease in respect of an immovable property for more than a year, a registered document is necessary. The terms of the lease would continue to apply for a period of five years of the lease. In case defendant No.1 wanted to exercise the right of renewal, then a fresh lease had to be executed and registered every time such renewal had to take place. If the plaintiffs failed to co-operate, defendant No.1 could have enforced his rights through a suit for specific performance for execution of such a lease deed. Defendant No.1 failed to do either. The lease expired by efflux of time. Any suit for specific performance of the renewal under the lease deed was to be filed within three years from the cause of action, which would be the date when the lease came to an end by the efflux of time. The failure to exercise the said right resulted in defendant No.1 being only a tenant by holding over."

21. We are entirely in agreement with the views expressed by the learned Single Judge and they are clearly in consonance with the discussion above. Since no other point was urged before us and on both counts we have held against the appellants, this appeal is dismissed with costs.

22. The amounts deposited by the respondent No.5 pursuant to directions given by virtue of the order dated 21.04.2009 in CM No.4745/2008 by the respondent No.5 shall continue to remain deposited with the Registrar of this Court till the parties have their rights to the same, if any, determined by an appropriate forum.

23. All the other pending applications also stand disposed of.

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GLOBE DETECTIVE AGENCY (P) LTD. ....PETITIONER

VERSUS

PRESIDING OFFICER INDUSTRIAL TRIBUNAL NO. III & ANOTHER ....RESPONDENTS

(VALMIKI J. MEHTA, J.)

W.P. (C) NO. : 7338/2002 DATE OF DECISION: 12.01.2011

Constitution of India, 1950—Article 226—Minimum Wages Act, 1948—Section 2(h)—Payment of Bonus Act, 1965—Section 2(21) (ii)—Petition challenging Award dated 16.09.2002 passed by Industrial Tribunal—

Contention—Workman is entitled to payment of bonus on the wages minus the house rent allowance and not on the entire amount of wages—Held—When reading the definition of salary or wages as found in the Payment of Bonus Act, 1965, we must also take into account the intention and purpose of the legislature in enacting the Payment of Bonus Act and the observation of the Supreme Court in Airfreights Ltd. (Supra) case that the minimum wages ought not to be broken up—In view of the above, I hold that the minimum wage is a figure which is to be taken as a whole and when bonus is paid on the same, the petitioner/Management is not entitled to break up this figure of minimum wage by stating that the minimum wage includes the figure of house rent allowance which should be deducted from the minimum wage and bonus is then payable only on such reduced figure of wages after removing the alleged figure of house rent allowance—Petition dismissed.

A reference to the aforesaid paragraphs therefore leave no manner of doubt that though doubt certain ingredients are contained in the minimum wage once the same is fixed, the same cannot be broken up. Therefore, when reading the definition of salary or wages as found in the Payment of Bonus Act, 1965, we must also take into account the intention and purpose of the legislature in enacting the Payment of Bonus Act and the observations of the Supreme Court in **Airfreights Ltd.** (Supra) case that the minimum wages ought not to be broken up. **(Para 10)**

In view of the above, I hold that the minimum wage is a figure which is to be taken as a whole and when bonus is paid on the same, the petitioner/Management is not entitled to break up this figure of minimum wage by stating that the minimum wage includes the figure of house rent allowance which should be deducted from the minimum wage and bonus is then payable only on such reduced figure of wages after removing the alleged figure of house rent allowance. I

may of course note that the contention of the petitioner is also misconceived because this Court failed to understand that under what authority the petitioner has arrogated to itself the power of an appropriate authority under the Minimum Wages Act to decide what would be the house rent allowance in the consolidated figure of minimum wage which is claimed to be split up and reduced from the definition of salary or wages for the purpose of payment of bonus. **(Para 11)**

Important Issue Involved: Minimum wages cannot be split up for the purposes of payment of bonus.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajat Arora with Mr. Jagat Arora, Advocates.

FOR THE RESPONDENTS : Mr. D.K. Aggarwal, Sr. Advocate with Mr. N.A. Sebastian, Advocates.

CASES REFERRED TO:

1. *Hamdard Laboratories* vs. *Deputy Labour Commissioner & Ors.* (2007) 5 SCC 281.
2. *Airfreight Ltd.* vs. *State of Karnataka* AIR 1999 SC 2459.
3. *S.Krishnamurthy* vs. *Presiding Officer, Central Govt. Labour Court* 1985 LLJ 133 (SC).
4. *Scindia Steam Navigation Co. Ltd.* vs. *Scindia Employees Union* 1983 Labour I.C. 759.

RESULT: Petition dismissed.

VALMIKI J. MEHTA, J (ORAL)

1. The present petition under Article 226 of the Constitution of India impugns the award dated 16.9.2002 passed by the Industrial Tribunal answering the reference as to whether the workmen are entitled to payment of bonus on the entire amount of wages or bonus has to be calculated on the wages minus the figure of house rent allowance. Though, this

was only one of the issues in the case which was decided, however. I may note that other issues in this case were given up by the petitioner vide order dated 7.5.2004.

2. Crystallizing the issue for determination by this Court, the question would be as to what would be the "salary or wages" for the purpose of payment of bonus under the Payment of Bonus Act, 1965.

3. To understand the issues involved, it is necessary to refer to the definition of "salary or wages" under Section 2(21) of the Payment of Bonus Act, 1965 and the said provision reads as under:-

> "2(21)"salary or wage" means all remuneration (other than remuneration in respect of over-time work) capable of being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to an employee in respect of his employment or of work done in such employment and includes dearness allowance (that is to say, all cash payments, by whatever name called, paid to an employee on account of a rise in the cost of living), but does not include-
>
> (i) any other allowance which the employee is for the time being entitled to;
>
> (ii) the value of any house accommodation or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of foodgrains or other articles;
>
> (iii) any travelling concession;
>
> (iv) any bonus (including incentive, production and attendance bonus);
>
> (v) any contribution paid or payable by the employer to any pension fund or provident fund or for the benefit of the employee under any law for the time being in force;
>
> (vi) any retrenchment compensation or any gratuity or other retirement benefit payable to the employee or any ex gratia payment made to him;
>
> (vii) any commission payable to the employee."

4. It is also necessary to refer to the definition of wages under Section 2(h) of the Minimum Wages Act, 1948 inasmuch as the issue in the present case is intertwined with the fact that what the workmen are getting in the present case are only minimum wages which are treated as their salary or wages.

5. The contention as raised on behalf of the petitioner by the learned counsel is that in terms of Section 2(21)(ii) the value of a house accommodation is not included in the salary or wages of Payment of Bonus Act, 1965. Counsel for the petitioner has relied upon the decision of the Supreme Court in the case of **Hamdard Laboratories vs. Deputy Labour Commissioner & Ors.** (2007) 5 SCC 281. As per paras 16 and 17 of the judgment in the case of **Hamdard Laboratories** (supra), the Supreme Court has said that the Courts while interpreting the provisions of statutes must interpret them in such a manner so as to give effect thereto keeping in mind that different statutes have different purposes to achieve. Counsel for the petitioner also relies upon **Scindia Steam Navigation Co. Ltd. vs. Scindia Employees Union** 1983 Labour I.C. 759, wherein in para 39, the Division Bench of the Bombay High Court has laid down that the claim to profit based bonus must be based on the provisions of the Bonus Act.

6. In response, the learned senior counsel for the respondent no.2/ workman, Union has relied upon the decision of the Supreme Court in the case of **Airfreight Ltd. vs. State of Karnataka** AIR 1999 SC 2459. The Supreme Court in the decision of **Airfreight Ltd.** (Supra) in paras 21 and 22 of the judgment has held that once minimum wages are fixed, it is one pay package which is not amenable to being split up, although, the minimum wages itself may be fixed on the basis of various ingredients one of which can be requirement of house rent. The learned senior counsel for the respondent has also relied upon **S.Krishnamurthy Vs. Presiding Officer, Central Govt. Labour Court** 1985 LLJ 133 (SC) to canvass that amounts payable which are otherwise included as part of the permanent wages of an employee, cannot be removed for purpose of calculating payment of bonus under the Payment of Bonus Act, 1965.

7. Before proceeding ahead, I may note that the object of Payment of Bonus Act, 1965 is to grant bonus to the employees with reference to a genuine salary or wages as it were, meaning thereby, the salary or wages must exclude there from certain inflatable's which are provided

in the sub-Clauses (i) to (vii) of Section 2(21) of the Payment of Bonus Act. The object of this provision is quite clear that if an employer has to be burdened with the liability of bonus payable being a percentage of salary or wages, the figure of salary or wage must be such that basic salary or wage figure should include all necessary ingredients thereof, but, salary or wage should not include variables which vary as per the nature of employment, type of employment, period of employment, type of employer, type of employee and so on. The object is therefore to arrive at a balanced figure of salary or wages and which figure is of such basic salary or wages without unnecessarily reducing or inflating the same.

8. The statute of Minimum Wages Act, 1948 is a social legislation in a polity which is a Socialist Democratic Republic and a Welfare State. A minimum wage as accordingly prescribed by this statute by the Government has co-relation to an employee being able to keep his head above water, that is such amount of wages which would take care of the really basic necessities for a human being to survive, and which is also a mandate of Article 21 of the Constitution of India. No doubt, when fixing a minimum wage, the appropriate authority from time to time may reconsider various ingredients such as the cost of living index, requirement towards minimum medical treatment and other requirements necessary for our citizens living in the democratic state to have a dignified life. Merely because a minimum wage is fixed keeping into account various ingredients will not take away from the fact that it is really a minimum wage that is the most basic wage and nothing more. Surely, it would therefore exclude by its very nature inflatables which would have otherwise inflated the wage figure so as to take it out of the definition of minimum wages. This undoubtedly, without any doubt, can be said to be the object or purpose of the legislation of the Minimum Wages Act, 1948 and its respective provisions.

9. Keeping the aforesaid in mind, I am of the opinion that the Writ Petition cannot succeed and must fail. The contention of the learned counsel for the petitioner that the definition of salary or wages under the Payment of Bonus Act, 1965 excludes house accommodation, is in the context of the Payment of Bonus Act itself only, meaning thereby, the object of the definition of salary and wages in the Payment of Bonus Act, 1965 was to have a salary or wages which would not include the ingredients

falling in sub-Clauses (i) to (vii) 2(21) of Payment of Bonus Act which can be said to be variables to the true nature of salary or wages so that the same should be excluded for calculation of the salary or wages for the purpose of giving permanent bonus. In fact, in the opinion of this Court, the observations of the Supreme Court in the case of **Hamdard Laboratories** (Supra) relied upon on behalf of the petitioner can be in fact read in favour of the respondent and against the petitioner because the said judgment very clearly provides that a Court should keep in mind the different purposes for which the different statutes have been enacted and that the interpretation must further the object of the Acts/Statutes. Supreme Court has very pithily observed that by interpreting the provisions of salary or wages, the provisions must be so interpreted so as to give effect to the true meaning thereof. In my opinion, in order to give true effect to the definitions in the Payment of Bonus Act, 1965 it will have to be so done so as to achieve an object that the basic minimum wages ought not to be split up. That the basic minimum wages ought not to be split up is no longer re integra and this had been very clearly pronounced upon by the Supreme Court in **Airfreight Ltd.**(Supra) case. Since Paras 21 and 22 of this judgment are clear, I would seek to reproduce the same in toto. These paras read as under:-

> "21. As stated above minimum wage must provide not merely for the bare subsistence of life but for the preservation of the efficiency of the worker and so it must also provide for some measure of education, medical requirements and amenities of himself and his family. While fixing the minimum wages, the capacity of the employer to pay is treated as irrelevant and the Act contemplates that rates of minimum wage should be fixed in schedule industries with a dual object of providing sustenance and maintenance of the worker and his family and preserving his efficiency as a worker. So it is required to take into consideration cost of bare subsistence of life and preservation of efficiency of the workers and for some measure of education, medical requirements and amenities. This cost is likely to vary depending upon the cost prevailing in the market of various items. If there are inflationary conditions prevailing in the country, then minimum wages fixed at a particular point of time would not serve the purpose. Therefore, Section 4 contemplates that minimum wages

fixed at a particular point of time should be revised from time to time. Section 4 postulates that minimum wages fixed or revised by the appropriate Government under Section 3 may consist of basic rates of wages and special allowance at a rate to be adjusted at such intervals in such manner as the appropriate Government may direct to accord as nearly as practicable with a variation in the cost of living index number applicable to such workers; alternatively, it permits the fixation of basic rate of wages with or without cost of living allowance and the cash value of the concessions in respect of supplies of essential commodities at concessional rates where so authorised; or in the alternative, it permits an all inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of concessions, if any. The purpose of Section 4 is to see that minimum wage can be linked with increase in cost of living so that increase in cost of living can be neutralised or all inclusive rates of minimum wages can be fixed. But, from the aforesaid Sections 3 & 4, it is apparent that what is fixed is total remuneration which should be paid to the employees covered by the Schedule and not for payment of costs of different components which are taken into consideration for fixation of minimum rates of wages. It is thus clear that the concept of minimum wages does take in the factor of prevailing cost of essential commodities whenever such minimum wage is to be fixed. The idea of fixing such wage in the light of cost of living at a particular juncture of time and of neutralising the rising prices of essential commodities by linking up scales of minimum wages with the cost of living index is provided for in Section 4 but V.D.A. is part and parcel of wages. Once rates of minimum wages are prescribed under the Act, whether as all inclusive under Section 4(1)(iii) or by combining basic plus dearness allowance under Section 4(1)(i) are not amenable to split up. It is one pay package. Neither the scheme nor any provision of the Act provides that the rates of minimum wages are to be split up on the basis of the cost of each necessities taken into consideration for fixing the same. Hence, in cases where employer is paying total sum which is higher than minimum rates of wages fixed under the Act including the cost of living index (VDA), he is not required to pay VDA

separately. However, that higher wages should be calculated as defined in Section 2(h) of the Act. Section 2(h) specifically provides that value of the following items are not required to be computed for finding out whether employer pays minimum wages as prescribed under the Act:

(i) the value of any house, accommodation, supply of light, water, medical care, or any other amenity or any service excluded by general or special order of the appropriate Government.

(ii) any pension fund or provident fund or under any scheme of social insurance

(iii) any travelling allowance or the value of any travelling concession

(iv) any sum paid to any person employed to defray special expenses curtailed on him by the nature of his employment or

(v) any gratuities payable on discharge.

22. But while deciding the question of payment of minimum wages, the competent authority is not required to bifurcate each component of the costs of each item taken into consideration for fixing minimum wages, as lump sum amount is determined for providing adequate remuneration to the workman so that he can sustain and maintain himself and his family and also preserve his efficiency as a worker. Dearness Allowance is part and parcel of cost of necessities. In cases where the minimum rates of wages is linked up with V.D.A., it would not mean that it is a separate component which is required to be paid separately where the employer pays a total pay package which is more than the prescribed minimum rate of wages."

10. A reference to the aforesaid paragraphs therefore leave no manner of doubt that though doubt certain ingredients are contained in the minimum wage once the same is fixed, the same cannot be broken up. Therefore, when reading the definition of salary or wages as found in the Payment of Bonus Act, 1965, we must also take into account the intention and purpose of the legislature in enacting the Payment of Bonus Act and the observations of the Supreme Court in **Airfreights Ltd.**

(Supra) case that the minimum wages ought not to be broken up.

11. In view of the above, I hold that the minimum wage is a figure which is to be taken as a whole and when bonus is paid on the same, the petitioner/Management is not entitled to break up this figure of minimum wage by stating that the minimum wage includes the figure of house rent allowance which should be deducted from the minimum wage and bonus is then payable only on such reduced figure of wages after removing the alleged figure of house rent allowance. I may of course note that the contention of the petitioner is also misconceived because this Court failed to understand that under what authority the petitioner has arrogated to itself the power of an appropriate authority under the Minimum Wages Act to decide what would be the house rent allowance in the consolidated figure of minimum wage which is claimed to be split up and reduced from the definition of salary or wages for the purpose of payment of bonus.

12. In view of the above, I do not find any merit in this petition and the same is dismissed leaving the parties to bear their own costs. Interim orders stand vacated.

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SUREKSHA LUTHRA ....PETITIONER

VERSUS

THE REGISTRAR GENERAL DELHI HIGH COURT & ORS. ....RESPONDENTS

(SANJAY KISHAN KAUL AND RAJIV SHAKDHER, JJ.)

WP (C) NO. : 3968/2010 DATE OF DECISION: 17.01.2011

Constitution of India, 1950—Article 226, 229—Delhi High Court Establishment (Appointment and Conditions of Service) Rules, 1972—Rule 11—Petition seeking promotion to post of Joint Registrar, when her juniors were promoted without claiming any monetary benefits—Her case for promotion was considered along with other candidates—She was superseded despite being the senior most Deputy Registrar—She made representations—Representation rejected—Subsequently appointed as Joint Registrar with effect from 21.03.2009—Petitioner Contention—According to OM No. 35034/7/97—Estt. (D) dated 08.2.2002 once the persons to be appointed on the basis of merit-cum-seniority meet the bench mark, no super-session in selection/promotion is permissible—Respondent no.1 contends that the selection in question being merit-cum-seniority, the subjective findings of the Selection Committee dated 04.08.2008 which have taken the comparative merit into consideration ought not to be interfered with—Application of OM No. 35034/7/97—Estt. (D) dated 08.02.2002 not disputed—Private respondent opposed the petition—OM No. 35034/7/97—Estt. (D) is not applicable in view of the provisions of Article 229 of the Constitution of India—Held—We are unable to accept the said contention for the reason that the said Rules have been issued under Article 229 of the Constitution of India and provide for Rules and Orders of Central Government to be made applicable when no provision or insufficient provision has been made in the said Rules—Other than stating that the criteria is merit-cum-seniority, nothing else was sent out in the Rules and thus OM No. 35034/7/97—Estt. (D) dated 08.02.2002 was made applicable—There is little doubt over the application of the OM No. 35034/7/97—Estt. (D) dated 08.02.2002 when the office note itself proceeds by relying on OM No. 35034/7/97—Estt. (D) dated 08.02.2002 which office note resulted in the case being put up for consideration before the Selection Committee for promotion of the petitioner R-2 and R-3 and other officers—OM No.

35034/7/97—Est. (D) dated 08.02.2002 would apply to the present case and would entitle petitioner to be promoted prior to promotion of R-2 and R-3—The petitioner is entitled to be placed in seniority above R-2 and R-3 and would be entitled to all the consequential benefits from the date when she ought to have been promoted to the post of Joint Registrar i.e. 07.08.2008 without the benefit of actual pay for the period she has not worked on the post of Joint Registrar till her appointment as Joint Registrar vide order dated 03.06.2009 with effect from 21.03.2009.

We are unable to accept the said contention for the reason that the said Rules have been issued under Article 229 of the Constitution of India and provide for Rules and Orders of Central Government to be made applicable when no provision or insufficient provision has been made in the said Rules. Other than stating that the criteria is merit-cum-seniority, nothing else was set out in the Rules and thus OM No.35034/7/97-Estt(D) dated 08.02.2002 was made applicable. There is little doubt over the application of the OM No.35034/7/97-Estt(D) dated 08.02.2002 when the office note itself proceeds by relying on OM No.35034/7/97-Estt(D) dated 08.02.2002 which office note resulted in the case being put up for consideration before the Selection Committee for promotion of the petitioner, R-2 & R-3 and other officers. **(Para 19)**

We are thus unequivocally of the view that the OM No.35034/7/97-Estt(D) dated 08.02.2002 would apply to the present case and which would entitle the petitioner to be promoted prior to promotion of R-2 and R-3. **(Para 20)**

On consideration of the aforesaid facts and circumstances, we are of the view that the petitioner is liable to succeed and the petitioner is entitled to be placed in seniority above R-2 and R-3 and would be entitled to all the consequential benefits from the date when she ought to have been promoted to the post of Joint Registrar i.e.07.08.2008 without

the benefit of actual pay for the period she has not worked on the post of Joint Registrar till her appointment as Joint Registrar vide order dated 03.06.2009 with effect from 21.03.2009. **(Para 25)**

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : C. Hari Shankar and Mr. Pushkar Kumar Singh, Advocates.

FOR THE RESPONDENTS : Mr. Rajiv Bansal and Mr. Amandeep, Advocates for R-1. Mr. Inderjit Sharma and Mr. R.C. Nangia, Advocates for R-2 and R-3.

CASES REFERRED TO:

1. *Rajendra Kumar Srivastava and Ors.* vs. *Samyut Kshetriya Gramin Bank and Ors.;* (2010) 1 SCC 335.
2. *P.K.Sarin* vs. *Union of India & Ors.* 2009 INDLAW Delhi 1344.
3. *Haryana State Electronics Development Corporation Limited and Ors.* vs. *Seema Sharma and Ors.;* (2009) 7 SCC 311.
4. *Dev Dutt* vs. *UOI & Ors.;* 2008 (8) SCC 725.
5. *K.M.Mishra* vs. *Central Bank of India and Ors.;* 2008 (9) SCC 120.
6. *Satya Narain Shukla* vs. *Union of India;* 2006 (9) SCC 69.
7. *K.K.Parmar & Ors.* vs. *High Court of Madras ;* AIR 2006 SC 3559.
8. *UOI and Ors.* vs. *Lt.Gen Rajendra Singh Kadyan and Anr.;* (2000) 6 SCC 698.
9. *State of U.P.* vs. *Yamuna Shankar Misra;* (1997) 4 SCC 7.
10. *Dalpat Abasaheb Solunke & Ors.* vs. *Dr.B.S.Mahajan &*

Ors.; AIR 1990 SC 434.

11. *M.Gurumoorthy* vs. *Accountant General, Assam and Nagaland* AIR 1971 SC 1850.

RESULT: Petition allowed.

SANJAY KISHAN KAUL, J.

1. The petitioner joined the services of the Delhi High Court as an LDC on 21.02.1979 and attained her promotions from time to time right till the post of Deputy Registrar on 01.11.2006.

2. The grievance of the petitioner is that when her case for promotion to the post of Joint Registrar was considered along with other candidates, she was superseded and not appointed as a Joint Registrar despite being the senior most Deputy Registrar. The representations made by the petitioner against her supersession were also rejected. However, the petitioner, while her representations were rejected, was appointed as a Joint Registrar against a vacancy vide order dated 03.06.2009 with effect from 21.03.2009. Thus, the only question which is required to be considered in the present case is the date from which the petitioner is required to be treated as having joined the post of Joint Registrar and whether her supersession was valid.

3. We may note that learned counsel for the petitioner has conceded that the petitioner does not claim any monetary benefits for the period she has not worked in the post of Joint Registrar, but she seeks appointment from the date of earlier consideration for all other benefits and for her to be shown senior to R-2 and R-3, who were appointed as Joint Registrar superseding her.

4. The petitioner has pleaded that the conditions of service of the staff on the Establishment of this Court are governed by the Delhi High Court Establishment (Appointment and Conditions of Service) Rules, 1972 ('the said Rules' for short) which have been issued under Article 229 of the Constitution of India. The appointments to the various posts as specified in Schedule II to the said Rules are to be made by the Hon'ble Chief Justice as per the mode of appointment and qualifications provided in the said Schedule to the said Rules. The post of Joint Registrar is to be filled up in the following manner:

"a. By selection on merit on deputation from Delhi Higher Judicial Service or Delhi Judicial Service (Selection Grade)

Or

b. By selection on the basis of merit cum seniority from Officer of category 2 (Deputy Registrars) of Class-I mentioned in Schedule-I."

In the present case we are concerned with clause (b) as all the concerned people are already officers working in the High Court as Deputy Registrar.

5. Rule 11 of the said Rules read as under:

"11. Application of Central Government Servants Service Rules –

In respect of all such matters regarding the conditions of service of Court servants for which no provision or insufficient provision has been made in these rules, the rules and orders for the time being in force and applicable to Central Government servants shall regulate the conditions of service of the Court servants subject to such modifications, variations or exception, if any, in the said rules, as the Chief Justice may, from time to time, specify.

Provided that the Registrar and Joint/Deputy Registrar belonging to Delhi Higher Judicial Service and Delhi Judicial Service respectively, shall be governed by the rules applicable to the said service."

6. The gravamen of the case of the petitioner is based on the aforesaid Rule and OM No.35034/7/97-Estt(D) dated 08.02.2002 issued by the Department of Personnel and Training. The aforesaid Rule provides for application of the norms applicable to Central Government servants where no provision or insufficient provisions have been made under the said Rules. The OM No.35034/7/97-Estt(D) dated 08.02.2002 seeks to traverse a slightly different path in respect of appointment based on merit-cum- seniority (which is applicable to the post of a Joint Registrar) inasmuch as it prescribes a change whereby once the persons to be appointed on the said basis meet the benchmark, no supersession in

selection/promotion is permissible. The petitioner thus pleads that it is no one's case that she did not meet the benchmark, but that R-2 and R-3 were appointed to the post of Joint Registrar despite being junior to her on the basis of superior ACRs.

7. To buttress her arguments, the petitioner has relied upon the note dated 01.08.2008 drawn up by the Establishment of the Delhi High Court while putting up the case before the Selection Committee for appointment to the post of Joint Registrar. The noting dated 01.08.2008 specifically drew attention to the instructions contained in the OM No.35034/7/97-Estt(D) dated 08.02.2002 which were thus unquestionably applicable. The petitioner had a grading of 'Good' in the first ACR earned as a Deputy Registrar for the year 2003 while for the subsequent years i.e.2004-2007, she had earned a 'Very Good' for each of the years. We may note that even in the previous posts for a number of years, the petitioner has earned an ACR of 'Very Good', the year 2003 being an exception.

8. The Selection Committee vide its Minutes dated 04.08.2008 made a comparative assessment of the petitioner, R-2 and R-3 for the posts which had fallen vacant and found R-2 and R-3 to be more meritorious than the petitioner who was the senior most candidate and thus recommended the appointment of R-2 and R-3 to the posts of Joint Registrar, who were so appointed. The petitioner aggrieved by the aforesaid supersession submitted two representations dated 25.09.2008 and 21.11.2008. The representations were based on the plea that no adverse ACR had been communicated to the petitioner and there was no justification for ignoring her seniority in view of OM No.35034/7/97-Estt(D) dated 08.02.2002. The petitioner has also placed reliance inter alia on the judgments of the Supreme Court in **Dev Dutt v. UOI & Ors.;** 2008 (8) SCC 725 and **State of U.P. v. Yamuna Shankar Misra;** (1997) 4 SCC 7 for ignoring the ACR of the petitioner for the year 2003 since if that came in the way of her promotion she had not been communicated the said ACR. These representations were rejected by the Selection Committee on 19.01.2009. The petitioner was, however, recommended for selection against the subsequent temporary vacancy of Joint Registrar created with effect from 20.12.2008 and was subsequently so appointed vide order dated 03.06.2009 with effect from 21.03.2009.

9. The petitioner seeks to also rely upon the manner in which the Delhi High Court had earlier dealt with two such similar cases –

Sh.J.L.Kalra and Sh. D.K.Prasad against their supersession. She sought the relevant information under the Right to Information Act, 2005 and she was duly supplied the material sought by her. The petitioner relied upon the same to substantiate her plea that even Sh.J.L.Kalra was earlier ignored but subsequently promoted to the post of Joint Registrar and Mr.D.K.Prasad who was earlier ignored but subsequently promoted to the post of Registrar with seniority and the decision to supersede them by their juniors was reversed. Another case cited by the petitioner is of Ms.Usha Kiran Gupta which found favour with the Selection Committee vide its Minutes drawn on 23.12.2009. A reading of these Minutes shows that the Selection Committee has noted that a formal benchmark had not been laid for promotion to the posts of Assistant Registrar, Deputy Registrar and Joint Registrar. It was noted that henceforth the benchmark for consideration to the posts of Assistant Registrar, Deputy Registrar and Joint Registrar would be at least three gradings of 'Very Good' in the ACRs during the preceding five years and those candidates fulfilling this condition of benchmark would be assessed in accordance with the said Rules. It has also been submitted by the petitioner that while considering the case of Mr.J.L.Kalra, the Selection Committee had, in fact, once again noted the aspect of non-communication of a down-grading ACR and the factum of 3 out of 5 ACRs being 'Very Good' entitling him to promotion on the basis of the benchmark.

10. The writ petition has been resisted both by the Delhi High Court and the private respondents.

11. The stand of the Delhi High Court is that the selection in question being merit-cum-seniority, the subjective findings of the Selection Committee dated 04.08.2008 which have taken the comparative merit into consideration ought not to be interfered with. The application of OM No.35034/7/97-Estt(D) dated 08.02.2002 has not been disputed but it is pleaded that the same had become obsolete as having been superseded by a Government of India OM No.22011/3/2007-Estt(D) dated 18.02.2008 containing revised guidelines. The OM prescribes that the DPC should ensure that promotion to the scale of Rs.18,400-22,400 and above which would apply to the post of a Joint Registrar, the benchmark of 'Very Good' should be invariably met in all ACRs of five years under consideration. The DPC in terms of the guidelines of the Department is required to make its own assessment on the basis of entries in the ACRs

and not be guided by overall grading. It has been emphasized that the executive instructions by the Government of India cannot be ipso facto made applicable to the High Court and strength is sought to be drawn from a judgment of the Supreme Court in **K.K.Parmar & Ors. V. High Court of Madras ;** AIR 2006 SC 3559 where it has been observed that Rules framed by States under Article 309 proviso may be applicable to the employees of the High Court, the executive instructions issued by the State, however, would not be applicable, particularly, when such executive instructions were contrary to or inconsistent with the Rules framed by the Chief Justice of the High Court in terms of Article 229 of the Constitution of India.

12. Learned counsel for R-1/Delhi High Court while emphasizing that this Court should not function as a Court of appeal over decisions of the Selection Committee fairly did not dispute that there had been no specific norms laid down as to the benchmark of 'Very Good' for five years prior service, but on the other hand the various selection committees had noted that a benchmark of 'Very Good' for three years would suffice. It was, however, pleaded that OM No.22011/3/2007-Estt(D) dated 18.02.2008 appears to have escaped attention. Learned counsel also could not seriously dispute the applicability of OM No.35034/7/97-Estt(D) dated 08.02.2002 as in the note prepared for the Selection Committee to carry out the selection, the said note was itself relied upon.

13. The records also show that in the past where such supersession had occurred in the case of an officer meeting the benchmark, the supersession had been subsequently reversed.

14. The private respondents (R-2 and R-3) have emphasized on the basis of selection which is merit-cum-seniority. It has been thus pleaded that a duly constituted Selection Committee having considered relative merit, this Court ought not to interfere with the same. The private respondents deny the applicability of any OM of the Government of India as their contention is that an OM to be made applicable has to be adopted by Hon'ble the Chief Justice. It has been emphasized that the administrative instructions cannot apply to the High Court and the power vests with the Chief Justice of the High Court which is unfettered under Article 229 of the Constitution of India. The cases of Sh.J.L.Kalra, Sh.D.K.Prasad and Ms.Usha Kiran Gupta are stated to have no application in the given facts

of the case. Learned counsel for the said respondents relied upon the decision of the Supreme Court in **Dalpat Abasaheb Solunke & Ors. v. Dr.B.S.Mahajan & Ors.;** AIR 1990 SC 434 to support the plea that whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. It was observed that the Court has no such expertise. A reference was also made to the judgment in **M.Gurumoorthy v. Accountant General, Assam and Nagaland** AIR 1971 SC 1850 for the proposition that the Chief Justice of the High Court or his nominee is the supreme authority in the matter of appointment of officers and servants of the High Court as per Article 229 of the Constitution of India.

15. We may notice that on a specific question being posed to learned counsel for R-1/Delhi High Court, it was categorically stated before us that the OM No.35034/7/97-Estt(D) dated 08.02.2002 was attracted in the present case and a categorical averment has already been made in para 11 of the counter affidavit to that effect. In fact, para 11 states that "only those officers who obtain the said Bench-mark are promoted in the order of merit." We find there is really not even a dispute raised about the factum of the petitioner having achieved the benchmark for being considered for promotion. The OM No.22011/3/2007-Estt(D) dated 18.02.2008 has not been made applicable till date and the notings made in the case of Sh.J.L.Kalra (prior to the case of promotion of the petitioner) and of the minutes dated 23.12.2009 (post the case of the petitioner) show that the benchmark being followed was of three 'Very Good' in the previous five years. In view of the aforesaid position, the only issue really to be examined is whether it was open to the Selection Committee to consider the comparative merit of the candidates who met the benchmark or whether it had to proceed in accordance with seniority once the benchmark was satisfied.

16. The answer of the aforesaid aspect in turn is dependent on the OM No.35034/7/97-Estt(D) dated 08.02.2002. We may notice that there is undoubtedly a distinction between the promotion based on merit-cum-seniority and seniority-cum-merit as explained in **Haryana State Electronics Development Corporation Limited and Ors. V. Seema Sharma and Ors.;** (2009) 7 SCC 311 and **Rajendra Kumar Srivastava and Ors. v. Samyut Kshetriya Gramin Bank and Ors.;** (2010) 1 SCC 335, the latter following the earlier judgment in **UOI and Ors.v. Lt.Gen**

Rajendra Singh Kadyan and Anr.; (2000) 6 SCC 698. Undisputedly, in merit-cum-seniority, greater emphasis has to be placed on merit and seniority comes into picture when the merit of the two candidates is more or less equal. The comparative merit can thus be taken into account. However, the OM No.35034/7/97-Estt(D) dated 08.02.2002 seeks to lay down a different parameter even in the case of merit-cum-seniority which provides that once a benchmark is met, there should be no supersession in promotion. This is apparent from a reading of the memorandum itself, relative portion of which is extracted below:

"F.No.35034/7/97-Estt(D)
Government of India
Ministry of Personnel, Public Grievances and Pensions
Department of Personnel and Training
New Delhi – 110 001
February 8, 2002

OFFICE MEMORANDUM

Subject : Procedure to be observed by Departmental Promotion Committees (DPCs) – NO supersession in 'selection' promotion – Revised Guidelines regarding.

… … … … … … … … …

2. Existing Guidelines

2.1 As per the existing (aforementioned) instructions, in promotions up to and excluding the level in the pay scale of Rs.12,000-16,500 (excepting promotions to Group 'A' posts/ services from the lower group), if the mode happens to be 'selection-cum-seniority', then the bench-mark prescribed is 'good' and officers obtaining the said bench-mark are arranged in the select panel in the order of their seniority in the lower (feeder) grade. Thus, there is no supersession among those who meet the said bench-mark. Officers getting a grading lower than the prescribed bench-mark ('good') are not empanelled for promotion.

2.2 In the case of promotions from lower Groups to Group 'A', while the mode of promotion happens to be 'selection by merit', the bench-mark prescribed is 'good' and only those officers

who obtain the said bench-mark are promoted in the order of merit as per grading obtained. Thus, officers getting a superior grading supersede those getting lower grading. In other words, an officer graded as 'outstanding' supersedes those graded as 'very good' and an officer graded as 'very good' supersedes officers graded as 'good'. Officers obtaining the same grading are arranged in the select panel in the order of their seniority in the lower grade. Those who get a grading lower than the prescribed bench-mark ('good') are not empanelled for promotion.

2.3 In promotions to the level in the pay-scale of Rs.12,000-16,500/- and above, while the mode of promotion is 'selection by merit', the bench-mark prescribed is 'very good' and only those officers who obtain the said bench-mark are promoted in the order of merit as per the grading obtained, officers getting superior grading supersede those getting lower grading as explained in paragraph 2.2 above. Officers obtaining the same grading are arranged in the select panel in the order of their seniority in the lower grade. Those who get a grading lower than the prescribed bench-mark ('very good') are not empanelled for promotion.

3. Revised Guidelines

The aforementioned guidelines which permit supersession in „selection. promotion ('selection by merit') have been reviewed by the Government and after comprehensive/extensive examination of relevant issues it has been decided that there should be no supersession in the matter of 'selection' (merit) promotion at any level. In keeping with the said decision, the following revised promotion norms/guidelines, in partial modification (to the extent relevant for the purpose of these instructions) of all existing instructions on the subject (as referred to in paragraph 1 above) are prescribed in the succeeding paragraphs for providing guidance to the Departmental Promotion Committees (DPCs).

3.1 Mode of Promotion

In the case of 'selection' (merit) promotion, the hitherto existing distinction in the nomenclature ('selection by merit' and 'selection-

cum-seniority]) is dispensed with and the mode of promotion in all such cases is rechristened as 'selection' only. The element of selectivity (higher or lower) shall be determined with reference to the relevant bench-mark ("Very Good" or "Good") prescribed for promotion.

3.2 'Bench-mark' for promotion

The DPC shall determine the merit of those being assessed for promotion with reference to the prescribed bench-mark and accordingly grade the officers as 'fit' or 'unfit' only. Only those who are graded 'fit' (i.e. who meet the prescribed bench-mark) by the DPC shall be included and arranged in the select panel in order to their inter-se seniority in the feeder grade. Those officers who are graded 'unfit' (in terms of the prescribed bench-mark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded 'fit' (in terms of the prescribed bench-mark) by the DPC.

3.2.1 Although among those who meet the prescribed bench-mark, inter-se seniority of the feeder grade shall remain intact, eligibility for promotion will no doubt be subject to fulfillment of all the conditions laid down in the relevant Recruitment/Service Rules, including the conditions that one should be the holder of the relevant feeder post on regular basis and that he should have rendered the prescribed eligibility service in the feeder post."

17. We have consciously reproduced the relevant portion of the aforesaid memorandum to show that the issuing authority was conscious of the normal practice based on merit-cum-seniority, but a revised guideline was issued. Once a revised guideline is applicable, there can be no doubt that no supersession can take place on the basis of comparative merit.

18. The private respondents (R-2 and R-3) did seek to contend that the OM No.35034/7/97-Estt(D) dated 08.02.2002 is not applicable in view of the provisions of Article 229 of the Constitution of India.

19. We are unable to accept the said contention for the reason that the said Rules have been issued under Article 229 of the Constitution of India and provide for Rules and Orders of Central Government to be

made applicable when no provision or insufficient provision has been made in the said Rules. Other than stating that the criteria is merit-cum-seniority, nothing else was set out in the Rules and thus OM No.35034/7/97-Estt(D) dated 08.02.2002 was made applicable. There is little doubt over the application of the OM No.35034/7/97-Estt(D) dated 08.02.2002 when the office note itself proceeds by relying on OM No.35034/7/97-Estt(D) dated 08.02.2002 which office note resulted in the case being put up for consideration before the Selection Committee for promotion of the petitioner, R-2 & R-3 and other officers.

20. We are thus unequivocally of the view that the OM No.35034/7/97-Estt(D) dated 08.02.2002 would apply to the present case and which would entitle the petitioner to be promoted prior to promotion of R-2 and R-3.

21. The other aspect which has been raised arises from the non-communication of the adverse ACR to the petitioner which comes in the way of promotion of the petitioner. In this behalf, learned counsel for the petitioner relied upon the judgment in **Dev Dutt v. UOI & Ors.'s** case (supra). Learned counsel for R-1/Delhi High Court, however, submitted that the Supreme Court of India itself in a order dated 29.03.2010 has referred to the inconsistencies arising from the said pronouncement on the one hand and in the case of **Satya Narain Shukla v. Union of India;** 2006 (9) SCC 69 and **K.M.Mishra v. Central Bank of India and Ors.;** 2008 (9) SCC 120. These observations have been made in Special Leave to Appeal (Civil) No. 15770/2009. We, however, find that all the three judgments have been considered by a Division Bench of this Court in **P.K.Sarin v. Union of India & Ors.** 2009 INDLAW Delhi 1344 where the conclusion was reached that the adverse ACRs ought to have been communicated.

22. We respectfully follow the decision of this Court in **P.K.Sarin's** case (supra) with a caveat; in view of the facts obtaining in the present case. The Division Bench in **P.K.Sarin's** case (supra) directed in the operative part of the judgment, reconsideration of the petitioner's case based on a fresh representation. Such an eventuality does not arise in the present case. The petitioner already stands promoted albeit from a later date. The effective relief sought is only that the date of seniority be advanced. Therefore, the question of communicating the ACRs to the petitioner and permitting the petitioner to make a representation whereafter

reconsideration takes place does not arise. The application of OM No.35034/7/97-Estt(D) dated 08.02.2002 ensures that the petitioner in any case is entitled to promotion as she has satisfied the benchmark and was senior to R-2 and R-3. We may add that it is the case of none of the respondents that the OM No.22011/3/2007-Estt(D) dated 18.02.2008 would apply but even if it was so, the petitioner satisfied the benchmark as she had a 'Very Good' throughout except for the year 2003 which ACR was never communicated to the petitioner.

23. We may notice the other aspects which emerge from a perusal of the record. The first one is that when the petitioner was promoted to the post of Joint Registrar subsequently, the next person in line had superior ACRs and yet the petitioner was promoted. Thus, the benefit of superior ACRs for such promotion is not an aspect taken into consideration. Not only that, in previous cases when this norm was breached, the same was remedied in each of the cases by subsequent acts of the Delhi High Court and each of the examples given show this – Sh. J.L.Kalra, Sh.D.K.Prasad and Ms.Usha Kiran Gupta. A different norm cannot be applied to the petitioner.

24. The second aspect is that the petitioner had earned a grading of 'Good' only for one year i.e. for the 2003 while she had earned a grading of 'Very Good' throughout in the previous post as Private Secretary and after her promotion as Joint Registrar has earned a grading of 'Outstanding'.

25. On consideration of the aforesaid facts and circumstances, we are of the view that the petitioner is liable to succeed and the petitioner is entitled to be placed in seniority above R-2 and R-3 and would be entitled to all the consequential benefits from the date when she ought to have been promoted to the post of Joint Registrar i.e.07.08.2008 without the benefit of actual pay for the period she has not worked on the post of Joint Registrar till her appointment as Joint Registrar vide order dated 03.06.2009 with effect from 21.03.2009.

26. The writ petition is accordingly allowed leaving the parties to bear their own costs.

ILR (2011) III DELHI 68
WP (C)

KAMLA DEVI ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(PRADEEP NANDRAJOG & SURESH KAIT, JJ.)

W.P. (C) NO. : 10674/2009 DATE OF DECISION: 20.01.2011

(A) Constitution of India, 1950—Article 226—Petition claiming 'Liberalized Family Pension; Late Mukhtiar Singh, husband of the petitioner was attached to 5th Battalion, ITBP which was stationed near Pantha Chowk, Srinagar—While on duty at the Unit Quarter Guard on 15.6.1999 late Mukhtiar Singh suffered Myocardial Infarction—Respondent denied that the place where Mukhtiar Singh died, was an operation area—It was a disturbed area—It was denied that ITBP was involved in war fought at the Line of Control—Held—Admittedly, late husband of the petitioner was not on combat duty; as were the late husband of Smt. Manju Tewari and Smt. Kanta Yadav—The petitioner asserted that her husband was in an operational area, a fact denied by respondents No. 1 to 3 who assert that petitioner's husband was in a 'Disturbed Area' and not in an 'Operational Area'—It is settled law that the onus lies upon the party who asserts a fact—That apart, we can take judicial fact of the matter that Kargil war was fought on the Line of Control between India and Pakistan and not in Srinagar Town—The admission by the petitioner that her husband was attached to the 5th Battalion of ITBP which was stationed at Pantha Chowk near Srinagar in the State of Jammu & Kashmir entitles this Court to presume that the husband of the petitioner

was not in an 'Operational Area'—Under category 'E' of the OM, the entitlement to grant of 'Liberalized Family Pension' is contingent upon the death being in an operational area or while on the way to an operational area—Thus, claim has to be rejected.

Admittedly, late husband of the petitioner was not on combat duty; as were the late husband of Smt.Manju Tewari and Smt.Kanta Yadav. The petitioner asserts that her husband was in an operational area, a fact denied by respondents No.1 to 3 who assert that petitioner's husband was in a 'Disturbed Area' and not in an 'Operational Area'. **(Para 14)**

It is settled law that the onus lies upon the party who asserts a fact. That apart, we can take judicial fact of the matter that Kargil war was fought on the Line of Control between India and Pakistan and not in Srinagar town. The admission by the petitioner that her husband was attached to the 5th Battalion of ITBP which was stationed at Pantha Chowk near Srinagar in the State of Jammu & Kashmir entitles this Court to presume that the husband of the petitioner was not in an 'Operational Area'. **(Para 15)**

Under category 'E' of the OM, the entitlement to grant of 'Liberalized Family Pension' is contingent upon the death being in an operational area or while on the way to an operational area. **(Para 15)**

Thus, the first claim has to be rejected. **(Para 17)**

(B) Constitution of India, 1950—Article 226—Petition claiming ex-gratia payment under a policy decision taken by the Government of Haryana and by the State of Jammu & Kashmir; Late Mukhtiar Singh, husband of the petitioner was attached to the 5th Battalion, ITBP, which was stationed near Pantha Chowk, Srinagar—While on duty at the Unit Quarter Guard on 15.6.1999 late Mukhtiar Singh suffered Myocardial Infarction—

Respondent denied that the place where Mukhtiar Singh died, was an operation area—It was a disturbed area—It is denied that ITBP is involved in war fought at the Line of Control—Held—As per OM dated 30.9.1999 the ex-gratia payment was contingent upon death while on duty in operational areas in Kargil—It is apparent that the ex-gratia scheme for grant of ex-gratia payment framed by the State of Haryana is to reward gallantry and no more—Similarly, pertaining to the State of Jammu & Kashmir, policy decision taken on 10.7.1990 is restricted when death is 'a result of violence attributable to the breach of law or order or other form of civil commotion'.

Suffice would it be to state that as per OM dated 30.9.1999 the ex-gratia payment was contingent upon death while on duty in operational areas in Kargil. **(Para 19)**

It is apparent that the ex-gratia scheme for grant of ex-gratia payment framed by the State of Haryana is to reward gallantry and no more. **(Para 20)**

Similarly, pertaining to the State of Jammu & Kashmir, policy decision taken on 10.7.1990 is restricted when death is 'a result of violence attributable to the breach of law or order or other form of civil commotion'. **(Para 21)**

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. S.R. Kalkal, Advocates.

FOR THE RESPONDENTS : Mr. Jasvinder Singh, Advocate for R-1 to R-3. Mr. Asheesh Jain, Advocate for R-4.

CASES REFERRED TO:

1. *Mrs.Manju Tewari* vs. *UOI & Ors.* 2005 (3) SCT 458.
2. *Kanta Yadav* vs. *UOI & Ors.* 2004(3) SCT 388.

RESULT: Petition dismissed.

PRADEEP NANDRAJOG, J.

1. The petitioner, who is the widow of late Mukhtiar Singh, employed with ITBP as a Head Constable, has claimed multifarious reliefs against 3 respondents. Her first claim is to be released 'Liberalized Family Pension'; second claim is to ex-gratia payment under a policy decision taken by the Government of Haryana and the third claim is to ex-gratia payment under a policy decision taken by the State of Jammu & Kashmir.

2. It is apparent that the first relief claimed is against the Union of India, the second is against the State of Haryana and the third against the State of Jammu & Kashmir.

3. Factual backdrop leading to the claim is not in dispute. Attached to the 5th Battalion, ITBP, which was stationed near Pantha Chowk, Srinagar, while on duty at the Unit Quarter Guard on 15.6.1999, late Mukhtiar Singh suffered Myocardial Infarction.

4. Disputed facts being that as per the petitioner, her husband had died in an operational area when Kargil war was being fought at the Line of Control between India and Pakistan in the State of Jammu & Kashmir and claims that as per OM dated 3.2.2000 she was entitled to 'Liberalized Family Pension' inasmuch as of the 5 distinct categories, her entitlement fell within the ambit of category 'E', which reads as under:-

> "Category 'E': Death or disability arising as a result of (a) attack by or during action against extremists, anti-social elements etc., and (b) enemy action in international war or border skirmishes and warlike situations, including cases which are attributable to (i) extremists acts, exploding mines etc. while on way to an operation area; (ii) kidnapping by extremists; and (iii) battle inoculation as part of training exercises with live ammunition."

5. Per contra, as per the counter affidavit filed by R-1 to R-3 who are concerned with claim No.1, admitting Mukhtiar Singh having died at the Unit Quarter Guard on 15.6.1999 due to Myocardial Infarction, it is denied that the place was an operational area. It is stated that the area was a disturbed area. It is denied that the ITBP Battalion was involved

in the war which was being fought at the Line of Control.

6. In support of the claim of the petitioner, learned counsel for the petitioner relies upon two decisions. The first is a decision of a Division Bench of this Court and the second is a decision of the Division Bench of the Punjab & Haryana High Court.

7. The decision of the Division Bench of this Court is reported as 2005 (3) SCT 458 **Mrs.Manju Tewari Vs. UOI & Ors.** In the said decision the admitted fact was that Mrs.Manju Tewari's husband was enrolled as a Combatant Soldier and was attached with the Kumaon Regiment and during Kargil war i.e. 'Operation Vijay' was deployed at the Pakistan border in Sriganganagar Sector of Rajasthan. It was not in dispute that husband of late Mrs.Manju Tewari was in an area declared 'Operational'. Notwithstanding he not having died at the field when the battle was on and notwithstanding he having died due to Myocardial Infarction, the Division Bench held that claim of Mrs.Manju Tewari would fall within category 'E' of the OM dated 3.2.2000.

8. The decision of the Division Bench of the Punjab & Haryana High Court is reported as 2004(3) SCT 388 **Kanta Yadav Vs. UOI & Ors.** Facts noted were that husband of Mrs.Kanta Yadav was attached with the Army Medical Corps and was on duty during 'Operation Meghdoot' on 24.7.2000. On duty, he died due to Pulmonary Embolism.

9. It was noted by the Division Bench that the deceased was on duty at a high altitude in the 'Siachin Glacier' and the deployment was under the military operation 'Operation Meghdoot'. The Division Bench noted that 'Liberalized Family Pension' had been sanctioned and the claim pertaining to grant of ex-gratia payment in sum of Rs.7.5 lacs under a policy which envisaged death occurring during (i) enemy action in international war or border skirmishes; and (ii) action against militants, terrorists, extremists etc." The Division Bench noted that being posted at an operational area during 'Operation Meghdoot', the claim had to succeed.

10. It is apparent that the ratio of law of both decisions is that the entitlement need not flow from death during a battle or in the field. As long as the deployment is in an operational area and is for or related to a combat, the death of a soldier at the battle front, notwithstanding actual firing not going on, would sustain the claim.

Ahmad, J.)

11. Relevant would it be to note that category 'E' of the OM dated 3.2.2000 contemplates death arising as a result of '(i) attack by or during action against extremists and anti-social elements; (ii) enemy action in international war or border skirmishes and warlike situations and includes death attributable to extremists acts in Operational Areas'. The policy does not contemplate death being the direct consequences of 'warfare'.

12. Needless to state the policy for grant of 'Liberalized Family Pension' is a beneficial provision and thus needs to be construed liberally and as long as the language of the statute permits, to be interpreted favourably to the claimants.

13. Thus, the claim of the petitioner against the respondents needs to be considered in light of the ratio of the 2 decisions noted hereinabove and the OM dated 3.2.2000, as understood by us hereinabove.

14. Admittedly, late husband of the petitioner was not on combat duty; as were the late husband of Smt.Manju Tewari and Smt.Kanta Yadav. The petitioner asserts that her husband was in an operational area, a fact denied by respondents No.1 to 3 who assert that petitioner's husband was in a 'Disturbed Area' and not in an 'Operational Area'.

15. It is settled law that the onus lies upon the party who asserts a fact. That apart, we can take judicial fact of the matter that Kargil war was fought on the Line of Control between India and Pakistan and not in Srinagar town. The admission by the petitioner that her husband was attached to the 5th Battalion of ITBP which was stationed at Pantha Chowk near Srinagar in the State of Jammu & Kashmir entitles this Court to presume that the husband of the petitioner was not in an 'Operational Area'.

16. Under category 'E' of the OM, the entitlement to grant of 'Liberalized Family Pension' is contingent upon the death being in an operational area or while on the way to an operational area.

17. Thus, the first claim has to be rejected.

18. As regards claim against the State of Haryana, petitioner relies upon an OM dated 4.1.2006, ignoring that petitioner's husband died on 15.6.1999 and thus OM dated 4.1.2006 cannot be the foundation of the claim. We note that as per State of Haryana the policy decision taken by

the State of Haryana was as per the OM dated 1.4.1994 which was superseded by OMs dated 17.6.1999, 23.6.1999, 2.7.1999 and 25.7.1999. As per OM dated 30.9.1999 effective from 1.4.1999, ex-gratia compensation payable to family of defence service personnel and para-military force personnel would be who die in harness in the performance of official duties while serving in operations in Kargil and would be restricted to those families and jawans who were residents of State of Haryana.

19. Suffice would it be to state that as per OM dated 30.9.1999 the ex-gratia payment was contingent upon death while on duty in operational areas in Kargil.

20. It is apparent that the ex-gratia scheme for grant of ex-gratia payment framed by the State of Haryana is to reward gallantry and no more.

21. Similarly, pertaining to the State of Jammu & Kashmir, policy decision taken on 10.7.1990 is restricted when death is 'a result of violence attributable to the breach of law or order or other form of civil commotion'.

22. It is apparent that the policy decision taken by the State of Jammu & Kashmir is restricted in its operation. It envisages death as a direct result of violence during breach of law and order or other form of civil commotion and does not concern itself with death while on duty in a disturbed area.

23. Noting that as against Ordinary Family Pension, the petitioner has been released Extra-Ordinary Family Pension as her husband died while on duty, expressing our sympathy with the petitioner, being helpless in the matter, we dismiss the writ petition but leave the parties to bear their own costs.

ILR (2011) III DELHI 75
FAO (OS)

SMT. RANI SHARMA ....APPELLANT

VERSUS

MS. SANGEETA RAJANI & OTHERS ....RESPONDENTS

(A.K. SIKRI & M.L. MEHTA, JJ.)

FAO (OS) NO. : 12/2011 & 35/2011 **DATE OF DECISION: 28.01.2011**

(A) Contract Act, 1872—Code of Civil Procedure Section 39, Rule 1, 2—Time is essence of contract—Interpretation—Defendant being owner of first floor and 2/9th share holder in suit property—Entered into Agreement to Sell with Plaintiff for the said share—Defendant had two daughters and one son—Partition suit pending between them—Case decreed one basis of compromise—Defendant acquired first floor—Each child got 2/9th share each—Understanding arrived at between daughters and Defendant for sale of share—Said sale not materialized—Suit for specific performance against daughters filed—Dismissed—Appeal pending—One daughter entered into agreement to sell her share to outsider—Defendant filed suit against daughter under Section 44, Transfer of Property Act, 1882—Defendant also acquired 2/9th share of son—Entire ground floor in in occupation of Official Liquidator appointed by Company Court—Plaintiffs filed suit for specific performance of Agreement to Sell—Application for permanent injunction also made—Total sum of Rs. 1 crore already paid by Plaintiffs—Application under Order 39 dismissed—Defendant directed to deposit sum of Rs. 7 crore with Registrar General—Defendant restrained from parting with share in suit property—Hence two appeals filed—Plaintiff claiming injunction and Defendant alleging Rs. 7 crore to be excessive.

Held:

Parties specifically agreed that Plaintiff entitled to negotiate with daughters without affecting sale price as soon as possible—Parties further agreed that after purchase of share of daughters, transaction with Defendant to be completed within three months—Consideration to remain 7 crores irrespective of transaction amount with daughters—Purchase of share of daughters condition precedent for implementation of agreement—Intention of parties to complete transaction within shortest possible period—However no agreement reached between daughters and Plaintiffs—Four year elapsed since original Agreement to Sell.

Though no specific date or time was fixed for the completion of the transaction, as rightly submitted by the learned counsel for the plaintiffs, but by reading of clauses 4 and 5, it seems that the intention of the parties was to complete the transaction **as soon as possible** and within the **shortest possible period** from the date of the agreement. On completion of the transactions with the daughters within shortest possible period, the plaintiffs were to complete the transaction with the defendant **within the period of three months.** What was ensured for the plaintiffs as per clause 4 was the negotiated sale price of 7 crores. A plaint reading of this clause with the required emphasis on words **"without affecting the sale price, payable to seller"** would bring out this meaning. It was presumably for the reason that if the transaction with the daughters was at some other price, the sale consideration of the suit premises payable to the defendant was to remain at agreed 7 crores. It is in this context that clause 6, which was mainly relied upon by the

learned counsel for the plaintiffs, has to be read. This clause cannot be read in isolation. Clause 9 further makes the parties intention clear that this agreement was being executed to facilitate the ultimate purchase of entire property by plaintiffs. Accordingly, we are of the view that purchase of shares of the daughters by the plaintiffs was a condition precedent to the implementation of the agreement. Admittedly, the plaintiffs have not been able to fulfill the condition precedent and now it is not possible since the daughters have admitted by agreed to sell their shares to Mr. Sanjiv Anand. **(Para 11)**

(B) Rightly held that essence of clause providing for shortest possible time had already elapsed—Period of four years rightly held to be too long—Defendant, *prima facie* entitled to say that sale price had become unrealistic—Defendant rightly unwilling to suffer transaction at earlier price—Factum of increase in price of suit property admitted by both parties.

Considering all these facts and circumstances, the learned Single Judge was of the view that there is nothing on record to demonstrate that the plaintiffs had at any point of time called upon the defendant to conclude the transaction qua her share in the suit premises after the execution of the agreement on 30th July, 2006 till 2nd June, 2010 when notice was issued to her for completion of the transaction. The learned Single Judge rightly recorded that the essence of clause 5 providing **shortest possible time should be taken to be the reasonable time** which in the given circumstances has already elapsed. The period of four years was rightly held to be far too long. We are in agreement with the learned Single Judge that in these circumstances, the defendant was prima facie entitled to say that sale price has become unrealistic and she is no longer willing to suffer the transaction. It is not in dispute that the prices of the immovable properties in Delhi have considerably risen in the recent past. It was fairly stated by learned

counsel for the defendant that the present value of the suit premises was not less than Rs.28 crores. This fact was not disputed by learned counsel for the plaintiffs. **(Para 13)**

(C) Restraining Defendant from dealing with suit premises—Reliance placed on ratio of KS Vidyandan—When delay makes specific performance inequitable even where time not essence of contract—Contract to be performed with reasonable time—Reasonable time determined by looking at surrounding circumstances.

In the aforesaid case, the Apex Court also observed that it is a case of total inaction on part of the plaintiffs for two-and-a-half years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed. The Apex Court held that the delay is coupled with substantial rise in prices, which, according to the defendants, are three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiffs. **(Para 15)**

The Apex Court also reiterated that the true principle is the one as stated by the Constitution Bench in the case of **Chand Rani v. Kamala Rani,** AIR 1993 SC 1742. In this case it was held that even where time is not the essence of the contract, the plaintiff must perform his part of the contract within reasonable time and the reasonable time should be determined by looking at the surrounding circumstances including the express terms of the contract and the nature of the property. **(Para 16)**

(D) Period of four years lapsed—Prices of suit premises have arisen—Co owners have created third party interests in their shares—Completion of original transaction beyond implementation and unenforceable—Defendant cannot be made to suffer

the transaction.

Applying the principles of law as laid by the Apex Court in the aforesaid cases, we may, at the sake of repetition, state that we cannot be oblivious to the reality which is that a considerable period of over four years has elapsed from the execution of the agreement without any action being taken by the plaintiffs to fulfill the terms and conditions and in the meantime not only the prices of the suit premises have risen to four times, but the co-owners have also created third party interests in their shares in the premises. All this has made the completion of transaction beyond implementation and unenforceable. In such circumstances, the defendant could not be made to suffer the transaction. **(Para 17)**

(E) Injunction—Rightly not granted—In given circumstances neither prima facie case nor balance of convenience lies in favour of Plaintiff—Irreparable loss—Defendant offered to deposit sum of Rs. 7 crore—Offer made by Defendant herself—No infirmity in the same.

Keeping in view the entire facts and circumstances and also the age of the defendant (68 years), the learned Single Judge was of the view that the suit property cannot be subjected to any injunction whereby the defendant, at this stage, is asked to wait to enjoy the fruits of her property. We are in complete agreement with the learned Single Judge that in the given circumstances neither the prima facie case nor the balance of convenience is in favour of the plaintiffs to restrain the defendant. With regard to question of irreparable loss, the learned Single Judge noted that an offer without prejudice to her rights was made by the defendant to deposit a sum of Rs.7.00 crores within three months. Though, the said offer was rejected by the plaintiffs, but to protect the interest of both the parties, the learned Single Judge accepted this offer of the defendant of deposit of Rs.7.00 crores. It was presumably on the perception that if the plaintiffs are entitled to any compensation, their

interest may remain secured. **(Para 20)**

The defendant in her appeal, i.e., FAO(OS) No.12/2011, impugned this part of the order of deposit of Rs.7.00 crores alleging it to be excessive. We have noted above that this was the offer of the defendant herself without prejudice to her rights and the same was considered and accepted by the learned Single Judge to secure the interests of both the parties. We do not see any infirmity or illegality in the order of the learned Single Judge in this regard. **(Para 22)**

Important Issue Involved: When delay makes specific performance inequitable even where time not essence of contract, Contract to be performed with reasonable time—Reasonable time is to be determined by looking at surrounding circumstances.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. Arvind K. Nigam, Sr. Advocate with Mr. Divyesh Pratap Singh & Ms. Kamini Jaiswal Advocats.

FOR THE RESPONDENTS : Mr. Sanjeev Anand, Mr. M.C. Dixit, & Mr. Vinod Sharma, Advocates.

CASES REFERRED TO:

1. *Skyline Education Institute (India) Pvt. Ltd.* vs. *S L. Vaswani & Another*, (2010) 2 SCC 142.
2. *K.S. Vidyanadam and others* vs. *Vairavan*, AIR 1997 SC 1751.
3. *Chand Rani* vs. *Kamala Rani*, AIR 1993 SC 1742.

RESULT: Appeals dismissed.

M.L. MEHTA, J.

1. These are two appeals filed against the order dated 26th November, 2010 passed by learned Single Judge in Original Suit being

CS(OS) No.1498/2010 whereby the application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC') of the plaintiffs, namely, Sangeeta Rajani and others (hereinafter referred to as 'the plaintiffs') was dismissed. Simultaneously, while dismissing the said application, the learned Single Judge directed the defendant, namely, Ms.Rani Sharma (hereinafter referred to as 'the defendant') to deposit a sum of Rs.7.00 crores within a period of three months with the Registrar General of this Court. It was also ordered that till such time the money was deposited, the defendant shall not part with the possession of her share comprising of first floor and 2/9th share in the ground floor of the premises bearing No.S-46, Panchshila Park, New Delhi.

2. The admitted facts are that the defendant being the owner of the first floor and 2/9th share in the ground floor, agreed to sell the same to the plaintiffs vide Memorandum of Understanding/Agreement to Sell dated 30th July, 2006 (hereinafter referred to as 'the agreement').

3. The defendant is the second wife of late Capt. Ravi Sharma, who had two daughters, namely, Rekha and Rashmi and one son, Sanjay. A partition suit was pending between them with regard to the premises bearing No.S-46, Panchshila Park, New Delhi. That case was decreed on the basis of a compromise arrived at between them whereby first floor came to be acquired by the defendant. The two daughters and son got 2/9th share each in the said premises. Sometime in 1983, an understanding was arrived at by the defendant with daughters for the sale of their shares. Since, it did not materialize, she filed a suit for specific performance against daughters, which came to be dismissed, and the appeal there from is stated to be pending. In the meantime, daughter Ms. Rashmi Sharma, entered into an agreement to sell her share in the suit premises with an outsider, Mr.Sanjiv Anand. The defendant (Rani Sharma) filed a suit against her under Section 44 of the Transfer of Property Act, 1882. The defendant also acquired 2/9th share of son Sanjay in the ground floor of premises. However, admittedly the entire ground floor was in occupation of the Official Liquidator appointed in terms of the Company Court of this Court.

4. The plaintiffs filed the suit for specific performance based on the agreement against the defendant on 20th July, 2010. An application under

Order XXXIX Rules 1 and 2 read with Section 151 of CPC was also filed. It was also an admitted case that a sum of Rs.60.00 lakhs was paid by the plaintiffs to defendant at the time of agreement and Rs.20.00 lakhs each on 12th March, 2007 and 19th March, 2007, thereby making a total payment of Rs.1.00 crore.

5. The case of the plaintiffs for specific performance and permanent injunction against the defendant was set up on these averments:

i. A sum of Rs.1.00 crore stood paid as per the agreement.

ii. As per clause 6 of the agreement, it was specifically agreed between the parties that the agreement shall not be cancelled by either of them and so the agreement dated 30th July, 2006 is irrevocable.

iii. The plaintiffs offered balance consideration to the defendant a number of times and have always been ready and willing to pay the balance sale consideration.

iv. As per clauses 4 and 5, they were entitled to negotiate with the daughters, Rekha and Rashmi, to purchase their shares, but since the same could not materialise, the defendant is bound to execute the Agreement to Sell her share.

v. No specific date was fixed for execution of the agreement which was contingent upon their purchasing the share of daughters of defendant. However, that itself cannot be a ground for the defendant to delay the execution of transaction and handover the possession of the premises comprising of first floor and 2/9th share in the ground floor of the premises.

vi. With regard to the cause of action, it was their case that it also arose on 4th May, 2010 when the defendant became furious and refused to refund the amount and also on 2nd June, 2010 when the defendant did not respond to their notice of this date to take steps to execute the documents of title for transfer of premises in their name.

6. It is also noted that the plaint was subsequently amended by incorporating that a sum of Rs.6.00 lakhs was paid by plaintiffs on

different dates by cheques/pay orders in the name of the defendant's lawyer at her request. This fact was however, denied by the defendant.

7. The plaintiffs have assailed the impugned order mainly on the grounds that the learned Single Judge failed to appreciate that a valuable right of the plaintiffs was created in the suit premises and the same was required to be protected till the disposal of the suit. Learned counsel for the plaintiffs submitted that the interest of both the parties would have been better served by securing the suit premises till final adjudication and by restraining the defendant from dealing with the same. The learned counsel further submitted that it was the defendant who defaulted by not being able to sort-out her family disputes, whereas the plaintiffs were always ready and willing to perform their part of the contract in respect of the entire property as also of the suit premises comprising of the first floor and 2/9th share in the ground floor. The learned counsel for the plaintiffs referred to some of the clauses of the Agreement to substantiate his submissions.

8. On the other hand, learned counsel for the defendant took us through various clauses of the agreement and submitted that the agreement had become incapable of compliance since the plaintiffs failed to adhere to the terms of the Agreement and also failed to negotiate with the daughters with regard to their share in the premises. He submitted that the agreement with the defendant was subject to completion of the deal by the plaintiffs with the daughters regarding their share and the plaintiffs have slept over the matter for more than four years and have not taken any steps in this regard and in the mean the daughters having agreed to sell their share to Mr. Sanjiv Anand, the agreement in respect of the suit premises has thus become unenforceable.

9. Since learned counsel for both the parties have referred to different clauses of the agreement to base their submissions, reading of those clauses in isolation will take us nowhere, much less towards the intent of the parties. Therefore, before adverting to the submissions of learned counsel it will be useful to refer to the relevant portion of the agreement, which reads as follows:-

> "Whereas keeping in view the absolute right of the Seller to the extent of 1/3rd plus 2/9th shares in the said property; the Seller has agreed to sell her shares to the Purchasers herein her right,

> title and interest for a total sale consideration of Rs.7 crores (Rupees seven crores) on the terms and conditions stated hereinafter.
>
> NOW THIS MEMORANDUM OF UNDERSTANDING/ AGREEMENT TO SELL WITHESSETH AS UNDER:-
>
> (1) The Purchasers have paid a sum of Rs.60 Lacs (Rupees sixty lacs only) to the Seller, simultaneously with the signing of this MOU/Agreement to Sell and the receipt of the said payment, the Seller hereby acknowledges. The details of the payment made by the Purchasers to the Seller are given in the Annexure annexed hereto.
>
> (2) It is also agreed between the parties that on the signing of the MOU/Agreement to Sell, the parties shall vigorously pursue the litigation pending in the Court and the Seller shall ensure that any restraint order issued against her in any proceedings is vacated at the earliest. The Seller shall also pursue her claim to possession of the Ground Floor in the Company Court, where the proceedings of winding up of the tenant Company are pending in order to facilitate the completion of the transaction relating to the entire property.
>
> (3) It is also agreed between the parties that the Seller shall act in the Court proceedings in the best interest of the Purchasers and shall be entitled to receive a further sum of Rs.40 Lacs (Rupees forty lacs only) after a period of six months, from the date of signing of this MOU/ Agreement to Sell, in case of delay in the disposal of the proceedings.
>
> (4) It is also agreed between the parties that the Purchasers shall be entitled to negotiate with the step-daughters of the Seller and all costs for purchase of their shares would be paid by the Purchasers, without affecting the sale price, payable to the Seller herein, for her share. The Purchasers further assures the Seller, that they shall try to conclude the deal with the step-daughters of the Seller as soon as possible and in case any amount is required to be deposited

in court by the seller on account of her right of pre-emption, the Purchaser shall pay the said amount to the seller for doing the needful.

(5) It is also agreed between the parties that after purchasing the shares of Ms.Rekha Sharma by way of settlement and Ms.Rashmi Sharma through court, in the said property within the shortest possible period from the date of this Agreement, the Purchasers shall complete the sale transaction with the Seller herein, within a period of three months and shall pay the balance sale price to the Seller against handing over of possession and execution of the other title documents to the satisfaction of the Purchasers.

(6) It is also agreed between the parties that none of the parties shall be entitled to cancel the MOU/Agreement to Sell in question.

(7) The Seller hereby agrees with the Purchasers that all costs of litigation shall be borne by the Seller, till the state of purchase of shares of Ms.Rekha Sharma and Ms.Rashmi Sharma by the Purchasers.

(8) The parties agree that the seller undertakes to take all necessary steps to take possession at its own cost in the winding up proceedings against the tenant Company so that the vacant possession is available for the benefit of the purchaser of the said portion of the property.

(9) The parties also agree that they have understood the implications of the pending litigation and have agreed to sign this memorandum of Understanding/Agreement to Sell to facilitate the ultimate purchase of the entire property by the Purchasers.

(10) It is also agreed between the parties that the Seller shall not in any manner create any third party interest in her portion of the property. The Purchasers have also agreed with the Seller that they shall not be entitled to assign their rights under this Agreement to any third party."

10. Reading the agreement, it may be noted that it was specifically agreed between the parties that plaintiffs were entitled to negotiate with

the daughters (Ms. Rekha Sharma and Ms. Rashmi Sharma) without affecting the sale price agreed with the defendant for the suit premises. The plaintiffs assured the defendant that they will try to conclude the deal with the daughters **as soon as possible** and in case any amount was required to be deposited in the Court by the defendant, (in the litigation going on between defendant and daughters) the plaintiffs shall pay the said amount for doing the needful. It may also be seen that as per clause 5, the parties further agreed that after purchasing shares of the daughters within the **shortest possible** period of the agreement, the plaintiffs were to complete the transaction with the defendant **within the period of three months** by making payment of the balance sale price simultaneously with the taking of possession and execution of the title documents.

11. Though no specific date or time was fixed for the completion of the transaction, as rightly submitted by the learned counsel for the plaintiffs, but by reading of clauses 4 and 5, it seems that the intention of the parties was to complete the transaction **as soon as possible** and within the **shortest possible period** from the date of the agreement. On completion of the transactions with the daughters within shortest possible period, the plaintiffs were to complete the transaction with the defendant **within the period of three months.** What was ensured for the plaintiffs as per clause 4 was the negotiated sale price of 7 crores. A plaint reading of this clause with the required emphasis on words **"without affecting the sale price, payable to seller"** would bring out this meaning. It was presumably for the reason that if the transaction with the daughters was at some other price, the sale consideration of the suit premises payable to the defendant was to remain at agreed 7 crores. It is in this context that clause 6, which was mainly relied upon by the learned counsel for the plaintiffs, has to be read. This clause cannot be read in isolation. Clause 9 further makes the parties intention clear that this agreement was being executed to facilitate the ultimate purchase of entire property by plaintiffs. Accordingly, we are of the view that purchase of shares of the daughters by the plaintiffs was a condition precedent to the implementation of the agreement. Admittedly, the plaintiffs have not been able to fulfill the condition precedent and now it is not possible since the daughters have admitted by agreed to sell their shares to Mr. Sanjiv Anand.

12. The learned counsel took us through the pleadings of plaint where it is averred that since the deal with the daughters could not

materialize, the stage for the completion of the transaction has not arisen and that since 2/9th share of son, Sanjay on the ground floor along with the other portion of sisters is lying sealed and there has been delay in conclusion of the proceedings, consequently the present transaction is not being concluded. It appears that may be because of these factors the plaintiffs did not take any action to make payment of the balance amount for finalizing the transaction. It may be that they might have tried to negotiate the deal with the daughters. However, the admitted fact now is that the daughters have struck a deal with Mr. Sanjiv Anand, may be on a higher price. It is then that the plaintiffs have chosen to file the suit against the defendant.

13. Considering all these facts and circumstances, the learned Single Judge was of the view that there is nothing on record to demonstrate that the plaintiffs had at any point of time called upon the defendant to conclude the transaction qua her share in the suit premises after the execution of the agreement on 30th July, 2006 till 2nd June, 2010 when notice was issued to her for completion of the transaction. The learned Single Judge rightly recorded that the essence of clause 5 providing **shortest possible time should be taken to be the reasonable time** which in the given circumstances has already elapsed. The period of four years was rightly held to be far too long. We are in agreement with the learned Single Judge that in these circumstances, the defendant was prima facie entitled to say that sale price has become unrealistic and she is no longer willing to suffer the transaction. It is not in dispute that the prices of the immovable properties in Delhi have considerably risen in the recent past. It was fairly stated by learned counsel for the defendant that the present value of the suit premises was not less than Rs.28 crores. This fact was not disputed by learned counsel for the plaintiffs.

14. Keeping in view the above discussion, the question for consideration would be as to whether, in these circumstances, the learned Single Judge ought to have restrained the defendant from dealing with the suit premises? We do not find any merit in the contention of the learned counsel for the plaintiffs. In the case of **K.S. Vidyanadam and others v. Vairavan,** AIR 1997 SC 1751, the Hon'ble Supreme Court laid as under:

> "10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement [which does not provide specifically that time is of the essence of the contract] should be decreed provided it is filed within the period of limitation notwithstanding the time limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limits specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this Court in Chand Rani v. Kamala Rani , "it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the court may infer that it is to be performed in a reasonable time if the conditions are (evident?): (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract". In other words, the court should look at all the relevant circumstances including the time-limits specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades…"
>
> 11. …Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. learned Counsel for the plaintiff says that when the parties entered into

the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as nonexistent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribes certain time-limits for taking steps by one or the other party, it must have some significance and that the said time-limits cannot be ignored altogether on the ground that time has not been made the essence of the contract [relating to immovable properties]."

15. In the aforesaid case, the Apex Court also observed that it is a case of total inaction on part of the plaintiffs for two-and-a-half years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed. The Apex Court held that the delay is coupled with substantial rise in prices, which, according to the defendants, are three times - between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiffs.

16. The Apex Court also reiterated that the true principle is the one as stated by the Constitution Bench in the case of **Chand Rani v. Kamala Rani,** AIR 1993 SC 1742. In this case it was held that even where time is not the essence of the contract, the plaintiff must perform his part of the contract within reasonable time and the reasonable time should be determined by looking at the surrounding circumstances including the express terms of the contract and the nature of the property.

17. Applying the principles of law as laid by the Apex Court in the aforesaid cases, we may, at the sake of repetition, state that we cannot

be oblivious to the reality which is that a considerable period of over four years has elapsed from the execution of the agreement without any action being taken by the plaintiffs to fulfill the terms and conditions and in the meantime not only the prices of the suit premises have risen to four times, but the co-owners have also created third party interests in their shares in the premises. All this has made the completion of transaction beyond implementation and unenforceable. In such circumstances, the defendant could not be made to suffer the transaction.

18. There is another aspect of the matter, which needs to be mentioned. It was contended by the learned counsel for the defendant that plaintiffs had rescinded/abandoned the agreement and consequently the advance sum of Rs.1.00 crores along with interest of Rs.32,28,495/- was refunded to them, and therefore, no cause of action survives. He drew our attention to the pleading of the plaint where it is pleaded that the cause of action also arose on 4th May, 2010, when the defendant became furious and refused to refund the amount of the earnest money. The learned counsel submitted that this averment was predicated on the premise that the agreement to the knowledge of plaintiffs stood rescinded or cancelled prior to 4th May, 2010.

19. The learned counsel for the defendant also raised the questions of validity of agreement, the limitation and also non maintainability of the plaint in the present form. An issue was also raised alleging the agreement to be a product of fraud played upon the defendant at the instance of her previous lawyer. We need not go into all these issues in the present proceedings.

20. Keeping in view the entire facts and circumstances and also the age of the defendant (68 years), the learned Single Judge was of the view that the suit property cannot be subjected to any injunction whereby the defendant, at this stage, is asked towait to enjoy the fruits of her property. We are in complete agreement with the learned Single Judge that in the given circumstances neither the prima facie case nor the balance of convenience is in favour of the plaintiffs to restrain the defendant. With regard to question of irreparable loss, the learned Single Judge noted that an offer without prejudice to her rights was made by the defendant to deposit a sum of Rs.7.00 crores within three months. Though, the said offer was rejected by the plaintiffs, but to protect the interest of both the

parties, the learned Single Judge accepted this offer of the defendant of deposit of Rs.7.00 crores. It was presumably on the perception that if the plaintiffs are entitled to any compensation, their interest may remain secured.

21. The learned Single Judge has examined all aspects of the matter and also the principles of applicability of Order XXXIX Rules 1 and 2 CPC. Having analysed ourselves that there is no infirmity in the impugned order and guided by the principles of law laid down by the Supreme Court in the case of **Skyline Education Institute (India) Pvt. Ltd. v. S L. Vaswani & Another,** (2010) 2 SCC 142, we are not inclined to interfere with the well reasoned order of learned Single Judge.

22. The defendant in her appeal, i.e., FAO(OS) No.12/2011, impugned this part of the order of deposit of Rs.7.00 crores alleging it to be excessive. We have noted above that this was the offer of the defendant herself without prejudice to her rights and the same was considered and accepted by the learned Single Judge to secure the interests of both the parties. We do not see any infirmity or illegality in the order of the learned Single Judge in this regard.

23. For the aforesaid reasons, we also do not see any merit in the appeal, i.e., FAO(OS) No.35/2011 of the plaintiffs which deserves dismissal. Consequently, both the appeals are dismissed with no orders as to costs.

24. It is clarified that the observations made by us will not have any bearing on the merits of the original suit.

ILR (2011) III DELHI 92
CS (OS)

J.S. CHAUDHARY ....PLAINTIFF

VERSUS

THE VICE CHAIRMAN, DDA & ANR. ....DEFENDANTS

(S. RAVINDRA BHAT, J.)

CS (OS) NO. : 1347/1998 DATE OF DECISION: 31.01.2011

Code of Civil Procedure, 1908—Money Suit-Loss of profitability due to delay in completion of contract—Plaintiff was awarded a works contract for construction of flats—Plaintiff amongst other claims-claimed loss of profitability due to delay in completion of contract—Defendant contended that while there was delay, plaintiff cannot claim any prejudice—At the time of extension of contract Parties agreed that no damages would be claimed and agreed to a formula which compensated that contractor for extention of time for performance.

Held-delay was attributable to the defendant—Undertaking furnished for extention of time imposes bar in respect of delay caused by the plaintiff—In works contracts, a contractor is entitled to claim damages for loss of profits on proof of breach of contract by the erring party.

The plaintiff claims loss of profitability due to delay in completion of contract @ Rs. 2,68,468/-. It is alleged that the delay and prolongation of contract, prevented him from carrying out other works, and he should accordingly be compensated towards loss of profit which he would have otherwise earned. This claim is denied by DDA. He also claims the sum of Rs. 34,43,818/- towards work performed

during the extended period of the contract stating his entitlement to 30% extra on the total value of the contract, for such extended period. There is no proof of these claims. It is argued that the unjustified delay caused by the DDA constrained the plaintiff to deploy resources, which could have been otherwise utilized profitably in some other contract. The DDA counters these claims, arguing that while there is delay, the plaintiff cannot claim any prejudice, because he stated, at the time of grant of extension, that no damages would be claimed, and further, that when the parties to the contract agreed to a formula which compensates the contractor for extension of time for performance, no question of damages on any head, or for loss of profit, can arise. **(Para 60)**

The sum of Rs. 34,43,818/- is derived as 30% of cost of work done up to 18.12.92 (which is the original stipulated date of completion as per agreement), which is Rs. 83,79,253/-. The DDA does not dispute the latter figure of Rs. 83,79,253/-, but objects in principle to the grant of damages on other grounds, noticed above. Although the plaintiff has not led evidence in this regard, the court is of the opinion that the effect of delay on account of various factors, such as increased expenses commitment to the contract for a longer period, the effect it may have upon the contractor who would be unable to commit (or enter into) other commercial transactions cannot be altogether lost sight of. In an expanding economy, where wage levels and availability of materials are dynamic factors, the possibility of a businessman to earn reasonable profits would depend on the time taken in the performance of contracts. If a contract performance is delayed on someone else's fault, he ought to be compensated, for the loss of profit, at least notionally. The Supreme Court authorities from A.T. Brij Paul onwards have consistently ruled that granting 15% of the contract value, towards loss of profit, is a reasonable standard. Those were in cases where the contractor led some evidence. Here, however, the plaintiff has not led any evidence, and

has claimed Rs. 37 lakhs approximately. Having regard to the totality of circumstances, the court is of the view that a reasonable standard of damages in this case should be 7.5% of the value of the work done till the date originally agreed. This figure works out to Rs. 6,28,443.97. **(Para 68)**

Important Issue Involved: In the works contract, if the party entrusting the work commits breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract on proving the breach of contract by the erring party.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Sudhanshu Batra, Advocate.

FOR THE DEFENDANTS : Mr. Ajay Verma, Advocate for Defendants.

CASES REFERRED TO:

1. *Delhi Development Authority, Appellant* vs. *Anand And Associates* 2008 (1) Arb LR 490.
2. *P. C. Sharma And Anr.* vs. *Delhi Development Authority* 2006 (1) Arb LR 403.
3. *Pt. Munshi Ram & Associates (P) Ltd.* vs. *DDA*, 128 (2006) DLT 619.
4. *M/s. K. R. Builders Private Limited* vs. *Delhi Development Authority & Anr.* (in C.S. (OS) 142/2003.
5. *Madan Lal Maggon*, vs. *Delhi Development Authority & Anr* 2001-(1)-Arb LR 201.
6. *DDA* vs. *K.C. Goyal & Company*, 2001 (II) AD (Delhi) 116.
7. *DDA* vs. *Jagan Nath Ashok Kumar*, 89 (2001) DLT 668 = 2000 (Suppl.) Arb. LR 281 (Del.).

8. *DDA* vs. *M/s. S. S. Jetley,* 2000 (VII) AD (Delhi) 743 = 2001 (1) Arb. LR 289 (Del.) (DB).
9. *Dwarka Das* vs. *State of MP* 1999 (3) SCC 500.
10. *M/s. Bedi Constructions* vs. *DDA and another,* CS (OS) No. 2822/1994.
11. *Santok Singh Arora* vs. *Union of India and Ors.* AIR 1992 SC 1809.
12. *Continental Construction Co. Ltd.* vs. *State of Madhya Pradesh* (AIR 1988 SC 1166).
13. *A. T. Brij Paul Singh* vs. *State of Gujarat* (1984) 4 SCC 59).
14. *Brij Paul Singh* vs. *State of Gujrat* AIR 1984 SC 1703.
15. *Mohd. Salamatullah* vs. *Govt. of A.P.* (1977) 3 SCC 590).

RESULT: Suit partly succeeded with pendente lite and future costs. The plaintiff was also held entitled to costs.

S. RAVINDRA BHAT, J.

1. The plaintiff claims a money decree, based on the sum of Rs. 81,54,667/-towards various heads, on account of amounts due from the Defendant (hereafter called "DDA") in a workscontract; additionally, the plaintiff claims interest, at a quantified rate, as well as *pendent lite* and future interest. The claim is premised on the performance of a works contract, entered into by the parties, for construction of 448 flats at Jhilmil Colony.

2. The facts, to the extent they are uncontroverted, are that the plaintiff, who describes himself as sole proprietor of a firm, successfully bid, and was awarded the contract, by the DDA. The bid was accepted on 09.9.1991; the written contract (Ex-PW-1/2) was entered into on16.09.1991. The time for performance, agreed upon by the parties, was 15 months, from the date of signing the agreement. It was however, extended. The plaintiff says that this was due to various defaults by DDA; the latter however denies that position. Eventually, the construction was completed on 12.12.1994. The completion certificate was issued on 6th July, 1995. The plaintiff relies on a document (Ex.PW-1/3) issued on

12.12.1994, evidencing the date of completion of construction.

3. The plaintiff contends that in terms of the Agreement, Ex. PW-1/2, the Final Bill had to be settled by DDA, within six months of completion. The suit claims the sum of Rs. 81,54,667/50 from the DDA towards various heads, which are described briefly hereafter. Claim (i) pertains to balance of final bill amount, i.e. Rs. 5,23,195/-. According to the plaintiff, the final bill was payable within six months from completion, i.e. 11.6.1995; DDA is alleged to have failed to pay this. The bill was submitted on 16.06.1996. The plaintiff admits to some part payment on 11.09.1996, after which it submitted a fresh bill on 10.09.1997. The sum of Rs. 5,23,195/- is claimed on this score.

4. Claim (ii) is for the release of bank guarantee to the extent of Rs. 3,00,000/-, which the plaintiff furnished in favour of DDA, for the due performance of the contract. It is alleged that interms of the contract, the guarantee had to be released within six months after completion, yet the DDA has not done so. The plaintiff claims the sum of Rs. 3,00,000/- on this account. Claim (iii) relates to incidental expenses towards revalidation of bank guarantee for the period beyond the contract, after its completion; the plaintiff says that a sum of Rs. 50,000/- is to be paid by DDA.

5. According to the suit, the cost of work done beyond the stipulated date of competition @30% extra amounts to Rs. 34,43,818.00/-; the plaintiff claims this. It is contended that the work could not be completed within the stipulated period on account of the following defaults of DDA:

(a) delay in handing over of site for work;
(b) delay in issue of stipulated material;
(c) delay in release of payments for work done,
(d) delay in laying of electrical conduits by the agency appointed by the defendant.
(e) delay in conveying of decisions to the plaintiff from time to time during/relating to the execution of work.

6. The suit says that due to the aforesaid defaults of DDA, the work could be completed only on 12.12.1994, i.e. in a period of 39 months, as against the stipulated period of 15 month scontained in the agreement between the parties. During the delayed period, the price of

material and labour increased in the market. It became impractical and un-economical for the plaintiff to execute the work within the accepted/ quoted rates. The plaintiff says that the rates quoted by him were in the month of May 1991; he however, was made to complete the work at the same rates even in the 1994. DDA is therefore, liable to make good the loss incurred (by the plaintiff) on this account before the completion of the work and after the originally stipulated date of completion. The plaintiff submits having indicated to the defendant, by a notice duly served upon it, that he would continue the work provided he is paid 30% over and above the contractual rates despite the escalation clause provided in the agreement. The DDA duly accepted the said condition (of the plaintiff) as no objection was raised by it and continued to get the work executed from him. The plaintiff claims the following payments, as due and payable to him by DDA on account of labour and materials due to the delay in execution of work:

Cost of work done as per final bill	Rs. 1,98,58,848.00
Less: Cost of work done upto 18.12.1992, which is the original stipulated date of completion as per agreement	Rs. 83,79,253.00
30% of the above	Rs. 34,43,818.00

Thus, says the plaintiff, DDA is liable to pay Rs. 34,43,818/- to the plaintiff on account of escalation of work.

7. The plaintiff claims refund of amounts withheld from the running bills to the tune of Rs. 20,000/- ; he also similarly seeks refund of payment in respect of issue of SCI pipe amounting to Rs. 8,025/-. It is submitted that in terms of the agreement between the parties, the DDA had to issue SCI pipes (under clause 10), amongst other items, at fixed rates to be used in the execution of work. The cost of issue of SCI pipes was deducted by DDA from the running bills. It is pertinent to mention here that the quantity stipulated for the issue was such that the mode of measurement of work has to be the same. The DDA, according to the plaintiff, misconstrued and miscalculated the payment to be deducted for issue of SCI pipes as the mode of measurement adopted by it (DDA) was based on measure of individual pipes, leading to the plaintiff being over charged 7cm for each pipe length of 1.83 cm as detailed in the suit, as follows:

Size	Qty. issued	Qty. to be charged	Overcharge
100mm	655.20mm	$\frac{655.20 \times 1.76}{1.83}$	25.20m
75mm	1547.10mm	$\frac{1547.10 \times 1.76}{1.83}$	60.00 m

Cost of 25.20 m of 10mm size @Rs.112.50 per meter Rs.	2835.00
Cost of 60.00 m of 75 mm size @Rs.86.50 per meter	Rs.5190.00
Total	Rs. 8025.00

Thus a sum of Rs. 8025/- is claimed by the plaintiff on this account.

8. The plaintiff claims the following, as cost of work done and services rendered beyond the scope of agreement:

(a)	Cost of centering and shuttering for DPC (item 2.5) amounting to	Rs. 7,559.00
(b)	Cost of bitumen used in item No.2.6 amounting to	Rs. 47,26.00
(c)	Cost of extra operation involved in item No.6.1 amounting to	Rs. 38,119.00
(d)	Cost of while cement used in item No.7.6 amounting to	Rs. 47,290.00
(e)	Cost of primer used in item No.9.7 amounting to	Rs. 31,042.00
(f)	Cost of SCI collar provided in SCI stacks amounting to	Rs. 31,781.00
(g)	Cost of GI Unions provided in G.I. Pipe line amounting to	Rs. 3,748.00
(h)	Cost of groove provide 10064m Cost 10064 x (2.20+55.15%)	Rs. 34,351.00
(i)	Extra cost of plaster done above 10.00m height amounting to	Rs. 22,871.00
(J)	Cost of centering and shuttering for laying of cement concrete In payments amounting to	Rs. 2,635.00
(k)	Cost of welding done in manufacture of M.S. grill amounting to	Rs. 85.652.00

(l)	Cost of cement concrete blocks used for fixing of M.S. railings amounting to	Rs.7,143.00
(m)	Cost of extra thickness of brick masonry and other allied items for construction of open surface drain amounting to	Rs. 69,647.00
(n)	Cost of deployment of pumps used for dewatering for laying of sewer line amounting to	Rs. 1,00,000.00
(o)	Cost of disposal of earth/rubbish/malba left by other agencies. Agencies amounting to	Rs. 1,17.085.00
(p)	Cost of extra thickness of base plaster in item No.7.7 amounting to	Rs. 17,487.00
(q)	Plastering of exposed surface of RCC shelves amounting to	Rs. 18,382.40
	Total	Rs. 6,39,518.40

9. The suit seeks refund of short payment due to wrong measurements in respect of No.9.6 amounting to Rs. 2,81,217.00. It is alleged that Item No.9.6 concerned provision for water cement paint on the outside surface of walls, which in turn were provided with rough cast. Plaster with graded or crushed stone aggregate 6 mm by item No.9.10 of the efficient of 250% for finishing of such a surface with water cement paint was used. DDA has measured this same without enhancing the actual surface area by 250% and as a result the plaintiff has been paid 150% less. The shortfall on this account comes to Rs. 2,81,217.00, the details of which are given in the suit, as follows:

Area paid under item no. 9.10 - 12653.07 sqm

Cost 12853.07 x 150% (9.55+ 55.15%) - Rs. 2,61,217.00

10. The plaintiff seeks refund of what it terms as illegal deductions by operation of item No. 3.9 to the extent of Rs. 1,78760.00. It is alleged that Item No.3.9 of the agreement provides for "Add/deduct for plastering of exposed surface of RCC surface" with a unit rate of Rs. 10.55 per sqm plus 55.15% contractors enhancement under clause 12 of the agreement. The exposed surface is defined in sub para (c) para 5.4.7.2 CPWD specifications 1877 vol. I page 108. The plaintiff says that no deduction could be to be made for any area which is exposed and not plastered and is less than 0.5 sqm. The deduction made by DDA is

alleged to be illegal and needs to be refunded to the plaintiff. The total deductions made are indicated thus:

11464.43 sqm @ Rs.10.05 + 55.15% Rs. 178760.00

Thus a sum of Rs.178760.00 is claimed.

11. The plaintiff next claims compensation payable under clause 10 CC of the agreement amounting to Rs. 18,28,690.00, and details the same as follows:

(i)	Due to wrong computation	Rs. 1547101
(ii)	On cost of work done which are not paid.	Rs. 2,81,589.50
	Total	Rs. 18,28,690.50

12. The suit claims, towards cost of deployment of staff engineer and machinery beyond the stipulated date of completion not originally contemplated at Rs.6,03.000.00. It is submitted that the plaintiff, on account of delay in execution, incurred extra expenditure for deployment of staff, engineer and machinery beyond the period of 15 months stipulated for completion of work in terms of the agreement. The amount sought is detailed as follows:

(a) Graduate engineer 1 no. @ Rs. 5000/- p.m.	Rs. 5000.00
(b) Diploma engineer 1 no. @ Rs. 3000/- p.m.	Rs. 3000.00
(c) Head Mistry 1 Nos. @ Rs. 2500/- p.m.	Rs. 2500.00
(d) Supervisor 4 Nos. @ 1250/- p.m. each	Rs. 5000.00
(e) Chowkidar 6 nos. @Rs.1000/- p.m. each	Rs. 6000.00
(f) Clerk 2 nos Rs.1500 p.m. each	Rs. 3000.00
(g) Accountant1nos.@2500/-p.m.	Rs. 2500.00
T&P and other equipment	Rs. 2.5 lacs
@ 18% pm	Rs. 3000.00
TOTAL	Rs. 30,000.00

It is alleged that such expenditure of Rs. 30,000/- p.m. for work of the magnitude is justified as it is hardly 2.5% of expected monthly out turn of Rs. 12,21,501.00 keeping into consideration the tendered cost of Rs. 1,83,22,518.00 to be completed in 15 months stipulated in the agreement. The plaintiff complains incurring a loss (after applying the principle of mitigation of loss to the extent of 50% on Rs. 72,0000.00) Rs. 6,03,000.00

13. The suit also claims the sum of Rs. 2,68,488.00 towards loss

of profitability due to delay in completion of the contract amount. Here, it is stated that the loss in profit suffered by due to delay in completion of the work wholly attributable to DDA, is on the following considerations:

Work done after the stipulated date of completion	Rs. 96.43,265.00
Profit @ 15 %	Rs. 14,91,490.00
Loss @ 18% on the delayed completion of work $\frac{1491490 \times 18 \times 24 \times 1}{100 \times 12 \times 2}$	= Rs. 2,68,468.00

14. The plaintiff also claims interest of 18% p.a. on the outstanding sum of Rs. 81,54,667.50 w.e.f. 12.06.1995 till 28.05.1998 final realization of the amount, which is Rs. 43,44,806.80. DDA, according to the plaintiff, is liable to pay Rs. 1,24,99,474.30 till the date of the suit and further interest thereupon till actual realization. The plaintiff submits having sent a legal notice dated 24.10.1997 to DDA calling upon it to make payments; the legal notice did not evoke any response. The cause of action, says the plaintiff, arose, on the date of award of contract, on the date of completion of the work, on 12.12.1994; on 06.07.1995 when certificate of completion was issued by DDA, on 11.09.1996 when part payment was made but the balance outstanding remained unpaid.

DDA's stand:

15. The DDA disputes the petitioner's entitlement, contending that the work was awarded to a partnership firm, M/s. J.S. Constructions and not to the plaintiff, as a proprietor. It is submitted that there is no evidence or material to justify that the plaintiff is entitled to claim the suit amounts.

16. The DDA denies that there was any delay in the completion of the contract, attributable to its conduct or omission. It is submitted that there were perhaps minor hindrances, which were duly accounted for in the parties' Extension of Time documents, approval of which was granted to and enjoyed by the plaintiff. DDA disputes the plaintiff's entitlement for any of the claims. According to it, the plaintiff never suffered any losses or incurred any extra expenditure so as to be entitled to claim the amounts set-out in the suit.

17. The DDA disputes that any amount is payable to the plaintiff

under the final bill. It is claimed that on the contrary, the Provisional Completion Certificate dated 12.12.1994 stipulated compliance with conditions spelt-out there, which were not in fact complied with, as a result of which the DDA is entitled to Rs. 9,14,276.21/-. This is claimed as a justification for the withholding release of bank guarantee.

18. On the question of delay, it is submitted that it is not attributable to DDA in not furnishing the drawings on time and failing to supply of materials and making timely payment of running bills are all not enforceable claims because in terms of Extension of Time proform as submitted by the plaintiff, no hindrances were in fact pointed nor was extension of time on such account was claimed by the plaintiff. It is also argued that the plaintiff cannot claim such amount in view of Clause-10 of the agreement and Clause-1 of the specifications and conditions. The same rationale is pressed into service in regard to other heads of delays, such as delay in handing-over of site, issuance of materials, delay in laying of electrical conduits by other agencies and delays in conveying decisions from time to time. The defendant relies upon a condition in the Extension of Time proforma Part-1, produced as Ex. DW-1/1, where the plaintiff agreed not to claim liquidated damages during the extended time.

19. The DDA denies that the plaintiff ever informed it about its condition of seeking 30% extra consideration for continuing to work. It is also submitted that there was no such agreement between the parties to pay any such additional amounts. Similarly, as regards alleged amounts wrongly withheld from running bills, it is submitted that such amounts were withheld due to objections raised by the Quality Control Cell, and in any case, cannot be refuted. The DDA has to recover an amount of Rs. 9.41 lakhs. The plaintiff's claim with regard to reimbursement or payment towards cost of SCI pipes is denied. The DDA submits that the actual measurement was taken as per CPWD specifications and relies upon Annexure-B to the written statement and further states that no amount was ever charged.

20. In regard to Claim No. (vii) – i.e. Work not completed as per description in Item by Agreement nor in the CPWD Specifications, 1977, all the claims are denied. The DDA submits that the cost of centering and shuttering had to be done as per Item 2.5 of the Contract and was covered as part of the work, in view of paras 64 and 6.4.6 of the specifications. With regard to claim- vii(b), i.e. Cost of supply of bitumen,

the DDA denies the amount, stating that the plaintiff was not entitled to the same, in view of Item Nos. 2.6 and 8.1 of the contract, the latter requiring that the spread coarse sand had to be carried-out. It is also submitted that the rate of execution of Item 2.6 includes cost of bitumen. As to claim vii(c), i.e. Payment towards M.S. Flats, C.C. Block etc., the defendant argues that the rate in Item 6.1 is inclusive in the operation and if at all the plaintiff is entitled to any amount it cannot exceed Rs. 9,028. On claim vii(d), i.e. Extra Costs for white cement, the DDA's counsel denies the same, contesting that there was no stipulation and that White Cement, wherever required, was to be provided by it in terms of the rate in Item 7.7. It is submitted that the DDA only provides Grey Cement, which is well-known in the trade amongst all the contractors. On claim vii(8), i.e. term 9.7 requiring use of primer, the DDA argues that such entitlement does not arise, since the plaintiff has placed reliance on Item 9.7, which relates to wood work whereas the primary and steel galvanized items/iron work is covered by Item 9.9. Likewise, the DDA submits that the claim of quantity being 139.26 does not deal with the work executed under Item 9.7 and, in fact, deals with work executed under Item 9.9. The DDA additionally states that the Item rates under 9.9 are exclusive of the cost of primer under para 13.33 and 13.34 of CPWD specifications.

21. The DDA denies claim vii(f), stating that any such amount towards drainage system, in addition to Clause 11.5 and 11.12 towards fitting collar etc., is payable in view of Special Condition No. 3.14, which stipulated that SCI collars required for fixing SCI pipe of the requisite size were to be provided by the Contractor free of cost. The claim towards fixing of GI pipes made by the plaintiff under Item 12.1 and 12.2 are denied. The DDA states that the rate of providing and fixing of GI pipes included cost of fitting and no extra payment was to be made for G.I. Union work which was paid in accordance with paras 19.8.1 and 19.8.2 of CPWD specifications. The DDA refutes the claim in item vii(h), i.e. payment for provision at the junction of roof and wall on the inside of rooms, kitchens etc. It is stated that this is not payable in view of condition No II of the additional conditions forming part of contract. Claim vii(i), for extra rates payable over 3 metres high construction or part thereto in excess of 10 meters and the plaintiff's reliance on condition 3.15 of the CPWD Specifications, 1977 and DSR 1989 is denied, saying that such amounts are not due. The DDA relies on condition 3.15 of the specifications and states that reference to DSR, 1989 is out of context

in view of the specific condition forming part of the contract. Claim vii(j), i.e. providing C.C. paths/payment around levels requiring laying of concrete in panels, centering and shuttering as being an additional portion, based on Items 10.1 and 5.11 are denied. It is argued that the rates of Items 10.1 and 5.11 are inclusive of such works. Reliance is placed on Item 16.1.6 and 16.1.7 of Volume 1, paras 17.10.2, 17.10.7 and 17.10.8, Volume-2 of CPWD specifications. All other items in Claim No. 7(k) to (q) are also denied.

22. Referring to claim viii, the DDA states that the plaintiff is not entitled to enhancement and proportionate payment on the basis of actual service being 250% or that he was paid 150% less. Here, the DDA says that the measurement was in accordance with para 13.25.6.1 and rate charged as per para 13.25.7, which indicate that the rates were inclusive of costs of materials and labor. It also relies upon clause 9.10 of the contract and argues that I.S. specifications are relied upon out of context and that the agreement between parties never provisioned for enhancement of the service by 250%. The plaintiff's claim (ix) that no deduction could be made for any area which is exposed, and plastered but is less than 0.5 square meters, is denied. The DDA relies upon para 3.9 of the schedule of quantities attached with the agreement and submits that in fact, no deducted as alleged, was made.

23. The plaintiff's claim under clause 10(CC) has been refuted. It is contended by the DDA that the plaintiff is not entitled to such amounts as no details were furnished and the plaintiff merely relies upon unsubstantiated conclusions, based on its calculation. Similarly, with regard to Claim 11, i.e. extra expenditure of Rs. 30,000/- per month, for the 54% of the work done after the stipulated date, amounting to an alleged loss of Rs. 6,03,000/-, the DDA says that the plaintiff did not incur any extra expenditure or suffer any loss. It is argued that payment under clause 10(CC) was made, which also covered all such expenses. The DDA emphasizes that prolongation of the work was not on account of its acts or omissions. Similarly, with regard to claim 12, i.e. loss of profit incurred due to delay in completion of work, the DDA also denies any liability, relying upon the plaintiff's undertaking submitted at the time of extension of time in Proforma Part-1 was granted, stating that he would not claim liquidated damages incurred during the extended period. It is submitted by the DDA that such undertaking was neither retracted, nor

withdrawn in any manner and that extension of time proforma in fact enabled the plaintiff to perform the work even though less than half the same had been done before the stipulated period. Based on such undertaking, and other facts, the DDA agreed to extend the time which was actually approved for 732 days, ultimately ending with actual completion of work, on 12.12.1994. It is submitted that the plaintiff has not refuted this averment or the document.

24. On the basis of pleadings and documents on the record, this Court had framed the following issues on 06.11.2003:

"1. Whether the suit is bad for non-joinder of necessary parties?OPD

2. Whether a valid notice was served under Section 53-B of Delhi Development Act, 1957? If not, to what effect? OPD;

3. Whether there was any delay in completion of the contract attributable to the defendant? OPP.

4. Whether the plaintiff is entitled to the payment of Rs. 81,54,667/- under various heads as mentioned in para 6 of the plaint? OPP.

5. Whether the plaintiff is entitled to his claims in view of the undertaking given by him at the time request for extension was made by him? OPP.

6. Whether the plaintiff is entitled to interest on Rs.81,54,667/-, if so at what rate and from what period? OPD.

7. Relief."

25. The Court directed the examination of parties' witnesses on commission. The plaintiff examined himself; the defendant examined one witness as DW-1. Both the parties have led voluminous evidence.

FINDINGS

Issue Nos. 1 and 2

26. As evident from the manner in which these issues were framed, the onus lay upon DDA to show that necessary parties were not impleaded. It has not led any oral evidence. As to the question of valid notice, there

is no dispute that a legal notice was issued to DDA on 24-10-1997. A copy of the same is also on the record. The mere nomenclature adopted in the notice, of its being under Section 80 of the Code of Civil Procedure cannot detract from the plaintiff's intent of asking DDA to formally settle his claims; that is also the rationale for Section 53-A of the Delhi Development Act. The suit was filed much after the lapse of the stipulated period. Therefore, the second issue is answered in favour of the plaintiff.

27. As regards the first issue, the court notices that the agreement was with M/s J.S. Constructions; which, according to the plaintiff's deposition (as PW-1) is a registered Class – I contractor. He also deposed to being its sole proprietor. This evidence has not been challenged in the cross examination. In the circumstances, the court holds that there is nothing to suggest that the plaintiff cannot maintain the suit, or that other, necessary parties were to be impleaded, in whose absence the suit must fail.

Issue No. 3

28. The contract, awarded to the plaintiff and signed by the parties on 16-9-1991, was to be completed by 15 months. It is a matter of record that extensions for performance were granted by DDA and the contract was eventually performed on 12-12-1994; the completion certificate was issued in 1995.

29. In support of the argument that delay in execution of the works, with resulting extension in time (for performance) was on account of the DDA, the plaintiff relies on letters Ex. PW-1/6 (dated 27-11-1991); Ex. P-1 and P-2, letters dated 28th November, 1992 and 14-1-1992 and the letter dated 4-2-1992 (Ex. PW-1/7) and submits that these establish that the site was not handed over in a state where work could be commenced in time. DDA denies any liability and says that such claims towards delay are beyond the contract; it relies on Clause 10 of the Agreement and Clause 1 of the specifications and conditions. It also says, besides, that clause 10-CC was agreed by the parties towards charges for escalation, and any charges over and above the formulae agreed, cannot be claimed. The plaintiff having received the benefit of clause 10-CC, cannot claim amounts additionally. DDA also relies on the plaintiff's undertaking, furnished in the Extension of time proforma submitted by it, containing the following terms:

"I will not claim liquidated damages occurred by me during the extended period."

30. Clause 10 of the contract speaks of stores to be supplied by DDA; the relevant part relied upon by it is as follows:

" Provided that the contractor shall in no case be entitled to any compensation or damages on account of any delay in supply or non-supply thereof all or any materials and stores.."

Just as in the case of alleged delay in handing over the site, free from hindrances and encumbrances, the plaintiff relies on documents (Ex. P-3 dated 9-2-1992, Ex.P-7 dated 20-7- 1992, Ex.P-8 dated 24-7-1992 – the last being written by DDA to the plaintiff, as well as Ex. P- 16, Ex. P-17, Ex. P-23) and exhibits marked during evidence (Ex. PW-1/9, Ex. PW-1/10, Ex. PW-1/16, and Ex. PW-1/21) to say that there was delay in issuance of stipulated materials, by DDA to it. Similarly, in support of the delay in respect of release of amounts towards running bills, documents Ex. P-4, Ex. P-6, Ex. P-9, Ex. P-11, Ex. P-12, Ex. P-13, Ex. P-15 and Ex. PW- 1-11, Ex. PW-1/18A, Ex. PW-1/12, Ex. PW-1-13, Ex. PW-1/14, Ex. PW-1/15 and Ex. P-31 are relied upon.

31. The above materials, in the opinion of the court, do establish that there was delay on the part of DDA in issuing various items, and for release of amounts, billed from time to time. The question of whether the plaintiff can claim amounts on such delays, however, is another matter, and would be discussed in the later part of this judgment, while considering other issues.

Issue Nos. 4 & 6

32. The above issues are to be considered together, as they pertain to common questions of fact and law, and involve examination of the same materials and pleadings. The first item of claim in the suit relates to balance of final bill amount, i.e. Rs. 5,23,195/-. The plaintiff says that the final bill was payable within six months from completion, i.e. 11-6-1995; DDA is alleged to have failed to pay this. The bill was submitted on 16-6-1996 (Ex. PW-1/2). The plaintiff admits to some part payment on 11-9-1996, after which it submitted a fresh bill on 10-9-1997. The sum of Rs. 5,23,195/- is claimed on this score. It is claimed that on the contrary, the Provisional Completion Certificate dated 12.12.1994 stipulated

compliance with conditions spelt-out therewhich were not in fact complied with, as a result of which the DDA is entitled to Rs. 9,14,276.21/-. This is claimed as a justification for withholding the amounts, as well as release of the bank guarantee. The discussion would reveal that there is no dispute by DDA about the amount withheld; however, it does not justify why that course was adopted. No contemporaneous notice, showing whether the amounts were deductible for any noticed deficiency, or towards over payments, has been produced or relied on. In the circumstances, it is held that the plaintiff is entitled to Rs. 5,23,195/-. The next claim by the plaintiff is towards release of bank guarantee for Rs. 3,00,000 withheld by DDA, and the payment of Rs. 50,000/- towards renewal of such guarantees. Now, in support of the allegation for this claim, no evidence has been led; furthermore, the plaintiff, in the written submission furnished to the court on 18th of September, 2008, giving a summary of claims, gave up the main claim for return of bank guarantee, for Rs. 3,00,000/-. In the circumstances, the court is of opinion that these amounts are inadmissible.

33. The major head of claim in Para 6 is Rs. 34,43,818/- towards work performed during the extended period of the contract. This is on the assumption that the plaintiff is entitled to 30% extra on the total value of the contract, for such extended period. DDA denies this, arguing that once the parties agree to a formula, whereby the consideration for the extended period is consciously provided, it is not open to one party to claim such "extra" amounts. The court proposes to examine this aspect when it deals with the head of loss of profit, later, in this judgment.

34. The next item is the sum of Rs. 20,000/- towards amounts wrongly withheld. In the written Statement, DDA does not dispute that these amounts were withheld; it however states that this was on account of objections by the Quality control cell. However, no evidence as to what these objections were, or whether they were communicated for rectification by the plaintiff, ever, and if so, when, has been led. In the circumstances, the plaintiff is entitled to the said amount of Rs. 20,000/-. The amount of Rs. 8025/- claimed by the plaintiff is in respect of deductions made by DDA from the running bills, for SCI (Sand cast Iron) Pipes. The plaintiff faults the deduction, saying that the method adopted was erroneous. It is contended that the DDA deducted the amount on the basis of measurement of individual pipes, which is

erroneous. Here, the court is of opinion that individual measurement, as opposed to bulk measurement, favoured by the plaintiff, is a choice of the mode that could have been adopted. As long as the optional choice is not demonstrated to be palpably unreasonable, or unconscionable, the court cannot hold that adopting the mode of measuring pipes individually was wrong, or illegal. The plaintiff, is therefore, not entitled to the sum of Rs. 8025/-.

35. The plaintiff claims, in Para 6 (vii)(a) towards cost of centering and shuttering for DPC (item 2.5) Rs. 7,559.00, on the basis that this is part of Item No. 2.5 of the Agreement. It is stated that this is not covered in the DPC items of the CPWD specifications of 1977, and is therefore, an extra. The DDA, on the other hand, points to Paras 4.6.1 and 4.6.6 of the CPWD specifications to argue that such cost is included. Para 4.6.6 reads as follows:

> *" The rate is inclusive of the cost of materials and labour involved in all the operations described above except for the application of a coat of hot bitumen and addition of water proofing materials which shall be paid for separately unless otherwise specified."*

It is thus, clear that the parties understood, in respect of DPC items, that the rate quoted and accepted was inclusive of cost of materials and labour involved. In these circumstances, the plaintiff's claim is untenable, and therefore, rejected.

36. Basing on clause 2.6 of the Agreement, the plaintiff claims Rs. 4726/- as cost of bitumen. This condition prescribes Rs. 9.25 as the consideration payable for applying a coat of residual petroleum bitumen of penetration 80/100 of approved quality using 1.7 kg per/sq. m on damp proof course, after cleaning the surface with brushes and finally with a piece of cloth lightly soaked in kerosene oil. DDA's explanation is to refer to the rates, in respect of Item 8.1 and says that the cost is included by implication. It however, does not dispute the measurement. The court is of the opinion that DDA's position here is not tenable, because in Para 4.6.6, there is a specific reference to application of bitumen, as excluding from the principle of non-payment of other items, whose costs are deemed to be included. Applying that logic, the sum of Rs. 4726/- is payable to the plaintiff.

37. Para 6 (vii) (c) claims Rs. 38,119/- towards cost of ingredients such as MS flat, hold fast, CC Block, etc. Reliance is placed on Clause 6.1 of the agreement, which states that 1815.60 kg of this material is required, and fixes Rs. 11.70 per kg, and the total amount is fixed at Rs. 21,243/-. The plaintiff does not say how the sum of Rs. 38,119/- is payable; DDA, however admits that Rs. 9,028/- is payable. Having regard to this state of pleadings and materials, the plaintiff is held entitled to Rs. 9028/- towards this claim.

38. The plaintiff's next claim is towards cost of white cement used, after deduction of the cost of grey cement. The amount sought is Rs. 47,290/-. It is stated that the type of cement is unspecified; the plaintiff relies on clause 7.6 of the agreement, and says that it had to procure 991.1 kg of such cement, at Rs. 4300/- per square meter (application on surface). DDA's response is that white cement was not required for Item 7.6, and relies on Item 7.7 saying that the express mention of white cement slurry excluded the use of that kind of cement for Item 7.6. Besides this aspect, the court notices that the plaintiff has not led any evidence to show that indeed, such quantity of white cement was used. Therefore, it is not entitled to the said amount of Rs. 47,290/-.

39. The claim in Para 6 (vii) (e) is towards application of priming coat; a sum of Rs.31,042/- is sought. Here, the plaintiff relies on Para 9.7 of the schedule which mentions the quantity of such application to be 216.54 sq. metres, for which Rs. 4.05/- per square meter is admissible. The DDA denies the claim, by reference to Para 9.9 of the Schedule to the agreement, and also submits such cost of primer is included under Paras 13.33 and 13.34 of the CPWD specifications. However, it admits that an amount of Rs. 22,347/- is payable, and not Rs. 47,290/-. DDA's interpretation of the contract, in this court's opinion, is erroneous, as both Paras 9.6 and 9.9 do talk of application of primer to separate surfaces. The DDA does not dispute that the plaintiff's claim, or its application is in respect of wood surface; therefore, the suit is justified in locating the cost or claim in relation to Para 9.6. So far as the amount Rs. 22,347/- is concerned, the DDA does not dispute the quantities set out in the suit; in the circumstances, the court is of opinion that there is no reason to deny the plaintiff the sum of Rs. 31,042/-, which it is entitled to.

40. The plaintiff next claims, in Para 6 (vii) (f) Rs. 31,781/- towards SCI stacking. Here, reliance is placed on Clause 12 and Clauses 11.2 and 11.3 of the Agreement. The plaintiff argues that drainage system, in addition to the fittings mentioned, also required fixing collars as well. The DDA relies on Condition No. 80, clause 3.14 to say that SCI collars' costs have to be paid by the contractor. The plaintiff counters, by relying on a correction slip of 11.11.1987. On an overall conspectus of the facts, the plaintiff, in the opinion of the court has not established how this claim is admissible. This claim, is, therefore, rejected. In Para 6 (vii) (g), Rs. 3,748/- is claimed towards cost of GI Unions; it is argued that in terms of Item No. 12.1, and 12.2, rates are specific for certain products, like fixings, fittings, GI Tee Bend, GI Tee socket, etc. However, GI unions were not provided, and they had to be supplied. The DDA counters by saying that according to its DAR (an internal instruction) such amount is inadmissible. The court is of opinion that such a position is not tenable. The reliance of an internal document, to which the contractor is not a party, nor is ever shown to be made aware of during the time of contract formation, is misconceived. The court also notices that this court, in a judgment, **Madan Lal Maggon, v. Delhi Development Authority & Anr** 2001-(1)-Arb LR 201 upheld the award of an arbitrator for a similar claim. Therefore, the plaintiff is entitled to the said amount of Rs. 3,748/- towards cost of GI Unions.

41. The claim in Para 6 (vii) (h) is towards provision for grooves at various places in the flat; a sum of Rs. 34,351/- is sought. The total length of groove provided by the plaintiff was 10064 metres, for which Rs. 34,351/- is sought. The DDA denies the claim, stating that this item of work was included, free of cost. However, it admits that an amount of Rs. 37,220/80 is payable, and not Rs. 34,351/-. DDA's stand, in this court's opinion, is incorrect. The DDA does not point to any specific clause or condition in the contract, in support of its contention, but admits at the same time that the grooves were provided. In the circumstances, the court is of opinion that there is no reason to deny the plaintiff the sum of Rs. 34,351/- as sought. The said amount is held payable to the plaintiff.

42. The next claim, under Para 6 (vii) (h) for Rs. 22,871/- is towards extra cost of plaster needed towards the height above 10.0 metres. The claim for extra rates is on the basis that the plastering had

to be done on the building which were about 30 metres in height, and the labour cost was higher. The DDA relies on clause 3.15 of the Agreement, but does not deny that such labor costs have to be incurred; according to its calculation, the amount payable is Rs. 20,620/-. The DDA's denial here appears to be arbitrary. There can be no gainsaying that the cost of labor for plastering the building, at higher levels is higher; the plaintiff's claim for the amount is reasonable. The DDA implicitly admits the logic, but disputes the amount, without saying how. In these circumstances, the plaintiff is held entitled to Rs. 22,871/-.

43. The next item, in Para 6 (vii) (j) is centering and shuttering for laying of cement concrete in pavements; the sum of Rs. 2635/- is claimed. This is denied by DDA, saying that rates for item No. 10.1 and 5.11 are inclusive of centering and shuttering cost; it also relies on Paras 16.16 and16.17 of the CPWD specifications. The court is of opinion that such a claim is not admissible. The plaintiff was aware that such work was needed, when it bid for the work; it apparently did not seek any clarification or specify that for such services, which are an integral part of pavement laying, separate amounts would be payable for centering and shuttering. For these reasons, the claim of this amount has to fail.

44. The next item of claim, in Para 6 (vii) (k) is towards welding in respect of manufacture or fabrication of MS Grill; the amount sought is Rs. 95,652/-. This is denied by DDA, which states that "assembled" in Para 6.8 means welding. Item 6.8 would be relevant in this behalf. It states that M.S. grill of required pattern by welding the frame of steel windows fabricated with M.S. flat square as per direction of Engineer-in-Charge. No drawings have been produced by the plaintiff to substantiate this claim. The plaintiff has thus failed to lead any evidence to show that the grill which has been installed was of some special pattern being an ornamental grill for which the plaintiff is entitled to recovery of extra amount. Moreover, the Item relied, 6.8 itself talks of welding. The claim of the plaintiff is, thus, to be rejected. This finding is reinforced by a previous decision of this court, in **M/s. K. R. Builders Private Limited** (supra). Similarly, the court finds as untenable, the claim for Rs. 7143/- towards cement concrete blocks used for fixing MS Railings. This claim is denied – and rightly so, by the DDA, which says that for all other claims, the plaintiff refers to some specific item or other. Here, having regard to the nature of the contract, where MS Railings were to

be fixed with supports, for which cement concrete blocks were used, the plaintiff cannot claim them as extras. The claim for Rs. 7143/- is, therefore, rejected.

45. The next claim under Para 6 (vii) (m) is for Rs. 69,647/- towards extra thickness of brick masonry and other allied items for construction of open surface drain. It is submitted that DDA wanted full brick masonry on either side, which was provided for the plaintiff. It is stated that this resulted in extra concrete and extra plaster in bed. The total length of the drain, it is submitted was 608 metres. DDA denies extra work, on this count, but does not point to any condition in the contract; it admits that if such item is admissible, the amount payable would be Rs. 26,571/-. The DDA, in this instance, has only baldly and generally denied its liability, without saying what was the extent of the work actually done. In the circumstances, the plaintiff's claim is entitled to succeed; it is entitled to an amount of Rs. 69,647/-.

46. Para 6 (vii) (n) seeks Rs. 1,00,000/- as cost of deployment of pumps for de-watering, for laying sewer lines. It is submitted that this was necessary to provide for proper disposal of sullage water through underground as it had to connect it with the trunk sewer. The plaintiff relies on a letter Ex. P-41 dated 6-12-1993 to this effect. The DDA denies the claim altogether, submitting that any water pipe was running parallel to the trunk sewer, requiring the extra item of work. In the absence of any evidence, the letter alone, in this court's opinion, is insufficient to establish this claim; it is accordingly rejected.

47. The next claim under Para 6 (vii) (o) is for Rs. 1,17,065/- for disposal of earth/ rubbish left by other agencies. The plaintiff says that such waste/ rubbish was left behind by agencies such as DESU, MTNL, etc; DDA, however denies this. The plaintiff relies only on a letter to DDA dated 22-6-1994 (Ex. P-30) in support of this claim. However, no other material- in the form of certificates, inspection, or minutes of joint meeting, etc are relied on. This claim, therefore, has to fail.

48. In Para 6 (vii) (p) the plaintiff seeks Rs. 17,487/- towards extra thickness of base plaster, in terms of Item 7.7. It is submitted that instead of the originally agreed cement plaster of 12 mm thickness- in the kitchen, bath room and WC on the rough side of the brick wall- 15mm was actually provided. Calculating the area of white glazed tiles (3886.62

sqm) the extra cost is claimed in this regard. The DDA does n that dispute this extra amount of work, but contests the amount; it admits the claim to the extent of Rs.11,873/-. The plaintiff is therefore, entitled to the said amount.

49. In Para 6 (vii) (q), a sum of Rs. 18,382/40 is claimed on the ground that under the agreement, the description of Item No. 3.2 is distinct, in respect of RCC shelves. It is argued that no finishing had to be done, but was in fact done, and the amount is payable. The DDA denies this claim head, contending that under Para 5.4.7.2 of the CPWD manual and specifications, no such claim is admissible. Although the plaintiff is relying on Para 3.2 of the agreement, the court notices that there are other paragraphs, such as Para 3.1 and 3.4 in respect of similar heads of work. Therefore, the plaintiff had to lead evidence, instead of merely claiming the amount on the basis of the work done. Since no specific minutes, or extract of the work measurement, or other document is shown, in this regard, the claim is inadmissible, and therefore rejected.

50. Now, in para 6 (viii) the plaintiff claims Rs. 2,82,217/- based on Item 9.6 claiming that water cement paint on the outside surface of the walls had been stipulated, and used. Reliance is placed on Item 9.10 to say that a rough cast, plaster with graded or crushed stone aggregate of 6mm thickness was provided for. The plaintiff further relies on ISI specifications to say that a co-efficient of 250% had been provided, which in turn shows that it was paid 150% less. The DDA denies the claim altogether, relying on Paras 13.25.6.6 and 13.25.6.7. The latter indicates that rates were inclusive of cost of materials and labour in all operations. Here, the court discerns that the description of work is in clause 9.6, which talks of *"Finishing walls with water proofing cement of approved brand and manufacturers and of required to give even shade.."* No doubt, the plaintiff may be correct in contending that the necessary cast had to be in accordance with the agreement. Yet, the court is of the opinion that the parties having stipulated the rate, specific for this work, and also agreed to the quality of products used, neither of them can be permitted to rely on extraneous materials to either claim an extra amount, or deduct what is legitimately payable to the contractor-plaintiff. In the circumstances, this claim is unmerited, and therefore, rejected.

51. In para 6 (ix) of the suit, the plaintiff claims Rs. 1,78,760/- based on Item 3.9 of the agreement, stating that this amount was illegally deducted. The stipulation reads as follows:

> *"Add or deduct for omitting in RCC work smooth finishing of the exposed surface with 6mm thick cement mortar 1:3 (1 cement : 3 fine sand).……..654.59 sq.m Rs. 10.05 only."*

The claim is denied, by the DDA, which submits that no such deduction, illegal or otherwise, was made. The plaintiff does not in support of this claim, show the demand made in the final bill, and the corresponding deduction, or refer to the relevant running bill, from which any relatable withholding of amount, or sum, was made. Derivatively too, the plaintiff does not attempt to establish that such a deduction was made, as is now alleged. In the circumstances, this claim is unmerited, and therefore, rejected.

52. The next claim in the suit is on account of alleged wrong computation of the sum payable under Clause 10CC of the contract. It is submitted, in this respect that the amount paid was short, or less by Rs. 15,47,101/-. The plaintiff says that compensation under Clause 10CC had to be computed for the element of labour and material. It is submitted that the DDA applied the old formula, and not the revised one, resulting in this head of claim. The defendant does not deny applicability of Clause 10CC under the circumstances. It is however, stated that the correct formula was applied, and the correct amount was paid.

53. The court notices here that the claim is based on wrong computation of the agreed formula. The plaintiff's grievance is that the DDA adopted an outdated, or superseded formula, while arriving at the compensation amount; according to the claim, it ought to have been Rs. 15,47,101/- more than what was paid. The plaintiff does not specify what was in fact, paid, and when, on this aspect. The earliest correspondence is dated 12th September, 1997, by the plaintiff, after submission of the 27th RA bill, paid for by the DDA, in 1996. The plaintiff reiterated the same grievance, and suggested that according to its calculations, the amount payable was Rs. 1,26,437/-. There after, the plaintiff caused a legal notice to be issued, (Ex. PW-1/380) where, forthe first time, Rs. 15,47,101/- was claimed as the correct figure. While the applicability of the correct, or latest formula, stipulated under Clause 10-

CC cannot be doubted, the court is of opinion that the least the plaintiff ought to have done, in this regard, is to show the exact amount paid by the DDA, towards clause 10-CC compensation, and how that was wrong. In this state of facts, the claim is inadmissible; it is accordingly rejected. The plaintiff has also claimed Rs. 2,81,589/50 towards cost of work done, but not paid for. No particulars or evidence have been alleged, or led in this regard. In these circumstances, this claim too, is inadmissible, and therefore, rejected.

54. The suit also claims Rs. 6,03,000/- towards cost of deployment of staff and engineer as well as machinery beyond the stipulated date of completion. It is alleged that due to delay in execution of the work, the plaintiff incurred extra expenditure for deployment of such staff, machinery, engineer, etc. The DDA denies the claim altogether, submitting that it is untenable, since Clause 10-CC provides for payments towards expenses incurred in respect of increased cost of labor, and other charges; and that granting any amount, on this alleged claim, would be a duplication. In this respect, it is pointed out that the plaintiff had produced the relevant salary slips, vouchers, etc as Ex. PW-1/17 to Ex. PW-1/317. DDA objects to the submission, and contends that the marking and production of the documents had been objected to during the course of trial, as the documents were irrelevant.

55. The record would disclose that initially, in the original affidavit (examination in chief) filed by plaintiff, the documents were marked as Ex. PW-1/17 to Ex. PW-1/37. The plaintiff sought to amend the affidavit, and moved IA 4982/2004. On 24th August, 2004, the court noted (erroneously) that the original affidavit had marked Ex. PW-1/17 to PW-1/379, which was sought to be corrected to PW-1/17 to PW-1/37. The court also noted the application number as IA 8727/2002, whereas actually no such application seeking amendment to that effect is on the record. The application (IA 4982/2004) was allowed on that date, as being formal in nature. In the circumstances, the court is of opinion that the documents were not objected to when they were permitted to be brought on record. In the circumstances, the objection to their production at the stage of trial was groundless. The DDA has not shown how the documents are irrelevant; no effort was made on its part to impeach their credibility.

56. These documents, Ex. PW-1/17 to Ex. PW-1/379 are receipts

of salaries for 24 months, in respect of various employees of the plaintiff, such as Engineers, Mason, Supervisor, watchman, etc. The monthly salary of these personnel has been indicated in the affidavit, sworn to by PW-1; there is no cross examination by DDA. Therefore, the court cannot doubt their credibility. The total expenditure said to have been incurred is Rs. 7,20,000/-. The plaintiff, after applying the principle of mitigation, restricts his claim to Rs. 6,03,000/-.

57. The DDA, in its defense, contends that where the parties in their wisdom have specified a formula where the methodology of working out of escalated costs both for escalation of material as well as for escalation of labour, which is under Clause 10CC, there is no rationale for awarding anything over and above such agreed formula, as the plaintiff is demanding by this head of claim.

58. In **P. C. Sharma And Anr. V. Delhi Development Authority** 2006 (1) Arb LR 403 this court held that:

> "In my considered view, if there are establishment and other charges which are other than increase in rates of labour and material for the same period of time, the amount can be awarded. However what has to be considered is whether there was any overlapping in the amount what has been awarded under this claim and what has been awarded under Clause 10(CC). It cannot be disputed that once the mechanism of Clause 10(CC) is made available under the contract, in respect of those items in issue being increase in labour and material charges for the relevant period of time the only mechanism to be applied is of Clause 10(CC) and of no other. In this behalf, judgment of the **Division Bench in DDA vs. M/s. S. S. Jetley,** 2000 (VII) AD (Delhi) 743 = 2001 (1) Arb. LR 289 (Del.) (DB), may be referred to where it is held that the contractor is entitled to damages only as per Clause 10(CC).
>
> The Division Bench of this court in **DDA vs. K.C. Goyal & Company,** 2001 (II) AD (Delhi) 116, has held that in view of Clause 10(CC), no other claim on this account would be permissible. This judgment of the Division Bench has been recently followed by this court in CS (OS) No. 2822/1994 titled **M/s. Bedi Constructions vs. DDA and another,** decided on

> 10.11.2005. While discussing the aforesaid judgments and other judgments it has been held that once the formula of Clause 10(CC) is provided for and is relied upon by the petitioner, it is that formula alone which should have been applied and no amount other than that formula could have been granted. Award to that extent is, thus, set aside.
>
> The Division Bench of this court in **DDA vs. Jagan Nath Ashok Kumar,** 89 (2001) DLT 668 = 2000 (Suppl.) Arb. LR 281 (Del.) (DB), held that the procedure prescribed therein was mandatory and this judgment has been followed in Narain Das R. Israni's case.
>
> Learned counsel for the respondent sought to draw the attention of this court whereby a reference has been made to the additional expenses/compensation on account of increase in price of material and wages of labour, etc. and submits that this payment has been taken into consideration by the arbitrator while making the award in respect of this claim. However a reading of the said paragraph shows that what has been noticed by the arbitrator is the contention of the petitioner while relying on the judgments cited in respect of the said claims that a separate amount can be claimed on account of such hindrances and other expenses apart from the amount it would be entitled to on account of increase in price of material and wages of labour. A perusal of the claim petition, thus, shows that what has been claimed is not increase in the price of material and labour but establishment charges, machinery charges, etc. for the period for which the respondent has been held liable for delay. That being the position there is no overlapping element in respect of this claim awarded and claim awarded under Clause 10(CC).
>
> The plea of the learned counsel for the respondent that there is no reasoning cannot be accepted since again in respect of this claim the arbitrator has clearly observed that the amount has been awarded "after carefully going through the various letters submitted by the claimants and respondents".

59. In view of the above settled legal position, the court cannot award these amounts, claimed to have been incurred by the plaintiff

contractor, towards salary to engineering, supervisory and other employees during the extended period of the contract.

Issue No. 5

60. The plaintiff claims loss of profitability due to delay in completion of contract @ Rs. 2,68,468/-. It is alleged that the delay and prolongation of contract, prevented him from carrying out other works, and he should accordingly be compensated towards loss of profit which he would have otherwise earned. This claim is denied by DDA. He also claims the sum of Rs. 34,43,818/- towards work performed during the extended period of the contract stating his entitlement to 30% extra on the total value of the contract, for such extended period. There is no proof of these claims. It is argued that the unjustified delay caused by the DDA constrained the plaintiff to deploy resources, which could have been otherwise utilized profitably in some other contract. The DDA counters these claims, arguing that while there is delay, the plaintiff cannot claim any prejudice, because he stated, at the time of grant of extension, that no damages would be claimed, and further, that when the parties to the contract agreed to a formula which compensates the contractor for extension of time for performance, no question of damages on any head, or for loss of profit, can arise.

61. The DDA relies on **Continental Construction Co. Ltd. vs. State of Madhya Pradesh** (AIR 1988 SC 1166) where it was held that once the parties have agreed that under a particular situation the contractor will not be entitled to claim any damages, then the Arbitrator would be misconducting himself, if, contrary to the specific provisions of the contract, any sum is awarded under that head. It also relies on **Pt. Munshi Ram & Associates (P.) Ltd. V. Delhi Development Authority** 2006-(1)-ARBLR -137 where, in the context of a dispute where the contractor had sought amounts on the basis of a claim other than the agreed formula, Clause 10-CC, it was held in that:

> "In my considered view, the law is quite well settled on the issue of the mode and manner of calculation of such escalation or increase in cost. The position was little different earlier under Clause 10(C) where no proper provision was made and that is why Clause 10(CC) was incorporated to take care of the position where the contract was not completed within the stipulated time

> and there was an extension granted. The escalations during the extended period of contract have to be calculated in terms of Clause 10(CC). There is also no doubt about the proposition that the extension should be in terms of Clause 5 of the General Conditions of Contract."

DDA also cites **M/s. K. R. Builders Private Limited V. Delhi Development Authority & Anr.** (in C.S. (OS) 142/2003, decided on September 28, 2007) where it was held as follows:

> "It cannot be lost sight of the fact that clause 10 (cc) para 2 stipulates that the cost of the work on which escalation will be payable shall be reckoned as 85% of the cost of work as per the bills, running or final bill "the value of material supplied under clause 10 of this contract or service rendered at fixed charges as per clause 34 of this contract" proposed to be recovered from the particular bill would be deducted before the amount of compensation for escalation is worked out. The basic concept, thus, is that where the material is supplied by the defendants or service rendered at fixed charges of labour, the plaintiff should naturally get the escalation. No doubt it was open to the defendants to have provided in the clause that this amount should be separately deducted in the formulas. This is, however, not known how the formula has been worded. In the present case there is no fixed charged labour provided but that would not make a difference to the working of the formula. Para 4 of clause 10 (cc) states that the compensation of escalation "shall be worked out as per formula given below." The 'W' in the formula states that it is the cost of the work done worked out as indicated, in sub-para (ii) above. Thus, 'W' has to be worked out only as per sub-para (ii). On the other hand, if the contention of the plaintiff was to be accepted, then this 'W' would not be worked out in the manner as given in the formula. The 'W' is the same in the formula for escalation of material in para-4 and for the escalation of labour in para 6. In the methodology of the plaintiff, the 'W' would be different for the escalation in material cost as compared to the 'W' in the escalation for labour cost. So, this would be contrary to the stipulation in the contract where even in respect of the escalation of labour, 'W' is stated to be the value of work

done worked out as indicated in sub-para (ii).

The parties in their wisdom have specified a formula where the methodology of working out of 'W' is same both for escalation of material as well as for escalation of labour. The 'W' has to be worked out strictly as per para 2 of clause 10 (cc). If this is done, the defendants have correctly worked out the amount payable to the plaintiff as escalation under clause 10 (cc).

In support of this plea, one can but not refer to the words of Lord Wensleydale, in **Monypenny v. Monypenny** (supra) that the question is not of the parties intended to do by entering into the contract but what is the meaning of the words used in the contract. Any disregard to this principle would lead to erroneous conclusions. A liberal construction has to be applied in considering such instruments. We must have regard not to presume intent of the parties, but to the meaning of the words that have been used, as held by the Apex Court in **Delhi Development Authority vs. Durga Chand Kaushish** (supra). In a different context where the question was whether the escalation should be given only as per clause 10 (cc) or some other methodology, it has been held in **M/s. Bedi Construction Co. vs. DDA & Anr.,** CS(OS) 2822/1994, decided on 10.11.2005 that once the formula of clause 10 (cc) forms part of the agreement and it is agreed upon, no other methodology will be adopted for the said purpose. These observations have been relied upon by this Court in **Pt. Munshi Ram & Associates (P) Ltd. vs. DDA,** 128 (2006) DLT 619. The judgment in **P.C. Sharma & Co.** (supra) was only considering an award passed by an arbitrator. The learned single Judge did not deem it appropriate to take another view in view of the interpretation put-forth by the learned arbitrator. There is no discussion in the judgment in respect of the interpretation of the clause and, thus, the said judgment can hardly be said to be of any binding nature.

In view of the aforesaid, there is no option but to reject the claim of the plaintiff in this behalf."

62. The Court notes that while the parties had indeed agreed for compensation towards increased costs and expenses contemplated under

Clause 10-CC, that was towards certain heads. In an earlier part of the judgment, the plaintiff's claim towards salary paid to certain employees and staff members was rejected, on the ground that he could not claim anything more than the agreed formula. However, as far as the two claim heads under consideration are concerned, the court notes that these are made on account of a notional loss of opportunity faced by the contractor, towards the time expended and the likely amount or income he could have gained, during the period, if the contract had been allowed to be performed in time. The court has already found while answering Issue No. 3, that the delay in performance was attributable to DDA. The latter's argument, i.e that the plaintiff had agreed not to claim damages, and therefore the claim has to fail, on that ground, has to be first examined.

63. DDA also relies on the plaintiff's undertaking, furnished in the Extension of time proforma submitted by it, containing the following terms:

> "I will not claim liquidated damages occurred by me during the extended period."

Reliance is also placed on Clause 10 of the contract, which speaks of stores to be supplied by DDA; the relevant part relied upon by it is as follows:

> " Provided that the contractor shall in no case be entitled to any compensation or damages on account of any delay in supply or non-supply thereof all or any materials and stores.."

A conjoint reading of the two documents prima facie may suggest that the plaintiff could not claim damages on account of delay. As far as the first document, i.e the undertaking furnished at when extension of time was sought, is concerned, the court finds that the bar against claiming damages was in respect of delays caused by the contractor, not the DDA. The DDA has not established how there was delay. As regards Clause 10, what it aims to protect DDA from is claim for damages for delay in supply of stores. In this case, the extensive materials on record suggest that at different stages, supplies were not made to the contractor; also there were other delays. The work measurement books are on the record; they also evidence these facts, and the hindrances encountered by the plaintiff. In these circumstances, the court, in the absence of any

evidence showing which part of the contract could nevertheless be proceeded with, by the contractor, cannot agree with the submission that such delays are not actionable.

64. The position when, in a works contract, the employer defaults or delays performance, or rescinds the contract without cause, can the contractor claim damages on account of loss of profit was first examined by the Supreme Court in **A. T. Brij Paul Singh v. State of Gujarat** (1984) 4 SCC 59). The court ruled that where, in the works contract, the party entrusting the work commits breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract and that claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was observed:

> "What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit.
>
> * * *
>
> Now if it is well established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor had executed a part of the works contract, the contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the works contract, the damages for loss of profit can be measured."

The above reasoning had been earlier indicated in **Mohd. Salamatullah v. Govt. of A.P.** (1977) 3 SCC 590). While approving award of damages in case of breach of contract, the court held that the appellate court was not justified in interfering with the finding of fact given by the trial court regarding quantification of the damages even if it was based upon guesswork. In both the cases referred to hereinabove, 15% of the contract price was granted as damages to the contractor. In the instant case however, the trial court had granted only 10% of the contract price which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the trial court regarding breach of contract by specifically holding that

> "we, therefore, see no reason to interfere with the finding recorded by the trial court that the defendants by rescinding the agreement committed breach of contract".

The Supreme Court, in **Dwarka Das v State of MP** 1999 (3) SCC 500, applied the rationale in the above two judgments, and held that:

> "It follows, therefore, as and when the breach of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement. The appellate court was, therefore, not justified in disallowing the claim of the appellant for Rs. 20,000 on account of damages on account of damages as expected profit out of the contract which was found to have been illegally rescinded."

65. The logic and reasoning why award of damages for loss of profit can be granted has been followed by two successive Division Benches of this court. In the judgment reported as **Delhi Development Authority, Appellant V. Anand And Associates** 2008 (1) Arb LR 490, the award of amounts towards loss of profit, towards a contractor, in a DDA contract, like in the present case, was upheld. The Division Bench, which decided the case, held as follows:

> "…the award of a sum of Rs. 3,50,000/- on account of the increase in the price of material was also held to be justified as was the sum of Rs. 1,91,659/- on account of increase of labour charges. Relying upon the decision of the Hon'ble Supreme Court

in **Brij Paul Singh vs. State of Gujrat** AIR 1984 SC 1703 the Court upheld the award made by the arbitrator even in regard to a sum of Rs. 3,48,563/- on account of loss of profit. The Court upheld even the award of interest by the arbitrator relying upon the decision of Hon'ble Supreme Court **Santok Singh Arora vs. Union of India and Ors.** AIR 1992 SC 1809 and dismissed the petition…..

…. …. …. ….

Similarly, the award of a sum of Rs. 3,50,000/- on account of the increase in the price of material was also held to be justified as was the sum of Rs. 1,91,659/- on account of increase of labour charges. Relying upon the decision of the Hon'ble Supreme Court in **Brij Paul Singh vs. State of Gujrat** AIR 1984 SC 1703 the Court upheld the award made by the arbitrator even in regard to a sum of Rs. 3,48,563/- on account of loss of profit. The Court upheld even the award of interest by the arbitrator relying upon the decision of Hon'ble Supreme Court **Santok Singh Arora vs. Union of India and Ors.** AIR 1992 SC 1809 and dismissed the petition.

We have heard learned counsel for the parties and perused the record. The scope of the interference with an arbitral award has been settled by a long line of decisions rendered by the Hon'ble Supreme Court including those upon which reliance has been placed by the learned Single Judge. The decisions authoritatively declare that a Court hearing objections against an arbitral award does not sit in appeal over the same nor can it reappraise evidence adduced before the arbitrator to substitute the findings recorded by the arbitrator by those arrived at by the Court. The jurisdiction of a Court while dealing with an arbitral award was limited to the grounds enumerated under Section 33 of the Arbitration Act, 1940 which provision is now replaced by Section 34 of Arbitration and Conciliation Act, 1996…"

66. In **Delhi Development Authority V. Wee Aar Constructive Builders And Anr** 2004 (3) Arb LR 291, a Division Bench had upheld the grant of amounts towards loss of profit, and observed as follows:

"The respondent No. 1 has suffered losses on account of

infructuous expenditure on labour, losses on account of idle tools, plants and machinery, losses due to hire charges for longer period for the idle steel shuttering plates and losses on account of wastage on building material due to deterioration of wooden scaffolding, bailies, batons, planks, etc. and losses on account of expenses over huts, blocking of working capital, incurring administrative charges and loss of profit. The Arbitrator has gone into details while awarding this amount on the basis of material produced before the Arbitrator. This Court in appeal will not substitute its own opinion for that of the Arbitrator. The view taken by the Arbitrator is a plausible view keeping in view his handling of projects as an Engineer. This Court will not interfere with the view of Arbitrator, even if different inferences may possibly be drawn by the Appellate Court. The Arbitrator has considered the agreement and clauses in the agreement and the evidence led by the parties and after due application of mind has come to findings which can not be assailed on the grounds as has been alleged by the appellant."

67. Two amounts claimed by the plaintiff , i.e Rs. 2,68,468/- towards delay and prolongation of contract, on the ground that prevented him from carrying out other works, and he should accordingly be compensated towards loss of profit which he would have otherwise earned. This claim is denied by DDA. He also claims the 8sum of Rs. 34,43,818/- towards work performed during the extended period of the contract stating his entitlement to 30% extra on the total value of the contract, for such extended period. There is clearly an over-lap in these claims. Further, the court has noted earlier that the plaintiff has not led evidence in this regard. At the same time, the DDA's role in contributing to the delay, occasioned in the performance of the contract has been found by the court. The question therefore, is whether the court should grant any amount.

68. The sum of Rs. 34,43,818/- is derived as 30% of cost of work done up to 18.12.92 (which is the original stipulated date of completion as per agreement), which is Rs. 83,79,253/-. The DDA does not dispute the latter figure of Rs. 83,79,253/-, but objects in principle to the grant of damages on other grounds, noticed above. Although the plaintiff has not led evidence in this regard, the court is of the opinion that the effect

of delay on account of various factors, such as increased expenses commitment to the contract for a longer period, the effect it may have upon the contractor who would be unable to commit (or enter into) other commercial transactions cannot be altogether lost sight of. In an expanding economy, where wage levels and availability of materials are dynamic factors, the possibility of a businessman to earn reasonable profits would depend on the time taken in the performance of contracts. If a contract performance is delayed on someone else's fault, he ought to be compensated, for the loss of profit, at least notionally. The Supreme Court authorities from A.T. Brij Paul onwards have consistently ruled that granting 15% of the contract value, towards loss of profit, is a reasonable standard. Those were in cases where the contractor led some evidence. Here, however, the plaintiff has not led any evidence, and has claimed Rs. 37 lakhs approximately. Having regard to the totality of circumstances, the court is of the view that a reasonable standard of damages in this case should be 7.5% of the value of the work done till the date originally agreed. This figure works out to Rs. 6,28,443.97.

Issue No. 6

69. The plaintiff seeks 18% interest on the amounts claimed in the suit. However, he has not led any evidence to show that the parties had agreed to interest @18% for delayed payments, or towards any eventuality. The court has held that some of the claims are admissible; the total amount of such claims works out to Rs. 7,30,451/-. Having regard to the circumstances, the court is of opinion that a reasonable rate of interest @ 12% on the said amount, from the date of institution of the suit, till payment, is called for. The claim for interest is allowed to the above extent. However, as far as the claim for interest on loss of profit is concerned, the court does not see any justification in granting it, since there is no question of awarding interest on damages.

Issue No. 7

70. In view of the above findings, the suit has to succeed, to the extent of Rs. 13,58,924.97/- (Rupees thirteen lakhs, fifty eight thousand, nine hundred and twenty four and ninety seven paise only) against the defendant DDA. The plaintiff will be entitled to pendente lite and future interest on Rs. 7,30,451/- at the rate of 12% on the said amount, from the date of institution of the suit, till payment. The suit is decreed in the

above terms. The plaintiff is also entitled to costs; in addition, counsel's fee is quantified at Rs. 55,000/-.

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CS (OS)

M/S. J.C. ENTERPRISES (REGD) ....PLAINTIFF

VERSUS

RANGANATHA ENTERPRISES ....DEFENDANT

(V.K. JAIN, J.)

CS (OS) NO. : 1443/1999 DATE OF DECISION: 31.01.2011

(A) Indian Evidence Act, 1872—Section 34—Entires made in books of accounts—Admissible as relevant evidence—One M/s JC Enterprises a partnership firm—Dissolved vide dissolution deed on 01.04.1997—Thereafter, Plaintiff running firm as proprietorship concern—Entered into oral agreement with Defendant—Defendant appointed as stockist of lotteries on whole sale rate basis—Plaintiff required to dispatch lottery tickets to Defendant as per requirement of Defendant—Defendant required to make payment within one week from date of draw—In default Plaintiff entitled to interest—Plaintiff alleged that Defendant is liable to pay total sum of Rs. 43,82,473- Hence present suit for recovery. Held:

(B) Mutual account—Must be transactions on each side which create independent obligations—Not merely transactions which create obligations on one side—Real question if whether transactions gave rise to independent obligations or whether merely mode of

liquidation—However, no allegation that parties having mutual, open current account and reciprocal demands between parties—Present suit based only on part payment last made by Defendant—No plea of parties maintaining mutual, open and current account—Hence Article 1 not applicable.

During the course of arguments, it was submitted by learned counsel for the plaintiff that since, the parties were maintaining a mutual open and current account in which last entry was made on receipt of payment from the defendant on 6th June, 1996, the suit having been filed on 23rd June, 1999, during summer vacation of the High Court is well within limitation.

Article 1 of the Limitation Act, 1963, to the extent it is relevant, provides that in a suit for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, the period of limitation is three years from the close of the year in which the last item admitted or proved is entered in the account. In order to an account to be mutual, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharge of such obligation. This proposition of law was upheld by the Supreme Court in **Hindustan Forest Co. v. Lalchand,** AIR 1959 SC 1349. In the case before the Supreme Court, the parties entered into an agreement for the supply of 5000 maunds of maize, 500 maunds of wheat and 1000 maunds of dal at the rates and time, specified. A sum of Rs.13,000/- has been paid as advance. The goods were delivered and the buyer was also making payments. The last delivery of the goods was made on 23rd June, 1947, and the suit was brought on 10th October, 1950, for the balance of the price due. The Supreme Court pointed out that what had happened was that the sellers had undertaken to make delivery of the goods and the buyer had agreed to pay for them and had

in part made payments in advance and held that there could be no question in such a case that the payments had been made towards the price due and there were no independent obligations on the sellers in favour of the buyer. This proposition of law was again applied by the Supreme Court in **Keshari Chand v. Shilong Banking Corporation Ltd.,** AIR 1965 SC 1711. The real question to be seen by the Court in such a case is to ascertain whether the transactions between the parties gave rise to independent obligations or they were merely a mode of liquidation of the obligation already undertaken by one party. Even in a case for price of goods sold and delivered, there may be obligation on the part of the seller towards the buyer in case some advance has been paid and has not been returned or the payment made by the purchaser is more than the price of the goods which he had to pay to the seller of the goods.

However, I find that there is no allegation in the plaint that the parties were having a mutual, open and current account in which there have been reciprocal demands between the parties. There is no allegation in the plaint that the plaintiff owed any amount to the defendant at any point of time whether on account of excess payment or otherwise. The case as set up in the plaint is based only on the part payment of Rs.1 lakh sent by the defendant on 6th June, 1996. In para 10 of the plaint it has been specifically alleged that the suit has been filed within the period of limitation since on account part payment last made by the defendant to the plaintiff at New Delhi on 6th June, 1996 was received on 10th June, 1996. No plea of the parties maintaining a mutual, open and current account with reciprocal obligations on the part of both the parties was set up even in the replication to the written statement. Hence, the period of limitation in this case cannot be calculated under Article I of Limitation Act. The issue is decided accordingly. **(Para 9)**

(C) Territorial jurisdiction—Contracts—Jurisdiction depends on situs of contract and cause of action

arising through connecting factors—Suit for breach of contract can always be filed at place where contract was to be performed or where performance completed—Part of cause of action arises where money is expressly or impliedly payable under contract.

In **A.B.C. Laminart Pvt. Ltd. and Another v. A.P. Agencies, Salem,** (1989) 2 SCC 163, the Supreme Court while dealing with the issue of territorial jurisdiction of the Court observed that the jurisdiction of the Court in the matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors. It was further observed that a cause of action is a bundle of facts, which, taken with the law applicable to them, gives the plaintiff a right to relief against the defendant and comprise every fact necessary for the plaintiff to prove to enable him to obtain a decree, through it has no relation whatever to the defence which may be set up by the defendant. It was also held that the performance of a contract being part of cause of action, a suit in respect of its breach can always be filed at the place where the contract should have been performed or its performance completed. It was further held that part of cause of action arises where money is expressly or impliedly payable under the contract **(Para 11)**

(C) Code of Civil Procedure, 1908—Section 20(C)—Cause of action-in suit for price of goods sold and delivered—Includes place where contract made—Place where contract to be performed—Place where money was payable—Party free to sue at any of the places.

In a suit for price of the goods sold and delivered which in effect is also the suit for breach of contract on the part of the defendant by not paying the price of the goods in terms of the agreement between the parties, the cause of action, within the meaning of Section 20(c) of the Code of Civil Procedure arises at the following places:-

(i) The place where the contract was made.

(ii) The place where the contract was to be performed which in such a contract would mean the place where the goods were delivered to the purchaser and

(iii) The place where money in performance of the contract was payable, expressly or impliedly.

The plaintiff, may in his choice, sue the defendant at any of these three places unless the parties by agreement have restricted the jurisdiction to a particular place, by agreeing that in the event of a dispute arise between them, the Court at a particular place alone would have jurisdiction to resolve the same.

As per illustration (a) to Section 20 of the Code of Civil Procedure, if A, a tradesman in Calcutta sells goods to B who is carrying on business in Delhi and on the request of B, A delivers the goods to Railway in Calcutta, A may sue B for price of goods either in Calcutta, where the cause of action has arisen or in Delhi, where B carries on business. This illustration clearly shows that cause of action does arise at the place where the goods are delivered by the seller to the purchaser. **(Para 12)**

(D) Property in lottery tickets handed over by Plaintiff to courier at New Delhi—Property passed over to Defendant the moment goods handed over to courier—Therefore tickets deemed to have been delivered at New Delhi itself—Hence, territorial jurisdiction established.

If the goods are handed over to the carrier for delivery directly to the consignee, the property in the goods passes to the consignee, the moment they are delivered to the carrier/courier for the purpose of delivering them to the consignee, since the consignee thereafter has no control in those goods and the carrier/courier is bound to deliver them only to the consignee. Section 23(1) of the Sale of Goods Act, 1930 provides that where there is a contract for the

sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the asset of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made. Sub-Section 2 of this Section, to the extent it is relevant, provides that where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. Since the goods handed over to the courier at Delhi were deliverable to the defendant and not to the order of the plaintiff or his agent, the plaintiff did not reserve any right of disposal of those goods, while handing them over to the courier. Therefore, the property in the lottery tickets handed over by the plaintiff to the courier at New Delhi passed to the defendant, the moment the goods were handed over to the courier for delivery to him and, therefore, the tickets shall be deemed to have been delivered to the defendant at New Delhi. Section 39(1) of the Sale of Goods Act, to the extent it is relevant, provides that where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer. Since the lottery tickets for price of which the present suit has been filed were delivered to the defendant at Delhi through R. South Couriers, the part of cause of action arose in the jurisdiction of this Court and, therefore, in view of the provisions contained in Section 20(c) of the Code of Civil Procedure, Delhi Court has jurisdiction to try the suit. **(Para 13)**

(E) Indian Evidence Act, 1872—Section 34—Entries made in books of accounts—Admissible as relevant evidence—Rationale—Regularity of habit, difficulty of falisification, fair certainty of ultimate detection—However, entries alone not sufficient to charge person with liability—Must be corroborated.

In **M/s. Gannon Dunkerlay & co. Ltd. vs. Their Workmen** 1972 3 SCC 443 it was found that the register in which entries had been made in the regular course of business was admitted in evidence by the Tribunal without any objection from the Union of India. Supreme Court was of the view that it was for the union to challenge the authenticity of the register by cross-examining the person, who proved the register on the points which could throw doubts on its authenticity. **(Para 17)**

(F) Entries made in books of accounts—Authenticity not impeached during cross examination—Oral deposition therefore sufficient corroboration of books of accounts—Furthermore, Defendant failed to produce his account books—Adverse inference may be drawn from the same.

In the case before this Court, PW-2 Manjeet Singh, who has been maintaining the books of accounts of the plaintiff, has duly proved the entries made in account books. The authenticity of the books of accounts of the plaintiff was not impeached during his cross-examination. According to the plaintiff, whatever was due to him was reflected in the ledger and was also shown in his income-tax returns. The oral deposition of the plaintiff, therefore, is sufficient corroboration of the entries made in the account books. This is more so when the defendant has failed to produce his account books despite admitting that he had been maintain such books. **(Para 19)**

In his cross-examination, the defendant has admitted that he had been maintaining account books and income tax return

has been filed by him on the basis of account books. He has also admitted that all credits, debits and dues are mentioned in his account books. However, the account books have not been produced by the defendant. He claimed, during his cross examination, that in the year 1996-97, there was a problem in the lottery business and the police had seized much of his record. He, however, could not give the case number or FIR number in which his documents were seized. He stated that though the case had been closed and he had applied for return of account books, the same had not been returned to him. In case, the account books of the defendant were seized by the police, as claimed by him, nothing prevented him from summoning the account books from the Court where they have been filed. This is more so when the defendant claims that he had already applied for return of those account books. Since the defendant had an opportunity to rebut the account books of the plaintiff by producing his own account books and he did not avail that opportunity, I see no reason to disbelieve the account books maintained by the plaintiff, who has also produced the author of the account books in the witness box. In fact, an adverse inference needs to be drawn against the defendant for not producing the account books, which he could easily have produced. Section 114 (g) of the Indian Evidence Act, 1872 provides that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. Therefore, an adverse inference can be drawn that had the defendant produced the account books in the Court, the entries showing the amount claimed by the plaintiff would have been found shown outstanding in those account books. **(Para 20)**

(G) However, Plaintiff only entitled to recover that amount which is not barred by limitation—Only amount not time barred as on 06.06.1996, when payment was made, recoverable.

However, the plaintiff can recover only that much amount, which has not become barred by limitation. Since the payment made by the defendant on 6th June 1996 would save, from limitation, only amount which had not become time barred as on 6th June, 1996, when payment was made by way of a demand draft, only the amount which was legally recoverable on 6th June 1996 can be recovered by the plaintiff as principal sum. The issues are decided accordingly. **(Para 21)**

Important Issue Involved: Indian Evidence Act, 1872—Section 34—Entries made in books of accounts—Admissible as relevant evidence—Rationale—Regularity of habit, difficulty of falsification, fair certainty of ultimate detection—However entries alone not sufficient to charge person with liability—Must be corroborated.

[Sa Gh]

APPEARANCES:

FOR THE PLAINTIFF : Mr. S.C. Singhal and Mr. Sanjay.

FOR THE DEFENDANT : Mr. R.N. Sharma.

CASES REFERRED TO:

1. *R.V.E. Venkatachala Gounder* vs. *Arulmigu Viswesaraswami and V.P. Temple and another* AIR 2003 SC 4548.
2. *Kulamani Mohanty* vs. *Industrial Development Corporation of Orissa Ltd.* AIR 2002 Orissa 38.
3. *A.B.C. Laminart Pvt. Ltd. and Another* vs. *A.P. Agencies, Salem,* (1989) 2 SCC 163.
4. *M/s. Gannon Dunkerlay & co. Ltd.* vs. *Their Workmen* 1972 3 SCC 443.
5. *Keshari Chand* vs. *Shilong Banking Corporation Ltd.,* AIR 1965 SC 1711.
6. *Kaka Ram Sohanlal and others* vs. *Firm Thakar Das*

Mathra Das and another AIR 1962 PUNJAB 27.

7. *Kalipada Sinha* vs. *Mahaluxmi Bank Ltd.* AIR 1961 Calcutta 191.

8. *Hindustan Forest Co.* vs. *Lalchand,* AIR 1959 SC 1349.

9. *Suraj Prasad* vs. *Mt. Makhna Devi* AIR 1946 All 127.

10. *Firm Jodha Mal Budhu Mal* vs. *Ditta* AIR1925 Lah 242 (1).

RESULT: Suit party decreed in favour of Plaintiff.

V.K. JAIN, J.

1. This is a suit for recovery of Rs.43,82,473/-. It is alleged in the plaint that M/s J78.C. Enterprises, which was a partnership firm, was dissolved vide Dissolution Deed dated 1.4.1997 and thereafter, the plaintiff Rakesh Sharma has been running this firm as his proprietorship concern. The defendant Suresh is running business under the name and style of M/s Ranganatha Enterprises. It is alleged in the plaint that under an oral agreement between the parties, the defendant was appointed as a stockiest of State lotteries including Daily Lotteries etc., on wholesale rate basis. As per the terms and conditions of the agreement, the plaintiff was required to dispatch lottery tickets to the defendant from Delhi as per the requirement of the defendant. The defendant was required to make payment to the plaintiff within a week from the date of the draw. In default of payment, the plaintiff was entitled to interest at the rate of 18% per annum for the period beyond 15 days from the date of draw. It is alleged that the defendant is liable to pay a sum of Rs.20,97,566/- to the plaintiff towards price of the lottery tickets, after adjustment of part payment of Rs.1 lakh made by him on 6th June, 1996. The plaintiff has also claimed interest on that amount at the rate of 18% per annum, which comes to Rs.22,84,907/-, thereby making a total sum of Rs.43,82,473/-.

2. The defendant has contested the suit. He has taken preliminary objections that this Court has no territorial jurisdiction to try the suit and the suit is barred by limitation. It is further alleged that since the agreement was executed between the defendant and M/s J.C. Enterprises, the plaintiff has no cause of action and no right to sue the defendant.

3. On merits, it is alleged that the defendant was in the business of

sale of lottery tickets till the year 1993 and had purchased some consignments of lotteries from M/s J.C. Enterprises, payments of which were promptly settled and nothing is due from him. The defendant has also denied the alleged oral agreement between him and M/s J.C. Enterprises, as also the agreement to pay interest. As regards the payment of Rs.1 lakh, it is alleged that this amount was paid to the plaintiff on 6th June, 1996 as a loan.

4. The following issues were framed on the pleadings of the parties:-

(i) Whether there is no cause of action for the suit and whether the plaintiff does not have the right to sue? OPD

(ii) Whether the suit is barred by law of limitation? OPD

(iii) Whether this Court has no territorial jurisdiction to try and decide the present suit? OPD

(iv) Whether there is any oral agreement entered into between the plaintiff and the defendant in the month of December, 1991 and if so, what were the terms and conditions of the same? OPP

(v) Whether the defendant was required to submit his accounts and make payments at New Delhi for the tickets alleged to have been received by him? OPP

(vi) Whether the plaintiff is entitled for recovery of an amount of Rs.43,82,473/- from the defendant as claimed in the suit? OPP

(vii) If the aforesaid issue is answered in favour of the plaintiff whether the plaintiff is also entitled for payment of any interest and if so, at what rate and for which period? OPP

(viii) Relief.

Issue No.1

5. On this issue, the plaintiff Mr. Rakesh Sharma, in his affidavit by way of evidence, stated that M/s J.C. Enterprises, which was a partnership firm till 1st April, 1997, was dissolved, vide Dissolution Deed dated 1st April, 1997 and now he is its proprietor. During his cross-examination, he stated that after dissolution of the partnership firm, he took over all its assets and liabilities being its proprietor. Though the

original Dissolution Deed was not produced by the plaintiff and consequently its copy filed by him could not be exhibited and was marked as mark X-1 during his examination before the learned Joint Registrar, even if the document Mark X-1 is excluded from consideration, the unrebutted deposition of plaintiff is sufficient to prove that M/s J.C. Enterprises was dissolved with effect from 1st April, 1997 and all its assets and liabilities were taken over by the plaintiff as its proprietor. Another important factor to be noted in this behalf is that no other partner of M/s J.C. Enterprises has sued the defendant for recovery of the dues of the firm, which, in turn, supports the oral deposition of the plaintiff that he had taken over the assets and liabilities of the erstwhile partnership firm with effect from 1st April, 1997. The issue is decided against the defendant and in favour of the plaintiff.

Issue No.2

6. It is an admitted case that the defendant made payment of Rs.1 lakh to the plaintiff, by way of demand draft, on 6th June, 1996. Though, the case of the plaintiff is that, in fact, the payment was received by him on 10th June, 1996, that would make no difference since the High Court was closed in June, 1999 and the suit was filed during vacation on 23rd June, 1999.

7. Section 19 of the Limitation Act, to the extent it is relevant, provides that where payment on account of a debt or of interest is made before the expiration of the prescribed period by the person liable to pay the debt, a fresh period of limitation shall be computed from the date when the payment was made. In case, part payment by way of a demand draft was made by the defendant to the plaintiff on 6th June, 1996, this being a payment in writing, a fresh period of limitation commenced from that date and since the High Court was closed in the month of June, 1999, the suit having been filed during the same vacation on 23rd June, 1999 would be within the prescribed period of limitation. The dispute between the parties, however, is as to whether the amount of Rs.1 lakh was paid as part payment towards the dues outstanding against the defendant on the date of payment as claimed by the plaintiff or it was paid as a friendly loan by the defendant to the plaintiff, as alleged by the defendant.

8. In his affidavit by way of evidence, the plaintiff ˇRakesh Sharma

has stated that part payment on account was made by the defendant on 6th June, 1996 vide letter Exhibit P/2 and receipt issued by the plaintiff in this regard on 10th June, 1996 is Exhibit P/3. PW-2 Shri Manjit Singh, who is working with the plaintiff, has corroborated the deposition of the plaintiff in this regard and has stated that last payment was received from the defendant vide Memo No.181 dated 6th June, 1996 for Rs.1 lakh vide demand draft, which was duly realized by the plaintiff. The original Memo dated 6th June, 1996 is Exhibit PW-2/1. I see no reason to disbelieve the oral testimony of plaintiff and his employee Shri Manjit Singh as regards the nature of the payment made by the defendant on 6th June, 1996. During his cross-examination of PW-2 Shri Manjit Singh also no suggestion was given to him that the document Exhibit PW-1/1 was not issued by the defendant. When a witness deposes a particular fact and no suggestion to the contrary is given during his cross-examination, the party against whom the deposition is made is made is deemed to have admitted that part of the deposition, which thereby remains unchallenged. Therefore, by not suggesting to PW-2 Shri Manjit Singh that the document Exhibit PW-1/1 was not issued by him, the defendant is deemed to have admitted the issue of this document by him. Even otherwise, Exhibit PW-1/1 on which the name as well as address and telephone number of Ranganatha Enterprises, of which the defendant admittedly is the proprietor, is correctly printed does not appear to be a forged document. The memo Ex.PW-2/1 shows that the payment of Rs.1 Lac was made in account, which implies part payment. The receipt Exhibit P-3, which is a computer generated receipt, as stated by PW-2 Shri Manjit Singh, also shows that the payment of Rs.1 lakh vide demand draft No.777626 dated 25th May, 1996 was received in the account of the defendant maintained with M/s J.C. Enterprises. The letter Exhibit P-2, which is written on the letterhead of the defendant, is the forwarding letter whereby the aforesaid demand draft for Rs.1 lakh was sent to M/s J.C. Enterprises. Though the case of the defendant is that Exhibit P/2 is a forged document, the fact and circumstance of the case indicate that this is a genuine document whereby demand draft for Rs.1 lakh was sent by the defendant to the plaintiff on 6th June, 1996. Another material circumstance in this regard is that though the defendant claims that the amount of Rs.1 lakh was given as a friendly loan to the plaintiff, no notice was ever issued by him demanding the aforesaid amount from the plaintiff. No suit admittedly has been filed by the defendant for recovery

of this amount from the plaintiff. Had the amount of Rs.1 lakh being given as a friendly loan, the defendant would at least have demanded this amount from the plaintiff and would also have filed a suit for recovering it from the plaintiff. Therefore, I am satisfied that the payment of Rs.1 lakh vide demand draft No.777626 dated 29th May, 1996 was made towards payment of the amount, which was due from the defendant at that time. In view of the provisions contained in Section 19 of the Limitation Act, the suit, to the extent it pertains to the amount, which had not become time barred on 6th June, 1996, when the part payment was made, will not be barred by limitation.

9. During the course of arguments, it was submitted by learned counsel for the plaintiff that since, the parties were maintaining a mutual open and current account in which last entry was made on receipt of payment from the defendant on 6th June, 1996, the suit having been filed on 23rd June, 1999, during summer vacation of the High Court is well within limitation.

Article 1 of the Limitation Act, 1963, to the extent it is relevant, provides that in a suit for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, the period of limitation is three years from the close of the year in which the last item admitted or proved is entered in the account. In order to an account to be mutual, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharge of such obligation. This proposition of law was upheld by the Supreme Court in **Hindustan Forest Co. v. Lalchand,** AIR 1959 SC 1349. In the case before the Supreme Court, the parties entered into an agreement for the supply of 5000 maunds of maize, 500 maunds of wheat and 1000 maunds of dal at the rates and time, specified. A sum of Rs.13,000/- has been paid as advance. The goods were delivered and the buyer was also making payments. The last delivery of the goods was made on 23rd June, 1947, and the suit was brought on 10th October, 1950, for the balance of the price due. The Supreme Court pointed out that what had happened was that the sellers had undertaken to make delivery of the goods and the buyer had agreed to pay for them and had in part made payments in advance and held that there could be no question in such a case that the payments had been made towards the

price due and there were no independent obligations on the sellers in favour of the buyer. This proposition of law was again applied by the Supreme Court in **Keshari Chand v. Shilong Banking Corporation Ltd.,** AIR 1965 SC 1711. The real question to be seen by the Court in such a case is to ascertain whether the transactions between the parties gave rise to independent obligations or they were merely a mode of liquidation of the obligation already undertaken by one party. Even in a case for price of goods sold and delivered, there may be obligation on the part of the seller towards the buyer in case some advance has been paid and has not been returned or the payment made by the purchaser is more than the price of the goods which he had to pay to the seller of the goods.

However, I find that there is no allegation in the plaint that the parties were having a mutual, open and current account in which there have been reciprocal demands between the parties. There is no allegation in the plaint that the plaintiff owed any amount to the defendant at any point of time whether on account of excess payment or otherwise. The case as set up in the plaint is based only on the part payment of Rs.1 lakh sent by the defendant on 6th June, 1996. In para 10 of the plaint it has been specifically alleged that the suit has been filed within the period of limitation since on account part payment last made by the defendant to the plaintiff at New Delhi on 6th June, 1996 was received on 10th June, 1996. No plea of the parties maintaining a mutual, open and current account with reciprocal obligations on the part of both the parties was set up even in the replication to the written statement. Hence, the period of limitation in this case cannot be calculated under Article I of Limitation Act. The issue is decided accordingly.

Issue No.4

10. In his affidavit by way of evidence, the plaintiff has stated that there was an oral agreement between the parties in December, 1991 and the terms and conditions of that agreement were accepted at New Delhi. He further stated that as per the terms and conditions of the agreement, the plaintiff was required to dispatch lottery tickets to the defendant from Delhi and the plaintiff had accordingly been dispatching lottery tickets to the defendant from time to time, the last consignment having been dispatched on 22nd July, 1993. He further stated that the defendant was

required to make payment to the plaintiff at Delhi for the lottery tickets received by him. PW-2 Shri Manjit Singh also has stated that tickets to the defendant used to be dispatched at Delhi and the payment used to be received at Delhi.

In his affidavit by way of evidence, the defendant has stated that in the year, 1990 Mr. J.C. Sharma one of the partners of M/s J.C. Enterprises had approached him in his office at Bangalore and had started supplying the lottery tickets to him. He further stated that he never came to Delhi in or around December, 1991 and did not enter into any oral or written agreement with the plaintiff. He further stated that most of the consignments were handed over to him in person either by the partner or the representatives of the plaintiff firm.

The plaintiff has filed a large number of bills issued by M/s R. South Courier, Ram Nagar, New Delhi in respect of the lottery tickets dispatched to the defendant from M/s J.C. Enterprises. Some of these bills are Bill Nos.087019 dated 17th December, 1992, 093076 dated 8th February, 1993, 093082 dated 12th February, 1993, 006705 dated 10th May, 1993, 019705 dated 8th June, 1993, 018986 dated 10th July, 1993 and 015610 dated 12th July, 1993. This documentary evidence clearly shows that the tickets used to be dispatched by the plaintiff to the defendant from Delhi and used to be delivered through M/s R. South Courier, which used to receive the lottery tickets from the plaintiff at Delhi and deliver the same to the defendant at Bangalore.

11. In **A.B.C. Laminart Pvt. Ltd. and Another v. A.P. Agencies, Salem,** (1989) 2 SCC 163, the Supreme Court while dealing with the issue of territorial jurisdiction of the Court observed that the jurisdiction of the Court in the matter of a contract will depend on the situs of the contract and the cause of action arising through connecting factors. It was further observed that a cause of action is a bundle of facts, which, taken with the law applicable to them, gives the plaintiff a right to relief against the defendant and comprise every fact necessary for the plaintiff to prove to enable him to obtain a decree, through it has no relation whatever to the defence which may be set up by the defendant. It was also held that the performance of a contract being part of cause of action, a suit in respect of its breach can always be filed at the place where the contract should have been performed or its performance

completed. It was further held that part of cause of action arises where money is expressly or impliedly payable under the contract.

12. In a suit for price of the goods sold and delivered which in effect is also the suit for breach of contract on the part of the defendant by not paying the price of the goods in terms of the agreement between the parties, the cause of action, within the meaning of Section 20(c) of the Code of Civil Procedure arises at the following places:-

(i) The place where the contract was made.

(ii) The place where the contract was to be performed which in such a contract would mean the place where the goods were delivered to the purchaser and

(iii) The place where money in performance of the contract was payable, expressly or impliedly.

The plaintiff, may in his choice, sue the defendant at any of these three places unless the parties by agreement have restricted the jurisdiction to a particular place, by agreeing that in the event of a dispute arise between them, the Court at a particular place alone would have jurisdiction to resolve the same.

As per illustration (a) to Section 20 of the Code of Civil Procedure, if A, a tradesman in Calcutta sells goods to B who is carrying on business in Delhi and on the request of B, A delivers the goods to Railway in Calcutta, A may sue B for price of goods either in Calcutta, where the cause of action has arisen or in Delhi, where B carries on business. This illustration clearly shows that cause of action does arise at the place where the goods are delivered by the seller to the purchaser.

13. If the goods are handed over to the carrier for delivery directly to the consignee, the property in the goods passes to the consignee, the moment they are delivered to the carrier/courier for the purpose of delivering them to the consignee, since the consignee thereafter has no control in those goods and the carrier/courier is bound to deliver them only to the consignee. Section 23(1) of the Sale of Goods Act, 1930 provides that where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the asset

of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made. Sub-Section 2 of this Section, to the extent it is relevant, provides that where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. Since the goods handed over to the courier at Delhi were deliverable to the defendant and not to the order of the plaintiff or his agent, the plaintiff did not reserve any right of disposal of those goods, while handing them over to the courier. Therefore, the property in the lottery tickets handed over by the plaintiff to the courier at New Delhi passed to the defendant, the moment the goods were handed over to the courier for delivery to him and, therefore, the tickets shall be deemed to have been delivered to the defendant at New Delhi. Section 39(1) of the Sale of Goods Act, to the extent it is relevant, provides that where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer. Since the lottery tickets for price of which the present suit has been filed were delivered to the defendant at Delhi through R. South Couriers, the part of cause of action arose in the jurisdiction of this Court and, therefore, in view of the provisions contained in Section 20(c) of the Code of Civil Procedure, Delhi Court has jurisdiction to try the suit.

14. Exhibit PW-2/1 to which I have earlier adverted indicates that the payment of Rs.1 lakh to the plaintiff was sent from Bangalore to Delhi. The letter Exhibit P/2 clearly shows that the draft of Rs.1 lakh was sent from Bangalore to Delhi. The computer generated receipt Exhibit P/3 is the most important document in this regard and this document, which could not have been issued at Bangalore, leaves no reasonable doubt that the payment of Rs.1 lakh was received by the plaintiff at Delhi vide demand draft No. 777626 dated 25th May, 1996. Therefore, besides oral evidence in the form of deposition of plaintiff and PW-2 Shri Manjit Singh, there is ample documentary evidence produced by the plaintiff to prove that the payment of lottery tickets used to be received by M/s J.C. Enterprises at Delhi. In fact, a large number of documents have been

filed by the plaintiff which show that payment of lottery tickets used to be sent by the defendant to M/s J.C. Enterprises from Bangalore. These documents have been collectively exhibited as Exhibit PW-2/2. These documents include a large number of letters whereby payment was sent by the defendant to M/s J.C. Enterprises from Bangalore on various dates. One such letters bears Sr. No.10272 and is dated 8th April, 1993. Another such letter bearing No.10299 is dated 15th April, 1993 and contains reference to payment of Rs.1,22,510/- vide demand draft No.903061 dated 24th April, 1993. Document bearing No.10300 dated 15th April, 1993, document bearing No.10405 dated 28th April, 1993, document bearing No.10451 dated 7th May, 1993, document bearing No.10452 dated 7th May, 1993, document bearing No.10406 dated 28th April, 1993, document bearing No.10492 dated 13th May, 1993, document bearing No.10494 dated 13th May, 1993, document bearing No.10583 dated 20th May, 1993, document bearing No.10584 dated 20th May, 1993, document bearing No.10604 dated 25th April, 1993 and document bearing No.10605 dated 25th May, 1993 are amongst numerous such documents filed by the plaintiff. The authenticity of these documents was not disputed by the defendant during cross-examination of PW-2. All these documents start with the words "We are herewith sending payments as follows", which clearly show that payments used to be sent by the defendant from Bangalore to M/s J.C. Enterprises at Delhi. Thus, it can hardly be disputed that payments used to be sent by the defendant from Bangalore to Delhi and used to be received by M/s J.C. Enterprises at Delhi. The receipt of payment at Delhi proves the case of the plaintiff that the agreement between the parties envisaged payment of price of the tickets at Delhi. The payment of price of the goods is an integral and important part of an agreement for sale of goods and if the payment was to be made and used to be made in the jurisdiction of this Court, it cannot be disputed that for this reason alone part of the cause of action arose at Delhi. Consequently, Delhi Court has jurisdiction to try the present suit.

Issue Nos. 4 to 6

15. In his affidavit by way of evidence, the plaintiff has stated that a sum of Rs.20,97,566/- is payable by the defendant towards the price of lottery tickets sold to him. He has also proved the copies of his ledgers, which are Exhibit P-4 (Colly). PW-2 Shri Manjit Singh, in his

affidavit corroborated the deposition of the plaintiff in this regard and stated that the defendant is liable to pay Rs.43,82,473/- inclusive of interest. In rebuttal, the defendant has stated that every penny of dues of M/s J.C. Enterprises had been cleared and settled.

16. I see no reason to disbelieve the entries made in the ledger book of the plaintiff. According to the plaintiff, he has been maintaining regular books of accounts in respect of his business transactions. According to PW-2 Shri Manjit Singh, he used to maintain the account books being accountant of the plaintiff company. Copies of the ledger book filed by the plaintiff shows that the principal amount claimed by him is payable by the defendant to M/s J.C. Enterprises.

In view of the provisions contained in Section 34 of Evidence Act, once it is shown that an entry has been made in a book of accounts and that book of accounts has been regularly kept in the course of business, the requirement contained in the first part of the Section is fulfilled and the entry becomes admissible as relevant evidence. However, the statement made in the entry will not alone be sufficient to charge any person with liability. The rationale behind admissibility of parties' books of account as evidence is that the regularity of habit, the difficulty of falsification and the fair certainty of ultimate detection give them in a sufficient degree a probability of trustworthiness. Since, however, an element of self-interest and partisanship of the entrant to make a person – behind whose back and without whose knowledge the entry is made – liable cannot be ruled out the additional safeguard of insistence upon other independent evidence to fasten him with such liability, has been provided for in Section 34 by incorporating the words "such statements shall not alone be sufficient to charge any person with liability".

17. In **M/s. Gannon Dunkerlay & co. Ltd. vs. Their Workmen** 1972 3 SCC 443 it was found that the register in which entries had been made in the regular course of business was admitted in evidence by the Tribunal without any objection from the Union of India. Supreme Court was of the view that it was for the union to challenge the authenticity of the register by cross-examining the person, who proved the register on the points which could throw doubts on its authenticity.

18. In **R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami and V.P. Temple and another** AIR 2003 SC 4548,

the appellant was found to be maintaining books of account. During cross-examination, he was not questioned regarding authenticity of the books or the entries made thereunder. Some of the entries in the books had been made by the deceased-father of the appellant, who was not available to depose incorporation of the entry. The subordinate Court felt no need of any further corroboration before acting upon the entries in the ledge book made by the deceased-father of the appellant. As regards the entries made by the appellant, he had deposed to making of those entries and had corroborated the same in his own statement. The appellant was believed by the trial Court as also by the appellate Court and his statement was found to be enough corroboration of the entries made by him. However, the fining of the trial Court and the first appellate Court was reversed by the High Court. Supreme Court found no justification for the High Court reversing the findings and was of the view that the High Court had erred in ruling out the books in consideration, on the ground that the same were not duly maintained or were not proved in the absence of the maker having stepped in the witness box.

In **Kulamani Mohanty vs. Industrial Development Corporation of Orissa Ltd.** AIR 2002 Orissa 38 it was held that if the books of accounts are produced as primary evidence and oral evidence is led as corroborative evidence relating to the entries in the books of accounts maintained in the regular course of business, unless the contrary is proved or any doubt is raised through evidence regarding genuineness of such books of account or any of the entries, then such books should be regarded as proved.

In **Kalipada Sinha vs. Mahaluxmi Bank Ltd.** AIR 1961 Calcutta 191 the entries made in the statement of accounts coupled with the oral deposition were found to be sufficient to prove the case of the respondent. Similar view was taken by a Division Bench of Punjab High Court in **Kaka Ram Sohanlal and others vs. Firm Thakar Das Mathra Das and another** AIR 1962 PUNJAB 27. In taking this view, the High Court relied upon the decision of Lahore High Court in **Firm Jodha Mal Budhu Mal vs. Ditta** AIR1925 Lah 242 (1) and the decision of the Allahabad High Court in **Suraj Prasad vs. Mt. Makhna Devi** AIR 1946 All 127.

19. In the case before this Court, PW-2 Manjeet Singh, who has been maintaining the books of accounts of the plaintiff, has duly proved

the entries made in account books. The authenticity of the books of accounts of the plaintiff was not impeached during his cross-examination. According to the plaintiff, whatever was due to him was reflected in the ledger and was also shown in his income-tax returns. The oral deposition of the plaintiff, therefore, is sufficient corroboration of the entries made in the account books. This is more so when the defendant has failed to produce his account books despite admitting that he had been maintain such books.

20. In his cross-examination, the defendant has admitted that he had been maintaining account books and income tax return has been filed by him on the basis of account books. He has also admitted that all credits, debits and dues are mentioned in his account books. However, the account books have not been produced by the defendant. He claimed, during his cross examination, that in the year 1996-97, there was a problem in the lottery business and the police had seized much of his record. He, however, could not give the case number or FIR number in which his documents were seized. He stated that though the case had been closed and he had applied for return of account books, the same had not been returned to him. In case, the account books of the defendant were seized by the police, as claimed by him, nothing prevented him from summoning the account books from the Court where they have been filed. This is more so when the defendant claims that he had already applied for return of those account books. Since the defendant had an opportunity to rebut the account books of the plaintiff by producing his own account books and he did not avail that opportunity, I see no reason to disbelieve the account books maintained by the plaintiff, who has also produced the author of the account books in the witness box. In fact, an adverse inference needs to be drawn against the defendant for not producing the account books, which he could easily have produced. Section 114 (g) of the Indian Evidence Act, 1872 provides that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. Therefore, an adverse inference can be drawn that had the defendant produced the account books in the Court, the entries showing the amount claimed by the plaintiff would have been found shown outstanding in those account books.

21. However, the plaintiff can recover only that much amount,

which has not become barred by limitation. Since the payment made by the defendant on 6th June 1996 would save, from limitation, only amount which had not become time barred as on 6th June, 1996, when payment was made by way of a demand draft, only the amount which was legally recoverable on 6th June 1996 can be recovered by the plaintiff as principal sum. The issues are decided accordingly.

Issue No.7

22. A perusal of the delivery challans raised by M/s J.C. Enterprises whereby goods were dispatched to the defendant shows that the term regarding interest has been specifically printed in the challans. Interest was payable at the rate of 18% per annum on payment received beyond 15 days from the date of dispatch. Hence the plaintiff is entitled to recover interest at the rate of 18% per annum on the unpaid principal amount. The issue is decided accordingly.

Issue No.8

23. Vide order dated 19th January, 2011, the plaintiff was directed to file an affidavit stating therein the amount which was due to him from the defendant on 6th June, 1993. The affidavit filed by the plaintiff shows that Rs.12,78,478/- was due to the plaintiff on 6th June, 1993. The plaintiff has claimed a sum of Rs.22,84,907/- as interst on the principal sum of Rs.20,97,566/- at the rate of 18% per annum. Calculated on proportionate basis, the amount of interest on Rs.12,78,478/-, being the principal amount, comes to Rs.13,92,262/- at the rate of 18% per annum. In view of my findings on the other issues, the plaintiff is entitled to a sum of Rs.12,78,478/- as principal amount and a sum of Rs.13,92,262/- as interest making a total sum of Rs.26,70,740/-.

ORDER

For the reasons given in the preceding paragraphs, a decree for recovery of Rs.26,70,740/- with proportionate costs and proportionate pendente lite and future interest at the rate of 12% per annum is passed in favour of the plaintiff and against the defendant.

Decree sheet be prepared accordingly.

ILR (2011) III DELHI 151
WP (C)

MAHINDER KUMAR ....PETITIONER

VERSUS

DELHI FINANCIAL CORPORATION ....RESPONDENTS

(DEEPAK MISRA & SANJIV KHANNA, J.)

WP (C) NO. : 5774/1998 DATE OF DECISION: 02.02.2011

Constitution of India, 1950—Article 226, 14—Delhi Financial Corporation (Staff) Regulations, 1961—Regulations 20—Petition challenging the order dated 24th April, 1996 vide which the appellant was retired prematurely—The Regulation 20 is unconstitutional—The regulation is arbitrary and hit by Article 14 of the Constitution of India as there is no guidance in the said provision and confers unguided, unfettered and unbridged powers on the authority to prematurely retire a person—Held—The present Regulation, is similar to the Regulations which have been struck down as ultra vires by the Apex Court in various decisions—It suffers from the same fallibility and vulnerability, which has repeatedly prompted and compelled the Supreme Court to strike down the unguided power of compulsory retirement—In view of the aforesaid, unfettered, unbridled and unguided power has been conferred on the authority to pass the order of compulsory retirement and, accordingly, we declare the said provisions to be unconstitutional—Order of compulsory retirement set aside—Benefit restricted to 40% of back wages with all consequential benefits including pension after adjusting the benefits already availed.

The present Regulation, in our considered opinion, is similar

to the Regulations which have been struck down as ultra vires by the Apex Court in the aforesaid three decisions. It suffers from the same fallibility and vulnerability, which has repeatedly prompted and compelled the Supreme Court to strike down the unguided power of compulsory retirement. **(Para 9)**

In our considered opinion, the controversy is covered by the decisions in **Izhar Hussain** (supra), **Uttar Pradesh Cooperative Sugar Factories Federation Ltd.** (supra) and **S.M.K. Khan** (supra). In view of the aforesaid, we have no hesitation in holding that unfettered, unbridled and unguided power has been conferred on the authority to pass the order of compulsory retirement and, accordingly, we declare the said provision to be unconstitutional.**(Para 12)**

Important Issue Involved: Regulation 20 of the Delhi Financial Corporation (Staff) Regulations, 1961 is unconstitutional.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. G.D. Gupta, Sr. Advocate with Mr. Vishal Anand, Advocate.

FOR THE RESPONDENT : Mr. V.K. Rao, Advocate with Mr. Ayushman Kumar, Advocate.

CASES REFERRED TO:

1. *National Aviation Company of India Ltd.* vs. *S.M.K. Khan,* AIR 2009 SC 2637.
2. *Uttar Pradesh Cooperative Sugar Factories Federation Ltd.* vs. *P.P. Gautam and others,* (2008) 17 SCC 365.
3. *Union of India and others* vs. *Shaik Ali,* AIR 1990 SC 450.
4. *Senior Superintendent of Post Office and others* vs. *Izhar*

Hussain, AIR 1989 SC 2262.

RESULT: Petition partly allowed.

DIPAK MISRA, CJ.

1. By this writ petition, the petitioner, Deputy General Manager (Technical) in Delhi Financial Corporation (for short 'the Corporation') established under the State Financial Corporation Act, 1951, has challenged the order dated 24th April, 1996, purported to have been passed in exercise of the powers conferred on the authority by virtue of Regulation 20 of the Delhi Financial Corporation (Staff) Regulations, 1961 (for brevity "1961 Regulations") pre-maturely retiring him on the foundation that the Regulation 20 is unconstitutional and once the provision is declared as unconstitutional, the acts undertaken on the base or bedrock of the said provision deserves to be lanceted and a fall out of that all the consequential benefits are to follow.

2. On a perusal of the pleadings in the writ petition, it is clear as crystal that the petitioner has been compulsorily retired at the age of 51 years placing reliance on the Regulation 20(1) of the 1961 Regulations. It is contended in the petition that the said Regulation is arbitrary and hit by Article 14 of the Constitution of India inasmuch as there is no guidance in the said provision and on a keener scrutiny, it would be manifest that unguided, unfettered and unbridled power has been conferred on the authority to pre-maturely retire a person which invites the frown of the equality clause as enshrined in Article 14 of the Constitution of India.

3. Mr.Gupta, learned senior counsel appearing for the petitioner, submitted that he is not inclined to advance any other contention or assail the order on any other substratum like how the power has been exercised inasmuch as the authority bereft of the provision or sans the power could not have exercised the power. The learned counsel would submit that if the source of power is declared as ultra vires, the exercise thereof as a sequitur would automatically get annulled.

4. Mr.Rao, learned senior counsel appearing for the Corporation, after referring to the counter affidavit, has submitted that the provision does not play foul of Article 14 of the Constitution of India since the concept of public interest inheres in the said provision. It is his further submission that if the entire career graph of the petitioner is scrutinized,

there can be no trace or shadow of doubt that the present case is one where the petitioner deserves to be compulsorily retired from service.

5. Regard being had to the submissions raised at the Bar, the heart of the matter is whether the relevant Regulation in question is invalid or stands the test of Article 14 of the Constitution of India. To appreciate the controversy, we think it apposite to reproduce Regulation 20(1) of the 1961 Regulations. It reads as follows: -

> "An employee shall retire at fifty eight years of age provided that the Board may at its discretion, sanction from time to time the extension of his employment for a period not exceeding one year at a time but in no case beyond the age of sixty, and provided further that the Corporation may, at its discretion, retire an employee on completion of 25 years of service or 50 years of age."

6. Mr.Gupta, learned senior counsel for the petitioner, has commended us to the decision rendered in **Senior Superintendent of Post Office and others v. Izhar Hussain,** AIR 1989 SC 2262. In the said decision, the challenge was to the validity of Rule 2(2) of the Liberalised Pension Rules, 1950 on the ground that unguided powers were conferred on the government and hence, the said provision was ultra vires Articles 14 and 16 of the Constitution. To have a complete picture, we think it apt to reproduce the said provision:

> "Rule 2(2) - An Officer may retire from service any time after completing 30 years' qualifying service provided that he shall give in this behalf a notice in writing to the appropriate authority at least 3 months before the date on which he wishes to retire. Government may also require an officer to retire, any time after he has completed 30 years qualifying service provided that the appropriate authority shall give, in this behalf a notice in writing to the officer at least three months before the date on which he is required to retire, or three months' pay and allowances in lieu of such notice."

While dealing with the validity of the said provision, their Lordships have expressed the view as follows: -

"4. Fundamental Rule 56(j) while granting absolute right to the

Government provides that such power can only be exercised in 'Public Interest'. This guide-line is a sufficient safeguard against the arbitrary exercise of power by the Government. The object of this Rule is to chop-off the dead-wood. Rule 2(2) of ˇthe Pension Rules on the other hand provides no guide-line and gives absolute discretion to the Government. There is no requirement under the rule to act in 'Public Interest'. A person who joins Government service at the age of 21 years can be retired at the age of 51/52 years as by then he must have completed 30 years of qualifying service. Although the rules are mutually exclusive and have been made to operate in different fields but the operational effect of the two rules is that a Government servant who has attained the age of 55 years can be retired prematurely under F. R. 56(j) only on the ground of 'Public Interest' whereas another Government servant who is only 51 and has completed 30 years of qualifying service, can be retired at any time at the discretion of the Government under Rule 2(2) of the Pension Rules.

5. The object of Rule 2(2) of Pension Rules may also be to weed-out those Government servants who have outlived their utility but there is no guide-line provided in the Rule to this effect. The Rule gives unguided discretion to the Government to retire a Government servant at any time after he has completed 30 years of qualifying service though he has a right to continue till the age of superannuation which is 58 years. Any Government servant who has completed 30 years of qualifying service and has not attained the age of 55 years can be picked-up for premature retirement under the Rule. Since no safeguards are provided in the Rule, the discretion is absolute and is capable of being used arbitrarily and with an un-even hand. We, therefore, agree with the Division Bench of the High Court and hold that Rule 2(2) of the Pension Rules is ultra-vires Articles 14 and 16 of the Constitution of India."

(Emphasis added)

7. A two-Judge Bench of the Apex Court in **Union of India and others v. Shaik Ali,** AIR 1990 SC 450, considered the validity of paragraph 620(ii) of the Railway Pension Manual which reads as follows:

"620(ii) The authority competent to remove the railway servant from service may also require him to retire any time after he has completed thirty years. qualifying service provided that the authority shall give in this behalf a notice in writing to the railway servant, at least three months before the date on which he is required to retire or three months. pay and allowances in lieu of such notice."

Their Lordships placing reliance on **Izhar Hussain's** case held as follows:

"In Izhar Hussain's case the Court was concerned with F.R.56(j) and Rule 2(2) of the Pension Rules. F.R.56(j) is substantially the same as Rule 2046(h)(ii) of the Code and Rule 2(2) is substantially the same as paragraph 620 with which we are concerned. Since Rule 2(2) has been struck down as violative of Article 14 of the Constitution, paragraph 620(ii) would meet the same fate."

After declaring the said provision their Lordships proceeded to state thus:

"7. Before we part we may observe that the concerned authorities will do well to amend Rule 2(2) of the Pension Rules and Paragraph 620(ii) referred to above so as to incorporate therein the requirement of public interest, that is to say, the premature retirement on completion of qualifying service of thirty years can be ordered in public interest only."

8. In **Uttar Pradesh Cooperative Sugar Factories Federation Ltd. v. P.P. Gautam and others,** (2008) 17 SCC 365, the decision of the Allahabad High Court declaring the second proviso to sub-regulation (1) of Regulation 21 of the U.P. Cooperative Sugar Factories Federation Limited Employees Services Regulations, 1988 as unconstitutional was approved by the Apex Court placing reliance on **Izhar Hussain** (supra). The provision that was under consideration read as follows: -

"An employee shall retire on attaining the age of 60 years:

Provided that an employee, who attains the age of superannuation on any day other than the first day of any calendar month shall retire on the last day of that month:

Provided further that the appointing authority may, at any time, by giving three months. notice or pay in lieu thereof, to any employee (whether temporary or permanent), without assigning any reason, require him to retire after he attains the age of fifty years or such employee may, by giving three months. notice to the appointing authority voluntarily retire at any time after attaining the age of forty-five years or after he has completed twenty years of service under the establishment of the Federation."

After referring to the said provision, their Lordships have held thus –

"The High Court has come to the conclusion that the aforesaid proviso confers an unbridled power on the employer to require an employee to retire on his attaining the age of 55 years and conferment of such unbridled power is violative of Article 14 of the Constitution. It is no doubt true that the order of compulsory retirement is not penal in nature, and every employer has a right to require the employee to compulsorily retire in accordance with the relevant service regulation, provided the non-continuance of service of the employee is held to be in public interest. The impugned regulation, however, does not indicate that the power under the second proviso could be exercised in public interest. To our query as to whether the employer has issued any guidelines for the exercise of power under the second proviso, and has indicated that such power could be exercised only in public interest, the answer was in the negative. In the absence of any such guidelines, and in the absence of such provision in the proviso itself, the conclusion of the High Court that it confers an unbridled power and is violative of Article 14 is unassailable. In fact, a decision of this Court on somewhat similar provisions in **Senior Supdt. of Post Offices v. Izhar Hussain fully** supports the conclusion of the High Court."

(Emphasis supplied)

9. The present Regulation, in our considered opinion, is similar to the Regulations which have been struck down as ultra vires by the Apex Court in the aforesaid three decisions. It suffers from the same fallibility and vulnerability, which has repeatedly prompted and compelled the

Supreme Court to strike down the unguided power of compulsory retirement.

10. Mr.Rao, learned counsel for the respondent, has commended us to a two-Judge Bench decision in **National Aviation Company of India Ltd. v. S.M.K. Khan,** AIR 2009 SC 2637 to highlight that merely because the words "at its discretion" have been used, the provision cannot be treated as unconstitutional. At the very outset, we may state with profit that the constitutionality of the provision was not the subject matter of assail in the aforesaid case. In paragraph 9, their Lordships have opined thus –

"9. The learned counsel for the respondent next submitted that recourse to 'compulsory retirement' should be only in 'public interest'; and that in this case, as neither the regulations nor the order of compulsory retirement referred to public interest, the compulsory retirement was vitiated. This contention has no merit. "Public interest" is used in the context of compulsory retirement of Government servants while considering service under the state. The concept of public interest would get replaced by 'institutional interest' or 'utility to the employer' where the employer is a statutory authority or a Government company and not the Government. When the performance of an employee is inefficient or his service is unsatisfactory, it is prejudicial or detrimental to the interest of the institution and is of no utility to the employer. Therefore compulsory retirement can be resorted to (on a review of the service on completion of specified years of service or reaching a specified age) in terms of relevant rules or regulations, where retention is not in the interests of the institution or of utility to the employer. It is however not necessary to use the words 'not in the interests of the institution' or 'service not of utility to the employer' in the order of compulsory retirement as the regulation provides that no reason need be assigned."

11. On a perusal of the aforesaid paragraph, it is quite vivid that the constitutionality of the regulation was not challenged and their Lordships have only interpreted the provision.

12. In our considered opinion, the controversy is covered by the decisions in **Izhar Hussain** (supra), **Uttar Pradesh Cooperative Sugar**

Factories Federation Ltd. (supra) and **S.M.K. Khan** (supra). In view of the aforesaid, we have no hesitation in holding that unfettered, unbridled and unguided power has been conferred on the authority to pass the order of compulsory retirement and, accordingly, we declare the said provision to be unconstitutional.

13. At this juncture, we may note with profit that we have been apprised at the Bar that the said regulation has been deleted. On a query being made as to what prevailed on the respondent to delete the said provision, Mr. Rao, learned senior counsel, submitted that the respondents have taken the decision in their own wisdom. We have noted so only for the sake of completeness.

14. Presently, to the issue of grant of necessary relief. Once the regulation is declared as ultra vires, the sequitur has to be axing of the order of pre-mature retirement and, accordingly, we so direct. Be it noted, in the meantime, the petitioner has attained the age of superannuation. Therefore, despite our quashment of the order of pre-mature retirement, we are not inclined to grant full back wages to the petitioner. As is perceptible from the material on record, he was compulsorily retired in April, 1996 and attained the age of superannuation in 2005. Regard being had to the totality of circumstances, we are inclined to restrict the back wages to 40% of the dues that would have been earned by the petitioner with the pay revision. However, he shall be entitled to all consequential benefits including pension and any other benefits under the Scheme as he would be deemed to be in service for all purposes. Be it clarified, all other benefits would also include medical facilities because he was deprived from opting for the same as he was visited with the order of pre-mature retirement prior to the expiry of the date of option. However, we may hasten to clarify that if for some other reason, he is not entitled to get the medical benefits under the scheme, the same may be brought to his notice. Needless to emphasize, the benefits that have already been availed of by the petitioner because of compulsory retirement shall be adjusted towards 40% back wages.

15. The writ petition is, accordingly, allowed in part. There shall be no order as to costs.

ILR (2011) III DELHI 160
RSA

STATE BANK OF PATIALA ....APPELLANT

VERSUS

S.K. MATHUR ....RESPONDENT

(INDERMEET KAUR, J.)

RSA NO. : 78/2010 DATE OF DECISION: 09.02.2011

Indian Contract Act, 1872—Section 128, 134—Regular second appeal against Appellate Court's order endorsing Trial Court's judgment dismissing suit for recovery by plaintiff/Appellant on the basis that suit stood abated in view of Section 134—Defendant 1 Principal debtor expired during pendency, suit stood abated qua Defendant No. 1—Defendant no.2 Guarantor—Whether in view of Section 128 and 134 of Contract Act, suit survives against Defendant 2—Held—Since suit abated against the principal debtor the result would be that suit is dismissed qua him. The question of continuation of suit against Guarantor does not arise—Claim against Guarantor not divisible and not an independent claim Section 134 applicable, surety stood discharged. Appeal dismissed.

The instant is not one such case. Admittedly in this case, a joint claim had been preferred against the two defendants of whom one having died, the suit proceedings stood abated qua him on 08.02.2007. Since the suit proceedings had abated against the principal debtor, the question of continuance of the suit against the guarantor would not arise. Claim against the guarantor was not divisible; it was not an independent claim. Section 134 of the Indian Contract Act was applicable; surety stood discharged. **(Para 8)**

In AIR 1996 SC 1427 **Sri Chand Vs. M/s Jagdish Pershad Kishan Chand,** the Apex Court had held that no exhaustive statement can be made as to when and under what circumstances the appeal will abate as a whole or it would proceed. The three tests laid down by the Court to determine this read as follows:-

> "The courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed. These three tests, as pointed out by this Court in **Sri Chand v. M/s. Jagdish Pershad Kishan Chand** MANU/SC/0008/1966 are not cumulative tests. Even if one of them is satisfied, the court may dismiss the appeal." **(Para 9)**

Applying the first test, it is clear that once the suit had abated against defendant No. 1, the result would be that the suit is dismissed qua him; if the claim is decreed against defendant No. 2 it would be a conflict between the decree of dismissal passed against defendant No. 1 and, therefore, it would lead to the court passing a decree which has even otherwise become final with respect to the same subject matter between the appellant and the deceased defendant no.1. **(Para 10)**

Important Issue Involved: The claim against Guarantor and principal debtor are not divisible and independent. If the principal debtor dies and the suit abates then the suit cannot be continued against the guarantor.

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Narender Pal, Advocate.

FOR THE DEFENDANT : Nemo.

CASES REFERRED TO:

1. *Shahazada Bi and others* vs. *Halimabi* AIR 2004 SC 3942.
2. *Sri Chand* vs. *M/s Jagdish Pershad Kishan Chand,* AIR 1996 SC 1427.
3. *Prestige Finance P Ltd. (In liquidation)* vs. *Balwant Singh & Anr* (1978) 48 Comp Cas 459.
4. *Sri Chand* vs. *M/s. Jagdish Pershad Kishan Chand* MANU/SC/0008/1966.

RESULT: Appeal dismissed.

INDERMEET KAUR, J. (Oral)

1. This appeal has impugned the judgment and decree dated 08.12.2009 which has endorsed the findings of the trial Judge dated 08.05.2009 wherein the suit filed by the plaintiff i.e. State Bank of Patiala seeking recovery against two defendants had been dismissed.

2. The short dispute is as follows:-

The plaintiff had filed a recovery suit of Rs.1,56,872.40 paise against two defendants of whom defendant No. 1 was the principal debtor and defendant No. 2 was the guarantor. This was a composite suit which had been filed by the plaintiff against both the defendants. In the course of proceedings, it was brought to notice that defendant No. 1 had expired on 18.10.2005; on 08.02.2007 orders were passed that the suit filed by the plaintiff stands abated qua defendant No. 1. A perusal of the order

dated 08.02.2007 shows that this order was passed on the statement made by counsel for defendant No. 2.

3. The question which arose for decision was as to whether the suit has abated as a whole i.e. against defendant No. 2 as well

4. Section 134 of the Indian Contract Act, 1872 (hereinafter referred to as the 'said Act') reads as follows:-

> "134. Discharge of surety by release or discharge of principal debtor.- The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor."

4. Trial Judge had relied upon the aforenoted statutory provision to draw a conclusion that the suit stands abated as a whole.

5. This finding was endorsed in appeal.

6. Learned counsel for the appellant has urged that under Section 128 of the said Act, the liability of principal debtor and guarantor is coextensive and even assuming that suit filed by the plaintiff against defendant No. 1 stands abated, the plaintiff has every right to pursue his suit against defendant No. 2; it was an independent right; the guarantor could not be discharged. It is pointed out that this is also evident from the contract between the parties. Counsel for the appellant has placed reliance upon (1978) 48 Comp Cas 459 **Prestige Finance P Ltd. (In liquidation) Vs. Balwant Singh & Anr** and AIR 2004 SC 3942 **Shahazada Bi and others Vs. Halimabi** to support this submission.

7. Both these judgments are inapplicable to this factual scenario. In the case of Prestige Finance a claim petition has been filed by the Official Liquidator under Section 446 of the Companies Act, 1956 and on summons being issued, it was noted that Krishan Lal had expired; an application under Order 22 Rule 4 of the Code of Civil Procedure (hereinafter referred to as the 'Code') had been preferred by the Official Liquidator; the Court held that the original application had been filed against a dead person; proceedings could not be declared null and void; legal representative could be brought on record under Order 1 Rule 10 of the Code; provisions of Order 22 Rule 4 of the Code would have no application

; the ratio of the said judgment is inapplicable. The second judgment relied upon by learned counsel for the appellant in Shahazada Bi is also distinct on facts. This was a case where a suit for recovery of possession had been filed against tenants in common; each defendant was in separate independent possession of each room; the relief claimed against each of the defendants was divisible and since claim was against each individual defendant, it was held that the death of one defendant would not lead to abatement of the entire suit.

8. The instant is not one such case. Admittedly in this case, a joint claim had been preferred against the two defendants of whom one having died, the suit proceedings stood abated qua him on 08.02.2007. Since the suit proceedings had abated against the principal debtor, the question of continuance of the suit against the guarantor would not arise. Claim against the guarantor was not divisible; it was not an independent claim. Section 134 of the Indian Contract Act was applicable; surety stood discharged.

9. In AIR 1996 SC 1427 **Sri Chand Vs. M/s Jagdish Pershad Kishan Chand,** the Apex Court had held that no exhaustive statement can be made as to when and under what circumstances the appeal will abate as a whole or it would proceed. The three tests laid down by the Court to determine this read as follows:-

> "The courts will not proceed with an appeal (a) when the success of the appeal may lead to the court's coming to a decision which may be in conflict with the decision between the appellant and the deceased respondent and, therefore, it would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective that is to say it could not be successfully executed. These three tests, as pointed out by this Court in **Sri Chand v. M/s. Jagdish Pershad Kishan Chand** MANU/SC/0008/1966 are not cumulative tests. Even if one of them is satisfied, the court may dismiss the appeal."

10. Applying the first test, it is clear that once the suit had abated against defendant No. 1, the result would be that the suit is dismissed qua him; if the claim is decreed against defendant No. 2 it would be a conflict between the decree of dismissal passed against defendant No. 1 and, therefore, it would lead to the court passing a decree which has even otherwise become final with respect to the same subject matter between the appellant and the deceased defendant no.1.

11. The substantial questions of law have been phrased on page 7 of memo of appeal. No such substantial question of law having arisen.

Appeal is dismissed in limine.

ILR (2011) III DELHI 165
WP (C)

AMIT DAGAR & ORS. ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(SUDERSHAN KUMAR MISRA, J.)

WP(C) NO. : 7362/2009 DATE OF DECISION: 18.02.2011

Constitution of India, 1950—Article 226 & 227—Challenge to a test after undertaking it without any protest—Petitioners challenged-conduct of test on manual typewriters on the ground that some of the candidates were allowed to take the test on computer—Respondents contended that pursuant to the consent order dated 30.04.2007 passed by the Division Bench the Petitioners who were called for typing test were asked to bring their own typewriters-denied that test was taken on computer—Some candidates were exempted by the Division Bench having qualified the test earlier it was only in those cases that test was conducted on computer.

Held—Petitioner consciously approbated the methodology adopted for conducting the test and participated without reservation—Challenged the test only on being unsuccessful—Therefore the objection of Petitioners has no force and must be rejected.

The only thing is that two or three candidates were exempted from taking this test in terms of the compromise order of 30.04.2007 on the ground that they had already qualified in a typing test held much before the termination in question was impugned before the Division bench and which led to the consent order of 30.04.2007. At that point in time, the test taken by those individuals was on a computer. Be that as it may, to my mind, looking to the fact that admittedly, the same method was applied to all who were permitted to take the test with the petitioners, and the fact that the petitioners consciously approbated the methodology adopted for conducting this test and also duly participated in the same without reservation, this objection has no force and must be rejected. **(Para 5)**

The proposition that no relief can be granted to a petitioner who has participated in the examination with open eyes and with complete knowledge of all the relevant circumstances, and then chooses to file a petition once he realizes that he has not been selected in the examination, has been reiterated repeatedly by the Supreme Court , inter alia, in **Om Prakash Shukla Vs. Akhilesh Kumar Shukla and others** 1986(Supp) Supreme Court Cases 285 para 24; and again in **Chandra Prakash Tiwari and others Vs. Shakuntala Shukla and Ors.** AIR 2002 SC 2322 wherein it is stated as follows:

> "The law seems to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not

'palatable' to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process."

This proposition has been further reiterated in **Union of India and others Vs. S. Vinodh Kumar and Others** (2007) 8 Supreme Court Cases 100 para 18, which states as follows: "It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same." **(Para 6)**

Important Issue Involved: No relief can be granted to a petitioner who had participated in the examination with open eyes and with complete knowledge of all the relevant circumstances and challenges the examination only once he realizes that he has not been selected in the examination.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sanjay Ghose, Advocate.

FOR THE RESPONDENTS : Ms. Anjana Gosain, Advocate.

CASES REFERRED TO:

1. *Union of India and others* vs. *S. Vinodh Kumar and Others* (2007) 8 Supreme Court Cases 100 para 18.
2. *Chandra Prakash Tiwari and others* vs. *Shakuntala Shukla and Ors.* AIR 2002 SC 2322.
3. *Om Prakash Shukla* vs. *Akhilesh Kumar Shukla and others* 1986(Supp) Supreme Court Cases 285 para 24.

RESULT: Writ Petition dismissed.

SUDERSHAN KUMAR MISRA, J. (Oral)

1. The only ground of challenge in the matter is that pursuant to the order passed on 30.04.2007 by the Division Bench of this Court in W.P.(C) No. 19688-92/2004 and other connected matters, the petitioners

were invited to participate in a typing test which was held on manual typewriters, whereas, according to the petitioners, some individuals were given the facility of giving their test on computer. The petitioners contend that, under the circumstances, the same opportunity should have been made available to them also.

2. Admittedly, one of the terms of the aforesaid order of 30.04.2007 passed by the Division Bench, which was a consent order, was that the petitioners would be obliged to undertake a typing test. Pursuant to that, it is also admitted that along with other candidates, the petitioners were also called for a typing test and they were asked to bring their own typewriters. Obviously, therefore, the petitioners were well aware that they would be required to use a typewriter for the test. Having known that, the petitioners brought their own typewriters and sat for the test. In other words, they approbated the structure and system adopted by the respondents for conducting the test. It is only when they found themselves unsuccessful, they seek to challenge the decision to conduct the test by way of a manual typewriter.

3. Having already taken a chance and failed, it is not open to the petitioners to now seek to impugn this aspect of the test and ask for a fresh test to be conducted on a computer. Having participated with their eyes open in the test, it is now not open to them to disavow the same merely because they have not been successful.

4. The petitioners. contentions that some individuals were permitted to take the test in question on a computer is denied by counsel for the respondent who clarifies that when the test in question was held, after due notice, all the candidates who took that test used a manual typewriter only.

5. The only thing is that two or three candidates were exempted from taking this test in terms of the compromise order of 30.04.2007 on the ground that they had already qualified in a typing test held much before the termination in question was impugned before the Division bench and which led to the consent order of 30.04.2007. At that point in time, the test taken by those individuals was on a computer. Be that as it may, to my mind, looking to the fact that admittedly, the same method was applied to all who were permitted to take the test with the petitioners, and the fact that the petitioners consciously approbated the

methodology adopted for conducting this test and also duly participated in the same without reservation, this objection has no force and must be rejected.

6. The proposition that no relief can be granted to a petitioner who has participated in the examination with open eyes and with complete knowledge of all the relevant circumstances, and then chooses to file a petition once he realizes that he has not been selected in the examination, has been reiterated repeatedly by the Supreme Court , inter alia, in **Om Prakash Shukla Vs. Akhilesh Kumar Shukla and others** 1986 (Supp) Supreme Court Cases 285 para 24; and again in **Chandra Prakash Tiwari and others Vs. Shakuntala Shukla and Ors.** AIR 2002 SC 2322 wherein it is stated as follows:

> "The law seems to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not 'palatable' to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process."

This proposition has been further reiterated in **Union of India and others Vs. S. Vinodh Kumar and Others** (2007) 8 Supreme Court Cases 100 para 18, which states as follows: "It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same."

7. The same ratio applies with full force to the facts of the present case.

8. No other grounds are raised.

9. The writ petition is dismissed.

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WP (C)

UNION OF INDIA ....PETITIONER

VERSUS

MR. D.R. DHINGRA & ANR. ....RESPONDENTS

(ANIL KUMAR & VEENA BIRBAL, JJ.)

WP(C) NO. : 11685/2009 & 11694/2009 **DATE OF DECISION: 23.02.2011**

(A) Constitution of India, 1950—Article 226—All India Services (Death-cum-Retirement Benefits) Rules, 1958—Rule 16 A and Rule 3—Petitioner moved application to change his date of birth from 06.05.1948 to 06.05.1952—His representation was rejected by Govt. of India—Petition filed before the Central Administrative Tribunal—Matter remanded back to the Govt. of India to re-examine—Central Government again declined the representation—Pursuant to the rejection of the change of date of birth by order dated 27.05.2008, the order dated 30.05.2008 was issued retiring the applicant from the service—Tribunal finally allowed the original application of the applicant—It is rarest of the rare case—Directed Central Government to consider the applicability of Rule 3 of the All India Services (Death-cum-Retirement Benefits) Rules, 1958 and to take a decision whether or not, the applicant is entitled for dispensation or relaxation of the requirement of rules or regulations on account of undue hardship to him—Order challenged by Union of India—Contested by the respondent/applicant—Held—This is no more res-integra that for invoking Rule 3 of All India Services (Conditions of service—Residuary Matters) Rule, 1960 requirement is that there should be an appointment to the service in accordance with

the rules, and by operation of the rule, undue hardship has been cause, that too in an individual case in which case the Central Government on satisfaction of the relevant conditions, is empowered to relieve such undue hardship by exercising the power to relax the condition—This cannot be disputed that in the context of 'Undue hardship' undue means something which is not merited by the conduct of the claimant, or is very much disproportionate to it—In the circumstances the three factors as alleged on behalf of applicant, retirement before the age of superannuation, deprivation of salary, allowance and qualifying service before which the applicant would be retired and the effect on his pension as the last drawn salary is the determinant effect which would be lifelong, would not constitute 'undue hardship' as contemplated under the said rule—Rule 16 of the rules of 1985 makes it clear that the said Rule is made to limit the scope of correction of date of birth and service record and the intent of the rule is to exclude all other circumstances for the said purpose—If under the rules applicable to the service of the applicant in State, he would not have been entitled for alteration of his date of birth in the State, the relief cannot be granted to him under Rule 3 of All India Services (Conditions of Service—Residuary Matters) Rule, 1960 nor the scope of Rule 16 A could be enlarged—In the circumstances the directions as given by the Tribunal cannot be sustained in the facts and circumstances of the case.

This is no more res-integra that for invoking Rule 3 of All India Services (Conditions of service-Residuary Matters) Rule, 1960 requirement is that there should be an appointment to the service in accordance with the rules, and by operation of the rule, undue hardship has been caused, that too in an individual case in which case the Central Government on satisfaction of the relevant conditions is empowered to relieve such undue hardship by exercising

the power to relax the condition. The condition of the recruitment cannot be relaxed but the condition of service may be relaxed while exercising power under Rule 3. The 'hardship' is essentially pertaining to the cadre of service, interest of service, however, least to individual interest. Government is not empowered by the rule to confer benefits which are not contemplated in rules. This also cannot be disputed that in the context of 'Undue hardship' undue means something which is not merited by the conduct of the claimant, or is very much a disproportionate to it. In the circumstances the three factors as alleged on behalf of applicant, retirement before the age of superannuation, deprivation of salary, allowances and qualifying service before which the applicant would be retired and the effect on his pension as the last drawn salary is the determinant effect which would be lifelong, would not constitute 'undue hardship' as contemplated under the said rule. Rule 16 of the rules of 1985 makes it clear that the said Rule is made to limit the scope of correction of date of birth and service record and the intent of the rule is to exclude all other circumstances for the said purpose. If under the rules applicable to the service of the applicant in State, he would not have been entitled for alteration of his date of birth in the State, the relief cannot be granted to him under Rule 3 of All India Services (Conditions of Service-Residuary Matters) Rule, 1960 nor the scope of Rule 16 A could be enlarged. In the circumstances the directions as given by the tribunal cannot be sustained in the facts and circumstances of the case. **(Para 58)**

Important Issue Involved: The date of birth of an employee cannot be changed by invoking Rule 3 of All India Services (Conditions of service—Residuary Matters) Rule, 1960, if he could not have, sought alteration of date of birth under the Rules applicable to the employee in State.

[Vi Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. S.K. Dubey and Mr. Tongesh Advocates. Mr. Mukul Rohtagi, Sr. Advocate with Mr. A.K. Behra & Mr. Ramesh Gopinathan, Advocates.

FOR THE RESPONDENTS : Mr. Mukul Rohtagi, Sr. Advocate with Mr. A.K. Behra & Mr. Ramesh Gopinathan, Advocates for respondent no.1. Mr. Manjit Singh, Advocate for respondent no.2. Mr. S.K. Dubey and Mr. Tongesh Advocates.

CASES REFERRED TO:

1. *State of Haryana* vs. *Satish Kumar Mittal and anr.* (2010) 9 SCC 337.
2. *Priya Shah* vs. *Enforcement Directorate*, 2009 (160) DLT 238.
3. *Smt.Surjit Kaur Sandhu* vs. *Union of India* 2008 in O.A No.573/2008.
4. *R.R.Tripathi and Gaurang Dinesh Damani* vs. *Union of India through Secretary, Ministry of Home Affairs & Ors.* MANU/MS/0153/2008.
5. *State of Gujarat* vs. *Vali Mohammed Dosa Bhai Sindhi;* (2006) 6 SCC 537.
6. *State of Punjab & Anr.* vs. *Shiv Narayan Upadhyay;* (2005) 6 SCC 49.
7. *UP Madhyamik Shiksha Parishad & Anr.* vs. *Raj Kumar Agnihotri;* (2005) 11 SCC 465.
8. *State of Punjab* vs. *S.C.Chaddha;* (2004) 3 SCC 394.
9. *State of U.P. & Others* vs. *Gulaichi;* (2003) 6 SCC 483.
10. *Union of India* vs. *M.S.Heble (deceased) through LRs* (2001) 9 SCC 230.
11. *G.M.Bharat Coking Coal Ltd., West Bengal* vs. *Shib Kumar Dushad & Ors.;* (2000) 8 SCC 696.
12. *S.Janardhana Rao* vs. *Government of A.P and anr.*, (1999) SCC (L&S) 653.
13. *Union of India* vs. *C.Ramaswami & Others*(1997) 4 SCC 647.
14. *Union of India* vs. *C. Rama Swamy,* (1997) 4 SCC 547.
15. *M.J. Sivani and Ors.* vs. *State of Karnataka :* [1995]3SCR329.
16. *Syed Khalid Rizvi and Ors. & Ramesh Prasad Singh and Ors.* vs. *Union of India (UOI) and Ors & Krishna Behari Srivastava* vs. *State of U.P. and Anr;* (1993)3SCC575.
17. *Executive Engineer, Bhadrak (R&B) Division, Orissa and Ors.* vs. *Rangadhar Mallik;* (1993) Sup.1 SCC 763.
18. *Union of India* vs. *Harnam Singh;* (1993) 2 SCC 162.
19. *UOI* vs. *Harnam Singh,* (1993) 2 SCC 162.
20. *R.R.Verma & Ors.* vs. *Union of India & Ors.;* (1980) 3 SCC 402.
21. *D.D.Suri* vs. *Union of India (UOI) & Anr.;* (1979) 3 SCC 553.

RESULT: Petition dismissed.

ANIL KUMAR, J.

1. These writ petitions are against the orders dated 4th August, 2009 passed by the Principal Bench, Central Administrative Tribunal in O.A No.1267/2008 titled **'D.R. Dhingra v. Union of India and Anr'** holding that the date of birth of Sh.D.R.Dhingra (hereinafter referred to as applicant) is 6th May, 1952 and not 6th May, 1948. The Tribunal has held that though there is no bonafide clerical mistake as contemplated under Rule 16A of the All India Services (Death-cum-Retirement Benefits) Rules, 1958, however, the tribunal deemed the case of the applicant as a rarest of rare case, and thus directed the Central Government to consider the applicability of Rule 3 of the All India Services (Conditions of Service-Residuary Matters) Rules, 1960 and to take a decision whether or not, the applicant is entitled for dispensation or relaxation of the requirement of rules or regulations on account of undue hardship to him. The Tribunal,

however, left it to the discretion of the Union of India to continue or not to continue the applicant in service and during the three weeks granted by it directed the Government to decide the applicability of Rule 3 and if the Government is of the view that in the facts and circumstances, the case does entail a change in date of birth, then the period of three weeks be not treated as an interruption in the service of the applicant. The Tribunal further directed that in case the applicant succeeds then he be also given leave of the kind due, as may be permissible under the rules.

2. The Union of India has challenged the impugned order dated 4th August, 2009 of the Tribunal in Civil Writ Petition No.11685/2009 challenging the date of birth of the applicant as 6th May, 1952 and the direction of the Tribunal to consider the case of the applicant under Rule 3 of the All India Services (Conditions of Service-Residuary Matters) Rules, 1960 whereas the applicant has also challenged the order of the Tribunal in his writ petition being W.P(C) No.11694/2009 seeking direction to Union of India to continue the applicant in service in accordance with his date of birth as 6th May, 1952 and to give all the consequential benefits and direction to the UOI to issue and order after getting extension of time for implementation of the order dated 4th August, 2009, advising the Chief Secretary, State of Haryana not to discontinue the services of the petitioner.

3. The facts in brief relevant for decision of writ petitions are as follows. On 14th May, 1993 after the name of the applicant was approved for selection from State Civil Services to Indian Administrative Service, a representation dated 22nd May, 1993 was filed before the Chief Secretary, Government of Haryana regarding alteration of his date ˇof birth contending inter-alia that the mother-in-law of his elder sister Smt.Sheela Taneja had expired in April, 1993 and on the kriya ceremony it transpired that his elder sister was born in the year 1951 being the first child out of the wedlock of his parents who got married in the year 1949. He asserted that his elder sister Sheela was born on 21st July, 1951 as per the certificate issued by District Registrar (Birth and Death) Civil Surgeon, Rohtak. According to the applicant the birth certificate also indicates that Sheela was the eldest child born to her parents at Village Anwal, Police Station Kalanaur, Tehsil and District Rohtak. His sister was admitted in the year 1960 in the first class in the Government Girls Primary School at Village Anwal and her school certificate and middle

standard examination certificate indicated her date of birth as 3rd March, 1951. The applicant contended that he is the second child and as per the certificate of the Government Primary School, Anwal he was born on 6th May, 1952 which is also the date of birth in the certificate issued by the Headmaster, Government High School, Lahli, which is also the date of birth reflected by the certificate issued by the District Education Officer, Rohtak for middle standard examination. The applicant also contended that the office of District Registrar (Births and Deaths) Civil Surgeon, Rohtak failed to supply his birth certificate, rather issued "not to be found" certificate for the year 1948-50 and 1952-54. According to the applicant therefore, his date of birth as recorded in the service record as 6th May, 1948 cannot be correct as he being the second child, his year of birth should be between 1951-1955 as the first child to his parents was born in 1951 and the child younger to him was born in 1955. The incorrect date of birth in the matriculation certificate in his opinion was on account of some act of commission and omission of the teacher filling up the form of Matriculation Examination. The applicant further pleaded that his younger brother Manohar Lal whose name is recorded as Vishan Dass in the certificate issued by District Registrar (Births and Deaths) Civil Surgeon, Rohtak was born on 26th November, 1955. The certificate also discloses that his brother Manohar Lal was the third child. His brother's high school certificate shows his date of birth as 6th April, 1955. In the case of his younger brother and younger sister though there are variations in the date and month in the various records, however, the order is the same. The applicant, therefore, contended that his date of birth is 6th May, 1952 and not 6th May, 1948 as he could not have been born prior to the marriage of his parents in the year 1949.

4. The first representation of the applicant was rejected and communicated by letter dated 12th July, 1993 by the Under Secretary (Administration) on behalf of the Chief Secretary to the Government of Haryana stating that the applicant first entered into the Government service as Assistant Registrar Cooperative Societies, Haryana on the basis of the date of birth recorded in the Matriculation Certificate as 6th May, 1948. Had the date of birth of the applicant being 6th May, 1952 he would not have been eligible for appointment to the said post. It was further stated that since the applicant has already availed the benefit in the matter of entry into service on the basis of the date of birth recorded in the matriculation certificate, the applicant is estopped from stating that his

correct date of birth is 6th May, 1952 and, therefore, his request for changing the date of birth from 6th May, 1948 to 6th May, 1952 was rejected.

5. The applicant had moved the Punjab University for change of his date of birth in his Matriculation Certificate from 6th May, 1948 to 6th May, 1952 which was allowed by the University in its syndicate proceedings held on 20th January, 1997 and a revised matriculation certificate changing the date of birth from 6th May, 1948 to 6th May, 1952 was issued. Consequent thereto the applicant filed another representation dated 27th March, 1997 to the Chief Secretary, Government of Haryana.

6. Another representation of the applicant was rejected by Department of Personnel and Training by communication reference No.F.No.25015/3/97-AIS-II dated 19th May, 1997 stating that as per Rules 16A (3) of AIS (DCRB) Rules, 1958 change of date of birth in service records of an IAS officer is not to be allowed unless there is a bonafide clerical mistake in accepting the date of birth as per sub rule (2) or (3) of Rule 16A of AIS (DCRB) Rules. While rejecting the representation of the applicant, reference was also made to the decision of the Tribunal, Principal Bench in case of **Deshraj Singh v. Union of India** in O.A No.1789/1990 stipulating that even a complete certificate indicating the entry of birth in the register of births and deaths cannot shake the date of birth once it has been accepted in accordance with the statutory rules. It was further stated that if anybody after taking advantage of the date of birth recorded in the High School/Matriculation Certificate secures employment, such a person cannot claim change of date of birth and in the circumstances there is no bonafide clerical mistake in accepting the date of birth as 6th May, 1948 and the second representation of the applicant was also rejected.

7. After rejection of applicant's second representation by communication dated 19.5.1997, the applicant remained dormant for ten years. Ten years after the rejection of his second representation, the applicant made a third representation to the Chief Secretary, Government of Haryana which was forwarded by the State Government to the Government of India, Ministry of Personnel by communication dated 26th July, 2007. In the third representation dated nil made by the applicant he reiterated the facts as disclosed by him in the first and second

representations of 1993 and 1997 respectively and further contended that the rejection of his representation on the premise that he had also taken the advantage of his recorded date of birth 6th May, 1948 while getting employment in the State Government according to rules, is not correct.

8. The petitioner disclosed that advertisement was issued in October, 1972 for holding Haryana Civil Service (Executive Branch) and other allied services Examination which was to be held in March, 1973. He passed the examination held in June, 1973 and was called for an interview on 7th February, 1974. The post for Assistant Registrar Cooperative Society in 1974 was governed by Punjab State Cooperative Service Class II, Rules, 1958. Rule 6 (b) of the said rules provided for qualification of the candidates by direct recruitment which provided eligibility condition of 21 years and not more than 25 years on the first of October preceding the date on which he was interviewed by the Commission. According to the applicant his age, therefore, should not have been less than 21 years on 1st October, 1973 and more than 25 years on that date, as the interview was held on 7th February, 1974. According to him by taking into account his proposed date of birth as 6th May, 1952 also, he was more than 21 years of age on the relevant date and eligible for appointment. Therefore, he had not taken any benefit of giving the wrong date of birth as 6th May, 1948 because with his allegedly correct date of birth also he would have been eligible for appointment to the post of Assistant Registrar Cooperative Societies. He further stated that after selection to the post of Assistant Registrar, Co-operative Society he underwent training for 2 years but before the completion of training he competed for HCS (EB) Examination held in the year 1974 and was selected and appointed to Haryana Civil Service. In the circumstances, it was stated that he was never appointed as Assistant Registrar, Cooperative Societies. The advertisement issued by the Haryana Civil Service Commission was, however, not produced contending that in any case it is irrelevant as any age limit prescribed in the advertisement contrary to the rules would be a nullity.

9. The applicant's plea was that rejection of his earlier representation appeared to be on the basis of rules of 1997 i.e the Haryana State Cooperative (Group B) Service Rules, 1997. Rule 5 of the 1997 Rules contemplate that no person shall be appointed in the service by direct recruitment who was less than 21 years or more than 35 years of age

on or before the last date of submission of application to the commission. In the circumstances, in his third representation of 2007 the applicant contended that as per his wrong date of birth he would retire on 31st May, 2008 though he is legally entitled to work upto 31st May, 2012 and, therefore, he sought change of his date of birth.

10. The third representation of the applicant was also rejected by the Government of India by letter reference No.25015/3/97-AIS (II) dated 7th September, 2007 on the ground that in view of provision of Rule 16A of AIS (DCRB) Rules, 1958 it is not established that a bonafide clerical error has been committed in accepting the date of birth under sub Rule (3) of Rule 16A and, therefore, the request of the applicant for change of date of birth from 6th May, 1948 to 6th May, 1952 was not accepted.

11. Aggrieved by the rejection of the representation by communication dated 7th September, 2007, the applicant filed a petition before Central Administrative Tribunal, Principal Bench being O.A No.2207/2007 titled **'Sh.D.R.Dhingra v. Union of India'** which was disposed of by order dated 13th March, 2008 remitting the matter back to the Government of India to re-examine the same in the context of the observations made in the order dated 13th March, 2008 and in the light of the decision of the Apex Court in **S.Janardhana Rao v. Government of A.P and anr.,** (1999) SCC (L&S) 653 and **Union of India vs. C. Rama Swamy,** (1997) 4 SCC 547.

12. Pursuant to order dated 13th March, 2008 the Government of India passed the order dated 27th May, 2008 relying on Rule 16A of the AIS (DCRB) Rules, 1958 holding that change of date of birth in the service records of an IAS Officer is not be allowed unless there is a bonafide clerical mistake in accepting the date of birth as per sub Rule (2) or (3) of the said rule. The communication dated 27th May, 2008 also relied on the uniform policy of the Central Government that the date of birth once entered by the concerned officer in the service record is not to be changed on any ground at all except if there was some clerical mistake while entering the date of birth. Any subsequent change in the source of information regarding date of birth does not make it incumbent for the Government of India to make consequential changes in the service records. The judgments in reference to which the representation was to

be reconsidered were considered and were found to be distinguishable. The Government of India noticed that in case of **C.Ramaswamy** (supra), the candidate was a direct recruit to IAS whereas the applicant was appointed from the State Civil Service under the IAS (Appointment by Promotion) Regulation and was an officer of the State Civil Service. Relying on various other orders of the Supreme Court and the Tribunal it was held that correction of date of birth or alteration was not to be allowed at the fag end of service or after considerable period on entering the service, as it would disturb the entire cadre management and as a result thereof continuation of an officer further would have far reaching implications and shall affect the service conditions of other officers including the juniors. Reliance was placed on Tribunal's order dated 2nd April, 2008 in O.A No.573/2008, **Smt.Surjit Kaur Sandhu v. Union of India** holding that matriculation certificate is not the sole criterion under All India Service Rules to determine the date of birth. It was also held that the selection committee constituted under Regulation 3 of the Indian Administrative Service (Appointment by Promotion) Regulation, 1955 held on 30th March, 1993, had prepared a list of candidates including the applicant where the date of birth of the applicant was recorded as 6th May, 1948 whereas the applicant made representation to the State Government for change of his date of birth on 22nd May, 1993, two months after the meeting of the selection committee held on 30th March, 1993. The UPSC had also approved the recommendations of Selection Committee on 14th May, 1993 prior to the representation of the applicant and the applicant had not represented either to the State Government before the meeting of the Selection Committee or before the approval of the recommendation of the Selection Committee by UPSC on 14th May, 1993 despite being in the State Civil Service since 1st July, 1976. Therefore the alteration was not allowed after considerable period of entering the State service as it would have disturbed the cadre management and as a result thereof continuation of applicant further would have had far reaching implications and would have affected the service conditions of other officers including the juniors. In the circumstances, the Government of India held that the representation of the applicant for change of his date of birth could not be said to be pending with the Government on the date relevant for acceptance of date of birth and could not be allowed.

13. The case of **S. Janardhana Rao** (supra) was also found to be distinguishable as in that case the date of birth of the candidate had been

changed by the State Government prior to the meeting of the selection Committee for inclusion of the name of the candidate in the select list. However, instead of correct date of birth, incorrect date of birth was communicated whereas in the case of applicant no representation was even pending on the date of the selection Committee meeting. In the case of S.Janardhana Rao before the proposal was sent for promotion to IAS, the State Government had corrected the service book of that candidate and consequently it had been held that on the ratio of S.Janardhana Rao's case the applicant is not entitled for change of date of birth, as the State Government did not change his date of birth before his case was referred to the Central Government. Thus on reconsideration of the representation of applicant pursuant to order dated 13th March, 2008 of the Tribunal, the change of date of birth was again declined by order dated 27th May, 2008.

14. Pursuant to rejection of change of date of birth of the applicant by order dated 27th May, 2008, an order dated 30th May, 2008 was issued retiring the applicant from the service. The applicant filed an original application being O.A No. 1267/2008 where an interim order dated 17th June, 2008 was passed and the order dated 27th May, 2008 of the Department of Personnel and Training as well as order dated 30th May, 2008 retiring the applicant from service were stayed till 1st July, 2008.

15. The Tribunal has allowed the Original application of the applicant holding that the case of the applicant is a rarest of rare case, as he has produced irrefutable and unimpeachable evidence showing that his date of birth recorded in the official record is incorrect. Despite all other authorities accepting his stand based on the evidence produced by the applicant, even the State of Haryana recommending by a detailed communication supporting the case of the applicant, the Government of India has declined to change the date of birth on the rigor of Rule 16A of the All India Service (Death Cum Retirement Benefits) Rules, 1958. The Tribunal held that with regard to the actual date of birth there is hardly any doubt about the date of birth of the applicant. It was held that the case of the applicant is not such where an employee comes on some imaginary stories like coming to know of their correct date of birth from their old or grown up relations or from their family purohits. But the applicant has been able to bring on record and to the satisfaction of all

concerned, be it the Punjab University or the State Government, irrefutable evidence of his actual date of birth being 6th May, 1952. The Tribunal also held that the parents of the applicant got married in November, 1949 and his elder sister was born on 21st July, 1951, therefore, the date of birth of 6th May, 1948 as recorded in the original matriculation certificate of the applicant, could not be correct as he could not have been born before his parents were married and before his elder sister was born. Thus the applicant brought on record all the conceivable certificates up to the middle standard which too he had passed from the State Education Board which are more than 30 years old and hence has the presumption of truth under Section 90 of the Evidence Act. The Tribunal further held that the birth and death certificates as also middle school examination certificate were in the custody of such authorities which, in the nature of their duties, carry out such purpose. Hence it was concluded that the said certificates were given by the proper authorities and would meet the requirement under section 90 of the Evidence Act. According to the Tribunal on the basis of pleadings made in the application and the documents, a firm finding has to be recorded that the applicant had produced irrefutable and unimpeachable evidence that he was actually born on 6th May, 1952 and not on 6th May, 1948 and, therefore, the date of birth being 6th May, 1952 had become a non issue.

16. The Tribunal by impugned order, however, held that the correct procedure as envisaged under Rule 16A of the 1958 Rules of not accepting the date of birth was adopted and no bonafide clerical mistake had been committed in accepting the date of birth of the applicant as 6th May, 1948. The plea of the applicant that the order of the Government of India dated 27th May, 2008 was in contrast to the judicial precedent of Supreme Court in **S.Janardhana Rao** (Supra) was repelled. The plea of the applicant that while deciding his earlier O.A 2207/2007, the Tribunal had given a conclusive finding was also repelled holding that if the findings given in the earlier original application filed by the applicant by the Tribunal were final, there was no need to remit the matter to the authorities concerned.

17. The Tribunal dealing with the issue of delay or inaction on the part of the applicant held that the issue had been raised only during the course of the argument and change of date of birth has not been rejected on the basis of delay. It was held that in the reply filed on behalf of Government of India there was no plea with regard to the applicant

acting late in the matter of correction of his date of birth. According to the Tribunal in the case of the applicant, it is not that he had hit upon an idea to get a change in his date of birth close to his retirement, instead as soon as he came to know about the discrepancy in his date of birth record in his matriculation certificate, he moved the Punjab University for correction of his date of birth in the matriculation certificate and the decision was taken in the syndicate meeting held on 20th January, 1997. Applicant even prior to that day had made a representation on 22nd May, 1993 to the Chief Secretary Haryana. The Tribunal also noted that had the plea of delay been determined at any stage, the applicant would have explained that he was not aware of the difference in rules applicable when he came to be appointed and the rules on the basis of which it was said that the applicant had taken advantage of his wrong date of birth in securing the Government employment as the Assistant Registrar Cooperative Societies. It has also been held that applicant is not in the kind of service that he would have naturally known in the course of his duties the rule position and, therefore, the third representation made after 10 years of the second representation was held to be justified and, therefore, rejection of change of date of birth on the ground of delay was not acceded to.

18. Tribunal after returning the finding that the actual date of birth of the applicant is 6th May, 1952 and not 6th May, 1948 relying on the alleged irrefutable and or impeachable evidence produced by the applicant further held that it is a rarest of rare case. Since the applicant had not taken advantage of his wrong date of birth for securing the Government employment, therefore, rejection of his representation in 1993 and 1997 was incorrect as his representations were rejected on the wrong premise that he had taken advantage of his wrong date of birth and that he was ineligible in 1974 for the appointment to the post of Assistant Registrar, Cooperative Societies on the basis of his date of birth of 6th May, 1952. Since the evidence produced by the applicant has been held to be irrefutable, the Tribunal considered whether the rigor of Rule 16A of Rules of 1958 can be relaxed or not. In view of Rule 3 of the All India Services (Conditions of Service-Residuary Matters) Rules, 1960 the Tribunal has deemed it to be a case which requires consideration by the Government of India and, therefore, has directed the Government of India to consider the applicability of Rule 3 on the ground that the case of the applicant appears to be a rarest of rare case where the employee has proved to the

hilt that his date of birth is incorrect and allowed his original application to this limited extent.

19. The order of the Tribunal has been challenged by the Government of India inter alia on the following grounds. Learned counsel for the petitioner has vehemently argued that the tribunal has gravely erred in its finding that the present matter of the applicant is a rarest of rare case and hence the petitioners are required to reconsider the plea of the applicant under Rule 3 of the All India Services (Condition of Service-Residuary Matters) Rules 1960. It is alleged that the tribunal has completely ignored the law on the subject, on both counts namely the statutory rules enumerated in Rule 16 A which does not permit the change of date of birth except on account of a bonafide clerical mistake, a change which would have a cascading adverse effect on other employees, public interest vis-à-vis individual interest and that neither the requirement of rule 3 are applicable in the case of applicant nor the applicant had made such a request or prayer before the government or even before the Learned Tribunal.

20. The learned counsel for the Union of India Mr. Dubey has contended that even the Tribunal came to the conclusion that the correct procedure as envisaged under Rule-16A of the Rules of 1958 was adopted and while doing so, no bonafide clerical mistake had been committed in accepting the date of birth. According to the learned counsel once the Tribunal has given the finding that there has not been any bonafide clerical mistake under Rule 16A of 1958 Rules, direction could not be given to the petitioner to consider the matter for giving relaxation under Rule 3(ii) of the All India Services (Conditions of Service–Residuary Matters) Rule, 1960 to relax Rule 16A on account of alleged undue hardship and alter the date of birth of the applicant.

21. According to the learned counsel the power under Rule-3 is an enabling power of the Central Govt. which on consideration of facts in an appropriate case, may, grant relief, any relaxation of certain provisions of the Rules or the Regulations made under All India Service Act. According to him, Union of India has raised in Ground (G) of the petition, the challenge to the change of date of birth of the respondent. Representations after a lapse of 17 long years in the service in the government by the applicant for a change of his date of birth from 6th

May, 1948 to 6th May, 1952 on the ground that his parents got married in 1949 and his elder sister was born on 21st July, 1951 and that in 1993, on the death of the mother-in-law of his elder sister, he came to know about these facts and therefore, his correct date of birth on the basis of the documents collected by him is 6th May, 1952 and not changing his date of birth will cause undue hardship, is without any factual and legal basis.

22. In view of the ex facie evident facts that the applicant is an officer qualified as MA, LL.B and worked as a civil servant in state services for 45 years and is the eldest male child, learned counsel contends that it is incomprehensible to accept that he wasn.t aware of the alleged mistake in his date of birth as recorded in the service record for the 17 years he spent in service. That the date of birth of the applicant being 6.5.1948 as recorded in his service record, was furnished by him with his academic testimonials since 1976, pursuant to his appointment in Haryana Civil Service (Executive) and also recorded in the Matriculation Certificate issued by the Punjab University, produced by the applicant at the time of his selection to the post of Assistant Registrar, Co-operative Society, Haryana. Thereafter on his selection in the Haryana State Civil Service (Executive) at the administrative level for nearly 17 years from his joining the civil services in State of Haryana and approximately 45 years from his date of birth, the respondent did not complain or make any representation with regard to the alleged incorrect date of birth i.e. 6.5.1948 as appearing in the service book and his academic record. In March, 1993 the name of the applicant was included in the select list for promotion to the All India Civil Services (IAS) along with the other officers of the State of Haryana. In May 1993 UPSC had held DPC where his name was recommended for the promotion to the All India Civil Services (IAS) and it is only then that the applicant had made his first application on 22nd May 1993 for change of date of birth from 6.5.1948 to 6.5.1952. After the rejection of his first two representations in 1993 and 1997, the third application was only made in the year 2007 when the respondent was due to retire on 31st May 2008, at the fag end of his service. The first representation to the State Government was in the circumstances after considerable period after entering the State service, rather at the fag end of State Service. It was contended that under the rules of the State Government, the applicant would not have been entitled for change of his date of birth after 17 years of entering the service.

Hence it was contended that the applicant cannot be allowed to take advantage of his own wrong in the facts and circumstances of the present case, where such mistake is not bonafide.

23. It is also contended that Rule 16 of the All India Service (Death Cum Retirement Benefit) Rules 1958 permits only correction of date of birth in cases of bonafide clerical mistake, while Rule 3(ii) of the All India Services (Conditions of Service Residuary Matters) Rules clearly states that any regulation made under any such rule, regulating the conditions of service of persons appointed to All India Service causes undue hardship in any particular case, it may, by order, dispense or relax the requirements of the rule or regulation, as the case may be, to such extent and subject to such exceptions and conditions as it may consider necessary for dealing with the case in a just and equitable manner. “Undue hardship” signifies unforeseen or unmerited hardship to an extent not contemplated when the rule was framed and does not cover any ordinary hardship or inconvenience which normally arises. This also undoubtedly implies the reasonable care to be taken on the part of the party alleging undue hardship. In the facts and circumstances it is evident that the undue hardship caused is due to the negligence or mistake on the part of the applicant himself for which the government cannot be held responsible.

24. The bare reading of Rule 16 makes it clear that the said Rule is made to limit the scope of correction of date of birth and service record and the intent of the rule is to exclude all other circumstances for the said purpose. The benefit to alleviate the undue hardship of relaxation of any rule or rules must be of a nature already provided for in the rules. Government is not empowered by this rule to confer benefits which are not contemplated in the rules. Therefore the impugned order of the tribunal is apparently erroneous, illegal and contrary to the mandate of law and the intent and purposes of All India Services (Condition of Service- Residuary matters) Rules 1960 as well as All India Services (Death cum retirement Benefit) Rules 1958.

25. It has been further contended that the order of the Tribunal is bound to have a delirious effect of overriding and upsetting the service record maintained in the due course of administration for promotion/ appointment to All India Services and seniority thereof. The impugned order of the tribunal is contrary to the public interest and virtually makes

the statutory provisions i.e. Rule 16 of the All India Services (Death cum Retirement) Rules 1958 totally ineffective and non applicable.

26. Regarding the non applicability of Rule 3 of the residuary rules the learned counsel Mr. Dubey has relied on (1993)3SCC575, **Syed Khalid Rizvi and Ors. & Ramesh Prasad Singh and Ors. Vs. Union of India (UOI) and Ors & Krishna Behari Srivastava Vs. State of U.P. and Anr;** (1979) 3 SCC 553, **D.D.Suri Vs Union of India (UOI) & Anr.;** (1980) 3 SCC 402, **R.R.Verma & Ors. Vs Union of India & Ors.;** MANU/MS/0153/2008, **R.R.Tripathi and Gaurang Dinesh Damani Vs Union of India through Secretary, Ministry of Home Affairs & Ors.** According to learned counsel for the Union of India mere assertion of `undue hardship is not sufficient and has relied on 2009 (160) DLT 238, **Priya Shah Vs Enforcement Directorate,** New Delhi. Reliance has also been placed on (2001) 9 SCC 230, **Union of India Vs M.S.Heble (deceased) through LRs** where Supreme Court had set aside the order of Tribunal invoking Rule 3 All India Services (Condition of Service-Residuary Matters) Rules, 1960.

27. The learned counsel for the Union of India has also relied on (2010) 9 SCC 337, **State of Haryana Vs Satish Kumar Mittal and anr.** to contend that under the rules of State Government the claim of the applicant seeking alteration of date of birth could not be entertained after 19 years and since the record of the Union of India is based on the date of birth recorded in the record of the State Government, the same cannot be done and the Tribunal could not have given a direction to treat it as rarest of rare cases and apply Rule 3 of the All India Services (Conditions of Service-Residuary Matters) Rules, 1960 and to take a decision whether the applicant is entitled for dispensation or relaxation of the requirement of rules or regulations on account of undue hardship.

28. The learned counsel for the Union of India has also relied on (1993) Sup.1 SCC 763, **Executive Engineer, Bhadrak (R&B) Division, Orissa and Ors. v. Rangadhar Mallik;** (1993) 2 SCC 162 **Union of India v. Harnam Singh;** (2000) 8 SCC 696 **G.M.Bharat Coking Coal Ltd., West Bengal v. Shib Kumar Dushad & Ors.;** (2003) 6 SCC 483 **State of U.P. & Others v. Gulaichi;** (2004) 3 SCC 394, **State of Punjab v. S.C.Chaddha;** (2005) 6 SCC 49 **State of Punjab & Anr. v. Shiv Narayan Upadhyay;** (2005) 11 SCC 465 **UP Madhyamik Shiksha Parishad & Anr. v. Raj Kumar Agnihotri;** (2006) 6 SCC 537 **State of Gujarat v. Vali Mohammed Dosa Bhai Sindhi;** (1997) 4 SCC 647 **Union of India v. C.Ramaswami & Others** in support of its pleas and contentions.

29. Per contra the learned counsel for the applicant contended that two fold reliefs have been claimed by the applicant, which are setting aside the impugned orders dated 27.5.2008 and 30.05.2008 and to correct the date of birth of the applicant as 6.5.1952 and to give all the consequential benefits to the applicant.

30. The learned counsel for the applicant has contended that the order dated 27th May 2008 is based on after thoughts and is contrary to statutory rules, in as much the petitioners have declined to accept 6.5.1952 as the correct date of birth on the ground that as on 30th March 1993 when the Selection Committee meeting was held to consider the petitioner for promotion, no representation regarding the date of birth had been preferred by the petitioner. It is contended that it is not the Selection Committee but the Central Government who accepts the date of birth. It is an admitted position that the proposal relating to the promotion of the respondent was sent by the State Government only on 8th July 1993 and by that time the representation of the petitioner regarding the date of birth was pending with the State Government. Thus the natural inference would be that the occasion for accepting the date of birth would arise only after 8th July 1993 and not before that. In support of this submission the learned counsel for the respondents has relied on Rule 16 A of the All India Services (Death-Cum –Retirement Benefits) Rules 1958 which clearly stipulates in clause (1):

> "For the purpose of determination of the date of superannuation of a member of the service, such date shall be calculated with reference to the date of birth as accepted by the Central Government under this rule"

31. The learned counsel for the respondent has also relied on the comments given by the State Government to his third representation made in the year 2007 dated nil which is annexed with the letter date 28th June 2007 by the Chief Secretary, Government of Haryana, addressed to the Secretary, Government of India, Ministry, which has been heavily relied on by the Tribunal as well. The State government had duly traced the history of the case referring to the earlier representations made by the

applicant and had given detailed reasons for its finding that the applicant had submitted irrefutable proof of his actual date of birth as being 6.5.1952 instead of 6.5.1948. It was also stated therein that the respondent had not accrued any benefit in the matter of securing employment in the Government on the basis of his wrong date of birth. The learned counsel for the respondent further contended that even though The State Government had found the representation meritorious with the conclusion that the evidence produced by the applicant for the correction of his date of birth was irrefutable, and had even made the recommendation to the Government of India for correction of his date of Birth in the official records, however by order dated 9th August 2007, the State government could not do the needful, as the service records were not in its possession and were instead sent to the Government of India.

32. According to Mr. Rohtagi, Sr. advocate the declaration given by The Tribunal on the basis of irrefutable and unimpeachable evidence, that the date of birth of applicant is 6th May, 1952 has not even been challenged by the Union of India. According to him the middle school certificate and the marks sheet issued by the concerned authorities, the date of birth has been shown as 6th May, 1952. He submitted that even in earlier petition before Central Administrative Tribunal, Principal Bench being O.A No.2207/2007 titled **'Sh.D.R.Dhingra v. Union of India'** which was disposed of by order dated 13th March, 2008 remitting the matter back to the Government of India to re-examine the same in the context of the observations made in the order dated 13th March, 2008 and in the light of the decision of the Apex Court in **S.Janardhana Rao v. Government of A.P and Anr,** (1999) SCC (L&S) 653 and **Union of India v. C. Rama Swamy,** (1997) 4 SCC 547, the date of birth of the applicant as 6th May, 1952 was not challenged nor in any of the application the factum of the said date of birth has been denied.

33. According to learned senior counsel `undue hardship. has not been defined in any of the judgments of Supreme Court in service matters. The expression 'undue hardship' has to be construed in normal circumstances and a natural meaning has to be given to the said expression. According to him 'undue' is unnecessary and `hardship' is suffering. Since the factum of date of birth is not denied, the three factors, retirement before the age of superannuation, deprivation of salary, allowances and qualifying service before which the applicant would be retired and the

effect on his pension as the last drawn salary is the determinant effect which would be lifelong, and would therefore constitute 'undue hardship'.

34. This Court has heard the learned counsel for the parties in detail and has also perused the record which was before the Tribunal and the precedents relied on by the parties. Before analyzing the facts of the case, the precedents relied on by the parties are considered.

35. In **Executive Engineer, Bhadrak (R&B) Division, Orissa and Ors.** (Supra), the Supreme Court had held while dealing with Rule 65 of Orissa General finance rule that correction in a date of birth cannot be entertained at stage of superannuation and date of birth admitted in service role shall be final. It was also held that while dealing with the representation for alteration in change of date of birth, there was no requirement of any law to give any personal hearing to any such employee before dismissing his representation.

36. In **Harnam Singh** (Supra), the Apex Court was of the opinion that those employees who were already in service prior to 1979 were obliged to seek alteration within the maximum period of 5 years from the date of coming into force of amended note in 1979. In this case, alteration was sought in 1991 by the employee 35 years after his induction into the service in 1956 during which period he had several occasions to see service book, but he raised no objection regarding his date of birth and therefore, in view of unexplained and inordinate delay and relying on Fundamental Rule 56 (m) a note vide the alteration in the date of birth was declined. A division Bench of this Court in the matter of Sh.Y.P.Madan (WP(C) No.6821/2010) by order dated 24.01.2011 had noticed the judgment of Supreme Court setting aside the direction given to Government of Haryana for change of date of Birth. It was held:

> 19. In a recent judgment, the Supreme Court had set aside the decree granted in favor of the employee of Haryana Govt. directing the authorities to correct the date of birth of the employee, though the request was made 9 years after joining the service. Rules had contemplated that correction of date of birth could be sought within two years from joining the service. In this recent judgment **State of Haryana Vs. Satish Kumar Mittal & Ors.,** (2010) 9 SCC 337, the Supreme Court rather cautioned the Tribunal or the High Court that any application for correction of

date of birth should not be dealt with keeping in view only the public servant concerned. The Apex Court was of the view that any direction for correction of the date of birth of the public servant concerned has a chain reaction inasmuch as others waiting for years below him for their respective promotions are affected in this process and some are likely to suffer irreparable injury, inasmuch as, because of the correction of date of birth, officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority, waiting for promotion may lose their promotions for ever.

20. According to the Supreme Court, the application for correction of date of birth is also to be looked into from the point of view of the concerned department and the employee engaged therein. No doubt, it is true that the respondent has since retired and in his case, alteration in the date of birth may not affect many employees, however, under the Rules prescribing the time limit during which the alteration can be carried out, no exceptions have been carved out that alteration in the date of birth can be carried out if the employee requesting the correction of the birth date has already retired. The Supreme Court has further held that unless a clear case on the basis of clinching material, which can be held to be conclusive in nature, is made out by the public servant and that too within a reasonable time as provided in the Rules governing the service, the Court or the Tribunal should not issue a direction or make a declaration on the basis of the materials which make such claim only plausible. The Supreme Court relied on para-7 of **UOI Vs. Harnam Singh,** (1993) 2 SCC 162with approval, which is as under:

> "A Government servant, after entry into service, acquires the right to continue in service till the age of retirement, as fixed by the State in exercise of its powers regulating conditions of service, unless the services are dispensed with on other grounds contained in the relevant service rules after following the procedure prescribed therein. The date of birth entered in the service records of a civil servant is, thus of utmost importance for the reason that the right to continue in service stands decided by its entry

> in the service record. A Government servant who has declared his age at the initial stage of the employment is of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the Government servant must do so without any unreasonable delay. In the absence of any provision in the rules for correction of date of birth, the general principle of refusing relief on grounds of laches or stale claims, is generally applied to by the courts and tribunals. It is nonetheless competent for the Government to fix a time limit, in the service rules, after which no application for correction of date of birth of a Government servant can be entertained. A Government servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous. The law of limitation may operate harshly but it has to be applied with all its rigour and the courts or tribunals cannot come to the aid of those who sleep over their rights and allow the period of limitation to expire. Unless altered, his date of birth as recorded would determine his date of superannuation even if it amounts to abridging his right to continue in service on the basis of his actual age..."

37. In **G.M.Bharat Coking Coal Ltd.** (supra), the employee had sought alteration in the date of birth in the service record maintained by employer after 20 years of service. The employee in this case had subsequently obtained two certificates and claimed alteration in the date of birth on the basis of the same. The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India had allowed the writ petition directing the employer to change the date of birth. Reversing the decision of the High Court it was held that core question was whether two certificates subsequently obtained by the employee should be accepted

and the date of birth entered therein be taken as conclusive. The Supreme Court further held that High Court in its writ jurisdiction is not an appropriate forum for undertaking such enquiry into the disputed questions of fact. The Supreme Court held that the date of birth of an employee is not only important for the employee but for the employer also. While determining the dispute in such matters Courts should bear in mind that in change of date of birth long after joining services, particularly when the employee is due to retire shortly which will upset the date recorded in the service record maintained in due course of administration should not generally be accepted. The court was further of the view that the date of birth should not be dealt by the tribunal or High Court keeping in view only the public servant concerned as any direction for alteration in the date of birth of the public servant concerned has chain reaction, inasmuch as others waiting for years, below him for their respective promotion which is affected in this process and some are likely to suffer irreparable injury, inasmuch as, because of correction of the date of birth, the officer concerned, continue in the office, in some cases for years within which time many officers who are below him in seniority waiting for their promotion may lose their promotion forever. The Supreme Court, therefore, caution that the Court or the tribunal should therefore, be slow in granting interim relief for continuation in service, unless prima facie evidence or impeachable character is produced because if the public servant succeeds he could always be compensated, but if he fails, he would have enjoyed undeserved benefits of extended service which would further cause injustice to his immediate juniors.

38. In **S.C.Chaddha** (Supra), an application filed by the employee seeking change of date of birth within a period of two years as provided under Punjab Civil Services Rules, Vol.-I, Part-1 was rejected, however, the High Court allowed the change in date of birth on the ground of request for change being made within the period permitted by the amended rules. The Supreme Court had set aside the judgment of the High Court and held that merely because an opportunity was granted to a Government Employee to get his date of birth corrected, did not take away the fact of inaction and continuing silence for the considerable period, which de-horse the latches on the employee's part seriously reflected the lack of bona fide in his claim. The Supreme Court had held that no explanation by the employee as to why he did not go for correction of date of birth on any occasion when he was employed in 7 or 8 institutions makes his

claim doubtable.

39. In **Shiv Narayan Upadhyay** (Supra), the order of the High Court directing alteration in the date of birth on account of non-production of service record by the employer was set aside by the Supreme Court as the service record of the employee showed his date of birth which also bore the employee's signature. Similarly, in **Rajkumar Agnihotri** (Supra), the employee's appeal for correction of his date of birth on the basis that his date of birth was wrongly entered in High School Certificate was allowed by the High Court, however, the order of the High Court was set aside by the Supreme Court holding that there was no conclusive proof which could lead to irresistible conclusion regarding date of birth of the employee.

40. In **Vali Mohammed Dosa Bhai Sindhi** (Supra), while dealing with the Rule 171 of the Bombay Civil Services Rules 1959, it was held that under Rule 171 once an entry of age and date of birth has been made in the service book, no alteration of the entry afterwards could be allowed unless it was shown that entry was wrong for want of care on the part some person, other than individual in question or was obvious a clerical error.

41. In the circumstances, it was held that unless a clear case on the basis of material which could held to be a conclusive in nature, was made out by the employee and that to within a reasonable time provided in the rules governing the services, the court or tribunal should not issue a direction or make a declaration on the basis of the material which make such claim only plausible. In the circumstances, the judgment of a Division Bench directing alteration in the date of birth was quashed by the Supreme Court.

42. In **C.Ramaswami** (Supra), the positive case put forth by the employees was that it was after the demise of his mother that he has discovered that his real date of birth was different than what was recorded in that service record. The Supreme Court had held that even in absence of statutory rules like 16 A, the principle of estoppel would apply and authorities concerned would be justified in declining to alter the date of birth and if such a decision is challenged, the court also ought not to grant any relief even if it is shown that the date of birth as originally recorded was incorrect because the candidate concerned had represented

a different date of birth to be taken into consideration obviously with a view that would be to his advantage. Once having secured entry into the service, possibly preference to other candidates, the principle of estoppel would clearly be applicable and relief of change of date of birth can be legitimately denied.

43. In **Syed Khalid Rizvi** (supra), the Supreme Court held that for invoking Rule-3 of All India Services (Conditions of Service –Residuary Matters) Rule, 1960 requirement is that there should be an appointment to the service in accordance with rules, and by operation of the rule, undue hardship has been caused, that too in an individual case, the Central Govt., on its satisfaction of those conditions, has been empowered to relieve such undue hardship by exercising the power to relax the condition. It was further held that the conditions of recruitment and conditions of service are distinct and the conditions of appointment according to rules are preceded by condition of service. The conditions of the recruitment cannot be relaxed but the condition of service may be relaxed while exercising power under Rule-3.

44. The Supreme Court had also held that relaxation under Rule-3 would be a policy matter, which will be in the discretion of the Executive and the Courts will not interfere and issue a direction to the Govt. In **R.R. Verma and Ors.** (Supra), the challenge to the constitutional validity of said Rule-3 was repelled and it was held that the Central Govt. is vested with a reserve power under Rule-3 to deal with unforeseen and unpredictable situations, and to relieve the Civil servants from the infliction of undue hardship and to do justice and equity. It was further held that it does not mean that the Central Govt. is free to do what it likes, regardless of right or wrong; nor does it mean that the Courts are powerless to correct them. The Central Govt. is bound to exercise the power in the public interest with a view to secure Civil servants of efficiency and integrity, and when and only when undue hardship is caused by the application of the rules, the power to relax is to be exercised in a just and equitable manner but, again, only to the extent necessary for so dealing with the case.

45. Rule-3 of All India Services (Conditions of Service –Residuary Matters) Rule, 1960 is as under:-

"3. **Power to relax rules and regulations in certain cases-**

Where the Central Government is satisfied that the operation of-

(i) any rules made or deemed to have been made under the All India Services Act, 1951 (61 of 1951), or

(ii) any regulation made any such rule, regulating the conditions of service of persons appointed to an All India Service causes undue hardship in any particular case, it may, be order, dispense with or relax the requirements of that rule or regulations, as the case may be, to such extent and subject to such exceptions and conditions as it may consider necessary for dealing with the case in a just and equitable manner."

46. In **RR Tripathi and Gaurang Dinesh Damani** (Supra), the Supreme Court had held that the essence of the Rule is the words "causes undue hardship in any particular case". The word "undue hardship" has to be given its literal meaning and should be understood on its plain language. In para-29 of the said judgment, the Bombay High Court had held that hardship essentially has reference to the cadre of service, interest of service and least individual interest. Relevant para-29 is as under;-

"29. Now, coming to the applicability of Rule 3 of the Rules, 1960, this Rule certainly vests the Central Government with the power to relax rules and regulations in certain cases. Exercise of such power to relax the requirement of the rule or regulation to such extent and to such exception and conditions as it may consider necessary for dealing with the case must be in a just and equitable manner. The essence of the Rule is the words "causes undue hardship in any particular case". The word "undue hardship" has to be given its literal meaning and should be understood on its plain language. The "undue hardship" is relatable to the persons appointed to all India service. It is hardship in relation to regulating the conditions of service of persons appointed to All India service. The hardship, therefore, should essentially have reference to the cadre of service, interest of the service and least individual interest. The State Government in its proposal had not made out any case of hardship either to the service or even to the individual respondents. While taking decision in exercise of its powers conferred under Rule (3) of Rule 1960, the Competent Authority is required to strike a balance between

public interest/service interest and individual interest. To a private interest, interest of the service would be paramount while to the service interest, public interest would be paramount. The Government may be able to take recourse to power of relaxation or even to issue instructions to provide for a situation which is not dealt with specifically under the Rules. Even if that was the situation, still the reasons ought to be the ones which would tilt the balance of interest in favour of the order rather than against it. The Central Government or any competent authority granting approval and/or according its sanction for such purpose must do so for valid and proper reasons. The action of the State or its instrumentalities should be for reasons which are valid, just fair and reasonable. The fairplay and transparency in such an administrative or executive actions is the sine qua non to exercise of such power. Reference may be made to the judgment of the Apex Court in the case of **M.J. Sivani and Ors. v. State of Karnataka :** [1995]3SCR329. The Central Government, in the compilation filed before the Court, made a reference to the letter dated 1st January, 1966, where the Government clarified that benefit to be conferred in relaxation of any Rule or Rules must be of a nature already provided for in the Rules and Governments are not empowered by this Rule to confer benefits which are not contemplated in Rules. It also indicated that undue hardship signifies unforeseen hardship to an extent not contemplated in the Rule framed and not covered under any ordinary hardship or inconvenience."

47. In **Priya Shah** (supra), A Division Bench of this Court had held that "undue" means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. It was held that "undue hardship" is caused when the hardship is not warranted by the circumstances. For a hardship to be "undue", it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it, therefore, "undue" adds something more than just hardship which means an excessive hardship or a hardship greater than the circumstances warrant.

48. The Tribunal has held that the case of the applicant is not such

where an employee comes with some stories like coming to know of his correct date of birth from his old or grown up relations or from his family purohits. This observation of the Tribunal is incorrect because the case of the applicant is that the mother-in-law of his elder sister Smt.Sheela Taneja had expired in April, 1993 and on the kriya ceremony it transpired that his elder sister was born in the year 1951 being the first child out of the wedlock of his parents who got married in the year 1949. The applicant is the eldest male child and is also not illiterate. Even according to him in his middle school record his the date of birth of the year 1952 is shown. In 1972 when he applied for Haryana Civil Services (Executive Branch) and other allied services examination which was held in March, 1973, he would have known the year of marriage of his parents and year of birth of his elder sister. He had entered the civil service of the State in 1974. No plausible ground has been disclosed by the applicant as to why he did not take any steps from 1976 to 1993 to correct his date of birth. It is also inconceivable that for seventeen years he did not know about his incorrect date of birth and he realized that his date of birth is incorrect from his relative and friends whom he met on the ceremonies of death of mother in law of his elder sister. The Tribunal has not considered this aspect and has gone on its own assumption that the case of the applicant is not such where an employee comes on some stories like coming to know of his correct date of birth from his old or grown up relations or from his family purohits.

49. Had the applicant continued in the civil service of State of Haryana, he could not have got his date of birth altered or changed in 1993 which was entered in 1973. In the State of Haryana the rule governing the change of date of birth was rule 2.5 of the Punjab Civil Services Rules, 1994 which laid down that the date of birth of the Government employee, once recorded in service book, cannot be corrected except in case of a clerical error without previous order of the Government. The Rule further provided that the date of birth/declaration of age made at the time of entry into service shall be deemed to be conclusive as against the Government servant, unless he applies for correction of his age within two year from the date of his entry into government service.

50. The relevant rule contained in Para 1 of the Punjab Financial Rules reads as follows: (Referred to in Rule 2.5 and Note 3 there under)

1. In regard to the date of birth a declaration of age made at the time of, or for the purpose of entry into government service shall, as against the government employee in question, be deemed to be conclusive. The employee already in the service of the Government of Punjab on the date of coming into force of the Punjab Civil Services (First Amendment) Rules, Volume I, Part I, 1994, may apply for the change of date of birth within a period of two years from the coming into force of these Rules on the basis of confirmatory documentary evidence such as matriculation certificate or municipal birth certificate, etc. No request for the change of date of birth shall be entertained after the expiry of the said period of two years. The Government, however, reserves the right to make a correction in the recorded age of a government employee at any time against the interest of the government employee when it is satisfied that the age recorded in his service book or in the history of service of a gazetted government employee is incorrect and has been incorrectly recorded with the object that the government employee may derive some unfair advantage there from."

51. This rule was later on amended on 20.12.2000 and under the amended rule it was provided that if an application is made beyond two years, it must be considered on the recommendation of the Administrative Department and the Chief Secretary only in consultation with the Finance Department. It was entirely left to the discretion of the Government whether to entertain any such application. The principal provision, which required that the employee must apply within two years, remained unaltered. The rule amended on 20.12.2000 reads as follows:

"1. These rules may be called the Punjab Financial Volume I (Haryana First Amendment) Rules, 2000.

2. In the Punjab Financial Rules, Volume I, in Annexure A referred to in Rule 7.3 and Note 3 there under,

(i) For Para 1, the following paragraph shall be substituted, namely:

1. In regard to the date of birth a declaration of age made at the time of, or for the purpose of entry into government service, shall as against the government

employee in question, be deemed to be conclusive unless he applied for correction of his age as recorded within two years from the date of his entry into government service. Wherever, it is proposed to consider the application of the employee for correction of his age within a period of two years from the date of his entry into government service, the same would be considered by the Government in consultation with the Chief Secretary to the Government of Haryana. In cases where such application has been made beyond the stipulated period and is proposed to be accepted, the same shall be considered on recommendations of the Administrative Department and the Chief Secretary to the Government of Haryana, in consultation with the Finance Department. The Government however, reserves the right to make a correction in the recorded age of the government employee at any time against the interest of that government employee when it is satisfied that the age recorded in his service book or in the history of services of a government employee is incorrect and has been incorrectly recorded with the object that the government employee may derive some unfair advantage there from."

52. Subsequently, by the Notification dated 13-8-2001 this rule was again amended. Amended rule contemplated that unless the application is made within two years, no change in the date of birth will be entertained. This new Rule 1, as amended on 13-8-2001 reads as follows:

"1. These rules may be called the Punjab Financial Volume I (Haryana First Amendment) Rules, 2001.

2. In the Punjab Financial Rules, Volume I, in Annexure A referred to in Rule 7.3 and Note 3 there under:

(i) for Para 1, the following paragraph shall be substituted, namely:

1. In regard to the date of birth, a declaration of age made at the time of, or for the purpose of entry into government service, shall as against the government

employee in question, be deemed to be conclusive unless he applied for correction of his age as recorded within two years from the date of his entry into government service. No application submitted beyond the stipulated period of two years for change in date of birth will be entertained. Wherever, the application for correction of his age is submitted by the employee within a period of two years from the date of his entry into government service, the same would be considered by the Government in consultation with the Chief Secretary to the Government of Haryana. The Government, however, reserves the right to make a correction in the recorded age of the government employee at any time against the interest of that government employee when it is satisfied that the age recorded in his service book or in the history of services of a government employee is incorrect and has been incorrectly recorded with the object that the government employee may derive some unfair advantage there from."

53. Though in 1974 when the applicant entered the State service these rules were not applicable even then he should have sought alteration in his date of birth within a reasonable time. If the subsequent rules contemplated two years period, then after entering the State service in 1974 he should have sought change or alteration in his date of birth within reasonable period which could not be seventeen years as he first sought change of date of birth in 1993 on the ground that the mother-in-law of his elder sister Smt.Sheela Taneja had expired in April, 1993 and on the kriya ceremony it transpired that his elder sister was born in the year 1951 being the first child out of the wedlock of his parents who got married in the year 1949 and therefore his date of birth could not be 1948. His representation was rejected even in 1997 after 1993, however, surprisingly this plea of its own rules for correction of date of birth within two years of entering the service was not taken by the respondent no.2. While recommending the change of date of birth pursuant to representation in 2007, again the State Government of Haryana has ignored its own rule and had recommended the alteration to the Respondent no.1.

54. Thus if the applicant had continued in services of the State Government, he could not successfully claim change of his date of birth which was recorded in his service record in 1974. If that be so, can he seek change of date of birth with the respondent no.1 on the grounds as has been canvassed on behalf of the applicant. The plea of the applicant that after coming to know the alleged discrepancy he has obtained various certificates from various authorities which makes it apparent that there is error in his date of birth as he could not have been born before the marriage of his parents. It has been held by the Supreme Court that any subsequent change in the source of information regarding date of birth does not make it incumbent for the Government of India to make consequential changes in the service record. In **G.M.Bharat Coking Coal Ltd.** (supra) relied on by the Union of India opposing change of date of birth, the employee had subsequently obtained two certificates and had claimed alteration in date of birth. The Supreme Court had held that the core question is whether the certificates obtained subsequently obtained by the employee should be accepted and date of birth entered therein be taken as conclusive. It was held that the High Court in writ jurisdiction is not an appropriate forum for undertaking such an enquiry into the disputed question of fact.

55. The applicant has not produced his own certificate regarding date of birth on the ground that the record is not traceable. The applicant has also not produced the record of the primary school where he got admission before entering the middle school. In the record of the Middle school, the date of birth must have been recorded on the basis of the record of the primary school. It is not the case of the applicant that he joined the middle school without undergoing education in the primary school. At the time of admission in the primary school, the school authorities must have demanded the proof of date of birth, which could either be the date of birth certificate or the hospital record or an affidavit of any of the parent. The applicant is silent as to what was his date of birth in the primary school and on what basis the date of birth in the primary school was entered. Though the applicant has produced the certificate of the middle school and subsequent change of date of birth carried out by the Punjab University at his instance. In our opinion this shall not constitute clinching and irrefutable evidence about the date of birth of the applicant and in the circumstances the Tribunal ought not to have gone into the disputed questions of fact. The plea of the applicant

of his date of birth of 1952 is based on the certificate of his elder sister and younger brother and the deposition in the form of affidavit filed by his parents about the year of their marriage. The certificate of the elder sisters of the applicant though does not have any column whether the child is eldest or youngest, yet the certificate which is in Urdu, the child being eldest (`Awaal.) is written in Hindi. The copy of this certificate was also obtained by the applicant in 1993 and the date of birth of elder sister is shown as 21st July, 1951. The applicant has also produced middle standard examination certificate of his sister where her date of birth is shown as 3rd March, 1951. The certificates issued in respect of his younger brother also has different name of his brother. The certificate of the younger brother reflecting his nationality as Indian which is written in Hindi also has another endorsement as `No.3. which is construed as third child by the applicant. Bare perusal of said certificate reflects that the word `Indian' in Hindi and the word `no.3. are in different handwritings. These observations will negate the inferences of the tribunal that the applicant has produced clinching and irrefutable evidence in support of his contention that his correct date of birth is 6th May, 1952. This evidence cannot be termed to be irrefutable and unimpeachable to make the case of the applicant as rarest of rare case. The plea of the learned counsel for the applicant that the date of birth of 1952 of the applicant is not denied by the Union of India is also contrary to the record. It has been specifically averred in the petition filed by Union of India that the evidence produced by the applicant cannot be accepted as clinching evidence and does not deserve any consideration. The presumption under section 90 of the Evidence Act of the documents which are more than 30 years old is also rebuttable and not conclusive. In view of the writings on the certificate in different handwritings, merely because the certificates are issued by the authorities, it cannot be held that they stood proved in view of categorical assertion of Union of India that they cannot be accepted and do not deserve any consideration. In any case, as held by Supreme Court, the High Court and Tribunal are not appropriate forums for undertaking enquiry into the disputed questions of fact.

56. In 1993 when the applicant first applied or represented for the change of his date of birth, the burden was on him to show that he had not taken advantage of recorded date of birth of 1948. The representations of the applicant in 1993 and 1997 were rejected on the ground that he

had taken advantage of his recorded date of birth of 1948 for appearing in Haryana Civil Services (Executive Branch) and other allied services examination which was held in March, 1973. After rejection of his representation in 1993, another representation that he had not taken advantage was made in 2007 which has been justified by the tribunal on the ground that the applicant is not in the kind of service that he would have naturally known in the course of his duties the rule position and, therefore, the third representation made after 10 years of the second representation was held to be justified. This observation of the Tribunal is based on its own assumption. The applicant was in the state civil Services of the state of Haryana. He could have known the rule position. He had applied for change of date of birth in the record of Punjab University which was done in 1997. The third representation was made by the applicant 10 years thereafter and no satisfactory explanation has been given. After 1993 the applicant was functioning as an Indian administrative service officer. In the circumstances it could not be held that he was in the kind of service that he would have naturally known the rule position. Another noticeable factor is that though the applicant has produced the rule pertaining to post of Assistant Registrar Cooperative Society in 1974, however, he has not produced the rules applicable to Haryana Civil Services. In our opinion this is not justifiable and the long delay has not been satisfactorily explained and the case of the applicant cannot be construed to be rarest of rare cases.

57. In the circumstances it has not been established by clinching and irrefutable evidence that the date of birth of the applicant is 6th May, 1952 and a firm finding as has been recorded by the Tribunal cannot be recorded in the facts and circumstances. Unless a clear case on the basis of material which could be held to be conclusive in nature could be made out within a reasonable time as contemplated under the rules, the direction or declaration as has been made by the Tribunal could be made in the facts and circumstances as in the facts and circumstances and on the basis of the material produced by the applicant his claim can be held to be only plausible and the order of the tribunal is liable to be set aside.

58. This is no more res-integra that for invoking Rule 3 of All India Services (Conditions of service-Residuary Matters) Rule, 1960 requirement is that there should be an appointment to the service in accordance with the rules, and by operation of the rule, undue hardship has been caused,

that too in an individual case in which case the Central Government on satisfaction of the relevant conditions is empowered to relieve such undue hardship by exercising the power to relax the condition. The condition of the recruitment cannot be relaxed but the condition of service may be relaxed while exercising power under Rule 3. The `hardship' is essentially pertaining to the cadre of service, interest of service, however, least to individual interest. Government is not empowered by the rule to confer benefits which are not contemplated in rules. This also cannot be disputed that in the context of `Undue hardship' undue means something which is not merited by the conduct of the claimant, or is very much a disproportionate to it. In the circumstances the three factors as alleged on behalf of applicant, retirement before the age of superannuation, deprivation of salary, allowances and qualifying service before which the applicant would be retired and the effect on his pension as the last drawn salary is the determinant effect which would be lifelong, would not constitute `undue hardship.' as contemplated under the said rule. Rule 16 of the rules of 1985 makes it clear that the said Rule is made to limit the scope of correction of date of birth and service record and the intent of the rule is to exclude all other circumstances for the said purpose. If under the rules applicable to the service of the applicant in State, he would not have been entitled for alteration of his date of birth in the State, the relief cannot be granted to him under Rule 3 of All India Services (Conditions of Service-Residuary Matters) Rule, 1960 nor the scope of Rule 16 A could be enlarged. In the circumstances the directions as given by the tribunal cannot be sustained in the facts and circumstances of the case.

59. For the foregoing reasons the writ petition being WP(C) 11685 of 2009 filed by Union of India is allowed and the order of the Tribunal dated 4th August, 2009 holding that the date of birth of the applicant is 6th May, 1952 and directing Union of India to consider the case of the applicant under Rule 3 of All India Services (Conditions of Service-Residuary Matters) Rule, 1960 is set aside and the writ petition of the applicant being WP(C) 11694 of 2009 is dismissed. Considering the facts and circumstances, the parties are left to bear their own costs.

ILR (2011) III DELHI 206
CS (OS)

TOYOTA JIDOSHA KABUSHIKI KAISHA ....PLAINTIFF

VERSUS

MR. BIJU & ANR. ....DEFENDANT

(V.K. JAIN, J.)

CS (OS) NO. : 62/2007 DATE OF DECISION: 24.02.2011

Code of Civil Procedure, 1908—Order XXXIX, Rule 1 & 2—Suit for permanent injunction, rendition of accounts and damages and delivering up of infringing material—Defendant is alleged to be infringing the trade mark 'TOYOTA' of plaintiff—Defendant no. 3 compromised with plaintiff during pendency—Other defendants proceeded ex parte—Held—The trade mark found being used by defendant no.1 was absolutely identical to the registered trademark of plaintiff company—The Court needs to take note of the fact that a lot of energy and resources are spent in litigation against those who infringe the trademark and copy right of others and try to encash upon the goodwill and reputation of other brands by passing of their goods and/or services as those of that well known brand—If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, use the well-reputed trademark of another person, so as to encash on the good will and reputation which that mark enjoys in the market, with impunity and then avoid payment of damages by remaining absent from the Court, thereby depriving the plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark, which can be computed only on the basis of his account books—This would, therefore, amount to

putting premium on dishonesty is and give an unfair advantage to unscrupulous infringer over those who have a bona fide defence to make and therefore come forwarded to contest the suit and place their case before the Court—Defendant No. 1 restrained from manufacturing, selling storing for sale or advertising auto components under the trademark TOYOTA or any other mark identical or similar to the registered trademark TOYOTA of the plaintiff company—Defendant no.1 also directed to pay punitive damages amounting to Rs. 50,000/- to the plaintiff company.

Also, the Court needs to take note of the fact that a lot of energy and resources are spent in litigating against those who infringe the trademark and copyright of others and try to encash upon the goodwill and reputation of other brands by passing of their goods and/or services as those of that well known brand. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, use the well-reputed trademark of another person, so as to encash on the goodwill and reputation which that mark enjoys in the market, with impunity, and then avoid payment of damages by remaining absent from the Court, thereby depriving the plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark, which can be computed only on the basis of his account books. This would, therefore, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court. **(Para 20)**

For the reasons given in the preceding paragraphs, defendant No.1 is restrained from manufacturing, selling, storing for sale or advertising auto components under the trademark TOYOTA or any other mark identical or similar to the registered trademark TOYOTA of the plaintiff company. Defendant No.1 is also directed to pay punitive damages

amounting to Rs.50,000/- to the plaintiff company. No other relief is pressed, at this stage, by the learned counsel ˇfor the plaintiff. In the facts and circumstances of the case, there shall be no order as to cost. **(Para 21)**

Important Issue Involved: The violators of trademarks, notwithstanding having not contested the suit, should be burdened with punitive damages.

[Vi Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Pravin Anand, Ms. Diva Arora and Ms. Tanya Varma.

FOR THE DEFENDANT : None.

CASES REFERRED TO:

1. *Larsen and Toubro Limited* vs. *Chagan Bhai Patel* MIPR 2009 (1) 194.
2. *Microsoft Corporation* vs. *Deepak Raval* MIPR 2007 (1) 72.
3. *Hero Honda Motors Ltd.* vs. *Shree Assuramji Scooters,* 2006 (32) PTC 117 (Del).
4. *Time Incorporated* vs. *Lokesh Srivastava & Anr.,* 2005 (30) PTC 3 (Del).
5. *Mahendra & Mahendra Paper Mills Ltd.* vs. *Mahindra & Mahindra Ltd.* 2002(24) PTC 121 (SC).
6. *Montari Overseas Ltd.* vs. *Montari Industries Ltd.* 1996 PTC (16).

RESULT: Suit disposed of.

V.K. JAIN, J. (ORAL)

1. This is a suit for permanent injunction, rendition of accounts and damages and delivering up of infringing material. The plaintiff is a corporation registered in Japan. Defendant No.1 Mr. Biju is the proprietor of defendant No.2 Benz Auto Spares. The plaintiff claims to be the sixth largest industrial corporation in the world engaged in manufacture and

sale of automobiles and auto-parts and is amongst Fortune Global 500 Companies. The plaintiff claims to have coined the trademark TOYOTA which has no meaning in India nor is a dictionary word or a word of any trade or usage. It is alleged that the trademark TOYOTA is being used by the plaintiff in India since 1957 in relation to vehicles, their parts and fittings. It is also alleged that on account of the quality of the products, which are being sold under the name TOYOTA and continuous use of the aforesaid trademark, it has acquired an enviable reputation and goodwill in the market. The trademark TOYOTA is registered in the name of the plaintiff company in the following classes:-

S. No.	Trademark	Registration/ Application No.	Class	Status
1.	TOYOTA	506695	12	Registered and renewed upto 09.03.2013
2.	TOYOTA	506690	05	Registered and renewed upto 09.03.2009
3.	TOYOTA	506685	10	Registered and renewed upto 09.03.2009
4.	TOYOTA	506697	18	Registered and renewed upto 09.03.2010
5.	TOYOTA THS	1228330	12	Registered upto 28.08.2013
6.	TOYOTA INNOVA	232944	12	Registered upto 05.09.2013
7.	TOYOTA INNOVA	1243213	36	Registered upto 14.10.2013
8.	TOYOTA	1243214	37	Registered upto 14.10.2013
9.	TOYOTA	1243215	39	Registered upto 14.10.2013
10.	TOYOTA DEVICE MARK	1243207	36	Registered upto 14.10.2013
11.	TOYOTA DEVICE MARK	1243209	39	Registered upto 14.10.2013

2. The plaintiff claims sale of Yen15,501,553,000,000, Yen17,294,760,000,000 and Yen18,551,526,000,000 in the years 2003, 2004 and 2005, respectively. It is alleged that in automobile industry the mark TOYOTA qualifies as a source indicator of one the most reputed and trusted names in car makers and it is a well known mark under Section 11 of Trademarks Act, 1999, entitled to protection across classes of goods since any misuse of the mark is not only likely to cause confusion and deception but would also be contrary to public interest and would dilute the reputation and goodwill which has come to be associated with it for last many years.

3. Defendants No.1 to 3 are dealing in automobile spares. On receipt of information about sale of fake spare parts being sold under the name TOYOTA, the plaintiff company appointed Investigator and it came to be revealed that they were selling Spurious Oil Filter and Universal Joint Cross. It is alleged that the Investigators were able to purchase a Spurious Oil Filter from defendant No.3 and a Spurious Universal Joint Cross from defendant No.2. A legal notice was sent by the plaintiff to the defendants in February 2006 requiring them to refrain from unauthorized use of the trademark TOYOTA. There was no response to this notice which then was followed by a reminder sent in May 2006. Defendant No.2 replied to the notice denying infringement.

4. The plaintiff has sought injunction restraining the defendants from manufacturing, selling, offering for sale or advertising auto spare parts under the trademark TOYOTA or any other trademark identical with or deceptively similar to the plaintiff's trademark TOYOTA. It has also sought injunction restraining the defendant from using the aforesaid mark on any goods not originating from the plaintiff company. The plaintiff has also sought damages amounting to Rs.25 Lacs besides delivering up of the infringing packaging goods, packaging, etc.

5. Defendant No.3 compromised with the plaintiff during pendency of the suit and a compromise decree was accordingly passed on 16th December 2008. The other defendants were proceeded ex parte vide order dated 16th December 2008.

6. The plaintiff has filed affidavit of Mr. Koichiro Inagaki, General Manager, Department of Intellectual Property Division of the plaintiff company. In his affidavit Mr. Inagaki has supported on oath the case

setup in the plaint and has proved the documents relied upon by the plaintiff. He stated that the trademark TOYOTO was first used in India in the year 1957 in relation to vehicles, parts and fittings and on account of their quality and continues use it has acquired enviable reputation and goodwill. He has further stated that by virtue of priority of adoption, long, continuous and extensive user the goods bearing the trademark TOYOTO are exclusively associated with the products originating from the plaintiff. He has claimed that the trademark TOYOTO has become a source identifier inasmuch as it stands for the high standards and superior quality of goods manufactured by the plaintiff and sold the over world.

7. A perusal of the legal proceedings certificate Ex.PW-2/13 (colly) would show that vide registration No.1232944, the word mark TOYOTO INNOVA was registered in the name of the plaintiff company in respect of motorcars and parts thereof, falling in Class 12 w.e.f. 5th September 2003 and the registration is valid upto 5th September 2013. It further shows that vide registration No.506695 the word mark TOYOTO was registered in the name of the plaintiff in respect of goods included in Class 12. Vide registration No.1228330 the word mark TOYOTO THS was registered in the name of the plaintiff company in respect of motorcars, engines for land vehicles, all being goods falling Class 12.

8. Ex.PW-2/19 is the copy of invoice whereby a fuel filter was purchased by the Investigator appointed by the plaintiff company from Benz Auto Spares, which is stated to be the proprietorship concern of defendant No.1 Mr. Biju. It has come in the affidavit of Mr. D.C. Sharma, Independent Investigator appointed by the plaintiff company that in the month of July 2005, he had visited Benz Auto Spares and purchased a counterfeit TOYOTO spare part being fuel filter for a sum of Rs.190/- vide invoice bearing No.145 dated 22nd July 2005. He has further stated that the products as well as the invoice were given by him to the plaintiff company. A perusal of Ex.PW-2/19 would show that this is the same invoice which has been referred in the affidavit of Mr. Sharma. Ex.PW-2/17 is the photograph of the fuel filters, which were purchased by Mr. Sharma from Benz Auto Spares. A perusal of the photograph on the right of Ex.PW-2/17 would show that the word mark TOYOTA has been used on the fuel filter which Benz Auto Spares sold to the Independent Investigator appointed by the plaintiff company. It is thus evident that defendant No.1, who is trading under the name and style of Benz Auto

Spares, has been selling auto parts using the trademark of the plaintiff company without any permission or authorization from the plaintiff company.

9. Section 29(1) of Trade Marks Act, 1999, to the extent it is relevant, provides that a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark.

10. The mark being used by defendant No.1 on the fuel filter sold by him is exactly the same as is the registered trademark of the plaintiff company, and the defendant has just copied the plaintiff's registered mark, the product on which the aforesaid trademark was found being used by defendant No.1 is an auto component being fuel filter, which is used in cars and other four wheeled automobile. The trademark TOYOTO is registered in the name of the plaintiff company in respect of the goods under Class 12 of Schedule 4 to the Trade Mark Act, 1999, which are vehicles; apparatus for locomotion by land, air and water. The fourth schedule specifically provides that parts of an article or apparatus are, in general, classified with the actual article or apparatus, except where such parts constitute articles included in other classes. There is no particular class in the fourth schedule with respect to automobile components. Therefore, automobile components would also be included in Class 12 and, consequentlyl, the registration of the trademark TOYOTO in the name of the plaintiff company in respect of vehicles would also cover the components which are used in a vehicle. Therefore, by using the mark TOYOTO on the fuel filter being sold by him defendant No.1 has infringed the registered trademark TOYOTO of the plaintiff company.

11. Section 29(4) of Trade Marks Act, 1999, to the extent it is relevant, provides that a registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with or similar to the registered trade mark; and is used in relation to goods or services which are not similar to those for which the trade mark is registered provided the registered trade mark has a reputation in India and

the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark.

12. In **Mahendra & Mahendra Paper Mills Ltd. vs. Mahindra & Mahindra Ltd.** 2002(24) PTC 121 (SC), the suit was filed by Mahendra and Mahendra against use of the words Mahindra and Mahindra Ltd. The contention of the defendant before the Supreme Court was that there was no similarity of the goods manufactured or sold by the parties. Noticing that the name 'Mahindra & Mahindra' had acquired a distinctiveness and a secondary meaning in the business and trade circles and people had come to associate the name 'Mahindra' with a certain standard of goods and services, the Supreme Court was of the view that any attempt by another person to use that name in business and trade circles is likely to and in probability will create an impression of a connection with the plaintiffs' group of companies.

13. In **Montari Overseas Ltd. vs. Montari Industries Ltd.** 1996 PTC (16), Supreme Court, inter alia, observed that while adopting a trade name, a person is required to act honestly and bona fidely and not with a view to cash upon the goodwill and reputation of another. It was further observed that no company is entitled to carry on business in a manner so as to generate a belief that it is connected with the business of another company, firm or individual. It was also observed that copying of a trade name amounts to making a false representation to the public from which they need to be protected. The observations made by the Supreme Court would clearly apply when a well established corporate name or trademark of a large company is adopted by another person though not in respect of the same goods or services, when the trademark has become synonymous with the company and the members of the public expect any product bearing that trademark to be of a particular standard and quality.

14. In the case of **Mahendra** (supra), the impugned name was not a replica of the name of the plaintiff company. In the case of **Montari Overseas Ltd.** (supra) also there was change in the middle name. However, in the present case, the defendants have been found using not only the corporate name, but also the registered trademark of the plaintiff company and that too without even making an attempt to camouflage their infringement by making minor changes here and there. The infringement

by them, therefore, is very blatant and absolutely unequivocal. The case of the plaintiff company for grant of injunction, therefore, stands on a much stronger footing.

15. As noted earlier, the trademark found being used by defendant No.1 is absolutely identical to the registered trademark of the plaintiff company. Is has come in the deposition of Mr. Iganaki that the trademark TOYOTA is being used in India since 1957 and is now a well known brand in India. A large number of vehicles are being sold in India under the trademark TOYOTA, prominent amongst them being TOYOTA INNOVA, TOYOTA CAMRY, TOYOTA COROLLA and TOYOTA ETIOS. A perusal of Ex.PW-2/15 which are the extracts from the books titled 'The World's Greatest Brands' edited by Nicholas Kochan would show that the TOYOTA is amongst top 100 brands being placed at serial No.31. It further shows that amongst Automotive and Oil companies, the plaintiff company occupies 4th position in the world. The plaintiff company had huge turnover of Yen15,501,553,000,000, Yen17,294,760,000,000 and Yen18,551,526,000,000 in the years 2003, 2004 and 2005, respectively

16. Ex.PW-1/11 is the Global Brand Survey of 100 top brands, which would show that TOYOTA was ranked at serial No.11 in the year 2003 and at serial No.9 in the year 2004, amongst 100 top brands. It is, therefore, difficult to dispute that the trademark TOYOTA enjoys immense reputation and goodwill in India in respect of automobiles and it parts and, therefore, has become a well known trademark in this field. The use of the trademark TOYOTA by the defendant is likely to prove detrimental to the reputation and goodwill which the brand TOYOTA commands in the market. Any person buying an auto component being sold under the trademark TOYOTA would be buying it under the impression that he was purchasing a product manufactured and sold by the plaintiff company. The products of the plaintiff company enjoy a premium position and premium price in the market. The defendant cannot be allowed to take an unfair advantage of the immense goodwill and brand quality which the brand TOYOTA enjoys in the market in relation to automobiles and auto components.

17. If a product being sold by the defendant under the trademark TOYOTA is found to be of any inferior quality that is likely to cause serious prejudice to the image and goodwill of the brand TOYOTA in the market since the person purchasing the product on being saddled with

an inferior product, bearing the same trademark, may assume that the quality of the product being manufactured and sold by the plaintiff company has gone down. This, in turn, is likely to adversely affect the financial interest of the plaintiff company besides giving unjust enrichment to the defendant at the cost of the plaintiff company.

18. The learned counsel for the plaintiff seeks award of punitive compensatory damages. Regarding punitive damages in the case of **Time Incorporated v. Lokesh Srivastava & Anr.,** 2005 (30) PTC 3 (Del), this Court observed that punitive damages are founded on the philosophy of corrective justice and as such, in appropriate cases these must be awarded to give a signal to the wrong doers that the law does not take a breach merely as a matter between rival parties but feels concerned about those also who are not party to the lis but suffer on account of the breach. In the case of **Hero Honda Motors Ltd. v. Shree Assuramji Scooters,** 2006 (32) PTC 117 (Del), this Court noticing that the defendant had chosen to stay away from the proceedings of the Court felt that in such case punitive damages need to be awarded, since otherwise the defendant, who appears in the Court and submits its account books would be liable for damages whereas a party which chooses to stay away from the Court proceedings would escape the liability on account of the failure of the availability of account books.

19. In **Microsoft Corporation v. Deepak Raval** MIPR 2007 (1) 72, this Court observed that in our country the Courts are becoming sensitive to the growing menace of piracy and have started granting punitive damages even in cases where due to absence of defendant, the exact figures of sale made by them under the infringing copyright and/ or trademark, exact damages are not available. The justification given by the Court for award of compulsory damages was to make up for the loss suffered by the plaintiff and deter a wrong doer and like-minded from indulging in such unlawful activities.

In **Larsen and Toubro Limited v. Chagan Bhai Patel** MIPR 2009 (1) 194, this Court observed that it would be encouraging the violators of intellectual property, if the defendants notwithstanding having not contested the suit are not burdened with punitive damages.

20. Also, the Court needs to take note of the fact that a lot of energy and resources are spent in litigating against those who infringe the

trademark and copyright of others and try to encash upon the goodwill and reputation of other brands by passing of their goods and/or services as those of that well known brand. If punitive damages are not awarded in such cases, it would only encourage unscrupulous persons who actuated by dishonest intention, use the well-reputed trademark of another person, so as to encash on the goodwill and reputation which that mark enjoys in the market, with impunity, and then avoid payment of damages by remaining absent from the Court, thereby depriving the plaintiff an opportunity to establish actual profit earned by him from use of the infringing mark, which can be computed only on the basis of his account books. This would, therefore, amount to putting premium on dishonesty and give an unfair advantage to an unscrupulous infringer over those who have a bona fide defence to make and therefore come forward to contest the suit and place their case before the Court.

21. For the reasons given in the preceding paragraphs, defendant No.1 is restrained from manufacturing, selling, storing for sale or advertising auto components under the trademark TOYOTA or any other mark identical or similar to the registered trademark TOYOTA of the plaintiff company. Defendant No.1 is also directed to pay punitive damages amounting to Rs.50,000/- to the plaintiff company. No other relief is pressed, at this stage, by the learned counsel for the plaintiff. In the facts and circumstances of the case, there shall be no order as to cost.

Decree sheet be prepared accordingly.

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WP

INTEROCEAN SHIPPING (I) PVT. LTD. ....PETITIONER

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

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

WP NOS. : 9394/2009, 12228/2009, 7773/2010 AND 7774/2010 **DATE OF DECISION: 03.03.2011**

(A) Constitution of India, 1950—Article 226—Refusal to exercise writ jurisdiction where suitable alternative remedy exists—Petitioner companies engaged in ship broking and other activities—Petitioners registered with Service Tax Department under "Steamer Agent Service" category—Category brought into service tax net by Finance Act, 1997—Amendment in form of Clause (i), Section 65(105) read with section 65(100), Finance Act, 1997—Petitioners liable to pay service tax under said clauses—However whether Petitioners liable to pay service tax under "Business Auxiliary Heads" made taxable by Finance Act, 2003 whereby sub-section (zzb) to Section 65(105) enacted—Finance Act, 2004 expanded scope of "Business services"—Petitioners not acting as "commission agents"—Hence instant Petitions. Held:

Primary issue is with regard to actual nature and character of activity undertaken—Necessarily requires factual examination—Without first ascertaining and deciding factual dispute, interpretation of Finance Act will be in vacuum—No appropriate for writ court to go into factual aspects—Said examination should be undertaken by appellate authority, i.e. the Tribunal—Petitioners not allowed to circumvent said remedy—The other contention with respect to brokerage received in foreign exchange—Said contention also requires factual examination.

We have examined the contentions raised by the petitioners in the writ petitions, their reply to show cause notice and the defence of the respondents, including the Commissioner of Service Tax, which is reflected in their counter affidavit as well as the assessment order which has been passed. A perusal of the reply and the assessment order shows that the primary and core issue raised was/is with regard the actual nature and character of the activity undertaken by the petitioners. The contention of the petitioners is that they do not act as an agent of any party i.e. ship owner or ship charterer. This necessarily requires a factual examination of the nature of activities undertaken by the petitioners generally or in a particular case. On the basis of the factual finding it has to be decided and determined whether generally or a particular transaction or activity can be classified as a 'business auxiliary service' activity as per the provisions of the Finance Act as amended from time to time. This of course, will require interpretation of the provisions of the Finance Act relating to taxability of 'business auxiliary service' but without first ascertaining and deciding the factual dispute about the nature of the activity, interpretation will be in vacuum. Some or many issues may remain unanswered. Thus, to fully resolve and decide all matters/issues appellate remedy under the statute is required to be resorted to. It may be noted here that as per the petitioners as well as the assessment order, ship brokerage activities have been classified into three categories, situations 1, 2 and 3. Situation 1 is where the ship owner and the ship charter both are located outside India and it has been held in the assessment order, that the payments received in foreign currency are not taxable. However, in situation 2 when either the ship owner or the ship charterer is located/based in India or in

situation 3 when both of them are located in India have been held to be taxable, regardless of fact that the brokerage was received in foreign currency. We do not think that it will be appropriate and proper for a writ court in the present case to examine and go into the factual aspects about the actual nature of activity provided and undertaken by the petitioners. No doubt, certain questions of law have been raised but first and foremost need and requirement is to have clarity on the facts as to the nature of the transactions and the scope of the activity undertaken by the petitioners on which they have earned brokerage. This may require examination of each transaction on case to case basis. This we feel should be undertaken before the appellate authority i.e. the Tribunal. The statutory appellate remedy should not be allowed to be bye-passed/avoided in the present cases. The petitioners should invoke the said remedy and should not be allowed to circumvent the same. **(Para 8)**

The third contention raised by the petitioner is in respect of brokerage received in foreign exchange/currency. It is stated that these should be treated as export of services within the meaning of Export of Service Rules, 2005 and, therefore, not subject to service tax. This plea is raised in alternative. To decide the aforesaid question, we have to examine factual matrix of each case/transaction, classified as situation 2 in the assessment order. It has to be examined whether it would make any difference if the ship owner or ship charter was located outside India. Another question which may arise is with regard to the location of the ship and the journey/ voyage which is a subject matter of the contract. This necessarily involves examination of the factual matrix. Sometimes, minor changes in facts may have and can result in substantially different legal consequences e.g. when the voyage/charter does not envisage the ship coming into Indian territorial waters. It may not be advisable to delve and interpret the provisions without being clear on the factual matrix on the basis of which the provisions have to be interpreted. **(Para 12)**

(B) Constitution of India, 1950—Article 226—Refusal to exercise writ jurisdiction where suitable alternative remedy exists the exceptions are when alternative remedy is appeal from "Caesar to Caesar's wife" ie velief sought should not be mirage or fulite; When petition filed for enforcement of fundamental rights; where there is violation of natural justice and where order/proceeding wholly without jurisdiction or virus of Act is challenged.

It may be noted here that the petitioners have not challenged the constitutional validity of Section 65(105)(zzb) or 65(19) of the Finance Act as amended from time to time. The questions raised relate to interpretation of the said sections and not constitutional validity. Questions relating to interpretation of a section/provisions in tax matters do arise in several cases but generally the parties are not encouraged or permitted to avoid the statutory appellate remedy and seek recourse to Writ remedies or invoke power of judicial review. Article 226 of the Constitution confers wide powers in the matter of issuing writs but the remedy is discretionary and High Courts can refuse to exercise writ jurisdiction if the aggrieved party has an adequate or suitable alternative remedy. The remedy however should not be a mirage, futile exercise or an appeal from "Caesar to Caesar's wife". Other exceptions carved out are "at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged" (refer **Whirpool Corpn. Vs. Registrar of Trade Marks,** (1998) 8 SCC 1). This is not a Rule of Law but a self imposed limitation, a matter of policy. In **U.P. State Spg. Co. Ltd. v. R.S. Pandey,** (2005) 8 SCC 264, it has been explained :

> **"17.** Where under a statute there is an allegation of infringement of fundamental rights or when on the

undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in **L. Hirday Narain v. ITO** that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies, unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition.

18. At this juncture, it would be appropriate to take note of the few expressions in **R. v. Hillington, London Borough Council** which seem to bring out the position well. Lord Widgery, C.J. stated in this case: (All ER pp. 648f-649b)

"It has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy.

* * *

The statutory system of appeals is more effective and more convenient than application for certiorari and the principal reason why it may prove itself more convenient and more effective is that an appeal to (say) the Secretary of State can be disposed of at one hearing whether the issue between them is a matter of law or fact or policy or opinion or a combination of some or all of these ... whereas of

course an appeal for certiorari is limited to cases where the issue is a matter of law and then only it is a matter of law appearing on the face of the order.

* * *

An application for certiorari has however this advantage that it is speedier and cheaper than the other methods and in a proper case therefore it may well be right to allow it to be used ... I would, however, define a proper case as being one where the decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or in consequence of an error of law."

19. After all the above discussion, the following observations of Roskill, L.J. in Hanson v. Church Commrs. may not be welcomed but it should not be forgotten also:

"There are a number of shoals and very little safe water in the unchartered seas which divide the line between prerogative orders and statutory appeals, and I do not propose to plunge into those seas...."

20. In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

21. In **U.P. State Bridge Corpn. Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh** it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as

provided under the statute. To same effect are the decisions in.....". **(Para 9)**

Recently in **Raj Kumar Shivhare v. Directorate of Enforcement,** (2010) 4 SCC 772, it has been observed:

> **"31.** When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.
>
> **32.** No reason could be assigned by the appellant's counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.
>
> **33.** Reference may be made to the Constitution Bench decision of this Court rendered in Thansingh Nathmal v. Supdt. of Taxes, which was also a decision in a fiscal law. Commenting on the exercise of wide jurisdiction of the High Court under Article 226, subject to self-imposed limitation, this Court went on to explain:
>
> "7. … The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. *Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another*

> *jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."* (emphasis added)

The decision in Thansingh is still holding the field.

> **34.** Again in Titaghur Paper Mills Co. Ltd. v. State of Orissa in the background of taxation laws, a three-Judge Bench of this Court apart from reiterating the principle of exercise of writ jurisdiction with the time-honoured self imposed limitations, focused on another legal principle on right and remedies. In para 11, at AIR p. 607 of the Report, this Court laid down:
>
> "11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford* in the following passage:
>
> '… There are three classes of cases in which a liability may be established founded upon a statute. … But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.'
>
> The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd. and has been reaffirmed by the

Privy Council in **Attorny General of Trinidad and Tobago v. Gordon Grant and Co. Ltd. and Secy. of State v. Mask and Co.** It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

35. In this case, liability of the appellant is not created under any common law principle but, it is clearly a statutory liability and for which the statutory remedy is an appeal under Section 35 of FEMA, subject to the limitations contained therein. A writ petition in the facts of this case is therefore clearly not maintainable.

36. Again another Constitution Bench of this Court in **Mafatlal Industries Ltd. v. Union** of India speaking through B.P. Jeevan Reddy, J. delivering the majority judgment, and dealing with a case of refund of Central excise duty held:

"77. … So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/ Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."

In the concluding portion of the judgment it was further held: (Mafatlal Industries Ltd. case,)

"(x) … The power under Article 226 is conceived to serve the ends of law and not to transgress them."

37. In view of such consistent opinion of this Court over several decades we are constrained to hold that

even if the High Court had territorial jurisdiction it should not have entertained a writ petition which impugns an order of the Tribunal when such an order on a question of law, is appealable before the High Court under Section 35 of FEMA."

In the said case as an appeal under the relevant provisions was maintainable before the High Court and the Supreme Court has held that the Writ Petition should not have been entertained by applying the principle of alternative remedy. **(Para 10)**

Learned counsel for the petitioners, during the course of arguments, had submitted that the petitioners have challenged letter F.No.332/41/2008-TRU dated 19th December, 2008 issued by Government of India, Ministry of Finance, Department of Revenue, Tax Research Unit. This letter was written pursuant to the letters of the petitioners dated 3rd November, 2008 and 21st November, 2008, seeking clarification on leviability of service tax on ship broking activities. The letter expresses the view of the Ministry of Finance that activities undertaken by the ship brokers or commission agents are covered and are 'business auxiliary service' under Section 65(105)(zzb) of the Finance Act. The aforesaid letter, as noticed, was written in response to the queries raised by the petitioners, who had asked for the opinion and clarification from the Ministry of Finance, Department of Revenue. The aforesaid letter or clarification is not binding on the Tribunal. The Tribunal is not an 'authority' under the Finance Act and independently and uninfluenced by the said letter can to go into the factual matrix and also interpret the relevant provisions. Tribunal will not be bound by the observations/opinion in the letter dated 19th December, 2008. **(Para 11)**

(C) Letter issued by Ministry of finance—Opinion that activities of Petitioners covered under "Business Auxiliary Service"—Said letter not binding on Tribunal—

Can go into matrix and interpret relevant provisions.

Learned counsel for the petitioners, during the course of arguments, had submitted that the petitioners have challenged letter F.No.332/41/2008-TRU dated 19th December, 2008 issued by Government of India, Ministry of Finance, Department of Revenue, Tax Research Unit. This letter was written pursuant to the letters of the petitioners dated 3rd November, 2008 and 21st November, 2008, seeking clarification on leviability of service tax on ship broking activities. The letter expresses the view of the Ministry of Finance that activities undertaken by the ship brokers or commission agents are covered and are 'business auxiliary service' under Section 65(105)(zzb) of the Finance Act. The aforesaid letter, as noticed, was written in response to the queries raised by the petitioners, who had asked for the opinion and clarification from the Ministry of Finance, Department of Revenue. The aforesaid letter or clarification is not binding on the Tribunal. The Tribunal is not an 'authority' under the Finance Act and independently and uninfluenced by the said letter can to go into the factual matrix and also interpret the relevant provisions. Tribunal will not be bound by the observations/opinion in the letter dated 19th December, 2008. **(Para 11)**

(D) Constitution of India, 1950—Article 226—Writ Jurisdiction—Whether the same to be exercised against show cause notice—Normally such petitions not entertained as Premature—Not desirable and appropriate to stall enquiry or investigation—Unless virus of statutory enactment or there is complete lack of jurisdiction or authorities ex-facie acting malafidely with ulterior motives—No such case made out—Hence petition against show cause notice not to be entertained—Petitioners granted leave to file appeal before Appellate Tribunal.

It is noticed that in large number of cases, parties rush to the High Court after a show cause notice is issued, why a

particular activity is not covered and should not be subjected to service tax and a reply is required to be filed. Writ petition (C) No. 9394/2009 was filed by the petitioner when show cause notice was issued and even the assessment order had not been passed. Of course now the assessment order has been passed and after amendment, has been made subject matter of challenge. Similarly, in case of Writ Petition (Civil) No. 12228/2009, the writ petition was filed immediately after the show cause notice was issued and the writ petition was amended after the assessment order was made. In Writ Petition (Civil) No. 7773/20010 and 7774/2010, assessment orders have not been passed and the petitioners have come to the Court on issuance of the show cause notice. It is well settled that the High Courts normally do not entertain writ petitions against issue of show cause notice. Entertaining such petitions is premature, unless vires of a provision is challenged or an exceptional case is made out and to prevent harassment, inference is required. It is not desirable and appropriate to stall enquiry or investigation, even if question of interpretation is involved and this directly or indirectly involves question of jurisdiction of the assessing officer. Resort to writ proceedings is disapproved, unless vires of a statutory enactment is involved or there is complete lack of inherent jurisdiction or the authorities ex- facie are acting malafidely with ulterior motives. In **Union of India v. Hindalco Industries,** (2003) 5 SCC 194, the Supreme Court has cautioned:

> **"12.** There can be no doubt that in matters of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226 of the Constitution either at the stage of the show-cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the case may be, is available but these are the limitations imposed by the courts themselves in exercise of their jurisdiction and they are not matters of jurisdictional factors. Had the High Court declined to interfere at

the stage of show-cause notice, perhaps this Court would not have been inclined to entertain the special leave petition; when the High Court did exercise its jurisdiction, entertained the writ petition and decided the issue on merits, we do not think it appropriate to upset the impugned order of the High Court under Article 136 of the Constitution on a technical ground." **(Para 13)**

In the present cases, as noticed above, there are factual disputes which have to be thrashed out in addition to interpretation of provisions. We do not see any reason why we should entertain Writ Petition (C) Nos. 7773/2010 & 7774/2010 against show cause notice. It may be noted that in these two writ petitions no circular or letter issued by the Ministry of Finance, Department of Revenue, has been challenged or questioned. For the sake of convenience, the prayer clause in Writ Petition (Civil) No. 7773/2010 is reproduced :-

"(A) issue a Writ of certiorari/mandamus or any other appropriate Writ/order/direction by quashing the impugned show cause notice dated 11.10.2010 issued by the Respondent No. 3 **(Annexure P-1);**

(B) tagged the present petition with the earlier Writ Petition (C) No. 9394/2009 filed by the present Petitioner, to consider the prayer made therein to declare that the ship broking activity of the Petitioner is not liable to tax under Chapter V of Finance Act, 1994;

(C) issue such other writ/order/direction and further orders as the Hon'ble Court may deem just and proper in the facts and circumstances of the case." **(Para 16)**

Important Issue Involved: Constitution of India—Article 226—Refusal to exercise writ jurisdiction where suitable alternative remedy exists—Exceptions—When alternative remedy is appeal from "Caesar to Caesar's wife"—When petition filed for enforcement of fundamental rights, where violation of natural justice and where order/proceeding wholly without jurisdiction or virus of Act is challenged—Self imposed limitation.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. J.K. Mittal, Advocate.

FOR THE RESPONDENTS : Mr. Mukesh Anand & Mr. Satish Kumar for R-2, Advocates.

CASES REFERRED TO:

1. *Raj Kumar Shivhare* vs. *Directorate of Enforcement,* (2010) 4 SCC 772.
2. *Union of India* vs. *Kunisetty Satyanarayana,* (2006) 12 SCC 28.
3. *U.P. State Spg. Co. Ltd.* vs. *R.S. Pandey,* (2005) 8 SCC 264.
4. *Special Director* vs. *Mohd. Ghulam Ghouse,* (2004) 3 SCC 440.
5. *Union of India* vs. *Hindalco Industries,* (2003) 5 SCC 194.
6. *Whirpool Corpn.* vs. *Registrar of Trade Marks,* (1998) 8 SCC 1).

RESULT: Petitions dismissed.

SANJIV KHANNA, J.

1. These four writ petitions have been filed by Interocean Group of Companies/concerns and as common issues/contentions have been raised, they are being disposed of by this common order. For the purpose of

convenience, Writ Petition (Civil) No. 9394/2009 filed by Interocean Shipping (I) Pvt. Ltd., is being treated as the lead case.

2. The aforesaid W.P.(C) No. 9394/2009 was filed on 27th May, 2009. Vide order dated 14th July, 2009, notice to show cause was issued in the writ petition and on the interim application, it was directed that the proceedings on the basis of impugned show cause notice could continue but the final order shall not be given effect to without leave of the Court. The said interim order has continued till date. The aforesaid writ petition was amended after the assessment order dated 26th October, 2010 was passed by the Commissioner of Service Tax, Delhi and in the amended writ petition the assessment order has been made subject matter of challenge. It may, however, be noted that in Writ Petition (Civil) Nos. 7773/10 and 7774/10, only show cause notices have been issued but no assessment order has been passed.

3. The petitioner companies/concerns are engaged in ship broking and other activities. It is submitted that as a ship broker the petitioners assists, guides and supports the ship owner and the ship charterer to negotiate a deal and conclude a fixture. Brokerage is paid by the ship owner and sometimes through a charterer. The petitioners also undertake distinct activities like ship agency, services to clients for loading/unloading of cargo, act as port agents, facilitate and procure berth hiring, etc. The petitioners are registered with the Service Tax Department under the category of 'Steamer Agent Service' and have been filing returns and paying service tax. 'Steamer Agent Service' was brought into the service tax net by the Finance Act, 1997 with amendment and enactment in form of Clause (i) to Section 65(105) read with Section 65(100). The aforesaid Sections have to be read along with Sections 65(96) and 65(97). The said clauses read as under:-

> **"Section 65(105)(i) :** Taxable service means any service provided or to be provided, to a shipping line, by a steamer agent in relation to a ship's husbandary or dispatch or any administrative work related thereto as well as the booking, advertising or canvassing of cargo, including container feeder services."
>
> **"Section 65(100):** Steamer agent means any person who undertakes, either directly or indirectly, --

> (i) to perform any service in connection with the ship's husbandry or dispatch including the rendering of administrative work related thereto; or
>
> (ii) to book, advertise or canvass for cargo for or on behalf of a shipping line; or
>
> (iii) to provide container feeder services for or on behalf of a shipping line."
>
> **"Section 65(96)** : Ship means a sea-going vessel and includes a sailing vessel".
>
> **"Section 65(97)** : Shipping line means any person who owns or charters a ship and includes an enterprise which operates or manages the business of shipping."

4. We are not concerned with the said clauses and the liability of the petitioners to service tax under the aforesaid sections. It is accepted by the petitioners that they are liable to pay service tax on the services mentioned therein.

5. The dispute raised pertains to whether the petitioners are covered and liable to pay service tax under the head 'Business Auxiliary Services'. The said services became taxable by the Finance Act, 2003, whereby sub-section (zzb) to Section 65(105) was enacted. The said clause has to be read with Section 65(19). The aforesaid provisions at the time of enactment were as under:-

> **"Section 65(105)(zzb):** any service provided, to a client, by a commercial concern in relation to business auxiliary service."
>
> **"Section 65(19) :** "business auxiliary service means any service in relation to, --
>
> (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
>
> (ii) promotion or marketing of service provided by the client; or
>
> (iii) any customer care service provided on behalf of the client; or
>
> (iv) any service incidental or auxiliary support service such as

billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer, public relation services, and includes services as a commission agent, but does not include any information technology service."

6. The Finance (No. 2) Act, 2004, w.e.f. 10th September, 2004, expanded the scope of 'Business Auxiliary Services' by including activities relating to procurement of inputs, processing of good (not amounting to manufacture), or provisions of services on behalf of clients by including them in the definition of 'Business Auxiliary Services'. The Finance Act, 2005, w.e.f. 16th June, 2005, made further amendments and expanded the scope of 'Business Auxiliary Service' by including commission agents. Presently Sections 65(105)(zzb) and 65(19) read as under:-

"Section 65(105)(zzb) : Taxable services means any services provided or to be provided, to a client, by any person in relation to business auxiliary service."

"Section 65(19) : business auxiliary service means any service in relation to ,--

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo;

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

Explanation –For the removal of doubts, it is hereby declared

that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client.

(v) Production or processing of goods for, or on behalf of the client; or

(vi) Provision of service on behalf of the client; or

(vii) A service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance or accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services management or supervision,

and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of clause (f) of section 2 of the Central Excise Act, 1944"

Explanation.—For the removal of doubts, it is hereby declared that for the purpose of this clause.—

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person, who, while acting on behalf of another person—

(i) deals with goods or services or documents of title to such goods or services; or

(ii) Collects payment of sale price of such goods or services; or

(iii) Guarantees for collection or payment for such goods or services; or

(iv) Undertakes any activities relation to such sale or purchase of such goods or services."

7. The question raised by the petitioners is whether they were/are providing 'business auxiliary services' as defined in the aforesaid clauses. It is their contention that they were/are not acting as commission agents. Their activities and earnings cannot be categorized as activities and earnings

of a 'commission agent'. It is submitted that the term 'commission agent' was defined by the Finance Act, 2005 w.e.f. 16th June, 2005 and prior to the said date, the definition as per Section 2(aaa) of the Central Excise Act, 1944 was applicable. Another contention in the alternative, raised by the petitioners is that they were/are providing services by way of export. In this connection, it may be noted that Export of Service Rules, 2005, came into force w.e.f. 15th March, 2005. These rules have also been amended from time to time and criteria/conditions have been specified for determination whether an assessee is engaged in export of taxable services.

8. We have examined the contentions raised by the petitioners in the writ petitions, their reply to show cause notice and the defence of the respondents, including the Commissioner of Service Tax, which is reflected in their counter affidavit as well as the assessment order which has been passed. A perusal of the reply and the assessment order shows that the primary and core issue raised was/is with regard the actual nature and character of the activity undertaken by the petitioners. The contention of the petitioners is that they do not act as an agent of any party i.e. ship owner or ship charterer. This necessarily requires a factual examination of the nature of activities undertaken by the petitioners generally or in a particular case. On the basis of the factual finding it has to be decided and determined whether generally or a particular transaction or activity can be classified as a 'business auxiliary service' activity as per the provisions of the Finance Act as amended from time to time. This of course, will require interpretation of the provisions of the Finance Act relating to taxability of 'business auxiliary service' but without first ascertaining and deciding the factual dispute about the nature of the activity, interpretation will be in vacuum. Some or many issues may remain unanswered. Thus, to fully resolve and decide all matters/issues appellate remedy under the statute is required to be resorted to. It may be noted here that as per the petitioners as well as the assessment order, ship brokerage activities have been classified into three categories, situations 1, 2 and 3. Situation 1 is where the ship owner and the ship charter both are located outside India and it has been held in the assessment order, that the payments received in foreign currency are not taxable. However, in situation 2 when either the ship owner or the ship charterer is located/ based in India or in situation 3 when both of them are located in India

have been held to be taxable, regardless of fact that the brokerage was received in foreign currency. We do not think that it will be appropriate and proper for a writ court in the present case to examine and go into the factual aspects about the actual nature of activity provided and undertaken by the petitioners. No doubt, certain questions of law have been raised but first and foremost need and requirement is to have clarity on the facts as to the nature of the transactions and the scope of the activity undertaken by the petitioners on which they have earned brokerage. This may require examination of each transaction on case to case basis. This we feel should be undertaken before the appellate authority i.e. the Tribunal. The statutory appellate remedy should not be allowed to be bye-passed/avoided in the present cases. The petitioners should invoke the said remedy and should not be allowed to circumvent the same.

9. It may be noted here that the petitioners have not challenged the constitutional validity of Section 65(105)(zzb) or 65(19) of the Finance Act as amended from time to time. The questions raised relate to interpretation of the said sections and not constitutional validity. Questions relating to interpretation of a section/provisions in tax matters do arise in several cases but generally the parties are not encouraged or permitted to avoid the statutory appellate remedy and seek recourse to Writ remedies or invoke power of judicial review. Article 226 of the Constitution confers wide powers in the matter of issuing writs but the remedy is discretionary and High Courts can refuse to exercise writ jurisdiction if the aggrieved party has an adequate or suitable alternative remedy. The remedy however should not be a mirage, futile exercise or an appeal from "Caesar to Caesar's wife". Other exceptions carved out are "at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged" (refer **Whirpool Corpn. Vs. Registrar of Trade Marks,** (1998) 8 SCC 1). This is not a Rule of Law but a self imposed limitation, a matter of policy. In **U.P. State Spg. Co. Ltd. v. R.S. Pandey,** (2005) 8 SCC 264, it has been explained :

> **"17.** Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they

do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in **L. Hirday Narain v. ITO** that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies, unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition.

18. At this juncture, it would be appropriate to take note of the few expressions in **R. v. Hillington, London Borough Council** which seem to bring out the position well. Lord Widgery, C.J. stated in this case: (All ER pp. 648f-649b)

"It has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy.

* * *

The statutory system of appeals is more effective and more convenient than application for certiorari and the principal reason why it may prove itself more convenient and more effective is that an appeal to (say) the Secretary of State can be disposed of at one hearing whether the issue between them is a matter of law or fact or policy or opinion or a combination of some or all of these ... whereas of course an appeal for certiorari is limited to cases where the issue is a matter of law and then only it is a matter of law appearing on the face of the order.

* * *

An application for certiorari has however this advantage that it is speedier and cheaper than the other methods and in a proper case therefore it may well be right to allow it to be used ... I would, however, define a proper case as being one where the

decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or in consequence of an error of law."

19. After all the above discussion, the following observations of Roskill, L.J. in Hanson v. Church Commrs. may not be welcomed but it should not be forgotten also:

"There are a number of shoals and very little safe water in the unchartered seas which divide the line between prerogative orders and statutory appeals, and I do not propose to plunge into those seas...."

20. In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

21. In **U.P. State Bridge Corpn. Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh** it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect are the decisions in.....".

10. Recently in **Raj Kumar Shivhare v. Directorate of Enforcement,** (2010) 4 SCC 772, it has been observed:

"31. When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

32. No reason could be assigned by the appellant's counsel to demonstrate why the appellate jurisdiction of the High Court under Section 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

33. Reference may be made to the Constitution Bench decision of this Court rendered in **Thansingh Nathmal v. Supdt. of Taxes**, which was also a decision in a fiscal law. Commenting on the exercise of wide jurisdiction of the High Court under Article 226, subject to self-imposed limitation, this Court went on to explain:

"7. … The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. *Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."* (emphasis added)

The decision in Thansingh is still holding the field.

34. Again in **Titaghur Paper Mills Co. Ltd. v. State of Orissa** in the background of taxation laws, a three-Judge Bench of this Court apart from reiterating the principle of exercise of writ jurisdiction with the time-honoured self imposed limitations, focused on another legal principle on right and remedies. In para 11, at AIR p. 607 of the Report, this Court laid down:

> "11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford* in the following passage:

> '… There are three classes of cases in which a liability may be established founded upon a statute. … But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.'
>
> The rule laid down in this passage was approved by the House of Lords in **Neville v. London Express Newspapers Ltd.** and has been reaffirmed by the Privy Council in **Attorny General of Trinidad and Tobago v. Gordon Grant and Co. Ltd. and Secy. of State v. Mask and Co.** It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

35. In this case, liability of the appellant is not created under any common law principle but, it is clearly a statutory liability and for which the statutory remedy is an appeal under Section 35 of FEMA, subject to the limitations contained therein. A writ petition in the facts of this case is therefore clearly not maintainable.

36. Again another Constitution Bench of this Court in **Mafatlal Industries Ltd. v. Union of India** speaking through B.P. Jeevan Reddy, J. delivering the majority judgment, and dealing with a case of refund of Central excise duty held:

> "77. … So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise

their jurisdiction consistent with the provisions of the enactment."

In the concluding portion of the judgment it was further held: (Mafatlal Industries Ltd. case,)

"(x) … The power under Article 226 is conceived to serve the ends of law and not to transgress them."

37. In view of such consistent opinion of this Court over several decades we are constrained to hold that even if the High Court had territorial jurisdiction it should not have entertained a writ petition which impugns an order of the Tribunal when such an order on a question of law, is appealable before the High Court under Section 35 of FEMA."

In the said case as an appeal under the relevant provisions was maintainable before the High Court and the Supreme Court has held that the Writ Petition should not have been entertained by applying the principle of alternative remedy.

11. Learned counsel for the petitioners, during the course of arguments, had submitted that the petitioners have challenged letter F.No.332/41/2008-TRU dated 19th December, 2008 issued by Government of India, Ministry of Finance, Department of Revenue, Tax Research Unit. This letter was written pursuant to the letters of the petitioners dated 3rd November, 2008 and 21st November, 2008, seeking clarification on leviability of service tax on ship broking activities. The letter expresses the view of the Ministry of Finance that activities undertaken by the ship brokers or commission agents are covered and are 'business auxiliary service' under Section 65(105)(zzb) of the Finance Act. The aforesaid letter, as noticed, was written in response to the queries raised by the petitioners, who had asked for the opinion and clarification from the Ministry of Finance, Department of Revenue. The aforesaid letter or clarification is not binding on the Tribunal. The Tribunal is not an 'authority' under the Finance Act and independently and uninfluenced by the said letter can to go into the factual matrix and also interpret the relevant provisions. Tribunal will not be bound by the observations/opinion in the letter dated 19th December, 2008.

12. The third contention raised by the petitioner is in respect of

brokerage received in foreign exchange/currency. It is stated that these should be treated as export of services within the meaning of Export of Service Rules, 2005 and, therefore, not subject to service tax. This plea is raised in alternative. To decide the aforesaid question, we have to examine factual matrix of each case/transaction, classified as situation 2 in the assessment order. It has to be examined whether it would make any difference if the ship owner or ship charter was located outside India. Another question which may arise is with regard to the location of the ship and the journey/voyage which is a subject matter of the contract. This necessarily involves examination of the factual matrix. Sometimes, minor changes in facts may have and can result in substantially different legal consequences e.g. when the voyage/charter does not envisage the ship coming into Indian territorial waters. It may not be advisable to delve and interpret the provisions without being clear on the factual matrix on the basis of which the provisions have to be interpreted.

13. It is noticed that in large number of cases, parties rush to the High Court after a show cause notice is issued, why a particular activity is not covered and should not be subjected to service tax and a reply is required to be filed. Writ petition (C) No. 9394/2009 was filed by the petitioner when show cause notice was issued and even the assessment order had not been passed. Of course now the assessment order has been passed and after amendment, has been made subject matter of challenge. Similarly, in case of Writ Petition (Civil) No. 12228/2009, the writ petition was filed immediately after the show cause notice was issued and the writ petition was amended after the assessment order was made. In Writ Petition (Civil) No. 7773/20010 and 7774/2010, assessment orders have not been passed and the petitioners have come to the Court on issuance of the show cause notice. It is well settled that the High Courts normally do not entertain writ petitions against issue of show cause notice. Entertaining such petitions is premature, unless vires of a provision is challenged or an exceptional case is made out and to prevent harassment, inference is required. It is not desirable and appropriate to stall enquiry or investigation, even if question of interpretation is involved and this directly or indirectly involves question of jurisdiction of the assessing officer. Resort to writ proceedings is disapproved, unless vires of a statutory enactment is involved or there is complete lack of inherent jurisdiction or the authorities ex- facie are acting malafidely with ulterior

motives. In **Union of India v. Hindalco Industries,** (2003) 5 SCC 194, the Supreme Court has cautioned:

> **"12.** There can be no doubt that in matters of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226 of the Constitution either at the stage of the show-cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the case may be, is available but these are the limitations imposed by the courts themselves in exercise of their jurisdiction and they are not matters of jurisdictional factors. Had the High Court declined to interfere at the stage of show-cause notice, perhaps this Court would not have been inclined to entertain the special leave petition; when the High Court did exercise its jurisdiction, entertained the writ petition and decided the issue on merits, we do not think it appropriate to upset the impugned order of the High Court under Article 136 of the Constitution on a technical ground."

14. In **Special Director v. Mohd. Ghulam Ghouse,** (2004) 3 SCC 440, it has been observed:

> **5.** This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless the High Court is satisfied that the show-cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show-cause notice and take all stands highlighted in the writ petition. Whether the show-cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the

> statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted."

15. In another case, **Union of India v. Kunisetty Satyanarayana,** (2006) 12 SCC 28, the Supreme court has held:

> **"13.** It is well settled by a series of decisions of this Court that ordinarily no writ lies against a charge-sheet or show-cause notice vide *Executive Engineer, Bihar State Housing Board v. Ramesh Kumar Singh, Special Director v. Mohd. Ghulam Ghouse, Ulagappa v. Divisional Commr., Mysore, State of U.P. v. Brahm Datt Sharma, etc.*
>
> **14.** The reason why ordinarily a writ petition should not be entertained against a mere show-cause notice or charge-sheet is that at that stage the writ petition may be held to be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the show-cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. It is well settled that a writ petition lies when some right of any party is infringed. A mere show-cause notice or charge-sheet does not infringe the right of anyone. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.
>
> **15.** Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.
>
> **16.** No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it

is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter."

16. In the present cases, as noticed above, there are factual disputes which have to be thrashed out in addition to interpretation of provisions. We do not see any reason why we should entertain Writ Petition (C) Nos. 7773/2010 & 7774/2010 against show cause notice. It may be noted that in these two writ petitions no circular or letter issued by the Ministry of Finance, Department of Revenue, has been challenged or questioned. For the sake of convenience, the prayer clause in Writ Petition (Civil) No. 7773/2010 is reproduced :-

"(A) issue a Writ of certiorari/mandamus or any other appropriate Writ/order/direction by quashing the ˇimpugned show cause notice dated 11.10.2010 issued by the Respondent No. 3 **(Annexure P-1);**

(B) tagged the present petition with the earlier Writ Petition (C) No. 9394/2009 filed by the present Petitioner, to consider the prayer made therein to declare that the ship broking activity of the Petitioner is not liable to tax under Chapter V of Finance Act, 1994;

(C) issue such other writ/order/direction and further orders as the Hon'ble Court may deem just and proper in the facts and circumstances of the case."

17. As noticed above, while issuing notice in the Writ Petition (Civil) No. 9394/2009, it was directed that the assessment order will not be given effect to without leave of the court. Similar interim order has been passed in the Writ Petition (Civil) No. 12228/2009 and the Writ Petition (Civil) Nos. 7773/2010 and 7774/2010.

18. Petitioners in Writ Petition (Civil) Nos. 9394/2009 and 12228/2009 are required to file an appeal before the Appellate Tribunal. The appellants are given liberty to file appeal within a period of 30 days of receipt of copy of this order. In case the appeal is filed within the said period, the same will not be dismissed/rejected on the ground that they have been filed beyond the period of limitation. The Tribunal will expeditiously hear the appeals and preferably decide the issues involved

within a period of six months from the date of filing of the appeals. The interim order passed by this Court will continue till the appeals filed by the petitioners are decided by the Tribunal. In case the petitioners delay the proceedings or ask for adjournments, learned Tribunal will be entitled to modify or even vacate the stay order.

19. In W.P.(C) No. 7773/2010 and 7774/2010, the interim order is modified to the extent that the assessment order, if passed, will not be given effect to for a period of one month from the date it is communicated to the petitioners to enable them to approach the Tribunal. It will be thereafter open to the Tribunal to decide the application for stay. At that stage, the Tribunal will take into account decision, if any, in the case of Interocean Shipping (I) Pvt. Ltd. and Interocean shipping Company and in case the appeals filed by them have not been decided, the application for stay will be decided keeping in mind the stay granted in the connected matters.

20. We have continued with the interim orders as WP(C) Nos. 9394/2009 and 12228/2009 have remained pending in this court for more than 18 months and we do accept and recognize that the questions raised require consideration and examination. Service tax has been recently imposed and in the present cases, there is a dispute about the interpretation of provisions relating to 'business auxiliary services' as well as the factual matrix. Though letter dated 19th December, 2008 was written by the Ministry of Finance, Department of Revenue, after the petitioners had asked for their intervention, it is the case of the petitioners that the opinion expressed in the letter foreclosed their defence and has prevented independent and fair application of mind by the adjudicating authority. The question with regard to interpretation of Export of Service Rules, 2005 is also involved.

21. The writ petitions are accordingly disposed of. There will be no orders as to costs. It is clarified that this court has not expressed any opinion on merits of the case of either side. Any observation on merits made above will not be binding on the Tribunal.

ILR (2011) III DELHI 247
RFA

MADAN LAL KAUSHIK ....APPELLANT

VERSUS

SHREE YOG MAYAJI TEMPLE & ORS. ....RESPONDENTS

(REVA KHETRAPAL, J.)

RFA NO. : 177/2004 DATE OF DECISION: 03.03.2011

Code of Civil Procedure, 1908—Section 96—Order XII Rule 6—Appellant filed a suit for declaration and injunction to protect the possession of property no. 10/7, Yog Maya Mandir, Mehrauli—Possession was inherited by him from his late father Pt. Badlu Ram—Smt. Ram Pyari widow of Shri Trikha gave possession of premises to his father fifty years ago for performing puja and seva—Owner being in adverse possession for the last more than 12 years—Suit contested by defendants—Badlu Ram was permitted to use the said accommodation as a paid employee of Yog Maya Mandir, as Badlu Ram used to serve water to the worshippers and clean the Mandir—The said licence came to an end on the death of Shri Badlu Ram—From the date of death of Shri Badlu Ram, the possession of appellant became illegal—Respondent filed a suit for possession and recovery of mesne profits from the appellant and his brother—Appellant defended the suit—Suit property was gifted to his father by Smt. Ram Pyari, wife of Shri Trikha—The brother of appellant admitted the claim of the respondent—Respondent moved application under Order XII Rule 6—Trial Court decreed the suit of the respondent—Dismissed the suit of appellant—Appeal—Held—The appellant has himself admitted that possession of the property was given to his father by one Smt. Ram Pyari, who was the

widow of one of the pujaris of the Temple and it was given while his father was doing puja and seva in the Temple—The said occupation was thus a permissive user—In the written statement in Suit No. 85/03, the appellant has raised the plea of ownership by virtue of gift—The gift of immovable property cannot be proved by oral evidence without a written and registered gift deed—There is not even a whisper that such gift deed was executed or registered by Smt. Ram Pyari in favour of Badlu Ram or the appellant herein—The appellant who admits permissive possession/occupation in the same breath cannot be allowed to plead adverse possession in the other, and that too without any hostile assertion made by him in denial of the title of the true owner—It is also noted that the defendant no. 2 Sant Lal Kaushik, who is the brother of the appellant, has admitted the case of plaintiff in toto—The appellant sought to brush this aside by asserting active collusion between the respondents and his brother—In the face of the admissions made by the appellant himself which have been culled out from his pleadings and inferred there from, this assertion must fall to the ground—Consequently, judgment of the trial Court affirmed.

The above being the position of law, it is proposed to revert back to the case in hand. There can be no manner of doubt that in the suit filed by the appellant, it was the case of the appellant that his father was in possession of the suit property as a pujari in the Temple. He has himself admitted that possession of the property was given to his father by one Smt. Ram Pyari, who was the widow of one of the pujaris of the Temple and it was given while his father was doing puja and seva in the Temple. The said occupation was thus a permissive user. No doubt, in the written statement in Suit No.85/03, the appellant has raised the plea of ownership by virtue of gift of the suit property to his father by Smt. Ram Pyari, but the same is clearly an afterthought, and that too

a belated one, inasmuch as the said position has been taken by the appellant ten years after the filing of his own suit. Even otherwise, the gift of immovable property cannot be proved by oral evidence without a written and registered gift deed. There is not even a whisper that such gift deed was executed or registered by Smt. Ram Pyari in favour of Badlu Ram or the appellant herein. **(Para 30)**

The other stand adopted by the appellant, viz., of ownership of the suit property by adverse possession for more than 12 years in hostility of its true owner, is also clearly unsustainable. To recapitulate, it is not the case of the appellant that his father Badlu Ram was in adverse possession. Badlu Ram died on 19.12.1991 and the appellant filed a suit for declaration in the year 1993. The question of the appellant being in adverse possession for more than 12 years, therefore, does not arise. Apart from this, as noted above, the mere fact that the appellant has come forward with a plea of adverse possession means that he admits the plaintiff to be the true owner. For a plea of ownership on the basis of adverse possession, the first and foremost condition is that the property must belong to a person other than the person pleading his title on the basis of adverse possession. The appellant who admits permissive possession/occupation in the same breath cannot be allowed to plead adverse possession in the other, and that too without any hostile assertion made by him in denial of the title of the true owner. In the instant case, it may be noted that the appellant himself had impleaded the parties arrayed as plaintiffs in the suit of Yog Mayaji Temple as defendants in his suit. Thus, no question of hostile assertion arises or can be countenanced. At the risk of repetition, it is also noted that the defendant No.2 Sant Lal Kaushik, who is the brother of the appellant, has admitted the case of plaintiff in toto. The appellant seeks to brush this aside by asserting active collusion between the respondents and his brother. In the face of the admissions made by the appellant himself which have been culled out from his pleadings and inferred therefrom, in my view, this assertion must fall to the ground.

Consequently, looking at the matter from any angle, the judgment of the trial court deserves to be affirmed. **(Para 31)**

Important Issue Involved: One who admits permissive possession cannot be allowed to plead adverse possession.

[Vi Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Randhir Jain, Advocate.

FOR THE RESPONDENTS : Mr. Vijay K. Gupta, Advocate.

CASES REFERRED TO:

1. *Karam Kapahi and Ors.* vs. *Lal Chand Public Charitable Trust and Anr.,* (2010) 4 SCC 753.
2. *Padmawati and Ors.* vs. *Harijan Sewak Sangh,* 154 (2008) DLT 411.
3. *Charanjit Lal Mehra and Ors.* vs. *Kamal Saroj Mahajan (Smt.) and Anr.,* (2005) 11 SCC 279.
4. *Uttam Singh Dugal & Co. Ltd.* vs. *Union Bank of India & Ors.,* (2000) 7 SCC 120.
5. *Annasaheb Bapusaheb Patil and Ors.* vs. *Balwant alias Balasaheb Babusaheb Patil (dead) by LRs & heirs etc.,* AIR 1995 SC 895.
6. *Thakur Kishan Singh (dead)* vs. *Arvind Kumar,* AIR 1995 SC 73.
7. *Bhagauti Prasad Khetan and etc.* vs. *Laxminathji Maharaj and etc.* reported in AIR 1985 Allahabad 228.
8. *Gaya Parshad Dikshit* vs. *Dr. Nirmal Chander and Anr.,* AIR 1984 SC 930.
9. *Pooranchand* vs. *The Idol, Shri Radhakrishnaji and Anr.* reported in AIR 1979 M.P.
10. *Shri Guru Granth Sahib Khoje Majra* vs. *Nagar Panchayat Khoje Majra,* Vol. LXXI – 1969 P.L.R. 844.

11. *Sheodhari Rai and Ors.* vs. *Suraj Prasad Singh and Ors.*, AIR 1954 SC 758.

RESULT: Appeal is dismissed.

REVA KHETRAPAL, J.

1. By way of this appeal, the appellant seeks to impugn the judgment of the learned Additional District Judge dated 10th February, 2004 whereby Suit No.85/03 filed by Shree Yog Mayaji Temple was decreed and Suit No.03/04/93 filed by Madan Lal Kaushik was dismissed.

2. At the outset, it must be noted that the plaintiffs in Suit No.85/03, who are arrayed as respondents in the present appeal, namely, Shree Yog Mayaji Temple and Others had filed an application under Order XII Rule 6 CPC praying for the passing of a decree in the suit while certain preliminary issues had been framed in the case of Suit No.03/04/93 filed by the appellant herein, namely, Madan Lal Kaushik, to which I shall presently advert.

3. The facts may be recapitulated in extenso as it is these facts which are material for the purpose of deciding the present appeal. On 04.09.1993, Madan Lal Kaushik, the appellant herein, had filed a suit for declaration and permanent injunction against Shri Hari Narain and Others, being Suit No.03/04/93. It was the case of appellant in the said suit that he was in peaceful physical possession of property No.10/7, Yog Maya Mandir, Mehrauli, New Delhi since the year 1943, comprising of two rooms, one kitchen, one store, one bathroom and a partly demolished room on the ground floor and one room on the first floor. The site plan of the said premises was filed by the appellant with the plaint. It was further the case of the appellant that the possession of the aforesaid property was inherited by him from his late father Pt. Badlu Ram, who had the exclusive possession of the same for the last more than 50 years and had died on 19.12.1991. According to the plaint, the defendants No.1 to 3, namely, Shri Hari Narain, Shri Inder Narain and Shri Surinder Narain, were pandas of Shree Yog Maya Mandir and had taken over the administration of the said Mandir.

4. It was asserted in the plaint by the appellant that he and his father had been performing 'puja' and 'seva' in the said Mandir on honorary basis for the last 50 years in the mornings and evenings. The

possession of the premises in question was given to his late father by one Smt. Ram Pyari, widow of Shri Trikha, about 50 years ago "for performing 'puja' and 'seva'." After the death of his father, the defendants had been trying their best to dispossess him and his family members on one pretext or the other and wanted to take forcible and illegal possession of the premises in question. It was submitted by the appellant that the defendants in the suit had last threatened the appellant on 29th August, 1993 with dire consequences if he did not vacate the premises within a week.

5. Alternatively, the appellant submitted that he was in legal and physical possession by virtue of adverse possession continuously for more than 12 years without any interruption and the defendants had no right, title or interest to throw him out of the said premises. Hence the suit filed by him (Madan Lal) praying for a decree of declaration that he be declared the owner of the property No.10/7, Yog Maya Mandir, Mehrauli, New Delhi, "being in adverse possession for the last more than 12 years." He also prayed for a decree of permanent injunction restraining the defendants in the suit from dispossessing him from the aforesaid premises.

6. The aforesaid suit was contested by the defendants, who stated that the appellant was a teacher in St. Xaviers School and was in illegal and unauthorized occupation of the suit property since 1991, when his father Badlu Ram died, and, that prior to the year 1991, he was living with his father in the suit property. It was submitted by the defendants, on behalf of the Yog Maya Mandir and Others, that Shri Badlu Ram was permitted to use the said accommodation as a paid employee of the Yog Maya Mandir, as Badlu Ram used to serve water to the worshippers and clean the Mandir. The said licence came to an end on the death of Shri Badlu Ram and from the date of the death of Shri Badlu Ram, the possession of the appellant became illegal. It was elaborated that Shri Badlu Ram was living in the said premises since 1949-50 and prior to that he was living with his family in the Mehrauli Village. He was permitted to occupy the suit premises in the interest of the Temple for providing better services to the worshippers and the Temple.

7. On the basis of the pleadings of the parties, the following issues were framed by the Court in Suit No.03/04/93 filed by the appellant:

"1. Whether the plaintiff is entitled for a decree of declaration of the suit property i.e. no.10/7 Yog Maya Mandir, Mehrauli, New Delhi being in adverse possession? OPP.

2. Whether the plaintiff is entitled for a decree of permanent injunction as prayed for? OPP.

3. Whether the suit is bad for want of necessary parties? OPD

4. Whether the suit is maintainable in its present form? OPP.

5. Relief."

8. At the time of the framing of issues, Issue No.1 was ordered to be treated as a preliminary issue and subsequently Issue No.3, viz., "Whether the suit is bad for want of necessary parties?" was also treated as a preliminary issue.

9. It deserves to be noted at this juncture that the issues were struck in the aforesaid suit subsequent to the filing of suit No.85/03, which was filed by Shree Yog Mayaji Temple and Others, who were the defendants in suit No.03/04/93 filed by the appellant. This suit No.85/03 was filed on 21.05.2003 for possession and recovery of mesne profits from the appellant and his brother Shri Sant Lal Kaushik. It was submitted by the plaintiffs in the said suit that the subject matter of suit No.03/04/93 was the property of Shree Yog Mayaji Mandir and Yog Maya Mandir – DEITY and the other plaintiffs, viz., the plaintiffs No.2 to 17 were the co-owners of the said property bearing No.10/7, Yog Maya Mandir, Mehrauli, New Delhi and the property attached to it. It was further stated that the plaintiffs No.2 to 16 were the pujaris of the Temple, who, along with their family members, had been looking after the affairs of Yog Maya Mandir as per their turn. It was asserted that the plaintiff/Temple is a very old Temple with religious and historical significance, which had come into existence at the time of the Mahabharta. The entire property built upon the land was now commonly known as 10/7, Yog Maya Mandir, New Delhi. As regards the nature of occupation of Shri Badlu Ram, it was stated in the plaint that the father of the defendants No.1 and 2, namely, Shri Badlu Ram was employed in the year 1949-50 at a salary of Rs. 5/- by the pujaris and ancestors of the plaintiff/Mandir for the purpose of doing various jobs, including cleaning, serving water and doing other incidental jobs in the Temple. During the course of such

employment, Badlu Ram was permitted to use and occupy one room, one store room, one tin shed kitchen and one tin shed bathroom on the ground floor of the Mandir property. Thus, Shri Badlu Ram was employed to offer water to the devotees coming to the Temple for worship and for keeping the Mandir neat and clean in the year 1950 merely as a licensee, without, in any manner, creating any right or interest in his favour in respect of the suit property. The said Shri Badlu Ram died on 19.12.1991 and at that time he was drawing a salary of Rs. 60/- per month together with the benefit of edibles/food, etc. and the benefit of living in the suit property. On his death, his license to use the said premises came to an end and stood automatically determined. Badlu Ram had two sons, namely, Shri Madan Lal Kaushik, the defendant No.1 and Shri Sant Lal Kaushik, the defendant No.2. On the death of Shri Badlu Ram, the defendant No.2 had left the suit premises along with his family and shifted to House No.579 in Ward No.3, Mehrauli, New Delhi-110030, but the defendant No.1, Madan Lal Kaushik continued to stay in the suit premises unauthorisedly along with the other family members despite the fact that he was repeatedly called upon to vacate the same. Finally, instead of vacating the suit premises, he (Madan Lal Kaushik) filed a suit for declaration wherein he allegedly claimed ownership by adverse possession and sought a decree for permanent injunction along with a decree for declaration in respect of the suit premises. The said suit was still pending, being Suit No.03/04/93, initially numbered as 325/93. Hence, this suit for recovery of possession from the defendants and also for mesne profits for the unauthorized use and occupation of the suit premises by the defendant No.1 at the rate of Rs. 3,000/- per month.

10. In the written statement filed by him to the aforesaid suit (Suit No.85/03), the brother of the appellant herein, namely, Shri Sant Lal Kaushik, who was arrayed as the defendant No.2 in the suit, admitted the case of the plaintiffs about his father having come into possession of the suit premises with the permission of the plaintiffs as he used to serve water to the pilgrims and the worshippers and clean the Temple. It was submitted by him that after the death of his father, Shri Badlu Ram, in 1991, his brother (Madan Lal Kaushik) declined the offer of the plaintiffs to perform the services which his father was performing, and hence the defendant No.2 had left the suit premises and shifted to Mehrauli. He also admitted that the defendant No.1 continued to occupy the suit premises with his family members unauthorisedly even after the death of his

father, and had declined to honour the wishes of his father to hand over the suit premises to Shree Yog Mayaji Mandir. He admitted that the defendants had no right in the suit property.

11. Needless to state that the defendant No.1 (the appellant herein) contested the suit and filed his written statement wherein he stated that the defendant No.2 was in active collusion with the plaintiffs and reiterated the facts as mentioned by him in his earlier suit bearing No.03/04/93, filed by him against the Shree Yog Mayaji Mandir and others.

12. At this stage, the plaintiffs (Shree Yog Mayaji Mandir and others) filed an application under Order XII Rule 6 CPC, wherein it was stated that the contents of the written statement filed on behalf of the defendant No.1, and in particular paragraph 6 thereof, revealed that his only defence was that the suit property in his occupation was gifted to his father by Smt. Ram Pyari, wife of Shri Trikha way back in the year 1943 and after the death of his father Pt. Badlu, the said property was inherited by him from his father. It was further stated by the plaintiffs that in paragraph 15 of the written statement, the defendant No.1 had mildly raised the plea of adverse possession in the alternative. In other words, the case of the defendant No.1 in the pleadings was that he became the owner of the premises in question by inheritance from his father, who was gifted the said property by Smt. Ram Pyari. Alternatively, the defendant No.1 claims that he is the owner of the property by way of adverse possession. Ex facie, the said pleas are self-contradictory, as, if it is a case of gift, the question of adverse possession would not arise and vice-versa. Moreover, the gift alleged by the defendant No.1 is without any document of title and as such is legally untenable and amounts to admission being an evasive and unspecific reply, and, at any rate it is a constructive admission to the claim of the plaintiffs in the plaint, entitling the plaintiffs in the plaint to a judgment and decree on the basis of the admissions in the pleadings of the defendant No.1.

13. It was on the aforesaid application under Order XII Rule 6 CPC filed by Shree Yog Mayaji Temple that the learned Additional District Judge passed the impugned order decreeing the suit filed by Shree Yog Mayaji Mandir for recovery of possession of the portion of the suit property in the possession of the defendant No.1 and dismissing the suit filed by Madan Lal Kaushik, the appellant herein. Aggrieved by the aforesaid

judgment of the learned Additional District Judge, the present appeal has been preferred by Shri Madan Lal Kaushik.

14. Mr. Randhir Jain, the learned counsel for the appellant seeks to assail the judgment of the learned Additional District Judge on a number of grounds. He contends that the suit filed by Shree Yog Mayaji Temple and decreed by the learned Additional District Judge was not maintainable since the suit was filed in the name of the Temple, and the Deity, which is a juristic person, was not impleaded as a party to the suit through the next friend of the Deity. To buttress this contention, he relied upon two decisions of the Allahabad High Court in **Bhagauti Prasad Khetan and etc. vs. Laxminathji Maharaj and etc.** reported in AIR 1985 Allahabad 228 and **Pooranchand vs. The Idol, Shri Radhakrishnaji and Anr.** reported in AIR 1979 M.P. 10. He further contended that though there were 17 plaintiffs to the suit, the plaint bears 16 signatures, inasmuch as the signature of the plaintiff No.1 Shree Yog Mayaji Temple through the next friend is missing. Likewise, the verification to the plaint too bears only 16 signatures. Further, the plaintiffs No.2 to 16, who had signed the plaint and verified the same, were not co-owners of the property as asserted by them, nor they were in control and management of the Mandir and the property attached to it, nor they had inherited any right as pujaris as asserted by them. Thus, the suit was not maintainable as laid.

15. Next, Mr. Randhir Jain, the learned counsel for the appellant contended that it was the case of the appellant that property No.10/7 was gifted to the father of the appellant by Smt. Ram Pyari and the appellant had inherited the same from his father. Alternatively, the appellant claimed adverse possession (vide paragraphs 6 and 15 of the written statement filed by the appellant to suit No.85/03). Thus, rather than there being any admission alleged to have been made by the appellant, it was clear from the record that it was a case of contest. Mr. Jain contended that even otherwise, the appellant had positively asserted ownership of the suit property (vide paragraph 17 of the written statement filed by the appellant to suit No.85/03) and an admission cannot be read into the positive assertion of ownership by the appellant, howsoever unfounded his assertion may be or howsoever tenuous his title may be. Even otherwise, assuming that the appellant failed in his suit, it does not follow therefrom that the suit of the Mandir has to be decreed. It is settled law that an admission

in order to form the foundation of a decree must be clear, categorical, unambiguous and unequivocal. In this factual scenario, it would be in the interest of justice to set aside the judgment of the learned Additional District Judge and remand both the suits to the learned trial court for trial.

16. Mr. Vijay K. Gupta, the learned counsel for the respondents herein, on the other hand, sought to rebut the aforesaid contentions raised on behalf of the appellant by urging that the Yog Maya Mandir was a juristic person and could own property. In paragraphs 1 and 8 of the plaint, there were clear assertions that the suit property situate in Khasra No.1801, Village Mehrauli, New Delhi is owned by Shree Yog Mayaji Mandir and the said Temple is being shown as the owner in revenue records including the Khasra Girdwari; that the plaintiffs No.2 to 16 are the co-owners of the said property and are in overall control and management of the Mandir and the properties attached to it, and that the plaintiffs No.2 to 16 are the pujaris, who along with their family members have been looking after the affairs relating to the Mandir, performing 'Puja – Arti' and 'Seva' in the said Temple for the last five centuries as per their turn, having inherited the said right as pujaris from their ancestors. The suit in the name of the Temple was competent as the Deity was competent to bring the suit within the meaning of the word 'person'. He relied upon the decision of the Punjab and Haryana High Court in **Shri Guru Granth Sahib Khoje Majra vs. Nagar Panchayat Khoje Majra,** Vol. LXXI – 1969 P.L.R. 844.

17. Mr. Gupta, the learned counsel for the respondents further contended that the pleas put forward by the appellant were irreconcilable, mutually destructive and inconsistent with one another. Thus, the plea of adverse possession and the plea of gift could not go together. Further, the case of the appellant is not that his father became owner by adverse possession, but that he has become the owner by adverse possession. The father of the appellant Badlu Ram died in 1991. The suit was preferred by the appellant in 1993, i.e., two years after the death of his father. It is settled law that a party who claims title by adverse possession to a property belonging to someone else should have been in occupation of the disputed property for more than 12 years without interruption. It was not the case of the appellant that his father was in adverse possession, and thus the plea of adverse possession was clearly not maintainable.

18. Mr. Gupta next contended that whereas a glance at the suit filed by the appellant (Suit No. 03/04/93) shows that the plaint focuses on possession alone and that gift is not even remotely suggested, in the written statement filed by the appellant to the subsequent suit filed by the respondents herein (Suit No. 85/03), the appellant asserts that the disputed property was gifted to his father by Smt. Ram Pyari. However, no gift deed is pleaded, and as a matter of fact, significantly the suit of the appellant continued for 10 years before the respondents chose to file a suit in the year 2003 and during all this period, there was not even a whisper of any gift or gift deed in favour of Badlu Ram. Mr. Gupta submitted that the father of the appellant was admittedly in permissive occupation, and, therefore, the question of adverse possession could not arise. Once a person is in permissive occupation, he can never claim adverse possession. The complete somersault is taken by the appellant in the written statement filed by him, by asserting that the property had been gifted to his father by one Ram Pyari, ought not to be countenanced by this Court.

19. The learned counsel for the respondents contended that the appellant had never set up title hostile to that of the Mandir. For the first time on 04.09.1993, he claimed adverse possession by filing a suit. In the said suit, it is not his case that he was occupying the premises independently of his father, and the undisputed position is that he was occupying the premises for less than two years. The plea of adverse possession is thus not made out. At best, the possession of the appellant was permissive in nature and, as already stated, a permissive occupant cannot claim adverse possession.

20. In the above context, reliance was placed by the learned counsel for the respondents on the following judgments:

(i) **Gaya Parshad Dikshit vs. Dr. Nirmal Chander and Anr.,** AIR 1984 SC 930, wherein it was held that mere termination of the license of a licensee does not enable the licensee to claim adverse possession, unless and until he sets up a title hostile to that of the licensor after termination of his license. It is not merely unauthorized possession on termination of his license that enables the licensee to claim title by adverse possession, but there must be some overt

act on the part of the licensee to show that he is claiming adverse possession. Mere continuance of unauthorized possession even for a period of more than 12 years is not enough.

(ii) **Sheodhari Rai and Ors. vs. Suraj Prasad Singh and Ors.,** AIR 1954 SC 758, wherein it was laid down that permissive possession cannot be treated as adverse possession till the defendant asserts an adverse possession.

(iii) **Annasaheb Bapusaheb Patil and Ors. vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs & heirs etc.,** AIR 1995 SC 895, wherein the Supreme Court enunciated the law to be that adverse possession means a hostile assertion, i.e., a possession which is expressly or impliedly in denial of the title of the true owner and held that under Article 65 of the Limitation Act, 1963, the burden is on the defendants to prove affirmatively.

(iv) **Harbans Kaur & Ors. vs. Bhola Nath & Anr,** 57 (1994) DLT 101, wherein it was laid down by this Court that the burden of proving adverse possession was a heavy one. Adverse possession implied a hostile possession whereby the title of the true owner is denied. A person who claims adverse possession must show on what date he came into possession and that he had been in continuous possession for more than 12 years, without a break and without interruption; his possession was to the exclusion of all other persons; his possession was of such a nature that it involved the exercise of rights so irreconcilable with that of the true owner as to afford him an opportunity to dispute that possession during that 12 years when he was in the process of perfecting his title. Adverse possession must have commenced in wrong and must be maintained against right. It must be open and hostile to the true owner. Possession must be nec vi, nec clam, nec precario, i.e., for the perfection of title it must be adequate in continuity, in publicity and extent.

(v) **Thakur Kishan Singh (dead) vs. Arvind Kumar,** AIR 1995 SC 73, wherein it was laid down that where the

possession was initially permissive, the burden was heavy on the appellant to establish that it became adverse. Mere possession for howsoever length of time does not result in converting permissive possession into adverse possession.

(vi) **Padmawati and Ors. vs. Harijan Sewak Sangh,** 154 (2008) DLT 411. In this case, the facts were somewhat similar to the present case. The record showed that the petitioners' father was in service of the respondent and the respondent had allotted suit premises to the father of the petitioners. After the death of the petitioners' father, the petitioners remained in unauthorized occupation of the said premises for a period of 24 years and 4 months. This Court in the aforesaid circumstances dismissed the petition with costs of Rs. 15,10,000/- to be recovered from the petitioners jointly and severally, holding the petitioners liable to pay user charges at the rate of Rs. 10,000/- per month if the premises were not vacated within 30 days.

21. Having perused the aforesaid precedents cited at the bar and gone through the records, the following position clearly emerges. The dispute between the parties arose on 29.08.1993. The appellant himself has alleged in paragraph 5 of the plaint, in Suit No.03/04/93 filed by him, that the defendants had asked him to vacate the premises on the said date and he had filed the suit immediately thereafter. A perusal of the plaint in Suit No.03/04/93 also shows that there is not a whisper in the plaint of ownership and the entire plaint focuses on the possession of the appellant alone. In paragraph 1 of the plaint, it is stated that the plaintiff is in **peaceful physical possession** and is also employed in St. Xaviers School, Civil Lines, Delhi. In paragraph 2 of the plaint, it is assertd that the **possession** of the abovesaid property was inherited by the appellant from his late father Badlu Ram, who had the exclusive **possession** of the same for the last more than 50 years and had died on 19.12.1991. In paragraph 3 of the plaint, it is admitted that Badlu Ram was performing 'Puja and Seva' in the Mandir on honorary basis for the last 50 years in the morning and evening. In paragraph 4 of the plaint, it is stated that the **possession** of the abovesaid premises was given to the late father of the plaintiff by one Smt. Ram Pyari, widow of Shri Trikha "about 50

years before (sic.) **for performing the abovesaid puja and seva.**" In paragraph 5 of the plaint, it is alleged that after the death of the father of the plaintiff, the defendants had been trying their best to **dispossess** the plaintiff and his family members on one pretext or the other. In paragraph 6 of the plaint, it is asserted that the appellant is at present "in l**egal and physical possession** by virtue of adverse possession continuously for more than 12 years without any interruption" and the defendants have no right to throw him out. In paragraph 7 of the plaint, it is alleged that the cause of action arose in the year 1991-92 when a complaint was lodged by the appellant against the defendant No.1 with the DCP, South District and again on 28–29.08.1993 when the defendants with ulterior motive had tried to dispossess the appellant. It is only in the prayer clause that a decree of declaration is sought that "the plaintiff be declared the owner of the property 10/7, Yog Maya Mandir, Mehrauli, New Delhi, being in adverse possession for last more than 12 years."

22. In the written statement filed to Civil Suit No.85/03 filed by Shree Yog Mayaji Temple, however, the appellant took a complete somersault by categorically denying that his father was employed in the Temple (though admitting that he was one of the pujaris of the Temple) and claiming that the property was **gifted** to his father by Smt. Ram Pyari, widow of Shri Trikha way back in the year 1943 and had now been inherited by him from his father (paragraph 7 of the written statement in suit No.85/03). In paragraph 9, it is again asserted that the defendants. father was the **owner** of the suit property and has given this property to the appellant. In paragraph 11, again the claim of ownership is asserted as also in paragraph 16, paragraph 17, paragraph 18 and paragraph 23.

23. From the aforesaid, it is clear that while in the suit instituted by him the appellant in the plaint had asserted that his father was in possession of the property since the year 1950 and he had inherited the said possession, in the written statement to the suit filed by the respondents, the appellant for the first time asserted ownership of the property by his father through a gift from Smt. Ram Pyari. However, no gift deed is pleaded nor any other document is placed on record to show that a gift of the disputed property had been made by Smt. Ram Pyari to the father of the appellant. It also stands out like a sore thumb that while the appellant in his suit impleaded three defendants, namely, Shri Hari Narain, Shri Inder Narain and Shri Surinder Narain, the names of the legal

representatives of Shri Hari Narain appear as plaintiffs No.2 and 3 in Suit No.85/03, Shri Inder Narain appears as plaintiff No.9 in the said suit and Shri Surinder Narain as plaintiff No.8 in the said suit. In other words, the appellant had impleaded as defendants the very same persons who are arrayed as plaintiffs in the suit filed by the Temple. It is also crystal clear that the suit is filed by the Deity as Shree Yog Maya ji Temple, and the plaintiffs No.2 to 16 merely claim to be „pandas. of the temple and responsible for the administration of the same. Thus, the suit evidently has been filed by the Deity and there can be no question of the suit being thrown out on the ground of improper institution.

24. Adverting next to the root of the matter, namely, as to whether the discretion exercised by the Trial Court to enter the judgment under Order XII Rule 6 CPC was properly exercised, in my considered opinion, the answer to this must be in the affirmative. This Court finds no merit in the contention of the learned counsel for the appellant that the exercise of jurisdiction by the learned Additional District Judge in decreeing the suit on the basis of admissions in the pleadings was altogether unjustified, for, to warrant the passing of a decree on admissions, the admissions must be unambiguous and unequivocal.

25. The ambit and scope of Order XII Rule 6 CPC is such that it confers almost sweeping powers on the Court to render speedy judgment in the suit to save the parties from going through the rigmarole of a protracted trial. As laid down in a catena of judgments of the Supreme Court and of various High Courts, the only pre-requisite is that there must be admissions of fact arising in the suit, either in the pleadings or otherwise, whether orally or in writing, and such admissions of fact must be clear, unequivocal and unambiguous. There is, however, no requirement for such admissions of facts to be specific or express and even constructive admissions have been deemed sufficient to pronounce judgment thereon. Furthermore, such admissions, it is well settled, may be culled out from the pleadings of the parties 'or otherwise' either by the Court or by any of the parties who may thereupon of its own motion move an application for pronouncement of judgment on the basis thereof. A duty is then cast on the Court to ascertain the admission of facts and to render judgment thereon, either in respect of the whole or a part of the claim made in the suit, after ascertaining whether the defence set up is such that it requires evidence for the determination of the issues or

whether the defence is an irreconcilable one, rendering it well nigh impossible for the defendant to succeed even if the same is entertained. For the aforesaid purpose, it would be open to the Court to look into the admissions gathered even constructively for the purpose of rendering a speedy judgment, subject of course to the stipulation that the objections raised by the opposite party against rendering the judgment are such which do not go to the root of the matter and are inconsequential in nature, making it impossible for the objecting party to succeed even if entertained.

26. It deserves to be noted at this juncture that Order XII Rule 6 CPC was amended by the Amendment Act of 1976. Prior to the amendment, the rule enabled any party, at any stage of a suit, where admissions of fact had been made to apply to the Court for a judgment or order upon such admissions as he may be entitled to, without waiting for the determination of any other question between the parties. In the 54th Law Commission Report amendment was suggested to enable the Court to give a judgment not only on the application of a party but on its own motion. Clearly, the amendment was brought about to further the ends of justice and to give the provisions of Order XII Rule 6 CPC a wider sweep.

27. In the case of **Uttam Singh Dugal & Co. Ltd. vs. Union Bank of India & Ors.,** (2000) 7 SCC 120, a contention was raised on behalf of the appellant, Uttam Singh Dugal that admissions under Order XII Rule 6 CPC should be only those which are made in the pleadings, and, in any event the expression "either in pleadings or otherwise" should be interpreted ejusdem generis. Rejecting the aforesaid contention, the Supreme Court held that the Court should not unduly narrow down the application of the provisions of Order XII Rule 6 CPC as the object is to enable a party to obtain speedy judgment.

28. Relying upon the observations made in the case of **Uttam Singh Dugal & Co. Ltd.** (supra), the Supreme Court in the case of **Charanjit Lal Mehra and Ors. vs. Kamal Saroj Mahajan (Smt.) and Anr.,** (2005) 11 SCC 279 construed the provisions of Order XII Rule 6 CPC to include admissions that could be **"inferred"** from the facts and circumstances of the case, and opined that Order XII Rule 6 CPC is enacted for the purpose of and in order to expedite the trials. The Court

observed:

> "If there is any admission on part of the defendants or an admission that can be **inferred from the facts and circumstances of the case (emphasis added)** without any dispute then, in such a case in order to expedite and dispose of the matter such admission can be acted upon."

29. In a recent judgment rendered by the Supreme Court in **Karam Kapahi and Ors. vs. Lal Chand Public Charitable Trust and Anr.,** (2010) 4 SCC 753, another Bench of the Supreme Court, after discussing the entire gamut of case law on this aspect, compared the provisions of Order XII Rule 1 CPC and Order XII Rule 6 CPC, and held that on such comparison it becomes clear that the provisions of Order XII Rule 6 CPC are wider, inasmuch as the provisions of Order XII Rule 1 CPC are limited to admission by "pleading or otherwise in writing", but in Order XII Rule 6 CPC the expression "or otherwise" is much wider in view of the words used therein, namely, "admission of fact …….. either in the pleading or otherwise, whether orally or in writing." It was further observed that as held in the case of **Charanjit Lal Mehra and Ors.** (supra) admissions can be inferred from the facts and circumstances of the case.

30. The above being the position of law, it is proposed to revert back to the case in hand. There can be no manner of doubt that in the suit filed by the appellant, it was the case of the appellant that his father was in possession of the suit property as a pujari in the Temple. He has himself admitted that possession of the property was given to his father by one Smt. Ram Pyari, who was the widow of one of the pujaris of the Temple and it was given while his father was doing puja and seva in the Temple. The said occupation was thus a permissive user. No doubt, in the written statement in Suit No.85/03, the appellant has raised the plea of ownership by virtue of gift of the suit property to his father by Smt. Ram Pyari, but the same is clearly an afterthought, and that too a belated one, inasmuch as the said position has been taken by the appellant ten years after the filing of his own suit. Even otherwise, the gift of immovable property cannot be proved by oral evidence without a written and registered gift deed. There is not even a whisper that such gift deed was executed or registered by Smt. Ram Pyari in favour of Badlu Ram or the appellant herein.

31. The other stand adopted by the appellant, viz., of ownership of the suit property by adverse possession for more than 12 years in hostility of its true owner, is also clearly unsustainable. To recapitulate, it is not the case of the appellant that his father Badlu Ram was in adverse possession. Badlu Ram died on 19.12.1991 and the appellant filed a suit for declaration in the year 1993. The question of the appellant being in adverse possession for more than 12 years, therefore, does not arise. Apart from this, as noted above, the mere fact that the appellant has come forward with a plea of adverse possession means that he admits the plaintiff to be the true owner. For a plea of ownership on the basis of adverse possession, the first and foremost condition is that the property must belong to a person other than the person pleading his title on the basis of adverse possession. The appellant who admits permissive possession/occupation in the same breath cannot be allowed to plead adverse possession in the other, and that too without any hostile assertion made by him in denial of the title of the true owner. In the instant case, it may be noted that the appellant himself had impleaded the parties arrayed as plaintiffs in the suit of Yog Mayaji Temple as defendants in his suit. Thus, no question of hostile assertion arises or can be countenanced. At the risk of repetition, it is also noted that the defendant No.2 Sant Lal Kaushik, who is the brother of the appellant, has admitted the case of plaintiff in toto. The appellant seeks to brush this aside by asserting active collusion between the respondents and his brother. In the face of the admissions made by the appellant himself which have been culled out from his pleadings and inferred therefrom, in my view, this assertion must fall to the ground. Consequently, looking at the matter from any angle, the judgment of the trial court deserves to be affirmed.

32. In the above view of the matter, it is deemed unnecessary to go into the question raised by the respondents that the appellant could have only taken the plea of adverse possession as a defence and that no declaration of the said right could be given in the suit to the plaintiff and as such even the consequential relief of injunction could also not have been given to the appellant.

33. The appeal is accordingly dismissed with the direction to send back the records to the trial court for adjudication on the aspect of mesne profits.

ILR (2011) III DELHI 266

FAO

KALA ....APPELLANT

VERSUS

UNION OF INDIA ....RESPONDENT

(MOOL CHAND GARG, J.)

FAO NO. : 322/2009 DATE OF DECISION: 04.03.2011

Claims—Compensation—Railways Accident—Untowards incident—Compensation for Railway Accident—Deceased a daily passenger—Commuting from Khekra to Vivek Vihar—At Shahdara Railway Station—Due to heavy rush could only hold onto gate after train started—Fell down and sustained grievious injuries—Eventually led to death—Hence claim filed by Appellant, wife of deceased, before Railways Claim Tribunal—Tribunal held accident due to negligence of deceased—Deceased standing on edge of platform, unmindful of arrival of train—Hence present appeal. Held—"Untoward incident" includes accidental falling while trying to board train, not limited to when person got inside train and fell off thereafter—No evidence led to show negligence of deceased—Observation that deceased fell on tracks due to gush of wind not sustainable—Order passed by Tribunal not sustainable.

Appeal allowed—Respodent directed to pay Rs. 4 lacs along with interest with interest from dated of filing of claim petition.

In the present case, even if the contents of the DD no. 21 have been accepted by the Tribunal as a gospel truth, a perusal of the abovementioned case **Union of India V. Prabhakaran Vijaya Kumar and Others.** (Supra) it is clearly held by the apex court that falling down of a bonafide passenger from a train while trying to board it is covered

under "untoward incident" and whether the passenger was not actually inside the train while falling down was held to be inconsequential. In any event , no evidence has been led by the respondent to prove that anybody saw the passenger being negligent on the station so as to ring his conduct in the exceptions provided for under Sec. 124A of the Railways Claims Tribunal Act. Furthermore the Tribunals observation that the deceased fell on the tracks due to the gush of the wind is not really sustainable since a gush of wind cannot push a grown man off the platform unless there is a heavy storm which was not the case in the current situation. In these circumstances considering the law laid down by the Apex Court in the case of **Union of India V. Prabhakaran Vijaya Kumar and Others.** (Supra), the order passed by the Tribunal cannot be sustained. **(Para 11)**

Consequently, the appeal is allowed and the Respondents are directed to pay Rs.4 lakhs, which is the amount fixed towards compensation in case of death, to the appellant along with interest @ 9% per annum w.e.f. the date of filing of the claim petition. The amount shall be paid by the Respondent within 1 month from today. A copy of this order be sent to the Tribunal along with records. **(Para 12)**

Important Issue Involved: "Untoward incident" includes accidental falling while trying to board train, not limited to when person got inside train and fell off thereafter—No evidence led to show negligence of deceased—Observation that deceased fell on tracks due to gush of wind not sustainable—Order passed by Tribunal not sustainable.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. S.N. Parashar, Advocate.

FOR THE RESPONDENT : Ms. Rashmi Malhotra, Advocate.

CASES REFERRED TO:

1. *Union of India* vs. *Prabhakaran Vijaya Kumar and Others.* (2008) 9 SCC 527.
2. *S.M. Nilajkar* vs. *Telecom Distt. Manager :* (2003)IILLJ359SC.
3. *Kunal Singh* vs. *Union of India :* (2003)IILLJ735SC.
4. *B.D. Shetty* vs. *CEAT Ltd. :* (2001)IILLJ1552SC.
5. *Transport Corporation of India* vs. *ESI Corporation : (2000)ILLJ1SC etc.*
7. *Jeewanlal Ltd.* vs. *Appellate Authority* : (1984)IILLJ464SC.
8. *Lalappa Lingappa and Ors.* vs. *Laxmi Vishnu Textile Mills Ltd. :* (1981)ILLJ308SC.
9. *Alembic Chemical Works Co. Ltd.* vs. *The Workmen :* (1961)ILLJ328SC.

RESULT: Appeal allowed.

MOOL CHAND GARG, J.

1. This appeal arises out of an order dated 06.03.2009 passed by the Railways Claims Tribunal, Principal Bench, Delhi, (hereinafter referred to as "the Tribunal"), whereby the learned Tribunal has dismissed the claim of the appellant filed under Section 16 of the Railways Claims Tribunal Act for payment of compensation on account of death of Sh.Jagdish, who was admittedly a bona fide passenger.

2. According to the appellant, the deceased was a daily passenger and was holder of MST bearing No. 002270 from Khekra to Vivek Vihar. On the day of the incident i.e. 24.07.2007 at about 5.30 p.m. the deceased commuting on the abovementioned route came to Shahdara Railway station from Vivek Vihar but due to the heavy rush he could only hold on to the gate and after the train started, due to heavy rush, jerk, push and pull, fell down from the train and sustained grievous injuries which eventually led to his death on 01.08.2007.

3. The claim was contested by the respondent-Railway Administration by filing a written statement, wherein they have denied that the deceased died due to falling from a running train but instead, the death occurred when the deceased was waiting for the train on the

platform and due to the force of the arrival of the train he fell down on the platform and sustained injuries. They have further made a plea that the respondents are protected under Section 124(c) of the Railway Claims Tribunal Act as the deceased was negligent and was standing close to the railway line on the railway platform while waiting for the arrival of train.

4. The Tribunal recorded the evidence led by the parties which comprises of the statement made by the appellant as AW-1 and one other witness Shri Anil as AW2 and has also placed on record Ex. AW1/1 to AW2/3. On behalf of the respondents, no evidence has been adduced either oral or documentary but it has placed on record the DRM's report as per ex. R-1 wherein, it is stated interalia that the deceased was standing at the edge of the platform and when the train came at the platform, he fell down and died.

5. While deciding Issue No.1 in favour of the appellant by holding that the applicant and her aforesaid four sons are the dependants of the deceased, the tribunal relied upon ration card ex. AW1/7 placed by the appellant and the cross-examination of AW-1. Issue No.2 was also decided in favour of the appellant i.e. the deceased was a bonafide passenger, on the basis of the MST No. 002270 dated 3.07.2007 and the Identity card No. 834489 from Khekra to Vivek Vihar which were placed on record as ex. AW1/5 and ex. AW1/4 respectively. Furthermore the report of Sr. DSO/RPF/ New Delhi to Sr. DCM, Northern Railways, New Delhi, also shows that the MST was recovered from the person of the deceased. Thus in totality of the circumstances, the deceased was held to be a bona fide passenger.

6. That Issue Nos. 3 and 4 were decided together for the sake of convenience. AW1 in her cross examination stated that AW2 had informed her about the incident over the phone. AW2 is also a daily rail passenger from Baraut to Shivaji Bridge and a monthly pass-holder bearing No.087287 and has stated in his affidavit that he entered the compartment of the train but due to the heavy rush, the deceased was standing near the gate of the compartment and when the train started, he fell down due to the heavy jerk of the train and push from inside the compartment and sustained grievous injury. Under cross-examination, he has clearly admitted that his MST was not valid for Vivek Vihar and stated that though he did not pull the alarm chain he was the one who had lifted the deceased and took him to the hospital and that he was the one who had informed the incident

to the police but the police never recorded his statement. Regarding AW2, the tribunal observed that the evidence of AW2 was full off loop holes and implicit reliance could not be placed upon it. Furthermore the contents of DD No. 21 dated 24.07.2007 would clearly reveal that the deceased while he was standing at the platform, had a fall due to the force of the arrival of the train and thus the tribunal placed reliance on the contents of the DD no. 21 and held the evidence of AW2 being highly artificial and unnatural. Thus once the evidence of AW2 was rejected, perusal of AW1 and DD No. 21 clearly states that the deceased did not fall from the train accidentally while boarding the train but instead he sustained injuries when he fell down at the platform on account of the arrival of the train at the platform.

7. The Tribunal arrived at the following conclusion :-

> "On careful perusal of the entire material placed on record, I find that the incident in question had occurred when the deceased was standing at the edge of the platform, due to the gush of the wind, he fell on the platform and sustained injuries. Therefore in all probability, the accident was due to the negligence of the deceased himself, when he was standing at the edge of the platform, totally unmindful of the arrival of the train at the said platform. Even if there was any negligence on the part of the Railway Administration, the application under Section 13 of the Railways Claims Tribunal Act is limited."

8. No evidence has been led by the Respondents.

9. I have heard the submissions made on behalf of the parties and have also gone through the written submissions filed by counsel for the respondent.

10. I have also gone through the judgment delivered by the Apex Court in the case of **Union of India V. Prabhakaran Vijaya Kumar and Others.** (2008) 9 SCC 527 which appears to be applicable to the facts of the present case. In the aforesaid case the deceased was trying to board the train and fell down. The Apex Court held it to be an 'accidental fall' and the relevant observations have been quoted hereunder for the sake of reference:-

> "10. We are of the opinion that it will not legally make any

difference whether the deceased was actually inside the train when she fell down or whether she was only trying to get into the train when she fell down. In our opinion in either case it amounts to an 'accidental falling of a passenger from a train carrying passengers'. Hence, it is an 'untoward incident' as defined in Section 123(c) of the Railways Act.

11. No doubt, it is possible that two interpretations can be given to the expression 'accidental falling of a passenger from a train carrying passengers', the first being that it only applies when a person has actually got inside the train and thereafter falls down from the train, while the second being that it includes a situation where a person is trying to board the train and falls down while trying to do so. Since the provision for compensation in the Railways Act is a beneficial piece of legislation, in our opinion, it should receive a liberal and wider interpretation and not a narrow and technical one. Hence in our opinion the latter of the abovementioned two interpretations i.e. the one which advances the object of the statute and serves its purpose should be preferred vide **Kunal Singh v. Union of India :** (2003)IILLJ735SC , **B.D. Shetty v. CEAT Ltd.** : (2001)IILLJ1552SC , **Transport Corporation of India v. ESI Corporation** : (2000)ILLJ1SC etc.

12. It is well settled that if the words used in a beneficial or welfare statute are capable of two constructions, the one which is more in consonance with the object of the Act and for the benefit of the person for whom the Act was made should be preferred. In other words, beneficial or welfare statutes should be given a liberal and not literal or strict interpretation vide **Alembic Chemical Works Co. Ltd. v. The Workmen** : (1961)ILLJ328SC , **Jeewanlal Ltd. v. Appellate Authority** : (1984) IILLJ464SC, **Lalappa Lingappa and Ors. v. Laxmi Vishnu Textile Mills Ltd.** : (1981)ILLJ308SC, **S.M. Nilajkar v. Telecom Distt. Manager** : (2003)IILLJ359SC etc."

11. In the present case, even if the contents of the DD no. 21 have been accepted by the Tribunal as a gospel truth, a perusal of the abovementioned case **Union of India V. Prabhakaran Vijaya Kumar and Others.** (Supra) it is clearly held by the apex court that falling down

of a bonafide passenger from a train while trying to board it is covered under "untoward incident" and whether the passenger was not actually inside the train while falling down was held to be inconsequential. In any event , no evidence has been led by the respondent to prove that anybody saw the passenger being negligent on the station so as to ring his conduct in the exceptions provided for under Sec. 124A of the Railways Claims Tribunal Act. Furthermore the Tribunals observation that the deceased fell on the tracks due to the gush of the wind is not really sustainable since a gush of wind cannot push a grown man off the platform unless there is a heavy storm which was not the case in the current situation. In these circumstances considering the law laid down by the Apex Court in the case of **Union of India V. Prabhakaran Vijaya Kumar and Others.** (Supra), the order passed by the Tribunal cannot be sustained.

12. Consequently, the appeal is allowed and the Respondents are directed to pay Rs.4 lakhs, which is the amount fixed towards compensation in case of death, to the appellant along with interest @ 9% per annum w.e.f. the date of filing of the claim petition. The amount shall be paid by the Respondent within 1 month from today. A copy of this order be sent to the Tribunal along with records.

ILR (2011) III DELHI 272
W.P.

MUKESH ....PETITIONER

VERSUS

AIR INDIA & ANR. ....RESPONDENTS

(REKHA SHARMA, J.)

W.P. NO. : 7112/2008 DATE OF DECISION: 04.03.2011

Constitution of India, 1950—Article 226—Challenge to Denial of Appointment—Effect of Surpressio Veri—Petitioner applied for the post of Ramp Service Agent—

Cleared trade test and personal interview—Allegedly found medically unfit—Petitioner presented himself for Pre-Employment Medical Examination ("PEME")—Respondent did not disclose result of PEME—Legal notice sent in August 2007—Application dated 01.12.2007 filed under Right to Information Act—Only on 12.12.2007 Petitioner informed of failure to pass PEME—Respondent did not specify nature of medical unfitness—Another RTI application filed—Petitioner found to be suffering from right ear deafness according to Respondent—Petitioner got himself examined by private ENT Specialist—No such abnormality found—Petitioner sent letter to Respondent—Another application under RTI Act filed with respect to qualifications of individuals who prepared medical report—Informed that said doctors were not ENT Specialists—Hence present petition—However, petition silent on the fact that one of the examining doctors was an ENT Specialist.

HELD:

(A) PEME Consists of various medical examinations conducted by Specialists—Said reports then handed over to Medical Officer for final review—Specialists who examined Petitioner included ENT Specialist—Petitioner chose not to disclose this fact—Tone and tenor of petition gave impression that Medical Officers had no material before them—Petitioner chose to remain silent—Said silence deliberate and not out of ignorance—Petitioner must approach with clean hands.

One fact clearly emerges from the case set-out by the respondents and that fact is that the petitioner was examined by an ENT Specialist, namely, Dr. (Major) Rajesh Bhardwaj who was on the panel of respondent No.1. But what I find to my dismay is that the petitioner who has made so much ado about his having been declared medically unfit by the

Medical Officers of the respondents who were not ENT Specialists, chose not to disclose this fact in his writ-petition. The tone and tenor of his writ-petition is such that it gives an impression as if the Medical Officers who declared him unfit had no material before them. On the other hand, as pointed out by the respondents, the fact of the matter is that they had before them the report of the ENT Specialist as well as the medical standards for the post in question which they applied to the report and only then did they declare the petitioner unfit. The Medical Officers who compared the ENT report of the petitioner with the prescribed standards were neither naïve nor laymen. They too were qualified doctors. It required no super-skill to consider the reports of the various specialists with reference to the prescribed medical standard and declare a person fit or unfit. **(Para 10)**

Given the fact that the petitioner is accusing the respondents that he has been declared medically unfit by the Medical Officers who were not qualified to do so, should he not have disclosed that he appeared before an ENT Specialist of the respondents and was examined by him? He chose to remain silent. To me, this silence was not out of ignorance. It was deliberate and with a view to present a distorted picture of what actually happened. For how many times the Courts have to repeat that a petitioner must approach the Court with clean hands? Here is a petitioner who knew that he had been examined by an ENT Specialist and yet did not disclose this fact in the writ-petition. **(Para 11)**

(B) Petitioner also fell short of prescribed standards—Once candidate declared medically unfit as per relevant rules, no provision for second round of medical examination—Hence, no fault to be found with Medical Officers—Furthermore no vacancies available—Hence Petition dismissed.

Something more! It is not the case of the petitioner that no medical norms are prescribed by the respondents. It is also not his case that the norms so prescribed were not followed.

The respondents have referred to those norms and in terms thereof, only less than 25 db of average hearing loss was considered normal and as regards speech discrimination, more than 90% w as taken as normal. The petitioner suffered from average hearing loss of 42 db vis-à-vis his right ear and 80% of speech discrimination in the said ear. He, thus, fell far short of the laid down standards. It is stated by the respondents that once a candidate is examined by a Specialist and has been declared medically unfit by an in-house panel of doctors as per the relevant Pre-employment Medical Rules, there is no provision of referring a candidate for a second round of medical examination. **(Para 12)**

In view of the above, no fault can be found with the Medical Officers declaring him unfit and I also feel that the petitioner does not deserve to be sent for a fresh medical examination. **(Para 13)**

And last but not least, I cannot lose sight of the fact that the petitioner has challenged the recruitment exercise that was undertaken way-back in the year 2004. As per the respondents, all the vacancies have since been filled up which I have no reason to disbelieve. **(Para 14)**

Important Issue Involved: Petitioner chose not to disclose this fact—Tone and tenor of petition gave impression that Medical Officers had no material before them—Petitioner chose of remain silent—Said silence deliberate and not out of ignorance—Petitioner must approach with clean hands.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. V.V.R. Rao, Advocate.

FOR THE RESPONDENT : Ms. Padma Priya, Advocate.

RESULT: Petition dismissed.

REKHA SHARMA, J.

1. The petitioner had applied for the post of Ramp Service Agent with respondent No.2 pursuant to an advertisement published in Employment News dated February 14-20, 2004. Despite having cleared the trade test and personal interview, he has not been appointed to the post, allegedly, on the ground that he was found medically unfit, as he failed to meet the standard of Pre-Employment Medical Examination (in short, called the "PEME").

2. The grievance of the petitioner is that after he had presented himself for the PEME conducted by the respondents, he kept waiting for a favourable response and when for a long time he did not hear from them, he made several trips to their office to know the status of his appointment but to no avail. Left with no option, he sent a legal notice to the respondents dated August 20, 2007 followed by an application under the Right to Information Act dated December 01, 2007. It was only thereafter, on December 12, 2007 that he was informed that he had been found medically unfit.

3. It is further his grievance that the information so given did not specify the nature of medical unfitness that he was found to be suffering from. That led him to file another application under the Right to Information Act, dated December 27, 2007 calling upon the respondents to supply him his medical report, in response to which he received letter dated January 17, 2008 informing him that the Medical Officer of the Company during the course of his medical examination found him to be suffering from right ear deafness and that it was for the said reason that he was declared medically unfit. Along with this letter he was sent his medical report signed by Dr. V.K.Gupta & Dr. V.K.Batra wherein against the heading "Final Assessment", it was recorded – "Temporarily Unfit". On receipt of letter dated January 17, 2008 along with his medical report, the petitioner got himself privately examined from an ENT Specialist, namely, Dr. V.K.Gupta, M.B.B.S., M.S. (ENT) FCGP Ex. H.C.M.S. who opined that he suffered from no abnormality and that his hearing was within normal limit. Armed with this report, the petitioner sent a letter to the respondent dated February 19, 2008 requesting that he be appointed to the post, and in the meanwhile, he sent another letter under the Right to Information Act dated April 24, 2008 inter-alia requesting the respondents to furnish details regarding the designation, specialization, qualification and experience of Dr. V.K.Gupta and Dr. V.K.Batra both of whom had

signed his medical report. He also sought information, whether they were ENT Specialists. The respondents did not accede to his request for appointment on the basis of the report obtained by him from an ENT Specialist, but after some reminders vide letter dated July 18, 2008 did inform him that Dr. V.K.Gupta was Locum Medical Officer with MBBS qualification and had an experience of 35 years, and Dr. V.K.Batra was Deputy General Manager, MD (Internal Medicines), M.N.A.M.S. (Internal Medicines) and had an experience of 29 years. He was also informed that they were not ENT Specialists.

4. In the aforementioned background, it is the case of the petitioner that the respondents having themselves admitted that Dr. V.K.Gupta and Dr. V.K.Batra who had declared him medically unfit on account of abnormality in his right ear were not ENT Specialists and he having got himself examined from an ENT Specialist who had given an opinion that he suffered from no abnormality, there is no justification on the part of the respondents in not appointing him to the post. Hence, he has come to this Court seeking inter-alia a writ, order or direction to the respondents to immediately consider him for appointment to the post of Ramp Service Agent with effect from the date he was disqualified in the medical examination and for a further direction to frame guidelines for conducting pre-medical examination at a Government recognized hospital by a qualified and specialist panel of doctors.

5. Having set out the case of the petitioner, it is turn now to furnish the respondents. version to the same. Both respondents No.1 & 2 have filed separate counter-affidavits but they have taken identical stand in so far as the merits of the case are concerned. However, before I refer to what the respondents have to say on merits, it needs to be noticed that respondent No.1, namely, Air India in its counter-affidavit has taken a plea that as on the date of the filing of the writ-petition, it had ceased to exist as an entity, in as much as along with Indian Airlines Limited, it stood amalgamated with National Aviation Company of India Limited (NACIL) vide Ministry of Corporate Affairs. order dated August 22, 2007 approving the scheme of amalgamation. Hence, it has prayed for deletion of its name from the array of parties. As regards the status of respondent No.2, it is stated by both the respondents that it is a wholly owned subsidiary of erstwhile Air India Limited and was established for undertaking ground handling functions at various Airports.

6. On merits, the respondents have accused the petitioner of deliberately suppressing a material fact that in the course of his PEME, he was examined by an ENT Specialist and that by suppressing this fact, he has sought to give an impression as if the Medical Officers of the respondents who have declared him medically unfit had done so without taking into consideration the report of the ENT Specialist. Giving details of how the PEME is carried out, it is stated that various medical examinations on a candidate are conducted by doctors who are on the panel of respondent No.1 including specialist doctors and thereafter, all the examination/assessment reports are handed ˇover/collected by Medical Officer of the respondent-company for final review/assessment. The Medical Officer after compiling all the reports from all the concerned panel doctors including specialist doctors, who have carried out the medical examination, prepares a final report giving his final remarks as per the Rules of the respondent-company. As per the respondents, the same procedure was followed in the case of the petitioner. The Specialists clinically examined him for Pathological tests, X-Ray, ENT, etc. The confidential reports of all these tests were sent in a sealed cover to the Medical Officer of the company. The Medical Officer/s of the company assessed the reports of the Specialists vis-à-vis the prescribed standard for the post. During the course of the assessment of the report of ENT Specialist, namely, Dr. (Major) Rajesh Bhardwaj, MBBS, MS(ENT), BLO, DNE, DHA, the petitioner was found to be medically unfit by the Medical Officer of the respondent-company, as the same was not meeting the standards of the PEME prescribed by the company which were as under:-

Sl. No.	Criteria	Standard of (Audiometry) Hearing required as per PEME Standards	Hearing (Audiometry) Loss of the petitioner at the time of pre-employment examination
1	Average Hearing Loss	Less than 25 db (Normal)	42 db (Right Ear) 23 db (Left Ear)
2	Speech Discrimination	More than 90% (Normal)	80% (Right Ear) 98% (Left Ear)

7. It is stated that Dr. (Major) Rajesh Bhardwaj, ENT Specialist

was only required to furnish his report on the basis of clinical examination conducted by him. It was thereafter the job of the Medical Officers of the company to examine the report vis-à-vis the prescribed medical standard. Accordingly, as noticed above, they examined the medical reports of the petitioner and only then did they declare him unfit for the job.

8. It is further stated that the job of Ramp Service Agent requires a person to operate/handle equipments at the Tarmac Area of the International Airport and as the Airport is a high risk area where high level of noise occurs due to constant presence of aircrafts and other heavy equipments, the job require precision in handling equipment. Accordingly, strict medical standards are laid down and the selection of the fittest from the fit is made so that the individual is not put to risk himself and is also not a cause of risk to others in the Airport premises.

9. For what has been noticed above, the following question arises for consideration:-

> "Is the petitioner guilty of suppression of a material fact? And if so, is the petition liable to be dismissed on that score, and if not, has he been wrongly declared medically unfit by the respondents?"

10. One fact clearly emerges from the case set-out by the respondents and that fact is that the petitioner was examined by an ENT Specialist, namely, Dr. (Major) Rajesh Bhardwaj who was on the panel of respondent No.1. But what I find to my dismay is that the petitioner who has made so much ado about his having been declared medically unfit by the Medical Officers of the respondents who were not ENT Specialists, chose not to disclose this fact in his writ-petition. The tone and tenor of his writ-petition is such that it gives an impression as if the Medical Officers who declared him unfit had no material before them. On the other hand, as pointed out by the respondents, the fact of the matter is that they had before them the report of the ENT Specialist as well as the medical standards for the post in question which they applied to the report and only then did they declare the petitioner unfit. The Medical Officers who compared the ENT report of the petitioner with the prescribed standards were neither naïve nor laymen. They too were qualified doctors. It required no super-skill to consider the reports of the various specialists with reference to the prescribed medical standard and declare a person

fit or unfit.

11. Given the fact that the petitioner is accusing the respondents that he has been declared medically unfit by the Medical Officers who were not qualified to do so, should he not have disclosed that he appeared before an ENT Specialist of the respondents and was examined by him? He chose to remain silent. To me, this silence was not out of ignorance. It was deliberate and with a view to present a distorted picture of what actually happened. For how many times the Courts have to repeat that a petitioner must approach the Court with clean hands? Here is a petitioner who knew that he had been examined by an ENT Specialist and yet did not disclose this fact in the writ-petition.

12. Something more! It is not the case of the petitioner that no medical norms are prescribed by the respondents. It is also not his case that the norms so prescribed were not followed. The respondents have referred to those norms and in terms thereof, only less than 25 db of average hearing loss was considered normal and as regards speech discrimination, more than 90% was taken as normal. The petitioner suffered from average hearing loss of 42 db vis-à-vis his right ear and 80% of speech discrimination in the said ear. He, thus, fell far short of the laid down standards. It is stated by the respondents that once a candidate is examined by a Specialist and has been declared medically unfit by an in-house panel of doctors as per the relevant Pre-employment Medical Rules, there is no provision of referring a candidate for a second round of medical examination.

13. In view of the above, no fault can be found with the Medical Officers declaring him unfit and I also feel that the petitioner does not deserve to be sent for a fresh medical examination.

14. And last but not least, I cannot lose sight of the fact that the petitioner has challenged the recruitment exercise that was undertaken way-back in the year 2004. As per the respondents, all the vacancies have since been filled up which I have no reason to disbelieve.

15. For the fore-going reasons, I feel that the petition deserves to be dismissed, and I hereby do so.

ILR (2011) III DELHI 281
CO. PET.

N&S&N CONSULTANTS S.R.O ....PETITIONER

VERSUS

SRM EXPLORATION PRIVATE LIMITED ....RESPONDENT

(MANMOHAN, J.)

CO. PET NO. : 248/2009 & CO. APPL. NOS. : 767/2009 & 1889/2010

DATE OF DECISION: 04.03.2011

Companies Act, 1956—Section 433, 434—Petitioner a Company registered under the laws of Czech Republic—Owned 100% shares in a Company SP of W, a.s—A Czech Republic Company—Executed a stock purchase and sale Agreement for the sale of 100% equity interest of SP of W, a.s at the purchase price of CZK 230,000,000, with another Company M/s Newco Prague, s.r.o (purchaser) sale price was to be paid in four installements—Respondent a Company registered with Registrar of Companies, Delhi stood as guarantor by a guarantee declaration for the payment of the said unpaid installments—Purchaser made only part payment—Petitioner approached respondent demanding payment of unpaid installments—Subsequently gave statutory winding up notice to the respondent for making payment—Respondent raised objections such as no debt could arise in favour of the petitioner until a decree on the basis of alleged declaration of guarantee is obtained against the respondent; no Power of Attorney executed in favour of Mr. Ravi Chilkuri the executant of guarantee declaration does not bear stamp or seal of respondent Company—Mr. Ravi Chilukuri neither a Director nor a shareholder at the relevant time; guarantee declaration

was null and void as no mandatory permission was obtained under FEMA or FERA and; winding up notice was pre mature as the notice could have been issued only if the payment had not been made within the stipulated time—Held—Question of Mr. Ravi Chilukuri having no Power of Attorney in his favour or guarantee declaration not bearing the stamp/seal of respondent not available as defence to respondent in view of the principle of internal management—Defence also clearly mentioned no criminal proceedings initiated against Mr. Ravi Chilukuri—Since the notice of winding up was issued only after the respondent did not make the payment in terms of declaration, neither winding up notice nor petition for winding up pre mature—If the guarantee declaration was executed in breach of provisions of FEMA or FERA respondent could be prosecuted for the same—It, however, cannot be said that guarantee is null and void or cannot be enforced on this ground—Gurantee declaration is a contract enforceable under law—Not necessary for the petitioner to wait to obtain a decree from Civil Court on the basis of guarantee declaration—Thus, respondent owe debt to petitioner which it defaulted in paying—Defence set up moonshine and sham—Provisional liquidator appointed.

Important Issue Involved: When there is no dispute as to Company's liability, the solvency of Company would not constitute a stand alone ground for setting aside notice u/s 434(1)(a) of Companies Act.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Vijay, K. Singh, Advocate.

FOR THE RESPONDENT : Mr. Amit S. Chadha, Senior Advocate with Mr. Sandeep Khurana with Mr. Dinesh Rastogi, Asvocates for

respondent. Ms. Manisha with Mr. Srinjoy Banerjee, Advocates for RBI.

CASES REFERRED TO:

1. *IBA Health (India) Private Ltd.* vs. *INFO-DRIVE Systems SDN. BHD.*, (2010) 10 SCC 553.
2. *Ram Bahadur Thakur and Compay* vs. *Sabu Jain Ltd.*, (1981) 51 Comp.

RESULT: Application allowed.

MANMOHAN, J : (Oral)

1. The present petition has been filed under Section 433(e) read with Section 434 of the Companies Act, 1956 (for short 'the Act') for winding up of the respondent-company.

2. The relevant facts of the present case are that the petitioner is a company incorporated under the laws of Czech Republic. It owns 100% equity shares in another Czech Republic company, namely, SP of W, a.s.

3. On 15th March, 2007, petitioner-company executed a Stock Purchase and Sale Agreement (for short **'Agreement'**) with M/s. Newco Prague, s.r.o. (hereinafter referred to as **'Purchaser'**) for sale of 100% equity interest of SP of W, a.s. at the purchase price of CZK 230,000,000. It is pertinent to mention that the Purchaser is also incorporated and established under the laws of Czech Republic. The above purchase price was to be paid by the Purchaser company in terms of Clause 3.1.1. in four installments. The said clause is reproduced hereinbelow:

'3.1.1.1 Payment of Purchase Price. The Purchase Price up to the agreed amount shall be paid to the Seller's account as follows:-

(i) First instalment. The first instalment in the amount of 50.000.000,-CZK (fifty million Czech Crowns) shall be paid into the Seller's Account within 3 (three) months after the Start of Construction but not earlier than 15 (fifteen) working days after the Registration Date.

(ii) Second instalment. The second instalment in the amount of 50.000.000,-CZK (fifty million Czech Crowns) shall be paid into the Seller's Account within 6 (six) months after the Start of Construction.

(iii) Third instalment. The third instalment in the amount of 50.000.000,-CZK (fifty million Czech Crowns) shall be paid into the Seller's Account within 12 (twelve) months after the Start of Construction.

(iv) Forth instalment. The forth instalment in the amount of 80.000.000,-CZK (eighty million Czech Crowns) shall be paid into the Seller's Account at the latest within 12 (twelve) months after the star of the commercial production but not later than 24 (twenty four) months after the Start of Construction.'

4. It is alleged that the respondent, a company incorporated under the Indian Companies Act, 1956 and registered with the Registrar of Companies, Delhi executed a Guaranty Declaration dated 15th March, 2007, whereunder it assumed the duty to pay to petitioner the unpaid installments in accordance with the Agreement in the event of default by the Purchaser. Since a lot of emphasis has been placed on Guaranty Declaration, the same is reproduced hereinbelow for ready reference:

"Guaranty Declaration

SRM Exploration Private Limited

with registered office at D-146, Saket, New Delhi – 110017, India represented on power of attorney by Mr. Ravi Chilukuri hereinafter the Guarantor hereby declares to

N & S & N Consultants s.r.o.

company no.: 482 92 583

with registered office at Budovatelu 2830, Most, postal code:434 01, Czech republic represented by the executive Mr. Ing. Miloslav Soldat hereinafter the Seller

that :

1. It has been acquainted with the obligation of the company NEWCO PRAGUE s.r.o. with registered office at Litynow-Janovg Pratelsyi 81, postal code: 435 42, Czech Republic, which ensues from the Stock Purchase and Sale Agreement concluded on 15.3.2007 between N & S & N Consultants s.r.o., as the Seller and NEWCO PRAGUE as the Purchaser under the terms of which NEWCO PRAGUE s.r.o. is obliged to pay the Seller a purchase price for the shares transferred of CZK 230,000,000

(to wit: two hundred and thirty million Czech crowns) by 30.04.2009 at the latest.

2. It hereby assumes the duty to pay the Seller specified above for the claim ensuring from the Stock Purchase and Sale Agreement of 15.3.2007 a maximum amount of CZK 230,000,000(to wit: two hundred and thirty million Czech crowns) on the condition that the claim or part thereof specified hereinabove is not satisfied by the Purchaser within the deadline agreed on nor within a reasonable additional deadline specified in the written request sent by the Seller for payment of an particular instalment.

3. The Guarantor undertakes to satisfy the claim of the Seller to the extent of the appropriate unpaid instalment in accordance with the Stock Purchase and Sale Agreement of 15.3.2007 referred to above within a deadline of 30 days of being delivered an announcement from the Seller that its claim has not been satisfied by the Purchaser within the deadline specified or to the specified extent, and that the Seller requests settlement in accordance with this Guaranty Declaration.

4. This guaranty is valid until 15.5.2009 and its validity will expire automatically if it is not enforced within this deadline. The Seller is entitled to apply the rights ensuing from the Guaranty Declaration within a deadline no shorter than 15 days prior to its expiry.

5. This Guaranty Declaration is not transferable to third parties.

6. The Seller accepts the Guarantor's declaration to the extent specified above. Prague, March 15, 2007

Sd/- Sd/-

guarantor Seller.

5. It is further alleged that as the Purchaser only paid an amount of CZK 14,625,000 out of the total consideration of CZK 230,000,000, petitioner sent letters requesting the Purchaser to pay the unpaid instalments. But as the Purchaser did not make the payment, the petitioner sent a

demand notice to the guarantor, namely, the respondent. According to petitioner, it also sent letters dated 30th May, 2008 and 14th April, 2009 demanding payment of unpaid installments.

6. Subsequently, the petitioner through their counsel issued a statutory winding up notice dated 1st May, 2009 calling upon the respondent to make payment within three weeks. As neither any reply nor any amount was received, the petitioner filed the present petition.

7. At the outset, Mr. Amit S. Chadha, learned senior counsel for respondent submits that present petition is not maintainable as there is no debt owed by the respondent to the petitioner. According to him, no such debt could arise until a decree on the basis of alleged declaration of guaranty is obtained against the respondent. Mr. Chadha further argues that there is neither acknowledgment nor inability to pay as respondent is a solvent and running company.

8. Mr. Chadha also submits that the present petition raises disputed questions of fact because no power of attorney has been executed in favour of Mr. Ravi Chilikuri, the executant of the guarantee document. In fact, according to respondent, there is no power of attorney as mentioned in the Guaranty Declaration. He also lays emphasis on the fact that the Guarantee Declaration did not bear stamp or seal of the respondent-company. He also points out that Mr. Ravi Chilikuri at the relevant time was neither a director nor a shareholder of respondent-company.

9. Mr. Amit S. Chadha also refers to the Board Resolution dated 2nd March, 2007 to show that respondent-company in a bid to maintain check and balance and to avoid misuse of power by any one person had delegated authority jointly to two persons.

10. In the alternative, Mr. Chadha submits that the aforesaid Guaranty Declaration is null and void as no mandatory permission has been obtained from the relevant statutory authorities either under Foreign Exchange Management Act, 1999 ('FEMA') or Foreign Exchange Regulation Act, 1973 ('FERA').

11. Mr. Chadha lastly submits that the winding up notice dated 1st May, 2009 is premature inasmuch as the said notice has been issued on the same date petitioner has made a demand from the Purchaser and that

too, when the Purchaser had time to make payment till 3rd June, 2009. Consequently, according to Mr. Chadha, the statutory notice under Sections 433 and 434 of the Act could have been sent by the petitioner only after the Purchaser had failed to pay the due amount, within the time permitted under the Agreement.

12. In response, Mr. Vijay K. Singh, learned counsel for petitioner submitted that Mr. Ravi Chilikuri is a very senior executive and promoter director of Spice Group. He states that the Mr. Chilikuri is the group CEO of the respondent Group and further that respondent is one of the companies under the Spice Energy Group. Therefore, according to him, the authority of Mr. Ravi Chilikuri to sign documents cannot be questioned.

13. After having heard the parties, I am of the opinion that the present petition raises no disputed question of fact as not only the respondent has under the Guaranty Declaration dated 15th March, 2007 assumed the duty to pay to the petitioner in the event of default by the Purchaser but it has also endorsed four promissory notes issued by the Purchaser for the equivalent amount of purchase price, i.e., CZK 230,000,000. A sample copy of one of the promissory notes is reproduced hereinbelow:-

	Promissory note
Per Aval *SRM Exploration Private Limited* *D*-146, Saket, New Delhi—110017, India Ravi Chilukuri Sd/-	*Prague March 15, 2007* *I promise to pay for this promissory note on April 30, 2008* *In order to N & S & N Consultants s.r.o. headquartered at Budovatelu, 2830, Most, Czech Republic The amount of CZK 50,000,000* _____ *In words : fifty million Czech crowns* _____ *Promisor: Newco Prague s.r.o. seated Litvinov-Janaov, Pratelstvi 81, Czech Republic Signature of the promisor _ sd/-Newco Prague s.r.o.* *Hamaion Basharmal, executive* *Place of payment : Most* *Payable at : CSOB*

14. Further, to show its bona fides, the respondent has even furnished its Banker, Canara Bank's letter dated 02nd March, 2007 stating that the promoters of the respondent-company are '*well reputed individuals of very large means and are associated with us for more than three decades.*' Though, it is the respondent's case that the said letter has been issued to a CZECH law firm, yet on a perusal of the papers, I find that the said letter has, in fact, been issued in accordance with Clause 3.2 of the Stock Purchase and Sale Agreement dated 15th March, 2007 executed between the parties. The relevant portion of Clause 3.2. is reproduced hereinbelow:

"3.2. Guarantees

3.2.1. Corporate Guarantee. The Purchaser shall procure the irrevocable Corporate Guarantee issued by the company SRM Exploration Private Limited., headquartered at D-146, Saket, New Delhi-110017, India in favour of the Seller for the aggregate amount of the Purchase Price, i.e. the amount of 230,000.000, -CZK (two hundred thirty million Czech Crowns) (hereinafter the .Corporate Guarantee.). The Corporate Guarantee in the wording as enclosed as Schedule 3 of this Agreement will be issued before the Signing date and handed over to the Seller against the hand-over of the Shares of the Company as described in section 3.4 of this Article.

3.2.2. Promissory Notes. The Purchaser shall issue the Promissory Notes in the amounts of the particular instalments of the purchase price in order to the Seller provided with aval of the company SRM Exploration Private Limited, headquartered at D-146, Saket, New Delhi-110017, India. The Promissory Notes will be deposited by into the deed-box at Komereni banka a.s., subsidiary Benesov and handed over to the Seller according to the terms of the Escrow Agreement concluded between the contracting Parties and JUDr. Miloslav JINdrich, notary acting as a trustee, provided the purchase price has not be paid by the Purchaser duly and in time. The Escrow Agreement will be signed before the signature of the hand-over minutes according to the Sec.3.4. of this Article."

15. Moreover Mr. Ravi Chilukuri who signed the Guaranty Declaration

and endorsed the promissory notes on behalf of the respondent is, in my opinion, authorized by the board resolution dated 2nd March, 2007 to sign deeds, documents, agreements and contracts etc. The certified copy of the board resolution is issued under the signature of the director of the Respondent. The Board Resolution dated 2nd March, 2007, is reproduced hereinbelow:

> "CERTIFIED TRUE COPY OF THE EXTRACT OF PROCEEDINGS OF THE BOARD MEETING HELD ON MARCH 2, 2007
>
> "Resolved that the consent of the Board be and is hereby accorded to Mr. Mohinder Verma and Mr. Ravi Chilukri to sign, verify, execute documents, applications, deeds, agreements, contracts etc. on behalf of the company. Resolved further that the Board hereby ratifies any action already taken by above persons in accordance with the resolution'
>
> For S R M Exploration Private Limited
>
> Sd/-
>
> Director.

16. In any event, in view of the principle of internal management, respondent cannot take the defence that either Mr. Ravi Chilukuri did not have a power of attorney in his favour or that he was singularly not authorised to execute the Promissory Note or the Guaranty Declaration did not bear the stamp/seal of respondent company. In fact, these defences are clearly a moonshine and sham as till date no criminal proceedings have been initiated against Mr. Ravi Chilukuri, even though if respondent's version is to be believed, then Mr. Ravi Chilukuri has perpetrated not only a fraud of a gigantic proportion but also a major crime!

17. Also from the record, I find that after the Purchaser had defaulted in making payment under the installments, the petitioner has periodically sent letters/notices to the Purchaser. In fact, the letter dated 17th September, 2007 for payment of first installment, letter dated 2nd November, 2007 for payment of second installment, letter dated 02nd May, 2008 for payment of third installment and letter dated 01st May, 2009 for payment of fourth installment are on record.

18. The petitioner through its advocates also wrote a letter dated 30th May, 2008 to the respondent and intimated about the defaults committed by the Purchaser in the payment of installments. The petitioner also reminded the respondent of its obligations under the Guaranty Declaration.

19. I also find that the petitioner through its lawyers also sent a letter dated 14th April, 2009 demanding payment of unpaid installment amounting to CZK 215,375,000. However, as the respondent did not make the payment in terms of the Guaranty Declaration, the petitioner, through its Advocates, issued a statutory winding up notice dated May 01, 2009 calling upon the respondent to make payment within three weeks. Consequently, neither the winding up notice nor the present petition is premature.

20. If the said Guaranty Declaration has been executed by the respondent in breach of any provisions of FEMA or FERA, the respondent can be prosecuted for the same. But, in my opinion, it cannot be said that the Guaranty is null, void or cannot be enforced on this ground.

21. I am further of the opinion that the Guaranty Declaration executed by the respondent is a contract enforceable under law. It is not the case of the respondent that the Guaranty Declaration is executed under coercion, undue influence, fraud and/or misrepresentation. The other defence that the board resolution has been given without implication of financial liability is not substantiated by the wording of the board resolution.

22. I am also of the opinion that the objection raised to the maintainability of the petition is untenable in law. In fact, this Court in **Ram Bahadur Thakur and Company v. Sabu Jain Ltd.,** (1981) 51 Comp. Cases 301(Delhi) has held as under:

> "11. The second contention of Sri Jain is that the provisions of Section 433(e) read with Section 434(1)(a) of the Companies Act have no application to the present case. He pointed out that the above provisions are attracted only where there is a " debt " owed by the company to a creditor and the contention is that in the present case there was no " debt " owed by the company to the firm. According to him, no such debt could arise until the amount thereof is ascertained and a decree, on the basis of the

deed of guarantee, is obtained against the company……

12. Applying this test, it is clear that a .debt. from the company to the firm has come into existence in the present case. Under the deed of guarantee, the company has undertaken an obligation to pay to the firm the amounts due to it by the mills. But no .debt. came into existence merely on the execution of the deed of guarantee because it was not a present liability but a contingent liability. The liability of the company to pay did not arise unless, (a) the mills defaulted in making the payments as scheduled, and (b) there was a request/notice calling upon the company to pay the amounts due. But the moment these contingencies happened, a present obligation arose resulting in the accrual of a .debt.……

xxx xxx xxx

14. Sri Jain tried to contend in several ways that the debt in this case—if it was one-was not a clear and undisputed debt. He submitted that, in a contract of suretyship, it was always implied that the money would be sought to be recovered from the principal debtor and that the guarantor would come in only if the money cannot be recovered from the principal debtor……

xxx xxx xxx

17. …..This amount as such has not been disputed either by the mills or the company. Even assuming that there is some controversy regarding the actual amount, there can be no doubt that a debt is clearly due and a mere dispute regarding the actual amount cannot disentitle the petitioner to a winding-up order at least at the stage of admission. Regarding the second point, I have already pointed out that the petitioner has alleged that it has sent repeatedly notices of demand to the mills and the company and that this allegation remains uncontroverter. So far as the third point is concerned, it is well settled that mere forbearance on the part of the creditor to sue the principal debtor will not discharge the surety. In regard to this plea, Sri Bhatt referred to a term of the guarantee deed which is in the following terms:

"Any alteration of the terms of repayment or other consideration given by the beneficiaries to the company shall not be considered

to act in any

manner prejudicial to the right or interest of the guarantors and this guarantee shall have full force notwithstanding any such consideration or alteration of the terms aforesaid."

18. This clause is no doubt of limited scope but it covers the present argument that the liabilities of the surety is discharged because of the .consideration given. by the firm to the mills in the sense of the postponement of action by the firm against the mills. According to the petitioner, the financial position of the mills is none too good and it will be impossible for them to proceed against the mills. There can be no doubt that the firm is entitled to ignore the principal debtor and seek payment from the surety and it is not open to the surety to ask the firm to first exhaust his remedy against the firm and then come to him. These contentions are, therefore, untenable and are rejected."

23. Consequently, there is no doubt that a debt is owed by the respondent to the petitioner and further the petitioner does not have to wait to obtain a decree from a Civil Court on the basis of the Guaranty Declaration.

24. Recently, the Supreme Court in **IBA Health (India) Private Ltd. v. INFO-DRIVE Systems SDN. BHD.,** (2010) 10 SCC 553 has held that if there is no dispute as to the company's liability, the solvency of the company would not constitute a stand alone ground for setting aside a notice under Section 434 (1)(a) of the Companies Act, meaning thereby, if a debt is undisputedly owing, then it has to be paid. Consequently, I am of the opinion that respondent owes a debt to the petitioner which it has defaulted in paying. Moreover, the defence set up by respondent is a moonshine and a sham.

25. In view of the aforesaid, the petitioner's application being CA 767/2009 is allowed. The Liquidator attached to this Court is appointed as the Provisional Liquidator of the respondent company. It is further ordered that the respondent company and its directors/officers are restrained from selling, parting with possession or creating third party rights in respect of its movable and immovable properties/assets till further orders. Consequently, CA 1889/2010 filed by the respondent for dismissal

of the present petition is dismissed.

CP 248/2009

26. List for further hearing on 13th September, 2011. The Official Liquidator is directed to file a status report one week before the next date of hearing.

ILR (2011) III DELHI 293
RFA

SHRI HARISH CHANDER NARULA & ANR. ....APPELLANTS

VERSUS

SHRI PURSHOTAM LAL GUPTA ....RESPONDENT

(VALMIKI J, MEHTA, J.)

RFA NO. : 523/2001 DATE OF DECISION: 07.03.2011

Delhi Rent Control Act, 1958—Section 2(i)—"Premises"—Meaning and interpretation—Appellant filed suit for, inter alia, possession of suit plot—Held, Respondent was tenant of plot with built up portion—Respondent entitled to protection of Delhi Rent Control Act, 1958 ("DRC Act")—Suit dismissed—Hence present appeal. Held—Issue limited to whether the "plot" fell within meaning of "premises" 2(i), DRC Act—Only land or land with temporary structure will not fall within definition of "premises"—Built up area temporary structure—Not "premises"—Since at best there was only temporary structure, Respondent not entitled to protection of DRC Act—Temporary structure such as Khoka/tin shed temporary structure—DRC Act not applicable—Built up portion can also be temporary structure—Impugned judgment set aside—Appeal allowed.

Important Issue Involved: Only land or land with temporary structures such as Khoka/tin sheds will not fall within definition of "premises" under Delhi Control Act 1958.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANTS : Mr. Ashish Mohan with Mr. Rohit Gandhi & Mr. Rohan Ahuja, Advocates.

FOR THE RESPONDENT : Mr. Sidhir Sukhija, Advocate.

CASES REFERRED TO:

1. *Kamla Devi* vs. *Laxmi Devi* (2000) 5 SCC 646.
2. *Surinder Kumar Jhamb* vs. *Om Prakash Shokeen* 82 (1999) DLT 569.
3. *Ajit Singh* vs. *Ram Saroop Devi* (1994) 55 DLT 759.
4. *Prabhat Manufacturing Industrial Cooperative Society* vs. *Banwari Lal* 1989 (2) SCC 69.

RESULT: Appeal allowed.

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 is to the impugned judgment and decree dated 21st December, 1999 whereby the suit of the appellants/plaintiffs for possession, mesne profits, recovery of money and mandatory injunction was dismissed by holding that the respondent/defendant was a tenant of a plot with built up portion and therefore the respondent/defendant being a tenant of a premises/building, had protection of the Delhi Rent Control Act, 1958 against eviction. I may note that the original respondent Sh. Purshotam Lal Gupta has expired and his legal heirs have been brought on record. The reference in this judgment to the respondent/defendant would imply a reference to the original respondent/defendant or his legal heirs as per the context.

2. The only issue argued before the Trial Court, and which was also argued before this Court, was whether what was let out to the respondent/defendant was only a plot or at the very best a plot with a temporary structure/shed/Khoka so as to be or not to be a "premises" within the meaning of the expression under Section 2(i) of the Delhi Rent Control Act, 1958. The respondent/defendant had contended that the structure which exists amounts to a building and was therefore premises within the meaning of the expression under Section 2(i) and therefore the respondent/defendant was a tenant under the Delhi Rent Control Act, 1958 (hereinafter referred to as DRC Act). The property in question has an area of 900 sq. feet forming part of an open plot of land of 412 sq. yds. at the Main Road of II-F, Block Corner, opposite Dua Travels, Rampur Market, Lajpat Nagar II, New Delhi.

3. There is an admitted document in the Trial Court record being the partnership deed entered into between the parties dated 30.4.1975, Ex.PW1/2. The contention of the respondent/defendant before the Trial Court was that this was a deed of partnership only in name, and in reality, through this document a relationship of landlord and tenant was created. A reference to this admitted document shows that what was let out to the respondent/defendant was only a plot of land. This has been very clearly mentioned in this document at page 4. Learned counsel for the respondent/defendant contended that there was an earlier document also between the parties of the year 1974 when the tenancy commenced and therefore this document cannot be looked into. I have failed to understand this argument because the respondent/defendant has admitted this document and argued that through this document, the parties did enter into a contractual relationship, which however was not of partnership, but only of a landlord and tenant. Once the document, Ex.PW1/2, is looked into, it becomes clear that what was let out to the respondent/defendant was only a plot of land. If what was let out to the respondent/defendant is only a plot of land, the same would not fall within the expression "premises" under Section 2(i) of the DRC Act, 1958. The Trial Court has committed a grave illegality and perversity in ignoring this admitted document between the parties.

4. Further, the case of the respondent/defendant at the very best was that there was a tin shed/Khoka in the premises when the tenancy commenced in April, 1974. For this purpose, the respondent/defendant

filed in the Trial Court and relied upon the House Tax Record of the Municipal Corporation of Delhi dated 1st June, 1974 to show that there existed one temporary Khoka with tin shed in front. This document has been exhibited as Ex.DP1 in the Trial Court. This document, being a survey report of the Municipal Corporation of Delhi, shows that the respondent/defendant namely Sh. Purshotam Lal was a tenant in the premises for commercial purpose and the only construction was a tin shed. The Survey report also mentions that there was building material lying for use on the plot. The tenancy in this case commenced in April, 1974 and this document of June/July 1974 shows that as of June/July, 1974 there was only one temporary Khoka/tin shed with the respondent/defendant and building material was only lying at the spot in open space which was meant for being used. Therefore, the document of the respondent/defendant itself, that too an unquestionable document from a public authority, shows that there did not exist any permanent building at the site in June/July, 1974 after commencement of the tenancy in April, 1974. If therefore assuming that what was let out to the respondent/defendant was not only an open plot of land, but there was also some structure on the same, the structure is at best only a temporary Khoka/tin shed which cannot be said to be a permanent building as envisaged under Section 2(i) of the DRC Act in view of the findings given hereinafter.

5. Learned counsel for the appellant/plaintiff has filed before this Court a compilation of judgments to argue the legal position that a temporary structure would not be included within the definition of premises within the meaning of expression under Section 2(i) of the DRC Act, 1958. I need not cite all the judgments and a reference to a few of them would suffice.

The Division Bench judgment of this Court in the case of **Surinder Kumar Jhamb vs. Om Prakash Shokeen** 82 (1999) DLT 569 has held that if what is let out is only land or land with a temporary structure, the property would not be a building and hence not premises within the meaning of the expression under Section 2(i) of the DRC Act. In para 10 of this judgment, at page 577 of the reporter, it is specifically held that a built up area being a temporary structure cannot be called premises nor also the vacant plot adjacent to this temporary structure. It was held that such land with temporary structure or land itself, would not be premises as per Section 2(i) of the DRC Act. Another relevant judgment

in this regard is the judgment of the Supreme Court in the case of **Kamla Devi vs. Laxmi Devi** (2000) 5 SCC 646. This judgment under the Delhi Rent Control Act clearly specifies that a mere plot of land would not be premises so as to get protection of the DRC Act and which is also so held by the the Supreme Court in the case of **Prabhat Manufacturing Industrial Cooperative Society vs. Banwari Lal** 1989 (2) SCC 69. I may note that this judgment also dealt with a case under the Delhi Rent Control Act. In fact in this judgment, the Supreme Court relied upon the survey report of the Assistant Custodian Industrial of the Municipal Corporation of Delhi, a report similar to a Survey Report of MCD as found in the present case.

There are then judgments of learned Single Judges of this Court. One such judgment is the decision in the case of **Ajit Singh vs Ram Saroop Devi** (1994) 55 DLT 759 and in which it has been held that a tin shed would not fall within the expression "premises" under Section 2(i) of the DRC Act, 1958. I need not further multiply judgments. It is therefore held that since at best there was only a temporary structure at the very best, the respondent/defendant cannot be said to be a tenant of a building/premises so as to get protection of the DRC Act.

6. By the impugned judgment and decree, the Trial Court has held that the temporary Khoka is a structure and therefore it has protection under the DRC Act, 1958. This finding and conclusion of the Trial Court, in view of the judgments quoted above, is quite clearly illegal and deserves to be quashed. I may, at this stage, refer to some of the relevant portions of the impugned judgment and decree which hold the respondent/ defendant to be a tenant of a premises under the DRC Act, 1958, and which finding has been arrived at in spite of the documents being the partnership deed, Ex.PW1/2 and the survey report, Ex.DP1. These portions read as under:-

> "As per the afore discussed pleadings of the parties, plaintiff's case is that they are the owners and landlords of the suit premises. The defendant's case, as per written statement, is that as the plaintiffs have failed and neglected to produce any document to show that there was relationship of landlord and tenant in between the parties in respect of the suit premises; that as, on the other hand, he was in occupation of the plot as well as built up portion

> ever since 1965 in his own right, hence, there was no privity of contract in between the parties. I would like to mention here that at the time of hearing arguments, Sh. N.N. Aggarwal, counsel for plaintiff, stated that as the defendant had admitted himself to be a tenant of the plaintiffs, therefore, he is stopped from denying the relation-ship of landlord and tenant in between the parties. In support of his arguments, ld. Counsel for the plaintiff took me through the notice Ex.PW1/3, as well as the reply of the said notice sent by defendant which is Ex.PW1/9. Plaintiff counsel stated that in the said reply, defendant clearly admitted that he was tenant under Somnath Narula and Harish Chand @ Rs.300/ - per month. In support of his further arguments that the defendant had admitted himself to be the tenant of Somnath Narula, plaintiff counsel also took me through the document Ex.PW4/1 i.e. suit filed by defendant here-in against MCD as well as document Ex.PW4/2 i.e. statement of the defendant in the said suit. In the said plaint was well as statement, plaintiff counsel stated, defendant had clearly admitted that he was tenant under Somnath Narula @ Rs.300/- per month. Not only this, plaintiff counsel also took me through inspection report of the house tax department of the MCD Ex.DP1 where-in it is shown that on the inspection carried on 1.6.74, defendant was found to be tenant in respect of one temporary Khokha, tin-shed and an open portion. Not only this plaintiff counsel also took me through the pleadings of the parties i.e. plain and written statement. He submitted that no-where in the written statement defendant specifically denied that he was not the tenant of the suit premises. He, therefore, submitted that in terms of Order VIII rule 5 CPC, it should be deemed to have been admitted by the defendant that he was tenant under the plaintiffs."
>
> …….....
>
> "Defendant counsel, on the other hand, submitted that in fact plot along with built up portion was let out to the defendant. He submitted that theory of unbuilt plot and date of letting was introduced later-on by the plaintiff. In support of his contentions, defendant counsel took me through the notice Ex.PW1/3 dated 11.7.88. He stated that in the said notice it is only mentioned that

defendant was tenant in respect of plot He further stated that in the said notice, neither the date of letting out, nor the fact that tenancy was only in respect of the open plot is mentioned. Thereafter, counsel for defendant took me through the reply of the said notice which is Ex.PW1/4. He stated that in the said reply, defendant clearly stated that he was tenant in respect of the plot and built-up portion under Somnath Narula only; that in the said reply, defendant also informed that Sh.Somnath Narula and Harish Chand Narula let out the property but instead of rent-deed benami partnership deed was written in the year 1974; that the tenancy continued in the aforesaid way till round-about April, 1978 and thereafter, there was no partnership deed, but, the defendant continued as tenant of Somnath Narula at monthly rent of Rs.300/-."

……..…….

"In support of his further arguments that plot alongwith built up portion was let out to the defendant, defendant counsel took me through document Ex.PW4/1 i.e. copy of the plaint of the suit of Permanent Injunction filed by the defendant against MCD in 1985, took me through document Ex.PW4/2 i.e. statement of defendant in the aforesaid case and document Ex.DP1 i.e. copy of the survey report of the House tax department of the MCD. He submitted that in the said plaint Ex.PW4/1, defendant had clearly stated that he was tenant in respect of office and open plot; that in the statement Ex.PW4/2, defendant had taken the same stand; that the aforesaid stand duly stands corroborated by the inspection report of MCD Ex.DP1 wherein it is clearly mentioned that on 1.6.1974, defendant was found to be tenant in respect of "One temporary Khokha, tin-shed as well as open plot". Defendant counsel further submitted that vide the said document Ex.DP1. It is further proved that on 1.6.74, property was already constructed because vide the said notice house tax was proposed to be increased from Rs.430/- per month to Rs.640/- per month."

…….

"The other very important document leading to the inference that

plot alongwith built up portion was let out to the defendant is document Ex.DP1.

The importance of this document lies in the fact that it relate to a point of time interior to the commencement of litigation between the parties. Vide this document, on the basis of inspection carried out on 1.6.74, by the officials of house tax department of MCD the house tax was proposed to be increased from Rs.430/- per annum to Rs.640/- per month. As per the inspection report on 1.6.74, the whole of the plot was found in possession of three persons namely Mr.Purshottam Lal, Mr. Gupta and Somnath Narula. As per the said report, Purshottam Lal (defendant) was found in occupation of one temporary Khokha, Tin-shed and open plot in front of tine shed, as a tenant @ Rs.300/- per month. Mr. Gupta was found in occupation of temporary Tin Shed meant for chowkida and open plot and Somnath Narula was in occupation of tin-shed and open portion. In means that at that time, there was one Khokha and three tin-sheds besides open portion on the whole of plot. Now taking into consideration that the said plot was already assessed to house tax even before 1974, therefore, the only conclusion that follows is that construction already existed upon the said plot even prior to 1974. It, therefore, leads to the only inference that when plaintiff let out property to the defendant, it was in the shape of plot and built-up portion.

I would like to mention here that even in the suit filed by the defendant against the MCD in 1985, his stand was that he was tenant in respect of Office and open plot. The aforesaid suit was also filed by defendant before the commencement of litigation between parties. Thus, all through, it has been the consistent stand of the defendant that he was tenant of plot as well as built up portion. Plaintiffs, on the other hand, in view of the aforesaid discussions, changed their stand. The oral evidence of PW1 regarding the tenancy of open plot, in view of the aforesaid documentary evidence and lacunas in the case of plaintiff, is not credible. So far as the partnership deed Ex.PW1/2 is concerned, after carefully going through the same, by no stretch of imagination, it can be said that it was in the shape of rent deed.

Hence, plaintiffs. evidence on the aforesaid point is unbelievable.

In view of the aforesaid discussions, I have no hesitation to hold that at the time of letting defendant was inducted as a tenant in respect of the plot and built up portion. Therefore, court has no jurisdiction to try this suit as the same is barred U/s. 50 of the Deli Rent Control Act. The aforesaid issue is accordingly disposed of." (Underlining added)

7. The aforesaid finding and conclusion is therefore quite clearly unsustainable because at best what has been proved to exist at the site is only land or land with temporary structure such as Khoka/tin shed and therefore, what has been let out to the respondent/defendant would not be a building or premises as per the meaning of the expression as found in Section 2(i) of the DRC Act, 1958.

8. Learned counsel for the respondent/defendant very vehemently argued that when, the appellants/plaintiffs sent a notice dated 11.7.1988, Ex.PW1/3, the respondent/defendant replied to the same vide reply dated 27.7.1988, Ex. PW1/9, and no rejoinder was given to the reply dated 27.7.1988 and therefore it must be held that the respondent/defendant was a tenant of a super structure along with the land and not only land or land with temporary structure. Counsel for the respondent/defendant relies upon para 1 of this notice and which reads as under:-

"1. Para 1 of your notice, as stated, is not admitted and is wrong and denied. It is admitted that my client is tenant of Shri Som Nath Narual only with respect to plot as well as built up portion. It is incorrect that rate of rent is Rs.700/- p.m. The rate of rent is Rs.300/- p.m.. It is incorrect that my client is in occupation of 900 sq.ft. of open pot only. The total area in occupation of my client is 2100 sq.ft. Shri Som Nath and Harish Chande let out the property but instead of rent benami partnership deed was written in the year 1974 inspite of the fact that your client and his son were not working. The tenancy continued in the abovesaid way till April, 1978. But the profit was Rs.300/- p.m. Thereafter there was no partnership. My client continued by the business as tenant of Somnath Narual at monthly rent of Rs.300/-."

In my opinion, no support can be derived from the aforesaid para 1 of Ex.PW1/9 inasmuch as this letter in fact only talks of a built up

portion without specifying the nature of the built up portion. A 'built up portion' can also be a temporary structure. It is not specified in this reply dated 27.7.1988, Ex.PW1/9, that there was a building or a permanent super structure on the plot. I, thus, fail to understand therefore how para 1 of Ex. PW1/9 supports the respondent/defendant. Assuming that it supports the respondent/defendant, merely by not sending a rejoinder to a reply to a legal notice cannot mean that other evidences in the case must be ignored. Every evidence in a case is looked in totality with other oral and documentary evidence which is led in the case so as to decide the civil case on a balance of probabilities. In my opinion, the documents being a partnership deed, Ex.PW1/2 and the survey report, Ex.DP1 clinches the issue that what has been let out to the respondent/defendant was not a building or premises.

9. Learned counsel for the respondent further sought to place reliance upon the notice dated 16.12.1993, Ex.PW1/11. The notice dated 16.12.1993 was sent on behalf of the appellants/plaintiffs which talks of an unbuilt open plot. Reliance was placed by learned counsel for the respondent/defendant on Ex.PW1/11 to argue that this notice was sent only after the death of original landlord and therefore the appellants/plaintiffs who were the successor in interest, cannot set up a new case. I do not think there is a new case which is set up by the appellants/plaintiffs at any point of time because the original landlord being the father of the appellants, never admitted the respondent/defendant to be a tenant in a building/super structure being premises within the DRC Act. On the contrary, Ex.PW1/2, the partnership deed very clearly states that what was let out was only the plot. There is therefore no question of the appellants/plaintiffs improving their case to the case set up by their father, Somnath Narula that the respondent/defendant was not the tenant of a building or permanent super structure.

10. In view of the above, the impugned judgment and decree is therefore set aside in that it holds that there existed a premises and respondent/defendant had protection of the Delhi Rent Control Act, 1958. It is held that respondent/plaintiff was not a tenant of any building or premises so as to get protection of the Delhi Rent Control Act, 1958.

11. The next issue is with regard to the mesne profits to be awarded. The appellants had claimed mesne profits at Rs.800/- per month till vacant physical possession is delivered by the respondent/defendant to

the appellants. The area in question is 900 square feet. I do not find that a sum of Rs.800/- per month can in any manner said to be exorbitant with respect to area of 900 square feet which is in possession of the respondent/defendant. The respondent/defendant will therefore be liable to pay mesne profits at Rs.800/- per month pendente lite and future till the appellants receive the vacant physical possession of the suit premises.

12. In view of the above, the appeal is accepted. The impugned judgment and decree dated 21st December, 1999 is set aside. The decree of possession is passed in favour of the appellants/plaintiffs and against the respondent/defendant with respect to the premises being a plot of land admeasuring 900 square feet situated on Main Road of II-F, Block Corner, Opposite Dua Travels, Rampur Market, Lajpat Nagar-II, New Delhi shown as red in site plan as Ex.PW1/1. The respondent/defendant may remove any structure which it claims to have made on the plot of land at its own costs. The appellant/plaintiff will also be entitled to mesne profits per month pendente lite and future @ Rs.800/- per month till receiving of the vacant physical possession of the suit premises from the respondent/defendant. Parties are left to bear their own costs. Decree sheet be prepared. Trial Court record be sent back.

ILR (2011) III DELHI 303
CS(OS)

JGA FASHION PRIVATE LIMITED ....PLAINTIFF

VERSUS

KRISHAN KUMAR KHANNA & ORS. ....DEFENDANTS

(J.R. MIDHA, J.)

CS (OS) NO. : 66/2010 DATE OF DECISION: 08.03.2011

Indian Evidence Act, 1873—Section 165—Plaintiff filed review application seeking review of order whereby notice was issued to Post Master, Post Office, Tis

Hazari Court, Delhi, to produce relevant records with respect to postal receipts filed by plaintiff—As per plaintiff, summoning of Post Master amounted to commencing inquiry under Section 340 of Code of Criminal Procedure which shall cause serious prejudice to plaintiff—Held:- Section 165 provides plenary powers to the judge to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant—It is intended to arm the judge with the most extensive power possible for the purpose of getting at the truth—The effect of this section is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever and thus possibly acquire valuable indicative evidence which may lead to other evidence stricly relevant and admissible—Notice issued to Post Master to find truth in exercise of power under the Act.

Mr. Edmund Burke arguing in Warren Hastings Trial said that it is the duty of the Judge to receive every offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance, or corrupt collusion, could not bring it forward. He has a duty of his own, independent of them, and that duty is to investigate the truth. If no prosecutor appears, the Court is obliged to examine and cross examine every witness who presents himself; and the Judge is to see it done effectively, and to act his own part in it. **(Para 5)**

In **Bartly vs. State,** 55 Nebr 294 : 75 N.W.832 Harrison, C.J., said:

> "It is undoubtedly necessary that the Judge who presided should acquire as full a knowledge of the facts and circumstances of the case on trial as possible, in order that he may instruct the jury, and correctly, to the extent his duty demands, shape the determination of the litigated matters, that Justice may not miscarry,

but may prevail; and doubtless, it is allowable at times, and under some circumstances, for the presiding Judge to interrogate a witness". **(Para 6)**

The object of Section 165 is, first to ascertain truth and then, do justice on the basis of the truth. The Judge is not only justified but required to elicit a fact, wherever the interest of truth and justice would suffer, if he did not. **(Para 7)**

Important Issue Involved: Section 165 provides plenary powers to the judge to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant—It is intended to arm the judge with the most extensive power possible for the purpose or getting at the truth—The effect of this section is that in order to get to the bottom of the matter inquire into every fact whatever and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Shyam Moorjhani and Mr. Kshitij Mittal, Advocates.

FOR THE RESPONDENTS : Mr. Arun Khosla with Ms. Shreeanka Kakkar, Advocate.

CASES REFERRED TO:

1. *Sanjeev Kumar Mittal* vs. *The State*, 174 (2010) DLT 214.
2. *Bartly* vs. *State*, 55 Nebr 294 : 75 N.W.832.

RESULT: Review application dismissed.

J.R. MIDHA, J. (Oral)

Review Petition No.79/2011

1. The plaintiff is seeking review of the order dated 4th February,

2011 whereby this court has issued the notice to the Post Master, Post Office, Tis Hazari Court, Delhi to produce the relevant records with respect to the postal receipts filed by the plaintiff.

2. Learned counsel for the plaintiff submits that summoning the Post Master amounts to commencing inquiry under Section 340 of the Code of Criminal Procedure which shall cause serious prejudice to the plaintiff.

3. The notice to the Post Master has been issued by this court on 4th February, 2011 in order to find out the truth in exercise of the power under Section 165 of the Indian Evidence Act which is reproduced hereunder:-

"SECTION 165. JUDGE'S POWER TO PUT QUESTIONS OR ORDER PRODUCTION –

The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:

Provided also that this Section shall not authorize any Judge to compel any witness to answer any question or produce any document which such witness would be entitled to refuse to answer or produce under Sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases herein before excepted."

4. This Section provides plenary powers to the Judge to put any question to any witness or party; in any form, at any time, about any fact relevant or irrelevant. Section 165 is intended to arm the Judge with the

most extensive power possible for the purpose of getting at the truth. The effect of this section is that in order to get to the bottom of the matter before it, the Court will be able to look at and inquire into every fact whatever and thus possibly acquire valuable indicative evidence which may lead to other evidence strictly relevant and admissible. The Court is not, however, permitted to found its judgment on any but relevant statements.

5. Mr. Edmund Burke arguing in Warren Hastings Trial said that it is the duty of the Judge to receive every offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance, or corrupt collusion, could not bring it forward. He has a duty of his own, independent of them, and that duty is to investigate the truth. If no prosecutor appears, the Court is obliged to examine and cross examine every witness who presents himself; and the Judge is to see it done effectively, and to act his own part in it.

6. In **Bartly vs. State,** 55 Nebr 294 : 75 N.W.832 Harrison, C.J., said:

> "It is undoubtedly necessary that the Judge who presided should acquire as full a knowledge of the facts and circumstances of the case on trial as possible, in order that he may instruct the jury, and correctly, to the extent his duty demands, shape the determination of the litigated matters, that Justice may not miscarry, but may prevail; and doubtless, it is allowable at times, and under some circumstances, for the presiding Judge to interrogate a witness".

7. The object of Section 165 is, first to ascertain truth and then, do justice on the basis of the truth. The Judge is not only justified but required to elicit a fact, wherever the interest of truth and justice would suffer, if he did not.

8. The framers of the Act, in the Report of the Select Committee published on 1st July, 1871 along with the Bill settled by them, observed as follows:-

> "Passing over certain matters which are explained at length in the Bill and report, I come to two matters to which the Committee attach the greatest importance as having peculiar reference to the

> administration of justice in India. The first of these rules refers to the part taken by the judge in the examination of witnesses; the second, to the effect of the improper admission or rejection of evidence upon the proceedings in case of appeal.
>
> That part of the law of evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well-educated Bar, co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases – probably the vast numerical majority – the Judge has to conduct the whole trial himself. In all cases, he has to represent the interests of the public much more distinctly then he does in England. In many cases, he has to get at the truth, or as near to it as he can by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in Bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him but to inquire to the utmost into the truth of the matter."

9. The Judge contemplated by Section 165 is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth.

10. The plaintiff has not yet filed the reply to the application under Section 340 of the Code of Criminal Procedure. The plaintiff has also not disclosed its defense to Section 340 of the Code of Criminal Procedure in review application. The contentions of the plaintiff with respect to Section 340 of the Code of Criminal Procedure cannot, therefore, be

considered at this stage. The principles regarding the scope of Section 340 of the Code of Criminal Procedure have been set out in the recent judgment of this Court in the case of **Sanjeev Kumar Mittal Vs. The State,** 174 (2010) DLT 214 and the contentions of the plaintiff with respect to Section 340 of the Code of Criminal Procedure shall be considered after the plaintiff files the reply to the application and discloses its defence.

11. There is no merit in the application for review which is hereby dismissed.

I.A.No.2656/201

1. Notice. Mr. Arun Khosla, Advocate, accepts notice.

2. The plaintiff is seeking waiver of the cost of Rs. 50,000/- imposed vide order dated 4th February, 2011 for not filing reply to I.A.No.5855-57/2010 and Crl.M.No.5782/2010 in time.

3. Learned counsel for the plaintiff submits that the notice of the aforesaid applications was accepted by the counsel for the plaintiff on 4th May, 2010 but the reply could not be filed within two weeks as the suit was dismissed in default before the expiry of two weeks on 18th May, 2010. The plaintiff filed I.A.No.8358/2010 for restoration of the suit which was taken up on 1st November, 2010 when the suit was restored subject to the cost of Rs. 25,000/- and the pending applications were directed to be listed on 29th November, 2010. On 29th November, 2010, the plaintiff was directed to file reply only to I.A.No.5855/2010 under Order VII Rule 11 of the Code of Civil Procedure but there was no direction to file reply to the other pending applications. It is submitted that the delay of nine months from 4th May, 2010 are not attributable to the plaintiff in as much as the suit was dismissed in default on 18th May, 2010 and was restored on 1st November, 2010.

4. In the facts and circumstances stated above, the application is allowed, the cost of Rs. 50,000/- is waived and the order dated 4th February, 2011 is modified to that extent.

CS(OS)No.66/2010

The learned counsel for the plaintiff has handed over 15 demand drafts totaling Rs.24,40,050/- to learned counsel for the defendants in

Court today. The learned counsel for the defendants has accepted the said amount without prejudice to the rights and contentions of the defendants. The photocopy of the demand draft is taken on record.

ILR (2011) III DELHI 310
W.P.

SANWAL RAM ....PETITIONER

VERSUS

UNIVERSITY OF DELHI & ORS. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P.(C) NO. : 8151/2010, 8521/2001 & CM NO. : 21007/2010 **DATE OF DECISION: 10.03.2011**

Constitution of India, 1950—Petitioner no.1 filed writ petition seeking directions to Respondent university to accept his result of qualifying examination which was subsequently declared and to allow him to appear in first semester end term examination—Petitioner no.2 prayed for cancellation of his provisional admission by Respondent University—Petitioners urged they cleared LLB entrance test and were admitted to LLB course provisionally since their results of qualifying examination of graduation were not declared till then—Petitioners were required to have their provisional admission confirmed not later than 15.10.2010 failing which provisional admission was to stand automatically annulled—In subsequently declared graduation result of petitioners they had compartment in one of the papers and were required to clear said paper in supplementary examination to be held in

month of September 2010—However owing to common wealth games, compartment examination was held on 14.12.2010—Thus, as deadline provided of 15.10.2010 ended, petitioner no.1 was not allowed to appear in first semester end term examination and provisional admission of petitioner no.2 was cancelled by Respondent university—Held:- Once the supplementary examination is passed, the result thereof would relate back to first appearance in examination and effect of that would be treated as if candidate had passed examination on the date when result was declared initially—Candidate who cleared qualifying examination in first attempt and those who cleared the same with a compartment, for the purposes of determining eligibility cannot be discriminated—Petitioner declared entitled to confirmation of their provisional admissions—Respondent University directed to allow petitioners to take ensuing semester end term examination in accordance with its rules.

In view of the aforesaid and further for the reason that the respondent University in its Bulletin of Information did not so clearly provide that those awaiting results of their qualifying examination are required to clear the qualifying examination in the first instance only and not in the compartment/ supplementary examination, it is deemed expedient to allow the petitioners to continue in the LLB course. A reference in this regard may also be made to **Jayant Sud Vs. The Faculty of Law** AIR 1993 Delhi 25 where the petitioner even though securing less than 50% marks in the eligibility examination was allowed to continue in the LLB course for the reason of having cleared the admission test. Needless to state that the petitioners herein also have cleared the admission test with good ranks. Because of the ambiguity in the Bulletin of Information, the petitioners did not take admission to any course/college to which they may have been entitled to take admission and continued pursuing the course and it is now deemed inequitable to waste their valuable year and to make them appear again in the

admission test in the ensuing year. **(Para 15)**

Important Issue Involved: Once the supplementary examination is passed, the result thereof would relate back to first appearance in examination and effect of that would be treated as if candidate had passed examination on the date when result was declared initially—Candidate who cleared qualifying examination in first attempt and those who cleared the same with a compartment, for the purposes of determining eligibility, cannot be discriminated.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. S. C. Pathak and Mr. R.R. Jangu, Advocates. Mr. J.P. Sengh, Sr. Advocate with Mr. Dheeraj Sachdev, Advocate.

FOR THE RESPONDENTS : Mr. Mohinder J.S. Rupal & Mr. Aravind Varma Advocates for DU.

CASES REFERRED TO:

1. *Anju* vs. *University of Delhi* W.P.(C) No.2475/2010.
2. *Sukriti Upadhyay* vs. *University of Delhi* LPA No.539/ 2010.
3. *Deep Gupta* vs. *Guri Gobind Singh Indraprastha University* MANU/DE/1187/2008.
4. *S.N. Singh* vs. *Delhi University,* W.P.(C) No.7701/2005.
5. *Ankur Vahi* vs. *Union of India* 2004 (72) DRJ 428.
6. *S.N. Singh* vs. *Union of India* 106 (2003) DLT 329.
7. *Sh. Prashant Srivastava* vs. *C.B.S.E.* AIR 2001 Delhi 28.
8. *Neha Kattyar* vs. *C.B.S.E.,* LPA No.385/1999.
9. *Jayant Sud* vs. *The Faculty of Law* AIR 1993 Delhi 25.

RESULT: Writ petitions allowed.

RAJIV SAHAI ENDLAW, J.

1. These two writ petitions concern admission to the Bachelor of Law (LLB) course of the respondent University for the academic year 2010-2011. The eligibility criteria for admission to the said course as prescribed in the Bulletin of Information 2010-2011 of the respondent University was Graduate/Post Graduate Degree from the University of Delhi or any other Indian or Foreign University recognized as equivalent by the University of Delhi, with at least 50% marks or an equivalent grade point in the aggregate in either of them. The admission to the said course was to be on the basis of merit in the LLB entrance test. It was however provided that the candidates appearing in the qualifying degree examination and who were awaiting the result of such examination, were also eligible to appear in the LLB Entrance Test, 2010 but their admission would depend on their securing the minimum prescribed eligibility marks.

2. The petitioner in W.P.(C) No. 8151/2010 was pursuing his Bachelor of Business Administration (BBA) course from Jai Narain Vyas University, Jodhpur, Rajasthan and was to complete the same in the year 2010. The petitioner in W.P.(C) No.8521/2010 was pursuing Bachelor of Arts (BA) programme from a College affiliated to the respondent University and was also to complete the same in the year 2010.

3. The petitioners in both the writ petitions appeared in the LLB Entrance Test held by the respondent University. While the petitioner in W.P.(C) No.8151/2010 secured the rank of 272 in the OBC Category to which he belongs, the petitioner in W.P.(C) No.8521/2010 secured the rank of 1149 in the unreserved category. Both petitioners were called for counselling and were admitted to the LLB course, albeit provisionally since their results of the qualifying examination had not been declared till then.

4. The result of the BBA course aforesaid was declared by the Jai Narain Vyas University in the last week of June 2010. The petitioner in W.P.(C) No.8151/2010 had compartment in one of the papers of the three year BBA course. He appeared in the supplementary examination held on 13th October, 2010, however the result of the said supplementary examination was not declared.

5. Similarly, the petitioner in W.P.(C) No.8521/2010 also in the result declared, had not cleared one of the papers and was placed in

compartment in the said subject. It is his case that though the said compartment examinations are held by the respondent University in the month of September, 2010 so that the students if able to clear the same qualify for the further education intended by them but owing to the Commonwealth Games, 2010, the compartment examination was held only on 14th December, 2010.

6. The Bulletin of Information aforesaid provided that those provisionally admitted were required to have their admission confirmed not later than 15th October, 2010, failing which the provisional admission was to stand automatically annulled. Such confirmation was to naturally be by production of documents of having cleared the qualifying examination with the requisite marks, though it is not so expressly provided in the Bulletin. Both petitioners having not in the first instance cleared the qualifying examination and having appeared in the compartment/ supplementary examination naturally could not have their provisional admission confirmed. In the meanwhile, the first semester end term examination of the LLB course to which they had been provisionally admitted were to be held in December, 2010.

7. W.P.(C) No.8151/2010 was filed when the petitioner therein was prevented from appearing in the end term examination averring that the respondent University had allowed documents of eligibility to be submitted till 25th November, 2010 and seeking direction to the respondent University to accept the result of the petitioner therein of the qualifying examination which had by then been declared and to allow the petitioner therein to appear in the first semester end term examination. W.P.(C) No.8151/ 2010 came up first before this Court on 6th December, 2010 when in the Court the result of the petitioner therein of the qualifying examination was perused and finding the petitioner therein to have cleared the qualifying examination i.e. BBA course from Jai Narain Vyas University, vide interim order, the said petitioner was permitted to take the first semester end term examination, subject to further orders in the writ petition.

8. The result of the compartment examination taken by the petitioner in W.P.(C) No.8521/2010 was however not declared till the first semester end term examination of LLB course. The said petitioner was therefore unable to appear in the same. He filed the writ petition impugning the cancellation of his provisional admission contending that the delay by the respondent University itself in declaring the result of the compartment

examination should not lead to cancellation of his provisional admission. Notice of the writ petition was issued and the said petitioner permitted to continue to attend classes.

9. Pleadings have been completed and the counsels for the parties have been heard.

10. The core question for decision in these writ petitions is, whether the petitioners were required to clear their qualifying examinations in the examinations already held and awaiting result whereof they were provisionally admitted or they could clear the qualifying examination by taking the compartment/supplementary examination also. There is no categorical/unequivocal answer thereto in the Bulletin of Information aforesaid.

11. The contention of the respondent University is that it was earlier not admitting students till the result of their qualifying examination was declared and till they were found to have cleared the same. It is contended that the same however often led to delay in admission owing to the delay in declaration of the result of the qualifying examination. It is yet further contended that pursuant to the directions of the Division Bench of this Court in **S.N. Singh Vs. Union of India** 106 (2003) DLT 329 and order dated 5th December, 2006 in W.P.(C) No.7701/2005 titled **S.N. Singh Vs. Delhi University,** and to enable those whose result of the qualifying examination was awaited to attend all the classes of the semester, the system of provisional admission was devised. Reference is also made to judgment dated 4th October, 2010 of Division Bench of this Court in LPA No.539/2010 titled **Sukriti Upadhyay Vs. University of Delhi** emphasizing importance of attendance in LLB course. It is contended that however the same cannot change the basic rule for admission to LLB course; the candidate had to be a Graduate with the requisite marks. It is urged that if the candidate had taken the qualifying examination prior to the date prescribed for admission, the candidate would be eligible for admission even if the result of the qualifying examination had not been declared till the prescribed date for admission; however taking the qualifying examination (as would be the case with respect to supplementary/ compartment examination) after the prescribed date for admission to LLB course is not permissible.

12. Per contra, the senior counsel for the petitioner in W.P.(C)

No.8521/2010 has contended on the basis of Ordinance IX of the respondent University that a candidate clearing the examination in a compartment/supplementary examination is deemed to have passed the qualifying examination in that year only and cannot be said to have passed the qualifying examination in a subsequent year. He thus contends that the result of the compartment examination would date back to the year in which the qualifying examination had been taken.

13. Neither counsel has cited any judgment in this regard. However, I find that the Division Bench of this Court in **Sh. Prashant Srivastava Vs. C.B.S.E.** AIR 2001 Delhi 28, relying on the earlier judgment dated 7th September, 1999 of another Division Bench in LPA No.385/1999 titled **Neha Kattyar Vs. C.B.S.E.,** held that once the supplementary examination is passed, the result thereof would relate back to the first appearance in the examination and the effect of that would be treated as if the candidate had passed the examination on the date when the result was declared initially. Of course, both the cases were with respect to class XIIth examination and not with respect to Delhi University.

14. I however find a Single Judge of this Court in **Ankur Vahi Vs. Union of India** 2004 (72) DRJ 428 to have taken a different view. Nevertheless another Single Judge in **Deep Gupta Vs. Guri Gobind Singh Indraprastha University** MANU/DE/1187/2008 again held that the candidates who cleared qualifying examination in first attempt and those who cleared the same with a compartment, for the purposes of determining eligibility cannot be discriminated.

15. In view of the aforesaid and further for the reason that the respondent University in its Bulletin of Information did not so clearly provide that those awaiting results of their qualifying examination are required to clear the qualifying examination in the first instance only and not in the compartment/supplementary examination, it is deemed expedient to allow the petitioners to continue in the LLB course. A reference in this regard may also be made to **Jayant Sud Vs. The Faculty of Law** AIR 1993 Delhi 25 where the petitioner even though securing less than 50% marks in the eligibility examination was allowed to continue in the LLB course for the reason of having cleared the admission test. Needless to state that the petitioners herein also have cleared the admission test with good ranks. Because of the ambiguity in the Bulletin of Information, the

petitioners did not take admission to any course/college to which they may have been entitled to take admission and continued pursuing the course and it is now deemed inequitable to waste their valuable year and to make them appear again in the admission test in the ensuing year.

16. There is also some controversy as to whether the petitioners inspite of succeeding, would be eligible to appear in the next semester end term examination or not, for the reason of not having the requisite attendance. To avoid any further litigation and in the absence of any clear stands with respect thereto and for the reason of the uncertainty which had prevailed with respect to the continuance of the petitioners in the course, it is deemed expedient to clarify herein that subject to the petitioners diligently attending the remaining classes of the term, they shall be entitled to appear in the examination.

17. However, in view of the dissent expressed in **Ankur Vahi** (supra) and further since this Bench had not deemed it necessary to attempt to deal with the diverse opinion, it is deemed expedient to clarify that this judgment shall not constitute a precedent and has been pronounced on its own facts.

18. The counsel for the respondent University after close of hearing has also invited attention to my judgment dated 20th August, 2010 in W.P.(C) No.2475/2010 titled **Anju Vs. University of Delhi** contending that the same covers the subject. However in that case the petitioner therein had misrepresented facts to the University as well as to the Court and was denied relief on that ground.

19. The writ petitions therefore succeed. The petitioners are declared to be entitled to confirmation of their provisional admissions. The respondent University is directed to confirm the provisional admissions of the petitioners and to allow the petitioners to take ensuing semester end term examination in accordance with its rules.

No order as to costs.

ILR (2011) III DELHI 318
IPA

RUSTAM DECD THR LRS ....APPELLANT

VERSUS

JAMIA MILIA ISLAMIA UNIVERSITY ....RESPONDENTS

(PRADEEP NANDRAJOG AND SURESH KAIT, JJ.)

LPA NO. : 117/2010, 118/2010 & 120/2010 **DATE OF DECISION: 14.03.2011**

Public Premises (Eviction of Unauthorised Occupants) Act 1971—Appellants filed three writ petitions challenging order passed by Additional District Judge, upholding orders passed by Estate Officer of first respondent ordering possession to be recovered of subject land from appellants in proceedings under Act—All the writ petitions dealt with common questions qua acquiring title to disputed land by prescription—Held:- A person who claims adverse possession should show : (a) On what date he came into possession, (b) What was the nature of his possession, (c) Whether the factum of possession was known to the other party, (d) How long his possession has continued and (e) His possession was open and undisturbed—Respondent University of Jamia Millia Islamia had no right, title or interest in property against whom Appellants claimed adverse possession of the property.

The ethos of the impugned judgment is that claim for adverse possession or title by prescription is established only when the claimant is in actual physical possession, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding 12 years. Mere long and continuous possession by itself does not constitute adverse

possession, if it is either permissive possession or possession without possendendi. Relying upon the judgment reported as JT 2009 (9) SC 527 **Lnaswathama & Anr. Vs. P.Prakash,** the learned Single Judge has held that unless person in possession shows requisite animus to possess the property, hostile to the title of the owner, period of prescription does not commence. **(Para 7)**

Important Issue Involved: A person who claims adverse possession should show: (a) On what date he came into possession, (b) What was the nature of his possession, (c) Whether the factum of possession was known to the other party, (d) How long his possession has continued and (e) His possession was open and undisturbed.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Sunil Chauhan, Advocate.

FOR THE RESPONDENTS : Ms. Jaya Goyal and Ms. Nagina Jain, Advocate with Mr. Rohit Gandhi, Advocate.

CASES REFERRED TO:

1. *Lnaswathama & Anr.* vs. *P.Prakash*, JT 2009 (9) SC 527.
2. *Annakili* vs. *A.Vedanayagam & Ors.* AIR 2008 SC 346.
3. *P.T.Munichikkanna Reddy & Ors.* vs. *Revamma & Ors.* AIR 2007 SC 1753.
4. *Karnataka Board of Wakf* vs. *Government of India & Ors.* 2004 (10) SCC 779.
5. *Mohd.Shamim* vs. *Jamia Milia Islima & Anr.* W.P.(C) No.3772/2002.

RESULT: Appeals dismissed.

PRADEEP NANDRAJOG, J.

1. A common judgment dated 22.1.2010 has resulted in three writ petitions, being W.P.(C) No.4929/2007, W.P.(C) No.4930/2007 & W.P.(C) No.5292/2007 being disposed of. The appellants of LPA No.117/2010 were the writ petitioners of W.P.(C) No.4930/2007. The appellants of LPA No.118/2010 were the writ petitioners of W.P.(C) No.4929/2007. The appellants of LPA No.120/2010 were the writ petitioners of W.P.(C) No.5292/2007. All the appellants had challenged an order dated 6.7.2007 passed by a learned Additional District Judge upholding orders passed by the Estate Officer of the first respondent ordering possession to be recovered of the subject land from the appellants in proceedings under the Public Premises (Eviction of Unauthorized Occupants) Act 1971.

2. All and sundry defences were raised by the appellants before the Estate Officer, including the plea that the forefathers of the appellants had acquired title to the subject lands by prescriptions. We note that other defences taken were that the subject lands did not belong to Jamia Milia Islamia. A defence was taken that at site, the subject lands were not in respect whereof eviction proceedings were directed. Jurisdictional issues pertaining to the subject land being public premises were raised.

3. At the hearing of the three appeals, since inchoate and rolled over submissions were being pressed into aid, resulting in waste of judicial time, we had repeatedly emphasized upon learned counsel for the appellants to segregate the documents upon which appellants relied for a particular plea. For example, qua the plea that the subject lands were not the ones qua which Jamia Milia Islamia claimed title, requiring counsel for the appellants to show us the relevant documents, we found that the response was to show documents relatable to the plea of adverse possession. When required to segregate such documents on which appellants relied upon to make good the plea of adverse possession, counsel would show us documents pertaining to demarcations carried out at site. After some quibbling, if we may with apology use the expression, counsel for the appellants stated that the appeals are being pressed only with respect to the plea of having acquired title to the disputed lands by prescription. The common order dated 8.3.2011 passed in the 3 appeals reads as under:-

"1. Arguments heard.

2. Learned counsel for the appellants submits that the appellants

admit that the land in dispute is a part of land comprising 24 bigha and 11 biswa, Khasra No.68 min.

3. Learned counsel for the appellants gives all other pleas which were raised before the learned Single Judge and states that the appellants have acquired title to the land in dispute by prescription; being in adverse possession of the said land.

4. Learned counsel does not dispute that as per revenue record of village Okhla, land comprised in Khasra No.68 admeasures 125 bigha and 5 biswa. Counsel asserts that the said land was divided into five segments being as under:

(a) Khasra No.68 min (1-10) recorded in the ownership of Respondent No.1.

(b) Khasra No.68 min (23-1) recorded in the ownership of Respondent No.1.

(c) Khasra No.68 min (4-4) recorded in the ownership of the Central Government.

(d) Khasra No.68 min (89-2) recorded in the ownership of the Central Government.

(e) Khasra No.68 min (1-10) recorded in the ownership of the Central Government.

5. Counsel submits that only 2 out of the 5 parcels of land which were bifurcated out of original Khasra No.68 i.e. parcel No.a and b admeasuring 1 bigha and 10 biswa and 23 bigha and 1 biswa came under the ownership of Jamia Milia Islamia. Counsel states that remaining three parcels admeasuring 4 bigha and 4 biswa; 89 bigha and 2 biswa; and 1 bigha and 10 biswa came under the ownership of the Central Government.

6. As desired by learned counsel written submissions are permitted to be filed with respect to the plea urged and such documents on which parties rely; being the ones which were before the writ court.

7. Reserved for judgment."

4. Written submissions, running into 17 pages, have been filed and the only documents referred to therein are, as stated, in para 7 thereof. The documents are a possession report dated 25.1.1953 and a plaint pertaining to a suit for possession filed by the University against Rustam.

5. These are the only two documents referred to in the written submissions and indeed were the only two documents referred to during arguments in support of the plea of having acquired title by adverse possession. We may hasten to add that learned counsel for the appellants had made us read various other documents, but after reading each one of them, would concede that none of them was relevant qua the plea of adverse possession and this is our reason why, to pin the appellants, we had required the appellants to file written submissions.

6. Before we deal with the documents, we would highlight that a perusal of the impugned order shows that principally, the writ petitions before the learned Single Judge were also argued on the plea of having acquired title by prescription.

7. The ethos of the impugned judgment is that claim for adverse possession or title by prescription is established only when the claimant is in actual physical possession, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding 12 years. Mere long and continuous possession by itself does not constitute adverse possession, if it is either permissive possession or possession without possendendi. Relying upon the judgment reported as JT 2009 (9) SC 527 **Lnaswathama & Anr. Vs. P.Prakash,** the learned Single Judge has held that unless person in possession shows requisite animus to possess the property, hostile to the title of the owner, period of prescription does not commence.

8. We may only add that in the decision reported as (2006) 7 SCC 570 **T.Anjanappa & Ors. Vs. Somalingappa & Anr.,** it has been observed that adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. In the decision reported as AIR 2008 SC 346 **Annakili Vs. A.Vedanayagam & Ors.** it was observed that claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue

to remain in possession for a period of 12 years thereafter. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. In the decision reported as AIR 2007 SC 1753 **P.T.Munichikkanna Reddy & Ors. Vs. Revamma & Ors.** it was observed that it follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. In the decision reported as (2004) 10 SCC 779 **Karnataka Board of Wakf vs. Government of India & Ors.** it has been observed: *"Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) On what date he came into possession, (b) What was the nature of his possession, (c) Whether the factum of possession was known to the other party, (d) How long his possession has continued, and (e) His possession was open and undisturbed."*

9. Let us consider the plea taken by the appellants in response to the notice served upon them by the Estate Officer.

10. We extract the reply filed by Rustam Khan. He has stated as under:-

> "1. That the objector/respondent is not an unauthorized occupant over the land, over which the House of the objector/respondent is located, a site plan of which is being filed herewith. The objector/respondent has been in possession of the land and the house standing thereon in the capacity of owner in his own right since more than the last 50 years.
>
> 2. That the land which is the subject matter of dispute is not a public premises and consequently the present proceedings against the objector/respondent are not maintainable.
>
> 3. That the university has no locus standi to sue and initiate proceedings in respect of the subject matter of dispute. The University of Jamia Milia Islamia has had never any right, title or interest in the same. The university has neither been the owner

> or in possession thereof. The university has had never any connection with the same. Hence, the present proceedings which are a sheer nullity in the eyes of law and as such be dropped.
>
> 4. That even otherwise the University of Jamia Milia Islamia is estopped from filing the instant eviction proceedings in respect of the house of the objector/respondent particularly in view of the fact that it had already instituted a suit for possession, mandatory and permanent injunction against the objector/ respondent regarding this very house and the land underneath the same, in the civil court. The suit being Suit No.256 of 1981 and styled as Jamia Milia Islamia University versus Shri Rustam Khan was tried by the court of Shri Gurdeep Kumar, the then Sub-Judge, Delhi, Tis Hazari Courts, Delhi. A copy of the plaint thus filed by the university of Jamia Milia Islamia is being attached herewith for your kind perusal. It was on 6.2.1985 that Shri S.K.Mahajan, Advocate for the Jamia Milia Islamia university made the following statement before the Court:
>
> > "As the suit land had been acquired by the Government, I do not want to continue with the suit. As such I withdraw the suit, Parties be left to bear their own costs."
>
> The Learned court of Shri Gurdeep Kumar, the then Sub-Judge, Delhi, passed an order on the basis of the statement of the University's counsel that the suit is hereby dismissed as withdrawn. The parties are left to bear their own costs. The file be consigned to the record room. Photostat copies of the statement thus made by the Learned counsel of the university of Jamia Milia Islamia and the order passed by the Hon'ble Court on 6.2.1985 are being filed herewith for the perusal of this Hon'ble Court.
>
> 5. That in view of the filing of the suit, its dismissal by the Hon'ble Court on 6.2.1985, the university of Jamia Milia Islamia is estopped from initiating the proceedings yet afresh again. The same have been initiated by the university simply to harass the poor objector/respondent, merits dismissal and be dismissed.
>
> 6. That on account of the unconditional withdrawal of the suit

by the university on 6.2.1985 before the Court of Shri Gurdeep Kumar, Civil Judge, Delhi, the present proceedings are barred by order 2 rule 2 and section 11 of the Code of Civil Procedure. The same are not maintainable on account of the fact and the very well established principle of law that nobody can be vexed twice. Our judicial system does not encourage multiplicity of litigation. Thus on account of the previous suit having been dismissed as withdrawn, the instant proceedings cannot continue.

7. That the Jamia Milia Islamia university, its staff, agents and employees are guilty of concealment of true facts from this Hon'ble Court. It seems that the fact of filing the suit no.256 of 1981 by the university of Jamia Milia Islamia against the objector/ respondent and the subsequent unconditional withdrawal by their counsel Shri S.K.Mahajan on behalf of the university, was not brought to the notice of this Hon'ble Court for the reasons best known to them. Had these material facts been brought to your kind notice, no proceedings could have been initiated against the objector and no notice could have been issued by the Court against the objector/respondent.

8. That as a matter of fact, the University of Jamia Milia Islamia had in an earlier suit alleged that the objector/respondent had encroached upon the land in dispute in May, 1970. The true facts are that the objector/respondent has been in possession of the subject matter of dispute since 1940. It was in May, 1970 that the University of Jamia Milia Islamia had started construction of a wall from the Southern side of the objector's house and in doing so, threatened to demolish a portion of the objector's house, whereupon the objector was compelled to file the suit. The whole of the structure as depicted by the objector/respondent in the site plan exists since 1940, the house was a kacha one, which was constructed by the objector/respondent a pucca one in 1957, which was later on assessed to house tax. The two Doors of the objector's pucca house opened towards the land, which is a part and parcel of the above mentioned pucca house of the objector/respondent. The house of the objector/respondent cannot be enjoyed by him and his family members without the land in suit. As a matter of fact, the land which is the subject

matter of these proceedings, is apurtinet to the house of the objector/respondent and is very necessary for the proper enjoyment of the objector's house. The land in an ancestral land of the objector/respondent in which the University of Jamia Milia Islamia, has no right, title or interest.

9. That the present proceedings as already submitted, are not maintainable in law and this Hon'ble Court has no jurisdiction to try the same in view of the statement earlier made by the counsel of the university Shri S.K.Mahajan before the Civil Court of Shri Gurdeep Kumar, Civil Judge, Delhi on behalf of the University. The proceedings as such are not maintainable and be dropped."

11. Others have taken similar pleas.

12. It strikes the reader that the pleas required to be advanced as per the decision reported as 2004 (10) SCC 779 **Karnataka Board of Wakf Vs. Government of India & Ors.** are wanting and thus the appellants are liable to be non-suited on said count alone. Suffice would it be to state that evidence sans a plea is meaningless. The principle of law prohibiting variance between pleading and proof compels us to do so.

13. But, we would consider the two documents relied upon by the appellants.

14. The possession report relied upon pertains to the date 25.1.1953 and records that of the 3.959 acres of land, at site actual possession of 3.622 acres was handed over to the representative of Jamia Milia Islamia and that 0.337 acres was under encroachment. It be highlighted by us that as recorded in our order dated 8.3.2011, which has been reproduced by us hereinabove, of the 125 bigha and 5 biswa of land comprised in Khasra No.68 only two parcels ad-measuring 1 bigha and 10 biswa and 23 bigha and 1 biswa i.e. total land ad-measuring 24 bigha and 11 biswa was recorded in the ownership of Jamia Milia Islamia.

15. Now, though the report is dated 25.1.1953 and certainly evidences that 0.337 acres land was under encroachment, but it does not show that the predecessor-in-interest of the appellants were occupying the encroached land.

16. Dealing with this issue, we find that a large number of persons are attempting to use the same very possession report to justify their occupation of land belonging to Jamia Milia Islamia. 11 writ petitions of various dates filed by various persons, lead matter being W.P.(C) No.3772/ 2002 **Mohd.Shamim Vs. Jamia Milia Islima & Anr.** was dismissed by a learned Single Judge on 31.8.2004. Letters Patent Appeals filed against said decision were dismissed and challenge to the said decisions before the Supreme Court also failed.

17. The report in question takes us nowhere and needless to state, takes the appellants nowhere.

18. As regard the suit, plaint whereof has been relied upon by the appellants, suffice would it be to state that one Rustam and one Naziruddin had filed suits for injunction against Jamia Milia Islamia in the year 1970 claiming ownership of the subject lands, comprising in part of Khasra No.68 in the revenue estate of Village Okhla. Issue of title was framed and after litigating for 8 years, vide judgment and decree dated 9.10.1978 it was held that title was proved to be in the name of Jamia Milia Islamia but ignoring the fact that the plaintiffs thereof could not show possession prior to the year 1970, and for the reason an interim injunction enured in their favour, the learned Trial Judge held that Jamia Milia Islamia could regain possession as per law. Thereafter, Jamia Milia Islamia filed an appeal which was allowed by the learned ADJ on 21.10.1980.

19. Jamia Milia Islamia had two options. To take forcible possession as the embargo over the University was no longer operative. Or take recourse to action contemplated by law.

20. Probably for the reason large number of persons trespassed different parcels of land and each claimed benefit of the possession report dated 25.1.1953, Jamia Milia Islamia was advised to file a suit for recovery and this is the plaint relied upon by the appellants. The suit was filed in the year 1983. It was withdrawn on 6.2.1985.

21. It is true that proceedings were initiated under the PP Act in the year 1997, but relevant would it be to state that post 1970, till the year 1980, it was the appellants who had, under Court orders prevented Jamia Milia Islamia to regain possession and thus the appellants cannot claim benefit of said period. In the year 1988 Jamia Milia Islamia was declared

a Central University. We do not go into the issue whether period of adverse possession qua the immovable property of Jamia Milia would be 30 years or 12 years, but would simply highlight the fact that there is no evidence that after the appellants lost on the issue of title, they did any act asserting title to the subject land. We highlight that mere reiteration of possession is neither here nor there. It assumes importance to note that the appellants have simply opened the doors of their houses to trespass upon abutting land belonging to Jamia Milia Islamia, possession whereof is being sought to be recovered by Jamia Milia Islamia. As per the appellants, a fact brought out in para 8 of the reply filed to the eviction notice, the land in dispute is vacant land abutting their houses.

22. In what manner have the appellants asserted title; what acts have been done by them to assert title, none have been pleaded and indeed none exists.

23. It is a simple case of an owner of a building putting a hedge or a boundary wall on the abutting land and probably putting a chair or two thereon to bask in the sun. We doubt whether this would constitute an act of hostile title.

24. An issue of adverse possession is a blended question of fact and law and we find that the learned Single Judge has decided the issue within the confines of writ jurisdiction.

25. We find no merit in the appeals which are dismissed.

26. No costs.

ILR (2011) III DELHI 329
RFA

STATE BANK OF INDIA ....APPELLANT

VERSUS

SMT. VIJAY LAKSHMI THAKRAL ....RESPONDENT

(KAILASH GAMBHIR, J.)

RFA NO. : 141/2003 DATE OF DECISION: 15.03.2011

Code of Civil Procedure, 1908—Section 96—State Bank of India Employees Provident Fund Rules—Rules 33 & 359—Payment of Gratuity Act, 1972—Section 7—Respondent filed suit for recovery against appellant bank on ground it failed to pay interest on Provident Fund amount and gratuity amount of her deceased husband employed as officer with appellant bank—Suit decreed—Aggrieved appellant bank urged in appeal, Respondent failed to produce relevant documents for release of terminal dues of her husband due to inter se dispute between legal heirs of deceased which prevented appellant bank from releasing terminal dues—Held:- Rule 359 is a beneficial rule framed for the expeditious settlement of the provident fund dues and pension claims of bank employees and to burden the bank with the interest liability in the event of any delay—Interest is a compensation payable when the money is unnecessarily withheld by one whose obligation was to pay the same at a given time and the same is not paid in breach of legal rights of creditor—The appellant bank cannot be blamed for not making the refund of terminal benefits to the Respondent which is attributed only to the Respondent.

Black's Law Dictionary (7th Edition) defines 'interest' inter alia as the compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially, the amount owed to a lender in return for the use of the borrowed money. According to *Stroud's Judicial Dictionary of Words And Phrases (5th edition)* interest means, inter alia, compensation paid by the borrower to the lender for deprivation of the use of his money. The essence of interest in the opinion of Lord Wright, in **Riches v. Westminister Bank Ltd.,** (1947) 1 All ER 469 is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not used that money. The general idea is that he is entitled to compensation for the deprivation. Hence interest is a compensation payable when the money is unnecessarily withheld by one whose obligation was to pay the same at a given time and the same is not paid in breach of the legal rights of the creditor. **(Para 13)**

Important Issue Involved: Rule 359 is a beneficial rule framed for the expeditious settlement of the provident fund dues and pension claims of bank employees and to burden the bank with the interest liability in the event of any delay—Interest is a compensation payable when the money is unnecessarily withheld by one whose obligation was to pay the same at a given time and the same is not paid in breach of the legal rights of the creditor.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. S.L. Gupta & Mr. Ram Gupta, Advocates.

FOR THE RESPONDENT : Mr. J.R. Bajaj, Advocate.

CASES REFERRED TO:

1. *State Bank of India* vs. *P. Sarathy* (MANU/TN/3318/2006).
2. *Shri Banarasi Dass* vs. *Mrs. Tekku Dutta* (2005) 4 SCC 449.
3. *H.Gangahanume Gowda* vs. *Karnataka Agro Industries Corporation Ltd.* AIR 2003 SC 1526.
4. *Joginder Pal* vs. *Indian Red Cross Society,* (2000) 8 SCC 143.
5. *Madhvi Amma Bhawani Amma and Ors.* vs. *Kunjikutty Pillai Meenakshi Pillai and Ors. :* AIR2000SC2301.
6. *M/s Champaran Sugar Co.* vs. *Joint Commissioner & Ors.* AIR 1987 Patna 96.
7. *Riches* vs. *Westminister Bank Ltd.,* (1947) 1 All ER 469.

RESULT: Appeal allowed.

KAILASH GAMBHIR, J.

1. By this appeal filed under Section 96 of the Code of Civil procedure, 1908 the appellant seeks to set aside the judgment and decree dated 11.11.2002 passed by the Court of the ADJ, Delhi whereby the suit for recovery filed by the respondent was decreed in favour of the respondent and against the appellant.

2. Brief facts of the case relevant for deciding the present appeal are that the respondent is the widow of late Sh. Satish Chander Thukral who was working as an officer in the State Bank Of India and had expired on 22.11.84 leaving behind the respondent widow and his mother as legal heirs. That after the death of her husband, the respondent vide her application dated 29.3.85 requested the appellant bank to release his terminal dues like provident fund and gratuity, etc. In response, when the Bank asked the respondent to submit the requisite papers including the succession certificate, she was unable to do so due to the inter se disputes between the legal heirs. For this purpose, the respondent had approached the concerned civil court which granted the succession certificate on 4.6.97 in favour of the respondent. On furnishing the same on 6.6.97, the Bank released the terminal dues of the deceased in October,

1997 but did not pay any interest on the amount for the delayed period. The respondent consequently filed a suit for recovery of the interest which vide judgment and decree dated 11.11.2002 was decreed in favour of the respondent for a sum of Rs.3,76,404 alongwith costs and pendentalite and future interest @10.5% p.a. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Mr. S.L. Gupta, learned counsel for the appellant submitted that the suit filed by the respondent was clearly barred by limitation as the time prescribed for filing of the recovery suit against the bank is three years, the same being a simple recovery suit. The contention of the counsel for the appellant was that the ld. Trial Court has wrongly observed that the succession certificate was a money decree which can be executed within a period of 12 years. Counsel further submitted that before the Succession Court the appellant was not a party and in any case the succession certificate cannot be enforced as a money decree against the appellant bank, the same being a decision by the succession court inter se between the legal heirs of the deceased employee of the bank. Counsel thus stated that the suit for recovery filed by the respondent was clearly barred by limitation. The other argument raised by the counsel for the appellant was that the appellant was not liable to pay the interest on the amount of gratuity and the provident fund as the appellant had never shown any reluctance to pay the amount of terminal dues to the legal heirs of the deceased employee and it was only on account of the inter se dispute between the legal heirs that the appellant bank was prevented from releasing the amount of the provident fund and the gratuity. Counsel further invited attention of this court to the letter dated 16.05.1985 (Ex. DW 1/3) addressed by the nominee of the deceased employee as well as the injunction order dated 20.9.85 granted by the Succession Court. Counsel thus stated that it was not the fault of the appellant bank but due to the infighting of the legal heirs themselves due to which the appellant could not make the timely payment of the said dues. Counsel also submitted that the Rule 359 on which the ld. Trial court placed reliance is not applicable to the instant facts; firstly, because the said rule is from a reference book which has no binding effect on the appellant and secondly even under the reference book in the illustration (3) of Rule 362 it has been clearly provided that the nominee/legal heirs are entitled for interest from the date of submission of the application in the prescribed format and not from the date of the death of the member. The contention of the

counsel for the appellant was that the application in the prescribed format for seeking release of the said amount was made by the wife of the deceased employee only after the grant of the succession certificate and not prior thereto. Counsel also placed reliance on sub Section 3A of Section 7 of the Payment of Gratuity Act, 1972, proviso of which clearly provides that the interest shall not be paid by the employer if there is a delay on the part of the employee in claiming the said payment. The appellant submitted that in fact the appellant bank has its own rules which govern the payment of gratuity and the provident fund. Counsel also invited attention of the Court to Rule 33 of the SBI Employees' Provident Fund Rules which states that interest on the money standing in the books of the fund to the credit of a member shall cease on the day such particular employee leaves the service of the bank or on the day when he dies, whichever event shall happen first. The contention of the counsel for the appellant was that the said rules governing the Provident Fund and Gratuity have been framed by the appellant bank deriving its power from Section 50(2)(o) of the State Bank of India Act, 1955 and thus have a statutory force. Counsel thus submitted that the provident fund amount and the gratuity amount were immediately released by the appellant bank after the respondent had submitted the succession certificate along with application in the duly prescribed form. Counsel also submitted that the respondent has claimed the amount in suit for the payment of interest at one particular rate of 9% p.a. and then charging the interest at the higher interest rate @ 18% p.a. while calculating the decreetal amount and this fact has been overlooked by the learned trial court while granting relief to the respondent. Counsel for the appellant hence submitted that in any event of the matter the appellant is not legally obligated to pay the interest amount.

4. Mr. Bajaj, learned counsel for the respondent on the other hand argued that the Reference Book on Staff Matters which was relied upon by the respondent in fact is a Bible for the appellant bank and the same contains various administrative instructions and statutory rules governing the service conditions of the employees of the bank including the retiral benefits. Counsel for the respondent submitted that under Rule 359 of the Employees Provident Fund Rules forming part of the Reference book on Staff Matters, the bank is under a legal obligation to release payment towards provident fund from the date of death of the employee or from the date of the application submitted by the legal heirs of the deceased

employee. Counsel further submitted that in the present case, there is an enormous delay on the part of the bank in releasing the provident fund and the gratuity amount and, therefore, the respondent became entitled to interest in terms of illustration 3 of the said Rule 362. Similarly, counsel submitted that the respondent is entitled to interest on the delayed payment of gratuity in terms of Rules 415 and 417 of the said reference book. Under Rule 417, the bank is even liable to pay compound interest @ 9% p.a. for the intervening period during which the bank fails to pay the amount of interest on the gratuity amount. Mr.Bajaj also placed reliance on Section 8 of the Payment of Gratuity Act, 1972, which gives right to an employee to recover the amount of gratuity payable together with compound interest thereon, if it is not paid within the prescribed time.

5. Counsel further invited attention of this Court to the legal opinion submitted by the Assistant General Manager (Law) dated 02.02.1999 to the Chief Manager (Personnel), State Bank of India thereby taking a stand that the bank is liable to pay interest for the period from 20.09.1985 till the date of production of succession certificate by the respondent. This stand was taken by the said officer of the appellant-bank after looking into the bank's extant instructions and also on account of the fact that the said money remained with the bank because of the operation of the restraint order. Counsel further submitted that the money was with the bank as per the privity of contract of an employee with the bank and not with the provident fund trust and, therefore, the said money being with the bank must have fetched interest thereon and hence the bank cannot deny payment of interest to the respondent. Counsel also submitted that the suit filed by the respondent was within the prescribed period of limitation as the appellant-bank through its letter dated 05.03.1999 took a stand to deny the said interest to the respondent and the learned court has rightly decided the issue of limitation in favour of the respondent.

6. I have heard learned counsel for the parties and gone through the records.

7. The respondent had filed a suit for recovery of Rs.3,76,404/- against the appellant-bank mainly on the ground that the appellant-bank failed to pay the interest on the provident fund amount and the gratuity amount of the deceased-husband of the respondent who was employed

as an officer with the appellant-bank. Before dealing with the rival contentions of both the parties, it would be useful to refer to some of those facts which are not in dispute between the parties. These admitted facts are:

(a) The husband of the respondent was working as an Officer with the appellant-bank and had died on 22.11.1984 leaving behind the respondent i.e. his widow, and his mother Smt.Saraswati Devi as the only legal heirs.

(b) That vide letter dated 09.01.1985 the appellant-bank called upon the respondent to submit the requisite papers so as to enable the appellant-bank to process her claim and make the necessary payments including the provident fund amount etc.

(c) In response to this letter dated 9.1.1985, a reply dated 21.01.1985 was sent by the respondent to the appellant-bank stating that she was not in a position to submit the papers desired by the appellant-bank.

(d) The respondent vide her letter dated 29.03.1985 made a request to the appellant-bank to pay the terminal dues of her deceased husband such as provident fund, gratuity, leave encashment and salary for 22 days etc. In this letter dated 29.03.1985 the respondent informed the appellant-bank that she was the only legal heir to claim right over the retiral benefits of the deceased including the provident fund and gratuity etc. as were admissible as per the Bank Rules and Regulations. The respondent further informed the bank not to entertain any claim from any other family member of her husband.

(e) That vide letter dated 09.05.1985, the appellant bank received a legal notice from Smt. Saraswati Devi, mother-in-law of the respondent, thereby informing the appellant bank that she being the mother of her late son, Satish Chander Thukral, was entitled to equal share along with his widow. In this letter, mother-in-law of the respondent also requested the appellant bank not to take any hasty action.

(f) That vide letter dated 16.05.1985, Mr.Ram Dutta Thukral informed the appellant bank that he was the nominee of the deceased and thus in that capacity he was entitled for the payment of entire retiral dues of the deceased.

(g) That vide order dated 20.09.1985, the Court of Shri J.P.Sharma, Sub-Judge, First Class passed a restraint order against the bank from paying any amount to any one till further orders are passed by the Court. The said order was duly intimated to the appellant-bank.

(h) That succession certificate was granted by the Court of Administrative Civil Judge vide order dated 04.06.1997 in favour of the respondent.

(i) That on 06.06.1997 the respondent forwarded a copy of the succession certificate to the appellant bank and the appellant bank released the provident fund amount of Rs.58,049/-on 06.10.1997 and gratuity amount of Rs.29,250/-on 21.10.1997.

8. In the background of the aforesaid admitted facts, the rival contentions raised by both the parties need to be examined and appreciated. Rule 359 of the Staff Reference Book is the sole basis for the learned Trial Court to accept the claim of the respondent. The said reference book is a compilation of various rules governing the service conditions of the employees of the Bank and the said Rule 359 deals with the payment of interest when refund is delayed. For better appreciation of the said rule, the same is reproduced as under:

> "Para 359. It is observed that despite efforts to settle expeditiously the claims on account of refund of the Provident Fund balance of Ex. Employees, delays some times abnormally long continue to occur. There have also been a few instances where delays have occurred in the settlement of pension payable. All this causes hardship to employees who have a record of long, loyal service to the Institution, besides depriving them of interest on sizeable funds for long periods. While efforts should continue to be made to settle these claims expeditiously, to ameliorate the hardships to the extent possible, interest rate prevailing for Provident Fund account be allowed to the Provident Fund balance of ex.

Employees from the date of employees' application for refund of Provident Fund or from the date of retirement whichever is later, to the date of actual refund. The procedure for application of interest will also be the same as applicable to the Provident Fund account maintained at Central Accounts office."

9. Certainly, the aforesaid rule 359 is a beneficial rule framed for the expeditious settlement of the provident fund dues and pension claims of bank employees and to burden the bank with the interest liability in the event of any delay. The delay envisaged in the said Rule is not the delay which can be attributed to the retiring employee himself or the legal heirs including the nominee of the deceased employee. It is a matter of common knowledge that despite various directions given by the High Courts and the Hon'ble Supreme Court, the retiral dues, pensionary benefits and provident fund, gratuity etc. are not released to the retiring employees with promptitude the same deserves. The said Rule 359 thus deals with such routine delays caused by the Bank in the release of provident fund balance of the ex employees or in the settlement of the pension payable to such employees and manifestly not in those cases where the delay is caused at the end of such an employee or the legal heirs of the deceased-employee.

10. The learned counsel for the appellant also placed reliance on Rule 33 of the State Bank of India Employees Provident Fund Rules to support his argument that interest on all moneys as standing to the credit of the employee shall cease on the day on which he dies. Counsel also placed reliance on the judgment rendered by the Division Bench of the Madras High Court in the case of **State Bank of India Vs. P. Sarathy** (MANU/TN/3318/2006) in support of his argument. In the said judgment of the Madras High Court, a similar question arose for consideration and the Court took a view that if the delay is not due to the laches on the part of the Bank then the employee cannot be entitled to any interest on the amount of the provident fund. The Division Bench of Madras High Court also upheld the legality and constitutionality of the said Rule 33 of the State Bank of India Employees Provident Fund Rules in the said case. The relevant paras of the said judgment are reproduced as under:

"8. Mr.K.M.Ramesh, learned Counsel appearing for the respondent/ writ petitioner contended that as per Rules, it is the duty of the

employer/here Trustees of the Fund to intimate the employee and make payment. In the light of the specific provision in Rule 33 of the Rules, we are of the view that after cessation of service, the employee is required to make a demand for refund of the P.F. balance and then only it becomes payable. As rightly pointed out by the learned Senior Counsel for the Bank, if the service of the employee is terminated as a result of disciplinary action, the Provident Fund balance becomes ready for settlement and even after making a request for payment of the P.F. balance lying in his credit, he can contest the order of the disciplinary authority before different forums, viz., Appellate Authority, Reviewing Authority or by filing writ in the High Court and Appeal up to the Supreme Court, however, if he feels the acceptance of the Provident Fund does prejudice his case, he has to obtain necessary order for keeping the P.F. amount in fixed Deposit and if he does not obtain such order, the Bank cannot pay interest on the said amount. Further, some employees may, even after cessation of employment, purposely leave the amount under the fund as the P.F. interest rate offered by the Board is higher than the deposit rates prevailing in the Banks. It is also brought to our notice that the interest income on P.F., which was not withdrawn, is eligible for tax benefit. Therefore, if delay is not due to laches on the part of the Bank, the employee cannot be entitled to interest on the said amount.

10. Coming to the case of the respondent/petitioner, it is brought to our notice that, at the time of admission to the P.F., he had subscribed to the Rules, therefore, it cannot be said that he was not put on notice about Rule-33. In such case, it was for the petitioner to apply for settlement of his dues immediately after his cessation of employment. It is not in dispute that he was removed from service by the Bank on 11.01.1983. It is equally true that he was questioning the order of removal by way of departmental appeal, review, civil suit, writ petition in this Court and even went upto the Supreme Court. Merely because he was agitating his order of removal before various authorities, it cannot be said that, for the entire period, interest is payable on his P.F. amount."

11. Somewhat similar situation has arisen in the present case. From the admitted facts already reproduced above, it is manifest that immediately after the death of the husband of the respondent, the appellant-bank wrote to the respondent vide its letter dated 09.01.1985 thereby calling upon the respondent to submit necessary papers so as to enable it to release the necessary dues but, in response thereto, the respondent expressed her helplessness in submitting the desired papers. Even vide letter dated 29.03.1985, on which much emphasis was laid by the counsel for the respondent, the respondent is not seen to have fulfilled the Bank's formalities. The main concern expressed by the respondent in the said letter was that the Bank should not entertain claim of any other member of her husband's family and she being the only legal heir was entitled for the grant of provident fund, gratuity and other terminal dues of her deceased husband. The respondent has not disputed the fact that the mother of the deceased-employee was also one of the legal heirs entitled to an equal share in the said terminal benefits. In claiming her legal rights, the mother-in-law of the respondent had even served a legal notice dated 09.05.1985 upon the appellant bank.

12. Another fact which cannot be ignored is the claim of the nominee, Mr.Ram Dutta Thukral, who also vide his letter dated 16.05.1985 called upon the appellant bank to pay the provident fund amount to him being the nominee of the deceased employee. In such a scenario, it cannot be said that there was a delay on the part of the appellant-bank in not making the timely payment of provident fund and gratuity amount to the respondent. The argument of counsel for the respondent was that immediately on the death of the employee, his wife became entitled to the retiral benefits including the amount lying in the provident fund account, gratuity etc. even though no application in writing was made by the legal heir. It would be useful to reproduce section 7 of the Payment of Gratuity Act,1972 here:

> **"7. DETERMINATION OF THE AMOUNT OF GRATUITY. -** (1) A person who is eligible for payment of gratuity under this Act or any person authorised, in writing, to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.
>
> (2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.
>
> (3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable.
>
> (3A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify : Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.
>
> ……..".

Looking attractive at the first blush, but on deeper examination of such claim of the respondent, the argument lacked any merit. No doubt as it is clear from the language of Section 7 that so far the payment of gratuity amount is concerned, sub section 2 casts an obligation on the employer to determine the amount of gratuity even in a case the application, as referred to in sub section 1, has been made or not. But clearly sub section 2 does not envisage a situation where there are inter se disputes between the legal heirs of the deceased employee. Rather, Proviso 1 of Sub Clause (3A) of Section 7 will be attracted to the facts of the present case which states that no such interest shall be payable if the delay in payment is due to the fault of the employee.

13. *Black's Law Dictionary (7th Edition)* defines 'interest' inter alia as the compensation fixed by agreement or allowed by law for the use or detention of money, or for the loss of money by one who is entitled to its use; especially, the amount owed to a lender in return for the use

of the borrowed money. According to *Stroud's Judicial Dictionary of Words And Phrases (5th edition)* interest means, inter alia, compensation paid by the borrower to the lender for deprivation of the use of his money. The essence of interest in the opinion of Lord Wright, in **Riches v. Westminister Bank Ltd.,** (1947) 1 All ER 469 is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not used that money. The general idea is that he is entitled to compensation for the deprivation. Hence interest is a compensation payable when the money is unnecessarily withheld by one whose obligation was to pay the same at a given time and the same is not paid in breach of the legal rights of the creditor.

14. The Hon'ble Supreme Court in a catena of judgments has held that the provident fund amount or the gratuity amount has to be paid by the employer immediately on the retirement of the employee or on the cessation of his service and the employee would be entitled to interest if there is a delay on the part of the employer in payment of such amounts. The judgment of the Hon'ble Apex Court in **H.Gangahanume Gowda Vs. Karnataka Agro Industries Corporation Ltd.** AIR 2003 SC 1526 and in **M/s Champaran Sugar Co. vs. Joint Commissioner & Ors.** AIR 1987 Patna 96 cited by the counsel for the respondent, reiterating the said legal position, will be of no help to the respondent in the facts of the present case, as the consistent view of the Courts is that the interest would be payable only where the delay is not due to the fault of the employee.

15. As discussed above, in the facts of the present case, the appellant-bank cannot be blamed for not making the refund of the provident fund amount and gratuity amount to the respondent; firstly because the respondent did not come forward to make the proper application after completing all the formalities of the bank as was notified to her by the bank vide its letter dated 09.01.1985; secondly because of the inter se dispute between the legal heirs of the deceased employee. Once the succession certificate was obtained by the respondent in her favour and the same was forwarded to the appellant bank, then the requisite amounts were released by the appellant bank to the respondent on 06.10.1997 and 21.10.1997 without much delay.

16. The appellant has also contended that the respondent has claimed the amount of interest @9% p.a and @18% p.a both and the learned trial court without going into the question of rate of interest has granted the same. The respondent however cannot calculate the amount due by applying two types of rate of interest. The general principle governing the grant of interest is looking at the facts and circumstances of each case as to whether such interest is in the nature of compensation, damages or penal interest. The delay which causes the interest to be accrued on the amount due should be such so as to cause harassment to the rightful beneficiary of such amount. In the case at hand the release of benefits to the respondent was rather swift within a period of almost three to four months as compared to what it takes in normal circumstances.

17. Coming to the argument of the counsel for the appellant that the suit is barred by limitation, this court also does not subscribe to the finding given by the learned trial court on the issue no.1, taking the view that the recovery suit could be filed by the respondent within a period of 12 years from the date of grant of succession certificate. This finding has been given by the learned trial court on the premise that the period of limitation for the execution of a decree has been prescribed for 12 years under Article 136 of the Limitation Act 1963 and therefore, the suit filed by the respondent on 6.2.2002, five years from the date of the succession certificate was well within the prescribed period of limitation. This court is of the considered view that the reasoning given by the learned trial court is wholly fallacious and contrary to the legal position. Under Section 2(2) of the Code of Civil Procedure 'decree' has been defined in the following words:

> "Section 2
>
> (2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include
>
> (a) any adjudication from which an appeal lies as an appeal from

an order, or

(b) any order of dismissal for default.

Explanation -A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final;"

18. Before the succession court, the lis was between the legal heirs of the deceased and not between the legal heirs on one hand and the appellant bank on the other and thus the bank clearly was not a party to the said lis, therefore, it cannot be said that any 'decree' was passed by the succession court against the appellant bank. The grant of succession certificate merely clothes the holder of the certificate with an authority to realize the debts of the deceased and to give authority of discharge. In **Shri Banarasi Dass Vs. Mrs. Tekku Dutta** (2005) 4 SCC 449, the Apex Court has held that the object of the succession certificate is to facilitate the collection of the debt, to regulate the administration of succession and to protect persons who deal with the alleged representatives of the deceased. The purpose of the grant of succession certificate is thus to give a valid discharge of the debt. The succession certificate is granted by the court while conducting summary proceedings and the grant of succession certificate is not a final decision to determine the rights of the parties. In the case of **Joginder Pal Vs. Indian Red Cross Society,** (2000) 8 SCC 143, the Apex Court held as under:

"These Sections make it clear that the proceedings for grant ofsuccession certificate are summary in nature and that no rights are finally decided in such proceedings. Section 387 puts the matter beyond any doubt. It categorically provides that no decision under Part X upon any question of right between the parties shall be held to bar the trial of the same question in any suit or any other proceeding between the same parties. Thus Section 387 permits the filing of a suit or other proceeding even though a succession certificate might have been granted.

16. This question was also considered by this Court in the case of **Madhvi Amma Bhawani Amma and Ors. v. Kunjikutty Pillai Meenakshi Pillai and Ors.** : AIR2000SC2301. In this

case after having considered the provisions of Sections 370 to 390 of the Indian Succession Act as well as Section 11 of the CPC, it has been held that any adjudication under Part X does not bar the same question being raised between the same parties in a subsequent suit or proceeding. It has been held that Section 387 of the Indian Succession Act takes a decision given under Para X of the Indian Succession Act outside the purview of Explanation VIII to Section 11 of the CPC. It has been held that Section 387 gives a protective umbrella to ward off from the rays of res judicata to the same issue being raised in a subsequent suit or proceeding. We are in full agreement with the view expressed in this case."

It would be thus seen that the grant of succession certificate in favour of the petitioner cannot operate even as res judicata in a subsequent suit as the succession court only prima facie determines the right of a person entitled to collect the debts of the deceased. Therefore in the background of this settled legal position, the succession certificate cannot be treated as a decree which can be said to have conclusively determined the rights of the parties and in any event of the matter in the present case the bank and other debtors are not before the court nor their rights are involved for any determination. The succession certificate therefore cannot be treated as a decree as envisaged under Section 2(2) of the Code of Civil Procedure. The grant of succession certificate in favour of the respondent thus entitled her to file the recovery suit within a period of three years from the date of the grant of said succession certificate. There is no particular Article in the Limitation Act which deals with the limitation period to recover the statutory dues and therefore the residuary Article 113 of the Limitation Act would attract to such a suit and the period of three years would be reckoned from the date when the right to sue is accrued. In the facts of the present case, the right to sue in favour of the appellant accrued on the date of grant of the succession certificate or at the most when the respondent had presented the application with the bank to seek release of the said statutory dues of the deceased employee. The recovery suit was filed by the respondent on 6.2.2002, whereas the succession certificate was granted on 4.6.97 and it was submitted by her to the appellant bank on 6.6.97. Therefore, undoubtedly the suit of the respondent was hopelessly barred by time.

19. In the light of the above discussion, the present appeal is allowed and the impugned order dated 11.11.02 passed by the learned trial court is set aside.

ILR (2011) III DELHI 345
CM(M)

JAYANT BHARGAVA ....PETITIONER

VERSUS

PRIYA BHARGAVA ....RESPONDENT

(G.S. SISTANI, J.)

CM (M) NO. : 98/2011 DATE OF DECISION: 01.04.2011

Hindu Marriage Act, 1955—Section 24—Petitioner challenged order passed on application under Section 24 of Act granting maintenance @Rs. 10,000/- to Respondent on ground his income was only Rs.6,200/- per month and proof of his income, appointment letter and salary slip placed on record were ignored by learned trial Court—Per-contra, Respondent urged, petitioner willfully concealed material documents as it was extremely improbable that out of bare earnings of Rs.6,200/- he would be looking after his parents, two unmarried sisters and would be maintaining Honda city car received by him at time of marriage—Held:- Although there cannot be an exhaustive list of factors, which are to be considered in guessing the income of spouses, but order based on guess work cannot be arbitrary, whimsical or fanciful—While guessing income of the spouse, when sources of income are either not disclosed or not correctly disclosed, Court can take into consideration amongst others following factors;

(i) Life style of spouse; (ii) Amount spent at time of marriage and manner in which marriage performed: (iii) Destination of honeymoon; (iv) Ownership of motor vehicles; (v) Household facilities; (vi) Facility of driver, cooking and other held; (vii) Credit cards; (viii) Bank Account details; (ix) Club membership; (x) Amount of insurance premium paid; (xi) Property or properties purchased; (xii) Rental income; (xiii) Amount of rent paid; (xiv) Amount spend on travel/holiday; (xv) Locality of residence; (xvi) Number of mobile phones; (xvii) Qualification of spouse; (xviii) School(s) where the child or children are studying when parties were residing together; (xix) Amount spent on fees and other expenses incurred; (xx) Amount spend on extra-curricular activities of children when parties were residing together; (xxi) Capacity to repay loan.

These are some of the factors, which may be considered by any court in guesstimating or having a rough idea or to guess the income of a spouse. It has repeatedly been held by the Courts that one cannot ignore the fact that an Indian woman has been given an equal status under Articles 14 and 16 of the Constitution of India and she has a right to live in dignity and according to the status of her husband. In this case, the stand taken by the respondent with respect to his earning is unbelievable. **(Para 17)**

Important Issue Involved: Although there cannot be an exhaustive list of factors, which are to be considered in guessing the income of spouses, but order based on guess work cannot be arbitrary, whimsical or fanciful—While guessing income of the spose, when sources of income are either not disclosed or not correctly disclosed, Court can take into consideration amongst others following factors; (i) Life style of spouse; (ii) Amount spent at time of marriage and manner in which marriage performed; (iii) Destination of honeymoon; (iv) Ownership of motor vehicles; (v) Household facilities; (vi) Facilities of driver, cooking and

other help; (vii) Credit cards; (viii) Bank Account details; (ix) Club membership; (x) Amount of insurance premium paid; (xi) Property or properties purchased; (xii) Rental income; (xiii) Amount of rent paid; (xiv) Amount spent on travel/holiday; (xv) Locality of residence; (xvi) Number of mobile phones; (xvii) Qualification of spouse; (xviii) School(s) where the child or children are studying when parties were residing together; (xix) Amount spent on fees and other expenses incurred; (xx) Amount spend on extra-curricular activities of children when parties were residing together; (xxi) Capacity to repay loan.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Saurabh Kansal and Ms. Pallavi Sharma, Advocates.

FOR THE RESPONDENTS : Mr. Anil Sharma, Mr. Vinod Kumar and Ms. Deepayan Monda, Advocate.

CASES REFERRED TO:

1. *Sudhir Diwan* vs. *Tripta Diwan & Anr.* reported at 2008 (3) AD 1.
2. *Bharat Hegde* vs. *Saroj Hegde*, reported at 140 (2007) DLT 16.
3. *Raj Kumar* vs. *Vijay Laxmi* reported at 95 (2002) DLT 265.
4. *Jasbir Kaur Sehgal (Smt.)* vs. *District Judge, Dehradun & Others*, reported at (1997) 7 Supreme Court Cases 7.
5. *Ashok Rani* vs. *Rattan Lal* (MANU/DE/0381/1989).
6. *Pradeep Kumar Kapoor* vs. *Sbailja Kapoor*, reported at AIR 1989 Delhi 10.

RESULT: Petition dismissed.

G.S.SISTANI, J. (ORAL)

1. Present petition is directed against the order 13.12.2010 passed

by learned Additional District Judge, Delhi, on an application filed by respondent (wife) under Section 24 of Hindu Marriage Act, by virtue of which, petitioner was directed to pay maintenance @ Rs.10,000/, per month, to the respondent.

2. Counsel for the petitioner submits that learned trial court has exceeded its jurisdiction by awarding maintenance @ Rs. 10,000/-, per month to the respondent. Counsel further submits that the respondent has misled the court with regard to income of the petitioner by stating that the petitioner is earning a sum of Rs. 30,000/- per month. It is next submitted by the counsel for the petitioner that the petitioner is working as a Sales Supervisor with M/s Kishan Lal Enterprises and is getting a monthly salary of 6200/. Counsel also submits that learned trial court fell into error by ignoring the proof regarding income of the petitioner apart from the appointment letter and salary slip of the petitioner which was placed on record.

3. It is submitted by counsel for the petitioner that petitioner is a mere graduate and is still pursuing his MBA through distance learning in order to become a helping hand to his family and take care of his parents and two sisters who are of marriageable age and who are dependent on him. It is next submitted that trial court has failed to take into consideration that petitioner has to look after his parents and help in settling his two sisters. It is also submitted that trial court has also ignored the fact that respondent is capable of earning as she has done a course in interior designing. It is next submitted that the respondent is residing with her parents.

4. Learned counsel for the petitioner has strongly urged before this court that trial court has wrongly assessed the income of the petitioner to be around 30,000/-, per month, while there is absolutely no basis whatsoever for arriving at this incorrect figure.

5. Learned counsel for the respondent submits that petitioner has failed to make out a case for interference under Article 227 of the Constitution of India and there is no infirmity in the impugned order. Counsel further submits that trial court has passed the impugned order based on correct appreciation of facts and has correctly applied the law to the facts of the case. Counsel also submits that respondent is entitled to enjoy the same status as she was enjoying in her matrimonial home.

Counsel next submits that the parents of the respondent had spent a large amount on the marriage of the respondent, which is evident from the fact that besides a Honda City Car various other valuable gifts were given at the time of marriage of the respondent to the petitioner and his family.

6. It is submitted by counsel for the respondent that it would not be expected that the parents of the respondent would marry the respondent to a person, who is barely earning the minimum wages and in turn would spend lavishly on the marriage. It is further submitted that petitioner has willfully concealed the material documents from the trial court, which has forced the trial court into guessing the income of the petitioner, which the trial court was entitled to do in accordance with law laid down by the Apex Court and this Court. It is also submitted that petitioner has not come to court with clean hands. It is next submitted that an application under Order 10 Rule 2 read with Rules 12 and 14 CPC was filed by the respondent before the trial court to direct the petitioner to place documents on record for the correct assessment of the income of the petitioner, however, as noticed by the trial court in para 15 of the impugned order no reply was filed to this application nor the necessary documents were filed. It is next submitted that in view of the conduct of the appellant the trial court has correctly drawn an adverse inference with regard to the allegations made by the respondent. It is next submitted that trial court has correctly placed reliance on the copies of information downloaded from the internet, which pertain to M/s Rashi Telecom, running at C-3, Pandav Nagar, Delhi. It is next contended by the counsel for the respondent that trial court has rightly observed in the impugned order that a list shows the names of dealers of M/s INTEX. The name of Rashi Telecom is listed at serial no.665, as one of its dealers. It is submitted by the counsel for the respondent that on a perusal of the list, the name of the petitioners appears as the contact person's name and and the address is C-3, Pandav Nagar, Delhi, which matches with the address of the petitioner and that of Rashi Telecom appears which is enough to show that the petitioner has an interest in Rashi Telecom and to which there is no satisfactory explanation by the petitioner.

7. Learned counsel for the respondent submits that petitioner had neither in the reply to the petition filed under Section 24 of Hindu Marriage Act nor at the time of hearing of the petition before the trial court had asserted that he is responsible for maintaining and looking after his parents

and two unmarried sisters. It is further submitted by the counsel for the respondent that, even otherwise, it is extremely improbable that a person earning barely Rs. 6200/-, per month, would be looking his after parents, two unmarried sisters and wife and would be maintaining a Honda City Car received by him at the time of his marriage. Counsel further submits that petitioner has not disputed before the trial court that besides working as a Sales Supervisor, he is also helping his mother in the running of the shop.

8. Learned counsel for the petitioner submits that in case it is presumed that petitioner is earning out of the shop which is being run by the mother then the income from the said shop should be divided into six parts and not that the petitioner alone would be earning Rs. 10,000/-, per month.

9. Learned counsel for the petitioner has relied upon **Pradeep Kumar Kapoor v Sbailja Kapoor,** reported at AIR 1989 Delhi 10 and also Civil Revision Appeal No.64/1989 titled as **Ashok Rani v. Rattan Lal** (MANU/DE/0381/1989) in support of his plea that while awarding interim maintenance the Court must take into consideration the fact that spouse is oblige to maintain his brother or sister, who have no source of livelihood.

10. Learned counsel for the respondent, in support of the submission that a fair assessment is to be made and some guess work is permitted by the court while arriving at a conclusion with regard to the income of spouses relied upon **Sudhir Diwan vs. Tripta Diwan & Anr.** reported at 2008 (3) AD 1 wherein the court has upheld the legal proposition that that "where a party does not truthfully disclose its income an element of conjuncture and guess work has to inevitably enter in the decision making process". The learned Counsel for the respondent has also relied upon the case of **Raj Kumar Vs. Vijay Laxmi** reported at 95 (2002) DLT 265 wherein the courts have drawn an inference regarding the income of the spouse from the fact that the person is an engineer and is able bodied. The court has observed that the spouse's income was within his/her own special knowledge. It has been further observed by the court that the trial court was justified in drawing a conclusion from the fact that the husband was unable in giving some cogent and reasonable explanation regarding his income and as to how was he managing to maintain himself and his parents. The relevant paragraph is reads as

under:

> "The income of the petitioner was in his special knowledge, he is a qualified Engineer. It is difficult to believe that he would be idle and unemployed and was not earning at all. The petitioner was working as a Project Engineer. He alleged that he worked there only for about 11 months and received a lumpsum of Rs. 32,500/- But he is an (SIC) able bodied man and a qualified Engineer. Though he says (SIC) that he had no source of income at all but he has not (SIC) explained as to how he was maintaining himself and his (SIC) parents. His contention, therefore, does not at all evince (SIC) confidence. On the other hand, the respondent has alleged (SIC) that she does not have any independent source of income. (SIC) Apart from denying this allegation the petitioner has not disclosed any fact which may suggest that the respondent had (SIC) income for her maintenance and support. The respondent has (SIC) alleged in the reply that he had paid a sum of Rs. 1 lac to the petitioner when he was granted anticipatory bail in the criminal case registered on the complaint of the respondent wife. The source for payment of the amount has not been disclosed. The source of money by which he is maintaining the car has also not been revealed by him. The trial court on the facts and the circumstances seems perfectly justified in assuming that petitioner had regular income as alleged by the respondent".

11. I have heard counsel for the parties and also carefully perused the order dated 13.12.2010 passed by learned trial court. In this case, basic facts are not in dispute that marriage between parties was solemnized on 21.1.2008. Parties have been residing separately since August, 2009.

12. It is settled position of law that a wife is entitled to live in a similar status as was enjoyed by her in her matrimonial home. It is the duty of the courts to ensure that it should not be a case that one spouse lives in a life of comfort and luxury while the other spouse lives a life of deprivation, poverty. During the pendency of divorce proceedings the parties should be able to maintain themselves and should be sufficiently entitled to be represented in judicial proceedings. If in case the party is unable to do so on account of insufficient income, the other spouse shall

be liable to pay the same. (See **Jasbir Kaur Sehgal (Smt.) v. District Judge, Dehradun & Others,** reported at (1997) 7 Supreme Court Cases 7).

13. A Single Judge of this Court in the case of **Bharat Hegde v. Saroj Hegde,** reported at 140 (2007) DLT 16 has culled out 11 factors, which can be taken into consideration for deciding the application under Section 24 of Hindu Marriage Act.

14. Further it has been noticed by the Courts that the tendency of the spouses in proceedings for maintenance is to not truthfully disclose their true income. However, in such cases some guess work on the part of Court is permissible.

15. The Supreme Court of India in the case of **Jasbir Kaur (Smt.)** (supra), has also recognized the fact that spouses in the proceedings for maintenance do not truthfully disclose their true income and therefore some guess work on the part of the Court is permissible. Further the Supreme Court has also observed that "*considering the diverse claims made by the parties one inflating the income and the other suppressing an element of conjecture and guess work does enter for arriving at the income of the husband. It cannot be done by any mathematical precision*".

16. Although there cannot be an exhaustive list of factors, which are to be considered in guessing the income of the spouses, but the order based on guess work cannot be arbitrary, whimsical or fanciful. While guessing the income of the spouse, when the sources of income are either not disclosed or not correctly disclosed, the Court can take into consideration amongst orthers the following factors:

(i) Life style of the spouse;

(ii) The amount spent at the time of marriage and the manner in which marriage was performed;

(iii) Destination of honeymoon;

(iv) Ownership of motor vehicles;

(v) Household facilities;

(vi) Facility of driver, cook and other help;

(vii) Credit cards;

(viii) Bank account details;

(ix) Club Membership;

(x) Amount of Insurance Premium paid;

(xi) Property or properties purchased;

(xii) Rental income;

(xiii) Amount of rent paid;

(xiv) Amount spent on travel/ holiday;

(xv) Locality of residence;

(xvi) Number of mobile phones;

(xvii) Qualification of spouse;

(xviii) School(s) where the child or children are studying when parties were residing together;

(xix) Amount spent on fees and other expenses incurred;

(xx) Amount spend on extra-curricular activities of children when parties were residing together;

(xxi) Capacity to repay loan.

17. These are some of the factors, which may be considered by any court in guesstimating or having a rough idea or to guess the income of a spouse. It has repeatedly been held by the Courts that one cannot ignore the fact that an Indian woman has been given an equal status under Articles 14 and 16 of the Constitution of India and she has a right to live in dignity and according to the status of her husband. In this case, the stand taken by the respondent with respect to his earning is unbelievable.

18. In the instant case, admittedly the petitioner is a graduate and is pursuing MBA by distant learning since the year 2007. The petitioner has rendered a faint explanation that he could not complete the MBA on account of being mentally disturbed, due to the marital discord. Though the petitioner has made a vague averment that the respondent is capable of maintaining herself as she has done a course in interior decoration however no documents were placed on record in support of the same. Petitioner has placed on record of the trial court a certificate and a letter of appointment issued by M/s Kishan Lal Enterprises to show that he is earning Rs. 6500/-, per month. In my view the letter of appointment and the certificate is unreliable on account of circumstances and the manner in which the marriage was conducted between the parties. In view of the

fact that it is not disputed that at the time of marriage the family of the respondent had presented Honda City Car to the petitioner, it is highly improbable that the family of the respondent would marry their daughter to a person, who is earning Rs.6500/-, per month. The trial court has analyzed the income of the petitioner, based on facts of the instant case and especially, in view of the fact that petitioner chose not to file any reply to the application filed by the respondent under Order 10 Rule 2 read with Rules 12 and 14 CPC. In fact, this could have been an opportunity for the petitioner to truthfully bring his financial particulars on record unless he wanted to conceal his true income. Having chosen not to file any reply an adverse inference is bound to be drawn against the petitioner. Another factor, which is to be considered is that assuming that petitioner is looking after his two unmarried sisters and parents, Rs. 6500/-is not an amount in which he would be able to look after four members of his family and also maintain himself together with the fact that it is admitted that mother is running a shop. Further, based on the list of dealers that was downloaded from the internet and placed on record it prima facie shows that the petitioner is a dealer. Additionally, even if the stand of the petitioner is to be believed that the mother of the petitioner is carrying on her own business, it cannot be said that she is dependent on the petitioner. Further, in view of the fact that the mother of the petitioner is carrying out her own business, it is highly improbable that the unmarried sisters of the petitioner would be dependent on the petitioner who is stated to be earning a meager sum of Rs. 6,200/-per month. As far as earning from the shop, which is being run by the mother of the petitioner, is concerned, in the absence of any clear assessment with regard to the income, which the petitioner has himself chosen not to disclose, no benefit can be given to the petitioner on the basis of this submission. In my opinion, the trial court has rightly applied the law to the facts of this case. Thus, I find no infirmity in the order passed by learned trial court, which requires interference under Article 226 of the Constitution of India. Accordingly, petition stands dismissed.

CM NO.2045/2011 (STAY)

19. In view of the orders passed in the petition, application stands dismissed.

ILR (2011) III DELHI 355
FAO

PURSHOTAM DASS ....APPELLANT

VERSUS

NEW INDIA ASSO. CO. LTD. & ORS. RESPONDENTS

(J.R. MIDHA, J.)

FAO NO. : 280/1995 DATE OF DECISION: 08.04.2011

Motor Vehicle Act, 1988—Appellant suffered grievous injuries in accident occurring on 27.04.1993—Appellant standing near front gate of bus—Driver abruptly applied brakes—Appellant fell out of bus and right foot crusted under wheels—Under treatment from 27.04.1992 to 11.06.1993—Right forefoot amputated and skin grafting done—Motor Accidents Claims Tribunal awarded total compensation of Rs. 1,55,000/-—Appellant seeks enhancement of compensation—Hence instant appeal—Held—Appellant aged 28 years at time of accident—Working as Machine Operator drawing salary of Rs.3,469 Though no loss of earning capacity—Appellant suffered 60% disability—Appellant transferred to administrative department as Junior Assistant after accident—No loss of earning capacity—However promotions delayed due to transfer—Lump sum of Rs.50,000/- awarded for loss of income due to delayed promotions—Compensation enhanced to Rs.3,30,000/-—Appeal allowed.

In the present case, the appellant has suffered 60% disability due to amputation on right foot and restriction of movement of left knee as per the Ex.PW-2/9. The functional disability of the appellant has to be determined before awarding the compensation for loss of earning capacity according to the principles laid down by the Hon'ble Supreme Court in the

case of **Raj Kumar** (supra). The present condition of the appellant was examined by this Court on 25th March, 2011. The front mid portion of the right foot of the appellant has been amputated and a steel rod is inserted in left leg and skin grafting has been done due to which the left lower leg of the appellant has been disfigured. The appellant walks with the help of a stick. The permanent disability of the appellant is 60% as per the disability certificate, Ex.PW-2/9. The appellant was working as Machine Operator with Engineers India Ltd. at the time of the accident. As per the Certificate, Ex.P-1 of Engineers India Ltd., the appellant could not perform the duties of Operator after accident and was therefore transferred to the Administrative Department and re-designated as Junior Assistant. As such, there was no loss of earning capacity to the appellant at that point of time. However, the promotions of the appellant were delayed on account of transfer to the Administrative Department. As per the Certificate, Ex.P-1, the appellant could have got promotions earlier, had he remained in technical department. However, the Certificate does not specify the period of delay. In that view of the matter, it would not be possible to ascertain the exact amount of loss under this head. However, considering that the appellant has in fact suffered loss due to delay of promotions, a lump sum amount of Rs. 50,000/- is awarded to the appellant for loss of income due to delayed promotions. **(Para 20)**

The appellant shall be entitled to compensation of Rs. 3,30,000/- as per the break-up given hereunder:-

(i) Compensation for pain and suffering : Rs. 75,000

(ii) Compensation for loss of amenities of life and disfiguration : Rs. 75,000/-

(iii) Compensation for expenses incurred on treatment, special diet and conveyance : Rs. 35,000/-

(iv) Compensation for loss of salary for five months :

Rs. 25,000/-

(v) Compensation for loss of income due to delayed promotions : Rs. 50,000/-

(vi) Compensation towards future conveyance : Rs. 50,000/-

(vii) Other miscellaneous expenses including expenses for engaging attendant : Rs. 20,000/-

Total : Rs. 3,30,000/- **(Para 23)**

Important Issue Involved: Assessment of general damages—Must be fair and just—General damages therefore to a considerable extent conventional—Principles of uniformity and predictability important—Victim entitled to pecuniary and non-pecuniary damages.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Shri Nitinjya Choudhary & Ms. Sushma Sachdeva, Advocate.

FOR THE RESPONDENTS : Mr. Kanwal Choudhary, Advocate.

CASES REFERRED TO:

1. *Raj Kumar* vs. *Ajay Kumar & Anr.*, (2011) 1 SCC 343.
2. *Madan Lal Papneja* vs. *State of Haryana & Ors.*, (2011) 161 PLR 61.
3. *Yadava Kumar* vs. *D.M., National Insurance Co. Ltd.* – 2010 (8) SCALE 567).
4. *Arvind Kumar Mishra* vs. *New India Assurance Co. Ltd.*, 2010 (10) SCALE 298.
5. *Oriental Insurance Company Ltd.* vs. *V.S. Vijay Kumar Mittal*, 2008 ACJ 1300..
6. *B.N.Kumar* vs. *D.T.C.*, 118 (2005) DLT 36.

7. *Arvind Kumar Mishra* vs. *New India Assurance Co Ltd and another* C.A.No.5510 of 2005 dated Sep.29, 2010.
8. *Iranna* vs. *Mohammadali Khadarsab Mulla & Anr.* 2004 ACJ 1396.
9. *Fakkirappa* vs. *Yallawwa & Anr.*, 2004 ACJ 141.
10. *Nagappa* vs. *Gurudayal Singh and Ors.*, AIR 2003 SC 674.
11. *K. Shankar* vs. *Pallavan Transport Corporation*, 2001 ACJ 488.
12. *Oriental Insurance Company Limited* vs. *Koti Koti Reddy*-2000(2) LLJ 552 (AP).
13. *Common Cause, A Registered Society* vs. *Union of India*, AIR 1999 SC 376.
14. *M. Jaganathan* vs. *Pallavan Transport Corporation*, 1999 ACJ 366.
15. *Bhagwan Singh Meena* vs. *Jai Kishan Tiwari*, 1999 ACJ 1200.
16. *Jitendra Singh* vs. *Islam, 1998* ACJ 1301.
17. *New India Insurance Company Ltd* vs. *Rajauna*-(1996) 1 TAC 149 (Kant).
18. *R.D. Hatangadi* vs. *Pest Control (India) Pvt. Ltd.*, I (1995) ACC 281.
19. *Ward* vs. *James*, (1995) ALL.ER 563.
20. *R. D. Hattangadi* vs. *Pest Control (India) Ltd.* - 1995 (1) SCC 551.
21. *Orissa State Road Transport Corporation* vs. *Bhanu Prakash Joshi*-(1994) 1 ACC 467 (Ori).
22. *Balaiah (T.)* vs. *Abdul Majeed*-AIR 1994 AP 354.
23. *Dr. Gop Ramchandani* vs. *Onkar Singh & Ors.*, 1993 ACJ 577.
24. *Sadasihiv Krishan Adke* vs. *M/s Time Traders*- 1992(1) LLJ 877.
25. *Executive Engineer, PWD, Udaipur* vs. *Narain Lal*-(1977)

2 LLN 415, 1977 LIC 1827 (Raj).

26. *Pratap Narain Singh Deo* vs. *Srinvas Sabata*- AIR 1976 SC 222.

27. *C. K. Subramonia Iyer* vs. *T. Kunhikuttan Nair* – AIR 1970 SC 376.

28. *Baker* vs. *Willoughby* – 1970 AC 467.

29. *The Management of Sree Lalithambika Enterprises, Salem* vs. *S. Kailasam*- 1988 (1) LLJ 63.

30. *Yadav Kumar* vs. *The Divisional Manager, National Insurance Co. Ltd & another* C.A.No.7223.

RESULT: Appeal allowed.

J.R. MIDHA, J. (Oral)

1. The appellant has challenged the Award of the Claims Tribunal whereby compensation of Rs. 1,55,000/- has been awarded to him. The appellant seeks enhancement of the award amount.

2. The accident dated 27th April, 1993 resulted in grievous injuries to the appellant. The appellant and his wife were travelling in bus No.DL-1P-2213. The appellant was standing near the front gate. The bus driver abruptly applied the brakes due to which the passengers standing in the bus including the appellant and his wife fell down. The appellant fell out of the front gate of the bus and his right foot was crushed under the wheels. The appellant suffered grievous injuries on the right foot, fracture on left femur, injury on knee, right hand, left shoulder and other injuries all over the body. The appellant was initially taken to Hindu Rao Hospital from where he was shifted to Batra Hospital. The appellant remained under treatment at Batra Hospital from 27th April, 1993 to 11th June, 1993. The right forefoot of the appellant was amputated and skin-grafting was done after healing of the wound.

3. The Claims Tribunal awarded a sum of Rs. 35,000/- towards the pain and suffering, Rs.25,000/- towards loss of salary for five months, Rs.35,000/- towards expenses on treatment, special diet and conveyance, Rs.30,000/- towards future prospects and enjoyment of life, Rs.10,000/- towards expenses on future conveyance and Rs.20,000/- towards

miscellaneous expenses. The total compensation awarded is Rs.1,55,000/-.

4. Learned counsel for the appellant urged the following grounds at the time of hearing of this appeal:-

(i) Compensation for loss of earning capacity due to permanent disability be awarded;

(ii) Compensation for pain and suffering be enhanced;

(iii) Compensation towards conveyance be enhanced;

(iv) Compensation for loss of amenities of life be enhanced; and

(v) Compensation for engaging an attendant be awarded.

5. The appellant appeared in the witness box as PW-2 and his wife appeared in the witness box as PW-1 and they proved the rashness and negligence of the driver of the offending vehicle. The appellant proved the MLC – Ex.PW2/A prepared at Hindu Rao Hospital where he remained for 4-5 hours on 27th April, 1993. The appellant was, thereafter, taken to Batra Hospital where he remained for one and a half months up to 11th June, 1993 and the mid front portion of the right feet was amputated. A rod was inserted in the left leg which had got fractured and skin grafting was done there. The discharge summary of the Batra Hospital is Ex.PW2/2. The appellant could not sit, walk or stand after discharge from the hospital and remained on complete bed rest for a long time. The admission card of the Batra Hospital and the OPD card have been proved as Ex.PW2/3 to Ex.PW2/7. The appellant was again admitted in the hospital for removal of the rod by surgery from 4th November, 1993 to 9th November, 1993, the discharge summary in respect whereof is Ex.PW2/8. The disability of the appellant has been assessed as 60% vide Disability certificate-Ex.PW2/9. The appellant made 16 visits to the hospital incurring an expenditure of Rs.400/- per visit. The appellant proved the salary certificate - Ex.PW2/10 and the leave of 150 days by leave certificate – Ex.PW2/11. The appellant claimed to have spent more than Rs. 1,00,000/- on diet, conveyance and medicine. The appellant also deposed that he could not travel by public transport and had to travel by three-wheeler or taxi for which he had spent Rs. 1,200/- per month. The appellant also spent Rs. 50/- to Rs. 60/- per day on special diet. The appellant's wife also took leave to look after her husband. The FIR and site plan were

proved as Ex.PW2/17 and Ex.PW2/18.

6. The appellant was aged 28 years at the time of the accident and was working as Machine Operator in the Research and Development Department with Engineers India Ltd., drawing a salary of Rs. 3469.15. The appellant remained on leave till 22nd November, 1993 and was thereafter transferred to Administrative Department as he was unable to perform the duties of an Operator and was re-designated as Junior Assistant. The appellant's promotion was delayed on account of transfer to the Administrative Department. On 16th March, 2010, the Manager (HR), Engineers India Limited appeared before this Court and produced the personal file of the appellant and also proved the certificate – Ex.P-1 according to which the appellant could not perform the duties of the Operator due to 60% permanent disability after the accident and was, therefore, transferred to administrative department where he could get promotion on 1st January, 1996. The appellant got next promotions in 2001 and 2008. It was further certified that the employees in technical department get promotions faster than the administrative department and, therefore, the appellant could have got promotions earlier had he remained in the technical cadre.

7. The law with respect to the grant of compensation in injury cases is well-settled. The injured is entitled to pecuniary as well as non-pecuniary damages. Pecuniary damages also known as special damages are generally designed to make good the pecuniary loss which is capable of being calculated in terms of money whereas non-pecuniary damages are incapable of being assessed by arithmetical calculations. The pecuniary or special damages, generally include the expenses incurred by the claimants on his treatment, special diet, conveyance, cost of nursing/ attending, loss of income, loss of earning capacity and other material loss, which may require any special treatment or aid to the insured for the rest of his life. The general damages or the non-pecuniary loss include the compensation for mental or physical shock, pain, suffering, loss of amenities of life, disfiguration, loss of marriage prospects, loss of expected or earning of life, inconvenience, hardship, disappointment, frustration, mental stress, dejectment and unhappiness in future life, etc. The above list is not exhaustive and there may be special or additional circumstances depending on the facts in each case.

8. In the case of **Raj Kumar v. Ajay Kumar & Anr.,** (2011) 1 SCC 343, the Hon'ble Supreme Court laid down the following general principles for computation of compensation in injury cases:-

"General principles relating to compensation in injury cases

4. The provision of the Motor Vehicles Act, 1988 ('Act' for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or tribunal shall ˇhave to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. (See **C. K. Subramonia Iyer v. T. Kunhikuttan Nair** – AIR 1970 SC 376, **R. D. Hattangadi v. Pest Control (India) Ltd.** - 1995 (1) SCC 551 and **Baker v. Willoughby** – 1970 AC 467).

5. The heads under which compensation is awarded in personal injury cases are the following:-

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life. Assessment of pecuniary damages under item (i) and under item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses – item (iii) – depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages – items (iv), (v) and (vi) –involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decision of this Court and High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability - item (ii)(a). We are concerned with that assessment in this case."

9. In **R.D. Hatangadi v. Pest Control (India) Pvt. Ltd.,** I (1995) ACC 281, the Hon'ble Supreme Court held that:-

"Broadly speaking, while fixing the amount of compensation payable to a victim of an accident the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually

incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are capable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant; (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far as non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.

In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards."

10. In the case of **Common Cause, A Registered Society v. Union of India,** AIR 1999 SC 376, the Hon'ble Supreme Court held that:-

"121. The object of an award of damages is to give the plaintiff compensation for damage, loss or injury he has suffered. The elements of damage recognized by law are divisible into two main groups: pecuniary and non-pecuniary loss is not so

calculable. While the pecuniary loss is capable of being arithmetically worked out, the non-pecuniary loss is not so calculable. Non-pecuniary loss is compensated in terms of money, not as a substitute or replacement for other money, but as a substitute, what McGregor says, is generally more important than money: it is the best that a court can do.

11. In **Nagappa v. Gurudayal Singh and Ors.,** AIR 2003 SC 674, the Hon'ble Supreme Court held that:-

"26. While calculating such damages, the Tribunal/court is required to have some guesswork taking into account the inflation factor. This aspect is well discussed by M.J. Rao, J. (as he then was) in **P. Satyanarayana v. I. Babu Rajendra Prasad and Anr.** 1988 ACJ 88. The learned Judge has given a Classification or Injuries: A Useful Guide and has observed thus:-

24. If a collection of cases on the quantum of damages is to be useful, it must necessarily be classified in such a way that comparable cases can be grouped together. No doubt, no two cases are alike but still, it is possible to make a broad classification which enables one to bring comparable awards together. Such classifications have been made by Bingham in his Motor Claims Cases, Munkman in his Employer's Liability and Kemp & Kemp in their Quantum of Damages. (Munkman p.181).

26. (sic) Cases relating to injuries have been classified into four categories, i.e.: (a) total works; (b) partial wrecks and (c) where limits and eyes and other specific parts of the body are lost, which can be sub-grouped according to the type of limb lost and (b) smaller injuries which cannot be specifically grouped but for which compensation can be assessed by comparison with injuries of loss of limbs, e.g., comparing permanent 'wrist injuries' with 'loss of hand', or comparing a temporary broken arm with the loss of the arm etc. Such comparisons are often made by judges. Munkman points out that in America, Mr. Melvin M. Belli, an eminent lawyer, classified injuries into 11 categories as (1) Back; (2) Traumatic amputation of leg;

(3) Paralysis; (4) Hand or arm off; (5) Death; (6) Multiple fractures; (7) Burns; (8) Personality change; (9) Blindness; (10) Brain injury and (11) Occupation diseases. By 1967, awards (say) for blindness had risen to 930,000 dollars (Munkman pp. 181-182). Today after 20 years, these awards must have gone up further. The 'total wreck' category comprises of cases of complete incapacity for work and virtually no enjoyment of life, e.g., paralysis, severe brain injury causing insanity, multiple injuries leaving the victim a total cripple. The 'partial wreek' cases are also cases where the entire body is affected and not one set of limbs alone as in the third category. Cases of brain injuries resulting in a personality change and multiple injuries with grave disfigurement fall in this second category. The third category does not present much difficulty for sub-classification. The fourth category deals with minor injuries in a limb which be compared with major injuries in the same limb.

12. In case of a permanent disability, percentage of permanent disability is determined on the basis of the disability certificate issued by the Medical Board constituted by the competent authority. The permanent disability also results in functional disability and the loss of earning capacity is determined on the basis of the loss of functional disability. In the case of **Raj Kumar v. Ajay Kumar & Anr.** (supra), the Hon'ble Supreme Court laid down the following principles for assessment of future loss of earnings due to permanent disability:-

"Assessment of future loss of earnings due to permanent disability

6. Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account

of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accidents injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ('Disabilities Act' for short). But if any of the disabilities enumerated in section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation.

7. The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%.

8. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal

should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terns of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in **Arvind Kumar Mishra v. New India Assurance Co.Ltd.** – 2010(10) SCALE 298 and **Yadava Kumar v.D.M., National Insurance Co. Ltd.** – 2010 (8) SCALE 567).

9. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement

of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

10. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future

earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may.

11. The Tribunal should not be a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular the extent of permanent disability. Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to 'hold an enquiry into the claim' for determining the 'just compensation'. The Tribunal should therefore take an active role to ascertain the true and correct position so that it can assess the 'just compensation'. While dealing with personal injury cases, the Tribunal should preferably equip itself with a Medical Dictionary and a Referencer for evaluation of permanent physical impairment (for example, the Manual for Evaluation of Permanent Physical Impairment for Orthopedic Surgeons, prepared by American Academy of Orthopedic Surgeons or its Indian equivalent or other authorized texts) for understanding the medical evidence and assessing the physical and functional disability. The Tribunal may also keep in view the first schedule to the Workmen's Compensation Act, 1923 which gives some indication about the extent of permanent disability in different types of injuries, in the case of workmen.

If a Doctor giving evidence uses technical medical terms, the Tribunal should instruct him to state in addition, in simple non-medical terms, the nature and the effect of the injury. If a doctor gives evidence about the percentage of permanent disability, the Tribunal has to seek clarification as to whether such percentage of disability is the functional disability with reference to the whole body or whether it is only with reference to a limb. If the percentage of permanent disability is stated with reference to a limb, the Tribunal will have to seek the doctor's opinion as to whether it is possible to deduce the corresponding functional permanent disability with reference to the whole body and if so the percentage.

12. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give 'ready to use' disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local Hospitals/Medical Colleges) and refer the claimant to such Medical Board for assessment of the disability.

13. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

14. The assessment of loss of future earnings is explained below with reference to the following illustrations:-

Illustration 'A': The injured, a workman, was aged 30 years and earning Rs.3000/- per month at the time of accident. As per Doctor's evidence, the permanent disability of the limb as a consequence of the injury was 60% and the consequential permanent disability to the person was quantified at 30%. The loss of earning capacity is however assessed by the Tribunal as 15% on the basis of evidence, because the claimant is continued in employment, but in a lower grade. Calculation of compensation will be as follows:

(a) Annual income before the accident : Rs.36,000/-.

(b) Loss of future earning per annum : Rs. 5400/-.

(15% of the prior annual income)

(c) Multiplier applicable with reference : 17 to age

(d) Loss of future earnings (5400 x 17) : Rs. 91,800/-

Illustration 'B': The injured was a driver aged 30 years, earning Rs.3000/- per month. His hand is amputated and his permanent disability is assessed at 60%. He was terminated from his job as he could no longer drive. His chances of getting any other employment was bleak and even if he got any job, the salary was likely to be a pittance. The Tribunal therefore assessed his loss of future earning capacity as 75%. Calculation of compensation will be as follows:

(a) Annual income prior to the accident : Rs.36,000/-

(b) Loss of future earning per annum : Rs.27,000/-

(75% of the prior annual income)

(c) Multiplier applicable with reference to age : 17

(d) Loss of future earnings : (27000 x 17) : Rs. 4,59,000/-

Illustration 'C': The injured was 25 years and a final year Engineering student. As a result of the accident, he was in coma for two months, his right hand was amputated and vision was affected. The permanent disablement was assessed as 70%. As the injured was incapacitated to pursue his chosen career and as he required the assistance of a servant throughout his life, the loss of future earning capacity was also assessed as 70%. The calculation of compensation will be as follows:

(a) Minimum annual income he would have got if had been employed as an Engineer : Rs.60,000/-

(b) Loss of future earning per annum : Rs.42,000/-

(70% of the expected annual income) Multiplier applicable (25 years)

(c) Multiplier applicable (25 years) : 18

(d) Loss of future earnings:(42000 x 18) : Rs.7,65,000/-

[Note : The figures adopted in illustrations (A) and (B) are hypothetical. The figures in Illustration (C), however, are based on actuals taken from the decision in **Arvind Kumar Mishra** (supra)].

15. After the insertion of section 163A in the Act (with effect from 14.11.1994), if a claim for compensation is made under that section by an injured alleging disability, and if the quantum of loss of future earning claimed, falls under the second schedule to the Act, the Tribunal may have to apply the following principles laid down in Note (5) of the Second Schedule to the Act to determine compensation:

"5. Disability in non-fatal accidents :

The following compensation shall be payable in case of disability to the victim arising out of non-fatal accidents:-

Loss of income, if any, for actual period of disablement not exceeding fifty two weeks.

PLUS either of the following :-

(a) In case of permanent total disablement the amount payable shall be arrived at by *multiplying the annual loss of income by the Multiplier applicable to the age on the date of determining the compensation,* or

(b) In case of permanent partial disablement such percentage of compensation which would have been payable in the case of permanent total disablement as specified under item (a) above.

Injuries deemed to result in Permanent Total Disablement/ Permanent Partial Disablement and percentage of loss of earning capacity shall be as per Schedule I under Workmen's Compensation Act, 1923."

16. We may in this context refer to the difficulties faced by claimants in securing the presence of busy Surgeons or treating Doctors who treated them, for giving evidence. Most of them are reluctant to appear before Tribunals for obvious reasons either because their entire day is likely to be wasted in attending the Tribunal to give evidence in a single case or because they are not shown any priority in recording evidence or because the claim petition is filed at a place far away from the place where the treatment was given. Many a time, the claimants are reluctant to take coercive steps for summoning the Doctors who treated

them, out of respect and gratitude towards them or for fear that if forced to come against their wishes, they may give evidence which may not be very favorable. This forces the injured claimants to approach 'professional' certificate givers whose evidence most of the time is found to be not satisfactory. Tribunals should realize that a busy Surgeon may be able to save ten lives or perform twenty surgeries in the time he spends to attend the Tribunal to give evidence in one accident case. Many busy Surgeons refuse to treat medico-legal cases out of apprehension that their practice and their current patients will suffer, if they have to spend their days in Tribunals giving evidence about past patients. The solution does not lie in coercing the Doctors to attend the Tribunal to give evidence. The solution lies in recognizing the valuable time of Doctors and accommodating them. Firstly, efforts should be made to record the evidence of the treating Doctors on commission, after ascertaining their convenient timings. Secondly, if the Doctors attend the Tribunal for giving evidence, their evidence may be recorded without delay, ensuring that they are not required to wait. Thirdly, the Doctors may be given specific time for attending the Tribunal for giving evidence instead of requiring them to come at 10.30 A.M. or 11.00 A.M. and wait in the Court Hall. Fourthly, in cases where the certificates are not contested by the respondents, they may be marked by consent, thereby dispensing with the oral evidence. These small measures as also any other suitable steps taken to ensure the availability of expert evidence, will ensure assessment of just compensation and will go a long way in demonstrating that Courts/Tribunals show concern for litigants and witnesses.

Assessment of compensation

17. In this case, the Tribunal acted on the disability certificate, but the High Court had reservations about its acceptability as it found that the injured had been treated in the Government Hospital in Delhi whereas the disability certificate was issue by a District Hospital in the State of Uttar Pradesh. The reason given by the High Court for rejection may not be sound for two reasons. Firstly though the accident occurred in Delhi and the injured

claimant was treated in a Delhi Hospital after the accident, as he hailed from Chirori Mandi in the neighbouring District of Ghaziabad in Uttar Pradesh, situated on the outskirts of Delhi, he might have continued the treatment in the place where he resided. Secondly the certificate has been issued by the Chief Medical Officer, Ghaziabad, on the assessment made by the Medical Board which also consisted of an Orthopaedic Surgeon. We are therefore of the view that the High Court ought not to have rejected the said disability certificate.

18. The Tribunal has proceeded on the basis that the permanent disability of the injured claimant was 45% and the loss of his future earning capacity was also 45%. The Tribunal overlooked the fact that the disability certificate referred to 45% disability with reference to left lower limb and not in regard to the entire body. The said extent of permanent disability of the limb could not be considered to be the functional disability of the body nor could it be assumed to result in a corresponding extent of loss of earning capacity, as the disability would not have prevented him from carrying on his avocation as a cheese vendor, though it might impede in his smooth functioning. Normally, the absence of clear and sufficient evidence would have necessitated remand of the case for further evidence on this aspect. However, instead of remanding the matter for a finding on this issue, at this distance of time after nearly two decades, on the facts and circumstances, to do complete justice, we propose to assess the permanent functional disability of the body as 25% and the loss of future earning capacity as 20%.

19. The evidence showed that at the time of the accident, the appellant was aged around 25 years and was eking his livelihood as a cheese vendor. He claimed that he was earning a sum of Rs.3000/- per month. The Tribunal held that as there was no acceptable evidence of income of the appellant, it should be assessed at Rs.900/- per month as the minimum wage was Rs.891 per month. It would be very difficult to expect a roadside vendor to have accounts or other documents regarding income. As the accident occurred in the year 1991, the Tribunal ought to have assumed the income as at least Rs.1500/- per month (at the rate

of Rs.50/- per day) or Rs.18,000/- per annum, even in the absence of specific documentary evidence regarding income.

20. In the case of an injured claimant with a disability, what is calculated is the future loss of earning of the claimant, payable to claimant, (as contrasted from loss of dependency calculated in a fatal accident, where the dependent family members of the deceased are the claimants). Therefore there is no need to deduct one-third or any other percentage from out of the income, towards the personal and living expenses.

21. As the income of the appellant is assessed at Rs.18000/- per annum, the loss of earning due to functional disability would be 20% of Rs.18000/- which is Rs.3600/- per annum. As the age of appellant at the time of accident was 25, the multiplier applicable would be 18. Therefore, the loss of future earnings would be 3600 x 18 = Rs.64,800/- (as against Rs.55,080/- determined by the Tribunal). We are also of the view that the loss of earning during the period of treatment (1.10.1991 to 16.6.1992) should be Rs.12750/- at the rate of Rs.1500/- for eight and half months instead of Rs.3600/- determined by the Tribunal. The increase under the two heads is rounded of to Rs.20,000/-.

13. In the case of **Arvind Kumar Mishra v. New India Assurance Co. Ltd.,** 2010 (10) SCALE 298, the accident resulted 70% permanent disablement. The Hon'ble Supreme Court held the functional disability to be 70%. The loss of earning capacity was computed according to the multiplier method. The Hon'ble Supreme Court held as under:-

> "The basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must

> ask whether the sum awarded is a fair and ˇreasonable sum. The conventional basis of assessing compensation in personal injury cases – and that is now recognized mode as to the proper measure of compensation – is taking an appropriate multiplier of an appropriate multiplicand."

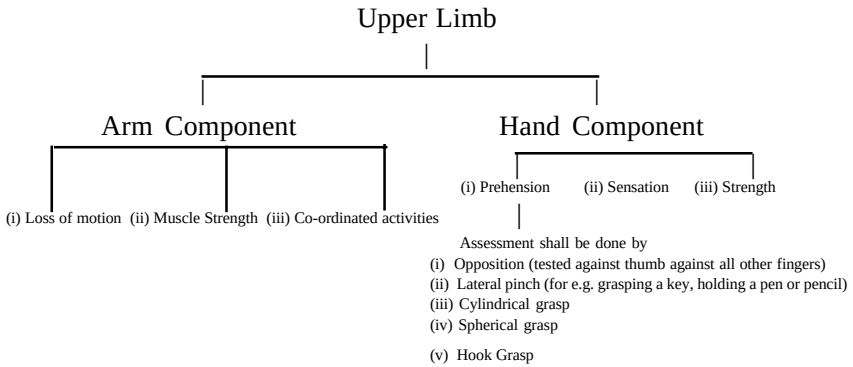
14. In **Madan Lal Papneja v. State of Haryana & Ors.,** (2011) 161 PLR 61, the Punjab & Haryana High Court held as under:-

> **"VII. Disability assessment, as per government guidelines**
>
> 8. In all cases resulting in grievous injuries that include fractures that further result in disablement, temporary or permanent, there is a practice to simply accept whatever the doctor assesses. There is hardly ever any cross examination in the disability assessment to the doctor, except a suggestion that his assessment is high. It is important to know how the assessment is made and what the percentage of disability signifies. In order to review the guidelines for evaluation of various disabilities and procedure for certification and to recommend appropriate modification/ alterations, a committee was set up in 1988 by the Government of India, Ministry of Social Justice & Empowerment under the Chairmanship, DGHS, GOI with subcommittee, one each in the area of Mental Retardation, Locomotor/ Orthopaedic, Visual and Speech & Hearing disability. After considering the reports of committee, keeping in view the provisions of Persons with Disabilities (Equal opportunities Protection of rights and Full participation) Act 1995, guidelines for evaluation of following disabilities and procedure for certification was notified vide no. 'The Gazette of India, Extra ordinary Part-II Section 1, Dated 13, June 2001' for:
>
> 1. Visual Impairment
> 2. Locomotor /Orthopedic Disability
> 3. Speech and Hearing Disability
> 4. Mental Retardation
> 5. Multiple Disabilities
>
> 9. In the guidelines, the functional (permanent physical impairment

or PPI) due to congenital, post disease or trauma have been evaluated. This is commonly interpreted as disability which is not so, in strict terms. In case of loco motor conditions, broadly, the body has been divided into upper limb, lower limb & trunk. In principle, the function of one part cannot be replaced by other, therefore each functional part in itself is 100% and thus loss of function/ PPI of that part is taken as 100%. On the other hand, the whole body value cannot exceed 100%. Thus in case the impairment is seen in more than one function or body part, the mathematical sum may exceed 100 but total of body/individual cannot exceed 100%. Thus a total of one or all segments of body cannot exceed 100% in any situation.

10. The guidelines shall be applied for determining the % of disability. If a doctor or a medical board makes an assessment there shall be no mistake in accepting the same, prima facie. However, if the assessment is doubted, it is necessary to cross-verify with the mode of assessment prescribed under the guidelines [The method of computation is meant only to provide a theoretical basis for an inquisitive judge/lawyer/litigant]. Broadly, it necessary to know that the injury to upper limb is assessed thus:

(a) Upper limb assessment



11. (i) The value of maximum range of motion (ROM) in the arm component is 90%. Each of the three joints of the arm (shoulder, elbow and wrist) is weighed equally, i.e., 30% or 0.30. This could be understood through an illustration. A fracture

of the right shoulder may affect ROM so that active abduction (abduct is to draw away from the medial line of the body) is reduced to say, 900. It is possible to take the arm thrown downwards from alongside the leg to touch the ear by abducting it to 1800. The relative loss is 50% of its efficacy, but in terms of the arm component, the % of loss shall be 50 X 0.30 = 15% loss of motion for the arm component. If more than one joint is involved, the same method is applied and the losses in each of the affected joints are added. If the loss of abduction of the shoulder is 600, loss of extension of wrist (as opposed to bending, extending means straightening. Medically, they are referred respectively as palmar flexion and dorsi flexion) is 400, then the loss of range of motion for the arm is (60X 0.30) + (40x0.30) = 30%.

(ii) The strength of muscles could be tested by manual testing like 0-5 grading.

0.- 100% (complete paralysis)

1.- 80% (flicker of contraction only)

2.- 60% (power detected when gravity is excluded, i.e., when the arm moves sideways and not upwards against gravity)

3.- 40% (movement against force of gravity but not against examiner's resistance)

4.- 20% (minimal weakness)

5.- 0% (normal strength)

The mean percentage of muscle strength loss is multiplied by 0.30. If there has been a loss of muscle strength of more than one joint, the values are added as has been described for loss of ROM.

(iii) Principles of evaluation of co-ordinated activities shall be:

a. The total value for co-ordinate activities is 90%

b. Each activity has value of 9%

(iv) Combining the values for the arm component:

The value of loss of function of arm component is obtained

by combining the values of ROM, muscle strength and co-ordinated activities, using the following formula:

$\frac{a + b\,(90 - a)}{90}$, where 'a' will be the higher score and 'b' will be the lower score.

12. The total value of hand component is 90%.

(i) The principles of evaluation of prehension include:

(a). Opposition (8%) tested against index finger (2%), middle finger (2%), ring finger (2%) and little finger (2%).

(b). Lateral pinch (5%) tested by asking the patient to hold a key.

(c). Cylindrical grasp (6%) tested for (a) large object 4" size (3%) and small object 1" size (3%)

(d). Spherical grasp (6%) tested for (a) large object 4" size (3%) and small object 1" size (3%)

(e.) Hook grasp (5%) tested by asking the patient to lift a bag.

(ii) Principles of evaluation of sensations:

Total value of sensation is 30%. It includes, 1. Radial side of thumb (4.8%, that is the outer side), 2. Ulnar side of thumb (1.2%, that is the inner side), 3. radial side of each finger (4.8%) and 4. Ulnar side of each finger (1.2%). Total value of strength is 30%. It includes, 1. Grip strength (20%), 2. Pinch strength (10%). 10% additional weightage is to be given to the following factors viz., 1. Infection; 2. Deformity; 3. Mal-alignment; 4. Contractures; 5. Abnormal mobility (when a person has a wobbly hand, for example); 6. Dominant extremity (4%), i.e., depending on the lack of strength.

(iii) Combining value of the hand component shall mean the final value or loss of function of hand component obtained by summing up of loss of prehension, sensation and strength.

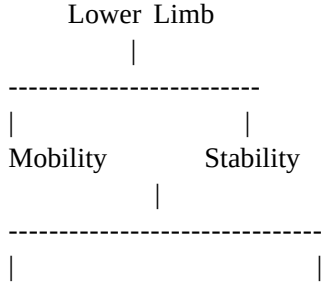
(iv) Applying the formula mentioned in the preceding paragraph, the % of disability for the combined arm and hand components could be calculated. If the impairment of the arm is say 27% and

impairment of the hand is 64%, the combined value is:

$64 - \frac{27(90-64)}{90} = 71.8\%$, where 64 is the higher value 90 and 27 is the lower value.

(b) Lower limb assessment

13. The lower extremity is divided into mobility component and stability component. Mobility component includes range of movement and muscle strength. To put it graphically,



Range of movement Muscle strength

(i) The value of maximum ROM in the mobility component is 90%. Each of the 3 joints, i.e., hip, knee, foot-ankle is weighed equally at 30% or 0.30. For example, a fracture of the right hip affects range of motion, so that active abduction is 270 against the abduction of 540 found for the left hip. There is a 50% relative loss of abduction. The % of loss of mobility component is 50X0.30=15%. If more than one joint is involved, the same method as applied above is applied and the losses in each of the affected joints are added. For example, if the loss of abduction of the hip is 60% and loss of extension is 40%, the loss of ROM for mobility component is (60 x 0.30) + (40 x 0.30)=30%

(ii) Principles of evaluation of muscle strength consists of: (1) Taking the value for muscle strength in the leg to be 90% and (2) Taking the strength of muscle tested by manual testing like 0 to 5 grading:

Grade 0 - 100%

Grade 1 - 80%

Grade 2 60%

Grade 3 40%

Grade 4 20%

Grade 5 0%

The mean % of muscle strength loss is first multiplied by 0.30. If there has been a loss of muscle strength of more than one joint, the values are added as described for ROM.

(iii) Combining values of mobility component. Suppose an individual has a fracture of the right hip joint and has in addition to 16% loss of motion, 8% loss of strength muscles, combining the values, the disability is:

$$16\text{----------} = \frac{8(90-16)}{90} = 22.6\%$$

(iv) Principle of evaluating the stability component consists of taking the total value as 90% and tested on 'scale method' and clinical method.

(c) Traumatic and non-traumatic leisions

14. Cervical spine fractures are assessed on the basis of evaluation of vertebral compressions, fragmentation, involvement of posterior elements, nerve root involvement of posterior elements and moderate neck rigidity. They are assessed by X ray examination and treated surgically. Cervical inter-vertebral disc disorders, thoracic and dorso-lumbar spine fractures resulting in acute pain, paraplegia, vertebral compression resulting in severe pain, neurogenic low back disc injuries resulting in severe pain are assessed on a scale of 0 to 100%. Without the accompaniment of any compression, fractures or leisions, there could be persistent muscle spasm, stiffness of spine with mild, moderate to severe radiological changes are assessed in the range of 0 to 30% .

VIII. Efficacy of disability of assessment

(a) Assessment of compensation for pain.

15. In the manner of assessment of pain and suffering, the

disability assessed will be a good guide to know how the particular injury affects performance in the work place and elsewhere. Head injury or spinal injury are sometimes regressive and lead to further complications like epilepsy, numbness, acute pain and spasms. There is a need to know the real sufferer from a malingerer. Expert's evidence through a doctor will help the tribunal in determining the appropriate response to prayer for compensation.

(b) Translating disability into loss of earning power

16. All injuries and assessments of disability do not impact the earning capacity [**Orissa State Road Transport Corporation v. Bhanu Prakash Joshi**-(1994) 1 ACC 467 (Ori); **New India Insurance Company Ltd v. Rajauna**-(1996) 1 TAC 149 (Kant); **Balaiah (T.) v. Abdul Majeed**-AIR 1994 AP 354]; nor in a similar way. The disability has to be seen in the context of the particular occupation or calling that the victim is engaged in. For instance, a mal-union of fracture in the lower limb and stiffness at the knee for a professional driver of motor vehicle may completely make him unfit to be a driver. In **Oriental Insurance Company Limited v. Koti Koti Reddy**-2000(2) LLJ 552 (AP), the injuries caused to the claimant were on the forehead and right leg, particularly at joint and foot. The permanent disability was assessed at 30% by the doctor and due to calcanian fracture, it was in evidence that he could not work as driver. The WC Commissioner assessed the loss of earning capacity as 100% and the HC upheld the assessment. A deformity of the hand could affect a carpenter differently than how it may be irrelevant for, say, a telephone operator. In **Pratap Narain Singh Deo v. Srinvas Sabata**- AIR 1976 SC 222, an amputation of the arm of a carpenter was taken to result in 100% loss of earning capacity; In **Sadasihiv Krishan Adke v. M/s Time Traders**-1992(1) LLJ 877, a coolie lost his leg. The injury to his leg resulted in his walking with crutches and the Court assessed the loss of earning capacity to be 100%. The attempt at the trial shall always be to elicit how the particular percentage of disability has affected the job that the person was doing and if not suitable for the same job, to what other type of employment that he or she

is fit for, in the changed circumstances and what is likely to be the loss of income. With the passing of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, a person may continue in the same employment, notwithstanding such disability, the ascertainment of loss of earning capacity will still be relevant to know the employability of the person in open market with the particular disability. The continuance of employment despite the injury may not itself dis-entitle the person from claiming compensation. Posing the question what such injury results, the Madras High Court said in **The Management of Sree Lalithambika Enterprises, Salem v. S. Kailasam**- 1 988 (1) LLJ 63 that the employer may continue an injured person in employment and deny that any loss of earning capacity has resulted in spite of privation of an organ. This, the court said, could not be supported and cannot be the intendment of the WC Act . To the same effect, see **Executive Engineer, PWD, Udaipur v. Narain Lal**-(1977) 2 LLN 415, 1977 LIC 1827 (Raj). It must be noticed both the Workmen's Compensation Act and the MV Act use the expression loss of earning capacity differently from disability per se and without making reference to the claimant's evidence and the expert opinion of a doctor, it will be arbitrary to simply take the % of disability as % of loss of earning capacity. If a Tribunal assesses compensation at a fixed sum for every %of disability, it will result in overlapping of claims if assessment of loss of earning capacity is independently assessed. There are certain recent decisions of the Supreme Court itself [**Arvind Kumar Mishra v. New India Assurance Co Ltd** and another C.A.No.5510 of 2005 dated Sep.29, 2010; **Yadav Kumar v. The Divisional Manager, National Insurance Co. Ltd & another** C.A.No.7223 of 2010, dated Aug.31, 2010], where the % of disability assessed has been taken as synonymous with % of loss of earning power, but it must be assumed that the court took the value of % of disability to be the same as % of earning power, having regard to the special facts and circumstances. When the loss of earning power and compensation are determined, it is not necessary to make any deduction for personal expenses, as we do, for determining dependency for claimants in fatal accidents. The reason is obvious; the claimant

is alive to receive the whole loss of income in injury cases and this principle has also been recognized in **Oriental Insurance Co Ltd. v. Ram Prasad**-(2009) 2 SCC 712.

IX. Future medical expenses

17. The question of providing for future medical expenses was specifically dealt with by the Supreme Court in **Nagappa v. Gurudayal Singh** - AIR 2003 SC 674, (2003) 2 SCC 274 when it observed that the MV Act does not provide for further award after a final award is passed. Therefore in a case where injury to a victim requires periodical medical expenses, fresh award cannot be passed or previous award cannot be reviewed, when medical expenses are incurred after finalization of the award. Hence, the only alternative is that at the time of passing of final award, the Tribunal should consider such eventuality and determine compensation accordingly. It is most desirable that the Tribunal elicits from the doctor himself if a future medical treatment shall be necessary and the likely expenses."

15. Assessment of General Damages is a vexed question. It is really difficult to assess the exact amount of compensation, which would be equivalent to the pain, suffering and the loss suffered by the claimant. It can never be full compensation, but it must be fair and just. No amount of money can restore the physical frame of the claimant, yet the Courts have to make an effort to assess the compensation, which may provide relief to the injured. The general damages are "so far as money can compensate" meaning thereby that it is impossible to equate money with human suffering or personal deprivation. The money awarded can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature, which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that Judges and Courts can do is to award sums which must be regarded as giving reasonable compensation. In the process, there must be the endeavour to secure some uniformity in the general method of approach. It is, therefore, eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. The general damages awarded in the case of injuries are therefore to a considerable extent conventional.

16. The principles for computation of general damages laid down in **Ward v. James,** (1995) ALL.ER 563 are as under:-

"(1) The award should be moderate, just and fair and it should not be oppressive to the respondent;

(2) The award should not be punitive, exemplary and extravagant; and

(3) So far as possible similar cases must be decided similarly. The community of public at large may not carry the grievance of discrimination."

17. Principles of uniformity and predictability are very important. There should be some measure of uniformity in awards, so that similar decisions may be given in similar cases otherwise there will be great dissatisfaction in the community and much criticism of the administration of justice. Secondly, the parties should be able to predict with some measure of accuracy the sum, which is likely to be awarded in a particular case. For, by this means, the cases can be settled peacefully, a thing very much to the public good.

18. In **Oriental Insurance Company Ltd. v. V.S. Vijay Kumar Mittal,** 2008 ACJ 1300, this Court discussed the principles relating to the award of non-pecuniary compensation towards pain and suffering, loss of amenities of life and disfiguration. This Court examined all the previous judgments with respect to the non-pecuniary compensation awarded in the case of permanent disability and held that the courts have awarded about Rs.3,00,000/- under the heads of non-pecuniary damages for permanent disability of 50% and above. The findings of this Court are as under:-

"10. The possession of one's own body is the first and most valuable of all human rights and while awarding compensation for bodily injuries this primary element is to be kept in mind. Bodily injury is to be treated as a deprivation which entitles a claimant to damages. The amount of damages varies on account of gravity of bodily injury. Though it is impossible to equate money with human suffering, agony and personal deprivation, the Court and Tribunal should make an honest and serious attempt to award damages so far as money can compensate the loss. Regard must be given to the gravity and degree of deprivation as

well as the degree of awareness of the deprivation. Damages awarded in personal injury cases must be substantial and not token damages.

11. The general principle which should govern the assessment of damages in personal injury cases is that the Court should award to injured person such a sum as will put him in the same position as he would have been in if he had not sustained the injuries.

12. Broadly speaking, while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and non pecuniary damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money. Whereas, non pecuniary damages are those which are incapable of being assessed by arithmetical calculations.

13. Pecuniary loss may include the following:

(i) Special damages or pre-trial pecuniary loss.

(ii) Prospective loss of earnings and profits.

(iii) Medicinal expenses.

(iv) Cost of future care and other expenses.

14. Non pecuniary loss may include the following:

(i) Pain and suffering.

(ii) Damages for mental and physical shock.

(iii) Loss of amenities of life which may include a variety of matters i.e. on account of injury the injured may not be able to walk, run or sit etc.

(iv) Loss of expectation of life i.e. on account of injury normal longevity of the life of the person concerned is shortened.

(v) Disfigurement.

(vi) Discomfort or inconvenience, hardship, disappointment, frustration and mental stress in life.

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18. In order to properly appreciate the contentions advanced by the learned counsel for the appellant, I note the following judgments:-

(i) **B.N.Kumar vs. D.T.C.,** 118 (2005) DLT 36.

In said case, injured sustained crush injuries on his right leg leading to its amputation above knee in a road accident on 5th November 1987. He suffered a permanent disability of 85%. Noting various judgments wherein Courts had awarded Rs.3,00,000/- under the head non-pecuniary damages, a Single Judge of this Court awarded Rs.75,000/- for 'pain and suffering' and Rs.2,00,000/- for 'continuing disability suffered by him'. Thus, a total of Rs.2,75,000/- was awarded under this head.

(ii) **Fakkirappa vs. Yallawwa & Anr.,** 2004 ACJ 141 In said case, a minor male child sustained grievous injury in a road accident which occurred on 8.5.2000 resulting in amputation of his left leg below knee. Considering the gravity of injury suffered the injured, Division Bench of Karnataka High Court awarded following compensation under the head 'non-pecuniary damages':-

(i) Pain and suffering	: Rs.50,000/-
(ii) Loss of amenities of life	: Rs.1,00,000/-
(iii) Loss of marriage prospects	: Rs.50.000/-
(iv) Damages for amputation of leg before knee	: Rs. 1,50,000/-
(v) Loss of expectation of life	: Rs.50,000/-
Total	: Rs.4,00,000/-

(iii) **K. Shankar v. Pallavan Transport Corporation,** 2001 ACJ 488

In said case, injured sustained serious injuries on his right leg in an accident on 14.2.1989. His right leg was amputated and he suffered permanent disability of 80%. A learned Single Judge of Madras High Court awarded the following compensation under the head 'non-pecuniary damages'.

(i) For permanent disability	: Rs. 80,000/-
(ii) Pain and suffering	: Rs. 50,000/-
(iii) Loss of expectation of life and proper marital alliance	: Rs. 50,000/-
(iv) For mental agony	: Rs. 1,00,000/-
Total	: Rs. 2,80,000/-

(iv) **M. Jaganathan v. Pallavan Transport Corporation,** 1999 ACJ 366

In said case, injured aged 45 years sustained injuries in an accident on 21.6.1990. The injury sustained by the injured resulted in the amputation of his left leg above the knee. Division Bench of Madras High Court awarded following compensation under the head 'non pecuniary damages':-

(i) Pain and suffering	: Rs. 1,00,000/-
(ii) Compensation for continuing Permanent disability	: Rs. 2,00,000/-
(iii) Mental agony, torture and Humiliation because of Amputation	: Rs. 75,000/-
Total	: Rs.3,75,000/-

(v) **Bhagwan Singh Meena v. Jai Kishan Tiwari,** 1999 ACJ 1200

In said case, the injured sustained severe and serious injuries on account of the road accident. His right leg was amputated. A learned Single Judge of Rajasthan High Court awarded a compensation of Rs.3,00,000/- under the head non-pecuniary damages.

(vi) **Dr. Gop Ramchandani v. Onkar Singh & Ors.,** 1993 ACJ 577

In said case, in an accident which had occurred on 17.12.1985, injured sustained injuries because of which his left leg was

amputated resulting in 50% permanent disability. A Single Judge of Rajasthan High Court awarded a compensation of Rs.3,00,000/- under the head 'non pecuniary damages'. Break-up of the compensation under the said head is as under:-

(i) Physical and mental agony	: Rs.1,00,000/-
(ii) Permanent disability	: Rs.1,00,000/-
(iii) Loss of social life and loss in profession	: Rs.1,00,000/-
Total	: Rs.3,00,000/-

(vii) **Jitendra Singh v. Islam,** 1998 ACJ 1301

In said case, in an accident which had occurred on 14.02.1992, injured sustained injuries because of which his left leg was amputated resulting in 55% permanent disability. A Single Judge of Rajasthan High Court awarded a compensation of Rs.3,00,000/- under the head 'non pecuniary damages'.

(viii) **Iranna v. Mohammadali Khadarsab Mulla & Anr.** 2004 ACJ 1396

In said case, on 19.4.2000, injured aged 7 years met with an accident. Due to the said accident, he sustained grievous injuries resulting in amputation of his left leg below knee. Tribunal awarded following compensation to him under the head 'non pecuniary damages':-

(i) Pain and suffering	: Rs.50,000/-
(ii) Loss of amenities, happiness, frustration	: Rs.1,00,000/-
(iii) Loss of marriage prospects	: Rs.50,000/-
(iv) Amputation of leg below knee and knee dis-articulation	: Rs.1,50,000/-
Total	: Rs.3,50,000/-

From the afore noted judicial decisions, a trend which emerges is that between the years 1985 to 1990, Courts have been awarding about Rs.3,00,000/- under the head 'non pecuniary damages' for amputation of leg resulting in permanent disability of 50% and above."

19. To sum up, in accident claims relating to injuries, the victim is entitled to pecuniary as well as non-pecuniary damages. The pecuniary damages such as expenditure on treatment, special diet, conveyance, attendant, loss of income etc. are based on documentary evidence produced by the claimant. The non-pecuniary damages such as pain and suffering, loss of amenities of life, disfiguration and matrimonial prospects are conventional and depend upon the nature of injuries suffered and are based on comparable awards to maintain uniformity and predictability. In cases of permanent disablement, the claimant is also entitled to loss of earning capacity. The permanent disability is assessed on the basis of the certificate issued by the medical board. Every permanent disability does not result in loss of earning capacity. The loss of earning capacity is determined according to the principles laid down by the Hon'ble Supreme Court in the case of **Raj Kumar** (supra).

20. In the present case, the appellant has suffered 60% disability due to amputation on right foot and restriction of movement of left knee as per the Ex.PW-2/9. The functional disability of the appellant has to be determined before awarding the compensation for loss of earning capacity according to the principles laid down by the Hon'ble Supreme Court in the case of **Raj Kumar** (supra). The present condition of the appellant was examined by this Court on 25th March, 2011. The front mid portion of the right foot of the appellant has been amputated and a steel rod is inserted in left leg and skin grafting has been done due to which the left lower leg of the appellant has been disfigured. The appellant walks with the help of a stick. The permanent disability of the appellant is 60% as per the disability certificate, Ex.PW-2/9. The appellant was working as Machine Operator with Engineers India Ltd. at the time of the accident. As per the Certificate, Ex.P-1 of Engineers India Ltd., the appellant could not perform the duties of Operator after accident and was therefore transferred to the Administrative Department and re-designated as Junior Assistant. As such, there was no loss of earning capacity to the appellant at that point of time. However, the promotions of the appellant were

delayed on account of transfer to the Administrative Department. As per the Certificate, Ex.P-1, the appellant could have got promotions earlier, had he remained in technical department. However, the Certificate does not specify the period of delay. In that view of the matter, it would not be possible to ascertain the exact amount of loss under this head. However, considering that the appellant has in fact suffered loss due to delay of promotions, a lump sum amount of Rs. 50,000/- is awarded to the appellant for loss of income due to delayed promotions.

21. The Claims Tribunal has awarded a sum of Rs. 35,000/- to the appellant towards pain and suffering and Rs. 30,000/- towards future prospects and loss of amenities of life. Following the judgments of the Hon'ble Supreme Court and this Court and taking into account 60% permanent disability suffered by the appellant relating to amputation of right foot restricting movement with 60 degrees, the compensation for pain and suffering is enhanced from Rs. 35,000/- to Rs. 75,000/- and the compensation for loss of amenities of life and disfiguration is also enhanced from Rs. 30,000/- to Rs. 75,000/-.

22. The Claims Tribunal has awarded a sum of Rs. 10,000/- towards future conveyance. Considering that the appellant has suffered 60% permanent disability due to amputation of right foot and restriction of movement of left knee and is unable to travel by public transport and, therefore, has to incur regular expenditure on conveyance, the amount awarded by the Claims Tribunal is inadequate. The compensation for conveyance is enhanced from Rs. 10,000/- to Rs. 50,000/- on the basis that the said amount would remain in fixed deposit and interest thereon should be sufficient to meet the future medical expenses. The Appellant is also seeking compensation for engaging an attendant. Noting that the Claims Tribunal has awarded Rs. 20,000/- towards the miscellaneous expenses which would include the expenditure for engaging an attendant, no further compensation is warranted under this head.

23. The appellant shall be entitled to compensation of Rs. 3,30,000/- as per the break-up given hereunder:-

(i)	Compensation for pain and suffering	: Rs. 75,000
(ii)	Compensation for loss of amenities of life and disfiguration	: Rs. 75,000/-

(iii)	Compensation for expenses incurred on treatment, special diet and conveyance	: Rs. 35,000/-
(iv)	Compensation for loss of salary for five months	: Rs. 25,000/-
(v)	Compensation for loss of income due to delayed promotions	: Rs. 50,000/-
(vi)	Compensation towards future conveyance	: Rs. 50,000/-
(vii)	Other miscellaneous expenses including expenses for engaging attendant	: Rs. 20,000/-
	Total	: Rs. 3,30,000/-

24. The appeal is according allowed and compensation is enhanced from Rs.1,55,000 to Rs. 3,30,000/-. The Claims Tribunal has awarded interest at the rate of 12% per annum which is not disturbed on the original award amount of Rs. 1,55,000/-. However, on the enhanced award amount, rate of interest shall be 7.5% from the date of filing of the claim till realization. Enhanced award amount along with up to date interest be deposited by the Respondent No.1 with UCO Bank, Delhi High Court Branch.

25. Upon the aforesaid amount being deposited, the UCO Bank is directed to release 10% of the same to the appellant by transferring the same to the Saving Bank Account of the appellant. The remaining amount be kept in fixed deposit in the name of the appellant in the following manner:-

(i) Fixed deposit in respect of 10% for a period of one year.

(ii) Fixed deposit in respect of 10% for a period of two years.

(iii) Fixed deposit in respect of 10% for a period of three years.

(iv) Fixed deposit in respect of 10% for a period of four

years.

(v) Fixed deposit in respect of 10% for a period of five years.

(vi) Fixed deposit in respect of 10% for a period of six years.

(vii) Fixed deposit in respect of 10% for a period of seven years.

(viii) Fixed deposit in respect of 10% for a period of eight years.

(ix) Fixed deposit in respect of 10% for a period of nine years.

26. The interest on the aforesaid fixed deposits shall be paid monthly by automatic credit of interest in the Savings Account of the appellant.

27. Withdrawal from the aforesaid account shall be permitted to the appellant after due verification and the Bank shall issue photo Identity Card to the appellant to facilitate identity.

28. No cheque book be issued to the appellant without the permission of this Court.

29. The Bank shall issue Fixed Deposit Pass Book instead of the FDRs to the appellant and the maturity amount of the FDRs be automatically credited to the Saving Bank Account of the beneficiary at the expiry of the period of the FDRs.

30. No loan, advance or withdrawal shall be allowed on the said fixed deposit receipts without the permission of this Court.

31. Half yearly statement of account be filed by the Bank in this Court.

32. On the request of the appellant, Bank shall transfer the Savings Account to any other branch according to the convenience of the appellant.

33. The appellant shall furnish all the relevant documents for opening of the Saving Bank Account and Fixed Deposit Account to Mr. M.M. Tandon, Member-Retail Team, UCO Bank Zonal, Parliament Street, New Delhi (Mobile No. 09310356400).

34. Copy of the order be given dasti to counsel for both the parties under the signatures of the Court Master.

35. Copy of this order be also sent to Mr. M.M. Tandon, Member-Retail Team, UCO Bank Zonal, Parliament Street, New Delhi (Mobile No. 09310356400) under the signature of Court Master.

ILR (2011) III DELHI 397
FAO

BHARAT SANCHAR NIGAM LTD. ....APPELLANT

VERUS

BWL LTD. ....RESPONDENT

(VIKRAMAJIT SEN & SIDDHARTH MRIDUL, JJ.)

FAO (OS) NO. : 457/2010 & CM NO. : 12044/2010 **DATE OF DECISION: 19.04.2011**

Arbitration and Conciliation Act, 1996—Section 34-scope—Appellant placed Advance Purchase Order on Respondent on 23.10.1996 for purchase of Tubular Towers—On 19.11.1996, Appellant placed Purchase Order on Respondent for Towers for total value of Rs.9.10 crores—Terms of contract state that supplies only effected after issuance of Quality Approval by DOT and supplies completed on or before 28.05.1997—Clause 16.1 and 16.2 dealing with liquidated damages for non-compliance of delivery time—Non-supply within prescribed time allowed Purchaser to make deductions in bills raised by Supplier—Appellant deducted Rs. 47 lakhs from Running Bills claiming the same to be liquidated damages—Respondent claimed the same along with interest—Total claim of Rs. 1.32 crores made before Arbitrator— Held that no delay osceribable to Respondent nor had damages resulted from delayed completion of supplies—Hence award passed—

Appellant filed Objection before Single Bench—No interference by Single Bench—Hence present appeal. Failure to record objection cannot lead to conclusion that any demur thereafter is unjustifiable. If party left with no option but to go along with demands of superior/dominant party—Open for Arbitral Tribunal to go into question whether the accord & satisfaction given by party free of any extraneous circumstances or obtained under force or coercion—If evidence reveals that accord and satisfaction not born out of free will of party, Tribunal obliged to enter reference and decide conclusively on claims despite purported accord and satisfaction. Findings of fects not perverse—No interference warranted—Appeal dismissed.

We must not lose sight of the fact that the learned Single Judge was concerned with Objections that had been filed by the Appellant under Section 34 of the A&C Act. If the Arbitrator had incorrectly appreciated the law, or pursued a path which was repugnant to the public policy of India, interference would be justified. The role of the Division Bench is even more restricted than that of the learned Single Judge adjudicating Objections. Neither Court exercises appellate powers; they are not empowered or expected to sift through the evidence nor to satisfy itself that the conclusions drawn by the Arbitrator are in consonance with the thinking of the Court. Both Courts must desist interference where perversity of legal application or marshalling of evidence is not manifest. We are satisfied that the learned Arbitrator has, on an appreciation of the documentary evidence, found the claim of damages of the Appellant to be unsustainable as neither was there any delay ascribable to the Respondent nor had any damages resulted from the delayed completion of the supplies. These are findings of fact which are not perverse in nature and hence cannot be interfered with by the Court. **(Para 15)**

Important Issue Involved: Merely because contract contains liquidated damages, damages cannot be claimed even where no loss sustained or where delay has not actually occurred and where delay is not a consequence of action of the claimant.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Shri H.S. Phoolka, Sr. Advocate with Mr. Sharat Kapoor & Mr. Kanwar Faisal, Advocates.

FOR THE RESPONDENT : Shri Ramesh Singh with Ms. Tanya Khare, Advocates.

CASES REFERRED TO:

1. *Bharat Sanchar Nigam Limited* vs. *Reliance Communication Ltd.,* (2011) 1 SCC 394.
2. *National Agriculture Co-operative Marketing Federation of India Limited* vs. *Union of India,* 2010 (1) Arb. LR 575.
3. *Union of India* vs. *Daulat Ram,* 2009(2) Arb. L.R. 327.
4. *Union of India* vs. *Hakam Chand,* 2009 (1) Arb. L.R. 421.
5. *ONGC Limited* vs. *Garware Shipping Corporation Ltd.,* (2007) 13 SCC 434.
6. *NTPC* vs. *Rashmi Constructions, Builders & Contractors,* (2004) 2 SCC 663.
7. *ONGC* vs. *Saw* Pipes, 2003(5) SCC 705.
8. *Union of India* vs. *Popular Builders, Calcutta,* (2000) 8 SCC 1.
9. *Nathani Steels Ltd.* vs. *Associated Constructions,* 1995 Supp(3) SCC 324.
10. *LIC of India* vs. *Consumer Education & Research Centre,* (1995) 5 SCC 482.

11. *DTC* vs. *DTC Mazdoor Congress,* AIR 1991 SC 101.
12. *Photo Production Ltd.* vs. *Securicor Transport Ltd.,* [1980] AC 827.
13. *Clifford Davis Management Ltd.* vs. *W.E.A. Records Ltd.,* [1975] 1 WLR 61.
14. *A Schroeder Music Publishing Company Ltd.* vs. *Macaulay,* [1974] 1 WLR 1308.
15. *Maula Bux* vs. *Union of India,* (1969) 2 SCC 554.
16. *Suisse Atlantique Societe d' Armement Maritime S.A.* vs. *N.V. Rotterdamsche Kolen Centrale,* [1967] 1 A.C. 361.
17. *Fateh Chand* vs. *Balkishan,* AIR 1963 SC 1405.

RESULT: Appeal dimissed.

VIKRAMAJIT SEN, J.

1. This Appeal assails the concurrent findings of the Arbitral Tribunal as well as the learned Single Judge. The Respondent had challenged the deduction from its Running Bills of a sum of Rs. 1,32,04,290/- inclusive of interest. The Appellant made these deductions on the ground of liquidated damages. An Advance Purchase Order was placed by the Appellant on the Respondent on 23.10.1996 for the supply of (a) 21 nos. 60 M Tubular Tower and (b) 108 nos. 80 M Tubular Towers. Eventually, on 19.11.1996, the Appellant placed a Purchase Order on the Respondent for the aforementioned numbers of Towers for a total value of Rs. 9,10,49,192. The terms, inter alia, were that the supplies would be effected only after issuance of Quality Approval by the DOT and secondly that these supplies would be completed within six months, that is, on or before 28.5.1997. The necessary Drawings were supplied by the Appellant to the Respondent on 9.12.1996.

2. Clauses 16.1 and 16.2 of the Contract, which deals with the imposition and recovery of liquidated damages, read thus:-

> 16.1 The date of delivery of the stores stipulated in the acceptance of tender should be deemed to be the essence of the contract and delivery must be completed not later than the dates specified therein. Extension will not be given except in exceptional circumstances. Should, however, deliveries be made after expiry

> of the contract delivery period, without prior concurrence of the Purchaser, and be accepted by the consignee, such deliveries will not deprive the Purchaser of his right to recover liquidated damages under clause 16.2 below. However, when supply is made within 21 days of the contracted original delivery period, the consignee may accept the stores and in such cases the provision of clause 16.2 will not apply.
>
> 16.2 Should the tenderer fail to deliver the stores or any consignment thereof within the period prescribed for delivery the Purchaser shall be entitled to recover ½% of the value of the delayed supply for each week of delay or part thereof, subject to maximum of 5% of the value of the delayed supply; provided that delayed portion of the supply does not in any way hamper the commissioning of the other systems. Where the delayed portion of the supply materially hampers installation and commissioning of the other systems, L/D charges shall be levied as above on the total value of the purchase order. Quantum of liquidated damages assessed and levied by the purchase shall be final and not challengeable by the supplier.

3. The assailed deductions were carried out to the extent of Rs. 47,09,583/-, and after adding interest at the rate of 24 per cent per annum, the amount claimed before the Arbitrator aggregated Rs. 1,32,04,290/-, already mentioned above.

4. Mr. H.S. Phoolka, learned Senior Counsel for the Appellant, justifies the filing of the present Appeal on the premise that the Arbitrator as well as the learned Single Judge have proceeded on an erroneous understanding of the law pertaining to the claim for liquidated damages. The contention is that since the Appellant had granted an extension of time for supply of the Towers subject to its claim for liquidated damages, and since the Respondent had not demurred or objected to the deductions being carried out, the Respondent's Claim was totally untenable.

5. We are of the opinion that failure to record an objection cannot, ipso facto, and without more, inexorably lead to the conclusion that any demur thereafter is unjusticiable. This proposition, having been stated so widely and broadly, must be rejected. There is an abundance of decisions of the Hon'ble Supreme Court to the effect that if a party is left with no

option but to go along with the whims or demands of the other party which enjoys a superior and dominating position, it is, at best, an acquiescence which can subsequently be withdrawn. Their Lordships have clarified that even though a Receipt had been given stating that monies had been accepted in full and final settlement, since the parties were not in pari delicto, the disadvantaged party could subsequently assert the absence of a complete accord and satisfaction. Private parties are very often forced and compelled to acquiesce the dictates of the Government or other authorities in order to minimize their losses or protect their profits. At the highest, a failure to object can be seen as evidence substantiating a particular position. Such evidence cannot be conclusive or total self-sustainable, impervious to or intolerant of proof to the contrary. It shall be open for the Arbitral Tribunal to go into the question and give a determinative finding as to whether the accord and satisfaction given by the party was free of any extraneous circumstances or was obtained under force or coercion by the party in a domination position. It has been held in **Nathani Steels Ltd. –vs- Associated Constructions,** 1995 Supp(3) SCC 324 and **Union of India –vs- Popular Builders, Calcutta,** (2000) 8 SCC 1 that where a party has accepted the Final Bill without any protest and the Court is satisfied that the accord and satisfaction had been arrived at by the execution of a full and final receipt and/or a final bill, in the absence of any fraud, duress, coercion or the like, the Arbitration Clause would have come to its logical end and no proceedings under the Arbitration & Conciliation Act, 1996 (A&C Act for short) would be called for. A reading of **NTPC –vs- Rashmi Constructions, Builders & Contractors,** (2004) 2 SCC 663 is further illustrative on this issue and it holds that the existence of any fraud, coercion or undue influence can be gone into by the Arbitral Tribunal which is competent to determine all questions of law and facts including construction of the contract agreement. If on a consideration of the evidence collected by it, there are reasons to conclude that the accord and satisfaction granted by a party before it had been arrived at by free will, it should record it and refrain from proceeding further. If, however, the evidence before it reveals that such an accord and satisfaction was not born out of the free will of the party, it shall be its duty to enter reference and decide conclusively on the claims despite the purported accord and satisfaction.

6. It is in this context that we are reminded of the sterling

observations of the Constitution Bench in **DTC –vs- DTC Mazdoor Congress,** AIR 1991 SC 101 in these words:

> 281. The trinity of the Constitution assure to every citizen social and economic justice, equality of status and of opportunity with dignity of the person. The State is to strive to minimise the inequality in income and eliminate inequality in status between individuals or groups of people. The State has intervened with the freedom of contract and interposed by making statutory law like Rent Acts, Debt Relief Acts, Tenancy Acts, Social Welfare and Industrial Laws and Statutory Rules prescribing conditions of service and a host of other laws. All these Acts and Rules are made to further the social solidarity and as a step towards establishing an egalitarian socialist order. This Court, as a court of constitutional conscience enjoined and is jealously to project and uphold new values in establishing the egalitarian social order. As a court of constitutional functionary exercising equity jurisdiction, this Court would relieve the weaker parties from unconstitutional contractual obligations, unjust, unfair, oppressive and unconscionable rules or conditions when the citizen is really unable to meet on equal terms with the State. It is to find whether the citizen, when entering into contracts of service, was in distress need or compelling circumstances to enter into contract on dotted lines or whether the citizen was in a position of either to .take it or leave it. and if it finds to be so, this Court would not shirk to avoid the contract by appropriate declaration. Therefore, though certainty is an important value in normal commercial contract law, it is not an absolute and immutable one but is subject to change in the changing social conditions. (Emphasis Supplied)

7. LIC of India –vs- Consumer Education & Research Centre, (1995) 5 SCC 482 reiterates and resonates the tenor and timbre of these very observations in these compelling words:-

> 47. It is, therefore, the settled law that if a contract or a clause in a contract is found unreasonable or unfair or irrational, one

must look to the relative bargaining power of the contracting parties. In dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forego the service for ever. With a view to have the services of the goods, the party enters into a contract with unreasonable or unfair terms contained therein and he would be left with no option but to sign the contract.

8. A similar exposition of the law is available in **Suisse Atlantique Societe d' Armement Maritime S.A. –vs- N.V. Rotterdamsche Kolen Centrale,** [1967] 1 A.C. 361; **A Schroeder Music Publishing Company Ltd. –vs- Macaulay,** [1974] 1 WLR 1308; **Clifford Davis Management Ltd. –vs- W.E.A. Records Ltd.,** [1975] 1 WLR 61 and **Photo Production Ltd. –vs- Securicor Transport Ltd.,** [1980] AC 827.

9. We are, therefore, unable to affirm, in toto, the decision in **Union of India –vs- Daulat Ram,** 2009(2) Arb. L.R. 327 (Delhi) wherein the learned Single Judge may have been right in coming to a particular conclusion which cannot ubiquitously apply to all situations. This very question came up for consideration in **ONGC –vs- Saw Pipes,** 2003(5) SCC 705 and their Lordships formulated the controversy to be -.Whether the claim of refund of the amount deducted by the appellant from the bills is disputed or undisputed claim?. The discussion is perspicuous and is available in paragraphs 70-72. The conclusion was that the .arbitrators were required to decide by considering the facts and the law applicable whether the deduction was justified or not.. These decisions are an enunciation of the legal position that (a) liquidated damages cannot be punitive in nature and (b) that the actual loss need not be proved in order to sustain the claim for liquidated damages. This, however, does not mean that merely because a contract contains a liquidated damages clause, these damages could be claimed even where no loss has been sustained; even where delay has not actually occurred; and where delay is a consequence of the action of the claimant.

10. A neat question of law has, once again, arisen on the manner in which Clauses in an Agreement providing or pertaining to liquidated

damages are to be interpreted and applied. The earliest exposition of the law is to be found in the decision of the Constitution Bench in **Fateh Chand –vs- Balkishan,** AIR 1963 SC 1405, which was, as it had to be, applied in the subsequent Judgment in **Maula Bux –vs- Union of India,** (1969) 2 SCC 554. Both these decisions have been explained in the **Saw Pipes** and we can do no better than reproduce the relevant paragraphs:-

> 64. It is apparent from the aforesaid reasoning recorded by the Arbitral Tribunal that it failed to consider Sections 73 and 74 of the Indian Contract Act and the ratio laid down in **Fateh Chand** case wherein it is specifically held that jurisdiction of the court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; and compensation has to be reasonable. Under Section 73, when a contract has been broken, the party who suffers by such breach is entitled to receive compensation for any loss caused to him which the parties knew when they made the contract to be likely to result from the breach of it. This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach. Therefore, the emphasis is on reasonable compensation. If the compensation named in the contract is by way of penalty, consideration would be different and the party is only entitled to reasonable compensation for the loss suffered. But if the compensation named in the contract for such breach is genuine pre-estimate of loss which the parties knew when they made the contract to be likely to result from the breach of it, there is no question of proving such loss or such party is not required to lead evidence to prove actual loss suffered by him. Burden is on the other party to lead evidence for proving

that no loss is likely to occur by such breach. Take for illustration: if the parties have agreed to purchase cotton bales and the same were only to be kept as a stock-in-trade. Such bales are not delivered on the due date and thereafter the bales are delivered beyond the stipulated time, hence there is breach of the contract. The question which would arise for consideration is — whether by such breach the party has suffered any loss. If the price of cotton bales fluctuated during that time, loss or gain could easily be proved. But if cotton bales are to be purchased for manufacturing yarn, consideration would be different.

65. In **Maula Bux** case plaintiff Maula Bux entered into a contract with the Government of India to supply potatoes at the Military Headquarters, U.P. Area and deposited an amount of Rs 10,000 as security for due performance of the contract. He entered into another contract with the Government of India to supply at the same place poultry eggs and fish for one year and deposited an amount of Rs 8500 for due performance of the contract. The plaintiff having made persistent default in making regular and full supplies of the commodities agreed to be supplied, the Government rescinded the contracts and forfeited the amounts deposited by the plaintiff, because under the terms of the agreement, the amounts deposited by the plaintiff as security for the due performance of the contracts were to stand forfeited in case the plaintiff neglected to perform his part of the contract. In context of these facts, the Court held that it was possible for the Government of India to lead evidence to prove the rates at which potatoes, poultry, eggs and fish were purchased by them when the plaintiff failed to deliver .regularly and fully. the quantities stipulated under the terms of the contracts and after the contracts were terminated. They could have proved the rates at which they had to be purchased and also the other incidental charges incurred by them in procuring the goods contracted for. But no such attempt was made. Hence, claim for damages was not granted.

66. In **Maula Bux** case the Court has specifically held that it is true that in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the court is

competent to award reasonable compensation in a case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. The Court has also specifically held that in case of breach of some contracts it may be impossible for the court to assess compensation arising from breach.

67. Take for illustration construction of a road or a bridge. If there is delay in completing the construction of road or bridge within the stipulated time, then it would be difficult to prove how much loss is suffered by the society/State. Similarly, in the present case, delay took place in deployment of rigs and on that basis actual production of gas from platform B-121 had to be changed. It is undoubtedly true that the witness has stated that redeployment plan was made keeping in mind several constraints including shortage of casing pipes. The Arbitral Tribunal, therefore, took into consideration the aforesaid statement volunteered by the witness that shortage of casing pipes was only one of the several reasons and not the only reason which led to change in deployment of plan or redeployment of rigs Trident II platform B-121. In our view, in such a contract, it would be difficult to prove exact loss or damage which the parties suffer because of the breach thereof. In such a situation, if the parties have pre-estimated such loss after clear understanding, it would be totally unjustified to arrive at the conclusion that the party who has committed breach of the contract is not liable to pay compensation. It would be against the specific provisions of Sections 73 and 74 of the Indian Contract Act. There was nothing on record that compensation contemplated by the parties was in any way unreasonable. It has been specifically mentioned that it was an agreed genuine pre-estimate of damages duly agreed by the parties. It was also mentioned that the liquidated damages are not by way of penalty. It was also provided in the contract that such damages are to be recovered by the purchaser from the bills for payment of the cost of material submitted by the contractor. No evidence is led by the claimant to establish that the stipulated condition was by way of penalty or the compensation contemplated was, in any way, unreasonable. There was no reason for the

Tribunal not to rely upon the clear and unambiguous terms of agreement stipulating pre-estimate damages because of delay in supply of goods. Further, while extending the time for delivery of the goods, the respondent was informed that it would be required to pay stipulated damages. (Emphasis supplied)

11. Mr. Ramesh Singh, learned counsel for the Respondent, has contended that the findings of the Arbitrator are to the effect that the performance of the contract was not delayed because of any action or inaction of the Respondent. It is also contended that it was a legal imperative for the Appellant to lead evidence to prove that it had sustained damages owing to the alleged delay in the performance of the contract by the Respondent.

12. We are fully mindful of the caution in **ONGC Limited –vs- Garware Shipping Corporation Ltd.,** (2007) 13 SCC 434 where their Lordships observed that – "There is no proposition that the courts could be slow to interfere with the arbitrator's award, even if the conclusions are perverse, and even when the very basis of the arbitrator's award is wrong".

13. We are unable to appreciate the reliance placed by Mr. H.S. Phoolka, learned Senior Counsel for the Appellant on **Bharat Sanchar Nigam Limited –vs- Reliance Communication Ltd.,** (2011) 1 SCC 394, wherein their Lordships had "noted that the liquidated damages serve useful purpose of avoiding litigation and promoting commercial certainty and therefore, the Court should not be astute to categorise as penalties the clauses described as liquidated damages". The Respondent itself does not contend that the liquidated damages partake of the stigma of a penalty. Its argument is that the Appellant did not bother to place any evidence of its having suffered losses.

14. Learned Counsel for the Respondent has contended that the Arbitrator, as well as the learned Single Judge, were fully satisfied that no damage had resulted as a consequence of the delay effect the change of the name of the Respondent. It is not controverted that since the contract was to be performed by the company in its new/changed name, in the absence it being certified to be a Small Scale Industry, it would be required to deposit a sum of Rs. 20,00,000/- as the Bid Security. This Certificate was eventually given in favour of the Respondent by National

Small Scale Industries Corporation (NSIC). Mr. Singh has submitted that the supplies could not have been commenced till the TAC had been given on behalf of the Appellant, and this event occurred as late as on 25.8.1987. Mr. Singh has further argued that the delay was occasioned because the consignee had been changed by the Appellant from time to time. Mr. Phoolka's response is that Clause 13.1.C. empowered the Appellant to make changes with regard to the place of delivery, and that this is all that was done; the Consignee had not been changed.

15. We must not lose sight of the fact that the learned Single Judge was concerned with Objections that had been filed by the Appellant under Section 34 of the A&C Act. If the Arbitrator had incorrectly appreciated the law, or pursued a path which was repugnant to the public policy of India, interference would be justified. The role of the Division Bench is even more restricted than that of the learned Single Judge adjudicating Objections. Neither Court exercises appellate powers; they are not empowered or expected to sift through the evidence nor to satisfy itself that the conclusions drawn by the Arbitrator are in consonance with the thinking of the Court. Both Courts must desist interference where perversity of legal application or marshalling of evidence is not manifest. We are satisfied that the learned Arbitrator has, on an appreciation of the documentary evidence, found the claim of damages of the Appellant to be unsustainable as neither was there any delay ascribable to the Respondent nor had any damages resulted from the delayed completion of the supplies. These are findings of fact which are not perverse in nature and hence cannot be interfered with by the Court.

16. It seems to us that in that in these premise the decision of the Division Bench in **Union of India –vs- Hakam Chand,** 2009 (1) Arb. L.R. 421 Delhi is of no avail to the Appellant. Our learned Brothers were satisfied that the failure to perform the contract for supply of milk inherently, inexorably and undeniably resulted in a loss. Furthermore, the Court was satisfied that the liquidated damages of Rs. 2 per kg/litre was not in the nature of a penalty. This is not the factual matrix obtaining before us.

17. Mr. Phoolka relies on paragraph 8 of the decision of the learned Single Judge in **Mahanagar Telephone Nigam Ltd. –vs- Haryana Telecom Ltd.,** 2010(2) Arb. L.R. 60(Delhi). Our learned Brother had in

contemplation contracts the breach of which would invariably lead to damages. It was in those circumstances that the burden of proof was held to shift from the claimant to the party in breach. The latter would then have to prove that the breach did not result in any loss. Secondly, our learned Brother had only reiterated the consistent views of the Supreme Court starting from Fateh Chand, continued in Maula Bux and reiterated in Saw Pipes that in the presence of a clause for liquidated damages it may be irrelevant to prove actual loss, but the contract did not absolve the claimant to prove that it had sustained some loss attributable to a breach or non-performance by the alleged defaulter. It would also be required to prove that the liquidated damages were not punitive in nature, and in so doing it was irrelevant what the actual loss was because of the presence of the liquidated Damage Clause.

18. We must also consider the submission of Mr. Phoolka that a previous decision rendered by the author of the impugned Judgment contains a contrary conclusion. In **National Agriculture Co-operative Marketing Federation of India Limited –vs- Union of India,** 2010 (1) Arb. LR 575, no doubt the learned Single Judge had expressed the opinion that .the petitioner/objector was estopped from raising this counter claim as during the contemporaneous period when liquidated damages were deducted, Petitioner-Objector had never raised any objection. Consequently, in my view, petitioner-objector has waived its right to claim refund of liquidated damages. In any event, I find that the petitioner-objector did not lead any evidence to show that petitioner-objector did not lead any evidence to show that petitioner-objector had not breached its original contract dated 19th March, 1996.. So far as the facts of the present case are concerned, it is unassailable that the extension of time granted on 11.9.1997 and 30.3.1998 was subject to levy of liquidated damages. The learned Single Judge has taken note of the fact that by letter dated 26.9.1997 (Ex. CW1/6), the Respondent had recorded that the delay in effecting supplies cannot be attributed to it. Furthermore, the learned Single Judge had also taken cognizance of the fact, as per Ex. CW2/134 to 137, that supplies have been made within the extended period. These are findings of fact which we ought not and do not wish to dislodge. However, we think it relevant to mention that if the Appellant thinks it is entitled to claim liquidated damages because it had so cautioned and declared in its letter, equal efficacy must be given to the Respondent's letter where it had recorded that no delay had occurred for which the

Respondent was liable. Having received such a letter, the Appellant, who enjoys a dominant position, could have refused to accept deliveries. In the event, it has not been done so and must therefore, have acquiesced or agreed or consented to the asseverations made by the Respondent in its Letters to the effect that no delay had transpired.

19. It is in these circumstances it is our view that the Appeal is devoid of merits. No question justiciable under Section 34 or Section 37 of the A&C Act has arisen. It is accordingly dismissed. CM No.12044/ 2010 is also dismissed. There shall be no order as to costs.

ILR (2011) III DELHI 411
WRIT PETITION

ALSTOM PROJECTS INDIA LTD. & ANR. ....PETITIONERS

VERSUS

ORIENTAL INSURANCE COMPANY LIMITED ....RESPONDENTS

(S. MURALIDHAR, J.)

W.P. NO. : 13522/2009 & CMs NO. : 15068/2009 & 3998/2010 **DATE OF DECISION: 20.04.2011**

Constitution of India, 1950—Article 226—Interference in contractual agreements permissible when instrumentality of State party to contract and acts in an unreasonable and arbitrary manner—Petitioner No.1 engaged in business of design, manufacture, installation and servicing of power generation equipment—Petitioner No.2 director and shareholder of Petitioner No.1—Petitioner No.1 entered into agreement on 27.04.2007 for Onshore Services with Gujarat State Electricity Corporation Ltd ("GSECL") for commissioning of power plant in Surat—GSECL also

entered into agreement with Alstom Switzerland Ltd for providing Offshore Equipment and Spare Parts supply on CIF basis pertaining to Surat power plant—Respondent issued marine Policy and Erection All Risk Insurance ("EARI") Policy—Petitioner No.1 paid requisite premium under EARI Policy in six agreed installments—Last installment paid on 08.11.2007—On 06.07.2009, Petitioner No.1 received notice fro Respondent raising demand of Rs.1.50 crores—Comptroller and Auditor General ("CAG") objected to alleged excess discount given by Respondent to Petitioner—Respondent had allegedly allowed discount of more than 51.25% limit prescribed by Insurance Regulatory and Development Authority ("IRDA")—Petitioner claimed that demand for additional premium without legal basis—Respondent contended that CAG demanding immediate compliance and recovery of differential premium amount—Respondent stated that if premium not paid before 30.10.2009, Respondent would be "off cover"—On 24.11.2009, Respondent informed Petitioner that CAG query could not be dropped—Petitioner informed that non-payment of additional premium amount by 10.12.2009 would result in cancellation of EARI Policy—Hence present petition—Petitioner impugned demand for additional premium—Whether demand and letter stating cancellation on non-payment of premium arbitrary—Demand for additional premium not raised immediately upon CAG pointing out excess discount—Action of Respondent in raising demand during period when de-tariff regime not come into existence—Petitioner must be aware of statutory regime and statutory constraints of Respondent—Not possible to conclude that demand for additional premium unreasonable or arbitrary—Petition dismissed.

The question, therefore, really boils down to this: whether in making a demand for additional premium and in seeking to cancel the policy on account of non-payment of such

premium, the Respondent has acted arbitrarily and unreasonably. The demand for additional premium was not raised immediately upon the CAG pointing out to OICL that the maximum discount which could be offered would not be higher than 51.25% in terms of the IRDA's norms. It is in this context that the provision of Section 64VB of the Insurance Act, 1938 is relevant. **(Para 16)**

The correspondence between the parties shows that OICL itself took up the matter of dropping the CAG query. The letter dated 24th November 2009 from OICL to APIL acknowledges this. It states "However we regret to state that this being a CAG query, we have not been able to get it dropped in spite of our best efforts and would thus request you to please remit the additional premium to us." This was also acknowledged earlier by APIL in a letter dated 30th October, 2009 to OICL stating "We understand that pursuant to our request in respect of withdrawal of demand for additional premium, the senior officials from Oriental are pursuing the matter with the Ministry of Finance for considering the tenability of the demand and its withdrawal." The action of OICL in raising the demand for additional premium was during the period when the de-tariff regime had not come into existence. The Petitioner could not be said to be unaware of statutory regime and the statutory constraints under which the OICL had to work. In the above circumstances, it is not possible for this Court to conclude that in raising the demand for additional premium, which was necessitated on account of the note of the CAG, OICL acted unreasonably or arbitrarily. **(Para 18)**

Important Issue Involved: Maintainability under Article 226—Where instrumentality of the State is party to contract, it has obligation to act fairly, justly and reasonable. Contravention would allow writ Court to issue suitable directions to set right arbitrary actions.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Rajiv Nayar, Senior Advocate with Mr. Sulabh Tewari, Advocate.

FOR THE RESPONDENT : Mr. Vishnu Mehra, Advocate.

CASES REFERRED TO:

1. *United India Insurance Company Limited* vs. *Manubhai Dharmasinhbhai Gajera* (2008) 10 SCC 404.
2. *Atlas Interactive (India) Pvt. Ltd.* vs. *Bharat Sanchar Nigam Limited* 2005 (40) RAJ 585.
3. *ABL International Ltd.* vs. *Export Credit Guarantee Corporation of India Ltd.* (2004) 3 SCC 553.
4. *Pioneer Publicity Corporation* vs. *Delhi Transport Corporation* 2003 (2) RAJ 132.
5. *G. Ram* vs. *Delhi Development Authority* 98 (2002) DLT 800.
6. *Dr. Sanjay Gupta* vs. *Dr. Shroff's Charity Eye Hospital* 2002 (4) SLR 788.
7. *VST Industries Ltd.* vs. *Workers Union* (2001) 1 SCC 298.
8. *Kumari Shrilekha Vidyarthi* vs. *State of UP* (1991) 1 SCC 212.
9. *General Assurance Society Ltd.* vs. *Chandmull Jain* AIR 1966 SC 1644.

RESULT: Petition dismissed.

S. MURALIDHAR, J.

1. The petitioners challenge a demand raised by the Respondent Oriental Insurance Company Ltd. (OICL) on Petitioner No.1 Alstom Projects India Ltd. (APIL) for an additional premium in the sum of Rs.1,49,88,732/- and applicable service tax in relation to an Erection All Risk Insurance (EARI) cover policy issued by OICL.

Background facts

2. APIL, having its registered office at Mumbai, is stated to be

engaged in the business of design, manufacture, installation and servicing of power generation equipments in India and abroad. Petitioner No. 2 is stated to be a shareholder and Director of APIL. APIL and the Gujarat State Electricity Corporation Ltd. (GSECL) entered into an Agreement dated 27th April, 2007 for Onshore Services under which APIL was required to design, engineer, procure equipment, materials, supplies and carry out erection, conduct testing and commissioning of a 370 MW combined cycle power plant in Surat, Gujarat. Alstom Switzerland Ltd. (ASL) entered into an agreement on the same date with GSECL for Offshore Equipment and Spare Parts Supply (CIF) under which ASL was required to design, engineer, procure and manufacture, carry out testing, shop assembly, pack, and transport the equipment, materials, supplies on a CIF basis pertaining to the power plant. Work for the power plant commenced on 29th May 2007 and the reliability run at the site was completed on 18th November 2009.

3. APIL invited bids from OICL, M/s. United India Insurance Company Ltd. (UIIL) and M/s. ICICI Lombard General Insurance Company Ltd. (ILGICL) through its insurance broker, M/s. Aon Global Insurance Brokers Pvt. Ltd. (`Aon Global') for taking an EARI cover for covering material damage, third party liability and other add on covers as well as a Marine Insurance cover for the power plant. The requirements of APL were communicated to each of the aforementioned insurance companies by Aon Global by quote slips on 4th October 2007 and invitation for final quotes was sent on 6th November 2007. It is stated that while OICL submitted a quote of Rs.6,64,88,287/-, UIIL submitted a quote of Rs.6,13,96,316/- and ILGICL a quote of Rs.6,82,74,471. OICL by its letter dated 7th November, 2007 offered to provide EARI cover at a premium of Rs.6,25,42,060/- and Marine Insurance cover at a premium of Rs.39,46,227/- to be paid in specified instalments. APIL states that although OICL's offer was not the lowest, APIL accepted it in view of the long standing relationship between the parties and the representation and assurance of OICL that it would provide the best standards of services under the policy to be concluded between the parties. Upon APIL's acceptance of OICL's offer, OICL issued both a Marine Policy as well as an EARI Policy. OICL was the lead insurer with a share of 50% in the sum insured and in the premium whereas UIIL and ILGICL were the other insurers with a share of 25% each in the sum insured and in the premium. The EARI Policy stipulated in the collective insurance

clause that OICL would be responsible for issuing and administering the policy and the remaining insurers agreed to follow OICL on all issues concerning policy interpretation and indemnification. The policy was extended by a further period of three months by way of endorsement dated 12th October, 2009. The EARI Policy was valid till 7th January, 2010. The period of 24 months of extended maintenance cover commenced from 12th November, 2009 and was to be completed on 11th November, 2011.

4. It is stated that APIL paid the requisite premium under the EARI Policy in six agreed instalments, the last of which was paid before the due date. The total premium of Rs.3,54,39,996/- was paid by the Petitioner to OICL excluding the premium paid for extending the EARI Policy of three months. After accounting for the payment made by ASL, the balance premium of Rs.5,36,381/- and Swiss Francs 99,098 were paid respectively by APIL and ASL on 8th November, 2007.

5. On 6th July 2009 APIL was surprised to receive a notice dated 3rd June, 2009 from the OICL raising a demand in the sum of Rs.1,49,88,372/- on account of the Comptroller and Auditor General (CAG) having objected to an alleged `excess discount' over and above the permissible discount of 51.25% that had been given by the OICL to APIL. OICL further demanded that the differential premium amount should be paid at the earliest to enable OICL settle the CAG query and that failure to do so would amount to violation of Section 64VB of the Insurance Act, 1938 and the claims of APIL would not be admissible under the EARI Policy as per the regulations of the Insurance Regulatory and Development Authority (IRDA). Along with the impugned notice, OICL attached a copy of the letter issued to it by the Audit Board II, Ministry of Finance, Department of Financial Services, Government of India. The CAG pointed out that OICL had allowed a discount of more than 51.25% which was the maximum limit permitted by the IRDA. This had resulted in an alleged short collection of the premium amounting to approximately Rs.1.5 crores. OICL replied to the CAG in May, 2009. However, the CAG found the explanation untenable and observed that non-adherence to the IRDA guidelines/norms would be viewed as a breach of Section 14(2) (i) of the IRDA Act, 1999. APIL claims that at a meeting on 13th August, 2009 when APIL stated that the demand for additional premium had no legal basis, OICL had stated that it would

confer internally and revert as to the tenability of its demand for payment of additional premium. However, OICL sent a reminder to APIL on 21st August, 2009 stating that the CAG was pressing hard for immediate compliance and recovery of the differential premium amount. It is stated that on OICL's request, the CAG had extended the deadline till 10th September, 2009. On 9th September, 2009, the OICL sent APIL the calculations that purportedly formed the basis of the impugned notice and reiterated the claim for payment of the differential premium. OICL wrote to APIL on 28th October, 2009 stating that in the event the payment of the differential premium amount was not made before 30th October, 2009 OICL would be "off cover". OICL wrote to APIL on 24th November, 2009 stating that despite its best efforts the CAG query could not be dropped. Accordingly, OCIL sent to APIL the impugned notice of cancellation of the EARI Policy in the event that the differential premium amount was not paid by 10th December 2009.

6. On 3rd December 2009, while issuing notice to OICL it was directed by this Court that OCIL would not terminate the policy on the ground of non-payment by APIL of the differential premium of Rs.1,49,88,372/- along with service tax. However, APIL was directed to furnish an undertaking that it would pay the said sum in case the stay application/writ petition was dismissed. Thereafter APIL filed an affidavit of undertaking in the above terms.

Stand of OCIL

7. In the counter affidavit it is first submitted that the writ jurisdiction under Article 226 of the Constitution could not be invoked as the disputes have arisen under a policy of insurance which is in effect a contract between the insurer and the insured. It is submitted that an efficacious alternative remedy was available to the Petitioner. Secondly, it is submitted that under General Condition No. X of the EARI Policy it was permissible for OCIL to cancel the policy at any time by giving 15 days' notice to the insured. Referring to the decision of the Supreme Court in **General Assurance Society Ltd. v. Chandmull Jain** AIR 1966 SC 1644 it is submitted that such a condition was a reasonable one and gave sufficient discretion to OCIL not to continue the EARI policy on the ground of the failure by APIL to make payment of the differential premium. Further the failure on the part of APIL to make payment of the differential premium

was a violation of Section 64VB of the Insurance Act, 1938 (as amended).

8. Thirdly it is submitted by OICL that Aon Global was fully conversant with the provisions of the Insurance Regulatory Development Authority (Brokers Regulations) 2002. The negotiations for working out better terms of premium with APIL were going on since March, 2007. It is stated that in the context of the tariff regime which was undergoing constant change from 1st January, 2007 till October, 2007, the movement in the insurance market was closely watched by insurance brokers and through them the insured themselves. By a circular dated 25th June 2007, IRDA announced that "Effective from 1st September, 2007, the control on rates with regard to fire, engineering and workmen's compensation insurance classes of business shall be totally removed." In circular dated 13th August, 2007 of the IRDA, it was stated that "subject to insurers achieving a satisfactory state of compliance within the month of August, 2007 and filing any revised rates schedules or approach note as applicable, the relaxation of control on pricing can be given effect to from 1 November 2007." It is stated that on 29th October, 2007, the IRDA advised the insurers not to implement the rates fixed by the OICL and to follow rates that were agreed to and communicated by its earlier circular dated 13th March, 2007. It is stated that the differential premium amount became payable on account of the statutory nature of the demand and, therefore, was permissible in law. It is maintained that there was nothing unusual in the letter dated 6th July, 2009 of the OICL calling upon APIL to pay a sum of Rs.1,49,88,372/- as the differential premium amount.

Submissions of Counsel

9. Mr. Rajiv Nayar, learned senior counsel appearing for the Petitioners submitted that once the insurance policy was issued, it constituted a complete contract incorporating the terms and conditions including the premium amount. It could not be subsequently altered by either party to the contract. None of the conditions spelt out in Clause X of the Insurance Policy were attracted. In other words, the insurance policy could not be cancelled or revoked on account of non-payment of the additional premium, the demand for which was raised after the insurance contract had been concluded. According to him, there is no clause in the EARI policy permitting the raising of such demand for additional premium. He submits that this is a classic case of an arbitrary action on the part

of OICL, which was amenable to Article 226 of the Constitution. Relying on the passages in the decision of the Supreme Court in **ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.** (2004) 3 SCC 553, it is submitted that against an arbitrary action under Article 14 of the Constitution, a writ petition would lie, notwithstanding the fact that dispute arose out of a contract. He also places reliance on the judgments of this Court in **Pioneer Publicity Corporation v. Delhi Transport Corporation** 2003 (2) RAJ 132 and **Atlas Interactive (India) Pvt. Ltd. v. Bharat Sanchar Nigam Limited** 2005 (40) RAJ 585. He also relied upon the observations in **United India Insurance Company Limited v. Manubhai Dharmasinhbhai Gajera** (2008) 10 SCC 404.

10. Mr. Vishnu Mehra, learned counsel appearing for the Respondent-OICL submitted that the facts in **ABL International Ltd.** (supra) were distinguishable. He submitted that the decision of the Supreme Court in **General Assurance Society Ltd.** (supra) would apply. He also placed reliance on the judgments of this Court in **G. Ram v. Delhi Development Authority** 98 (2002) DLT 800 and **Dr. Sanjay Gupta v. Dr. Shroff's Charity Eye Hospital** 2002 (4) SLR 788. Adverting to Regulation 3 of the IRDA (Brokers Regulations) 2002, Mr. Mehra submitted that Aon Global was fully aware of the possibility of there being an enhanced premium demand and, therefore, APIL could not be said to have been taken by surprise by the demand. He submitted that OICL was constrained to raise the demand only on account of CAG's observations and had no option in the matter. In the circumstances, the impugned demand for additional premium could not be said to be arbitrary or unreasonable.

Maintainability of the petition

11. As regards the maintainability of the writ petition, the decision in **ABL International Ltd.** is relevant and requires to be referred to at some length. The facts of the said case were that Rassik Woodworth Limited (RWL) entered into a contract with State-owned Corporation of Kazakhstan (Kazakh Corporation) for supply of 3000 MT of tea. The payment for the tea exported was to be made by the Kazakh Corporation by barter of goods mentioned in the schedule to the said agreement within 120 days of the date of delivery by the exporter. The payment was to be guaranteed by the Government of Kazakhstan. As per the

amendment to the agreement, it was provided that if the contract of barter of goods could not be finalised for any reason, then the Kazakh Corporation would pay to the exporter for the goods received by it in US dollars within 120 days from the date of the delivery. This amended agreement also provided for a guarantee being given by the Ministry of Foreign Economic Relations of Kazakhstan from prompt payment of such consideration. RWL subsequently assign a part of the said export contract with the Kazakh Corporation in favour of ABL International Ltd. on the same terms. On a direction issued by the Reserve Bank of India to cover the risk arising out of the export of tea made by the appellants as per the assigned contract, ABL International Ltd. approached Export Credit Guarantee Corporation of India Ltd. (ECGCIL) to insure the risk of payment of consideration that was involved in the said contract of export. Thereafter ECGCIL issued a comprehensive risk policy effect from 23rd September, 1993 to 30th September, 1995. On the failure of the Kazakh Corporation to pay the balance consideration and the Kazakhstan Government to fulfill its guarantee, ABL International Ltd. made a claim on ECGCIL. This claim was repudiated by ECGCIL stating that ABL International Ltd. had changed the terms of the contract without consulting ECGCIL. Thereupon, a writ petition was filed in the Calcutta High Court. After holding the writ petition to be maintainable, the learned Single Judge of the Calcutta High Court issued the directions, as prayed for requiring ECGCIL to honour the claim. A Division Bench of the Calcutta High Court reversed the judgment of the learned Single Judge holding that the petition raised disputed questions of fact and could not have been adjudicated in writ proceedings under Article 226 of the Constitution. The Supreme Court allowed the appeal of ABL International Ltd. On the question of maintainability of the writ petition under Article 226 of the Constitution, after discussing the judgment of the Court in **Kumari Shrilekha Vidyarthi v. State of UP** (1991) 1 SCC 212 and distinguishing the judgment in **VST Industries Ltd. v. Workers' Union** (2001) 1 SCC 298, the Supreme Court in ABL International Ltd. observed as follows (SCC, p. 570):

> "…. once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent."

12. The objection raised by OCIL as to maintainability of the present petition is more or less similar to what has been answered in the negative in the above decision. Consequently, this Court rejects the preliminary objection raised by OCIL. However, the question remains whether in the facts of the present case, OICL can be said to have acted arbitrarily.

Is the impugned demand for additional premium arbitrary?

13. General Condition No. X of the EARI policy reads as under:

> "….This insurance may also at any time be terminated at the option of the Insurer by 15 days notice to that effect being given to the Insured in which case the insurers shall be liable to repay on demand a rateable proportion of the premium for the unexpired term from the date of cancellation."

14. As rightly pointed out by the learned counsel for the Respondent, such a condition is legally valid and binding. In **General Assurance Society Ltd.,** it was held that a condition in an insurance policy giving mutual rights to parties to terminate the insurance at any time is a common condition and must be accepted as reasonable. It was emphasized that "the right to terminate at will, cannot, by reason of the circumstances be read as a right to terminate for a reasonable cause." It was explained in para 19 of the said judgment that "the reason of the rule appears to be that where parties agree upon certain terms which are to regulate their relationship, it is not for the court to make a new contract, however reasonable, if the parties have not made it for themselves." It was further observed in para 20 that "the cancellation was done at time when no one could say with any degree of certainty that the houses were in such danger that the loss had commenced or become inevitable…..The assurers were, therefore, within their rights under condition 10 of the policy to cancel it. As the policy was not ready, they were justified in executing it and cancelling it. The right of the plaintiff to the policy and to enforce it was lost by the legal action of cancellation."

15. The decision in **United India Insurance Company Limited** is distinguishable on facts. The facts in the said case were not disputed and in those circumstances it was held that a judicial review of the impugned action of the insurance companies was permissible. The insurance companies were held bound by the terms of the Mediclaim Insurance. However, there, the insured persons had already undergone the risk and their subsequent claims were rejected. In the instant case the demand for additional premium has been raised by OICL prior to any claim by APIL. The case in hand is more or less similar to the facts in **General Assurance Society Ltd.**

16. The question, therefore, really boils down to this: whether in making a demand for additional premium and in seeking to cancel the policy on account of non-payment of such premium, the Respondent has acted arbitrarily and unreasonably. The demand for additional premium was not raised immediately upon the CAG pointing out to OICL that the maximum discount which could be offered would not be higher than 51.25% in terms of the IRDA's norms. It is in this context that the provision of Section 64VB of the Insurance Act, 1938 is relevant.

17. The OICL was undoubtedly required to function in terms of the statutory framework. The IRDA Brokers Regulations and the Code of Conduct under Regulation 21 applied to Aon Global the insurance broker which negotiated the EARI policy on behalf of APIL. Equally, the IRDA Regulations were binding on the OICL. How much of a risk can be covered by the insurance company and how much discount it can offer are obviously circumscribed by the IRDA Regulations and norms announced from time to time. During the price control regime, which was in force till 31st October 2007, OICL did not have any option but to comply with such guidelines and circulars.

18. The correspondence between the parties shows that OICL itself took up the matter of dropping the CAG query. The letter dated 24th November 2009 from OICL to APIL acknowledges this. It states "However we regret to state that this being a CAG query, we have not been able to get it dropped in spite of our best efforts and would thus request you to please remit the additional premium to us." This was also acknowledged earlier by APIL in a letter dated 30th October, 2009 to OICL stating "We understand that pursuant to our request in respect of withdrawal of demand for additional premium, the senior officials from Oriental are

pursuing the matter with the Ministry of Finance for considering the tenability of the demand and its withdrawal." The action of OICL in raising the demand for additional premium was during the period when the de-tariff regime had not come into existence. The Petitioner could not be said to be unaware of statutory regime and the statutory constraints under which the OICL had to work. In the above circumstances, it is not possible for this Court to conclude that in raising the demand for additional premium, which was necessitated on account of the note of the CAG, OICL acted unreasonably or arbitrarily.

19. Consequently, this Court does not find any merit in the writ petition and it is dismissed as such. All the pending applications stand disposed of.

20. In terms of the affidavit of undertaking filed by the Petitioner in this Court, it shall make payment of the impugned demand of Rs.1,49,88,372/- along with service tax to the OICL within a period of two weeks from today. The said amount will be paid together with simple interest at the rate of 9% per annum for the period 10th November, 2009 till the date of payment.

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CRL. A.

MURARI **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

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

CRL. A. NO. : 10/2011, 228/2011, 241/2011, 139/2011 & 11/2011 **DATE OF DECISION: 28.04.2011**

Indian Penal Code, 1860—Section 302 and 34—All five

appellants challenged their conviction under Section 302 IPC read with Section 34 IPC—It was urged on behalf of four appellants, they cannot be made liable for acts of others with aid of Section 34 IPC as prosecution version was that quarrel took place all of a sudden on spur of moment without any pre concert or pre planning and they were not armed with any weapon—On other hand, it was contended on behalf of the State, there were some minor variations and discrepanies here and there in testimonies of three eye witnesses which do not affect the main substratum of prosecution version—Held:- In criminal law, every accused is responsible for his own act of omission or ommission—This rule is subject to exception of vicarious liability enshrined under Section 34 IPC—Direct proof of common intention is seldom available and therefore such intention can only be inferred from the facts and circumstances of each case.

There is another aspect of the prosecution case. All the Appellants have been convicted by the aid of Section 34 IPC. In criminal law, every accused is responsible for his own act of omission or commission. This rule is subject to the exception of vicarious liability enshrined under Section 34 IPC. Direct proof of common intention is seldom available and therefore such intention can only be inferred from the facts and circumstances of each case. In **Munni Lal v. State of M.P.** 2009 (11) SCC 395, it was held as under:-

> "…….In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same

> as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.
>
> The section does not say 'the common intentions of all', nor does it say 'an intention common to all'. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in **Chinta Pulla Reddy v. State of A.P.** Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused." **(Para 45)**

We have been taken through the report of the crime team Ex.PW-11/A. The crime team was summoned to the spot by the IO after recording statement Ex.PW-9/A of Mohd. Sagir wherein he had disclosed the injuries inflicted with the stone on the person of the deceased. According to the report Ex.PW-11/A the crime team made an inspection between

12:45 A.M. to 1:20 A.M. The presence of any stone is absent in the report. According to the IO and SI Aishvir Singh the stone was seized from the spot along with the other articles just after 2:10 A.M. The two stones/roda having blood stains were kept in separate white plastic bags were converted into two packets, sealed with the seal of "PS" and seized by memo Ex.PW-12/D. All these articles were deposited in Police Post Saket at 3:30 A.M. A perusal of register No.19, Ex.PW-15/A however reveals that the blood stained stone was deposited after the helmets, blood stained danda, blood stained clothes of the accused persons (which were recovered at the instance of some of the Appellants at 3:00 P.M.) and box containing viscera were deposited on 17.07.2007. **(Para 51)**

This is not the end of the matter. PW-2 and PW-9A the two public witnesses, who according to the prosecution witnessed the occurrence, returned to the spot from AIIMS along with the IO. Though, PW-9A Mohd. Sagir is a witness to the seizure of blood, blood stained earth, Splendor motor cycle, blood stained shoes of the deceased and blood stained seat cover of the Maruti Zen Car (belonging to the deceased) which are Exs. PW-9/C, PW-9/D, PW-9/E and PW-9/F respectively, he is not a witness to the recovery of the blood stained roda and stone Ex.PW-12/B and Ex.PW-12/C respectively. This shows that the stone and the roda were not seized in presence of PWs 2 and PW9A. **(Para 52)**

The autopsy on the dead body was performed by Dr. B.L. Choudhary on 17.07.2007 and the Post Mortem report was immediately made available. The big stone in a sealed bag was produced before PW-24 for his opinion only on 21.08.2007. PW-24 gave the dimensions of the stone as 40 cms x cms x 21 cms and to be of an irregular shape. The doctor further opined that injuries No.1,2,3,4,5 and 6 were possible by impact of this stone. The stone Ex.PW12/1 was seized from the spot in the wee hours of 17.07.2007 this would have been shown to the doctor either before the post mortem or immediately thereafter. The fact that the IO

waited for over a month to produce the big stone Ex.PW-12/1 before PW-24 makes the recovery in the manner alleged by the prosecution doubtful. **(Para 53)**

Important Issue Involved: In criminal law, every accused is responsible for his own act of omission or commission—This rule is subject to exception of vicarious liability enshrined under Section 34 IPC—Direct proof of common intention is seldom available and therefore such intention can only be inferred from the facts and circumstances of each case.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Sameer Chandra Advocate Ms. Meenakshi Lekhi, Advocate, Mr. Ranjit Singh, Advocate.

FOR THE RESPONDENT : Mr. Jaideep Malik, Advocate.

CASES REFERRED TO:

1. *Munni Lal* vs. *State of M.P.* 2009 (11) SCC 395.
2. *Jyoti Prakash Rai* vs. *State of Bihar,* AIR 2008 SC 1696.
3. *Rajnit Singh* vs. *State of Haryana* 2008 (9) SCC 453).
4. *Jitender Ram* vs. *State of Jharkhand,* 2006 (9) SCC 428.
5. *Pratap Singh* vs. *State of Jharkhand,* AIR 2005 SC 2731.
6. *Gurpreet Singh* vs. *State of Punjab,*2005 (12) SCC 615.
7. *Zahira Habibulla H. Sheikh* vs. *State of Gujarat,* (2004) 4 SCC 158).
8. *Khalil Khan* vs. *State of M.P.,* 2004 SCC Cri. 1052.
9. *Paras Yadav* vs. *State of Bihar,* 1999 (2) SCC 126.
10. *Bahal Singh* vs. *State of Haryana,* 1976 SCC (Cri.) 461.
11. *Pandu Rao* vs. *State of Hyderabad,* AIR 1955 SC 216.

RESULT: Appeals allowed.

G.P. MITTAL, J.

Crl. A. Nos. 10/2011, 228/2011, Crl. A. Nos. 241/2011, 139/2011 & 11/2011

1. Criminal law was set into motion when on the basis of information given by operator S-53 (of PCR) that there was a quarrel at Lado Sarai T point, near Masjid and a person was lying there in a serious condition, DD No.41/A (PW17/A) recorded in Police Station (PS) Mehrauli was handed over to Head Constable Mahender Bhardwaj for necessary action. Since the area of the incident fell within the jurisdiction of Police Post (PP) Saket, HC Mahender Bhardwaj transmitted the said information to the Police Post which was recorded by Constable Satbir at 10:50 P.M. by DD No.29 (Ex.PW27/A). DD No.29 was assigned to SI Aishvir Singh in charge PP Saket. He (SI Aishvir Singh) left for the spot along with HC Shiv Kumar, HC Devender and HC Jagdish.

2. On reaching the spot PW-29 SI Aishvir Singh (the SI) found a pool of blood at two places. One big stone and one small stone (both blood stained) were lying there. A motor cycle (Hero Honda Splendor) bearing No.DL3SAJ 7048 was parked at a distance of 50-60 metres from the spot. On inquiry SI Aishvir Singh came to know that the injured had been removed to AIIMS in his vehicle by a public person. HC Jagdish was directed to remain present at the spot to secure it. The SI proceeded to AIIMS along with other members of the staff.

3. On reaching AIIMS, the SI obtained the MLC (Ex.PW16/A) of Jitender Panwar (the deceased) who had been declared brought dead at 11:15 P.M. One Mohd. Sagir (PW-9A) met him who claimed to have seen the incident. The deceased's belongings were handed over to him by the Duty Constable Satish which were seized by him by memo Ex.PW12/A. SI recorded Mohd. Sagir's statement (Ex.PW-9A). He made an endorsement Ex.PW29/A and sent the same to the Police Station for registration of the case.

4. The SI along with his staff, the deceased's car and witnesses, namely, Nand Kishore, Naveen Kumar, Mohd. Sagir and Fakre Alam reached the spot at 12:45 A.M. He requisitioned the crime team.

5. Inspector Pankaj along with SHO and other staff met him at the spot. The investigation of the case was handed over to Inspector Pankaj

(IO). He (SI) entrusted him (the IO) DD No.29 and MLC Ex.PW16/A of the deceased.

6. According to the prosecution, the crime team reached the spot at about 12:50 A.M. SI Vinod Kumar and Constable Girdhar of the crime team took photographs of the spot from various angles. The crime team gave its report to the IO at 1:25 A.M. with direction to send the dead body to the autopsy surgeon to ascertain the cause of death. The IO prepared the site plan Ex.PW-9/B at the instance of Mohd Sagir PW-9A. The IO lifted the blood from the spot. Blood stained earth and control earth were seized from the spot. The articles seized were given various serial numbers and were taken into possession by the IO by memo Ex.PW-9/A. A "Splendor" motorcycle bearing No. DL 3SAJ 7048 was seized by memo Ex.PW-9/D. Two blood stained teeth were found in the backseat of the Maruti Zen car bearing no. DL2CN 7646. They were kept in a plastic box, which was converted into a pulanda and sealed with the seal of "PS". The seat cover also had blood stains. These were kept in a plastic bag sealed with a seal of "PS" and seized by memo Ex.PW9/F. A blood stained large stone was kept in a plastic bag whereas a blood stained roda was kept in a separate white plastic bag. SI Aishvir Singh got the names of registered owners of both motorcycles bearing No. DL3SAJ 7048 (make Splendor) and DL 4SAU 5239 (make CBZ) from the traffic helpline. Case property was deposited by Inspector Pankaj at Police Post Saket. The police party then reached H.No.C-18, JJ Colony, Khanpur, the residence of Mukesh (registered owner of the Splendor motorcycle). He informed the IO that the said motor cycle was taken by Appellant Suresh. According to the prosecution at about 9:30 A.M. Inspector Pankaj along with other police staff again went to AIIMS where he met the relatives of the deceased, namely, Dharmender Panwar and Sunil. The IO recorded their statements Ex.PW-7/A and Ex.PW-1/A regarding identification of the dead body. He held the inquest proceedings and sent the body for post mortem examination.

7. According to the prosecution, on 17.07.2007 at about 2:00 P.M. the IO received secret information regarding the presence of the four accused near a food rehri at T point Khanpur and arrested Appellants Rakesh, Suresh, Sandip and Chandan on identification by a secret informer. Motorcycle bearing No. DL 4SAU 5239 was parked near these four Appellants. After personal search of the Appellant Sanjay keys of the

Splendor motorcycle bearing No. DL3SAJ 7048 were also recovered. The keys were converted into a packet and sealed with a seal of "PS".

8. Appellants Suresh, Sandeep, Rakesh and Chandan made disclosure statements Ex.PW12/P, Ex.PW12/Q, Ex.PW12/R and Ex.PW12/S respectively. The four Appellants then led the police party to the spot and pointed out the place of incident. The IO prepared the pointing out memo Ex.PW12/T. Appellant Rakesh got a helmet recovered (Ex.P12/3) from the left side of the road at Anuvart Marg which was seized by memo Ex.PW12/V. Appellant Sandeep got recovered a helmet (Ex.P12/4) which was seized by memo Ex.PW12/W. Appellant Chandan took the police party to a place in front of a CNG petrol pump and took out a danda lying adjacent to the MCD office. The said danda was seized by memo Ex. PW12/X after preparing it into a sealed packet. Appellants Chandan, Sandeep, Suresh, Rakesh were found wearing blood stained shirts. They were asked to take them off; the shirts were seized by memos Ex.PW12/Y, Ex.PW12/Z, Ex.PW12/Z1 and Ex.PW12/Z2 respectively. According to the prosecution, the four Appellants were instructed to muffle their faces when they were produced in the Court on 18.07.2007.

9. On 18.07.2007 at about 6:00 P.M. Appellant Murari was arrested from his house No.L-I/150, Gali No.13, Sangam Vihar and arrest memo Ex.PW12/Z3 was prepared. He took out a white colour shirt from his bath room; it had blood stains on its left shoulder and arm. The shirt was seized by seizure memo Ex.PW12/Z6 after converting it into a pulanda and sealing it with a seal of "PS".

10. During investigation the Appellants refused to join the Test Identification Proceedings. Autopsy on the dead body of the deceased was performed by Dr. B.L. Choudhary (PW-24) who found seven injuries. He opined the cause of death to be coma as a result of head injury (injury No.1). The IO of the case produced a sealed bag with a seal of "PS" seeking his opinion regarding the stone recovered from the spot. PW-24 testified that on opening the sealed bag it was found to contain one stone weighing 20 kg with dimension 40x27x21 cms. of irregular size. He along with Dr. Raghvender Kumar, a junior resident opined that injuries No. 1 to 6 were possible due to impact of that stone. PW-24 was also shown the danda seized during investigation. PW-24 opined that injury No.7 was possible from this danda. After completion of investigation a report under Section 173 Cr.P.C was filed in the Court.

11. The Appellants pleaded not guilty to the charge for the offence punishable under Section 302 read with Section 34 IPC. The prosecution, in order to prove its case examined 29 witnesses. PW-2 Fakre Alam, PW-9A Mohd. Sagir and PW-22 Constable Rohtash claimed to be eye witnesses. PW-16 Dr. Sunil Kumar medically examined the deceased when he was removed to the casualty section of AIIMS. He declared the patient brought dead and proved his report Ex.PW16/A. PW-24 Dr. B. L. Choudhary performed the autopsy and proved post mortem report Ex.PW-24/A and gave his opinion in respect of the weapon of offence as Ex.PW-24/B. PW-7 Dharmender Panwar, (brother of the deceased) deposed that on 16.07.2007 (at about 10:30/11:00 P.M.) receiving a telephone call from a police man from AIIMS that his brother Jitender Panwar had met with an accident. He, along with his father reached AIIMS and identified his brother's corpse. On 17.07.2007 during cross-examination, the witness deposed having reached AIIMS between 10:30/11:00 P.M. and he was there till 4:00 /5:00 A.M. He met a police man, Shiv Kumar. He did not meet anyone else. Rest of the witnesses are police officials and have deposed about the part played by them during investigation of the case.

12. PW-9A Mohd. Sagir is an eye witness to the incident. The FIR was recorded on the basis of his statement Ex.PW9/A. He (PW-9A) deposed that on 16.07.2007 he along with Fakre Alam was returning from Lado Sarai park after seeing a cricket match. At about 10:30 P.M. they reached Lado Sarai Red Light, T-point, when they saw one Maruti Zen car bearing No.7646. In the meanwhile, one Hero Honda Splendor bearing No. DL3SAJ 7048 hit the bumper of the said car. Deceased Jitender Panwar (whom they knew previously) got down from the car and argued with the two boys on the motor cycle. The two boys started arguing with Jitender Panwar (the deceased). Jitender Panwar picked up a danda from his car and showed it to those boys and then sat in his car. In the meanwhile, three persons reached on a motorcycle CBZ No. 5239. They had a word with the two persons on the other motorcycle (who had argued with the deceased) and started abusing Jitender Panwar. He proceeded further and stopped at the Traffic Signal in front of the Masjid. He went out from the car with a danda. The said five persons too reached the spot and got off their motor cycles. There was a quarrel between Jitender Panwar and those five persons. The two persons who were driving the motor cycle started beating Jitender Panwar with the

help of helmets whereas the others (three persons) kicked him and gave fist blow and snatched the danda. He was given danda blows as a result of which he fell down on the road. They gave beatings to Jitender Panwar while he was lying on the road. They picked up a stone lying nearby and started hitting the deceased's head with it. They (PW9A and PW-2) raised an alarm and tried to chase the five culprits. In the meanwhile, one police man also reached the spot and accompanied them in their chase to catch the culprits. The three persons on the CBZ motorcycle fled on the bike. One of the other two tried to start the other motor cycle in order to escape, but could not start it. He, therefore, tried to run with the motor cycle. The fifth man ran towards Lado Sarai. Since the motorcycle (the Hero Honda) did not start, its rider ran towards the forest after leaving it on the left side of the bus stand. The witnesses. chase to catch the culprits was unsuccessful; therefore, they returned to the spot and found that members of the public had taken Jitender Panwar to AIIMS in his (deceased's) car. They also reached AIIMS where Jitender Panwar was found declared "brought dead".

13. PW-2 Fakre Alam and PW-22 Constable Rohtash gave their own account of the incident which we would discuss in a later part of the judgment.

14. On close of the prosecution evidence, the Appellants were examined under Section 313 Cr.P.C in order to enable them to explain the incriminating circumstances on the record against them. All of them denied involvement in the incident and took the plea that they were falsely accused in the case by the police. They stated that eye witnesses were planted by the police and had deposed falsely.

15. The Appellants Murari, Suresh and Rakesh produced, DW-1 Ram Avtar, DW-2 Mohd Farooque and DW-3 Ghanshaym to prove that at the time of the alleged incident they were with them.

16. DW-1 Ram Avtar deposed that he knew Appellant Murari for the last 10-12 years. On 16.07.2007 at about 9:00 P.M. the Appellant went to his house to clear the dues on account of milk supplied by him. He (Murari) had his dinner with him (DW-1) and left his house at 11:30 P.M.

17. DW-2 Mohd. Farooque testified that on 16.07.2007 at about

8:45 P.M. he and Appellant Suresh were present at Sainik Farms Gate No.1 and they had proceeded to Pali for loading a truck. The Appellant Suresh remained with him till 11:45 P.M.

18. Similarly, DW-3 Ghanshyam deposed that Appellant Rakesh was his neighbour. On 16.07.2007 at about 9:00 P.M. the Appellant Rakesh went to attend the birthday party of his daughter and he remained at his (DW-3) residence till 11:00 P.M.

19. By impugned judgment the learned Additional Sessions Judge (ASJ) found that Appellants Murari and Suresh were responsible for causing Injury No.1 on the person of the deceased which proved fatal. They were thus, individually and jointly held liable under Section 300 (3) read with Section 302 IPC. It was further held that the Appellants Sandeep, Chandan and Rakesh had shared the common intention of causing serious injuries on the person of the deceased and thus they were also held vicariously liable for the acts of the Appellants Murari and Suresh. Accordingly, all the Appellants were convicted under Section 302 read with Section 34 IPC and sentenced as stated earlier.

20. We have heard Mr. Sameer Chandra Advocate for Appellants Murari, Rakesh and Suresh, Ms. Meenakshi Lekhi Advocate for Appellant Sandeep, Mr. Ranjit Singh Advocate for Appellant Chandan and Mr. Jaideep Malik, Additional Public Prosecutor for the State and have perused the record.

21. It is urged by the learned counsel for the Appellants that PW-2 and PW-9A who were claimed by the prosecution to be eye witnesses to the occurrence are chance witnesses. Their testimonies do not inspire confidence as their conduct was unnatural. PW-22 (Constable Rohtash) who claimed himself to be an eye witness was disowned by the IO to be so. The testimonies of the three witnesses (i.e. PW-2, PW-9A and PW-22) are discrepant on major aspects of the prosecution version. Mohd. Sagir (PW-9A) did not give even the slightest description of the assailants; Constable Rohtash (PW-22) an alleged eye witness was associated in the search and apprehension of the culprits, though the culprits were previously not known to him which would make the investigation tainted and unfair. Therefore, it would be unsafe to rely upon their testimonies to base conviction of the Appellants.

22. Learned counsel for the Appellants referred to the crime team report Ex.PW-11/A which does not mention the weapon used, the name of the complainant is mentioned as 'PCR' though the FIR had already been recorded on the basis of the statement of PW-9A. It is contended that as per the prosecution version the statement Ex.PW-9/A of Mohd. Sagir was recorded at about 12:15 A.M. on 17.07.2007 on the basis of which the FIR was allegedly recorded immediately which is falsified by the scribe (of Ex.PW-9/A) SI Aishvir Singh initial IO of the case, who testified that the statements of Fakre Alam and Mohd. Sagir were recorded later, after completing search for the accused persons at about 6:00 A.M.

23. It is pleaded that the story of the arrest of the four Appellants Sandeep, Chandan, Rakesh and Suresh on 17.07.2007 at 2:00 P.M. at the pointing out of the secret informer at Khanpur T Point where the Appellants were allegedly standing near a food rehri is improbable and unbelievable. It is contrary to normal human conduct that four persons after committing a crime would casually stand near the place of the incident, wearing blood stained shirts. It is submitted that it has been stated by PW-24 Dr. B.L. Choudhary that "blood could not have splashed after the face of the deceased was hit with the stone as there was no large size damage of the arteries" and thus, there cannot be any blood stains on the clothes of the Appellants.

24. It is submitted that the prosecution version was that the quarrel took place all of a sudden, on a spur of moment without any preconcert or pre-planning and the Appellants were not armed with any weapon. Thus, the Appellants cannot be made liable for the act of others with the aid of Section 34 IPC.

25. On the other hand, it is contended on behalf of the State that there are some minor variations and discrepancies here and there in the testimonies of the three eye witnesses which do not affect the main substratum of the prosecution version. The recovery of danda and blood stained clothes at the instance of the Appellants has put a seal of authenticity on the prosecution version. The two public witnesses are reliable and trustworthy and thus the Appeals are liable to be dismissed.

26. PW-2 Fakre Alam is a resident of Ward No.1 Mehrauli, whereas PW-9A Mohd. Sagir is a resident of Ward No.6 Mehrauli. Deceased Jitender Panwar was not their immediate neighbour. The two public

witnesses and the deceased were not travelling together. The incident took place at quite a distance from the place of their residence. According to PW-2 he along with Mohd. Sagir (PW-9A) was returning to his home in the Wagon R when they had seen this incident. If by a coincidence or by chance someone happens to be at a crime scene at the time it takes place, he is called a "chance witness". And if he or she happens to be a relative or friend of the victim or is inimically disposed towards the accused then his being a chance witness is viewed with suspicion. (**Bahal Singh v. State of Haryana,** 1976 SCC (Cri.) 461). Of course, testimony of such a witness cannot be discarded such witness ipso facto is not unworthy of credence. The testimony of such witness, however has to be scrutinized with due care.

27. Both PWs 2 and 9A claim to have witnessed the incident from the Wagon R in which they were travelling. PW-2 deposed that on the way they noticed a Zen Car bearing No.7646. A black coloured motor cycle (Splendor make) with two boys hit the rear of the Zen. Jitender (deceased whom they knew previously) came out of the Zen Car; there was an altercation between the boys (on the motorcycle) and the deceased. Another motor cycle with three boys reached there. This resulted in an altercation between the five boys and the deceased. The deceased took out a danda from the car and showed it to the five boys. The red light turned green, the deceased's car and the motor cycles went ahead. At Anuvart Marg in front of the Masjid the two motor cycles went in front of the deceased's car. He went out and hit one of the boys and they snatched the danda. Those boys hit the deceased on his head with helmets and the danda which they had snatched (from the deceased). He fell down. Two boys came towards the foot path, picked up a stone and hit the deceased on the head. The witnesses raised alarm; the three boys on the CBZ motor cycle escaped, one boy who wielded the stone ran towards Lado Sarai; the other boy wheeled the motor cycle, and could not start it. He later left the motor cycle, and ran towards the jungle. A police man came. Mohd. Sagir, PW-2 and the police man followed the CBZ motor cycle in their Wagon R, but could not nab the assailants. The witnesses and the policeman returned to the spot. They learnt that some persons had removed the deceased to AIIMS.

28. PW-9A on the material aspect as to what happened after hitting of the car by the motor cyclist deposed that the deceased came down

from the car and scolded the two boys. The said two boys started arguing with the deceased. The deceased picked up a danda from his car and showed it to them. Thereafter, the deceased sat in the car. In the meanwhile, three persons reached there on a CBZ motor cycle. They had a word with the two boys and then started hurling abuses at the deceased. The deceased proceeded further and the five persons on the two motor cycles chased him. The deceased crossed the traffic signal and stopped the car in front of a Masjid and got down with a danda. The five persons who reached the spot on the motor cycles also got down and a scuffle took place. Two persons who were riding the motor cycles started beating the deceased with their helmets and others started giving kick and fist blows to the deceased. They snatched the danda from him and beat him with it as a result of which he fell on the road. They gave beating to the deceased with danda while he was lying on the road. They picked up a stone lying nearby and started hitting the deceased on his head. The witnesses raised alarm and tried to chase the five culprits. In the meanwhile, one police Constable reached there. He accompanied them in their chase of the culprits. Three of them escaped on the CBZ motor cycle while one of them tried to start the other motor cycle could not do so. He, therefore, held the handle of Hero Honda motor cycle and tried to flee. The fifth attacker of them ran towards Lado Sarai. The accused who was wheeling Hero Honda Motor cycle (on foot) parked it to the left of the bus stand and ran towards the jungle after crossing the iron fencing. They tried unsuccessfully to chase above said five assailants in their car. They returned to the spot and saw that some members of the public had removed the deceased to AIIMS.

29. Constable Rohtash PW-22 testified that on 16.07.2007 at about 10:30 P.M. he was patrolling the area on his motor cycle. He stopped his motor cycle at the Lado Sarai traffic signal and MB Road crossing. He noticed five persons quarreling with someone near the Mosque. They were giving leg and fist blows to a man and beating him with danda and helmets. As soon as the signal turned green the witness went forward and saw Appellants Murari and Suresh giving a stone blow on the head of that person. Appellants Rakesh and Sandeep were beating with the helmets. The Appellant Chandan was beating that person with a danda. He parked his motor cycle on one side of the road and raised an alarm pakro-pakro, the Appellant Murari fled towards Lado Sarai on foot, the Appellant Sandeep dragged the motor cycle by the handle as it did not

start. Appellants Rakesh, Suresh and Chandan fled on the CBZ motor cycle towards traffic signal of Anuvart Marg and Aurbindo Marg. Appellant Sandeep parked his motor cycle near a bus stand as it did not start and ran towards the jungle. They unsuccessfully chased the Appellants Suresh, Chandan and Rakesh till Adhchini. He, therefore, returned to the spot. Some public persons had removed the injured in his vehicle to AIIMS. When cross-examined, this witness deposed that he chased the accused persons on his motor cycle and the two public persons were sitting on his motor cycle at that time.

30. There is contradiction in the testimony of the two public witnesses and Constable Rohtash about the role assigned to each of the Appellants. There is also contradiction between the statement Ex.PW-9/A on the basis of which the FIR was recorded and the testimony of PW-9 Mohd. Sagir where the manner in which the incident took place is recorded. Similarly, there is contradiction on some aspects of the prosecution version in the statement under Section 161 Cr.P.C. of PW-2 Fakre Alam and his statement in the Court. The witnesses were cross-examined and also confronted with their earlier statements with regard to the improvements. We may not attach much importance to them as the witnesses are not expected to have a photographic memory. They are bound to mix up certain facts, particularly when, the number of assailants are five.

31. There is a contradiction on an important aspect of the prosecution version which a witness is not likely to forget or make a mis-statement even after a long lapse of time. According to PW-2 and PW-9A, Constable Rohtash (PW-22) chased the culprits in their Wagon R. The chase according to PW-22 was by him on his motor cycle and the two public persons were sitting on the pillion seat. Even if, it is assumed that the two public persons (sitting on his motor cycle) were other than PW-2 and PW-9A, yet there is no explanation as to how Constable Rohtash could accompany PW-2 and PW-9A in their Wagon R. It has emerged in the cross examination of these witnesses that 20 minutes after the chase they returned to the spot, when the injured had already been taken to AIIMS. As per the prosecution version, (which has been corroborated by PW-2, PW-9A and PW-22) the Splendor motor cycle did not start, as a result of which it was dragged by the Appellant Sandeep, on foot. According to the prosecution, when the motor cycle did not start, it was

parked near the bus stand on the left side. A perusal of the site plan Ex.PW-9/B reveals that the altercation took place between the two Appellants and the deceased at Point A, the assault of the deceased by the Appellants took place at Points B and C and the Splendor motor cycle was parked near the bus stand at Point D. PWs 2 and 9A claim to have chased the Appellants in their Wagon R whereas PW-22 (the police Constable) claimed to have chased them on his motor cycle. As noticed earlier, one of the culprits, Sandeep was dragging the motor cycle on foot (as it did not start). The distance between the place of the occurrence and the place where the motor cycle was found parked is about 50-60 metres. It would be very easy for anyone to apprehend someone who is wheeling (and not riding) a motorcycle, because its weight would slow him. In the instant case, the chase was on a motor cycle and in a car which in any case would be swifter than someone dragging a motor cycle for 50-60 metres. It is highly improbable, rather impossible that three persons chasing a person situated in a position such as the Appellant Sandeep would not be in a position to apprehend him even if it is believed that the other culprits could manage to escape.

32. According to the prosecution, PWs 2 and 9A and the police constable gave a chase in pursuit of the culprits and could return to the spot only after 20 minutes. Though, we are not even inclined to believe that a police Constable would chase a culprit than taking a mortally injured public person to a nearby hospital, yet the two acquaintances i.e. PWs 2 and 9A obviously would be more interested in saving the life of their friend rather than chasing the assailants and that too for as long as 10 minutes in a Wagon R (assuming that 10 minutes were spent in chasing and 10 minutes in returning to the spot). While dealing with this contention the Trial Court held that it would be the mental state of a witness which would govern which course to follow. We do not agree. PWs 2 and 9A were quite close to the deceased's car. Once the five Appellants had gathered and one of them had snatched the danda from the deceased and started giving him blows (while two others started giving him helmet blows) it would be the natural conduct of PWs 2 and 9A who were also young boys to intervene and save the deceased from the clutches of the five Appellants. If they preferred not to intervene, (though there was no reason not to intervene) as the Appellants were not armed with any weapon, it cannot be expected that they would give a chase to the Appellants instead of helping the deceased. Similarly, PW-

22 was riding a motor cycle. He could have reached the spot in no time to intervene and save the deceased. The conduct of PW-22 also creates doubts about his presence at the time of the incident. In fact, PW-27 Inspector Pankaj Singh admitted (when cross examined) that PW-22 was not an eye witness to the incident.

33. At this time, the testimony of PW-7 Dharmender Panwar, brother of the deceased assumes importance. He deposed that on 16.07.2007 at about 10:30 /11:00 P.M. he received a telephone call from a police man (from AIIMS) in his house that Jitender Panwar (his brother) had met with an accident. He reached AIIMS along with his father. In cross-examination, he deposed to having remained in AIIMS till about 4:00 / 5:00 A.M. He met a police man named Shiv Kumar and other police men were also present there. He, however, did not meet anyone else. If the brother (PW-7) of the deceased was present in AIIMS from 11:00 P.M. till at least 4:00 A.M. he would naturally have met PWs 2 and 9A (Mohd. Sagir and Fakre Alam) who knew the deceased. A specific reply regarding the absence of any person other than the police personnel negates the presence of PW-2 Fakre Alam and PW-9A Mohd. Sagir (whose statement Ex.PW-9/A was recorded in AIIMS by SI Aishvir Singh on the basis of which the present case was registered).

34. We would like to refer to the crime team report Ex.PW-11/A at this stage. According to PW-27 (IO) and PW-29 (SI) the crime team was summoned to the spot by PW-29. Both these witnesses were present at the spot at 12:50 A.M. at the time of the arrival of the crime team. The crime team (as per Ex.PW-11/A) inspected the spot from 12:45 A.M. to 1:20 A.M. The name of the deceased is mentioned as Jitender Panwar, aged about 35 years. The date and time of occurrence is mentioned as 16.07.2007, about 10:45 P.M. This information must have been given either by the SI (PW-29) or by the IO (PW-27). The name of the complainant is mentioned as PCR and the *modus operandi* is mentioned as by beating *"with a blunt weapon"*. The absence of the complainant's name i.e. Mohd. Sagir and the weapon used in the assault in the crime team report Ex.PW-11/A by 1:20 A.M. shows that the SI (PW-29) and the IO (PW-27) were not aware of the complainant's name and the weapon used by that time. In other words, the statement of PW-9A (Ex.PW-9/A) on the basis of which the FIR was registered had not been recorded by that time. This shows that the IO had not even met

Mohd. Sagir by that time. This inference is supported by the SI (PW-29). Though, PW-29 stated in his examination-in-chief that on reaching AIIMS he recorded statement of Mohd. Sagir, yet when cross-examined by the counsel for the Appellants Suresh, Rakesh and Murari, he stated that *"statements of Fakre Alam and Sagir were recorded later on after completing the search of the accused persons when it was about 6:00 A.M. and thereafter they were sent to their houses"*.

35. As stated earlier, the IO admitted, in his cross-examination, that PW-22 was not an eye witness to the incident. If we apply the test of caution while analysing the testimony of chance witnesses as held in **Bahal Singh** (supra) we have no option except to hold that their presence at the spot at the time of the incident is extremely doubtful.

36. Appellants Sandip @ Sanju, Chandan @ Chandu, Rakesh and Suresh were arrested on 17.07.2007 by the IO in presence of SI Aishvir Singh and HC Shiv Kumar. PW-27 (the IO) deposed that on 17.07.2007 at about 2:00 P.M. he along with SI Aishvir, HC Shiv Kumar, HC Devender and Constable Rohtash reached Khanpur T Point. He called HC Jagdish, Constable Jitender, Constable Bijender and Constable Rajender there. A secret informer informed the SHO that the two persons who were standing near the food rehri were Rakesh and Suresh (the Appellants) and two persons who were standing near the motor cycle were Sandip and Chandan (the Appellants) who were involved in the case. He interrogated and arrested them. It is quite strange that the aforesaid four Appellants were found wearing blood stained shirts at the time of their arrest. The Trial Court while dealing with this contention held that the police had conducted the raids on the night of the incident at the houses of the accused and had deputed PW-5 and other police Constables there which could have alerted the Appellants to change the blood stained clothes before they were apprehended. We are not convinced with the reasoning given by the Trial Court. The presence of the four Appellants near the place of incident and that too wearing blood stained shirts is improbable and highly suspect. If we go by the reasoning of the Trial Court that the police personnel were stationed near the Appellants. houses and had no opportunity to return to their houses and were therefore out of the house the whole night till their arrest, there was no reason for their presence near the place of the incident. Rather, they would have kept themselves away from the area and would have destroyed or washed the blood stained

clothes (if there was any blood thereon).

37. In **Khalil Khan v. State of M.P.,** 2004 SCC Cri. 1052, the Supreme Court declined to rely upon the recovery of the blood stained clothes made in similar circumstances. Moreover, it is also doubtful that the clothes of the five Appellants could be stained with the blood of the deceased if the incident took place in the manner as alleged by the prosecution.

38. According to the prosecution, two Appellants gave beatings to the deceased with their helmets, (there is discrepancy in the statements of PW-2 and PW9A, as PW-2 deposed in his examination-in-chief that Sandip and Rakesh gave helmet blows and in cross-examination he deposed that Chandan hit the deceased with the helmet whereas PW-9A testified that Sandip and Rakesh hit the deceased with the helmets, one Appellant (Chandan) gave a danda blow and two Appellants (Murari and Suresh) gave the fatal blow with the big stone). After the fatal blow no other injury was inflicted by any of the Appellants. PW-24 stated in his cross-examination that blood could not have splashed after the face of the deceased was hit with the stone as there was no large size damage of the arteries. There could have been presence of blood stains on the clothes of one or two of the Appellants who were in close contact of the deceased (in the absence of any splash of blood). Thus, the presence of blood stains on the shirt of all the five Appellants itself is suspect and points to its being planted by the police.

39. This conclusion is strengthened from the entry in register No.19 Ex.PW-15/A. The blood stained shirt of Appellant Murari was seized on 18.07.2007 as he was arrested only on that day. As per Ex.PW-15/A the shirt (though recovered on 18.07.2007) was deposited in the malkhana with PW-15/A HC Banwari Lal on 17.07.2007. It is not a case of the date being mentioned wrongly in the malkhana register because there is an entry regarding deposit of the articles belonging to the deceased by SI Aishvir Singh on 17.07.2007 after the deposit of the shirt of the Appellant Murari. This also shows that the investigation was unfair and tainted.

40. The presence of the big stone weighing 20kg at the spot is very doubtful as it does not find mention in the Crime Team Report Ex. PW11/A. Moreover, if two persons lift a stone weighing 20 kg and hit someone on the head, the head/face would be totally smashed or crushed.

The assailant in the given situation would not like to hold the stone and give only a mild blow to the victim.

41. The prosecution heavily relies on the refusal of the Appellants to join the Test Identification Parade (TIP) coupled with the identification of the Appellants in the Court by the two public witnesses. Refusal to participate in TIP would lead to an inference that if the Appellants had joined the TIP they would have been identified by the witnesses. This does not necessarily mean proof of guilt. There could be justification on the part of an accused to refuse to join a TIP for either he or his photograph had been shown to the witnesses or there could be other opportunities to the witnesses to see him.

42. According to the prosecution, Appellants Suresh, Rakesh, Sandip and Chandan were arrested on 17.07.2007 at about 3:00 P.M. They were also taken to the spot. No evidence has been produced by the prosecution to show that the Appellants were instructed to keep their faces muffled at the time of their arrest. Moreover, if the investigation is not fair, there is every possibility of the Appellants being shown to the witnesses. Although, Constable Rohtash was alleged to be an eye witness, yet he was associated by the IO in the search of the assailants (the Appellants). Moreover, not even a bare minimum description of the assailants (the Appellants) was given in his statement Ex.PW-9/A by Mohd. Sagir. Even the age, the build, the height or the clothes worn by the assailants were not mentioned in the statement. After the apprehension of the Appellants TIP has to follow when the crime was committed by unknown persons. Associating Constable Rohtash in search of the Appellants casts serious reflection on the fairness of the investigation by the IO. While refusing to participate in the TIP, the five Appellants stated that their photographs were taken through mobile phone and they were shown to the witnesses. This plea of the Appellants cannot be easily brushed aside. Even otherwise, the refusal to join the TIP itself is not sufficient to hold the Appellants guilty.

43. We are conscious of the fact that an accused cannot be acquitted merely on the ground that the investigation is defective or is tainted. (**Paras Yadav v. State of Bihar,** 1999 (2) SCC 126 and **Zahira Habibulla H. Sheikh v. State of Gujarat,** (2004) 4 SCC 158). The probability that PWs 2, 9A and 22 were not present at the spot at the time of the actual incident is too strong and cannot be ignored rendering their testimonies

to be suspect and unworthy of reliance.

44. In view of the foregoing discussions, we are of the view that there are grave doubts in the case of the prosecution in the manner the occurrence took place, who participated in the assault and whether all the five Appellants were at all present at the spot during the incident. The Appellants are entitled to the benefit of the doubt.

45. There is another aspect of the prosecution case. All the Appellants have been convicted by the aid of Section 34 IPC. In criminal law, every accused is responsible for his own act of omission or commission. This rule is subject to the exception of vicarious liability enshrined under Section 34 IPC. Direct proof of common intention is seldom available and therefore such intention can only be inferred from the facts and circumstances of each case. In **Munni Lal v. State of M.P.** 2009 (11) SCC 395, it was held as under:-

> "…….In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab the existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.
>
> The section does not say 'the common intentions of all', nor does it say 'an intention common to all'. Under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention.

As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in **Chinta Pulla Reddy v. State of A.P.** Section 34 is applicable even if no injury has been caused by the particular accused himself. For applying Section 34 it is not necessary to show some overt act on the part of the accused."

46. According to the prosecution version, after the altercation between the deceased and the Appellants at Lado Sarai T point, the deceased proceeded further on Anuvrat Marg and the five boys on their motor cycles followed him. The deceased got down from his car while holding a danda in his hand. The five boys also got down from their respective motor cycles. There was a scuffle between the deceased and these five boys. The deceased gave danda blows to the boys. Two of the boys inflicted helmet blows on the head of the deceased whereas the third one snatched the danda and gave danda blows on the head of the deceased. The two boys on the Splendor lifted a big stone lying nearby on the pavement and hit it on the head of the deceased.

47. It is evident that the five boys were unarmed whereas the deceased was the aggressor who took out the danda from his car simply because the bumper of his car was struck by one of the motor cyclists. It was he who started the attack by giving them danda blows. The Trial Court relied upon **Pandu Rao v. State of Hyderabad,** AIR 1955 SC 216 where it was held as under:-

"The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived."

48. The Trial Court held that the common intention which initially was merely to teach a lesson to the deceased progressed into common intention to cause serious injuries after the deceased came out with his danda from the car. We do agree that there may have been a common intention to teach the deceased a lesson who himself was an aggressor or to cause serious injuries on his person as he (the deceased) himself had given danda blows to the five boys. It was stated by PW-22 in his cross-examination that it took one or two minutes for the first incident (Lado Sarai T point where altercation took place) and one/two minutes for the second incident. True, common intention can develop at the spot or on the spur of moment. Even if, the prosecution version given in the FIR is admitted as it is, in our view, there was no common intention to cause any injury till the deceased got down and gave danda blows to the five boys. Thereafter, the acts of the assailants were spontaneous. At the most there could be common intention to cause serious injuries on the person of the deceased but there was no common intention to cause injuries with the intention or knowledge to cause death of the deceased.

49. Therefore, the three Appellants Sandip, Rakesh and Chandan could not be fastened with the vicarious liability of committing murder with the aid of Section 34 IPC. Even if, the prosecution case is accepted as it is, they could have been held guilty for the offence punishable under Section 325 read with section 34 IPC.

50. It is argued by the learned counsel for the Appellants that no injury was caused on the person of the deceased by any big stone as is the case of the prosecution. The learned counsel cited several reasons for the same.

51. We have been taken through the report of the crime team Ex.PW-11/A. The crime team was summoned to the spot by the IO after recording statement Ex.PW-9/A of Mohd. Sagir wherein he had disclosed the injuries inflicted with the stone on the person of the deceased. According to the report Ex.PW-11/A the crime team made an inspection between 12:45 A.M. to 1:20 A.M. The presence of any stone is absent in the report. According to the IO and SI Aishvir Singh the stone was seized from the spot along with the other articles just after 2:10 A.M. The two stones/roda having blood stains were kept in separate white plastic bags were converted into two packets, sealed with the seal of

'PS' and seized by memo Ex.PW-12/D. All these articles were deposited in Police Post Saket at 3:30 A.M. A perusal of register No.19, Ex.PW-15/A however reveals that the blood stained stone was deposited after the helmets, blood stained danda, blood stained clothes of the accused persons (which were recovered at the instance of some of the Appellants at 3:00 P.M.) and box containing viscera were deposited on 17.07.2007.

52. This is not the end of the matter. PW-2 and PW-9A the two public witnesses, who according to the prosecution witnessed the occurrence, returned to the spot from AIIMS along with the IO. Though, PW-9A Mohd. Sagir is a witness to the seizure of blood, blood stained earth, Splendor motor cycle, blood stained shoes of the deceased and blood stained seat cover of the Maruti Zen Car (belonging to the deceased) which are Exs. PW-9/C, PW-9/D, PW-9/E and PW-9/F respectively, he is not a witness to the recovery of the blood stained roda and stone Ex.PW-12/B and Ex.PW-12/C respectively. This shows that the stone and the roda were not seized in presence of PWs 2 and PW9A.

53. The autopsy on the dead body was performed by Dr. B.L. Choudhary on 17.07.2007 and the Post Mortem report was immediately made available. The big stone in a sealed bag was produced before PW-24 for his opinion only on 21.08.2007. PW-24 gave the dimensions of the stone as 40 cms x cms x 21 cms and to be of an irregular shape. The doctor further opined that injuries No.1,2,3,4,5 and 6 were possible by impact of this stone. The stone Ex.PW12/1 was seized from the spot in the wee hours of 17.07.2007 this would have been shown to the doctor either before the post mortem or immediately thereafter. The fact that the IO waited for over a month to produce the big stone Ex.PW-12/1 before PW-24 makes the recovery in the manner alleged by the prosecution doubtful.

54. In view of the reasons recorded above, the contention raised on behalf of the Appellants that the big stone Ex.PW-12/1 was subsequently planted cannot be easily brushed aside.

55. The Danda Ex.P-12/5 is alleged to have been recovered at the instance of Appellant Chandan from near the petrol pump in pursuance of the disclosure statement Ex.PW-12/S purported to have been made by Appellant Chandan. According to the prosecution version, the Appellants including the Appellant Chandan ran away after inflicting injuries on the

person of deceased. PWs 2, 9A and 22 chased the Appellants in order to catch them. If danda was thrown by Appellant Chandan, it must have been noticed by PWs 2, 9A and 22. In any case, the danda Ex.P-12/5 could not have been hidden by the Appellant Chandan. The recovery of danda at the behest of the Appellant Chandan therefore cannot be believed.

56. In this view of the matter, Appellants Murari and Suresh cannot be held liable for committing murder of the deceased either individually or collectively with the aid of Section 34 IPC.

57. On filing appeal being Criminal Appeal No.139/2011 an application was moved by the Appellant Rakesh claiming himself to be a juvenile on the date of the commission of the offence. A plea with regard to juvenility can be raised at any stage and even in Appeal. (**Jyoti Prakash Rai v. State of Bihar,** AIR 2008 SC 1696; **Pratap Singh v. State of Jharkhand,** AIR 2005 SC 2731; **Gurpreet Singh v. State of Punjab,**2005 (12) SCC 615; **Jitender Ram v. State of Jharkhand,** 2006 (9) SCC 428; **Rajnit Singh v. State of Haryana** 2008 (9) SCC 453). By order dated 03.02.2011, this Court directed an enquiry to be conducted by the Trial Court. As per the report dated 01.03.2011, Appellant Rakesh was 17 years and 24 days on the date of the commission of the offence. Thus, he was a juvenile on the date of the commission of the offence and, therefore, could not have been tried by any Court. On the other hand, only an inquiry could have been conducted by the Juvenile Justice Board under Section 14 of Juvenile Justice Act of 2000.

58. Since we have already taken a view that the case against the Appellants including the juvenile is not free from doubts, we do not, therefore, consider appropriate to remit the case of the Appellant Rakesh to the Juvenile Justice Board for inquiry under Section 14 of the Juvenile Justice Act of 2000.

59. In view of foregoing discussion, we are of the view that there are grave and serious doubts in the prosecution version. The learned Additional Sessions Judge fell into error in convicting the Appellants under Section 302 read with Section 34 IPC. The Appeals have to succeed. Accordingly, we set aside the judgment and order of the Trial Court and acquit the Appellants of the charge framed against them. Their personal bonds and surety bonds are discharged. They are ordered to be set at liberty.

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CRL. APPEAL

HARISH CHAWLA ....APPELLANT

VERSUS

STATE ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. APPEAL NO. : 662/2000 DATE OF DECISION: 03.05.2011

Indian Penal Code, 1860—Section 307—Aggrieved by judgment of conviction under Section 307 of Act and order on sentence to undergo rigorous imprisonment for 10 years and fine of Rs.5,000/-, in default of payment of fine to undergo rigorous imprisonment for one year, appellant has challenged order only qua quantum of sentence—It was urged period of sentence be modified to period already undergone as case of appellant does not fall within ambit of an 'intention' to commit an act that is likely to cause death but an intention to cause an injury which may probably cause death—Held:- To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted—Although nature of injury actually caused may often give considerable assistance in coming to a finding as to intention of deceased, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds—Section makes a distinction between an act of accused and its result, if any—Such an act may not be attended by any result so far as person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section—It is not necessary that injury actually caused to victim of assault should be sufficient under ordinary

circumstances to cause death of person assaulted—Intention of appellant was clear from fact that after shooting once at thigh of PW1, appellant again shot him and also asked his accomplice to shoot him and it was mere co-incidence that both bullets did not hit Complainant as he ran into house—Order of sentence modified, appellant to undergo Rigorous Imprisonment for a period of 8 years and fine of Rs.30,000/- out of which if realised Rs. 25,000/- be given as compensation to complainant.

Section 307 deals with two situations so far as the sentence is concerned. Firstly, whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and secondly if hurt is caused to any person by such act the offender shall be liable either to imprisonment for life or to such punishment as indicated in the first part i.e. 10 years. **(Para 10)**

Important Issue Involved: To justify a conviction under Section 307 IPC it is not essential that bodily injury capable of causing death should have been inflicted—Although nature of injury actually caused may often give considerable assistence in coming to a finding as to intention of deceased, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds—Section makes a distinction between an act of accused and its result, if any—Such an act may not be attended by any result so far as person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section—It is not necessary that injury actually caused to victim of assault should be sufficient under ordinary circumstances to cause death of person assaulted.

[Sh Ka]

APPEARANCES:

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

FOR THE RESPONDENT : Mr. Manoj Ohri, APP for the State.

CASES REFERRED TO:

1. *Pappu @ Hari Om* vs. *State of Madhya Pradesh,* (2009) 3 SCC(Crl.) 1450.
2. *Balkar Singh* vs. *State of Uttarakhand,* (2009) 15 SCC 366.
3. *State of Maharashtra* vs. *Balram Bana Patil,* 1983 Crl.J 331.
4. *Sarju Prasad* vs. *State of Bihar* AIR 1965 SC 843.

RESULT: Appeal disposed of.

MUKTA GUPTA, J.

1. This is an appeal against the judgment of conviction and sentence dated 25th July, 2000 and 29th July, 2000 whereby the Appellant has been convicted for offences punishable under Sections 307 IPC and directed to undergo a sentence of rigorous imprisonment for ten years and a fine of Rs. 5,000/-. In default of payment of fine, the Appellant is to undergo Rigorous Imprisonment for a period of one year.

2. The facts leading to the prosecution filing the charge-sheet are that on 19th June, 1998 at about 6:30 A.M. when the Complainant Vinod Kumar Gupta was present at his shop at 281/80 Pandav Road, Vishwas Nagar, Shahdara, the Appellant Harish Chawla with one Narender who knew him previously came to his shop and asked why he did not send money to him. On the Complainant replying that why he should pay the money, Harish Chawla took out a country-made pistol and fired at his right thigh protruding towards left in the skin of his thigh. On the Complainant escaping from the bullet injuries, Narender also fired at him from the behind. In the meantime, his brother and other persons started collecting. Thus on seeing the people coming, both the accused ran away. On the Statement Ex. PW1/A of the injured, FIR Ex.PW 6/A was registered and both the accused were arrested. After recording the statements of the prosecution witnesses, the accused persons and the

defence witnesses, the learned trial court convicted the Appellant for offence punishable under Section 307 IPC and sentenced as abovementioned. Learned Trial Court acquitted co-accused Narender of the charges framed against him.

3. Learned Sr. Counsel for the Petitioner does not challenge the present appeal on merits and confines his arguments to the quantum of sentence. He states that the Appellant was awarded a sentence of imprisonment for a period of ten years out of which he has already undergone a sentence of Rigorous Imprisonment for a period of more than seven years. He prays that the sentence of the Appellant be modified to the period already undergone. Reliance is placed on **Pappu @ Hari Om vs. State of Madhya Pradesh,** (2009) 3 SCC(Crl.) 1450 and **Balkar Singh vs. State of Uttarakhand,** (2009) 15 SCC 366. It is contended that the facts as stated do not fall within the ambit of an intention to commit an act that is likely to cause death but an intention to cause an injury which may probably cause death. In the decisions quoted above, the Hon'ble Supreme Court was dealing with the distinction between the knowledge of an offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons being caused from his imminently dangerous act, approximating to a practical certainty. It was held that when the knowledge on the part of the offender must be of the highest degree of probability, the act would amount to an offence punishable under Section 302 IPC having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

4. Per contra learned APP contends that there is no ground that the Appellant should be granted the relief claimed by him. There is sufficient evidence on record to show that the Appellant possessed the intention to kill and cause such a bodily injury which is sufficient to cause death in ordinary course and for an act to constitute an offence under Sec. 307 IPC, it is sufficient that there is intention coupled with some overt act in execution thereof, and thus, there is no merit in the present appeal and the same is liable to be dismissed.

5. I have heard learned counsel for parties and perused the record. The facts of the present case show that on 19th June, 1998 at about 6:30 to 6:40 A.M. the Appellant along with another associate whom he named

as Narender went to the shop of the Complainant PW1 and asked why he did not send money to him. On PW1 stating that he would send the money later on, the Appellant fired shot by a country-made pistol on his right thigh and the bullet shot entered his thigh from right side, protruding towards his left thigh skin. Thereafter the Appellant directed his accomplice Narender to fire a shot who also fired at PW1. When PW1 was running into his house, the Appellant fired a third shot at him. This shows the clear intention of the Appellant was to cause death of PW1. The MLC Ex. PW17/A records that there was a bullet injury on the mid thigh region of PW1, the Complainant though the nature of injury is stated to be simple.

6. It would be relevant to reproduce Section 307 IPC:

> "307. Attempt to murder.--Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life or to such punishment as is hereinbefore mentioned.
>
> Attempts by life-convicts.
>
> Attempts by life-convicts.-When any person offending under this section is under sentence of imprisonment for life he may, if hurt is caused, be punished with death.

7. The Hon'ble Supreme Court in **Sarju Prasad vs. State of Bihar** AIR 1965 SC 843 in para 6 observed that mere fact that the injury actually inflicted by the accused did not cut any vital organ of the victim, is not by itself to take it out of the purview of Section 307 IPC. Hon'ble Supreme Court in **State of Maharashtra vs. Balram Bana Patil,** 1983 Crl.J 331 had observed:

> "9. To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced

> from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.
>
> 10. The High Court, in our opinion, was not correct in acquitting the accused of the charge under Section 307 IPC merely because the injuries inflicted on the victims were in the nature of a simple hurt."

8. The reliance placed by learned Senior Counsel for the Appellant on the decision in **Pappu @ Hari On** (supra) and **Balkan Singh**(supra) is misconceived. In **Balkan Singh** (supra) there was an old enmity and the Appellant wanted the deceased to drink with him. On the refusal of the deceased, the Appellant therein first fired in the air then indiscriminately at the tractor resulting in the death of the deceased. In **Pappu**(supra) the Appellant therein quarrelled with the deceased and his companions for not letting him play cards and on their refusal a quarrel ensued resulting in the Appellant giving a gun shot injury on the right shoulder of the deceased. Whereas in the present case, the Appellant along with one other person arrived at the shop of the injured and asked why he did not send the money to him. On PW1's telling that he would send the money later on, the Appellant fired a shot at his thigh. This shot certainly cannot be with the intention of causing murder. However later he asked his co-accomplice to fire a shot, who fired and then the Appellant also shot another bullet but the same did not hit PW1. Though initially the common intention of the Appellant may have been not to commit murder of PW1 but only to threaten him that he pays the money but the subsequent acts

of asking the co-accused to fire and himself firing cannot be held to be not caused with an intention to commit the murder of PW1. The intention is born out clearly from the sequence of events of the overt acts.

9. Thus, on a perusal of Section 307 IPC and in the light of the law laid down by the Hon'ble Supreme Court, the present case falls clearly within the ambit of Sec. 307 IPC. The weapon of offence used is a firearm which is a dangerous weapon. The intention of the Appellant is clear from the fact that after shooting once at the thigh of PW1 the Appellant again shot him and also asked his accomplice to shoot him and it was mere co-incidence that both the bullets did not hit the Complainant as he ran into the house.

10. Section 307 deals with two situations so far as the sentence is concerned. Firstly, whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and secondly if hurt is caused to any person by such act the offender shall be liable either to imprisonment for life or to such punishment as indicated in the first part i.e. 10 years.

11. A perusal of the order on sentence passed by the learned Additional Sessions Judge would show that he came to the conclusion that the young age and that he had a widowed mother to look after were the mitigating circumstances in his favour and awarding of the maximum sentence would be too harsh and disappointing in the life. However, the learned trial court erred in coming to a conclusion that facts of the case attracted the punishment which may extend to life. As held above the injury was caused by the Appellant first when the Appellant had no intention to commit murder and when the Appellant had the intention to commit murder and two shots were fired no injury was caused. Thus, in the facts of the present case, the maximum punishment that could be awarded to the Appellant was imprisonment for a period of 10 years and fine. The learned trial court rightly held the offence committed by the Appellant was a serious one where he was illegally demanding money and on refusal fired gun shots, but in view of the mitigating circumstances, he should not be awarded the maximum sentence.

12. Thus, while maintaining the conviction of the Appellant for

offence punishable under Sec. 307 IPC the order on sentence is modified to the extent the Appellant will undergo Rigorous Imprisonment for a period of 8 years and a fine of Rs.30,000/- out of which if realized Rs.25,000/- will be given as compensation to the complainant and in default of payment of fine will undergo simple imprisonment for a period of one year. The appeal is accordingly disposed of. The Appellant is in custody. He will undergo the remaining sentence.