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P.S.D. 25.7.2012
650

INDIAN LAW REPORTS
DELHI SERIES
2012

(Containing cases determined by the High Court of Delhi)

VOLUME-4, PART-I

(CONTAINS GENERAL INDEX)

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

Annual Subscription rate of I.L.R.(D.S.) 2012
(for 6 volumes each volume consisting of 2 Parts)

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

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Controller of Publications
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Email:acop-dep@nic.in (&) pub.dep@nic.in
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Fax.: 23817876

PRINTED BY : **J.R. COMPUTERS, 477/7, MOONGA NAGAR,
KARAWAL NAGAR ROAD, DELHI-110094.
AND PUBLISHED UNDER THE AUTHORITY OF HIGH COURT OF DELHI,
BY THE CONTROLLER OF PUBLICATIONS, DELHI-110054—2012.**

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ANCIENT MONUMENT ACT, 1958—Second respondent had purchased a property in Nizamuddin East—Sought permission to construct upon it—Local authorities MCD etc. to process the application for sanction of the plan after the Archaeological Survey of India (ASI) accorded the approval—By virtue of notification dated 16.06.1992 of ASI, all construction within 100 meters of the protected monuments were prohibited—The ASI used to consider application for permission within this area on case-to-case basis—Constituted an expert Committee—The High Court in an earlier LPA held that the notification constituting the Expert Committee and consequent permission accorded by it, beyond the authority conferred upon the ASI by Act—Had a snow boiling effect since ongoing construction at various stages throughout country jeopardized—The executive step-in and issued an ordinance setting up an Authority to oversee implementation of enactment and at the same time validating subject to certain condition, permission granted by expert committee from time to time—Later on, the ordinance was replaced by an Act which amended the Ancient Monument Act, 1958—Appellant filed writ petition against the grant of permission—Contended the permission granted to the second respondent illegal and could not be implemented—The permissions conditioned upon time would be routinely extended and this defeats the very concept of prohibited area—ASI contented before Ld. Single Judge in view of the amended provision of the Act, the petition had been rendered merit less—Single Judge accepted the arguments that provision validates the permission and not the construction already carried out—The question which arose was whether the said permission was time bound—If so, whether the validation by amendment of the Act of the said permission permitted the extension of time for raising the construction—Court Observed—The permission as

recommended by EAC and as granted by Director General, ASI were not time bound—Such condition of time was added by Superintending Archaeologist while communicating the permission to the applicant to ensure compliance—Observed—Countersigning Authority cannot add to the conditions attached to the permission by primary authority—Thus, superintending archaeologist as countersigning Authority, had no power to add to the condition attached to the permission—Appeal dismissed.

ARBITRATION AND CONCILIATION ACT, 1996—Section 33—Indian Evidence Act, 1872—Section 114—Dispute arose qua contract awarded by Respondent to appellant for carrying out earth work for railway formation in construction of minor bridges—To settle dispute, Arbitration clause invoked, arbitrator made and published award in favour of appellant, amount was to be paid within two months from date of award—Appellant found clerical mistakes in award and thus filed application under Section 33 of Act—Application was sent on 18.06.2002 by UPC addressed to arbitrator and copy of it was sent to Respondent also—Learned Arbitrator was not available in Delhi from 18.06.2002 to 28.06.2002 though his office and residence remained open—Another communication was sent by appellant dated 22.07.2002 once again under UPC making reference to earlier application dated 18.06.2002 received by learned Arbitrator—Appellant was informed by office of Arbitrator about non receipt of application dated 18.06.2002—Respondent opposed second application of appellant on ground that no application dated 18.06.2002 was moved by appellant and subsequent application was time barred—However, learned Arbitrator made necessary corrections in award by way of two applications moved by appellant—Aggrieved by said order, Respondent filed objections—Learned Single judge though sustained plea of limitation and reached to a conclusion in favour of Respondent

but did not examine merits of the claim of appellant seeking correction—Thus, aggrieved appellant preferred appeal—According to Respondent application dated 18.06.2002 sent under UPC could not raise presumption in favour of appellant—Held:- Sending a communication by UPC is a mode of service as an acceptable mode of service and a presumption can be drawn under Section 114 (f) of Indian Evidence Act, 1872 in that regard—This, however, does not mean that presumption is not rebuttable and must follow in any case since there may be surrounding circumstances which may create suspicion or other facts may be brought to notice which would belie plea.

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— Section 9 & 11—Code of Civil Procedure, 1908—Section 16 & 20—Petitioner & Respondent entered into MOU/Agreement whereby Respondent company agreed to transfer its rights, title and interest in contiguous agricultural land measuring 150 acres to petitioner for total consideration of Rs. 102 Crores—Petitioner Company agreed for a value derived after reducing liabilities of Respondent Company—Separated detailed agreement covering all aspects of transaction had to be executed within 30 days from date of MOU—Land was situated on By Pass Road, Village Valla & Village Verka, District Amritsar, Punjab, approved by Government of Punjab for development of residential colony—However, due to failure of respondent Company in giving specific details of complete contiguous land and its revenue records, measurement, interest etc. for purpose of ascertaining value of shares, separate detailed agreement for transfer of shares never got executed—According to petitioner, it came to know that respondent was only having 80 acres of clear and developable contiguous land as against false representation of having approximately 150 acres of clear land—Said fact was deliberately suppressed by respondent company at the time of execution of MOU whereas petitioner duly acted upon MOU and made various payments

to respondent company from time to time—Subsequently, petitioner company learnt that promoters of respondent Company were already in process of transferring share holding of Company and immovable assets to third party, therefore they filed petition seeking restraint orders against respondent Company from transferring, mortgaging creating any charge or lien on share holding of Company etc. and also prayed for appointment of Indian arbitrator to adjudicate dispute between parties—However, Respondent challenged jurisdiction of Delhi courts alleging land was situated in Amritsar and MOU executed between parties was essentially agreement for transfer of said land and purchase of share holding of respondent Company was only a method for transfer of land—Therefore, petition was hit by proviso of Section 16 (d) of Code—On behalf of petitioner, it was urged that they were not claiming specific performance of MOU or possession of land—Also, respondent Company had its registered office in Delhi—Petitioner was also in New Delhi, agreement was executed in New Delhi, meetings of two representatives, both pre and post MOU, took place in Delhi and shares of respondent Company were agreed to be transferred in Delhi; therefore, Delhi Courts had jurisdiction—Held:- If an agreement is for sale and purchase of immovable property then Delhi Court does not has jurisdiction and petition will be required to be filed at a place where land is situated—Whereas, if it was an agreement to sale and purchase of shares, compliance of which can be obtained by personal obedience then Delhi Court has jurisdiction—Relief claimed by petitioner does not simply involve transfer of shares in books or in office of Registrar of Companies, but it would also involve transfer of possession of land in question—Therefore, Delhi Courts lack jurisdiction over subject matter.

Ansal Housing & Construction Ltd. v. *AJB Developers (P) Ltd.* *418*

CARRIERS ACT, 1865—Sections 8 and 9—Section 10—Appellant/defendant took upon transportation of packages of

colour picture tubes from Malanpur to New Delhi—Goods loaded in truck covered under the Marine Insurance Policy—Truck met with an accident—Respondent/plaintiff suffered loss of Rs. 3,03,715—Notice under Section 10 Carriers Act served vide letter dated 23.04.1999—Claim lodged with the Insurance company—Surveyor appointed who gave report dated 13.04.1999 and 30.04.1999—Claim settled by insurance company—Being subrogated filed the suit—Held—Part of cause of action arose at Delhi—The Court at Delhi has territorial jurisdiction—Suit decreed—Aggrieved appellant/defendant filed the regular first appeal—Held—Truck of the transporter appellant/defendant involved in accident—Statutory liability on account of negligence fastened—Part of cause of action arisen in Delhi—Court at Delhi have territorial jurisdiction—Appeal dismissed.

Roadlines Corporation (P) Ltd. v. *Oriental Insurance Co. Ltd. & Anr.* *22*

CENTRAL CIVIL SERVICES (CONDUCT) RULES, 1964— Government servant holding a elective office in National Sports Federation—Central Government entitled to lay down guidelines—The petitioner a government servant, serving under Govt. of UP—Claimed special interest in sports of shooting and associated with National Rifle Association—Co-opted as honorary Treasurer of the Association and continued till 2005—Contested election for the post and elected till the expiry of four years terms till 2009—Again election held—Re-elected Treasurer of NRAI for four years which would expire in 2013—Show cause notice issued by NRAI following the Govt. advice dated 24.12.2010 that petitioner as a serving government servant might not continue as treasurer for a period exceeding four years or one term whichever less, as to why governing body should not consider his removal from the post of honorary Treasurer—Meeting of governing body held on 28.03.2011—Show cause notice considered—General Body passed resolution to remove the petitioner—Petitioner contended that Central Government Circular not applicable to

him *ipso-facto*—Further contended that petitioner belongs to Uttar Pradesh States Service and was not Central Government Servant and CCS (Conduct Rules) were not applicable to him—State of U.P. not made any similar rules/instructions—Per-contra State Government/UT Administration bound by said circular in relation to National Sports Federation—National Sports Federation recognized and regulated by Central Government—Received aid and funds from Central Government—Further contended that in public interest, the government servant whether in the Central Government or State Government should not be involved in Sports Federation for an indefinite period in an elected capacity as it was bound to affect the discharge of their primary responsibilities and duties as government servant—Held—Central Government entitled to lay down guidelines to govern National Sports Federation—Such guidelines bound on and enforceable against National Sports Federation—A Central Government aided and funded the activity and regulated them—It is true that a senior government servant in the Central Government should be available to it to render his services and no activity unconnected with his official duties should be allowed to interfere in efficient discharge of such duties; it was equally true for State government servant—Further the decision of General Body removing him has not been assailed—Writ Petition Dismissed.

Shyam Singh Yadav v. *National Rifle Association of India* *1*

CENTRAL EXCISE ACT, 1944—Section 11A;—Limitation Act, 1963—Section 5—Petition against notices and letter of demand of interest on duty short paid-No direction on interest in the order—Whether demand of interest is barred on account of delay and laches—Held—Period of limitation unless otherwise stipulated by the statute which applies to a claim for the principal amount, should also apply to the claim for interest thereon—Held—In present case period of limitation for demand for duty would be one year therefore, period of limitation for

demand for interest also would be one year—Demand beyond the period of limitation would be hit by principles of limitation—Demand for interest quashed—Petition allowed.

Kwality Ice Cream Company and Anr. v. *Union of India and Ors.* *30*

CODE OF CIVIL PROCEDURE, 1908—Section 20—Territorial Jurisdiction—Carriers Act, 1865—Sections 8 and 9—Section 10—Appellant/defendant took upon transportation of packages of colour picture tubes from Malanpur to New Delhi—Goods loaded in truck covered under the Marine Insurance Policy—Truck met with an accident—Respondent/plaintiff suffered loss of Rs. 3,03,715—Notice under Section 10 Carriers Act served vide letter dated 23.04.1999—Claim lodged with the Insurance company—Surveyor appointed who gave report dated 13.04.1999 and 30.04.1999—Claim settled by insurance company—Being subrogated filed the suit—Held—Part of cause of action arose at Delhi—The Court at Delhi has territorial jurisdiction—Suit decreed—Aggrieved appellant/defendant filed the regular first appeal—Held—Truck of the transporter appellant/defendant involved in accident—Statutory liability on account of negligence fastened—P vujuart of cause of action arisen in Delhi—Court at Delhi have territorial jurisdiction—Appeal dismissed.

Roadlines Corporation (P) Ltd. v. *Oriental Insurance Co. Ltd. & Anr.* *22*

— Section 144, 151—Application seeking direction to petitioner to pay for loss occurred on account of fluctuation in foreign currency while remitting the amount payable under Letter of Credit pursuant to order of High Court and in terms of subsequent order of Supreme Court-Maintainability—Held—Applicant could maintain an application u/s 144 for any loss it may have suffered as a result of the orders of this Court which were set aside by the Supreme Court—On merits, however the application fails as there was no guarantee in the contract or L/C that Applicant would be paid in a currency

other than US$. Since there is in international trade a time lag between the transaction and receipt of proceeds, hedging of risks associated with currency exchange fluctuations in not unknown. Exporters and importers are exposed to and therefore anticipate and account for such risks. Application Dismissed.

PEC Limited v. *Thai Maparn Trading Co. Limited & Anr.* *35*

— Order 12 Rule 6—Transfer of Property Act, 1882—Section 106 & 116—Respondent/landlord wrote a letter 28.12.2010 after expiry of tenancy by efflux of time, to vacate the property—Appellant did not vacate; legal notice sent on 4.2.2011 terminating the tenancy—Appellant failed to vacate—Appellant bank had account of respondent in their branch—Started depositing rent in the account—Claimed by tenant that by acceptance of such deposit fresh tenancy came into existence—Landlord when came to know of surreptitious and unilateral deposit of rent, wrote a letter dated 12.07.2011 that deposit of rent was without any instruction on their behalf and the deposit would be taken without prejudice to their right—Court observed any amount received after the termination of tenancy can surely be taken as charges towards use and occupation because after all the tenant had continued to use and occupy tenanted premises and was liable consequently to pay user charges—Fresh tenancy is a bilateral matter of contract coming into existence—Unless there is bilateral action and an agreement entered into to create fresh tenancy, mere acceptance of rent after termination of tenancy cannot create fresh tenancy—Appellant Bank Contended that since the appellant disputed all the aspect in the written statement, decree could not be passed by Trial Court under Order 12 Rule 6—Held—Contention to be misconceived as existence of relationship of landlord and tenant, the factum of premises not having protection of Delhi Rent Control Act, 1958, and fact of tenancy termination by service of a legal notice not disputed in the written statement—Fresh tenancy

also not found to have been created—Appeal dismissed.

Punjab National Bank v. *Virendra Prakash & Anr.* *110*

— Section 35—Cost—Actual, realistic and proper cost would go a long way to control false pleadings and also unnecessary adjournments—Dishonest and unnecessary litigation is a strain on judicial system—Cost of Rs. 2 lacs imposed.

Punjab National Bank v. *Virendra Prakash & Anr.* . *110*

— Order 39, Rule I and 2—Trade Marks Act, 1999—Section 11, 23, 28, 31 and 134—Copyright Act, 1957—Section 62—Trade Marks Rule, 2002—Rule 37—Plaintiff registered trade mark owner of expression "SHRIRAM" for vast range of products since 1960—By interim order, defendants restrained from manufacturing or selling any produce by name of "SHRIRAM CARTAP" which is deceptively similar trademark of plaintiff—Case of defendants that they have got registration of trade mark from registry—Date of registration relates back to date of application—Plaintiff is entitled to continue with suit for passing off which is still maintainable but defendants are residing and carrying on their business outside jurisdiction of this court—Plaintiff under action of passing off can not take advantage of section 134(2) of Act in order to invoke territorial jurisdiction—Plaint is liable to be returned because of lack of territorial jurisdiction—Held—Defendants did not amend written statement after obtaining registration nor defendants have filed any application for return of plaint—Defendants in their written statement have not denied existence of territorial jurisdiction of this Court—On date of institution, this court had jurisdiction to entertain and try proceedings on basis of provisions under law—One fails to understand as to why defendants are now challenging jurisdiction on passing off when in written statement in cause of action, defendants admitted territorial jurisdiction—Registration has been secured by defendants which has been although applied prior but, was prosecuted and obtained pursuant to interim orders passed by

this court in matter—Registrar of Trade Marks has not cited previously registered trade mark of plaintiff as a matter of conflicting mark in examination report and proceeded to grant registration without citing plaintiff's prior registered mark and also perhaps not been informed about interim orders and seisin of dispute by this Court and granted registration contrary to Rule 37 of T M Rules—By ignoring mandatory provisions of Act and granting registration to defendants, it is clear that it is done with malafide intention, in order to defeat orders passed by court—It is a triable question whether registration of defendants is actually a valid one or is it just entry wrongly remaining on register, depending upon inference which court is going to draw by way of impact of subsequent events—Objection qua jurisdiction at this stage can not be sustained and same is dismissed.

DCM Shri Ram Consolidated v. *Sree Ram Agro Ltd. & Ors.* *119*

— Section 96—Filed against judgment of the trial Court dated 23.05.2003 dismissing the suit for recovery of 4,46,027.65/- filed by the appellant/plaintiff against respondent No.1/ defendant No.1. Respondent No.2/Oriental Insurance Company Limited/defendant No.2 was a proforma party—Held—The trial Court was fully justified in holding that there was no negligence of defendant No. 1/respondent No. 1 in having lost any of the packages which were given to the defendant No. 1/respondent no.1. The package which was given to it was of 47 kilograms (kgs.) as per Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986 and it is this consignment of 47 Kgs. as stated in Airlines Consignment Note C/No.: 09635970 which was delivered to the appellant/ plaintiff at Calcutta. Surely, if only 47 Kgs. were delivered to defendant No. 1/respondent No.1 there does not arise any question of any loss being caused by it of the difference of 100 Kgs. and 47 Kgs. At best, the liability of defendant No.1/ respondent No. 1 would be for taking short delivery, however, even that liability would not be there because to the knowledge

of the appellant/plaintiff the main package had been broken open as is clear from the letter dated 6.10.1986 written to Sh. Mago at the Airport Cargo Terminal and at best the negligence of defendant No.1/ respondent No.1 would be of taking short delivery. However, that negligence in itself cannot fasten the defendant No.1/respondent No. 1 with liability because it is not as if the appellant/plaintiff was not aware within the limitation period that it was the International Airport Authority of India which had given short delivery and therefore, the suit could well have been filed against the International Airport Authority of India within the limitation period for the loss caused during the period the consignment was in the custody of the International Airport Authority of India. The liability, therefore, for having lost the goods, was of the International Airport Authority of India and not of defendant No. 1/ respondent No. 1.

Union of India v. *Cox & Kings (India) Ltd. Anr.* *158*

— Section 16 & 20—Petitioner & Respondent entered into MOU/ Agreement whereby Respondent company agreed to transfer its rights, title and interest in contiguous agricultural land measuring 150 acres to petitioner for total consideration of Rs. 102 Crores—Petitioner Company agreed for a value derived after reducing liabilities of Respondent Company—Separated detailed agreement covering all aspects of transaction had to be executed within 30 days from date of MOU—Land was situated on By Pass Road, Village Valla & Village Verka, District Amritsar, Punjab, approved by Government of Punjab for development of residential colony—However, due to failure of respondent Company in giving specific details of complete contiguous land and its revenue records, measurement, interest etc. for purpose of ascertaining value of shares, separate detailed agreement for transfer of shares never got executed—According to petitioner, it came to know that respondent was only having 80 acres of clear and developable contiguous land as against false representation of having approximately 150 acres of clear land—Said fact was deliberately suppressed by respondent company at the

time of execution of MOU whereas petitioner duly acted upon MOU and made various payments to respondent company from time to time—Subsequently, petitioner company learnt that promoters of respondent Company were already in process of transferring share holding of Company and immovable assets to third party, therefore they filed petition seeking restraint orders against respondent Company from transferring, mortgaging creating any charge or lien on share holding of Company etc. and also prayed for appointment of Indian arbitrator to adjudicate dispute between parties—However, Respondent challenged jurisdiction of Delhi courts alleging land was situated in Amritsar and MOU executed between parties was essentially agreement for transfer of said land and purchase of share holding of respondent Company was only a method for transfer of land—Therefore, petition was hit by proviso of Section 16 (d) of Code—On behalf of petitioner, it was urged that they were not claiming specific performance of MOU or possession of land—Also, respondent Company had its registered office in Delhi—Petitioner was also in New Delhi, agreement was executed in New Delhi, meetings of two representatives, both pre and post MOU, took place in Delhi and shares of respondent Company were agreed to be transferred in Delhi; therefore, Delhi Courts had jurisdiction—Held:- If an agreement is for sale and purchase of immovable property then Delhi Court does not has jurisdiction and petition will be required to be filed at a place where land is situated—Whereas, if it was an agreement to sale and purchase of shares, compliance of which can be obtained by personal obedience then Delhi Court has jurisdiction—Relief claimed by petitioner does not simply involve transfer of shares in books or in office of Registrar of Companies, but it would also involve transfer of possession of land in question—Therefore, Delhi Courts lack jurisdiction over subject matter.

Ansal Housing & Construction Ltd. v. *AJB Developers (P) Ltd.* *418*

CODE OF CRIMINAL PROCEDURE, 1973—Section 105—Prevention of Corruption Act, 1988—Section 13—Indian Penal Code, 1860—Section 120B & 420—Petitioner Company charge sheeted along with other accused by CBI for alleged commission of offences under Section 120-B, read with Section 420 IPC and Section 13 (2) read with Section 13(1)(d) of Act—Petitioner summoned through its CEO by diplomatic channels through Ministry of External Affairs, Interpol—Accordingly Embassy of India, Berne sent letter enclosing summons in original informing him about next date of hearing before Special Judge, Delhi—Petitioner though admitted service of summons, but urged service as not in compliance with Exchange of letters—Accordingly, Learned Special Judge issued fresh summons to petitioner as per Exchange of letters which was forwarded by Embassy of India at Berne to FOJ in Switzerland which further informed Indian Embassy that summons were issued—However, petitioner again admitted delivery of fresh summons but disputed validity of service and filed two applications before learned Special Judge—Learned Special Judge disposed of applications holding petitioner duly served and intentionally avoided appearance to delay trial—Orders challenged by petitioner urging, FOJ at Berne not competent authority to serve summons on petitioner and notification not issued as per Section 105 Cr.P.C.—Moreover, Letter of Exchange dated 20.02.1989 between India and Switzerland relates only to purpose of investigations—Held:- In case of summons to an accused issued by a court in India shall be served or executed at any place in any Country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such Country or place for service or execution of summons or warrants in relation to the criminal matters, may be sent in duplicate in such forms, directed to such Court, Judge or Magistrate and sent to such authority for transmission, as the Central Government may by notification specify in this behalf—Though serving or execution of summons at a place or country is mandatory, however, sending of such summons or warrants to such court, Judge or Magistrate and to such

authority for transmission as may be notified is directory in nature—Exchange of letters dated. 20.02.1989 is a binding treaty between India and Switzerland, even applicable for service of summons to compel the presence of a person who is accused of an offence for trial and for determining whether to place such person on trial—Summons served through FOJ, designated agency as per Swiss Federal laws amounted to valid service of summons.

Swiss Timing Ltd. v. *CBI & Anr.*..... *234*

— Section 299—Charge sheet was laid under Section 302/307/34 IPC against accused persons which also included name of two appellants as accused persons—However, appellants absconded during trial and were declared proclaimed offenders—Trial of other two co accused persons ended in their acquittal as none of prosecution witnesses to occurrence as well as complainant had supported case of prosecution—Thereafter, appellants were apprehended and were also sent to face trial under same offences—They pleaded discharge from offences before learned ASJ on ground that as trial of other two accused persons had resulted in acquittal and evidence to be produced by prosecution in case two appellants were made to face trial, would remain same and ultimately, case would result in their acquittal also—However, learned ASJ turned down their pleas and they were charged for having committed offences punishable under Section 302/307/34 IPC and were ordered to face trial—Aggrieved by said order, appellants preferred petition urging that same witnesses had not identified other accused persons facing trial at that time and same would happen during trial of said petitioners also—Thus, they be discharged—On behalf of State, it was urged at stage of framing of charge, Court has to consider statement of witnesses recorded under Section 161 of the Code and other material collected by prosecution to prove its case—Statements of witnesses recorded during trial of co accused persons can at most be treated as under Section 299 of Code against said two appellants and same can be read against them

issued by NRAI following the Govt. advice dated 24.12.2010 that petitioner as a serving government servant might not continue as treasurer for a period exceeding four years or one term whichever less, as to why governing body should not consider his removal from the post of honorary Treasurer—Meeting of governing body held on 28.03.2011—Show cause notice considered—General Body passed resolution to remove the petitioner—Petitioner contended that Central Government Circular not applicable to him *ipso-facto*—Further contended that petitioner belongs to Uttar Pradesh States Service and was not Central Government Servant and CCS (Conduct Rules) were not applicable to him—State of U.P. not made any similar rules/instructions—Per-contra State Government/UT Administration bound by said circular in relation to National Sports Federation—National Sports Federation recognized and regulated by Central Government—Received aid and funds from Central Government—Further contended that in public interest, the government servant whether in the Central Government or State Government should not be involved in Sports Federation for an indefinite period in an elected capacity as it was bound to affect the discharge of their primary responsibilities and duties as government servant—Held—Central Government entitled to lay down guidelines to govern National Sports Federation—Such guidelines bound on and enforceable against National Sports Federation—A Central Government aided and funded the activity and regulated them—It is true that a senior government servant in the Central Government should be available to it to render his services and no activity unconnected with his official duties should be allowed to interfere in efficient discharge of such duties; it was equally true for State government servant—Further the decision of General Body removing him has not been assailed—Writ Petition Dismissed.

— Article 226—Central Excise Act, 1944—Section 11A; Limitation Act, 1963—Section 5—Petition against notices and letter of demand of interest on duty short paid-No direction on interest in the order—Whether demand of interest is barred on account of delay and laches—Held—Period of limitation unless otherwise stipulated by the statute which applies to a claim for the principal amount, should also apply to the claim for interest thereon—Held—In present case period of limitation for demand for duty would be one year therefore, period of limitation for demand for interest also would be one year—Demand beyond the period of limitation would be hit by principles of limitation—Demand for interest quashed—Petition allowed.

— Article 227—Delhi Land Reforms Act, 1954—Bhumidari—Delay and lches—Appellant assailed the order of Financial Commissioner in Writ Petition—Writ Petition came up for hearing in the year 2001—Dismissed in default as none appeared—Application made by counsel for restoration on the ground that he left practice but could not withdraw from the case due to lack of communication—Restored; came up for hearing on 6th September, 2004—Ld. Single Judge directed to list the writ petition with connected writ petition in the presence of proxy counsel—Matter taken up on 26th of October, 2004—File of the connected case summoned—Transpired that it was dismissed on 23rd July, 2004 for non-prosecution—None appeared on behalf of appellant—Dismissed for non-appearance—Appellant filed CM in 2011 for recall after delay of seven years—Dismissed by Ld. Single Judge—Non-explanation of non-appearance—Filed LPA—Contended that earlier counsel was ailing and not appearing who expired on 1st June, 2008—Held—No doubt if the applicant whose writ petition was dismissed for non-prosecution is able to show sufficient cause for non-appearance and able to explain the delay satisfactorily for

approaching the Court, liberal approach has to be taken—Normally endeavour of the court should be to deal with the matter on merit—It is also trite litigant have to be vigilant and take part in the proceedings with due diligence—Court will not come to rescue of such applicant if negligence established—Application dismissed.

Man Singh Decd Thr Lrs v. *Gaon Sabha Jindpur & Ors.* *50*

— Article 226—Writ Petition—Central Board of School Examination—Bye Law 69.2—Date of Birth Correction—Petitioner stated her date of birth wrongly noted in the record of respondent/CBSE as 20.02.1986 instead of actual date of birth 12.10.1988—Fact could be verified and enclosed with writ petition—CBSE opposed the petition on the ground that not entitled to relief of change of date of birth so belatedly—Request could not be considered in view of Bye Law 69.2 which provides request to be made within two years of declaration of result of 10th examination—Passed 10th examination in the year 2004—Made representation after five years—Permits such correction only in circumstances arising out of clerical error—Petitioner had to approach CBSE through Head of School—Not impleaded head of school as party—Herself filled up the date of birth in various documents submitted by her during school days—Observed, documents placed on record—Discharge slip dated 15.10.1988 issued by Military Hospital MH Danapur Cant. indicated name of father Sh. S.N. Singh Unit 56 APO—Under column of date of birth two dates were shown—One 12.10.1988 and other 15.10.1988—Other documents was gazette notification dated 10.12.2009 which was got published by her notifying her date of birth as 12.10.1988—In copy of progress report of 1996-1997 of Kendriya Vidhyalaya where she was studying in class 3rd, date of birth shown as 20.02.1986—CBSE filed on record copy of petitioner's application for admission in Kendriya Vidyalaya Baliganj. Applicant to fill up date of words in figure as well as in words which showed her date of birth as

20.02.1986—Same was the case in the transfer certificate—An extract of school register where she was studying in class X showed her date of birth as 20.02.1986—The bye laws provides for request of correction within two years from the declaration of result of examination—Stand of petitioner falsified—Held—It was for the petitioner to place on record to establish her stand that right through her school days where she had taken admission from time to time, had recorded her date of birth as 12.10.1988—Further, she had approached the head of school from where she had taken the class 10th examination to point out the error—She failed to do so—Writ Petition dismissed.

Nutan Kumari v. *CBSE* *56*

— Article 227—Delhi Rent Control Act, 1958—Section 14 (1) (d)—Subletting—Eviction petition filed against tenant on the ground of subletting to respondent no. 2—Premises comprised of one room on the second floor—Tenant unauthorizedly constructed bathroom and latrine—Contended that tenant parted with possession in favour of respondent no.2 in the year 1988 without his consent in writing—Common written statement filed claiming continuously living with family of respondent no. 2 and denied premises sublet to sub-tenant—As per evidence, respondent no.2 was permitted to live with tenant after 1984 riots for which no rent was charged—Documents such as voter I-card, passport, electric connection in the name of tenant—ARC held that no subletting or parting with possession proved—Appeal before Additional Rent Control Tribunal endorsed the finding of ARC—Preferred writ petition—Held, there cannot be subletting unless the lessee parted with legal possession—The mere fact that some other person was allowed to use the premises while lessee retained the legal possession, not enough to create a sub-lease—The power of Court under Article 227 limited; unless and until manifest illegality or injustice suffered no scope for interference—Petition Dismissed.

Sardar Dalip Singh Loyal & Sons v. *Jagdish Singh* ... *67*

upon it—Local authorities MCD etc. to process the application for sanction of the plan after the Archaeological Survey of India (ASI) accorded the approval—By virtue of notification dated 16.06.1992 of ASI, all construction within 100 meters of the protected monuments were prohibited—The ASI used to consider application for permission within this area on case-to-case basis—Constituted an expert Committee—The High Court in an earlier LPA held that the notification constituting the Expert Committee and consequent permission accorded by it, beyond the authority conferred upon the ASI by Act—Had a snow boiling effect since ongoing construction at various stages throughout country jeopardized—The executive step-in and issued an ordinance setting up an Authority to oversee implementation of enactment and at the same time validating subject to certain condition, permission granted by expert committee from time to time—Later on, the ordinance was replaced by an Act which amended the Ancient Monument Act, 1958—Appellant filed writ petition against the grant of permission—Contended the permission granted to the second respondent illegal and could not be implemented—The permissions conditioned upon time would be routinely extended and this defeats the very concept of prohibited area—ASI contented before Ld. Single Judge in view of the amended provision of the Act, the petition had been rendered merit less—Single Judge accepted the arguments that provision validates the permission and not the construction already carried out—The question which arose was whether the said permission was time bound—If so, whether the validation by amendment of the Act of the said permission permitted the extension of time for raising the construction—Court Observed—The permission as recommended by EAC and as granted by Director General, ASI were not time bound—Such condition of time was added by Superintending Archaeologist while communicating the permission to the applicant to ensure compliance—Observed—Countersigning Authority cannot add to the conditions attached to the permission by primary authority—Thus, superintending archaeologist as

countersigning Authority, had no power to add to the condition attached to the permission—Appeal dismissed.

Vijaya Laxmi v. *Archaeological Survey of India & Ors.* *186*

— Article 227—Writ Petition—Letters Patent Appeal—Industrial Dispute Act, 1947—Section 2 (j)—Industry—Rajghat Samadhi Act, 1951—Powers & Duties—The appellants engaged as security guard by Rajghat Samadhi Committee (RSC), appointed in September, 1997 and November 1998 respectively—Services terminated on 8.9.2000 and 12.02.2001 respectively—Appellants raised industrial dispute—Referred to Central Government Industrial Tribunal (CGIT) to adjudicate whether termination illegal and/or unjustified—Respondent took preliminary objection—Reference not maintainable as RSC not industry—CGIT returned the findings that respondent was industry—Vide common award directed reinstatement of the appellants with 25% back wages—RSC filed writ petition allowed by Single Judge—Petitioner preferred Letters Patent Appeal (LPA)—Held—That RSC was constituted under Rajghat Samadhi Act, 1951—Powers and duties of the committee defined—The committee empowered to make byelaws Inter-alia for appointment of such person as may be necessary—To determine the terms and conditions of services of such employee—The function of Committee inter-alia included organizing of special function on 2nd October, and 30th January to observe birth and death anniversary of Mahatma Gandhi—Observed—The Samadhi attracts large number of tourists and other visitors including school children—These visitors are attracted to the Samadhi out of reverence for Mahatma Gandhi to pay respect to him and to imbibe the ideals from Gandhian atmosphere created and maintained at Samadhi—The Rajghat Samadhi thus, akin to place of worship—The test for ambit of definition of industry is production and/or of distribution of goods and services calculated to satisfy human wants and wishes—Excludes the

activity, spiritual or religious—Appeal dismissed.

Assem Abbas v. *Rajghat Samadhi Committee & Anr.* *143*

COPYRIGHT ACT, 1957—Section 62—Trade Marks Rule, 2002—Rule 37—Plaintiff registered trade mark owner of expression "SHRIRAM" for vast range of products since 1960—By interim order, defendants restrained from manufacturing or selling any produce by name of "SHRIRAM CARTAP" which is deceptively similar trademark of plaintiff—Case of defendants that they have got registration of trade mark from registry—Date of registration relates back to date of application—Plaintiff is entitled to continue with suit for passing off which is still maintainable but defendants are residing and carrying on their business outside jurisdiction of this court—Plaintiff under action of passing off can not take advantage of section 134(2) of Act in order to invoke territorial jurisdiction—Plaint is liable to be returned because of lack of territorial jurisdiction—Held—Defendants did not amend written statement after obtaining registration nor defendants have filed any application for return of plaint—Defendants in their written statement have not denied existence of territorial jurisdiction of this Court—On date of institution, this court had jurisdiction to entertain and try proceedings on basis of provisions under law—One fails to understand as to why defendants are now challenging jurisdiction on passing off when in written statement in cause of action, defendants admitted territorial jurisdiction—Registration has been secured by defendants which has been although applied prior but, was prosecuted and obtained pursuant to interim orders passed by this court in matter—Registrar of Trade Marks has not cited previously registered trade mark of plaintiff as a matter of conflicting mark in examination report and proceeded to grant registration without citing plaintiff's prior registered mark and also perhaps not been informed about interim orders and seisin of dispute by this Court and granted registration contrary to Rule 37 of T

M Rules—By ignoring mandatory provisions of Act and granting registration to defendants, it is clear that it is done with malafide intention, in order to defeat orders passed by court—It is a triable question whether registration of defendants is actually a valid one or is it just entry wrongly remaining on register, depending upon inference which court is going to draw by way of impact of subsequent events—Objection qua jurisdiction at this stage can not be sustained and same is dismissed.

DCM Shri Ram Consolidated v. *Sree Ram Agro Ltd. & Ors.* *119*

COURT FEES ACT. 1870—Whether a suit requiring the defendant to execute a formal deed is one of specific performance and whether court fees is payable on the entire sale consideration or only on the valuation of the suit by the plaintiff—Order dated 09.04.2008 of the Trial Court directing the plaintiff to pay the ad-valorem court fee on the amount of sale consideration of Rs. 24,32,950/-, wherein the petitioner had filed a suit for perpetual, mandatory injunction and damages impugned—Held:- Wholesome reading of the plaint clearly shows that what the plaintiff had sought was not a relief of specific performance but it was a direction to the defendant to execute the formality of the sale deed which he had not cared to do in spite of his obligation under Section 55(1)(d) of Transfer of Property Act. It is not in dispute that the defendant has received the entire purchase money; and had also handed over possession of the flats to the plaintiff; Admittedly, the plaintiffs were in possession of the suit property at the time when the suit was filed. In these circumstances, the court fee appended to the plaint which was as per the valuation made by the plaintiff suffers from no infirmity.

Dalmia Cement (Bharat) Ltd. v. *Hansalya Properties Ltd. & Anr.* *151*

DELHI LAND REFORMS ACT, 1954—Bhumidari—Delay and lches—Appellant assailed the order of Financial Commissioner in Writ Petition—Writ Petition came up for hearing in the year 2001—Dismissed in default as none appeared—Application made by counsel for restoration on the ground that he left practice but could not withdraw from the case due to lack of communication—Restored; came up for hearing on 6th September, 2004—Ld. Single Judge directed to list the writ petition with connected writ petition in the presence of proxy counsel—Matter taken up on 26th of October, 2004—File of the connected case summoned—Transpired that it was dismissed on 23rd July, 2004 for non-prosecution—None appeared on behalf of appellant—Dismissed for non-appearance—Appellant filed CM in 2011 for recall after delay of seven years—Dismissed by Ld. Single Judge—Non-explanation of non-appearance—Filed LPA—Contended that earlier counsel was ailing and not appearing who expired on 1st June, 2008—Held—No doubt if the applicant whose writ petition was dismissed for non-prosecution is able to show sufficient cause for non-appearance and able to explain the delay satisfactorily for approaching the Court, liberal approach has to be taken—Normally endeavour of the court should be to deal with the matter on merit—It is also trite litigant have to be vigilant and take part in the proceedings with due diligence—Court will not come to rescue of such applicant if negligence established—Application dismissed.

Man Singh Decd Thr Lrs v. *Gaon Sabha Jindpur & Ors.* *50*

DELHI RENT CONTROL ACT, 1958—Section 14 (1) (d)—Subletting—Eviction petition filed against tenant on the ground of subletting to respondent no. 2—Premises comprised of one room on the second floor—Tenant unauthorizedly constructed bathroom and latrine—Contended that tenant parted with possession in favour of respondent no.2 in the year 1988 without his consent in writing—Common written statement filed claiming continuously living with family of respondent no. 2 and denied premises sublet to sub-tenant—As per

evidence, respondent no.2 was permitted to live with tenant after 1984 riots for which no rent was charged—Documents such as voter I-card, passport, electric connection in the name of tenant—ARC held that no subletting or parting with possession proved—Appeal before Additional Rent Control Tribunal endorsed the finding of ARC—Preferred writ petition—Held, there cannot be subletting unless the lessee parted with legal possession—The mere fact that some other person was allowed to use the premises while lessee retained the legal possession, not enough to create a sub-lease—The power of Court under Article 227 limited; unless and until manifest illegality or injustice suffered no scope for interference—Petition Dismissed.

Sardar Dalip Singh Loyal & Sons v. *Jagdish Singh* ... *67*

EAST PUNJAB HOLDINGS (CONSOLIDATION OF FRAGMENTATION) ACT, 1948—Section 42—Constitution of India, 1950—Article 226—Land of petitioners acquired for public purpose of Rohini Residential Scheme—Petitioners moved application seeking release of compensation in their favour—One AR objected before LAC that petitioners had got more land during consolidation proceedings than was due to them at his cost and that land of petitioners belong to Gaon Sabha—Land Acquisition Collector, (LAC) disposed of objections finding that there is no merit in objections and there was no prima facie dispute of apportionment and directed release of compensation in favour of petitioners—AR filed proceedings before Financial Commissioner (FC) seeking implementation of certain documents, which petitioners claimed were forged—FC issued direction to Deputy Commissioner (West) to inquire into objections raised by AR qua consolidation and directed compensation be not released in favour of any party—Revenue authorities submitted that documents on basis of which AR had claimed rights, were not genuine and were based on forged documents—Revision Petition dismissed by FC and compensation including principal amount and interest released in favour of petitioners—Writ filed

before High Court claiming interest in respect of delayed payment—Plea taken, compensation has not been paid by LAC to petitioners for period of delay when proceedings were pending before FC and period when inquiry in pursuance to order of FC, took place—If FC has passed a wrong order, petitioners should not be made to pay for it by sacrificing interest for that period of time—Held—LAC did not cause any delay and a decision was taken promptly on objections of AR that prima facie no case was established for reference of dispute qua apportionment—LAC is not a beneficiary of any amount but only seeks to distribute amount obtained from beneficiary of land—Interest is also paid by beneficiary—LAC was willing to disburse amount after dealing with objections of AR but for interdict by order of FC-LAC is not party which persuaded court to pass order which was ultimately held unsustainable—LAC was handicapped by reason of interdict of order passed by FC and thus, could not itself deposit amount with reference court—Petitioners did not assail order of FC and thus accepted order—Acceptance of order of FC implies petitioners were satisfied with arrangement that inquiry should be made qua claim of AR and amount should not be disbursed till such inquiry is complete—If petitioners were aggrieved by these directions, nothing prevented petitioners from assailing the same in appropriate proceedings—Principle of restitution by LAC would not apply as LAC was not responsible for what happened—Petitioners have not claimed any relief against AR nor AR has been impleaded as a respondent in present proceedings.

Hardwari Lal and Anr. v. *Land Acquisition Collector/ADM (W) and Anr.* *194*

EXTRADITION ACT, 1962—Section 21—Respondent was named as one of accused in FIR No. 88/2002, under Section 387/506/507/201/120-B IPC and Section 3(2), Section 3(4) of MCOCA, read with Section 120B IPC—Charge-sheet was laid against five accused persons, out of which four were sent to stand trial but Respondent was shown as absconder—Trial

commenced against four accused persons, in the meanwhile, Respondent was located in Portugal—In pursuance of an existing Interpol notice and Red Corner Notice, extradition proceedings against him were initiated—Government of Portugal granted extradition subject to specific condition that Respondent would not be visited with punishment of death or imprisonment for a term more than 25 years—Said specific condition was solemnly assured by Government of India and accordingly, extradition of Respondent was granted by Government of Portugal in respect of 8 cases against him—Although competent authority granted sanction under Section 23 (2) of MCOCA to prosecute respondent and Supplementary chargesheet was also filed against him before the Designated Court—However, after filing of charge sheet, Government of NCT of Delhi, reconsidered case of Respondent in view of extradition condition laid by Government of Portugal and solemn assurance given by Government of India—Hence, prosecution filed application under Section 321 of Code seeking permission from Designated Court to withdraw prosecution of Respondent for offences punishable under Section 3 (2) & 3(4) of MCOCA read with Section 120-B IPC as both these offences were not in line with conditions imposed in Extradition Order—Learned Designated Court dismissed application—Aggrieved, State preferred petition for setting aside order as well as quashing of framing of charges against Respondent—Held:- Power of seeking withdrawal of prosecution is essentially an executive function and Special Public Prosecutor, unlike a Judge, is supposed to receive a request seeking withdrawal of prosecution from Executive—It is after receipt of such request from Executive, Special Public Prosecutor is required to apply his mind and then decide as to whether case is fit to be withdrawn from prosecution and leason for withdrawal could be social, economic or even political—Withdrawal of prosecution must be bonafide for a public purpose and in interest of justice—Further, while undertaking such an exercise, Special Public Prosecutor is not required to sift the evidence, which has been

gathered by prosecution as sought to be produced or is produced before the Court.

State of NCT of Delhi v. *Abu Salem Abdul Qayoom Ansari* *307*

FOREIGN EXCHANGE MANAGEMENT ACT, 1999 (FEMA)—Section 37 and 38—Challenge in this Intra-Court Appeal is to the judgment dated 4th May, 2011 of the Learned Single Judge allowing W.P. (C) No. 4542/2010 preferred by the respondent and directing the appellant to pay to the respondent simple interest @ 6% per annum on the sum of Rs. 7,75,000/- from the date of seizure i.e. 3rd January, 2003 till 31st December, 2007 and @ 9% per annum from 1st January, 2008 till 1st December, 2008—Brief Facts—Writ petition filed by the respondent pleading that the appellant had on 3rd January, 2003 seized Rs. 7,75,000/- in Indian currency and foreign currency equivalent to Rs. 96,000/- from the custody of the respondent and Proceedings initiated under the provisions of FEMA—Adjudicating authority vide order dated 28th June, 2004 forfeited the seized currency and also imposed a penalty of Rs. 5 lacs on the respondent—Respondent filed an appeal before the Appellate Tribunal for Foreign Exchange—Appeal allowed vide order dated 17th December, 2007 which order has attained finality but the seized currency was not returned inspite of repeated request and ultimately the Indian currency was released only on 1st December, 2008 and foreign currency on 02.02.2009—The respondent contended that his monies having been wrongfully withheld by the appellant, he was entitled to interest @ 24% per annum thereon from the date of seizure till return—Also contended that in fact under Rule 8 of the Foreign Exchange Management (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000 the return/refund should have been accompanied with interest @ 6% per annum. Held—While Rule 8(i) applies to return of seized currency after completion of investigation, Rule 8 (ii) applies to return of seized currency during adjudication—Again, while Rule 8(i) uses the

words "shall be returned..... with interest at the rate of 6% per annum.....", Rule 8 (ii) uses the words "may pass such order returning ..... together with interest at the rate of 6% per annum.....". The use of different words "shall" and "may" in Sub Rules (i) and (ii) respectively indicate that while it is mandatory to pay interest @6% per annum, when seized currency is returned on completion of investigation, it is not so when return is pursuant to adjudication and in which case, it is in the discretion of adjudicating authority whether interest is to be paid or not—In the present case the Appellate Tribunal for Foreign Exchange while allowing the appeal of the respondent did not award any interest to the respondent—No discussion whatsoever on the aspect of interest—Not even known whether interest was claimed by the respondent before the Appellate Tribunal—The settled position in Law (see *Santa Sila Devi Vs. Dhirendra Nath Sen* AIR 1963 SC 1677) is that if the order / judgment is silent on a particular aspect, that relief is deemed to have been declined. It thus, has to be necessarily held that the Appellate Tribunal did not deem it appropriate to award any interest under Rule 8(ii) to the respondent—Respondent if was aggrieved by non grant of interest, the remedy of further appeal under Section 35 of FEMA to this Court—That right not availed.

Directorate of Enforcement v. *Subhash Muljimal Gandhi* *78*

— Rule 8 was expressly made applicable to seizure under Section 37 of FEMA of Indian currency—Section 37 was omnibus provision regarding seizure be it for contravention of which so ever provisions—Seizure in present case was admittedly not by Directorate of Enforcement (DOE) but by Police—However, Section 38 of Act provides for empowerment of other officers including Police to affect such seizure—Proceedings in present case pursuant to initial seizure by Police, were admittedly by FEMA—In this view of matter, it was irrelevant whether initial seizure was by police or by DOE and seizure was deemed to be under Section 37 of FEMA—

However, FEMA does carve out distinction between Indian currency and foreign currency—Rules aforesaid enable adjudicating authority to direct payment of interest @6% per annum while passing order for return of Indian currency only and did not empower adjudicating authority to direct payment of any interest while directing return of foreign currency—Thus, there could be no order for payment of interest on return of seized foreign currency under Rule 8—Position which thus, unfolds was that interest at rate of 6% per annum under Rule 8 could had been awarded to respondent on seized Indian currency only—Single Judge had however, applying said Rule also awarded interest on seized foreign currency which could not be sustained. Hence, appeal partly allowed and writ petition of respondent dismissed.

Directorate of Enforcement v. *Subhash Muljimal Gandhi* *78*

INCOME TAX ACT, 1961—Section 245—Petitioner challenged order passed by Settlement Commission whereby it had accepted settlement application of petitioner in part—Also, it observed: *"No immunity is granted in respect of income contained in the seized papers on the basis of which computation of income has been made in the settlement application and which has been held not to belong to the applicant company by us. The department will be free to initiate penalty and prosecution proceedings, in respect of these papers in appropriate hands as per law".* According to petitioner, said observation of Settlement Commission required to be set aside being destructive of very objective, letter and spirit behind settlement provisions elucidated in Section 245D (4) and 245-I of Act—Also, settlement is contrary to law as order ceases to be conclusive, final and is uncertain—Held:- Under Act, Income Tax Officer can and he must, tax right person and right person alone—"Right person" is person who is liable to be taxed according to law with respect to a particular income, the expression "wrong person" is obviously used as opposite of expression of right person—Merely because a "wrong person" is taxed with respect to a particular

income, Assessing Officer is not precluded from taking "Right person" with respect to that income—Settlement Commission had substantially accepted surrender of income made by petitioner and also granted them immunity from penalty and prosecution—Computation of taxable income in case of petitioner does not mean that said papers or seized materials cannot be used if they disclose or relate to income of a third person.

Gupta Perfumers (P) Ltd. v. *Income Tax Settlement Commission & Ors.* *345*

INDIAN EVIDENCE ACT, 1872—Section 114—Dispute arose qua contract awarded by Respondent to appellant for carrying out earth work for railway formation in construction of minor bridges—To settle dispute, Arbitration clause invoked, arbitrator made and published award in favour of appellant, amount was to be paid within two months from date of award—Appellant found clerical mistakes in award and thus filed application under Section 33 of Act—Application was sent on 18.06.2002 by UPC addressed to arbitrator and copy of it was sent to Respondent also—Learned Arbitrator was not available in Delhi from 18.06.2002 to 28.06.2002 though his office and residence remained open—Another communication was sent by appellant dated 22.07.2002 once again under UPC making reference to earlier application dated 18.06.2002 received by learned Arbitrator—Appellant was informed by office of Arbitrator about non receipt of application dated 18.06.2002—Respondent opposed second application of appellant on ground that no application dated 18.06.2002 was moved by appellant and subsequent application was time barred—However, learned Arbitrator made necessary corrections in award by way of two applications moved by appellant—Aggrieved by said order, Respondent filed objections—Learned Single judge though sustained plea of limitation and reached to a conclusion in favour of Respondent but did not examine merits of the claim of appellant seeking correction—Thus, aggrieved appellant preferred appeal—According to Respondent application dated 18.06.2002 sent

(2) of Code seeking discharge on ground that Section 323 IPC was non cognizable offence which could not had been investigated without prior permission of learned MM—Application dismissed as not maintainable—Aggrieved Respondents preferred revision petition before learned ASJ which was allowed holding that Magistrate should not have converted case under Section 323 IPC because neither cognizance was taken of that offence initially nor police had alleged any offence under Section 323/3 IPC was made out—Also, permission was not sought by police to investigate case of non cognizable offence which is mandatory—Petitioner challenged said order and urged investigation does not stand vitiated warranting quashing of FIR in case where initially FIR was registered for cognizable offence, however, charge was framed for non cognizable offence—Held:- Even if the Police does not file a charge-sheet for a particular offence, though made out on the facts of the case, nor does the Magistrate take cognizance thereon, at the stage of framing of the charge, Learned Trial Court is supposed to apply its independent mind and come to the conclusion as to what offences are made out from the evidence collected by the prosecution. At that stage the Trial Court is not bound by the offences invoked in the charge-sheet or the offences for which cognizance has been taken—In such a situation the charge-sheet has to be treated as a complaint in view of the explanation to Section 2 (d) Cr. P.C. and the Police Officer filing the charge-sheet as complainant.

State v. *Lal Singh & Ors.* *329*

— Section 489B—Appellant assailed judgment convicting him under Section 489B of Code—Appellant urged, besides other lacunas in prosecution case, it further failed on ground that no public witness was joined by police inspite of appellant being apprehended from a crowded place, thus, alleged recovery of Indian currency notes was planted on appellant—Held:- Presumption that a person acts honestly and legally applies as much in favour of police officers as of other—It

is not proper and permissible to doubt evidence of police officers if there is no proof of ill-will, rancor or spite against accused—Judicial approach must not be to distrust and suspect their evidence on oath without good and sufficient ground thereof.

Shamim @ Bhura v. *The State of Delhi*..... *284*

INDUSTRIAL DISPUTE ACT, 1947—Section 2 (j)—Industry—Rajghat Samadhi Act, 1951—Powers & Duties—The appellants engaged as security guard by Rajghat Samadhi Committee (RSC), appointed in September, 1997 and November 1998 respectively—Services terminated on 8.9.2000 and 12.02.2001 respectively—Appellants raised industrial dispute—Referred to Central Government Industrial Tribunal (CGIT) to adjudicate whether termination illegal and/or unjustified—Respondent took preliminary objection—Reference not maintainable as RSC not industry—CGIT returned the findings that respondent was industry—Vide common award directed reinstatement of the appellants with 25% back wages—RSC filed writ petition allowed by Single Judge—Petitioner preferred Letters Patent Appeal (LPA)—Held—That RSC was constituted under Rajghat Samadhi Act, 1951—Powers and duties of the committee defined—The committee empowered to make byelaws Inter-alia for appointment of such person as may be necessary—To determine the terms and conditions of services of such employee—The function of Committee inter-alia included organizing of special function on 2nd October, and 30th January to observe birth and death anniversary of Mahatma Gandhi—Observed—The Samadhi attracts large number of tourists and other visitors including school children—These visitors are attracted to the Samadhi out of reverence for Mahatma Gandhi to pay respect to him and to imbibe the ideals from Gandhian atmosphere created and maintained at Samadhi—The Rajghat Samadhi thus, akin to place of worship—The test for ambit of definition of industry is production and/or of distribution of goods and services calculated to satisfy human wants and

wishes—Excludes the activity, spiritual or religious—Appeal dismissed.

Assem Abbas v. *Rajghat Samadhi Committee & Anr.* *143*

LAND ACQUISITION ACT, 1894—Section 4, 6, 16, 18, 30, 31, 34—East Punjab Holdings (Consolidation of Fragmentation) Act, 1948—Section 42—Constitution of India, 1950—Article 226—Land of petitioners acquired for public purpose of Rohini Residential Scheme—Petitioners moved application seeking release of compensation in their favour—One AR objected before LAC that petitioners had got more land during consolidation proceedings than was due to them at his cost and that land of petitioners belong to Gaon Sabha—Land Acquisition Collector, (LAC) disposed of objections finding that there is no merit in objections and there was no prima facie dispute of apportionment and directed release of compensation in favour of petitioners—AR filed proceedings before Financial Commissioner (FC) seeking implementation of certain documents, which petitioners claimed were forged—FC issued direction to Deputy Commissioner (West) to inquire into objections raised by AR qua consolidation and directed compensation be not released in favour of any party—Revenue authorities submitted that documents on basis of which AR had claimed rights, were not genuine and were based on forged documents—Revision Petition dismissed by FC and compensation including principal amount and interest released in favour of petitioners—Writ filed before High Court claiming interest in respect of delayed payment—Plea taken, compensation has not been paid by LAC to petitioners for period of delay when proceedings were pending before FC and period when inquiry in pursuance to order of FC, took place—If FC has passed a wrong order, petitioners should not be made to pay for it by sacrificing interest for that period of time—Held—LAC did not cause any delay and a decision was taken promptly on objections of AR that prima facie no case was established for reference of dispute qua apportionment—LAC is not a beneficiary of any amount but

only seeks to distribute amount obtained from beneficiary of land—Interest is also paid by beneficiary—LAC was willing to disburse amount after dealing with objections of AR but for interdict by order of FC-LAC is not party which persuaded court to pass order which was ultimately held unsustainable—LAC was handicapped by reason of interdict of order passed by FC and thus, could not itself deposit amount with reference court—Petitioners did not assail order of FC and thus accepted order—Acceptance of order of FC implies petitioners were satisfied with arrangement that inquiry should be made qua claim of AR and amount should not be disbursed till such inquiry is complete—If petitioners were aggrieved by these directions, nothing prevented petitioners from assailing the same in appropriate proceedings—Principle of restitution by LAC would not apply as LAC was not responsible for what happened—Petitioners have not claimed any relief against AR nor AR has been impleaded as a respondent in present proceedings.

Hardwari Lal and Anr. v. *Land Acquisition Collector/ADM (W) and Anr.* *194*

LIMITATION ACT, 1963—Section 5—Petition against notices and letter of demand of interest on duty short paid-No direction on interest in the order—Whether demand of interest is barred on account of delay and laches—Held—Period of limitation unless otherwise stipulated by the statute which applies to a claim for the principal amount, should also apply to the claim for interest thereon—Held—In present case period of limitation for demand for duty would be one year therefore, period of limitation for demand for interest also would be one year—Demand beyond the period of limitation would be hit by principles of limitation—Demand for interest quashed—Petition allowed.

Kwality Ice Cream Company and Anr. v. *Union of India and Ors.* *30*

— Partition Suit—Partition suit by heirs of R-defendants set up

an alleged will that bequeathed the suit property to her daughter-in law-Will disbelieved by trial court passed order dated 31.01.2011 decreeing the suit of the respondent Nos. 1 and 2/plaintiffs for partition of the suit property belonging to the mother of the parties, R—The trial Court passed a preliminary decree declaring all the legal heirs of R, including the plaintiffs, to be 1/8th co-owners in the suit property—Defendants/Appellants contend that suit property was used as a godown by a partnership business of the parties and therefore, had in any event, acquired rights by adverse possession and the suit was barred by time—Held:- A civil case is decided on balance of probabilities. Once the appellants failed to prove that there was any Will of the mother-R and also failed to prove the plea of adverse possession, which in any case is looked at with dis-favour by the Courts, the trial Court was justified in arriving at a finding decreeing the suit for partition—Also held that there was no clinching proof of claim of ownership by defendant—A party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner.

Kanak Lata Jain & Ors. v. *Sudhir Kumar Jain & Ors.* *176*

MAHARASHTRA CONTROL OF ORGANIZED CRIME ACT, 1999—Sections 3(2) & 3(4)—Extradition Act, 1962—Section 21—Respondent was named as one of accused in FIR No. 88/2002, under Section 387/506/507/201/120-B IPC and Section 3(2), Section 3(4) of MCOCA, read with Section 120B IPC—Charge-sheet was laid against five accused persons, out of which four were sent to stand trial but Respondent was shown as absconder—Trial commenced against four accused persons, in the meanwhile, Respondent was located in Portugal—In pursuance of an existing Interpol notice and Red Corner Notice, extradition proceedings against him were

initiated—Government of Portugal granted extradition subject to specific condition that Respondent would not be visited with punishment of death or imprisonment for a term more than 25 years—Said specific condition was solemnly assured by Government of India and accordingly, extradition of Respondent was granted by Government of Portugal in respect of 8 cases against him—Although competent authority granted sanction under Section 23 (2) of MCOCA to prosecute respondent and Supplementary chargesheet was also filed against him before the Designated Court—However, after filing of charge sheet, Government of NCT of Delhi, reconsidered case of Respondent in view of extradition condition laid by Government of Portugal and solemn assurance given by Government of India—Hence, prosecution filed application under Section 321 of Code seeking permission from Designated Court to withdraw prosecution of Respondent for offences punishable under Section 3 (2) & 3(4) of MCOCA read with Section 120-B IPC as both these offences were not in line with conditions imposed in Extradition Order—Learned Designated Court dismissed application—Aggrieved, State preferred petition for setting aside order as well as quashing of framing of charges against Respondent—Held:- Power of seeking withdrawal of prosecution is essentially an executive function and Special Public Prosecutor, unlike a Judge, is supposed to receive a request seeking withdrawal of prosecution from Executive—It is after receipt of such request from Executive, Special Public Prosecutor is required to apply his mind and then decide as to whether case is fit to be withdrawn from prosecution and leason for withdrawal could be social, economic or even political—Withdrawal of prosecution must be bonafide for a public purpose and in interest of justice—Further, while undertaking such an exercise, Special Public Prosecutor is not required to sift the evidence, which has been gathered by prosecution as sought to be produced or is produced before the Court.

State of NCT of Delhi v. *Abu Salem Abdul Qayoom Ansari* *307*

affected person to impugn such determination in proceedings under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (PP Act)—Brief Facts—Petitioner was granted perpetual lease of plot of land—Respondent DDA vide notice dated 10th May, 2000 to the petitioner averred, that the building over the said plot of land was being used for commercial purpose as Anukumpa banquet Hall—Construction was not as per the sanctioned plan—Mezzanine floor had been converted into a working hall-all this was in breach of the terms and conditions of the perpetual lease deed—Petitioner asked to stop and remove the breaches—Petitioner vide its reply dated 25th May, 2000 denied that any banquet hall was functioning on the property and stated that the electricity supply to the property had been disconnected because of the Central Pollution Control Board and the basement was lying closed on account of water seepage; the violations in the setbacks were stated to have been removed—DDA vide the said notice dated 21st November, 2005 determined the perpetual lease deed—Called upon the petitioner to remove itself from the plot of land and deliver possession thereof—Petitioner sent a representation denying any breach of the perpetual lease deed conditions—DDA was requested to withdraw the notice of determination of lease—The Estate Officer of the respondent DDA issued the notice dated 5th May, 2006 under Section 4 of the PP Act and whereafter this writ petition was filed—DDA in its counter affidavit reiterated its case of banquet hall being run on the property in contravention of the perpetual lease conditions—Held—The Division Bench of this Court in *Ambitious Gold Nib* undoubtedly held that the correctness or otherwise of the allegations of the DDA on the basis of which the determination of the lease has been effected is to be decided by the Authority under the PP Act—It was further observed that whether the lessee had committed breach of terms of the lease deed or not and whether the determination of the lease was legal or not are matters to be adjudicated by the concerned authority under the PP Act and cannot be gone into in exercise of writ

jurisdiction—Disputed questions of fact viz whether notices were served on the petitioner or not, whether the petitioner has used the premises as a Banquet Hall or not and whether the petitioner committed other breaches or not, cannot be adjudicated in writ jurisdiction—Petitioner has alternative suitable remedy before the Estate Officer—The petition thus, fails and is dismissed.

Ocean Plastics & fibres (P) Limited v. *Delhi Development Authority & Anr.* *134*

SPECIFIC RELIEF ACT, 1963—Section 22—Amendment of relief claimed in the plaint and decree—Decree Holders filed suit seeking relief for specific performance of agreement to sell dated 2.05.1988 against five judgment debtors including one Satbir and Vijaypal—Judgment debtors proceeded ex-parte—Suit decreed in favour of decree holders—In terms of the judgment and decree, sale deed dated 22.10.1991 was executed by the Registrar in favour of decree holders—Application filed by Satbir and Vijaypal for setting aside ex-parte judgment and decree, dismissed—Appeal preferred by them before Division Bench—Division Bench directed judgment debtors to not to transfer, alienate, part with or create any third party interest in the property pending appeal—By order dated 16.08.2011 appeal dismissed by Division Bench—Review petition filed after the dismissal of the appeal, was also dismissed—Decree holders filed application under Order XXI Rule 11(2) for execution of decree dated 15.11.1990—Prayer also made for the amendment of the plaint and decree by abundant caution as it was incumbant on judgment debtors anyway to put the decree holders in possession after the decree of specific performance—Submitted on behalf of the judgment debtors Satbir and Vijaypal inter-alia that it would amount to denovo trial—Held, it may not always be necessary for the plaintiff to specifically claim possession over the property as it is inherent in the relief of specific performance of the contract of sale—Words "at any stage of proceedings" in proviso to sub Section 2 of Section 22 includes execution

proceedings—Relief for delivery of possession is just a formality—Executing Court is empowered to grant such relief even though no such prayer had been made in plaint or mentioned in decree—To meet, however, the objections raised by the judgment debtors, and cover conflicting views expressed by Courts, amendment allowed to include claim for possession, under proviso to sub Section 2 of Section 22 of the Act.

Adarsh Kaur Gill v. *Mawasi & Ors.* *87*

TRADE MARKS ACT, 1999—Section 11, 23, 28, 31 and 134—Copyright Act, 1957—Section 62—Trade Marks Rule, 2002—Rule 37—Plaintiff registered trade mark owner of expression "SHRIRAM" for vast range of products since 1960—By interim order, defendants restrained from manufacturing or selling any produce by name of "SHRIRAM CARTAP" which is deceptively similar trademark of plaintiff—Case of defendants that they have got registration of trade mark from registry—Date of registration relates back to date of application—Plaintiff is entitled to continue with suit for passing off which is still maintainable but defendants are residing and carrying on their business outside jurisdiction of this court—Plaintiff under action of passing off can not take advantage of section 134(2) of Act in order to invoke territorial jurisdiction—Plaint is liable to be returned because of lack of territorial jurisdiction—Held—Defendants did not amend written statement after obtaining registration nor defendants have filed any application for return of plaint—Defendants in their written statement have not denied existence of territorial jurisdiction of this Court—On date of institution, this court had jurisdiction to entertain and try proceedings on basis of provisions under law—One fails to understand as to why defendants are now challenging jurisdiction on passing off when in written statement in cause of action, defendants admitted territorial jurisdiction—Registration has been secured by defendants which has been although applied prior but, was prosecuted and obtained pursuant to interim orders passed by

this court in matter—Registrar of Trade Marks has not cited previously registered trade mark of plaintiff as a matter of conflicting mark in examination report and proceeded to grant registration without citing plaintiff's prior registered mark and also perhaps not been informed about interim orders and seisin of dispute by this Court and granted registration contrary to Rule 37 of T M Rules—By ignoring mandatory provisions of Act and granting registration to defendants, it is clear that it is done with malafide intention, in order to defeat orders passed by court—It is a triable question whether registration of defendants is actually a valid one or is it just entry wrongly remaining on register, depending upon inference which court is going to draw by way of impact of subsequent events—Objection qua jurisdiction at this stage can not be sustained and same is dismissed.

DCM Shri Ram Consolidated v. *Sree Ram Agro Ltd. & Ors.* *119*

TRADE MARKS RULE, 2002—Rule 37—Plaintiff registered trade mark owner of expression "SHRIRAM" for vast range of products since 1960—By interim order, defendants restrained from manufacturing or selling any produce by name of "SHRIRAM CARTAP" which is deceptively similar trademark of plaintiff—Case of defendants that they have got registration of trade mark from registry—Date of registration relates back to date of application—Plaintiff is entitled to continue with suit for passing off which is still maintainable but defendants are residing and carrying on their business outside jurisdiction of this court—Plaintiff under action of passing off can not take advantage of section 134(2) of Act in order to invoke territorial jurisdiction—Plaint is liable to be returned because of lack of territorial jurisdiction—Held—Defendants did not amend written statement after obtaining registration nor defendants have filed any application for return of plaint—Defendants in their written statement have not denied existence of territorial jurisdiction of this Court—On date of institution, this court had jurisdiction to entertain and try proceedings on basis of provisions under law—One fails

to understand as to why defendants are now challenging jurisdiction on passing off when in written statement in cause of action, defendants admitted territorial jurisdiction—Registration has been secured by defendants which has been although applied prior but, was prosecuted and obtained pursuant to interim orders passed by this court in matter—Registrar of Trade Marks has not cited previously registered trade mark of plaintiff as a matter of conflicting mark in examination report and proceeded to grant registration without citing plaintiff's prior registered mark and also perhaps not been informed about interim orders and seisin of dispute by this Court and granted registration contrary to Rule 37 of T M Rules—By ignoring mandatory provisions of Act and granting registration to defendants, it is clear that it is done with malafide intention, in order to defeat orders passed by court—It is a triable question whether registration of defendants is actually a valid one or is it just entry wrongly remaining on register, depending upon inference which court is going to draw by way of impact of subsequent events—Objection qua jurisdiction at this stage can not be sustained and same is dismissed.

TRANSFER OF PROPERTY ACT, 1882—Section 106 & 116—Respondent/landlord wrote a letter 28.12.2010 after expiry of tenancy by efflux of time, to vacate the property—Appellant did not vacate; legal notice sent on 4.2.2011 terminating the tenancy—Appellant failed to vacate—Appellant bank had account of respondent in their branch—Started depositing rent in the account—Claimed by tenant that by acceptance of such deposit fresh tenancy came into existence—Landlord when came to know of surreptitious and unilateral deposit of rent, wrote a letter dated 12.07.2011 that deposit of rent was without any instruction on their behalf and the deposit would be taken without prejudice to their right—Court observed any amount received after the termination of tenancy can surely

be taken as charges towards use and occupation because after all the tenant had continued to use and occupy tenanted premises and was liable consequently to pay user charges—Fresh tenancy is a bilateral matter of contract coming into existence—Unless there is bilateral action and an agreement entered into to create fresh tenancy, mere acceptance of rent after termination of tenancy cannot create fresh tenancy—Appellant Bank Contended that since the appellant disputed all the aspect in the written statement, decree could not be passed by Trial Court under Order 12 Rule 6—Held—Contention to be misconceived as existence of relationship of landlord and tenant, the factum of premises not having protection of Delhi Rent Control Act, 1958, and fact of tenancy termination by service of a legal notice not disputed in the written statement—Fresh tenancy also not found to have been created—Appeal dismissed.

ILR (2012) IV DELHI 1
W.P.(C)

SHYAM SINGH YADAV ....PETITIONER

VERSUS

NATIONAL RIFLE ASSOCIATION OF INDIA ....RESPONDENT

(VIPIN SANGHI, J.)

W.P. (C) NO. : 6159/2011, 1980/2011 & C.M. NO. : 16893/2011 **DATE OF DECISION: 05.01.2012**

Constitution of India, 1950—Article 226—Central Civil Services (Conduct) Rules, 1964—Government servant holding a elective office in National Sports Federation—Central Government entitled to lay down guidelines—The petitioner a government servant, serving under Govt. of UP—Claimed special interest in sports of shooting and associated with National Rifle Association—Co-opted as honorary Treasurer of the Association and continued till 2005—Contested election for the post and elected till the expiry of four years terms till 2009—Again election held—Re-elected Treasurer of NRAI for four years which would expire in 2013—Show cause notice issued by NRAI following the Govt. advice dated 24.12.2010 that petitioner as a serving government servant might not continue as treasurer for a period exceeding four years or one term whichever less, as to why governing body should not consider his removal from the post of honorary Treasurer—Meeting of governing body held on 28.03.2011—Show cause notice considered—General Body passed resolution to remove the petitioner—Petitioner contended that Central Government Circular not applicable to him *ipso-facto*—Further contended that petitioner belongs to Uttar Pradesh States Service

and was not Central Government Servant and CCS (Conduct Rules) were not applicable to him—State of U.P. not made any similar rules/instructions—Per-contra State Government/UT Administration bound by said circular in relation to National Sports Federation—National Sports Federation recognized and regulated by Central Government—Received aid and funds from Central Government—Further contended that in public interest, the government servant whether in the Central Government or State Government should not be involved in Sports Federation for an indefinite period in an elected capacity as it was bound to affect the discharge of their primary responsibilities and duties as government servant—Held—Central Government entitled to lay down guidelines to govern National Sports Federation—Such guidelines bound on and enforceable against National Sports Federation—A Central Government aided and funded the activity and regulated them—It is true that a senior government servant in the Central Government should be available to it to render his services and no activity unconnected with his official duties should be allowed to interfere in efficient discharge of such duties; it was equally true for State government servant—Further the decision of General Body removing him has not been assailed—Writ Petition Dismissed.

It is well settled that the Central government is entitled to lay down guidelines to govern the National Sports Federations and such guidelines are binding on and enforceable against the National Sports Federations. The Central Government aids and funds the activities of the NSFs and regulates them. The Central Government is also entitled to lay down the tenure clause for the office bearers and members of the National Sports Federations. By circular dated 01.05.2010, the Central Government, in the Ministry of Youth Affairs and Sports, has laid down the tenure for, inter alia, the Hon.

Treasurer of any recognized National Sports Federation/ Association as *"a maximum of two successive terms of four years each after which a minimum cooling off period of four years will apply to seek fresh election"*. However, it is important to note that this prescription of tenure is a general prescription for all those who may hold the post of, inter alia, the Hon. Treasurer of the National Sports Federation. This prescription does not whittle down the effect of further restrictions placed by the Central Government on the holding of an elective office in the National Sports Federations by government servants. As early as on 22.04.1994, the DOPT has laid down that no Central Government servant should be allowed to hold an elective office in any sports association/ federation for a term of more than four years or for one term, whichever is less. **(Para 23)**

No doubt, the said prescription is in respect of Central Government employees. However, the reason behind the said prescription is what is more important to be taken note of than even the prescription itself. As noted in the said office memorandum, the entire time of the government servant, particularly a senior officer should be available to the Government and no activities connected with his official duties should be allowed to interfere with the efficient discharge of such duties. The Government while issuing the said office memorandum was conscious of the tendency on the part of the government servant to seek elective offices in sports federations/associations at the National/State level, and after taking note thereof laid down, inter alia, the principle that no government servant should be allowed to hold elective office in any sports association/federation for a term of more than four years or for one term, whichever is less. If it is true that a senior government servant in the Central Government should be available to the Central Government for rendering his services, and no activities unconnected with his official duties should be allowed to interfere in the efficient discharge of such duties, it is equally true for State Government servants as well.

(Para 24)

Important Issue Involved: The Central Government can lay down guidelines to run sports federations.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. Mohit Chaudhary with Mr. Dheeraj Gupta and Mr. A. Das, Advocates.

FOR THE RESPONDENT : Mr. Sanjeev Sachdeva, Senior Advocate with Mr. Preet Pal Singh and Ms. Priyam Mehta, Advocates.

RESULT: Writ Petition Dismissed.

VIPIN SANGHI, J. (Oral)

1. These two petitions under Article 226 of the Constitution of India have been preferred by the petitioner in relation to the action of the respondent/National Rifle Association of India (NRAI) in removing him from the post of Treasurer. The respondent-Association/NRAI is an association, which is an autonomous body recognized by the Ministry of Sports at the national level for the promotion and advancement of the sport of shooting in India. It is the National Sports Federation duly recognized and regulated by the Government of India. It receives substantial grants from the Central Government. According to the petitioner, it received grants of Rs. 22 Crores (approximately) between 2007 and July 2011.

2. The petitioner is a government officer serving under the Government of Uttar Pradesh. He states that he is a PCS 1982 Batch officer. He claims that he has special interest in the sport of shooting, and is interested in advancement of the said sport in India. He has been associated with the NRAI since 1996.

3. The petitioner states that on 14.08.2001, the Government, acting through the Ministry of Sports (Ministry of Youth Affairs & Sports), notified and introduced the Sports Code for assistance to National Sports Federations. The Government set priorities and detailed the procedure to be followed by National Sports Federations for their recognition and to

avail sponsorship and assistance from the Government.

4. In the year 2004, upon the demise of the erstwhile Treasurer, the petitioner was co-opted as the Hon. Treasurer of the respondent-Association. He continued in that position till 2005 when the elections, inter alia, for the said post were held. The petitioner contested for the said post of Hon. Treasurer in the respondent-Association, and was elected to that position. On the expiry of the four-year term in the year 2009, the elections for the said post were again held, and the petitioner again offered his candidature for the said post. Once again he was elected as the Hon. Treasurer of NRAI for a term of four years, which will expire in 2013.

5. On 04.02.2010, the Government of India through the Ministry of Youth Affairs & Sports, Department of Sports, issued a circular addressed to the Chief Secretaries of all the State Governments and Union Territories, and to Sports Secretaries of Governments of all State Governments and Union Territories on the subject of adoption of norms relating to obtaining of prior governmental sanction for contesting and canvassing in elections to sport bodies. This circular took note of the fact that a number of government servants of the State Governments and the Union Territories Administration are holding posts in various sports associations and bodies at the national level, state level and district level. It pointed out that holding of elective office by government servants by the Central Government is regulated by the Central Civil Services (Conduct) Rules, 1964 [CCS (Conduct) Rules]. In terms of Rule 15(1) of the CCS (Conduct) Rules, previous sanction of the Central Government is required to hold an elective office in any body. Under Rule 12 of the CCS (Conduct) Rules, previous sanction of the Government or the prescribed authority is also necessary for a government servant, associating himself with raising of any funds or other collections, in pursuance of any object whatsoever.

6. Pertinently, this circular also referred to instructions issued by the Department of Personnel & Training (DOPT) contained in its O.M. No. 11013/3/9/93-Estt.(A) dated 22.04.1994 which, *inter alia,* provides that no government servant should be allowed to hold an elective office in any Sports Association/Federation for a term of more than four years, or for one term, whichever is less. The circular dated 04.02.2010 called upon the State Governments/Union Territories Administrations to formulate,

if not already so formulated, appropriate rules/instructions for incorporating the above-referred provisions. The Government also required the States/Union Territories to furnish a list of names of officers, inter alia, belonging to the State Services holding elective posts in Sports Federations/Associations, along with details of their terms and tenure.

7. According to the petitioner, this Government circular dated 04.02.2010 was not *ipso-facto* applicable in the case of the petitioner since the petitioner, as aforesaid, belongs to Uttar Pradesh State Service and is not a Central Government servant. The petitioner submits that the CCS (Conduct) Rules are not applicable to him. It is also the petitioner's submission that the State of Uttar Pradesh has not made any similar rules/instructions as referred to in the circular dated 04.02.2010 of the Government of India. In this regard, reliance is placed by the petitioner on the communication dated 28.12.2010 issued by the Joint Secretary and Public Information Officer of the Uttar Pradesh Government, in response to a query raised under the Right to Information Act (RTI Act), wherein it is stated that no guidelines have been issued by the Appointment Department, Uttar Pradesh, in pursuance of Government of India circular dated 04.02.2010.

8. The petitioner submits that the NRAI, acting through its President, issued a show cause notice dated 03.02.2011 to him. In this notice, the respondent-NRAI sought to place reliance upon the correspondence undertaken by it with the Ministry of Sports & Youth Affairs vide its communication dated 20.12.2010 and the response received from the said Ministry on 24.12.2010. The show cause notice states that NRAI had sought a clarification and instructions from the Ministry of Sports & Youth Affairs with regard to the petitioner's eligibility to continue as an office bearer in the post of Hon. Treasurer or any other elected post in NRAI. It was also enquired whether the petitioner had the required No Objection Certificate (NOC) from his employer, i.e. the State of Uttar Pradesh, to continue as an office bearer of NRAI. The show cause notice made reference to the governmental response dated 24.12.2010, which advised the Federation that, as a serving government servant, the petitioner may not continue as the Hon. Treasurer, or be elected to any post in NRAI for a period exceeding four years or one term, whichever is less.

9. The show cause notice also referred to a communication sent by

the NRAI to the Government of Uttar Pradesh dated 21.12.2010 seeking instructions, as to whether or not the petitioner had taken prior permission to contest the elections of NRAI or to continue as the Hon. Treasurer, or to contest elections for any other post in the said Association in future. It also made a reference to the response received from the Chief Secretary, Government of Uttar Pradesh, vide his letter dated 31.12.2010, which states that the petitioner had not been accorded any such permission by the Uttar Pradesh State Government.

10. By this show cause notice the President, in exercise of his constitutional duty and on the ground of maintaining transparency in the functioning of the respondent-Federation, called upon the petitioner to show cause as to why the Governing Body should not consider his removal from the post of Hon. Treasurer of the Federation. The President also sought to curtail the powers of the petitioner in the interregnum by, firstly, constituting a three-member committee headed by the petitioner to act as a Special Finance Committee to oversee and discharge all the responsibilities of the Hon. Treasurer of NRAI. The President also required the petitioner to interact with the office staff through the Secretary only.

11. The petitioner, being aggrieved by the said communication dated 03.02.2011 issued by the President of NRAI, preferred W.P.(C.) No. 1980/2011 to assail the same. It appears that the petitioner also sought a restraint against consideration of the said show cause notice in the proposed Governing Body Meeting of NRAI.

12. This writ petition was taken up by the Court on 25.03.2011. On this date, the petitioner made a statement that he foregoes his right to answer to the said show cause notice. The Court observed that the pendency of the writ petition would not prevent the respondent NRAI from proceeding to dispose of the show cause notice in accordance with law, and in passing appropriate orders. The Court also rejected the petitioner's application for stay, (which was not numbered, though wrongly noted in the order as C.M. No. 4198/2011), whereby the petitioner sought a restraint against the holding of the Governing Body Meeting on 28.03.2011, on the ground that the petitioner had not made out a prima-facie case for interim relief.

13. The Governing Body Meeting of respondent-Association was held on 28.03.2011. The consideration of the show cause notice issued to the petitioner was taken up by the Governing Body under Item 14(g).

The minutes of the said Governing Body Meeting have been placed on record of W.P.(C.) No. 6159/2011. From the minutes, it appears that the Governing Body after discussions adopted the proposal mooted by the President that the petitioner be removed from the post of Treasurer of NRAI. The Governing Body was conscious that for this purpose the General Body should pass a resolution.

14. Thereafter the General Body Meeting was convened on 28.03.2011, where the General Body considered whether the petitioner should continue as the Hon. Secretary of NRAI or not. The minutes of the meeting of the General Body held on 28.03.2011 have been placed on record by the respondent with their counter-affidavit.

15. The General Body had a total strength of 40. Out of 40 members, two members left the house and were not present at the time of voting. 31 out of 38 members voted in favour of the resolution and, accordingly, the said resolution was passed by overwhelming majority. Consequently, the petitioner stands removed from the post of Hon. Treasurer of the NRAI.

16. As aforesaid, the primary submission of the petitioner is that the circular dated 04.02.2010 is not applicable to the petitioner, as it has been issued by the Central Government, whereas the petitioner is a Government officer under the State of Uttar Pradesh and is not bound by the CCS (Conduct) Rules. The second submission of the learned counsel for the petitioner is that the State of Uttar Pradesh has not yet adopted the said circular dated 04.02.2010 and there are no guidelines laid down by the State of Uttar Pradesh for grant of sanction, to enable the petitioner to continue to serve as the Hon. Secretary of NRAI. He submits that since there are no rules or guidelines in this regard, the petitioner, possibly, could not have obtained any prior permission from the State of Uttar Pradesh. Thirdly, it is submitted that the election of the petitioner as Hon. Treasurer had taken place in the year 2009, whereas the said Government circular had come to be issued only on 04.02.2010. It is argued that this circular would, at best, be prospective in its operation and cannot affect the right of the petitioner, who is holding the position of Hon. Treasurer for a period of four years from 2009 to 2013. The petitioner also submits that the President of the NRAI has no authority to curb the powers of the Hon. Treasurer, as done by him in the show cause notice dated 03.02.2011.

17. The petition is opposed by the respondent. The submission of learned counsel for the respondent is that the issue of implementation of tenure restrictions in National Sports Federations/Associations was pending for a long time and was not implemented due to strong opposition of the Indian Olympic Association and various National Sports Federations. However, this Court in W.P.(C.) No. 7868/2005, while dealing with the case of Indian Olympic Federation, in its order dated 02.03.2010 observed that the Government guidelines governing the National Sports Federations were valid, binding and enforceable and that the tenure clause was not in violation of the International Olympic Committee's (IOC) Charter. It was also held that the Government of India was fully competent to make regulations of National Sports Federations and Indian Olympic Association.

18. Learned counsel draws attention of the Court to the circular dated 01.05.2010 issued by the Ministry of Youth Affairs & Sports to the President of Indian Olympic Association, and all recognized Sports Federations and to the Secretary General/Secretary of, inter alia, of National Sports Federations, wherein the government, inter alia, observes:

> "Accordingly after taking into account the entire facts and circumstances of the case, and the views expressed by the Hon'ble Courts and Parliament, and the prevailing public opinion on the matter, and with a view to encouraging professional management, good government, transparency, accountability, democratic elections, etc. in NSFs, including IOA, the competent authority after satisfying himself has set aside the orders keeping the tenure clause in abeyance with immediate effect subject to the following modifications in the existing tenure limit provisions referred to in letter dated 20th September, 1975
>
> ....
>
> x x x x x x x x x x
>
> ii. The Secretary (or by whatever other designation such as Secretary General or General Secretary by which he is referred to) and the Treasurer of any recognized National Sports Federations, including the Indian Olympic Association, may serve a maximum of two successive terms of four years each after which a minimum cooling off period of four years will apply to seek fresh election to either post."

19. Learned counsel for the respondent submits that the circular dated 04.02.2010 issued by the Central Government makes reference to DOPT instructions dated 22.04.1994 which, inter alia, provides that no government servant should be allowed to hold an elective office in any sports association/federation for a term of more than four years or for one term, whichever is less. He submits that the State Government/UT administrations are bound by the said circular, at least in relation to National Sports Federations, since the National Sports Federations are recognized and regulated by the Central Government and receive aid and funds from the Central Government. The National Sports Federations are bound by the Central Government guidelines and no member or office bearer of National Sports Federation can remain in office in breach of the guidelines laid down by the Central Government. Learned counsel for the respondent submits that it is in public interest that government servants, whether under the Central Government or under a State Government/UT administration, should not be involved in sports federations for an indefinite period of time in an elected capacity, as it is bound to effect the discharge of their primary responsibilities and duties as a government servant. It is for this reason that Rule 15 of the CCS (Conduct) Rules lays down various prescriptions, and prohibits that the government servant shall not, except with the previous sanction of the Government engage in trade or business; undertake any other employment; hold an elective office, or canvass for a candidate or candidates for an elective office, in any body, whether incorporated or not etc. He also refers to the DOPT O.M dated 22.04.1994, referred to in the circular dated 04.02.1010. This DOPT O.M., inter alia, states :-

> "——It hardly needs to be emphasized that the entire time of the Government servant, particularly a senior officer, should be available to the Government and no activities unconnected with his official duties should be allowed to interfere with the efficient discharge of such duties. The need for curbing the tendency on the part of a Government servant to seek elective office in sports federations/associations at the National/State level has been considered carefully and it has been decided that the following principles should be followed while considering requests from Government servants for seeking election to or holding elective offices in sports federations/associations:-
>
> (i) No government servant should be allowed to hold elective

office in any sports association/federation for a term of more than 4 years, or for one term, whichever is less.

(ii) .....

(iii) .....

(iv) .....”

20. Learned counsel for the respondent submits that the respondent has acted bona fide and upon the advice of the Central Government. He has drawn my attention to the communication dated 20.12.2010 issued to the Government of India, Ministry of Youth Affairs & Sports, bringing to its notice the fact that the petitioner had been holding an elected office since 2005, and had been elected for the second time in 2009 to the post of Hon. Treasurer. The respondent had sought the advice of the said Ministry as to whether the petitioner could continue as the Hon. Secretary or contest elections for any other post in the respondent- Association. The Central Government had responded vide letter dated 24.12.2010, inter alia, stating:

> “As per the extant guidelines on the subject matter, no Government Servant can hold an elective post in any sports association/ federation for more than four years or one term whichever is less. Further, he is required to obtain prior sanction of the government before holding any elective post.
>
> Since Sh. Yadav has already completed 6 years as Hony. Treasurer, he is not entitled to continue in the post nor can he contest for any other elective post in the sports body. It is also not known if he had taken prior sanction from the Government for holding the post”.

21. Learned counsel for the respondent further submits that the petitioner did not even chose to respond to the show cause notice dated 03.02.2011, as recorded in the order dated 25.03.2011 passed in W.P(C) 1980/2011. He submits that since the office bearers of the association are elected by the General Body, their removal has also to be considered by the General Body. He submits that the petitioner has been removed by the General Body in its meeting held on 28.03.2011. He further submits that the petitioner has not even challenged the resolution passed by the General Body by an overwhelming majority.

22. In his rejoinder, learned counsel for the petitioner submits that his writ petition, being W.P(C) 1980/2011 ought to have been considered as his reply to the show cause notice dated 03.02.2011. Moreover, since the petitioner is an U.P State Government servant and not a Central Government servant, the requirement of prior permission/approval from the State Government is not applicable so far as the petitioner is concerned, for holding the elective office of Hon. Secretary of the respondent-Association for more than one term.

23. It is well settled that the Central government is entitled to lay down guidelines to govern the National Sports Federations and such guidelines are binding on and enforceable against the National Sports Federations. The Central Government aids and funds the activities of the NSFs and regulates them. The Central Government is also entitled to lay down the tenure clause for the office bearers and members of the National Sports Federations. By circular dated 01.05.2010, the Central Government, in the Ministry of Youth Affairs and Sports, has laid down the tenure for, inter alia, the Hon. Treasurer of any recognized National Sports Federation/ Association as *“a maximum of two successive terms of four years each after which a minimum cooling off period of four years will apply to seek fresh election”*. However, it is important to note that this prescription of tenure is a general prescription for all those who may hold the post of, inter alia, the Hon. Treasurer of the National Sports Federation. This prescription does not whittle down the effect of further restrictions placed by the Central Government on the holding of an elective office in the National Sports Federations by government servants. As early as on 22.04.1994, the DOPT has laid down that no Central Government servant should be allowed to hold an elective office in any sports association/ federation for a term of more than four years or for one term, whichever is less.

24. No doubt, the said prescription is in respect of Central Government employees. However, the reason behind the said prescription is what is more important to be taken note of than even the prescription itself. As noted in the said office memorandum, the entire time of the government servant, particularly a senior officer should be available to the Government and no activities connected with his official duties should be allowed to interfere with the efficient discharge of such duties. The Government while issuing the said office memorandum was conscious

of the tendency on the part of the government servant to seek elective offices in sports federations/associations at the National/State level, and after taking note thereof laid down, inter alia, the principle that no government servant should be allowed to hold elective office in any sports association/federation for a term of more than four years or for one term, whichever is less. If it is true that a senior government servant in the Central Government should be available to the Central Government for rendering his services, and no activities unconnected with his official duties should be allowed to interfere in the efficient discharge of such duties, it is equally true for State Government servants as well.

25. The submission of the petitioner that since the State of U.P has not formulated prior rules/instructions for grant of permission to enable the State Government servants to contest for elective posts in sports federations, the petitioner is entitled to continue as the Hon. Secretary has no merit. This is so because the petitioner, admittedly, has already served for a full term of four years in an elective office i.e as Hon. Treasurer of the respondent-Association from the year 2005 to 2009, and even thereafter till his removal from office by the General Body of the respondent-Association on 28.03.2011. Beyond a period of four years the State Government cannot grant permission to a State Government servant to hold an elective office in a National Sports Federation. Whatever may the position with regard to holding of an elective office in a State/District Sports Federation by a State Government servant, in relation to an elective post in a National Sports Federation, the Government servant – to whichever service he belongs (whether Central or State), must comply with the requirements set out by the Central Government vide circular dated 04.02.2010. He cannot defy and breach those conditions by merely contending that the State Government of the State of U.P has not laid down appropriate rules/instructions for grant of permission.

26. Even though it would be academic to say so, and is not relevant for the purpose of this case, I may also observe that merely because the State of U.P may not have laid down specific rules/instructions for grant of appropriate permission, that did not preclude the petitioner from applying for permission/sanction from the State Government. Admittedly, the petitioner has not applied to the State of U.P for grant of permission to hold, or continue to hold the elective post of Hon. Secretary of the respondent-Association. In its communication dated 24.12.2010, as extracted above, the Central Government has conveyed its decision that

the petitioner is not entitled to hold the post of Hon. Secretary any further. In the light of the aforesaid, the General Body of the respondent –Association, by an overwhelming majority removed the petitioner. That decision/resolution of the General Body, which is supreme, has not been assailed in these proceedings. The challenge to the Minutes of the meeting of the Governing Body meeting held on 28.03.2011 is of no avail, as the Governing Body did not take the decision to remove the petitioner from his position as the elected, Hon. Treasurer of the respondent-Association. It only considered the issue whether the petitioner's case for removal should be placed before the General Body. It is the General Body of the respondent-Association which could have, and which has infact removed the petitioner from the post of Hon. Treasurer.

27. In the light of the aforesaid discussion, I do not intend to go into the petitioner's submission with regard to the curtailment of his powers as the Hon. Secretary by the President vide communication/show cause notice dated 03.02.2011, as the said issue has become academic in view of the petitioner's valid removal from his position as the Hon. Treasurer by the General Body in its meeting held on 28.03.2011.

28. For the aforesaid reasons, I do not find any merit in these petitions and dismiss the same, leaving the parties to bear their respective costs.

ILR (2012) IV DELHI 15
MAC. APP.

ORIENTAL INSURANCE COMPANY LTD. ....APPELLANT

VERSUS

RAJNI DEVI & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 286/2011 DATE OF DECISION: 06.01.2012

Motor Vehicles Act, 1988—Compensation granted by MACT challenged before High Court—Plea taken, there should have been deduction of 50% as against 1/3rd taken by Tribunal as deceased left behind only a widow—In absence of evidence led by claimants with regards to future prospects, 50% increase could not have been given in minimum wages adopted by Tribunal—Compensation awarded towards conventional heads is excessive—Per Contra plea taken, 50% of deduction is made in case of a bachelor—In case of a married person minimum deduction is one third—Held:- deceased died issueless—He did not leave behind his parents—Widow was only dependent—Deduction towards personal and living expenses has to be one half and not one third—Deceased would spend not less than 50% on himself—Tribunal erred in making deduction of only 1/3rd towards personal living expenses of deceased—Increase in minimum wages is not on account of promotion of a unskilled worker or on account of advancement in his career but same is due to increase in price index and cost of living—Minimum wages are revised not only to meet inflation but also to improve standard of living of lowest workers and to give benefit of growth in GDP—Where full compensation for loss of dependency is granted, only a notional sum is awarded towards non pecuniary damages i.e. loss of love and affection, loss of consortium and loss estate—There has to be uniformity in award under these heads irrespective of status of deceased of claimants—Compensation reduced.

Important Issue Involved: (A) Where deceased died issueless and did not leave behind the parents and the widow was the only dependent, the deduction towards personal and living expenses has to be one half and not one third.

(B) The increase in the minimum wages is not on account of promotion of an unskilled worker or on account of advancement in his career but the same is due to increase in the price index and cost of living. The minimum wages are revised not only to meet the inflation but also to improve the standard of living of the lowest paid workers and to give the benefit of growth in GDP. Therefore, 50% towards the future prospects/inflation is to be added to minimum wages of a skilled worker.

(C) Where full compensation for loss of dependency is granted, only a notional sum is awarded towards the non pecuniary damages i.e. loss of love and affection, loss of consortium and loss of estate.

(D) There has to be uniformity in the award of compensation for non pecuniary damages irrespective of the status of the deceased or the claimants.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Ms. Manjusha Wadhwa Advocate Ms. Angana Goswami Advocate.

FOR THE RESPONDENTS : Mr. Ajay Kumar Advocate with Mr. Anil Singh Advocate for R-1.

CASES REFERRED TO:

1. *Sarla Verma & Ors.* vs. *Delhi Transport Corporation &*

Anr., (2009) 6 SCC 121.

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

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

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

5. *New India Assurance Co. Ltd.* vs. *Charlie,* (2005) 10 SCC 720.

6. *U.P. SRTC* vs. *Trilok Chandara,* (1996) 4 SCC 362.

7. *Sarla Dixit* vs. *Balwant Yadav,* (1996) 3 SCC 179.

8. *G.M., Kerala SRTC* vs. *Susamma Thomas,* (1994) 2 SCC 176.

RESULT: Compensation reduced.

G. P. MITTAL, J. (ORAL)

1. The Appellant Oriental Insurance Company Ltd. seeks reduction of compensation of Rs. 9,41,040/- awarded by the Motor Accident Claims Tribunal, (the Tribunal) for death of Raju Kumar Mandal who succumbed to the fatal injuries in an accident which took place on 23.06.2007. During inquiry before the Tribunal, it was claimed that deceased Raju Kumar Mandal was aged about 25 years on the date of the accident. He was a professional driver and getting a salary of Rs. 6,000/- per month. Deceased's driving licence Ex.PW-1/1 was proved where the deceased's date of birth was mentioned as 14.01.1982. In the absence of any cogent evidence with regard to the deceased's income of Rs. 6,000/- per month, the Tribunal took the minimum wages of a skilled worker (Rs. 3940/- per month), added 50% towards inflation, deducted one-third towards personal and living expenses and applied the multiplier of 18 to arrive at the loss of dependency as Rs. 8,51,040/-. The Tribunal further granted sum of Rs. 50,000/- towards loss of love and affection, Rs. 10,000/- towards loss of estate, Rs.10,000/- towards loss of consortium and Rs. 20,000/- for last rites.

2. The contentions raises on behalf of the Appellant's are:-

(1) There should have been deduction of 50% as against one-third taken by the Tribunal as the deceased left behind only a widow.

(2) In the absence of any evidence led by the Claimants with regards future prospects 50% increase could not have been given in the minimum wages adopted by the Tribunal.

(3) The compensation awarded towards conventional heads i.e. loss of love and affection, loss of consortium and funeral expenses is excessive.

3. On the other hand, it is contended by the learned counsel for the Respondents that 50% deduction is made in case of a bachelor. In case of a married person, the minimum deduction is one-third. Reliance is placed on **Sarla Verma & Ors. v. Delhi Transport Corporation & Anr.,** (2009) 6 SCC 121.

4. The Hon'ble Supreme Court considered the judgments of **G.M., Kerala SRTC v. Susamma Thomas,** (1994) 2 SCC 176; **U.P. SRTC v. Trilok Chandara,** (1996) 4 SCC 362; **Sarla Dixit v. Balwant Yadav,** (1996) 3 SCC 179 and **New India Assurance Co. Ltd. v. Charlie,** (2005) 10 SCC 720, and held that where the deceased is a bachelor deduction towards the personal expenses should be 50%. However, where a bachelor leaves behind a widowed mother and young siblings dependant on him, the deduction towards the personal and living expenses should be one-third. In the case of married person where the number of dependants was 2-3, the deduction suggested was one-third.

5. In this case the deceased died issueless. He did not leave behind the parents. Thus, the widow was the only dependant; applying the ratio of **Sarla Verma** (supra), the deduction towards the personal and living expenses has to be one-half and not one-third. Obviously, the deceased would spend not less than 50% on himself. The Tribunal erred in making deduction of only one-third towards the personal living expenses of the deceased. In my view, it has to be one-half.

6. It is true that there was no evidence led towards the deceased's future prospects. It was claimed that the deceased was getting a sum of Rs. 6,000/- per month. The same was not believed by the Tribunal in the absence of any cogent evidence. The Tribunal, therefore, took the minimum wages of a skilled worker, added 50% towards the future prospects/inflation.

7. In **National Insurance Company Ltd. v. Renu Devi & Ors.,** III (2008) ACC 134, this Court held that the increase in the minimum wages is not on account of promotion of a unskilled worker or on account of advancement in his career but the same is due to increase in the price

index and cost of living. It has also to be borne in mind that the minimum wages are revised not only to meet the inflation but also to improve the standard of living of the lowest paid workers and to give the benefit of growth in GDP.

8. A perusal of the Notifications issued under the Minimum Wages Act would show that the minimum wages of a skilled worker were revised from Rs. 4377/- on 01.08.2009 to Rs. 6448/- on 01.02.2010. Thus, it has to be noticed that there was increase of about 50% in the minimum wages just in six months. This was not on account of inflation but to provide a better standard of living.

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

"9. In a recent decision of this Court **Sh. Narinder Bishal and Anr. v. Sh. Rambir Singh and Ors.,** MAC App. 1007-08/2006, decided on 20.02.08 by Kailash Gambhir, J., it has been observed as under:-

> "For determining the earning of the deceased or victim of the accident, the claimants are supposed to prove the exact income of the deceased by leading some cogent and reliable documentary evidence as to the nature of his employment or trade or business or in any other activity he was involved in and then the said income can be taken into consideration for determining the quantum of compensation and if in such a case, the claimants are further able to establish the future prospects as well, then the criteria laid down in Sarla Dixit's case would get attracted. There can be another category of cases where the claimants are able to establish the future prospects of the deceased by quantifying the amount to be earned by the deceased in future with the help of cogent, reliable and convincing evidence and in all such cases the tribunal can take into consideration such future increase as has been established by the claimants on record. The difficulty however, would arise in all those cases where although the claimants are able to sufficiently establish on record the educational qualification of the deceased or the nature of his employment whether skilled, semi-skilled or unskilled but fail to establish by any reliable evidence to prove the exact income of the deceased. In such cases, question arises whether the Tribunal can take into

> consideration the minimum wages and the periodical revision of minimum wages as are fixed by the Government under the Minimum Wages Act. To examine this question, it will have to be considered whether the revision which takes place under the Minimum Wages Act can be equated with the future prospects of a deceased. As would be evident from catena of judgments of the Supreme Court, the future prospects have no correlation with the price index, inflation or denunciation of currency value.
>
> The future prospects would necessarily mean advancement in future career, earnings and progression in one's life. It could be considered by seeing, from which post a person began his career, what avenues or prospects he has while being in a particular avocation and what targets he/she would finally achieve at the end of his career. The promotional avenues, career progression, grant of selection grades etc. are some of the broad features for considering one's future prospects in one's career.
>
> The minimum wage, in the very context of economy has a correlation with the growth and development of the nation's economy, postulating increase in the price index, reduction of purchasing power with the denunciation of currency value and consequent fixation of minimum wages giving some periodical increase so as to ensure sustenance and survival of the workman class. Keeping this in view, under no circumstance the revision of minimum wages can be treated on the same footing with the factor of future prospects."

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

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

11. The Court further observed:-

> "Noting that minimum wages virtually double after every 10 years to neutralise increase in inflation, cost of living, purchasing power of rupee....."

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

10. The Tribunal's finding on this aspect, therefore, cannot be faulted. 11. Where full compensation for loss of dependency is granted, only a notional sum is awarded towards the non-pecuniary damages i.e. loss of love and affection, loss of consortium and loss of estate. Funeral charges are awarded on actual basis. There has to be uniformity in the award of compensation under these heads irrespective of the status of the deceased or the Claimants. No evidence was led as to the actual funeral expenses spent by the Respondent.

12. Hence, revised loss of dependency works out as Rs. 6,38,280/- (3940/- + 50% ÷ 2 x 12 x 18).

13. The overall revised compensation is tabulated hereunder:-

(1) Loss of dependency	=	Rs. 6,38,280/-
(2) Loss of love and affection & loss of consortium	=	Rs. 25,000/-
(3) Loss of estate	=	Rs. 10,000/-
(4) Funeral Expenses	=	Rs. 10,000/-
TOTAL	**=**	**Rs. 6,83,280/-**

14. The compensation is reduced from Rs. 9,41,040/- to Rs. 6,83,280/- including the interim compensation of Rs. 50,000/-.

15. 50% of the amount was ordered to be released to Respondent by the order of this Court dated 28.04.2011.

16. The excess amount along with interest earned, if any, on the sum of Rs. 2,57,760/- shall be refunded to the Appellant Insurance Company. The statutory amount of Rs.25,000/- shall also be refunded.

17. The appeal is allowed in above terms.

18. The report from the Registry may be obtained as to the amount released and the amount lying deposited. List on 23.01.2012.

ILR (2012) IV DELHI 22
WRIT PETITION (CIVIL)

ROADLINES CORPORATION (P) LTD. ....APPELLANT

VERSUS

ORIENTAL INSURANCE CO. LTD. & ANR. ....RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA NO. : 656/2003 DATE OF DECISION: 16.01.2012

Code of Civil Procedure, 1908—Section 20—Territorial Jurisdiction—Carriers Act, 1865—Sections 8 and 9—Section 10—Appellant/defendant took upon transportation of packages of colour picture tubes from Malanpur to New Delhi—Goods loaded in truck covered under the Marine Insurance Policy—Truck met with an accident—Respondent/plaintiff suffered loss of Rs. 3,03,715—Notice under Section 10 Carriers Act served vide letter dated 23.04.1999—Claim lodged with the Insurance company—Surveyor appointed who gave report dated 13.04.1999 and 30.04.1999—Claim settled by insurance company—Being subrogated filed the suit—Held—Part of cause of action arose at Delhi—The Court at Delhi has territorial jurisdiction—Suit decreed—Aggrieved appellant/defendant filed the regular first appeal—Held—Truck of the transporter appellant/defendant involved in accident—Statutory liability on account of negligence fastened—Part of cause of action arisen in Delhi—Court at Delhi have territorial jurisdiction—Appeal dismissed.

Before going into the facts of the case, it is relevant to refer to the ratio of the judgment of the Supreme Court in the case of **Nath Brothers Exim International Ltd. vs. Best Roadways Ltd.** 2000 (4) SCC 553 which lays down that the liability of a transporter is the liability of an insurer, and

negligence is statutorily fastened upon a transporter under Sections 8 and 9 of the Carriers Act, 1865. The Supreme Court in this judgment has also held that the only exception to the liability of a transporter is an act of god or an act of enemy of the State and the expression act of god, has to be strictly construed, and for which reason the Supreme Court has held that even when a fire is caused in the godown, the same cannot be treated as an act of god, inasmuch as, the striking of lightening is an act of god and not the causing of fire. Paras 25, 27 and 31 are relevant and which read as under:-

> "25. We have already reproduced the provisions of Sections 6,8 and 9 above. Section 6 enables the common carrier to limit his liability by a special contract. But the special contract will not absolve the carrier if the damage or criminal act or that of his agents or servants. In that situation, the carrier would be liable for the damage to or loss or non-delivery of goods. In that situation, if a suit is filed for recovery of damages, the burden of proof will not be on the owner or the plaintiff to show that the loss or damage was caused owing to the negligence or criminal act of the carrier as provided by Section 9. The carrier can escape his liability only if it is established that the loss or damage was due to an act of God or enemies of the State (or the enemies of the King, a phrase used by the Privy Council). The Calcutta decision in *British & Foreign Marine Insurance Co. v. India General Navigation and Rly. Co. Ltd., the Assam decision in River Steam Navigation Co. Ltd. V. Syam Sunder Tea Co. Ltd.,* the Rajasthan decision in *Vidya Ratan v. Kota Transport Co. Ltd.* and the *Kerala decision in Kerala Transport Co. v. Kunnath Textiles* which have already been referred to above, have considered the effect of special contract within the meaning of Sections 6 and 8 of the Carriers Act, 1865 and, in our opinion, they lay down the correct law.
>
> 27. From the above discussion, it would be seen that the liability of a carrier to whom the goods are entrusted for carriage is that of an insurer and is absolute in terms, in the sense that the carrier has to deliver the goods safely, undamaged and without loss at the destination, indicated by the consignor. So long as the goods are in the custody of the carrier, it is the duty of the carrier to take due care as he would have taken of his own goods and he would be liable if any loss or damage was caused to the goods on account of his own negligence or criminal act or that of his agent and servants.
>
> 31. Thus the expression "at owner's risk" does not exempt a carrier from his own negligence or the negligence of his servants or agents." (underlining added) **(Para 2)**

In my opinion, issue nos. 2 and 3 are fully covered by the judgment of the Supreme Court in the case of Nath **Brothers Exim International Ltd.**(supra), and therefore, the transporter/appellant cannot contract out of his liability, inasmuch as, liability is statutorily fastened upon a transporter under the Carriers Act, 1865. The liability of a carrier is the liability equivalent to that of an insurer. Accordingly, once it is proved and admitted on record that there was an accident involving the truck of the appellant/transporter, statutory liability on account of negligence is fastened upon the appellant/transporter, and therefore, the appellant has rightly been held to be liable. **(Para 5)**

Important Issue Involved: (A) Liability of a transporter is the liability of an insurer and negligence is statutorily fastened upon a transporter under Section 8 & 9 of the Carriers Act. The only exception to the liability of a transporter is an act of God or an act of enemy of the State and the expression act of God has to be strictly construed and even when a fire is caused in the godown, the same cannot be treated as an act of God, in as much as, the striking of lightening is an act of God and not the causing of fire.

(B) Once it is proved and admitted on record that there was an accident involving the truck of the transporter, statutory liability on account of negligence is fastened upon the transporter.

[Vi Gu]

APPEARANCES:

FOR THE APPELLANT : Ms. Avni Singh with Mr. Ravi Prakash, Advocates.

FOR THE RESPONDENTS : None.

CASES REFERRED TO:

1. *Pramod Kr. Gupta* vs. *Sky Link Chemical* as reported in 2001 DLT (143).
2. *Nath Brothers Exim International Ltd.* vs. *Best Roadways Ltd.* 2000 (4) SCC 553.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment and decree dated 30.4.2003 whereby the suit of the Insurance Company/subrogee/plaintiff has been decreed for Rs.3,02,214/- along with interest at 9% per annum against the appellant/transporter.

2. Before going into the facts of the case, it is relevant to refer to the ratio of the judgment of the Supreme Court in the case of **Nath Brothers Exim International Ltd. vs. Best Roadways Ltd.** 2000 (4) SCC 553 which lays down that the liability of a transporter is the liability of an insurer, and negligence is statutorily fastened upon a transporter under Sections 8 and 9 of the Carriers Act, 1865. The Supreme Court in this judgment has also held that the only exception to the liability of a transporter is an act of god or an act of enemy of the State and the expression act of god, has to be strictly construed, and for which reason the Supreme Court has held that even when a fire is caused in the godown, the same cannot be treated as an act of god, inasmuch as, the striking of lightening is an act of god and not the causing of fire. Paras

25, 27 and 31 are relevant and which read as under:-

"25. We have already reproduced the provisions of Sections 6,8 and 9 above. Section 6 enables the common carrier to limit his liability by a special contract. But the special contract will not absolve the carrier if the damage or criminal act or that of his agents or servants. In that situation, the carrier would be liable for the damage to or loss or non-delivery of goods. In that situation, if a suit is filed for recovery of damages, the burden of proof will not be on the owner or the plaintiff to show that the loss or damage was caused owing to the negligence or criminal act of the carrier as provided by Section 9. The carrier can escape his liability only if it is established that the loss or damage was due to an act of God or enemies of the State (or the enemies of the King, a phrase used by the Privy Council). The Calcutta decision in *British & Foreign Marine Insurance Co. v. India General Navigation and Rly. Co. Ltd., the Assam decision in River Steam Navigation Co. Ltd. V. Syam Sunder Tea Co. Ltd.,* the Rajasthan decision in *Vidya Ratan v. Kota Transport Co. Ltd.* and the *Kerala decision in Kerala Transport Co. v. Kunnath Textiles* which have already been referred to above, have considered the effect of special contract within the meaning of Sections 6 and 8 of the Carriers Act, 1865 and, in our opinion, they lay down the correct law.

27. From the above discussion, it would be seen that the liability of a carrier to whom the goods are entrusted for carriage is that of an insurer and is absolute in terms, in the sense that the carrier has to deliver the goods safely, undamaged and without loss at the destination, indicated by the consignor. So long as the goods are in the custody of the carrier, it is the duty of the carrier to take due care as he would have taken of his own goods and he would be liable if any loss or damage was caused to the goods on account of his own negligence or criminal act or that of his agent and servants.

31. Thus the expression "at owner's risk" does not exempt a carrier from his own negligence or the negligence of his servants or agents." (underlining added)

3. The undisputed facts in the present case are that the appellant vide its invoice no. 2941 dated 30.3.1999 took upon the transportation of 16 packages comprising of colour picture tubes from Malanpur to New Delhi. The goods receipt is dated 30.3.1999 and the goods were loaded in truck no. HR-38-C-7829, and which truck met with an accident enroute at Agra. The owner/defendant no. 2 suffered a loss of Rs.3,03,715/- and for which, claim was lodged on the plaintiff/respondent/Insurance Company after a notice was sent under Section 10 of the Carriers Act, 1865 to the appellant/defendant no. 1 vide letter dated 23.4.1999. The goods were covered under the Marine Insurance Policy No.214600/21/99/00078 and the plaintiff/Insurance Company therefore appointed surveyor who gave reports dated 13.4.1999 and 30.4.1999. The respondent/plaintiff/Insurance Company thereafter in view of the survey reports paid the amount to the owner of the goods/defendant no.2 and thereafter being subrogated filed the subject suit.

4. Learned counsel for the appellant/defendant no.1 argued before this Court three principal points:-

i) That the Courts at Delhi had no territorial jurisdiction;

ii) By virtue of a clause in the policy, the transporter/appellant was exempted from any liability; and

iii) There was no negligence of the appellant/transporter.

5. In my opinion, issue nos. 2 and 3 are fully covered by the judgment of the Supreme Court in the case of Nath **Brothers Exim International Ltd.**(supra), and therefore, the transporter/appellant cannot contract out of his liability, inasmuch as, liability is statutorily fastened upon a transporter under the Carriers Act, 1865. The liability of a carrier is the liability equivalent to that of an insurer. Accordingly, once it is proved and admitted on record that there was an accident involving the truck of the appellant/transporter, statutory liability on account of negligence is fastened upon the appellant/transporter, and therefore, the appellant has rightly been held to be liable.

6. So far as the issue of this Court not having territorial jurisdiction is concerned, I find that the Trial Court has exhaustively dealt with this aspect in paras 8 to 13 of the impugned judgment and which read as under:-

"8. Issue No.1:-

i. Whether this Court has no territorial jurisdiction to try the present suit as alleged in the W.S.? OPD.

The onus of proving the aforesaid issue lays upon the defendant. In order to discharge the onus Mr. Anup Lr. Shukla appeared as DW1, who filed h is examination in chief by way of affidavit and deposed on the line of the pleadings. It is contended on behalf of the defendant that the goods were entrusted to defendant No.1 for transportation Ex.Malanpur to New Delhi by defendant no.2 was not damaged within the jurisdiction of this Court. He further argued that accident did not occur within the territorial jurisdiction of this Court as the consignment was to be delivered to New Delhi as the accident took place in "AGRA" which does not fall within the jurisdiction of this Court.

9. On the other hand, the counsel for the plaintiff urged that goods were entrusted at Malanpur and were to be delivered at New Delhi. It is further argued that the goods were insured at Delhi and claim was settled at Delhi. The payment was also made by the plaintiff to the defendant no.2 at Delhi. In "AIR 1992 SC Page 1915 in the matter of **M/s. Patel Roadways Ltd. vs. M/s. Prashad Trading Co.",** wherein their Lordships were pleased to market the following observations:-

"Under Section 20(c) of the Code of Civil Procedure, it a part of cause of action arose for filing suit, that court could have jurisdiction."

10. In another judgment as reported in "AIR 2001 madras 164 in case **M/s. Kalpaka Transport Co. Ltd. vs. Oriental** Fire and General Insurance Co, Ltd.", it was held that :-

"Civil P.C. (5 of 1908), S.20 – Transfer of Property Act (4 of 1882), S.92 – Jurisdiction of Civil Court – Suit for damages – Goods transported from place 'A' to Place 'S' – Contract of Carriage provided that Court at place 'C' alone will have jurisdiction to decide disputes among the parties – Subsequently letter of subrogation and Power of Attorney granted in favour of insurer at place 'D' – Suit

for damages filed at place 'D' by insurer and consignee-Maintainable."

11. On perusal of the judgments (supra), it appears that Court has a jurisdiction where part of cause of action arose. PW1 Sh. Sukhjeevan Singh specifically deposed in his examination in chief that the defendant no.1 has got its Branch Office at Delhi and works for gain within the territorial jurisdiction of this Court, but there is no cross-examination on this material point. It is a settled proposition of law as per the Evidence Act that if any part of the statement of any witness is not challenged in cross-examination, then it would be an admission of the truthfulness of the question as has been held in various judgments cited as under:

i. 1976 RLR (N) 112
ii. 1997 RLR 331 12.

It has been held in case titled as **"Pramod Kr. Gupta vs. Sky Link Chemical** as reported in 2001 DLT (143)", as under:-

"Civil Procedure Code, 1908-Order 7 Rule 10 Section 20(1), Explanation –Return of plaint:

Territorial jurisdiction: Place where principal office is situated (whether or not business actually carried on there) or place where business is carried or giving Rise of Corporation situated as such –Explanation to Sec. 20 relates to clauses (a) & (b) and not to clause (c) – This Court has territorial jurisdiction as cause of action has arisen in Delhi as defendant approached plaintiff in Delhi and appointed him as agent at Delhi and Commission payable at Delhi as per term and condition of agreement."

13. It is important to mention here that aforesaid statement of PW1 has also been corroborated in the testimony of DW 1, which shall demolish the defence of the defendant as set up in the written statement. The relevant portion of the statement is re-produced as under:

"The office of the defendant no.1 also situated in Delhi."

Further-more, in the instant case, the goods were insured at Delhi and the claim was settled at Delhi and the payment was also made by the plaintiff to the defendant no.2 at Delhi, therefore,

I have no hesitation to hold that part of cause of action certainly arose at Delhi. So, the issue no. 1 is decided against the defendant and in favour of the plaintiff."

7. No fault can be found with the aforesaid findings inasmuch as the Courts at Delhi had territorial jurisdiction because part of the cause of action had arisen at Delhi. The appellant had issued the transportation receipt, as agreed by the counsel for the appellant, at Delhi, the goods were also to be transported to Delhi, the Insurance Company/respondent/plaintiff had also paid the amount under the Insurance Policy to the defendant no.2/owner at Delhi. Once there are these undisputed facts, the Courts at Delhi would have territorial jurisdiction.

8. In view of the above, I do not find any fault with the impugned judgment and decree for the same to be set aside in this appeal. The appeal therefore being devoid of merits is accordingly dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

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W.P.

KWALITY ICE CREAM COMPANY AND ANR. ....PETITIONERS

VERSUS

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

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

W.P. NO. : 14414-15/2006 DATE OF DECISION: 18.01.2012

Constitution of India, 1950—Article 226—Central Excise Act, 1944—Section 11A; Limitation Act, 1963—Section 5—Petition against notices and letter of demand of interest on duty short paid-No direction on interest in the order—Whether demand of interest is barred on

account of delay and laches—Held—Period of limitation unless otherwise stipulated by the statute which applies to a claim for the principal amount, should also apply to the claim for interest thereon—Held—In present case period of limitation for demand for duty would be one year therefore, period of limitation for demand for interest also would be one year—Demand beyond the period of limitation would be hit by principles of limitation—Demand for interest quashed—Petition allowed.

It is, therefore, clear that the principle adopted by the Supreme Court was that the period of limitation, unless otherwise stipulated by the statute, which applies to a claim for the principal amount should also apply to the claim for interest thereon. If that be the position, the period of limitation prescribed for demand of duty under Section 11A is normally one year and, in exceptional circumstance of a case falling under the proviso to Section 11A(1), the period of limitation is five years. But that would be applicable only in case of misstatement, fraud, concealment etc., which is not the case here. As such, in the present case, the period of limitation for the demand for duty would be one year. By the same logic, the period of limitation for demand of interest thereon would be one year. Inasmuch as the demand for interest has been made beyond a period of one year, the demand would be clearly hit by the principle of limitation as laid down by the Supreme Court. Even if, we take the letter dated 25.10.2004 as the first demand of interest, although that letter was in respect of a demand for differential duty, the demand would still be beyond a period of three years. **(Para 5)**

[An Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. R. Narain with Ms. Mallika Joshi, Ms. Amrita Chatterjee and Mr. Rajan Narain.

FOR THE RESPONDENTS : Mr. Satish Kumar.

CASE REFERRED TO:

1. *Collector of Customs, Madras* vs. *TVS Whirlpool Limited,* 1996 (86) DLT 144.

RESULT: Petition allowed.

BADAR DURREZ AHMED, J. (ORAL)

1. By way of this writ petition, the petitioners seek the quashing of the default notices of demand dated 04.08.2006 and 03.07.2006 and the demand letters dated 07.03.2006, 09.12.2005 and 19.10.2005. By virtue of the said letters, the respondents have demanded a sum of Rs. 24,05,332/-by way of interest on the demand of central excise duty of Rs. 75,16,661/-. We may point out that by virtue of an order-in-original dated 06.04.2000, a sum of Rs. 1,23,00,006/- was demanded by way of duty short paid. When the petitioner went in appeal before the Commissioner (Appeals), the said amount of duty was reduced to Rs. 75,16,661/- by his order dated 12.09.2001. It is relevant to mentioned that neither in the order-in-original nor in the appellate order was there any direction for payment of interest.

2. It is also the case of the petitioner that as the petitioner desired to close the matter, it had agreed to pay the amount of Rs. 75,16,661/- and it was under an understanding that the matter would be treated as closed and no further proceedings would take place in respect of the same. It is on this basis that the petitioner did not prefer any appeal before the Central Excise and Gold (Control) Appellate Tribunal. Thereafter, no action was taken by the respondents. However, after a lapse of about three years, the petitioner received a letter dated 10.11.2004, in which a demand of Rs. 24,05,332/-, which was described as differential duty, was raised. But, as the petitioner had explained that the entire amount of differential duty amounting to Rs. 75,16,661/- had been paid, it appears that the respondents did not pursue the demand towards differential duty any further. However, the department issued another letter dated 19.10.2005, wherein it demanded the said sum of ‘ 24,05,332/-, this time, towards the payment of interest on the differential duty of Rs. 75,16,661/-, purportedly under the provisions of Section 11AA of the Central Excise Act, 1944.

3. The short point that arises for consideration in this writ petition is whether the demand for payment of interest would be barred on account of delay and laches. The learned counsel for the petitioner submitted that the amount determined by the Assistant Commissioner in the order-in-original was ultimately reduced by the Commissioner (Appeals) to Rs. 75,16,661/-by virtue of the order dated 12.09.2001. The said amount was paid shortly thereafter on 23.10.2001 and thereafter a letter dated 24.10.2001 was sent to the Commissioner of Central Excise enclosing the challan dated 23.10.2001. The matter rested there and it is only after a lapse of over three years that the first letter, raising the demand of Rs. 24,05,332/-, was received by the petitioner which was also purportedly towards differential duty. However, as the petitioner had explained that the entire duty amount had been paid, the department issued the said letter dated 19.10.2005, demanding interest of Rs. 24,05,332/-. The learned counsel for the petitioner submitted that the demand for interest, even if the starting point is taken as the date of the order passed by the Commissioner (Appeals), that is, 12.09.2001, is highly belated inasmuch as the first demand for interest was made on 19.10.2005.

4. The learned counsel for the petitioner drew our attention to a decision of the Tribunal reported in 1996 (86) DLT 144 entitled **Collector of Customs, Madras v. TVS Whirlpool Limited,** in which it was held that the lower authority was right in holding that the demand beyond the period of six months from the clearance of goods, was barred by limitation. This conclusion was arrived at based on the logic that the period of limitation for demanding interest ought to be the same as the period of limitation for demand of duty. This matter was carried in appeal to the Supreme Court. The matter was numbered as Civil Appeal No. 7299-7309/1997. The Supreme Court by an order dated 07.10.1999 held as under:

> "It is only reasonable that the period of limitation that applies to a claim for the principal amount should also apply to the claim for interest thereon. We find no merit in the appeals and they are dismissed with costs."

5. It is, therefore, clear that the principle adopted by the Supreme Court was that the period of limitation, unless otherwise stipulated by the statute, which applies to a claim for the principal amount should also apply to the claim for interest thereon. If that be the position, the period

of limitation prescribed for demand of duty under Section 11A is normally one year and, in exceptional circumstance of a case falling under the proviso to Section 11A(1), the period of limitation is five years. But that would be applicable only in case of misstatement, fraud, concealment etc., which is not the case here. As such, in the present case, the period of limitation for the demand for duty would be one year. By the same logic, the period of limitation for demand of interest thereon would be one year. Inasmuch as the demand for interest has been made beyond a period of one year, the demand would be clearly hit by the principle of limitation as laid down by the Supreme Court. Even if, we take the letter dated 25.10.2004 as the first demand of interest, although that letter was in respect of a demand for differential duty, the demand would still be beyond a period of three years.

6. In view of the fact that we have taken a decision, as indicated above, we are not examining the other point raised by the learned counsel for the petitioner that the duty itself was not payable in view of the decisions of the Supreme Court in respect of its sister concerns in relation to common agreements. However, the learned counsel for the respondents in that regard has submitted that the Commissioner's order dated 12.09.2001 had become final and, therefore, that aspect of the matter ought not to be looked into. In any event, as we have indicated above, since we have decided this writ petition only on the question of limitation, we have not gone into the second aspect of the matter.

7. The impugned demands and letters demanding a sum of Rs. 24,05,332/- towards interest on central excise duty stand quashed. The writ petition stands allowed. There shall be no order as to costs.

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OMP

PEC LIMITED **....PETITIONER**

VERSUS

THAI MAPARN TRADING CO. LIMITED & ANR. **....RESPONDENTS**

(S. MURALIDHAR, J.)

O.M.P. NO. : 149/2010 **DATE OF DECISION: 23.01.2012**

Code of Civil Procedure, 1908—Section 144, 151—Application seeking direction to petitioner to pay for loss occurred on account of fluctuation in foreign currency while remitting the amount payable under Letter of Credit pursuant to order of High Court and in terms of subsequent order of Supreme Court-Maintainability—Held—Applicant could maintain an application u/s 144 for any loss it may have suffered as a result of the orders of this Court which were set aside by the Supreme Court—On merits, however the application fails as there was no guarantee in the contract or L/C that Applicant would be paid in a currency other than US$. Since there is in international trade a time lag between the transaction and receipt of proceeds, hedging of risks associated with currency exchange fluctuations in not unknown. Exporters and importers are exposed to and therefore anticipate and account for such risks. Application Dismissed.

As far as the present case is concerned, the proceedings were initiated for enforcement of the Award dated 4th March 2010. It was only on account of the order dated 16th March 2010 as further modified by the order dated 26th March 2010 that the repatriation of the monies payable under the L/C to Thai Maparn was stayed. While by the subsequent

order dated 27th April 2010, the earlier orders were vacated the repatriation of the L/C amount was made conditional upon Thai Maparn furnishing security to the satisfaction of the Registrar General of this Court. There is no dispute that the actual repatriation did not take place till after the order dated 9th March 2011 of the Supreme Court in SLP (C) No. 27500 of 2005 by which the order dated 27th April 2010 of the learned Single Judge requiring Thai Maparn to furnish security as well as the order dated 30th April 2010 of the Division Bench modifying it were vacated. The order dated 9th March 2011 of the Supreme Court was in the nature of a final order in the enforcement proceedings that commenced with the filing of OMP No. 149 of 2010. With the payment having been made to Thai Maparn eventually only as a result of the order of the Supreme Court, one essential condition for maintaining an application under Section 144 stood satisfied. Thai Maparn could maintain an application under Section 144 CPC for any loss it may have suffered as a result of the orders of this Court which were set aside in appeal by the Supreme Court. Consequently, this Court negatives the objection of PEC to the maintainability of this application under Section 144 CPC. **(Para 20)**

There was no guarantee held out to Thai Maparn in the contract or the L/C or any other document incidental to the contract that it would be paid in a currency other than US $. In other words, there was no assurance that Thai Maparn would be paid in Thai Baht at the foreign exchange rate prevalent on a date five days after the production of the B/Ls to SBI. What the prevalent exchange rate might be on the date when the amount against the B/Ls became payable under the L/C was a matter of speculation. It was therefore not contemplated by the parties at the time the contract was entered into. Also, since there is in international trade a time lag between the transaction and receipt of proceeds, hedging of risks associated with currency exchange fluctuation is not unknown. Exporters and importers are exposed to and therefore anticipate and account for such risks. **(Para 25)**

The condition imposed in the order dated 16th March 2010 of this Court was that in the event the stay stood vacated, PEC would have to pay exemplary costs and also interest. As it has turned out the entire amount payable under the L/C was deposited by PEC with the SBI and kept in an interest bearing account. An amount of around Rs. 1.83 crores deposited with SBI by PEC to cover the exchange rate fluctuation loss was also placed in a fixed deposit. SBI repatriated both sums together with the interest accrued to Thai Maparn. In fact, in the present application Thai Maparn has not even prayed for any interest. This being the factual position, it is not possible to entertain the prayer by Thai Maparn for a direction to PEC to compensate Thai Maparn for the alleged loss in view of the fluctuation in the foreign currency. **(Para 26)**

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Ramji Srinivasan, Senior Advocate with Mr. Jayant K. Mehta and Mr. Sukant Vikram, Advocates.

FOR THE RESPONDENTS : Mr. Jay Savla with Ms. Meenakshi Ogra and Mr. Suresh Singh Bisht, Advocates for Applicant/R-1 in IA 7140 of 2011. Mr. S.L. Gupta and Mr. Ram Gupta, Advocates for SBI.

CASES REFERRED TO:

1. *Karnataka Rare Earth* vs. *Senior Geologist* (2004) 2 SCC 786.
2. *South Eastern Coalfields Ltd.* vs. *State of MP* 2003 (8) SCC 648.
3. *Oil & Natural Gas Commission* vs. *McDermott International Inc.* 2000 (1) Bom CR 369.
4. *Kerala State Electricity Board* vs. *MRF Ltd.* JT 1995 (9) SC 368.

5. *Special Officer (Revenue), Kerala State Electricity Board* vs. *MRF Ltd., Puni Devi Sahu v. Jagannath Mohapatra* AIR 1994 Orissa 240.
6. *Kavita Trehan* vs. *Balsara Hygiene Products Ltd.* (1994) 5 SCC 380, Special Officer (Revenue).
7. *South Eastern Coalfields Ltd.* vs. *State of MP and Zafar Khan v. Board of Revenue* AIR 1985 SC 39.
8. *Karnam Chand* vs. *Kamlesh Kumari* AIR 1973 MP 6.
9. *Bhagwant* vs. *Shri Kisen Dass* AIR 1953 SC 136.

RESULT: Application Dismissed.

S. MURALIDHAR

I.A. No. 7140/2011

1. This is an application by Thai Maparn Trading Company Ltd. ('Thai Maparn') under Section 144 read with Section 151 Code of Civil Procedure, 1908 ('CPC') for a direction to the Petitioner PEC Limited ('PEC') to pay Thai Maparn an amount of US$827,897.80 for the loss occurred on account of fluctuation in foreign currency while remitting the amount payable to Thai Maparn under a Letter of Credit (L/C) pursuant to an order dated 27th April 2010 passed by this Court and in terms of the subsequent order dated 9th March 2011 passed by the Supreme Court in SLP (C) No. 27500 of 2010. Thai Maparn has also prayed for exemplary costs.

Background facts

2. The background to the present application is that several contracts were entered into between the PEC and Thai Maparn during the period 2008-10 for sale of Thai Parboiled long grain rice whereunder Thai Maparn was the Seller and the PEC was the Buyer. It is stated that in relation to one such contract dated 8th January 2008 for supply of 22,000 metric tonnes ('MTs') of Thai Parboiled long grain rice disputes arose between the parties which were referred to arbitration under the Grain and Feed Trade Association ('GAFTA') Rules for Arbitration, London. An Award dated 4th March 2010 was passed by the GAFTA Arbitrators in favour of PEC. Thai Maparn was asked to pay PEC US $ 14,520,000 plus interest and costs.

3. During the pendency of the above arbitral proceedings a separate contract was entered into on 4th January 2010 between the parties in respect of supply of 25,000 MT of Thai parboiled long grain rice. The payment under the contract was by an irrevocable and unrestricted L/C On 12th January 2010 L/C was issued by PEC through the issuing bank, State Bank of India ('SBI'). Under the L/C the advising bank was Krung Thai Bank Public Co. Ltd., and the confirming bank was Intesa Sanpaolo SPA, Singapore. The beneficiary was Thai Maparn and payment was to be remitted at the Krung Thai Bank Public Co. Ltd., at Thailand. It is not in dispute that the L/C was covered by the Uniform Customs and Practice 600 Rules ('UCP 600'). It is further not in dispute that under Article 4 of UCP 600, the undertaking of the issuing bank on the day of the credit was not subject to any claims or defences and under Article 14 (b) UCP 600, the bank had a maximum of five banking days to determine if the presentation was in compliance with the requirements.

4. On 11th March 2010 PEC filed OMP No. 149 of 2010 in this Court under Section 9 read with Sections 47 and 48 of the Arbitration and Conciliation Act, 1996 ('Act') seeking an ex parte relief against Thai Maparn (Respondent No. 1) and the Corporate Accounts Group Branch of the SBI at New Delhi (Respondent No. 2). The prayer was that pending the hearing and final disposal of the petition for enforcement of the GAFTA Award dated 4th March 2010, a direction should be issued to the SBI to hold the Bills of Lading (B/L) submitted to it under L/C No. 0999610IM0000014 and the amendments thereto.

5. It was stated by PEC in OMP No. 149 of 2010 that the aforementioned L/C was opened on 12th January 2010 in favour of Thai Maparn by SBI at the instance of PEC for a sum of US $ 14,162,500. The payment was to be made against production of certain documents including ten B/Ls accompanied by the commercial invoice, certificate of origin, a phytosanitary certificate, certificate of quantity, quality and packing list, certificate of fumigation, surveyor's certificate and other requirements as per the L/C. It was stated that the documents had been tendered to Thai Maparn with a view to collect the payment under the L/C as per the Contract dated 4th January 2010. PEC stated that Thai Maparn had submitted the documents to Krung Thai Bank Public Co. Ltd., which in turn had forwarded them to Intesa Sanpaolo SPA, Singapore and thereafter to SBI. It was stated that the B/Ls issued on 17th February 2010 and

23rd February 2010 had reached New Delhi on 11th March 2010 and were with the SBI. It was stated that the SBI was "likely to accept and/or reject the documents by 15th March 2010." The cargo ownership rested with Thai Maparn but was physically outside this Court's jurisdiction and was in transit between the load port Kohsichang, Thailand en route to Cotonou, Benin and/or discharge port at Harcourt, Nigeria. It was stated that the B/Ls were within the jurisdiction of this Court in the custody of SBI and that "the Respondent No. 1 have no other assets within the jurisdiction of this Hon'ble Court, or anywhere in India that the Petitioners are able to obtain a security pending the enforcement of the London Arbitration Award." Since Thai Maparn had till then not honoured the GAFTA Award, PEC prayed that the Court should direct the attachment of the five B/Ls for the entire cargo intended for discharge at Port Harcourt, Nigeria as well as at Port Cotonou, Benin as these were "the only available assets". It was stated that once the SBI found the documents tendered by Thai Maparn to be in order, SBI would be obliged to release payments under the L/C. An order was sought to declare SBI as garnishees and/or holders in trust of the monies of Thai Maparn of an amount estimated at US $ 12,038,125 and not exceeding the awarded amount of US $ 14,520,000 plus interest and costs. As an interim measure PEC prayed that pending the enforcement of the BAFTA Award SBI should hold the B/Ls submitted and not to make payment of the proceeds under the L/C to Thai Maparn, or to the confirming or advising bank.

6. OMP No. 149 of 2010 came up first for hearing before this Court on 15th March 2010. It was again listed on 16th March 2010 when while directing notice to issue to the Respondents returnable 9th April 2010 this Court directed that SBI would be allowed to negotiate and accept the documents under the L/C but could not remit the amount. SBI was directed to retain the amount not exceeding the awarded amount of US $ 14,520,000 plus interest and costs "as a garnishee till further orders". It was further made clear that "in case this Court ultimately reaches the conclusion that interim order is liable to be vacated, this Court would saddle the petitioner with not only exemplary costs but also interest." Soon thereafter the Petitioner filed IA 3944 of 2010 which was heard on 26th March 2010. On that date counsel for the SBI stated that SBI would have no objection to releasing the B/Ls to PEC on receipt of the amount from PEC. Senior counsel for PEC sought a direction that SBI should keep the amount received from PEC in Indian currency in an

interest bearing account. He further stated that in case SBI suffered any fluctuation loss or damage, PEC would reimburse SBI. The Court then passed an order on those terms.

7. On 6th April 2010, Thai Maparn filed IA 4343 of 2010 seeking vacation of the interim order dated 16th March 2010 on the ground that PEC had concealed the fact that Thai Maparn was contemplating filing an appeal against the GAFTA Award. It was further urged that the petition seeking stay of remittance of the amount under the L/C in question was not maintainable at all since the GAFTA Award was passed in an unrelated contract which Award was in any event under appeal. A garnishee notice could not be issued to injunct SBI from honouring its commitment under the L/C as payment had to be released to the confirming bank which had the first lien on the amount payable under the L/C.

8. On 27th April 2010, a detailed order was passed by this Court whereby the interim order dated 16th March 2010 was vacated. It was observed that the power under Section 9 of the Act, after the passing of an Award, was available only where it was a "domestic award". Although the GAFTA Award could be enforced in this Court under Section 48 of the Act, the said proceedings were required to be deferred since an appeal had been preferred against the GAFTA Award by Thai Maparn. In the operative portion, this Court in exercise of the powers under Section 48 (3) of the Act directed Thai Maparn to furnish security to the satisfaction of the Registrar General of this Court for the awarded sum within a period of four weeks and granted SBI the liberty to repatriate the amount retained by it under the L/C. The case was listed before the Registrar General on 25th May 2010 for Thai Maparn to furnish security.

9. Aggrieved by the above order the Petitioner filed FAO (OS) No. 301 of 2010 which came to be disposed of by the Division Bench of this Court by an order dated 30th April 2010. The amount under the L/C was ordered to be released to Thai Maparn immediately upon it "furnishing security to the satisfaction of the Registrar General of this Court."

10. Thai Maparn filed SLP (C) No. 27500 of 2010 in the Supreme Court against the order 30th April 2010 of the Division Bench in FAO (OS) No. 301 of 2010. In the meanwhile the appeal preferred by Thai Maparn in the GAFTA Appellate Board was allowed and the Award in favour of PEC was set aside. In its order dated 9th March 2011 the Supreme Court observed that since the very basis of the orders of the

High Court did not exist, the SLP had to be allowed. The operative portion of the order dated 9th March 2011 of the Supreme Court disposing of SLP (C) No. 27500 of 2010 reads as under:

> "Having heard learned counsel for the parties, while we appreciate the submissions made on behalf of the respondents, we are afraid that once the very foundation of the proceedings has been obliterated, it is not within our province in these proceedings to pass any order of the nature, as prayed for on behalf of the respondents. The respondents will, of course, be free to make such submissions before the GAFTA Appellate Board, where its application is pending.
>
> We, therefore, dispose of the special leave petition by setting aside that part of the order of the learned Single Judge directing the petitioner to furnish security to the satisfaction of the Registrar General of the High Court for the awarded sum and also the impugned order of the Division Bench directing that the amount of the Letter of Credit be released to the petitioner-company only upon the petitioner-company furnishing security to the satisfaction of the Registrar General of the High Court. The special leave petition is allowed to the said extent. Since the amount involved in this transaction, which was released on the Letter of Credit, issued in favour of the petitioner-company, had been deposited by the respondent during the pendency of the appeal before the learned Single Judge, the respondent No.2 herein, we further direct that the said amount be released to the petitioner-company, forthwith along with accrued interest.
>
> We also keep the question of law relating to furnishing of security for invocation of a Letter of Credit, open for determination in other proceedings."

11. Consequent to the above order of the Supreme Court the SBI repatriated to Thai Maparn between 28th March 2011 and 15th April 2011 US $ 12,894,988.05 applying the prevalent exchange rate of the US $ vis-a-vis the Indian rupee. In is affidavit dated 28th November 2011, SBI stated that Thai Maparn received US$ 856,863.05 in addition to the L/C amount payable on the dates of the maturity of the two B/Ls, i.e., 16th August 2010 and 23rd August 2010. According to SBI, Thai Maparn thus received "additional US$ 313,104.53 on account of depreciation in

the rate of US Dollar, US$ 330,773.92 on account of interest from the respective due dates till the date of payment and US$ 212,984.60 being interest because of payments of Bills amount by PEC before the due dates."

12. In the meanwhile, on 8th April 2011, IA No. 5 of 2011 was filed by PEC in the disposed of SLP (C) No. 27500 of 2010 for a direction that the liability to pay interest on the L/C amount accrued only after the 180 days. The Supreme Court declined to entertain the said application stating "no orders". Thereafter on 30th April 2011 the present application, IA 7140 of 2011 was filed by Thai Maparn.

13. It is contended by Thai Maparn that on account of the orders passed by this Court the repatriation of the monies under the L/C to it was delayed. As a result of the weakening of the US currency against the Thai Baht during the said period Thai Maparn had suffered a huge loss by way of currency loss due to the foreign exchange fluctuation. Thai Maparn in the application states that the SBI remitted the total principal amount of US$ 120381258 to the Krung Thai Bank Public Co. Ltd., through Intesa Sanpaolo SPA, Singapore along with the interest payment of US $ 8568305 on 30th March 2011 in two tranches. The said US $ amount was converted into Thai Baht at an exchange rate of 1 US$= 30.33 Thai Baht. It is stated that had these amounts been remitted by the SBI by 16th March 2010 in the normal course, Thai Maparn would have received a higher amount since as on that date, i.e., 16th March 2011, the exchange rate was 1 US$ = 32.16 Thai Baht. In the circumstances, in the present application, Thai Maparn has prayed for a direction to PEC to pay Thai Maparn an amount of US $ 827897.80 for loss occurred on account of fluctuation in foreign currency apart from exemplary costs.

Submissions of counsel

14. Mr. Jay Savla, learned counsel for Thai Maparn submitted that the present application under Section 144 CPC was maintainable as it was based on the principle of restitution. He submitted that the said provision would be equally applicable to proceedings for enforcement of a foreign Award under Section 48 of the Act in this Court. Reliance was placed on the decisions in **Kavita Trehan v. Balsara Hygiene Products Ltd.** (1994) 5 SCC 380, Special Officer (Revenue), **Kerala State Electricity Board v. MRF Ltd.** JT 1995 (9) SC 368 and **South Eastern**

Coalfields Ltd. v. State of MP 2003 (8) SCC 648. It is submitted that Thai Maparn would be entitled to be placed in the same position as it was on 16th March 2010 when by an interim order the repatriation of the money due to it under the L/C was stayed by this Court. It is submitted that the powers of restitution of this Court are wide and include the power to award damages, compensation, mesne profit, interest etc. It is stated that the power could be exercised by the Court in the event the order passed by it on 16th March 2010 was set aside or varied. Since the very foundation for the passing of the said interim order, i.e., the GAFTA Award in favour of PEC had been set aside in appeal, and the Supreme Court set aside this Court's aforementioned order as well as the order dated 30th April 2010 of the Division Bench, Thai Maparn was liable to be restituted and compensated for the loss caused to it on account of foreign exchange fluctuation.

15. Mr. Jayant Mehta, learned counsel for PEC first submitted that the present proceedings under Section 144 CPC were not maintainable since the order of the GAFTA Board of Appeal had been challenged by PEC in the Courts in England. Thai Maparn could therefore not invoke Section 144 CPC till the conclusion of the said proceedings. There was no final order on merits of the said Award which could give rise to a claim for restitution. Secondly, the totality of the transactions between the parties, the contract as well as the L/C were denominated in one currency only, i.e., US $. None of the documents contemplated conversion of the US $ amount into any other currency be it Indian Rupee or Thai Baht. The conversion of US $ into another currency was, therefore, beyond the contemplation of the parties. Thirdly, there was in fact no loss caused to Thai Maparn. It not only received the full and complete payment in US $ in terms of the L/C but received interest thereon beyond its entitlement, i.e., for the period from March 2010 to August 2010. Fourthly, it was open to Thai Maparn to have furnished security to the satisfaction of the Registrar General of this Court and receive the payment. The delay, if any, in doing so was of Thai Maparn's own making. Lastly, in any event even SBI had confirmed that Thai Maparn has already received amounts far in excess of its entitlement. It is submitted that it is only with a view to pre-empting a claim against it by PEC for refund of the excess payment that Thai Maparn has filed the present application. Mr. Mehta relied on the decisions in **Special Officer (Revenue), Kerala State Electricity Board v. MRF Ltd., Puni Devi Sahu v. Jagannath**

Mohapatra AIR 1994 Orissa 240; **Bhagwant v. Shri Kisen Dass** AIR 1953 SC 136; **Karnam Chand v. Kamlesh Kumari** AIR 1973 MP 6 and **Karnataka Rare Earth v. Senior Geologist** (2004) 2 SCC 786

Maintainability of the application

16. The first issue to be considered is the maintainability of the present application under Section 144 CPC. The said provision states that "insofar as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted, the court which passed the decree or order shall, on the application of any party entitled in any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in a position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order."

17. The principle of restitution has been explained by the Supreme Court in **Kavita Trehan v. Balsara Hygiene Products Ltd.** It was held that Section 144 CPC incorporates "only a part of the general law of restitution. It is not exhaustive." It further held (SCC, p.391):

> "The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words "Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose,..." The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court."

18. In **Special Officer (Revenue), Kerala State Electricity Board v. MRF Ltd.,** the principle was explained as under (JT, p. 379):

> "24. There is no manner of doubt it is an imperative duty of the

> court to ensure that the party to the lis does not suffer any unmerited hardship on account of an order passed by the Court. The principle of restitution as enunciated by the Privy Council in **Alexander Rodger, Charles Carnie and Richard James Gilman v. The Comptoir D'Escompte De Parid** [1871 LR (Privy Council Appeals) 465] has been followed by the Privy Council in later decisions and such principle being in conformity to justice and fair play be followed. It should, however, be noted that in an action by way of restitution, no inflexible rule can be laid down. It will be the endeavour of the Court to ensure that a party who had suffered on account of decision of the Court, since finally reversed, should be put back to the position, as far as practicable, in which he would have been if the decision of the court adversely affecting him had not been passed. In giving full and complete relief in an action for restitution, the court has not only power but also a duty to order for mesne profits, damages, costs, interest etc. as may deem expedient and fair confirming to justice to be done in the facts of the case."

19. The judgments in **South Eastern Coalfields Ltd. v. State of MP and Zafar Khan v. Board of Revenue** AIR 1985 SC 39 also reiterated the above basic principles concerning restitution. The decision of the Bombay High Court in **Oil & Natural Gas Commission v. McDermott International Inc.** 2000 (1) Bom CR 369 is relevant as it has applied Section 144 CPC to grant restitution in a case arising out of arbitration proceedings.

20. As far as the present case is concerned, the proceedings were initiated for enforcement of the Award dated 4th March 2010. It was only on account of the order dated 16th March 2010 as further modified by the order dated 26th March 2010 that the repatriation of the monies payable under the L/C to Thai Maparn was stayed. While by the subsequent order dated 27th April 2010, the earlier orders were vacated the repatriation of the L/C amount was made conditional upon Thai Maparn furnishing security to the satisfaction of the Registrar General of this Court. There is no dispute that the actual repatriation did not take place till after the order dated 9th March 2011 of the Supreme Court in SLP (C) No. 27500 of 2005 by which the order dated 27th April 2010 of the learned Single Judge requiring Thai Maparn to furnish security as well as the order dated 30th April 2010 of the Division Bench modifying it were vacated.

The order dated 9th March 2011 of the Supreme Court was in the nature of a final order in the enforcement proceedings that commenced with the filing of OMP No. 149 of 2010. With the payment having been made to Thai Maparn eventually only as a result of the order of the Supreme Court, one essential condition for maintaining an application under Section 144 stood satisfied. Thai Maparn could maintain an application under Section 144 CPC for any loss it may have suffered as a result of the orders of this Court which were set aside in appeal by the Supreme Court. Consequently, this Court negatives the objection of PEC to the maintainability of this application under Section 144 CPC.

Merits of the application

21. The claim by Thai Maparn that PEC should be directed to restitute it for the alleged loss suffered by it as a result of the fluctuation in the rate of foreign exchange is based on the principle of restitution. In **Special Officer KSEB v. MRF Ltd.,** the Supreme Court cautioned (SCC, p. 379):

> "But in giving such relief, the Court should not be oblivious of any unmerited hardship to be suffered by the party against whom action by way of restitution is taken. In deciding appropriate action by way of restitution, the court should take a pragmatic view and frame relief in such a manner as may be reasonable, fair and practicable and does not bring about unmerited hardship to either of the party."

22. In the present case, it is seen that the contract between the parties was denominated only in US $. The payment of the amount under the L/C had to be made, and in fact was made by SBI only in US $. SBI's affidavit dated 28th November 2011 is significant in this regard. It points out that the amount under the L/C was payable after 180 days. The maturity date in one B/L for US$ 9772125 was 16th August 2010 and in the other B/L for US$2266000 it was 23rd August 2010. This meant that the SBI had to make payment under the L/C on the said dates. This much is not disputed by Thai Maparn. It however claims in para 3 of its rejoinder in the present application that if PEC had not obtained an interim order, the amount of US $ 12038125 under the L/C "would have been paid and credited to the account of the Applicant on or about 16 August 2010 and 22 August 2010 for USD 9,772,125 and USD 2,266,000 respectively."

23. From SBI's affidavit it transpires that on 27th March 2010 it converted US$12,038,125, being the amount payable under the L/C into Indian Rupee at the conversion rate of Rs. 46.01= 1US $ which worked out to Rs. 55,38,74,131. The said amount deposited by PEC was in terms of the order dated 26th March 2010 kept by SBI in an interest bearing account. In addition PEC deposited a sum of Rs. 1.83 crores with SBI towards security for exchange risk. This too was kept in an interest bearing amount. After the order dated 9th March 2011 of the Supreme Court, when Thai Maparn approached the SBI for payment, the conversion rate was 1 US$ = Rs. 44.67. The entire amount which had accrued till then with interest (Rs. 57,57,91,062.84) was converted by SBI into US$ at that exchange rate or thereabouts and paid to Thai Maparn in the following manner:

Payment date	Amount paid Code	Rate of Conversion	Rupees Amount
28.03.2011	9,772,125.00	44.67	43,65,20,823.75
28.03.2011	2,266,000.00	44.67	10,12,22,220.00
11.04.2011	323,889.83	44.29	1,43,46,700.00
15.04.2011	523,973.22	44.47	2,37,01,319.00
Total	12,894,988.05		57,57,91,062.84

24. SBI therefore rightly points out that Thai Maparn has in fact received not only the amount payable under the Bills of Lading, i.e., US$120,38,125/-but additionally US$ 856,863.05. This is in fact confirmed by Thai Maparn itself in para 20 of the present application. Consequently, Thai Maparn received the entire amount payable to it under the L/C in US $ and an additional sum of US$ 856,863.05.

25. There was no guarantee held out to Thai Maparn in the contract or the L/C or any other document incidental to the contract that it would be paid in a currency other than US $. In other words, there was no assurance that Thai Maparn would be paid in Thai Baht at the foreign exchange rate prevalent on a date five days after the production of the

B/Ls to SBI. What the prevalent exchange rate might be on the date when the amount against the B/Ls became payable under the L/C was a matter of speculation. It was therefore not contemplated by the parties at the time the contract was entered into. Also, since there is in international trade a time lag between the transaction and receipt of proceeds, hedging of risks associated with currency exchange fluctuation is not unknown. Exporters and importers are exposed to and therefore anticipate and account for such risks.

26. The condition imposed in the order dated 16th March 2010 of this Court was that in the event the stay stood vacated, PEC would have to pay exemplary costs and also interest. As it has turned out the entire amount payable under the L/C was deposited by PEC with the SBI and kept in an interest bearing account. An amount of around Rs. 1.83 crores deposited with SBI by PEC to cover the exchange rate fluctuation loss was also placed in a fixed deposit. SBI repatriated both sums together with the interest accrued to Thai Maparn. In fact, in the present application Thai Maparn has not even prayed for any interest. This being the factual position, it is not possible to entertain the prayer by Thai Maparn for a direction to PEC to compensate Thai Maparn for the alleged loss in view of the fluctuation in the foreign currency.

27. Consequently, the application is dismissed, but in the circumstances, with no order as to costs.

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LPA

MAN SINGH DECD THR LRS ....APPELLANT

VERSUS

GAON SABHA JINDPUR & ORS. ....RESPONDENTS

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

LPA NO. : 1072/2011 & CM APPL. NO. : 23091-93/2011 **DATE OF DECISION: 23.01.2012**

Constitution of India, 1950—Article 227—Delhi Land Reforms Act, 1954—Bhumidari—Delay and Iches—Appellant assailed the order of Financial Commissioner in Writ Petition—Writ Petition came up for hearing in the year 2001—Dismissed in default as none appeared—Application made by counsel for restoration on the ground that he left practice but could not withdraw from the case due to lack of communication—Restored; came up for hearing on 6th September, 2004—Ld. Single Judge directed to list the writ petition with connected writ petition in the presence of proxy counsel—Matter taken up on 26h of October, 2004—File of the connected case summoned—Transpired that it was dismissed on 23rd July, 2004 for non-prosecution—None appeared on behalf of appellant—Dismissed for non-appearance—Appellant filed CM in 2011 for recall after delay of seven years—Dismissed by Ld. Single Judge—Non-explanation of non-appearance—Filed LPA—Contended that earlier counsel was ailing and not appearing who expired on 1st June, 2008—Held—No doubt if the applicant whose writ petition was dismissed for non-prosecution is able to show sufficient cause for non-appearance and able to explain the delay satisfactorily for approaching

the Court, liberal approach has to be taken—Normally endeavour of the court should be to deal with the matter on merit—It is also trite litigant have to be vigilant and take part in the proceedings with due diligence—Court will not come to rescue of such applicant if negligence established—Application dismissed.

The Apex Court in **Hameed Joharan Vs. Abdul Salam,** (2001) 7 SCC 573 made the following observations:-

> ".....It cannot but be the general policy of our law to use the legal diligence and this has been the consistent legal theory from the ancient times: even the doctrine of prescription in Roman law prescribes such a concept of legal diligence and since its incorporation therein, the doctrine has always been favoured rather than claiming disfavor. Law courts never tolerate an indolent litigant since delay defeats equity – the Latin maxim vigilantibus et non dormientibus jura subveniunt the law assists those who are vigilant and not those who are indolent). As a matter of fact, lapse of time is a species for forfeiture of right...." **(Para 7)**

Important Issue Involved: The litigant has to be vigilant and if found negligent, the court not to come to rescue of such applicant.

[Gu Si]

APPEARANCES:

FOR THE APPELLANT : Mr. R.K. Saini, Advocate.

FOR THE RESPONDENTS : Mr. Asit Tiwari, Advocate for R-2
Ms. Sangita Sondhi, Advocate for R.4.

CASES REFERRED TO:

1. *Ram Kumar Gupta & Ors.* vs. *Har Prasad & Anr.* AIR 2010 SC 1159.
2. *Dr. Munjula Krippendorf Pathak* vs. *Vijay Dixit & Ors.* 146 (2008) DLT 566.
3. *Hameed Joharan* vs. *Abdul Salam,* (2001) 7 SCC 573.
4. *Narmada Nursery K.G. and Junior School, M.P.* vs. *Regional Provident Fund Commissioner & Anr.* JT 1999 (10) SC 406.
5. *Rafiq & Anr.* vs. *Munshilal & Anr.* (1981 (2) SCC 788): (AIR 1981 SC 1400).

RESULT: Application dismissed.

A.K. SIKRI, ACTING CHIEF JUSTICE: (ORAL)

1. The appellants herein claim themselves to be the bhumidar of certain land situated in village Jindpur, Delhi. This claim of the appellants was not accepted by the Revenue authorities, the Revenue Assistant had passed orders dated 31st August, 1974 vesting the land in Gaon Sabha. The appellants were accordingly dispossessed in the year 1974 itself. Challenging the aforesaid orders dated 31st August, 1974 of the Revenue Assistant as well as their dispossession, the appellants preferred Revision Petition which was also dismissed by the Financial Commissioner on 1st April, 1986. Assailing these orders the appellants had preferred W.P (C) 117/1987. In this writ petition, the appellants inter alia averred that on the same issue another Writ Petition (C) 2415/1986 was also pending in this Court in which rule Nisi had been issued. In these circumstances, the writ petition of the appellants was directed to be taken up alongwith Writ Petition (C) 2415/1986 issuing rule in this petition as well.

2. When this writ petition came up for hearing in the year 2001, the same was dismissed in default as nobody had appeared on behalf of the appellants. We may note at this stage that the appellants had engaged Mr. G.R. Mata, as their advocate who had filed the said writ petition. Mr. Mata moved an application for restoration of the writ petition, inter alia, stating that he could not appear due to his ailment and had practically given up his practice. However, in the present case, because of lack of communication with the appellants, he could not withdraw himself from the case. The writ petition was restored recalling the order of dismissal. Thereafter, it came up for hearing on 6th September, 2004. The learned Single Judge directed to list this writ petition alongwith W.P(C) 2415/

1986 having regard to the earlier orders. On that day, the proxy counsel had appeared on behalf of the appellants. The matter was taken up on 26th October, 2004. The file of W.P.(C) 2415/1986 had been summoned from which it transpires that said writ petition had been dismissed on 23rd July, 2004 for non-prosecution. However, as nobody appeared on behalf of the appellants in their writ petition, this petition was also dismissed for non-appearance on 26th October 2004 taking note of the fact that even earlier also this writ petition was dismissed on 22nd February, 2001. The appellants filed CM Appl. 17274/2011 for recall of the said order. Since there was delay of about seven years in preferring the said application, the same has been dismissed by the learned Single Judge inter alia stating that the application has been filed without explaining as to why their counsel could not appear on 26th October, 2004 when on previous date i.e. 26th September, 2004 proxy counsel had appeared for the appellants. Assailing this order, the present appeal is filed.

3. The submission of learned counsel for the appellant is that Mr. Mata was ailing and had not been appearing in the Court. He has drawn our attention to the earlier application for restoration filed by Mr. Mata in which he has stated this fact. He thus submits that the counsel could not appear because of the sickness and insofar as appellants are concerned, since they had engaged the counsel who never informed about his ailment and had not withdrawn from the case, the appellants were under the bona fide impression that the matter is being properly looked after by the counsel. He further submits that Mr. Mata expired on 1st June, 2008 as per the information obtained from the website of Bar Association. His submission is that in these circumstances, the delay should not be the reason for dismissing the application. He has relied upon the following judgments in support of his plea.

4. In **Ram Kumar Gupta & Ors. Vs. Har Prasad & Anr.** AIR 2010 SC 1159 the Apex Court held that the application for restoration should not have been rejected only on the ground of delay and laches but the Court was to see whether there was sufficient cause for non-appearance. Following observations from the said judgment are pressed by the learned counsel:-

> "That apart, considering the fact that the appellants had been prosecuting the litigation since 1982 diligently and there was no lapse on their part till the writ petition was dismissed for non

> prosecution and also considering the fact that a lawyer was engaged by them to contest the matter in the High Court who, however, subsequently was designated as an Additional Advocate General of the State and, therefore, could not be present at the time the writ petition was taken up for hearing, we cannot but hold that it would be improper that the appellants should be punished for non appearance of the learned counsel for the appellants at the time as we are of the view that the appellants were suffering injustice merely because their chosen advocate had defaulted: In **Rafiq & Anr. v. Munshilal & Anr.** (1981 (2) SCC 788): (AIR 1981 SC 1400), this Court has also drawn the same conclusion while considering the application for restoration of a writ application when the learned counsel for the appellant could not be present at the time of hearing of the application."

5. Another judgment is referred to by the learned counsel is **Narmada Nursery K.G. and Junior School, M.P. Vs. Regional Provident Fund Commissioner & Anr.** JT 1999 (10) SC 406 wherein the Court held that if the writ was dismissed for non-prosecution which was the due to the negligence of the lawyer, the litigant should not suffer and the opposite party can always be compensated in terms of costs. Last judgment on which reliance was placed is a Division Bench judgment of this Court in **Dr. Munjula Krippendorf Pathak Vs. Vijay Dixit & Ors.** 146 (2008) DLT 566 wherein the Court held as under:-

> "11. That a justice-oriented approach has to be adopted by the Courts while dealing with applications for seeking restoration of cases dismissed in default is evident even from the decision of the Supreme Court in **Mahendra Rathor Vs. Omkar Singh and Ors.**(supra).
>
> 12. The following legal propositions may, therefore, be taken to be well settled viz. (i) That the Court has to adopt a liberal approach in interpreting the expression 'sufficient cause' whether the same is for the purpose of extension of time in making the application or for explaining the non-appearance of the litigant on the date the suit was dismissed for non-prosecution.
>
> (ii) That sufficient cause has to be seen by reference to the date on which the suit was dismissed for non-prosecution or the defendant proceeded ex parte and not by reference to the earlier

defaults committed by him which the Court may have overlooked or condoned.

13. Applying the above principles to the case at hand, we are of the view that the order passed by the learned Single Judge is much too harsh to be legally sustained. We say so firstly because the learned Single Judge has not addressed himself to the question of existence or otherwise of sufficient cause for non-appearance of the appellant on the date of the dismissal of the suit and for condonation of delay in making the restoration application."

6. There is no quarrel about the aforesaid proposition and law on the subject. It is no doubt if the applicant whose writ petition was dismissed for non-prosecution is able to show sufficient cause for non-appearance on the date of dismissal of the proceedings and also is able to explain the delay satisfactorily for approaching the Court at belated stage, liberal approach has to be taken in the matter and normally it should be endeavour of the Court to deal with the matters on merits. At the same time, it is also trite law that the litigant has to be vigilant and he should contact and take part in the proceedings with due diligence. If negligence on the part of the litigant is established in a particular case, then the Courts are not to come to the rescue of such applicants. We find that present case falls in this category and shows utter callousness and lack of due diligence on the part of the appellants in pursuing their cases. As pointed out above, this writ petition was first dismissed in default on 22nd February, 2001. No doubt, this petition was restored on the application of the counsel who had stated in the said application that he had been ailing for quite some time and had practically given up his legal practice. However, due to lack of communication he was not in a position to withdraw from the case. At the same time, it also demonstrates that at least since 2001, the appellants were not in contact with their lawyer. This position remained not only till 2004 when the writ petition was dismissed in default again but continued till September, 2011 as the application was filed only at that time. Now, the knowledge of the order is attributed to the fact that Forest Department started utilizing the land in question in August, 2011. Thus, even at that time the appellant had not approached the counsel. This shows utter callousness on the part of the appellants who did not try to find out the fate of the proceedings for at least 11 years.

7. The Apex Court in **Hameed Joharan Vs. Abdul Salam,** (2001) 7 SCC 573 made the following observations:-

".....It cannot but be the general policy of our law to use the legal diligence and this has been the consistent legal theory from the ancient times: even the doctrine of prescription in Roman law prescribes such a concept of legal diligence and since its incorporation therein, the doctrine has always been favoured rather than claiming disfavor. Law courts never tolerate an indolent litigant since delay defeats equity – the Latin maxim vigilantibus et non dormientibus jura subveniunt (the law assists those who are vigilant and not those who are indolent). As a matter of fact, lapse of time is a species for forfeiture of right...."

8. Further, as already pointed out above, the appellants were dispossessed way back in the year 1974; land in question is a forest area which is to be maintained as green. It has already been handed over to the Forest Department for this purpose.

9. For all these reasons, we are not inclined to interfere with the orders passed by the learned Single. Finding no merit in this application, the same is dismissed.

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W.P. (C)

NUTAN KUMARI **....PETITIONER**

VERSUS

CBSE **....RESPONDENT**

(HIMA KOHLI, J.)

W.P. (C) NO. : 1277/2010 **DATE OF DECISION: 25.01.2012**

Constitution of India, 1950—Article 226—Writ Petition—Central Board of School Examination—Bye Law 69.2—

Date of Birth Correction—Petitioner stated her date of birth wrongly noted in the record of respondent/CBSE as 20.02.1986 instead of actual date of birth 12.10.1988—Fact could be verified and enclosed with writ petition—CBSE opposed the petition on the ground that not entitled to relief of change of date of birth so belatedly—Request could not be considered in view of Bye Law 69.2 which provides request to be made within two years of declaration of result of 10th examination—Passed 10th examination in the year 2004—Made representation after five years—Permits such correction only in circumstances arising out of clerical error—Petitioner had to approach CBSE through Head of School—Not impleaded head of school as party—Herself filled up the date of birth in various documents submitted by her during school days—Observed, documents placed on record—Discharge slip dated 15.10.1988 issued by Military Hospital MH Danapur Cant. indicated name of father Sh. S.N. Singh Unit 56 APO—Under column of date of birth two dates were shown—One 12.10.1988 and other 15.10.1988—Other documents was gazette notification dated 10.12.2009 which was got published by her notifying her date of birth as 12.10.1988—In copy of progress report of 1996-1997 of Kendriya Vidhyalaya where she was studying in class 3rd, date of birth shown as 20.02.1986—CBSE filed on record copy of petitioner's application for admission in Kendriya Vidyalaya Baliganj. Applicant to fill up date of words in figure as well as in words which showed her date of birth as 20.02.1986—Same was the case in the transfer certificate—An extract of school register where she was studying in class X showed her date of birth as 20.02.1986—The bye laws provides for request of correction within two years from the declaration of result of examination—Stand of petitioner falsified—Held—It was for the petitioner to place on record to establish her stand that right through her school days where she had

taken admission from time to time, had recorded her date of birth as 12.10.1988—Further, she had approached the head of school from where she had taken the class 10th examination to point out the error—She failed to do so—Writ Petition dismissed.

When all the aforesaid documents are taken into consideration collectively, it clearly falsifies the contention of the counsel for the petitioner that in view of the petitioner's father being employed in the Indian Army and consequently, having had to move from station to station with his family, due to a bonafide error, her date of birth was wrongly recorded in the school where she took admission, as 20.02.1986 instead of 12.10.1988. It is pertinent to note that Bye-law 69.2 stipulates that an application for correction of date of birth should be forwarded by the head of the school alongwith the documents mentioned therein and the same would be considered by CBSE only within a period of two years from the date of declaration of the result of class X examination. It further clarifies that no correction whatsoever would be made on an application submitted after expiry of the aforesaid period of two years. **(Para 11)**

In the present case, admittedly the petitioner had approached the respondent/CBSE after a period five years if reckoned from the date of passing her class X examination. Further, the falsity of the stand of the petitioner, that she had discovered the fact that her date of birth had been incorrectly reflected by the respondent/CBSE in its records only during the course of her making preparations for appearing in the competitive examinations while studying in the five years law course, is clear from the document placed at page 28 of the paper book, which is a copy of the petitioner's progress report issued by the school, where she was studying when in class III-B. The said document reveals that the date of birth of the petitioner had been mentioned as 20.02.1986. The aforesaid position has remained consistent even thereafter, which fact is borne out from a perusal of the copy of the application for admission submitted by/on behalf of

the petitioner to the Kendriya Vidyalaya, Ballygunge on 03.11.2000, wherein her date of birth had again been mentioned as 20.02.1986, both, in words and in figures. Similarly, the Transfer Certificate issued to the petitioner by Kendriya Vidyalaya, Danapur Cantt. on 27.10.2000 also reflected her date of birth as 20.02.1986. Lastly, the extract of the Register maintained by the school as forwarded to the CBSE reflects the same position. In the above facts and circumstances, the petitioner cannot be permitted to approach the Court by laying a challenge to the date of her birth as recorded by the respondent/CBSE in her Class X Certificate, i.e., 20.02.1986 and further, by calling upon it to change the same to 12.10.1988, as claimed by her. **(Para 12)**

In the present case, no such inquiry is required to be undertaken by this Court at the behest of the petitioner. In the first place, it was for the petitioner to have placed on record relevant documents to establish her stand that right through her school days, the schools where she had taken admission from time to time, had recorded her date of birth as 12.10.1988 and further that she had approached the head of the school where she was studying and from where she had taken her Class X examinations, to point out the error, if any, while recording her date of birth. Pertinently, the petitioner had taken her Class XII examinations from the same school and has passed out in the year 2006, but even at that time, she had neither noticed the above discrepancy, nor did she take any steps to approach the respondent/CBSE with such a request. Rather, the petitioner made such a request only in the year 2009. On the contrary, the respondent/CBSE had to make efforts to trace the records pertaining to the petitioner from the different schools, where she had studied from time to time and all of them when perused, bear out the fact that the date of birth of the petitioner was recorded therein as 20.02.1986 and not as 12.10.1988 as claimed by her. **(Para 14)**

Important Issue Involved: Belated application for correction of date of birth is impermissible.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. Mukesh Gupta, Advocate with Mr. Keshav Thakur, Advocate.

FOR THE RESPONDENT : Mr. Amit Bansal, Advocate.

CASES REFERRED TO:

1. *Bhagwat Dayal* vs. *CBSE & Ors.* reported as 180 (2011) DLT 1 (DB).
2. *Narinder Kaur* vs. *Punjab & Haryana High Court & Ors.* decided on 04.02.2011 and reported as (2011) 11 SCC 53.
3. *Kumari Para* vs. *Director, Central Board of Secondary Education* reported as AIR 2004 Delhi 310.

RESULT: Writ Petition dismissed.

HIMA KOHLI, J. (ORAL)

1. This petition has been preferred by the petitioner praying *inter alia* for directions to the respondent/CBSE to decide her representation dated 24.04.2009, to correct her date of birth as recorded in the Secondary School and Senior Secondary School Certificates issued to her in the year 2004 & 2006, from 20.02.1986 to 12.10.1988, and further issue corrected certificates to her.

2. In a nutshell, the facts of the case as set out in the writ petition are that the father of the petitioner, during his tenure with the Indian Army, was posted at different stations from time to time, due to which, his family members including the petitioner had to shift their place of residence and her school on a number of occasions. In the year 2004, the petitioner had passed her secondary school examination from Kendriya Vidyalaya Ballygunje, Kolkata, (West Bengal) under the respondent/CBSE. Thereafter, in the year 2006, the petitioner appeared for her class XII examinations from Kendriya Vidyalaya No.1, Gandhi Nagar, Jammu under

the respondent/CBSE. The respondent/CBSE had issued two certificates to the petitioner, the first one was upon her passing class X examinations in March 2004 and the second one was upon her passing class XII examinations in March 2006. In the year 2009, the petitioner took admission in a five year law course in Modern Law College, Ganeshkhind, Pune-53, University of Pune.

3. It is stated by the learned counsel for the petitioner that presently the petitioner is studying in the fifth and final year of the law course and she is simultaneously preparing for various competitive examinations. As per the petitioner, during the course of making preparations to appear in the said examinations, she checked her school leaving certificates and other related documents and found that although her correct date of birth is 12.10.1988, the same had been incorrectly recorded by the respondent/CBSE in the class X certificate as 20.02.1986. Immediately thereupon the petitioner claimed that she had approached the Law College, Pune University with a request to carry out necessary correction in its records but the authorities expressed their inability to do so till the respondent/CBSE carried out necessary correction in its records.

4. It is averred in the writ petition that the petitioner had paid a number of visits to the office of the respondent/CBSE at Delhi and finally submitted a representation dated 24.04.2009, seeking correction of her date of birth in its records. On 10.12.2009, the petitioner also got a notice published in the Gazette of Maharashtra notifying her changed date of birth as 12.10.1988. It is the case of the petitioner that the date of her birth has been wrongly noted in the records of the respondent/CBSE as 20.02.1986 whereas her actual date of birth is 12.10.1988 and the said fact can be verified from the documents enclosed with the writ petition. The petitioner claims that she has not taken any undue advantage of the incorrect recording of her date of birth and, therefore, directions be issued to the respondent/CBSE to carry out the necessary rectification in its records. In support of his argument that the petitioner is entitled to change of date of her birth in Class X Certificate issued by the respondent/CBSE, counsel for the petitioner relies upon the judgment in the case of **Kumari Para vs. Director, Central Board of Secondary Education** reported as AIR 2004 Delhi 310 and a decision of the Supreme Court in the case of **Narinder Kaur vs. Punjab & Haryana High Court & Ors.** decided on 04.02.2011 and reported as (2011) 11 SCC 53.

5. Counsel for the respondent/CBSE opposes the present petition and states that the petitioner is dis-entitled from claiming the relief of change of date of birth so belatedly and such a request cannot be acceded to in view of Byelaws 69.2, which stipulates that any request for correction in the date of birth has to be made within a period of two years of the date of declaration of her result of class X examination. It is submitted by the learned counsel that the petitioner had passed her class X examinations in the year 2004, whereas she had made a representation to the respondent/CBSE for correction of her date of birth after a period of five years, on 24.04.2009, and that the respondent/CBSE does not permit a change in the date of birth in its records and furthermore, it permits such a correction only in circumstances arising out of a clerical error, which is not the case here.

6. It is further clarified by the counsel for the respondent/CBSE that in any case, the petitioner could not have approached the CBSE directly with a request for correction and as per the CBSE Examination Byelaw 69.2, it was for the petitioner to have submitted an application for carrying out such a correction to the head of the school, who could have forwarded the same to the respondent/CBSE along with the relevant documents. He states that the aforesaid procedure was not followed by the petitioner and for reasons best known to her, she has not even impleaded the school, from where she had passed class X examination as a co-respondent in the present proceedings. Nor has the petitioner placed on record the requisite documents in support of her contention that the school had erroneously recorded her date of birth as 20.02.1986. He states that the aforesaid exercise had to be undertaken by the respondent/CBSE by retrieving the relevant records pertaining to the petitioner from her school and they have been enclosed with the counter affidavit, which bear out the fact that the petitioner had herself filled up her date of birth in various documents submitted by her during her school days that shows that she had herself indicated her date of birth as 20.02.1986. In support of his submission that the petitioner's request for change of date of birth cannot be acceded to, in view of the provisions of the aforesaid Byelaw, reliance is placed on a recent decision of a Division Bench of this Court in the case of **Bhagwat Dayal vs. CBSE & Ors.** reported as 180 (2011) DLT 1 (DB).

7. This Court has heard the counsels for the parties and has carefully examined the documents placed on record by both sides.

8. The facts of the case have already been noticed above. Bye-law 69.2 of the CBSE Examination Bye-laws deals with change/correction in date of birth and the same is reproduced hereinbelow:-

"69.2 **Change/correction in Date of Birth-**

(i) No change in the date of birth once recorded in the Board's records shall be made. However, corrections to correct typographical and other errors to make certificate consistent with the school records can be made provided that corrections in the school records should not have been made after the submission of application form for admission to Examination to the Board.

(ii) Such correction in Date of Birth of a candidate in case of genuine clerical errors will be made under orders of the Chairman where it is established to the satisfaction of the Chairman that the wrong entry was made erroneously in the list of candidates/ application form of the candidate for the examination.

(iii) Request for correction in Date of Birth shall be forwarded by the Head of the School along with attested Photostat copies of:

(a) Application for admission to the candidate to the School;

(b) Portion of the page of admission and withdrawal register where entry of date of birth has been made along with attested copy of Certificate issued by the Municipal Authority, if available, as proof of Date of Birth submitted at the time of seeking admissions; and

(c) The school leaving Certificate of the previous school submitted at the time of admission.

(iv) The application for correction in date of birth duly forwarded by the Head of school along with documents mentioned in Bye-laws 69.2 (iii) shall be entertained by the Board only within two years of the date of declaration of result of class X Examination. No correction whatsoever shall be made on application submitted after the said period of two years."

9. In the present case, the documents placed on record by the petitioner show that the discharge slip dated 15.10.1988 was issued by

the Military Hospital, M.H. Danapur Cantt., and reflects the name of the father of the petitioner, as Shri S.N. Singh, Unit 56 APO. The said slip has three columns, namely, (i) date of admission/discharge, (ii) International Code No. and (iii) Diagnosis. Under the column, "date of admission/ discharge, two dates are shown, one is 12.10.1988 and the other is 15.10.1988. In the column, "International Code No.", 'V-30' is endorsed and in the column, "Diagnosis", 'single born' is mentioned. The other relevant document filed by the petitioner is the Gazette notification dated 10.12.2009, got published by her, whereunder it is notified that her date of birth is 12.10.1988 and not 20.02.1986. The petitioner has also placed on record a copy of her progress report for the academic year 1996-97 issued by the Kendriya Vidyalaya No.1, Sangrur Road, Patiala Cantt, where she was studying in class III-B against admission No.7926. On the said document, the date of birth of the petitioner is endorsed as 20.02.1986. Apart from the aforesaid documents, the petitioner has not filed any other document pertaining to her date of birth.

10. As regards the respondent/CBSE, it has filed on record a copy of the petitioner's application for admission in Kendriya Vidyalaya, Ballygunge. The said application is dated 03.11.2000. Column number two of the said application relates to the date of birth. Under the said column, there are two sub columns, one of which requires the applicant to fill up the date of birth in figures and the other one requires the applicant to fill up the date of birth in words. In both the sub-columns, the date of birth of the petitioner has been filled in as 20.02.1986. Similarly, a perusal of the Transfer Certificate dated 27.10.2000 issued by the Kendriya Vidyalaya, Danapur Cantt, the date of birth of the petitioner is reflected in column No.6 as 20.02.1986, both in figures as also in words. Lastly, the respondent/CBSE has placed on record an extract of the Register forwarded by the school, where the petitioner was studying in class X, namely, Kendriya Vidyalaya, Ballyganje, Kolkata, whereunder her name features at Sr.No.5 and against the column of her date of birth, the same has been reflected as 20.02.1986, both in figures and in words.

11. When all the aforesaid documents are taken into consideration collectively, it clearly falsifies the contention of the counsel for the petitioner that in view of the petitioner's father being employed in the Indian Army and consequently, having had to move from station to station with his family, due to a bonafide error, her date of birth was wrongly recorded in the school where she took admission, as 20.02.1986 instead of

12.10.1988. It is pertinent to note that Bye-law 69.2 stipulates that an application for correction of date of birth should be forwarded by the head of the school alongwith the documents mentioned therein and the same would be considered by CBSE only within a period of two years from the date of declaration of the result of class X examination. It further clarifies that no correction whatsoever would be made on an application submitted after expiry of the aforesaid period of two years.

12. In the present case, admittedly the petitioner had approached the respondent/CBSE after a period five years if reckoned from the date of passing her class X examination. Further, the falsity of the stand of the petitioner, that she had discovered the fact that her date of birth had been incorrectly reflected by the respondent/CBSE in its records only during the course of her making preparations for appearing in the competitive examinations while studying in the five years law course, is clear from the document placed at page 28 of the paper book, which is a copy of the petitioner's progress report issued by the school, where she was studying when in class III-B. The said document reveals that the date of birth of the petitioner had been mentioned as 20.02.1986. The aforesaid position has remained consistent even thereafter, which fact is borne out from a perusal of the copy of the application for admission submitted by/on behalf of the petitioner to the Kendriya Vidyalaya, Ballygunge on 03.11.2000, wherein her date of birth had again been mentioned as 20.02.1986, both, in words and in figures. Similarly, the Transfer Certificate issued to the petitioner by Kendriya Vidyalaya, Danapur Cantt. on 27.10.2000 also reflected her date of birth as 20.02.1986. Lastly, the extract of the Register maintained by the school as forwarded to the CBSE reflects the same position. In the above facts and circumstances, the petitioner cannot be permitted to approach the Court by laying a challenge to the date of her birth as recorded by the respondent/CBSE in her Class X Certificate, i.e., 20.02.1986 and further, by calling upon it to change the same to 12.10.1988, as claimed by her.

13. Reliance placed by the learned counsel for the petitioner on the decision in the case of **Kumari Para** (supra) is misconceived inasmuch as Bye-laws 69.1 and 69.2 were not a subject matter of examination in the aforesaid case. Furthermore, the Single Judge had particularly recorded in para 15 of the aforesaid judgment that the petitioner therein had submitted a representation within a period of two years from the date of declaration of her result of class X examination. In the case of **Narinder**

Kaur (supra), the factual matrix is again entirely different. The said case is one relating to a service matter, where the appellant therein was selected in the Haryana Civil Services (Judicial) and she joined duties on 20.05.2000. Realizing that her date of birth was recorded wrongly in the birth certificate, she submitted an application dated 12.04.2002, within a period of two years from the date of her entry into Government service, requesting that her date of birth be changed from 26.01.1971 to 09.01.1972. The said request was turned down by the Punjab & Haryana High Court on the administrative side. Aggrieved by the said rejection order, the appellant therein preferred a writ petition before the High Court, which was also dismissed. Finally the appeal by the appellant filed before the Supreme Court was allowed by the Supreme Court and it was observed that the High Court had not undertaken any inquiry regarding the change of the date of birth of the appellant and further, the State of Punjab had submitted an affidavit confirming her correct date of birth, which fact could not be disputed or controverted in view of the presumptive value of such a record.

14. In the present case, no such inquiry is required to be undertaken by this Court at the behest of the petitioner. In the first place, it was for the petitioner to have placed on record relevant documents to establish her stand that right through her school days, the schools where she had taken admission from time to time, had recorded her date of birth as 12.10.1988 and further that she had approached the head of the school where she was studying and from where she had taken her Class X examinations, to point out the error, if any, while recording her date of birth. Pertinently, the petitioner had taken her Class XII examinations from the same school and has passed out in the year 2006, but even at that time, she had neither noticed the above discrepancy, nor did she take any steps to approach the respondent/CBSE with such a request. Rather, the petitioner made such a request only in the year 2009. On the contrary, the respondent/CBSE had to make efforts to trace the records pertaining to the petitioner from the different schools, where she had studied from time to time and all of them when perused, bear out the fact that the date of birth of the petitioner was recorded therein as 20.02.1986 and not as 12.10.1988 as claimed by her.

15. For all the reasons stated hereinabove, this Court does not find any merit in the present petition, which is dismissed while leaving the parties to bear their own costs.

ILR (2012) IV DELHI 67
CM (M)

SARDAR DALIP SINGH LOYAL & SONS ....PETITIONER

VERSUS

JAGDISH SINGH ....RESPONDENT

(INDERMEET KAUR, J.)

CM (M) NOS. : 1771-72/2005 & CM NOS. 4748/2008 & 10925/2009

DATE OF DECISION: 25.01.2012

Constitution of India, 1950—Article 227—Delhi Rent Control Act, 1958—Section 14 (1) (d)—Subletting—Eviction petition filed against tenant on the ground of subletting to respondent no. 2—Premises comprised of one room on the second floor—Tenant unauthorizedly constructed bathroom and latrine—Contended that tenant parted with possession in favour of respondent no.2 in the year 1988 without his consent in writing—Common written statement filed claiming continuously living with family of respondent no. 2 and denied premises sublet to sub-tenant—As per evidence, respondent no.2 was permitted to live with tenant after 1984 riots for which no rent was charged—Documents such as voter I-card, passport, electric connection in the name of tenant—ARC held that no subletting or parting with possession proved—Appeal before Additional Rent Control Tribunal endorsed the finding of ARC—Preferred writ petition—Held, there cannot be subletting unless the lessee parted with legal possession—The mere fact that some other person was allowed to use the premises while lessee retained the legal possession, not enough to create a sub-lease—The power of Court under Article 227 limited; unless and until manifest illegality or injustice suffered no scope for interference—Petition Dismissed.

This judgment of the ARC was endorsed in appeal by the ARCT vide impugned judgment dated 03.05.2005. The ARCT had noted that the ration card of Harbir Singh showing his name as head of HUF by itself was not a ground for substantiating the averments of the landlord that a case of sub-letting is made out as besides the fact that ration card can be easily procured for ulterior purposes, it also could not have overlooked the other documentary evidence (as discussed supra) which was in favour of the fact finding returned by the ARC that the tenant Jagdish Singh was still in possession of the disputed premises. The second fact finding Court also endorsed the conclusion of the ARC that the ground of sub-letting is not made out. **(Para 6)**

h **M/s Mahendra Saree Emporium v. G.V. Sirinivasa Murthy** JT 2004 (7) SC 20 the Supreme Court has held that the term 'sub let' has not been defined in the Act –new or old but the definition of lease can be adopted mutates mutandis for defining a sub lease. In view of section 105 of Transfer of Property Act, 1882, a sub lease would imply parting with by the tenant of a right to enjoy such property in favour of his sub tenant. Similarly in **Helper Girdharibhai v. Saiyed Mirasaheb Kadri & Ors.** (1987) 3 SCC 538, it was held that there cannot be a subletting unless the lessee has parted with the legal possession. The mere fact that some other person is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub lease. In **Hazari Lal And Ram Babu v. Shri Gian Ram** 1972 RCR 74 also it was held that where legal possession is retained by a tenant, there is no parting with possession and mere user by another person is not such parting with possession. The expression "otherwise parted with the possession" was commented upon in Para 9 of the judgment which reads as under:

> "9. Clause (b) to the proviso to Sub-section (1) of Section 14 of the Rent Act uses three expressions,

namely, "sub-let", "assigned and otherwise parted with the possession" of the whole or any part of the premises without obtaining the consent in writing of the landlord. These three expressions deal with three different concepts and apply to different circumstances. In subletting there should exist the relationship of landlord and tenant as between the tenant and his sub-tenant and all the incidents of letting or tenancy have to be found, namely, the transfer of an interest in the estate, payment of rent and the right to possession against the tenant in respect of the premises sublet. In assignment, the tenant has to divest himself of all the rights that he has as a tenant. The expression "parted with the possession'' undoubtedly postulates as has been held in the cases mentioned above the parting with legal possession. As we understand it, the lease has given parting with possession means giving possession to persons other than those whom possession and "the parting with possession" must have been by the tenant. The mere user by the other persons is not parting with possession so long as the tenant retains the legal possession himself or, in other words, there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to claim possession from his guest who does not pay him any rent or other consideration, it would not be possible to say that the tenant has parted with possession even though for the duration of his stay, the guest has been given the exclusive use of the whole or a part of the tenancy premises. If the tenant has a right to disturb the possession of his guest at any time, he cannot be said to have parted with the possession of the tenancy premises. The mere fact that the tenant himself is not in physical possession of the tenancy premises for any period of time would not amount to parting with

the possession so long as, during his absence, the tenant has a right to return to the premises and be in possession thereof. A more privilege or licence to use the whole or a part of the demised premises which privilege or licence can be terminated at the sweet Will and pleasure of the tenant at any time would not amount to "parting with possession." The divestment or abandonment of the right to possession is necessary in order to invoke the clause of parting with possession." **(Para 7)**

h **Jagan Nath v. Chander Bhan** (1988) 3 SCC 57, Supreme Court while dealing with expression "parting with possession" in the context of a tenant living with other family members, who has allowed the tenanted premise to be used by other family members, has held as under:

"6. The question for consideration is whether the mischief contemplated under Section 14(1)(b) of the Act has been committed, as the tenant had sublet, assigned, or otherwise parted with the possession of the whole or part of the premises without obtaining the consent in writing of the landlord. There is no dispute that there was no consent in writing of the landlord in this case. There is also no evidence that there has been any subletting or assignment. The only ground perhaps upon which the landlord was seeking eviction was parting with possession. It is well settled that parting with possession meant giving possession to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant; user by other person is not parting with possession so long as the tenant retains the legal possession himself, or in other words there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to

possession there is no parting with possession in terms of clause (b) of Section 14(1) of the Act. Even though the father had retired from the business and the sons had been looking after the business, in the facts of this case, it cannot be said that the father had divested himself of the legal right to be in possession. If the father has a right to displace the possession of the occupants, i.e. his sons, it cannot be said that the tenant had parted with possession. This Court in **Smt Krishnawati v. Hans Raj** AIR 1974 SC 280 had occasion to discuss the same aspect of the matter. There two persons lived in a house as husband and wife and one of them who rented the premises, allowed the other to carry on business in a part of it. The question was whether it amounted to subletting and attracted the provisions of sub-section (4) of Section 14 of the Delhi Rent Control Act. This Court held that if two persons live together in a house as husband and wife and one of them who owns the house allows the other to carry on business in a part of it, it will be in the absence of any other evidence, a rash inference to draw that the owner has let out that part of the premises. In this case if the father was carrying on the business with his sons and the family was a joint Hindu family, it is difficult to presume that the father had parted with possession legally to attract the mischief of Section 14(1)(b) of the Act."

(Para 8)

This Court is sitting in its power of superintendence under Article 227 of the Constitution of India; the right of second appeal as contained in Section 39 of the DRCA has now been abrogated; this Court is not an appellate forum; unless and until there is a manifest illegality or injustice which has been suffered by one party qua the other, scope of interference is limited. The evidence adduced supra clearly show that no ground of sub-letting under Section 14 (1)(b) of the DRCA has been made out. **(Para 9)**

Important Issue Involved: (i) Unless the lessee had parted with legal possession, there cannot be a subletting. (ii) The power of the High Court of superintendence under Article 227 is limited only in the cases of manifest illegality or injustice.

[Gu Si]

APPEARANCES:

FOR THE PETITIONER : Mr. Mani Mishra, Advocate.

FOR THE RESPONDENT : Mr. Nishant Dutta, Advocate.

RESULT: Petition Dismissed.

CASES REFERRED TO:

1. *M/s Mahendra Saree Emporium* vs. *G.V. Sirinivasa Murthy* JT 2004 (7) SC 20.
2. *Jagan Nath* vs. *Chander Bhan* (1988) 3 SCC 57.
3. *Helper Girdharibhai* vs. *Saiyed Mirasaheb Kadri & Ors.* (1987) 3 SCC 538.
4. *Smt Krishnawati* vs. *Hans Raj* AIR 1974 SC 280.
5. *Hazari Lal And Ram Babu* vs. *Shri Gian Ram* 1972 RCR 74.

INDERMEET KAUR, J. (Oral)

1. Order impugned before this Court is the order dated 03.05.2005 passed by the Additional Rent Control Tribunal (ARCT) endorsing the finding of the Additional Rent Controller (ARC) dated 25.11.2003 whereby the eviction petition filed by the landlord namely Sardar Dalip Singh Loyal & Sons (HUF) against the tenant Jagdish Singh under Section 14 (1)(b) of the Delhi Rent Control Act (DRCA) had been dismissed.

2. Record shows that the present eviction petition has been filed by the landlord against his tenant Jagdish Singh on the ground of having sub-let the disputed premises to respondent No. 2 namely Harbir Singh. The premises in dispute comprise of one room on the second floor of property bearing No. II/40/26 Dalip Singh Building, Delhi Cantt as depicted

in the red colour in the site plan where the tenant had unauthorizedly constructed a kitchen, bath-room and a latrine; rent was Rs.70/- per month excluding electricity and water charges. Contention of the landlord was that the tenant has parted with possession of the disputed premises in favour of Harbir Singh in the year 1988 without a written consent in writing of the landlord; eviction petition under Section 14 (1)(b) of the DRCA had accordingly been filed.

3. A common written statement had been filed by both the respondents; contention of the tenant Jagdish Singh was that he is continuously living in the premises; sometime the family of respondent No. 2 also comes to reside with him; he denied the submission that the premises have been sub-let in favour of the sub-tenant.

4. Oral and documentary evidence had been led on behalf of the parties. Three witnesses had been examined on behalf of the landlord and one witness had been examined on behalf of the tenant. The testimony of the landlord AW-1 is relevant; he had on oath reiterated the averments made in the petition; the site plan had been proved as Ex. AW-1/1. There was no dispute to the fact that the premises had been tenanted out by the landlord in favour of Jagdish Singh and rent receipts to substantiate this submission had been proved as Ex. AW-1/2 & Ex. AW-1/3. It is an admitted case that Harbir Singh (respondent No. 2) is the son-in-law of elder brother of Jagdish Singh (respondent No. 1); in his cross-examination this witness has denied that Jagdish Singh is still living in the premises; contention was that Jagdish Singh has in fact shifted to 218/12, Masjid Quarter, Sadar Bazar, Delhi Cantt and Harbir Singh and his family are all by themselves living in this suit property. AW-2 was a person having a fair-price shop in the locality. As per his record, AW-2/1 evidenced that Harbir Singh was a ration card holder from the disputed premises. In his cross-examination, he has admitted that the name of Jagdish Singh is also noted in the ration card. AW-3 was a neighbor. The sole witness of the respondent was RW-1. RW-1 had deposed that after 1984's riots Harbir Singh had been permitted to live with Jagdish Singh in the disputed premises; no rent was being charged; however the family of respondent No. 2 never used the said premises for the purpose of sleeping He had denied the submission that he had changed his residence from the disputed premises; he had proved ration card Ex. RW-1/1 evidencing the fact that he continued to reside in the disputed premises so also was the voter card (Ex.RW-1/2) in the name of the tenant Jagdish Singh to the same

effect which was dated 21.01.1995. Ex. RW-1/3 was the pass-port of the tenant showing the address as that of the disputed premises; electrical connection in the name of the respondent Jagdish Singh Ex. RW-1/4 had also evidenced this address. There was nothing in his cross-examination which could destroy this credibility of the tenant.

5. This was the sum total evidence which was led before the ARC. The ARC had examined the evidence and on the balance of probabilities had noted that there is no question of sub-letting, assigning or parting with possession by the tenant Jagdish Singh in favour of Harbir Singh. This oral and documentary evidence (Ex. RW-1/1 to Ex. Ex. RW-1/4) had weighed in the mind of the trial Court to hold that the ground of sub-letting has not been proved by the landlord as all the aforenoted documents i.e. ration card, passport, license and electricity connection in the name of Jagdish Singh had evidenced his address as that of the disputed premises; question of sub-letting or parting with possession did not arise.

6. This judgment of the ARC was endorsed in appeal by the ARCT vide impugned judgment dated 03.05.2005. The ARCT had noted that the ration card of Harbir Singh showing his name as head of HUF by itself was not a ground for substantiating the averments of the landlord that a case of sub-letting is made out as besides the fact that ration card can be easily procured for ulterior purposes, it also could not have overlooked the other documentary evidence (as discussed supra) which was in favour of the fact finding returned by the ARC that the tenant Jagdish Singh was still in possession of the disputed premises. The second fact finding Court also endorsed the conclusion of the ARC that the ground of sub-letting is not made out.

7. In **M/s Mahendra Saree Emporium v. G.V. Sirinivasa Murthy** JT 2004 (7) SC 20 the Supreme Court has held that the term 'sub let' has not been defined in the Act –new or old but the definition of lease can be adopted mutates mutandis for defining a sub lease. In view of section 105 of Transfer of Property Act, 1882, a sub lease would imply parting with by the tenant of a right to enjoy such property in favour of his sub tenant. Similarly in **Helper Girdharibhai v. Saiyed Mirasaheb Kadri & Ors.** (1987) 3 SCC 538, it was held that there cannot be a subletting unless the lessee has parted with the legal possession. The mere fact that some other person is allowed to use the premises while the lessee retains the legal possession is not enough to create a sub lease.

In **Hazari Lal And Ram Babu v. Shri Gian Ram** 1972 RCR 74 also it was held that where legal possession is retained by a tenant, there is no parting with possession and mere user by another person is not such parting with possession. The expression "otherwise parted with the possession" was commented upon in Para 9 of the judgment which reads as under:

> "9. Clause (b) to the proviso to Sub-section (1) of Section 14 of the Rent Act uses three expressions, namely, "sub-let", "assigned and otherwise parted with the possession" of the whole or any part of the premises without obtaining the consent in writing of the landlord. These three expressions deal with three different concepts and apply to different circumstances. In subletting there should exist the relationship of landlord and tenant as between the tenant and his sub-tenant and all the incidents of letting or tenancy have to be found, namely, the transfer of an interest in the estate, payment of rent and the right to possession against the tenant in respect of the premises sublet. In assignment, the tenant has to divest himself of all the rights that he has as a tenant. The expression "parted with the possession" undoubtedly postulates as has been held in the cases mentioned above the parting with legal possession. As we understand it, the lease has given parting with possession means giving possession to persons other than those whom possession and "the parting with possession" must have been by the tenant. The mere user by the other persons is not parting with possession so long as the tenant retains the legal possession himself or, in other words, there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to claim possession from his guest who does not pay him any rent or other consideration, it would not be possible to say that the tenant has parted with possession even though for the duration of his stay, the guest has been given the exclusive use of the whole or a part of the tenancy premises. If the tenant has a right to disturb the possession of his guest at any time, he cannot be said to have parted with the possession of the tenancy premises. The mere fact that the tenant himself is not in physical possession of the tenancy premises for any period of time would

> not amount to parting with the possession so long as, during his absence, the tenant has a right to return to the premises and be in possession thereof. A more privilege or licence to use the whole or a part of the demised premises which privilege or licence can be terminated at the sweet Will and pleasure of the tenant at any time would not amount to "parting with possession." The divestment or abandonment of the right to possession is necessary in order to invoke the clause of parting with possession."

8. In **Jagan Nath v. Chander Bhan** (1988) 3 SCC 57, Supreme Court while dealing with expression "parting with possession" in the context of a tenant living with other family members, who has allowed the tenanted premise to be used by other family members, has held as under:

> "6. The question for consideration is whether the mischief contemplated under Section 14(1)(b) of the Act has been committed, as the tenant had sublet, assigned, or otherwise parted with the possession of the whole or part of the premises without obtaining the consent in writing of the landlord. There is no dispute that there was no consent in writing of the landlord in this case. There is also no evidence that there has been any subletting or assignment. The only ground perhaps upon which the landlord was seeking eviction was parting with possession. It is well settled that parting with possession meant giving possession to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant; user by other person is not parting with possession so long as the tenant retains the legal possession himself, or in other words there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to possession there is no parting with possession in terms of clause (b) of Section 14(1) of the Act. Even though the father had retired from the business and the sons had been looking after the business, in the facts of this case, it cannot be said that the father had divested himself of the legal right to be in possession. If the father has a right to displace

the possession of the occupants, i.e. his sons, it cannot be said that the tenant had parted with possession. This Court in **Smt Krishnawati v. Hans Raj** AIR 1974 SC 280 had occasion to discuss the same aspect of the matter. There two persons lived in a house as husband and wife and one of them who rented the premises, allowed the other to carry on business in a part of it. The question was whether it amounted to subletting and attracted the provisions of sub-section (4) of Section 14 of the Delhi Rent Control Act. This Court held that if two persons live together in a house as husband and wife and one of them who owns the house allows the other to carry on business in a part of it, it will be in the absence of any other evidence, a rash inference to draw that the owner has let out that part of the premises. In this case if the father was carrying on the business with his sons and the family was a joint Hindu family, it is difficult to presume that the father had parted with possession legally to attract the mischief of Section 14(1)(b) of the Act."

9. This Court is sitting in its power of superintendence under Article 227 of the Constitution of India; the right of second appeal as contained in Section 39 of the DRCA has now been abrogated; this Court is not an appellate forum; unless and until there is a manifest illegality or injustice which has been suffered by one party qua the other, scope of interference is limited. The evidence adduced supra clearly show that no ground of sub-letting under Section 14 (1)(b) of the DRCA has been made out.

10. The impugned judgment calls for no interference. Dismissed.

ILR (2012) IV DELHI 78
LPA

DIRECTORATE OF ENFORCEMENT ....APPELLANT

VERSUS

SUBHASH MULJIMAL GANDHI ....RESPONDENT

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

LPA NO. : 669/2011 DATE OF DECISION: 01.02.2012

(A) Foreign Exchange Management Act, 1999 (FEMA)—Section 37 and 38—Challenge in this Intra-Court Appeal is to the judgment dated 4th May, 2011 of the Learned Single Judge allowing W.P. (C) No. 4542/2010 preferred by the respondent and directing the appellant to pay to the respondent simple interest @ 6% per annum on the sum of Rs. 7,75,000/- from the date of seizure i.e. 3rd January, 2003 till 31st December, 2007 and @ 9% per annum from 1st January, 2008 till 1st December, 2008—Brief Facts—Writ petition filed by the respondent pleading that the appellant had on 3rd January, 2003 seized Rs. 7,75,000/- in Indian currency and foreign currency equivalent to Rs. 96,000/- from the custody of the respondent and Proceedings initiated under the provisions of FEMA—Adjudicating authority vide order dated 28th June, 2004 forfeited the seized currency and also imposed a penalty of Rs. 5 lacs on the respondent—Respondent filed an appeal before the Appellate Tribunal for Foreign Exchange—Appeal allowed vide order dated 17th December, 2007 which order has attained finality but the seized currency was not returned inspite of repeated request and ultimately the Indian currency was released only on 1st December, 2008 and foreign currency on 02.02.2009—The respondent contended that his monies having

been wrongfully withheld by the appellant, he was entitled to interest @ 24% per annum thereon from the date of seizure till return—Also contended that in fact under Rule 8 of the Foreign Exchange Management (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000 the return/refund should have been accompanied with interest @ 6% per annum. Held—While Rule 8(i) applies to return of seized currency after completion of investigation, Rule 8 (ii) applies to return of seized currency during adjudication—Again, while Rule 8(i) uses the words "shall be returned..... with interest at the rate of 6% per annum.....", Rule 8 (ii) uses the words "may pass such order returning ..... together with interest at the rate of 6% per annum.....". The use of different words "shall" and "may" in Sub Rules (i) and (ii) respectively indicate that while it is mandatory to pay interest @6% per annum, when seized currency is returned on completion of investigation, it is not so when return is pursuant to adjudication and in which case, it is in the discretion of adjudicating authority whether interest is to be paid or not—In the present case the Appellate Tribunal for Foreign Exchange while allowing the appeal of the respondent did not award any interest to the respondent—No discussion whatsoever on the aspect of interest—Not even known whether interest was claimed by the respondent before the Appellate Tribunal—The settled position in Law (see *Santa Sila Devi Vs. Dhirendra Nath Sen* AIR 1963 SC 1677) is that if the order / judgment is silent on a particular aspect, that relief is deemed to have been declined. It thus, has to be necessarily held that the Appellate Tribunal did not deem it appropriate to award any interest under Rule 8(ii) to the respondent—Respondent if was aggrieved by non grant of interest, the remedy of further appeal under Section 35 of FEMA to this Court—That right not availed.

The order in the present case for return of seized currency

was during the course of adjudication. While Rule 8(i) applies to return of seized currency after completion of investigation. Rule 8 (ii) applies to return of seized currency during adjudication. Again, while Rule 8(i) uses the words "shall be returned ..... with interest at the rate of 6% per annum.....", Rule 8 (ii) uses the words "may pass such order returning ..... together with interest at the rate of 6% per annum.....". The use of different words "shall" and "may" in Sub Rules (i) and (ii) respectively indicate that while it is mandatory to pay interest @6% per annum, when seized currency is returned on completion of investigation, it is not so when return is pursuant to adjudication and in which case it is in the discretion of adjudicating authority whether interest is to be paid or not. In the present case the Appellate Tribunal for Foreign Exchange while allowing the appeal of the respondent and which had the effect of the respondent becoming entitled to return of the seized currency, did not award any interest to the respondent. Rather there is no discussion whatsoever on the aspect of interest. It is not even known whether interest was claimed by the respondent before the Appellate Tribunal. The settled position in Law (see **Santa Sila Devi Vs. Dhirendra Nath Sen** AIR 1963 SC 1677) is that if the order / judgment is silent on a particular aspect, that relief is deemed to have been declined. It thus has to be necessary held that the Appellate Tribunal did not deem it appropriate to award any interest under Rule 8(ii) to the respondent (The Appellate Tribunal had partly allowed the appeal of the respondent and had affirmed the finding of guilt of the respondent on some other aspects). The respondent if was aggrieved by non grant of interest had available to him the remedy of further appeal under Section 35 of FEMA to this Court. That appeal was not availed of. **(Para 9)**

(B) Rule 8 was expressly made applicable to seizure under Section 37 of FEMA of Indian currency—Section 37 was omnibus provision regarding seizure be it for contravention of which so ever provisions—Seizure

in present case was admittedly not by Directorate of Enforcement (DOE) but by Police—However, Section 38 of Act provides for empowerment of other officers including Police to affect such seizure—Proceedings in present case pursuant to initial seizure by Police, were admittedly by FEMA—In this view of matter, it was irrelevant whether initial seizure was by police or by DOE and seizure was deemed to be under Section 37 of FEMA—However, FEMA does carve out distinction between Indian currency and foreign currency—Rules aforesaid enable adjudicating authority to direct payment of interest @6% per annum while passing order for return of Indian currency only and did not empower adjudicating authority to direct payment of any interest while directing return of foreign currency—Thus, there could be no order for payment of interest on return of seized foreign currency under Rule 8—Position which thus, unfolds was that interest at rate of 6% per annum under Rule 8 could had been awarded to respondent on seized Indian currency only—Single Judge had however, applying said Rule also awarded interest on seized foreign currency which could not be sustained. Hence, appeal partly allowed and writ petition of respondent dismissed.

Next is the question of applicability of Rule 8. It is expressly made applicable to seizure under Section 37 of FEMA of Indian currency. Section 37 is the omnibus provision regarding seizure be it for contravention of whichsoever provisions. The seizure in the present case was admittedly not by the Directorate of Enforcement (DOE) but by the Police. However, Section 38 of the Act provides for empowerment of other officers including Police to affect such seizure. The proceedings in the present case pursuant to initial seizure by Police were admittedly by FEMA. In this view of the matter, it is irrelevant whether initial seizure was by the police or by DOE and seizure is deemed to be under Section 37 of FEMA. However, FEMA does carve out a

distinction between Indian currency and foreign currency. The Rules aforesaid enable the adjudicating authority to direct payment of interest @6% per annum while passing order for return of Indian currency only and do not empower the adjudicating authority to direct payment of any interest while directing return of foreign currency. Thus there can be no order for payment of interest on return of seized foreign currency under Rule 8(ii) supra. **(Para 10)**

The position which thus unfolds is that interest at the rate of 6% per annum under Rule 8 could have been awarded to the respondent on the seized Indian currency only. The learned Single Judge has however applying the said Rule also awarded interest on the seized foreign currency and which cannot be sustained. The Division Bench of this Court in **Neeraj Kumar** (supra) has held that a writ remedy cannot be availed to circumvent the non grant of interest by the authority, Commissioner, Central Excise in that case. It was also observed that in any event a writ petition for award of interest simplicitor was not maintainable in view of the availability of alternate remedy by way of appeal or by way of a suit. **(Para 11)**

Important Issue Involved: The use of different words "shall" and "may" in Sub Rules (i) and (ii) respectively indicate that while it is mandatory to pay interest @6% per annum, when seized currency is returned on completion of investigation, it is not so when return is pursuant to adjudication and in which case it is in the discretion of adjudicating authority whether interest is to be paid or not.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT	**:**	Ms. Rajdipa Behura, Advocate.
FOR THE RESPONDENT	**:**	Mr. S. Vasudev & Mr. Rajbir Singh, Advocate.

CASES REFERRED TO:

1. *Virender Sharma* vs. *Directorate of Enforcement* 2012 in LPA 27/2012.
2. *Neeraj Kumar* vs. *Commissioner of Central Excise* W.P.(C) No.2812/2007.
3. *UOI* vs. *M/s Orient Enterprises* (1998) 3 SCC 501.
4. *Suganmal* vs. *State of Madhya Pradesh* AIR 1965 SC 1740.
5. *Santa Sila Devi* vs. *Dhirendra Nath Sen* AIR 1963 SC 1677.

RESULT: Appeal Partly Allowed.

RAJIV SAHAI ENDLAW, J.

1. The challenge in this Intra-Court Appeal is to the judgment dated 4th May, 2011 of the Learned Single Judge allowing W.P.(C) No. 4542/2010 preferred by the respondent and directing the appellant to pay to the respondent simple interest @ 6% per annum on the sum of Rs.7,75,000/- from the date of seizure i.e. 3rd January, 2003 till 31st December, 2007 and @9% per annum from 1st January, 2008 till 1st December, 2008. Notice of this appeal was issued and the operation of the judgment of the Learned Single Judge stayed. The counsels have been heard.

2. The writ petition was filed by the respondent pleading that the appellant had on 3rd January, 2003 seized Rs.7,75,000/- in Indian currency and foreign currency equivalent to '96,000/- from the custody of the respondent and initiated inquiry under the provisions of Foreign Exchange Management Act 1999 (FEMA); that the adjudicating authority vide order dated 28th June, 2004 forfeited the seized currency and also imposed a penalty of Rs. 5 lacs on the respondent; that the respondent filed an appeal before the Appellate Tribunal for Foreign Exchange and which appeal was allowed vide order dated 17th December, 2007 which order has attained finality but the seized currency was not returned inspite of repeated request and ultimately the Indian currency was released only on 1st December, 2008 and foreign currency on 02.02.2009. The respondent thus averred in the writ petition that his monies having been wrongfully withheld by the appellant, he was entitled to interest @ 24% per annum thereon from the date of seizure i.e. 3rd January, 2003 till return on 1st

December, 2008 and 02.02.2009 respectively. It was also the contention of the respondent that in fact under Rule 8 of the Foreign Exchange Management (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000 the return/refund should have been accompanied with interest @6% per annum.

3. It is apposite to at this stage set out Rule 8 which is as under:-

> **"8. 'Payment of interest on the seized Indian currency:-** (i) Where it is found after completion of the investigation that the Indian currency seized under section 37 of the Act is not involved in the contravention and is to be returned, the same shall be returned to such persons together with interest at the rate of 6% per annum from the date of seizure till the date of payment.
>
> (ii) Where it has been found during the course of adjudication that the seized Indian currency is not relevant for such adjudication, the Adjudicating Authority may pass such order returning such Indian currency together with interest at the rate of 6% per annum to such person."

4. The appellant contested the writ petition contending that under Rule 8 (supra) it was only the adjudicating authority which could have awarded interest @ 6% per annum and the adjudicating authority having not awarded such interest, no direction even under Rule 8 could be issued in writ jurisdiction.

5. The Learned Single Judge in the judgment impugned before us has held the respondent entitled to interest under Rule 8 and accordingly allowed the writ petition on aforesaid terms. Interest @6% on seized amount was allowed till 31.12.2007 to give time of about fifteen days after order dated 17.12.2007 for payment and @9% thereafter.

6. The appellant has challenged the order before us on two grounds. Firstly, it is contended that Rule 8 (supra) applies to seizure of Indian currency under Section 37 of the Act and was not attracted to the present case where the seizure was by the Police and the seized monies handed over to the appellant subsequently on the directions of the Court. Secondly, it is reiterated that interest under Rule 8 could be awarded by the adjudicating or the Appellate Authority only and the said authorities having not awarded any interest the same cannot be claimed by way of

writ petition. Reliance is placed on **Suganmal Vs. State of Madhya Pradesh** AIR 1965 SC 1740 and on **UOI Vs. M/s Orient Enterprises** (1998) 3 SCC 501 and on judgment dated 20.09.2010 of the Division Bench of this Court in W.P.(C) No.2812/2007 titled **Neeraj Kumar Vs. Commissioner of Central Excise** to contend that writ petition for award of interest simplicitor is not maintainable.

7. The respondent has filed a reply to the appeal and in which it has rightly been stated that the pleas as are sought to be taken now were not taken before the Learned Single Judge; rather the appellant before the Learned Single Judge had itself pleaded Rule 8 to contend that the interest envisaged thereunder was at 6% only and thus the claim of the respondent for interest at 24% per annum could not be allowed.

8. Be that as it may, the said pleas being legal, we are inclined to consider the same.

9. The order in the present case for return of seized currency was during the course of adjudication. While Rule 8(i) applies to return of seized currency after completion of investigation. Rule 8 (ii) applies to return of seized currency during adjudication. Again, while Rule 8(i) uses the words "shall be returned ..... with interest at the rate of 6% per annum.....", Rule 8 (ii) uses the words "may pass such order returning ..... together with interest at the rate of 6% per annum.....". The use of different words "shall" and "may" in Sub Rules (i) and (ii) respectively indicate that while it is mandatory to pay interest @6% per annum, when seized currency is returned on completion of investigation, it is not so when return is pursuant to adjudication and in which case it is in the discretion of adjudicating authority whether interest is to be paid or not. In the present case the Appellate Tribunal for Foreign Exchange while allowing the appeal of the respondent and which had the effect of the respondent becoming entitled to return of the seized currency, did not award any interest to the respondent. Rather there is no discussion whatsoever on the aspect of interest. It is not even known whether interest was claimed by the respondent before the Appellate Tribunal. The settled position in Law (see **Santa Sila Devi Vs. Dhirendra Nath Sen** AIR 1963 SC 1677) is that if the order / judgment is silent on a particular aspect, that relief is deemed to have been declined. It thus has to be necessary held that the Appellate Tribunal did not deem it appropriate to award any interest under Rule 8(ii) to the respondent (The Appellate

Tribunal had partly allowed the appeal of the respondent and had affirmed the finding of guilt of the respondent on some other aspects). The respondent if was aggrieved by non grant of interest had available to him the remedy of further appeal under Section 35 of FEMA to this Court. That appeal was not availed of.

10. Next is the question of applicability of Rule 8. It is expressly made applicable to seizure under Section 37 of FEMA of Indian currency. Section 37 is the omnibus provision regarding seizure be it for contravention of whichsoever provisions. The seizure in the present case was admittedly not by the Directorate of Enforcement (DOE) but by the Police. However, Section 38 of the Act provides for empowerment of other officers including Police to affect such seizure. The proceedings in the present case pursuant to initial seizure by Police were admittedly by FEMA. In this view of the matter, it is irrelevant whether initial seizure was by the police or by DOE and seizure is deemed to be under Section 37 of FEMA. However, FEMA does carve out a distinction between Indian currency and foreign currency. The Rules aforesaid enable the adjudicating authority to direct payment of interest @6% per annum while passing order for return of Indian currency only and do not empower the adjudicating authority to direct payment of any interest while directing return of foreign currency. Thus there can be no order for payment of interest on return of seized foreign currency under Rule 8(ii) supra.

11. The position which thus unfolds is that interest at the rate of 6% per annum under Rule 8 could have been awarded to the respondent on the seized Indian currency only. The learned Single Judge has however applying the said Rule also awarded interest on the seized foreign currency and which cannot be sustained. The Division Bench of this Court in **Neeraj Kumar** (supra) has held that a writ remedy cannot be availed to circumvent the non grant of interest by the authority, Commissioner, Central Excise in that case. It was also observed that in any event a writ petition for award of interest simplicitor was not maintainable in view of the availability of alternate remedy by way of appeal or by way of a suit.

12. Else the position is squarely covered by Suganmal and M/s Orient Enterprise (supra) and this writ petition in the nature of enforcement of a civil liability that is claim for interest in the nature of compensation for wrongful retention of money is not maintainable. It is not as if payment of interest under Rule 8 (ii) was mandatory (as under Rule 8(i))

and which could be enforced by way of a writ petition. The impugned judgment awarding interest under Rule 8(i) qua Indian currency also can thus not be sustained.

13. We may also mention that we have recently vide judgment dated 13th January, 2012 in LPA 27/2012 titled **Virender Sharma v. Directorate of Enforcement** also dealt with some other aspects of the matter.

14. This appeal accordingly succeeds and is allowed. The judgment of the learned Single Judge is set aside, axiomatically W.P.(C) No.4542/2010 preferred by the respondent is dismissed.

No order as to costs.

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EX. P.

ADARSH KAUR GILL ....DECREE HOLDER

VERSUS

MAWASI & ORS. ....JUDGMENT DEBTORS

(MANMOHAN SINGH, J.)

EX. P. NO. : 286/2011 DATE OF DECISION: 02.02.2012

Specific Relief Act, 1963—Section 22—Amendment of relief claimed in the plaint and decree—Decree Holders filed suit seeking relief for specific performance of agreement to sell dated 2.05.1988 against five judgment debtors including one Satbir and Vijaypal—Judgment debtors proceeded ex-parte—Suit decreed in favour of decree holders—In terms of the judgment and decree, sale deed dated 22.10.1991 was executed by the Registrar in favour of decree holders—Application filed by Satbir and Vijaypal for setting aside ex-parte judgment and decree, dismissed—Appeal preferred by them before Division Bench—Division Bench directed judgment debtors to not to transfer, alienate, part with or create any third party interest in the property pending appeal—By order dated 16.08.2011 appeal dismissed by Division Bench—Review petition filed after the dismissal of the appeal, was also dismissed—Decree holders filed application under Order XXI Rule 11(2) for execution of decree dated 15.11.1990—Prayer also made for the amendment of the plaint and decree by abundant caution as it was incumbant on judgment debtors anyway to put the decree holders in possession after the decree of specific performance—Submitted on behalf of the judgment debtors Satbir and Vijaypal inter-alia that it would amount to denovo trial—Held, it may not always be necessary for the plaintiff to specifically claim possession over the property as it is inherent in the relief of specific performance of the contract of sale—Words "at any stage of proceedings" in proviso to sub Section 2 of Section 22 includes execution proceedings—Relief for delivery of possession is just a formality—Executing Court is empowered to grant such relief even though no such prayer had been made in plaint or mentioned in decree—To meet, however, the objections raised by the judgment debtors, and cover conflicting views expressed by Courts, amendment allowed to include claim for possession, under proviso to sub Section 2 of Section 22 of the Act.

It is also well established law that it may not always be necessary for the plaintiff to specifically claim possession over the property. The relief of possession is inherent in the relief for specific performance of the contract of sale.

(Para 23)

After having considered the abovementioned judgments, it is very clear that the grant of relief for delivery of possession is just a formality and even though, no specific prayer is made in the plaint and even the decree is silent about the delivery of possession, the Executing Court is empowered and bound to grant such relief. If I go through the judgments referred above, it is not even necessary to amend the plaint, as it is the admitted position in the present case that the sale deed in terms of the decree has already been executed in favour of the decree-holder and there is no involvement of the third party regarding the possession. This fact has not been controverted by the judgment-debtors in the pleadings also as status-quo orders passed by this Court till the disposal of the appeal. Thus, it is clear that the possession was with the judgment-debtors. Therefore, the facts of the cases directly apply to the facts and circumstances of the present case. However, since the objection is raised by the judgment-debtors and the decree-holder has also sought amendment of the plaint for including the relief for possession of the property in question, coupled with the fact that a conflicting view has been taken by the Courts in some of the cases and the proviso to sub-section (2) of Section 22 of the Specific Relief Act, 1963 allows the plaintiff who has not claimed any such relief provided by Clauses (a) or (b) of sub-section (1) of Section 22 to amend the plaint for including a claim for recovery of possession. The amendment, under these circumstances, can be allowed at any stage of proceedings including the execution proceedings.

(Para 28)

Under these circumstances, the prayer made by the decree-holder for amendment of the plaint has to be granted, even though such amendment was not necessary. Ordered accordingly and consequent thereto, the decree is also amended. **(Para 29)**

Important Issue Involved: (A) The Executing Court can direct possession of the suit property to be given to the dercee holder in execution of a decree of specific performance of a contract of sale, even where no specific relief has been claimed in this respect in the original plaint and also not so mentioned in the decree.

(B) An Executing Court has the power to amend the decree and the plaint even in the execution proceedings to include the prayer of possession of property in a suit for specific performance of a contract for transfer of immovable property, where no such relief has been claimed, under proviso to Section 2 of Section 22 of the Specific Relief Act.

[La Ga]

APPEARANCES:

FOR THE DECREE HOLDER : Mr. C.A. Sunderam, Sr. Advocate with Mr. Munindra Dwivedi, Ms. Divya Bhalla and Mr. Zafar Inayat, Advocates.

FOR THE JUDGMENT DEBTORS : Mr. Pramod Ahuja, Advocate with Dr. Pradeep N. Sharma, Advocates for J.Ds, No. 4 & 5.

CASES REFERRED TO:

1. *Smt. Suluguru Vijaya & Ors.* vs. *Pulumati Manjula,* AIR 2007 Andhra Pradesh 35.
2. *Ram Bachan Rai & Ors.* vs. *Ram Udar Rai & Ors.* reported in AIR 2006 Supreme Court 2248.
3. *V. Narasimha Chary* vs. *P. Radha Bai and Ors.,* 1999 (5) ALT 499.
4. *Hemchand* vs. *Karilal,* AIR 1987 Rajasthan 117.

5. *Lotu Bandu Sonavane* vs. *Pundalik Nimba Koli,* AIR 1985 Bombay 412.

6. *Babu Lal* vs. *Hazari Lal Kishori Lal,* reported in (1982) 1 SCC 525.

7. *M/s. Ex-service-men Enterprises (P) Ltd.* vs. *Sumey Singh,* reported in AIR 1976 Delhi 56.

8. *Mahender Nath Gupta* vs. *Moti Ram Rattan Chand and Anr.,* AIR 1975 Delhi 155.

9. *S.S. Rajabathar* vs. *N.A. Sayeed,* AIR 1974 Madras 289.

10. *Rameshwar Nath* vs. *U.P. Union Bank,* reported in AIR 1956 AII 586.

11. *Brij Mohan Matulal* vs. *Mt. Chandrabhagabai,* AIR 1948 Nag 406.

MANMOHAN SINGH, J.

1. The decree-holder (the then plaintiff) on 10.10.1988 filed the suit bearing No.2524/1988, seeking relief for specific performance of the agreement to sell dated 02.05.1988 entered into between the decree-holder, namely, Adarsh Kaur Gill and the five judgment-debtors (the then defendants), namely, (i) Mawasi, (ii) Smt. Ramkali, (iii) Satpal, (iv) Satbir, and (v) Vijay Pal, in respect of the land comprising in Mustatil No.90, Killa No.11/2, Mustatil No.91, Killa Nos.7/1, 7/2, 14, 17, 15/2 and 16, total admeasuring 17 Bighas and 4+ Biswas, situated within the revenue estate of Village Dera Mandi, Delhi, for a sale consideration of Rs. 7,20,000/- out of which Rs. 2,50,000/- were paid at different times. Despite of service, no one appeared on behalf of the judgment-debtors and vide order dated 06.11.1989 they were proceeded ex parte. The Statement of Account and the Certificates from the Bank were filed by the decree-holder which revealed that the decree-holder had necessary funds to perform her part of the contract at the time of institution of the suit as well as on the date of passing of the final order dated 15.11.1990 when the suit of the decree-holder was decreed to the following effect:-

> ".....that a decree for specific performance of the agreement of sale dated 02.05.1988 in respect of the land comprising in Mustatil No.90, Killa No.11/2, Mustatil No.91, Killa Nos.7/1, 7/2, 14, 17, 15/2 and 16, total admeasuring 17 Bighas and 4+ Biswas, situated within revenue estate of Village Dera Mandi, in the Union Territory of Delhi, be and the same is hereby passed in favour of the plaintiff against the defendants with the direction that the plaintiff shall deposit the balance sale consideration in Court within two weeks and thereafter the defendants shall take steps in accordance with the agreement of sale for execution and registration of the sale deed within two weeks thereafter, failing which the Registrar of this Court shall take necessary steps in accordance with the law for getting sale deed executed and registered after obtaining legal sanction."

2. The decree was drawn accordingly by the Registry. The memorandum of costs was also prepared on 31.01.1991. In view of the judgment and decree passed by the Court, the sale deed dated 22.10.1991 was executed by the Registrar of this Court in favour of the decree-holder in respect of the suit property.

3. Thereafter, two of the defendants, namely, Satbir and Vijay Pal (judgment-debtors No.4 & 5) filed an application being I.A. No.9784/1998 for setting-aside the ex parte judgment and decree dated 15.11.1990 along with an application being I.A. No.1398/1999 under Section 5 of the Limitation Act for condonation of delay. However, the same were dismissed vide order dated 07.07.1999. The order passed is reproduced here as below:-

> "..... Heard. I.A. No.1398/99 is an application for condonation of delay under Section 5 of the Limitation Act. The case proceeded ex parte against the defendants on 6th November, 1989. It was decreed on 15th November, 1990. The sale deed has already been executed on 8th October, 1991. If it is assumed for the sake of arguments that the defendants were minors on the date of agreement to sell, they were not minors on the date of the decree. They were not minors even when the sale deed was executed. It appears that the defendants purposely avoided and now, at this stage, after nearly seven years the present application for condonation of delay has been filed without explaining the delay. I am not inclined to entertain this application for condonation of delay. Accordingly, the application for condonation of delay (I.A. No.1398/99) is dismissed along with the application for setting aside the decree (I.A. No.9784/88)."

4. Feeling aggrieved by the above said order dated 07.07.1999, the said defendants/judgment-debtors No.4 & 5 in the month of August, 1999 filed an appeal before the Division Bench, being FAO(OS) No.228/1999. On 30.04.2001 the appeal was admitted and in the interim application being C.M. No.2789/1999, the following order was passed:-

> "..... Heard. No other or further order is required to be passed on this application except by directing respondent not to transfer, alienate, part with or create any third party interest in the property in question during pendency of the appeal. Ordered accordingly....."

5. Vide order dated 16.08.2011 the appeal filed by judgment-debtors No.4 & 5 was dismissed by the Division Bench of this Court. The relevant extract of the said order reads as under:-

> "Insofar as we are concerned, vide the impugned order the learned Single Judge has dismissed both the aforesaid applications. We are thus faced with a situation where, really speaking, there is no application before the learned Single Judge either under Order 9 Rule 13 r/w Section 151 CPC or under Section 5 of the Limitation Act, 1963 as the appellants have stated before us that they have not appended their signatures on these applications, affidavits filed in support thereof as also on the vakalatnama. The situation from the point of view of the appellants is no different qua the appeal.
>
> The appellants state that they have not signed on the appeal, the affidavits filed in support of the appeal as also the vakalatnama accompanying the appeal. In the given facts of the case, we refrain from saying anything further, but dismiss the appeal as incompetent as the same is neither supported by any affidavits, nor signed by the appellants nor is there any authority in favour of the lawyer to appear on their behalf.
>
> We would have proceeded to prosecute these appellants, but for the fact that they have not had much education and any further enquiry would place the counsel for the appellants in an awkward position.
>
> Ordered accordingly."

6. It appears from the above said order that the Division Bench before dismissing the appeal, also recorded the statements of Satbir and Vijay Pal (the then appellants) on the very same date. One of the specimen of the statements reads as under:-

> "STATEMENT OF SATBIR, S/O SH.RAGHUWAR, AGED: 40 YEARS, R/O OF VILLAGE MANDI (NEAR PRIMARY SCHOOL)
>
> ON S.A.
>
> I have been educated till 10th class. I have had my education throughout in Hindi medium. I do not know how to read, write, understand, speak or sign in English. I have been shown an affidavit affirmed on 03.08.1999 in FAO(OS) No.228/1999. I have been shown signatures at two places i.e. A to A and B to B. They are not my signatures as I cannot write in English.
>
> I have also been shown page 9 of the appeal which purports to bear my signatures at the end of the prayer clause(s) from point C to C. They are not my signatures.
>
> I have also been shown the vakalatnama which purports to bear my signatures at point I-2. These are not my signatures.
>
> I have appended my signatures in the Court, on a sheet of paper, at three places, which are collectively exhibited as Ex A-1.
>
> I have been shown the signatures on notices sent for 14.05.1991 in Suit No.2524/1988, which are signed on 09.05.1991. They have been circled as C, D, E and F qua notices of my mother-Smt. Ramkali, my brother-Satpal, myself and my brother-Vijay Pal. These are not my signatures.
>
> I have also been shown my purported signatures on the application under Order 9 Rule 13 r/w Section 151 CPC in Suit No.2524/1988 as also the affidavit filed in support thereof at points L-1 and J-1 and J-2 respectively. These are not my signatures.
>
> I have also been shown my purported signatures on the application under Section 5 of the Limitation Act, 1963 in Suit

No.2524/1988 as also the affidavit filed in support thereof at points M-1 and N-1 and N-2. These are not my signatures.

(The court records that all questions were put to the witness in Hindi and the consequences thereof were explained to the witness in Hindi before recording the same in English.)"

7. It has been informed by the parties that after the dismissal of the appeal, both the judgment-debtors No.4 & 5 filed a review petition being R.P. No.755/2011 before the Division Bench. The same was also dismissed with cost of Rs. 50,000/-.

8. As already stated that after the execution and registration of the sale deed dated 22.10.1991 by the Registrar of this Court in respect of the suit property in favour of the decree-holder, she also filed an application before the Revenue Assistant for mutation of the suit property in her favour. The same is still pending adjudication.

9. After the dismissal of the appeal, the decree-holder has now filed the present execution petition under Order XXI, Rule 11(2) read with Section 151 CPC for enforcement and execution of the decree dated 15.11.1990, on the grounds that because of the pendency of the proceedings in respect of the suit land before the Division Bench of this Court and the status-quo order passed therein, no execution proceedings were filed earlier. It is also stated that without prejudice, if it is required by the Court that the plaint be amended to include a specific prayer for possession by way of abundant caution, the decree-holder also seeks a suitable amendment of the plaint to incorporate such prayer for possession (as earlier not sought). It is also averred that in terms of the agreement to sell whose specific performance was ordered by this Court, it was incumbent upon the judgment-debtors to put the decree-holder in possession of the suit land. Therefore, it is prayed that the plaint and decree be amended to include the prayer to put the decree-holder in possession of the suit land. It is further prayed in the execution that the warrants of possession of the immovable property of land comprising in Mustatil No.90, Killa No.11/2, Mustatil No.91, Killa Nos.7/1, 7/2, 14, 17, 15/2 and 16, total admeasuring 17 Bighas and 4+ Biswas, situated within the revenue estate of Village Dera Mandi, Delhi, be issued and in case, this prayer cannot be granted without amendment of the plaint and the decree, then the following relief be included as relief No.(a)1 in the plaint:-

"It is most respectfully prayed that the judgment and decree be passed against the defendants jointly and severally to put the plaintiff in vacant and peaceful possession of the suit land."

10. Mr. Sunderam, learned Senior counsel appearing on behalf of the decree-holder has argued that the alternative prayer has been sought by the decree-holder only for the purpose of abundant caution, otherwise the execution qua possession is maintainable, despite having no specific prayer in the plaint. The learned counsel has further argued that since the suit was for specific performance of the agreement to sell entered into between the parties in respect of the land in question and the sale deed was executed after passing of the decree, the judgment-debtors who are in possession of the suit property, were duty bound to hand over the possession after receiving the balance sale consideration which was already deposited by the decree-holder in the Court. The learned Senior counsel has further submitted that after the registration of the sale deed, the next step was to be performed by the judgment-debtors to hand over the possession. In case this court feels proper and necessary, the decree be amended on the basis of the amendment sought in the prayer clause, as the Executing Court has got the jurisdiction to allow the said amendment.

11. Mr. Pramod Ahuja, Advocate who is appearing on behalf of judgment-debtors filed the reply supported by the affidavit of Satbir, one of the judgment-debtors who only executed the vakalatnama in favour of Mr. Ahuja. The following points have been raised in the reply:-

(i) The amendment sought by the decree-holder cannot be allowed, otherwise it would be denova trial.

(ii) The execution cannot be entertained, at this stage, for amendment of the decree dated 15.11.1990 and the same is liable to be dismissed, as the said amendment has been sought after a period of more than 20 years.

12. Mr. Ahuja has also argued that the suit filed by the decree holder was not maintainable, as when the agreement between the parties was entered into, two of the judgment-debtors, namely Satbir and Vijay Pal were minors and not competent to enter into any such contract. It was a void agreement and the same could not be enforced in view of the provisions of Section 11 of the Indian Contract Act, 1872. The learned counsel has further argued that the judgment-debtors No.4 & 5 are co-bhumidars in the land in question and the other co-bhumidars could not

sell the right, title or interest therein of the minors by means of the agreement to sell in question.

13. As far as the first submission of Mr. Ahuja is concerned that on the date of the agreement in question, his client Satbir was a minor. As per the Matriculation Certificate of Satbir, his date of birth is recorded as 15.10.1970. Obviously, on the date of passing of the judgment and decree, i.e. on 15.11.1990, he was about 20 years of age. On the date of registration of the sale deed, i.e. 22.10.1991, his age was more than 21 years. It is a matter of fact that after passing of the decree, the said Satbir filed an application before the Court for setting-aside the ex parte judgment and decree wherein he raised the same objection. The said application was dismissed vide order dated 07.07.1999 after considering the said objection. Satbir and Vijay Pal filed an appeal against the said order. Subsequently, as per orders passed by the Division Bench in the appeal and the statements of Satbir and Vijay Pal recorded in the Court on 16.08.2011, both the judgment-debtors admitted before the Division Bench that the appeal, application, affidavit and vakalatnama did not bear their signatures. In view of that, in a way, there was no appeal filed on their behalf. It is also the admitted position that despite of service in the suit, they did not appear before the Court and they were proceeded ex parte on 06.11.1989. The same objection after the expiry of more than 22 years cannot be re-agitated when the same was already determined by the Court. In view of above said reasons, it is clear that they lost the opportunity after the order dated 07.07.1999 was passed. Therefore, this objection raised by Satbir is accordingly rejected.

14. The second point as raised by the objector Satbir is that the execution filed by the decree-holder is not maintainable, as it has been filed after a period of more than 20 years. Mr. Ahuja has also referred the judgment passed by the Supreme Court in the case of **Ram Bachan Rai & Ors. vs. Ram Udar Rai & Ors.** reported in AIR 2006 Supreme Court 2248, the relevant para-11 at page 2250 reads as under:-

> "11. In view of the said decision, the inevitable conclusion is that the Executing Court was not correct in its view. It is to be noted that learned counsel for the respondents conceded to the position that the period of limitation is not to be reckoned from the date of dismissal of the Civil Revision which was filed relating to rejection of the application under Order IX Rule 13, CPC. The

> entire focus was on the date from which the period of limitation is to be reckoned. Reliance was placed on a decision of the Calcutta High Court in **Ram Nath Das and Ors. v. Saha Chowdhury and Co. Ltd. and Ors.** (AIR 1974 Cal 246) where it was held that the decree was enforceable and when cost is assessed. The ratio in the said judgment clearly runs counter to what has been stated in **Dr. Chiranji Lal's** case (supra)."

15. Now, the issue before this Court is, when the period of limitation for execution would commence. Article 136 of the Indian Evidence Act, 1872 reads as under:-

(*In terms of order dated 10.02.2012 the Indian Evidence Act, 1872 as referred in para 15 be read as Limitation Act, 1963.)

Description of application	Period of limitation	Time from which period begins to run
For the execution of any decree (other than a decree granting a mandatory	Twelve Years	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default injunction) or in making the payment or delivery in order of any respect of which execution is sought, civil Court. takes place; Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation.

16. In the present case, admittedly, the decree was passed on 15.11.1990. It is specifically mentioned in the ex parte judgment passed against the defendants with the direction that the plaintiff (decree-holder herein) would deposit the balance sale consideration in Court within two weeks and thereafter, the defendants (judgment-debtors herein) would take steps in accordance with the agreement of sale for execution and registration of the sale deed within two weeks, failing which the Registrar

of this Court would take necessary steps in accordance with law for getting the sale deed executed and registered after obtaining legal sanction. The memo of costs was prepared in the present suit and was accepted on 31.01.1991. The decree-holder/plaintiff had deposited bank draft dated 21.11.1990 for the remaining consideration, in favour of the Registrar General of this Court in terms of the *ex parte* judgment and decree. The draft of the sale deed was submitted by the plaintiff on 29.05.1991. The requisite stamp papers filed were also taken on record by order dated 24.09.1991. Thereafter, vide order dated 08.10.1991 the Superintendent of this Court was appointed as Local Commissioner for execution of the sale deed which was executed and registered on 22.10.1991.

17. In the present case, it is not disputed that in view of decree passed by the court, the sale deed was registered on 22.10.1991. The suit was not restored by the Court, as the application filed by the judgment-debtors also stood dismissed on 07.07.1999. The appeal was also dismissed on 16.08.2011. The present execution has been filed in October, 2011, i.e., about two months later.

It is also not in dispute that the Division Bench on 30.04.2001, while admitting the appeal, passed the interim order directing the judgment debtors not to transfer, alienate, part with or create any third party interest in the property in question during the pendency of the appeal. Not only that, on 07.10.2010 further interim order was passed in the appeal to the effect that no further construction would take place.

Therefore, in case both the interim orders are read together, it is clear that the judgment-debtors were precluded to part with possession of the suit property otherwise it would have been breached of the order passed by the Division Bench. Similarly, by the said orders, the decree-holder was impliedly asked not to receive the possession.

18. In the case referred by Mr. Ahuja, the facts are different i.e. the suit was filed for declaration of title and recovery of possession. There was no stay at any stage, granted by the court and the execution was filed after the expiry of twelve years. But in the present case, the Appeal Court has passed the specific order not to part with the possession of the suit property. Further, in the present case, in terms of decree, the sale deed was already registered in the name of decree holder in the year 1991 and next steps was merely to hand over the possession of the suit

property which could not be parted with because of interim orders. Thus, the period, in which the interim orders were operated against the parties, is to be excluded for the purpose of limitation. It is also the admitted position that after the dismissal of appeal filed by the judgment-debtors, who failed to handover the possession of the suit property in terms of agreement, the decree-holder was within her right to file the present execution for the purpose of remaining in compliance. The objection now raised about limitation is misconceived and is not tenable to the facts of the present case, as it was an obligation on the part of the judgment-debtors to deliver the possession in terms of agreement, in consonance with the provisions of Section 55(1) of the Transfer of Property Act, 1882 which mandates that the seller to give, on being so required, to the buyer, the possession of the suit property as its nature admits. The entire scheme is that it has to be done in order to avoid multiplicity of proceedings and such duty is to be performed by the party who is also a party to the agreement, meaning thereby it would be implied.

19. Since, after the dismissal of the appeal, the judgment-debtors did not come forward to handover the possession, the decree-holder is entitled to recover the same by filing of execution proceedings. Thus, the decision referred by the judgment-debtors does not help the case of objector, as the facts of the present case are materially different.

20. Now, coming to the last submission of Mr. Ahuja that the relief sought by the decree holder for possession cannot be granted mainly on two reasons, namely, (a) the plaintiff/decree holder in her plaint did not ask for such relief; and (b) same has been claimed after the long gap of 20 years and even amendment sought by the decree-holder in the execution proceedings cannot be allowed.

21. Admittedly, in the present case, when the suit for specific performance was filed in the year 1988, no relief for possession asked for. A decree for specific performance of the agreement was passed against the judgment debtors on 15.11.1991. The sale deed was registered on 22.11.1991 in favour of the decree holder.

22. It is settled law that an Executing Court cannot go behind the decree nor can it question its legality or correctness. But, there is one exception to this rule that where the decree sought to be executed in

nullity for lack of inherent jurisdiction in the court passing it, its invalidity can be set up in an execution proceedings. In the present case, there is no such position to the effect that the decree was passed for lack of inherent jurisdiction.

23. It is also well established law that it may not always be necessary for the plaintiff to specifically claim possession over the property. The relief of possession is inherent in the relief for specific performance of the contract of sale.

24. The proviso to sub section (2) provides for amendment of the plaint on such terms, as may, for including a claim for such relief at "Any stage of the proceedings." The word "proceedings" in Section 22 includes execution proceedings, meaning thereby, any stage in litigation which can have various stages. Thus, the Court executing the decree is competent to deliver the possession. On 01.03.1964, the Specific Relief Act of 1963 came into force and the Act was amended by enacting Section 22 which makes it mandate for the plaintiff to ask for the relief of possession in suit for specific performance. In fact, the said provision was enacted in order to avoid multiplicity of proceedings so that the party may claim a decree for possession in a suit for specific performance. However, despite of that the proviso to Section 22 provides power to a court to allow the amendment of plaint "at any stage of the proceedings" on such term as may be just for including a claim for possession where the plaintiff did not claim such relief in its original plaint.

25. This Court in the case of **M/s. Ex-service-men Enterprises (P) Ltd. vs. Sumey Singh,** reported in AIR 1976 Delhi 56 while relying upon the judgment of the Allahabad High Court in **Rameshwar Nath vs. U.P. Union Bank,** reported in AIR 1956 AII 586, has held as under:-

> ".....the word "proceeding" is a very comprehensive term meaning generally a prescribed course of action for enforcing a legal right and the expression "at any stage" in its literal and actual meaning means without limitation either in frequency or duration or length of time."

26. Now the question before this Court is as to whether the decree-holder asked to amend the plaint or the decree already granted in favour of decree-holder would imply the decree of delivery of possession also in view of fact that it would flow from the relief relating to execution

of sale deed. In the present case, admittedly the sale deed has already executed in favour of the decree-holder after passing the decree. 27. The similar question has arisen in various cases which are referred as under :

(a) AIR 1987 Rajasthan 117 by Sh. K.S. Lodha, J., in the case of **Hemchand vs. Karilal,** the relevant paras of which read as under:-

> "5. Now coming to the other limb, it may again be at once stated that the contention is ill founded in as much as there cannot be any reason or justification for the plaintiff asking for an amendment of the plaint when the relief of possession had already been prayed for and as stated above must be deemed to have been impliedly granted when the decree for specific performance of the contract has been passed. The matter stands concluded by their Lordships decision in the aforesaid case of Babu Lal. It is pertinent to note that before the provisions of Section 22 of the Specific Relief Act as amended in 1963 came into force the settled view was that a decree for specific performance of the contract implied a relief for possession also. Their Lordships of the Supreme Court have referred to all the cases which have taken this view and then they have referred to the amended Section 22 of the Specific Relief Act in 1963. Their Lordships observed that "Section 22 enacts a rule of pleading. The Legislature thought it will be useful to introduce a rule that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance, even though strictly speaking, the right to possession accrues only when suit for specific performance is decreed. The legislature has now made a statutory provision enabling the plaintiff to ask for possession in the suit for specific performance and empowering the Court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the given lime, the defendant should execute the deed and put the plaintiff in possession." Their Lordships further observed "the expression in Sub-section (1) of Section 22 'in an

appropriate case' is very significant. The plaintiff may ask for the relief of possession or partition or separate possession 'in an appropriate case' and it has been pointed out that even after the introduction of Section 22 of the Specific Relief Act in 1963, the plaintiff in a suit for specific performance of the contract need not always ask for the relief for possession because ordinarily such relief would be implied. It is only in appropriate cases that is cases in which ordinarily possession may not follow from the mere decree for specific performance of the contract e.g. where third party has intervened the plaintiff has to ask for the relief of possession and if not asked, the decree will not grant him possession. Their Lordships further observed "in a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simplicitor without specifically providing for delivery of possession, may give complete relief to the decree-holder. In order to satisfy the decree against him completely he is hound not only to execute the sale-deed but also to put the property in possession of the decree holder. This is in consonance with the provisions of Section 55(1) of the T. P. Act which provides that the seller is hound to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits. "Then their Lordships referred to the other kind of cases in which a relief for possession cannot be effectively granted to the decree-holder without specifically claiming relief for possession, namely, where the property agreed to be conveyed is jointly held by the defendant with other persons. In such a case the plaintiff has to pray for partition of the property and possession over the share of the defendant, and it has been observed that it is in such eases that a relief for possession must be specifically pleaded. Again it is observed "the contention on behalf of the petitioner is that the relief for possession must be claimed in a suit for specific performance of a contract in all cases. This argument ignores the significance of the

words 'in an appropriate case'. The expression only indicates that it is not always incumbent on the plaintiff to claim possession or partition or separate possession in a suit for specific performance of a contract for the transfer of the immovable properly. That has to be done where the circumstances demanding the relief for specific performance of the contract of sale embraced within its ambit not only the execution of the sale deed hut also possession over the property conveyed under the sale deed. It may not always be necessary for the plaintiff to specifically claim possession over the property with the relief for specific performance of the contract of sale. It is, therefore, abundantly clear that ordinarily the relief for specific performance of a contract implies the relief for possession of the immoveable property also and in such a case the plaintiff need not even ask for the decree for possession and as soon as a decree for specific performance of the contract is passed the plaintiff would be entitled to ask for possession in execution of such a decree. In the present case also the facts do not at all indicate that the possession would not follow the relief of specific performance of the contract. No third party has intervened. The properly is in possession of the contracting party and, therefore, the decree for specific performance of the contract would also ensure for possession of the property in execution of that decree.

6. So far as the question of amendment of the plaint in the peculiar circumstance of this case is concerned, it will only be a futile exercise. As already pointed above the plaintiff had claimed for possession and when the decree for specific performance of the contract has already been passed the mere fact that it specifically did not grant the relief for possession the plaintiff should again amend the plaint. There is no occasion for the plaintiff to amend the plaint when the relief had already been asked for and has impliedly been granted as slated above. I have already pointed above that the explanation 5 to Section 11 would not apply in such a case as the Hon'ble Supreme Court

has already clearly indicated in the aforesaid authority, in such a suit the decree for specific performance clearly implies a decree for possession also that is the relief of possession is inherent in the relief of specific performance of the contract of the sale."

(b) AIR 2007 Andhra Pradesh 35 by Sh. P.S. Narayana, J., in the case of **Smt. Suluguru Vijaya & Ors. vs. Pulumati Manjula,** the relevant paras of which read as under:-

"9. .....In **S.S. Rajabathar v. N.A. Sayeed,** AIR 1974 Madras 289 it was held that where a suit for specific performance of a contract of sale had been decreed, the executing Court while executing the decree, can direct delivery of possession in the absence of a specific direction to that effect in the decree. The view expressed in **Brij Mohan Matulal v. Mt. Chandrabhagabai,** AIR 1948 Nag 406 was dissented from. In **Mahender Nath Gupta v. Moti Ram Rattan Chand and Anr.,** AIR 1975 Delhi 155, the learned Judge of the Delhi High Court while dealing with the suit for specific performance of contract of sale which was filed before the commencement of the Specific Relief Act, 1963, and decree made after the commencement of the said Act, relief of delivery of possession neither claimed in the plaint nor granted in the decree and whether executing Court can grant delivery of possession, after referring to AIR 1967 SC 1541, AIR 1954 Allahabad 643, AIR 1952 Calcutta 362, AIR 1950 Allahabad 415, held in the affirmative mainly on the ground that Section 22 of the Specific Relief Act, 1963, indicates a rule of pleading. In **Lotu Bandu Sonavane v. Pundalik Nimba Koli**, AIR 1985 Bombay 412. Section 22(1) and Section 22(2) Proviso of the Specific Relief Act, 1963 had been dealt with. The expression "in an appropriate case" in Section 22(1) and "at any stage of the proceeding" in proviso to Section 22(2) it was held that decree directing specific performance of agreement of sale against defendant in possession of property specific prayer for delivery of possession is not necessary. In **Hemchand v. Karilal,**

AIR 1987 Rajasthan 117, it was held that in a suit for specific performance, property in possession of contracting party and no third party had intervened, relief of possession would be implied in decree for specific performance and need not be specifically asked for and the question of amendment of plaint does not arise. Reliance also was placed on a decision in **V. Narasimha Chary v. P. Radha Bai and Ors.,** 1999 (5) ALT 499.

10. In the light of the statutory duties and obligations cast on the seller by virtue of Section 55 of the Transfer of Property Act, 1882, and also in the light of the scope and ambit of Section 22 of the Specific Relief Act, 1963, this Court is of the considered opinion that when there is no dispute or controversy that the judgment debtors-defendants are in possession of the property, the mere fact that such specific prayer was not made, the same cannot be taken advantage of principally for the reason the decree for execution of sale deed would imply the decree of delivery of possession too inasmuch as these are the obligations which would flow from the relief relating to execution of the sale deed. Hence, this omission cannot be taken advantage of. It is pertinent to note that it is nobody's case that any third party rights had intervened. When that being so, this Court is of the considered opinion that the impugned order does not suffer from any illegality, whatsoever."

(c) The Supreme Court in the case of **Babu Lal vs. Hazari Lal Kishori Lal,** reported in (1982) 1 SCC 525 made the following observations:

"Specific Relief Act, 1963 (47 of 1963) – Section 22 – In appropriate cases of specific performance of contract of sale of immovable property, held, court competent to order delivery of possession of the property, even if not specifically asked for, by allowing suitable amendment in the plaint Order for delivery of possession without corresponding amendment in the plaint would be a mere omission, not fatal to the relief of possession, especially when the order made in furtherance of cause of justice

and in view of applicability of Section 28(3) Expressions "in an appropriate case" in Section 22(1) and "at any stage of the proceeding" in proviso to Section 22(2).

It may not always be necessary for the plaintiff to specifically claim possession over the property, the relief of possession being inherent in the relief for specific performance of the contract of sale. In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simplicitor, without specifically providing for delivery of possession, may give complete relief to the decree-holder in order to satisfy the decree to put the property in possession of the decree-holder. This is in consonance with the provisions of Section 55(1) of the Transfer of Property Act.

21. If once we accept the legal position that neither a contract for sale nor a decree passed on that basis for specific performance of the contract gives any right or title to the decree-holder and the right and the title passes to him only on the execution of the deed of sale either by the judgment-debtor himself or by the court itself in case he fails to execute the sale deed, it is idle to contend that a valuable right had accrued to the petitioner merely because a decree has been passed for the specific performance of the contract. The limitation would start against the decree-holders only after they had obtained a sale in respect of the disputed property. It is, therefore, difficult to accept that a valuable right had accrued to the judgment-debtor by lapse of time. Section 22 has been enacted only for the purpose of avoiding multiplicity of proceedings which the law courts always abhor.

23. There has been a protracted litigation and it has dragged on practically for about 13 years and it will be really a travesty of justice to ask the decree-holder to file a separate suit for possession. The objection of the petitioner is hyper-technical. The Executing Court has every jurisdiction to allow the amendment. The only difficulty is that instead of granting a relief of possession the High Court should have allowed an amendment in the plaint. The mere

omission of the High Court to allow an amendment in the plaint is not so fatal as to deprive the decree-holder of the benefits of the decree when Section 55 of the Transfer of Property Act authorizes the transferee to get possession in pursuance of a sale deed."

28. After having considered the abovementioned judgments, it is very clear that the grant of relief for delivery of possession is just a formality and even though, no specific prayer is made in the plaint and even the decree is silent about the delivery of possession, the Executing Court is empowered and bound to grant such relief. If I go through the judgments referred above, it is not even necessary to amend the plaint, as it is the admitted position in the present case that the sale deed in terms of the decree has already been executed in favour of the decree-holder and there is no involvement of the third party regarding the possession. This fact has not been controverted by the judgment-debtors in the pleadings also as status-quo orders passed by this Court till the disposal of the appeal. Thus, it is clear that the possession was with the judgment-debtors. Therefore, the facts of the cases directly apply to the facts and circumstances of the present case. However, since the objection is raised by the judgment-debtors and the decree-holder has also sought amendment of the plaint for including the relief for possession of the property in question, coupled with the fact that a conflicting view has been taken by the Courts in some of the cases and the proviso to sub-section (2) of Section 22 of the Specific Relief Act, 1963 allows the plaintiff who has not claimed any such relief provided by Clauses (a) or (b) of sub-section (1) of Section 22 to amend the plaint for including a claim for recovery of possession. The amendment, under these circumstances, can be allowed at any stage of proceedings including the execution proceedings.

29. Under these circumstances, the prayer made by the decree-holder for amendment of the plaint has to be granted, even though such amendment was not necessary. Ordered accordingly and consequent thereto, the decree is also amended.

30. Under Order VII, Rule 7 of CPC, it is provided that it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for. It is settled law that relief to be provided by the court is to

be based on the pleadings of the plaintiff.

31. This Court is of the considered view that the relief of possession is ancillary and it springs out and is comprised in the relief to that for the specific performance of the contract to sell.

32. In view of the reasons stated earlier, there is no impediment for the Court to grant the relief claimed in the execution proceedings. The judgment-debtors are, however, entitled to receive the balance sale consideration which has been deposited by the decree-holder with this Court. As it is now incumbent upon the judgment-debtors to put the decree-holder in possession of the suit property in view of the amendment in the plaint and the decree which include the relief of possession also.

33. Hence, it is directed that the warrants of possession qua the immovable property, i.e. land comprising in Mustatil No.90, Killa No.11/2, Mustatil No.91, Killa Nos.7/1, 7/2, 14, 17, 15/2 and 16, total admeasuring 17 Bighas and 4+ Biswas, situated within the revenue estate of Village Dera Mandi, Delhi, be issued for grant of peaceful and vacant possession thereof to the decree-holder through Bailiff to be appointed by the concerned Court. The Bailiff is also authorized to take the police assistance if necessary to ensure the compliance of the direction. The decree holder would take necessary steps by filing of process fee and to deposit other requisite charges. The execution petition is accordingly disposed of.

ILR (2012) IV DELHI 110
W.P. (C)

PUNJAB NATIONAL BANK ....APPELLANT

VERSUS

VIRENDRA PRAKASH & ANR. ....RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA NO. : 74/2012 DATE OF DECISION: 08.02.2012

(A) Code of Civil Procedure, 1908—Order 12 Rule 6—Transfer of Property Act, 1882—Section 106 & 116—Respondent/landlord wrote a letter 28.12.2010 after expiry of tenancy by efflux of time, to vacate the property—Appellant did not vacate; legal notice sent on 4.2.2011 terminating the tenancy—Appellant failed to vacate—Appellant bank had account of respondent in their branch—Started depositing rent in the account—Claimed by tenant that by acceptance of such deposit fresh tenancy came into existence—Landlord when came to know of surreptitious and unilateral deposit of rent, wrote a letter dated 12.07.2011 that deposit of rent was without any instruction on their behalf and the deposit would be taken without prejudice to their right—Court observed any amount received after the termination of tenancy can surely be taken as charges towards use and occupation because after all the tenant had continued to use and occupy tenanted premises and was liable consequently to pay user charges—Fresh tenancy is a bilateral matter of contract coming into existence—Unless there is bilateral action and an agreement entered into to create fresh tenancy, mere acceptance of rent after termination of tenancy cannot create fresh tenancy—Appellant Bank Contended that since the appellant disputed all the aspect in the written

statement, decree could not be passed by Trial Court under Order 12 Rule 6—Held—Contention to be misconceived as existence of relationship of landlord and tenant, the factum of premises not having protection of Delhi Rent Control Act, 1958, and fact of tenancy termination by service of a legal notice not disputed in the written statement—Fresh tenancy also not found to have been created—Appeal dismissed.

(B) Code of Civil Procedure, 1908—Section 35—Cost—Actual, realistic and proper cost would go a long way to control false pleadings and also unnecessary adjournments—Dishonest and unnecessary litigation is a strain on judicial system—Cost of Rs. 2 lacs imposed.

In my opinion, there cannot be a more frivolous, vexatious and malafide defence than the one raised by the appellant/tenant inasmuch as the respondents/landlords in this case even before the period of tenancy expired by efflux of time wrote their letter dated 28.12.2010 asking the appellant/defendant to vacate the property on the expiry of the tenancy period. Obviously, the appellant-bank, which has a lot of monetary resources however deemed it fit not to vacate the premises. The landlords thereafter sent a legal notice dated 4.2.2011 terminating the tenancy. Once again, the appellant gargantuan organization failed to comply with the notice and failed to vacate. Since the appellant-bank has the account of respondents/landlords in its branch, it started depositing rent in the said account and claimed that by acceptance of such amount deposited, a fresh tenancy came into existence. However, this aspect is not only factually incorrect so far as the conclusion of creation of fresh tenancy is concerned but legally too the same is misconceived. Factually, the stand of creation of fresh tenancy is wrong because the landlords when they came to know of the surreptitious and unilateral deposit of rent in their bank account, they wrote their letter dated 12.7.2011 that the rent is being deposited without any instructions on

their behalf and therefore the deposit will be taken without prejudice to their rights. Legally the stand of the appellant is incorrect because the Supreme Court in the judgment reported as **Sarup Singh Gupta v. S. Jagdish Singh & Ors.,** 2006 (4) SCC 205 has categorically clarified this position and said that any amount received after the termination of tenancy can surely be taken as charges towards use and occupation because after all the tenant has continued to use and occupy the tenanted premises and is liable consequently to pay user charges thereof. A fresh tenancy is a bilateral matter of a contract coming into existence. Unless there is a bilateral action and an agreement is entered into to create a fresh tenancy, mere acceptance of rent after termination of tenancy, cannot create fresh tenancy as held in the case of **Sarup Singh Gupta** (supra).

(Para 4)

Now, the issue is with respect to costs. I have already given a preface at the very beginning of this judgment. This preface, is a preface which was necessary inasmuch as there is a flood of litigation unnecessarily burdening the Courts only because obdurate tenants refuse to vacate the tenanted premises even after their tenancy period expires by efflux of time or the monthly tenancy has been brought to an end by service of a notice under Section 106 of Transfer of Property Act, 1882. In the present case, the tenant is not a poor or a middle class person, but is a bank with huge resources and hence can contest litigation to the hilt. It is therefore necessary that I strictly apply the ratio of the Supreme Court judgment in the case of **Ramrameshwari Devi and Others** (supra). In the judgment of **Ramrameshwari Devi and Others** (supra), the Supreme Court on the aspect of costs has observed as under:-

> "43. We have carefully examined the written submissions of the learned Amicus Curiae and learned Counsel for the parties. We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it

would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.

47. We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. In **Swaran Singh v. State of Punjab** MANU/SC/0320/2000 : (2000) 5 SCC 668 this Court was constrained to observe that perjury has become a way of life in our courts.

52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials.

A. ...

B. ...

C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary

adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

.....

56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs. 2,00,000/- (Rupees Two Lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation." (underlining added) Dishonest and unnecessary litigations are a huge strain on the judicial system which is asked to spend unnecessary time for such litigation. **(Para 7)**

Important Issue Involved: (i) The payment of rent after the termination of tenancy does not create fresh tenancy (ii) In the litigations where frivolous defence are taken, the actual and proper cost must be imposed to curb the tendency.

[Gu Si]

APPEARANCES:

FOR THE APPELLANT : Mr. S.S. Katyal, Advocate with Mr. Sanjay Katyal, Advocate.

FOR THE RESPONDENT : None.

CASES REFERRED TO:

1. *Ramrameshwari Devi and Others* vs. *Nirmala Devi and Others,* (2011) 8 SCC 249.
2. *M/s. Jeevan Diesels & Electricals Ltd.* vs. *M/s. Jasbir Singh Chadha (HUF) & Anr.* AIR 2010 SC 1890.

3. *Sarup Singh Gupta* vs. *S. Jagdish Singh & Ors.,* 2006 (4) SCC 205.

4. *Swaran Singh* vs. *State of Punjab* MANU/SC/0320/2000 : (2000) 5 SCC 668.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J (ORAL)

1. I must begin this judgment with a preface. Certain tenants, in this country, consider it an inherent right not to vacate the premises even after either expiry of tenancy period by efflux of time or after their tenancy is terminated by means of a notice under Section 106 of Transfer of Property Act, 1882. All such tenants, including the present appellant-bank, feel that they ought to vacate the tenanted premises only when the Courts pass a decree for possession against them. Considering the facts of the case, it is high time that a strict message is sent to those tenants who illegally continue to occupy the tenanted premises by raising frivolous defences only and only to continue in possession of the tenanted premises. Such incorrigible tenants should be appropriately burdened with penal costs, and which aspect of costs, I will deal with later noting the recent judgment of the Supreme Court reported as **Ramrameshwari Devi and Others v. Nirmala Devi and Others,** (2011) 8 SCC 249 in which it has been held that it is high time that actual and realistic costs be imposed in order to pre-empt and prevent dishonesty in litigation.

2. With this preface, let me turn to the present case. There are three requirements for decreeing a suit for possession, which is filed by a landlord against a tenant in Delhi. These requirements are: firstly, the existence of a relationship of a landlord and tenant, secondly rent being more than Rs. 3,500/- per month thereby taking the premises outside the protection of Delhi Rent Control Act, 1958, and thirdly that the monthly tenancy is terminated by means of a legal notice under Section 106 of Transfer of Property Act, 1882 as the tenancy of a fixed period has expired by efflux of time.

3. All the aforesaid three aspects are not disputed by the appellant/tenant/defendant. Last paid rent is Rs. 55,030/- per month after deduction of TDS. The only dispute which is raised is that after the tenancy period expired by efflux of time, the respondents/landlords had accepted the rent and therefore the tenancy relation was created afresh by virtue of

provision of Section 116 of Transfer of Property Act, 1882.

4. In my opinion, there cannot be a more frivolous, vexatious and malafide defence than the one raised by the appellant/tenant inasmuch as the respondents/landlords in this case even before the period of tenancy expired by efflux of time wrote their letter dated 28.12.2010 asking the appellant/defendant to vacate the property on the expiry of the tenancy period. Obviously, the appellant-bank, which has a lot of monetary resources however deemed it fit not to vacate the premises. The landlords thereafter sent a legal notice dated 4.2.2011 terminating the tenancy. Once again, the appellant gargantuan organization failed to comply with the notice and failed to vacate. Since the appellant-bank has the account of respondents/landlords in its branch, it started depositing rent in the said account and claimed that by acceptance of such amount deposited, a fresh tenancy came into existence. However, this aspect is not only factually incorrect so far as the conclusion of creation of fresh tenancy is concerned but legally too the same is misconceived. Factually, the stand of creation of fresh tenancy is wrong because the landlords when they came to know of the surreptitious and unilateral deposit of rent in their bank account, they wrote their letter dated 12.7.2011 that the rent is being deposited without any instructions on their behalf and therefore the deposit will be taken without prejudice to their rights. Legally the stand of the appellant is incorrect because the Supreme Court in the judgment reported as **Sarup Singh Gupta v. S. Jagdish Singh & Ors.,** 2006 (4) SCC 205 has categorically clarified this position and said that any amount received after the termination of tenancy can surely be taken as charges towards use and occupation because after all the tenant has continued to use and occupy the tenanted premises and is liable consequently to pay user charges thereof. A fresh tenancy is a bilateral matter of a contract coming into existence. Unless there is a bilateral action and an agreement is entered into to create a fresh tenancy, mere acceptance of rent after termination of tenancy, cannot create fresh tenancy as held in the case of **Sarup Singh Gupta** (supra).

5. Learned counsel for the appellant sought to rely upon the judgment of the Supreme Court in the case of **M/s. Jeevan Diesels & Electricals Ltd. Vs. M/s. Jasbir Singh Chadha (HUF) & Anr.** AIR 2010 SC 1890 to argue that since the appellant-bank had disputed all aspects in the written statement, therefore, a decree could not be passed by the trial Court under Order 12 Rule 6 CPC. The reliance upon the decision in the

case of **M/s. Jeevan Diesels & Electricals Ltd.** (supra) on behalf of the appellant is clearly misconceived because the existence of relationship of landlord and tenant, the factum of the premises not having protection of Delhi Rent Control Act, 1958 and the fact that tenancy was terminated by service of a legal notice are not disputed in the written statement. So far as the aspect of deposit of rent and creating a fresh tenancy is concerned, I have dealt with this aspect above by referring to the judgment of the Supreme Court in the case of **Sarup Singh Gupta**(supra)

6. There is therefore no merit in the appeal which is thus liable to be dismissed.

7. Now, the issue is with respect to costs. I have already given a preface at the very beginning of this judgment. This preface, is a preface which was necessary inasmuch as there is a flood of litigation unnecessarily burdening the Courts only because obdurate tenants refuse to vacate the tenanted premises even after their tenancy period expires by efflux of time or the monthly tenancy has been brought to an end by service of a notice under Section 106 of Transfer of Property Act, 1882. In the present case, the tenant is not a poor or a middle class person, but is a bank with huge resources and hence can contest litigation to the hilt. It is therefore necessary that I strictly apply the ratio of the Supreme Court judgment in the case of **Ramrameshwari Devi and Others** (supra). In the judgment of **Ramrameshwari Devi and Others** (supra), the Supreme Court on the aspect of costs has observed as under:-

> "43. We have carefully examined the written submissions of the learned Amicus Curiae and learned Counsel for the parties. We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases.
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> 47. We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit.

> It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. In **Swaran Singh v. State of Punjab** MANU/SC/0320/2000 : (2000) 5 SCC 668 this Court was constrained to observe that perjury has become a way of life in our courts.
>
> 52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials.
>
> A. ...
>
> B. ...
>
> C. Imposition of actual, realistic or proper costs and or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.
>
> .....
>
> 56. On consideration of totality of the facts and circumstances of this case, we do not find any infirmity in the well reasoned impugned order/judgment. These appeals are consequently dismissed with costs, which we quantify as Rs. 2,00,000/- (Rupees Two Lakhs only). We are imposing the costs not out of anguish but by following the fundamental principle that wrongdoers should not get benefit out of frivolous litigation." (underlining added) Dishonest and unnecessary litigations are a huge strain on the judicial system which is asked to spend unnecessary time for such litigation.

8. In view of the gross conduct of the appellant in the present case,

I dismiss the appeal with costs of Rs. 2 lacs. Since the respondents are not represented, costs be deposited in the account of Registrar General of this Court maintained in UCO Bank, Delhi High Court Branch for being utilized towards juvenile justice, surely a just cause. Costs be deposited within a period of four weeks from today. Obviously, the costs may be peanuts for a huge organization such as the appellant-bank but I hope the spirit of the costs will be understood by the appellant-bank as also all other tenants who refuse to vacate the premises although they have overstayed their welcome in the tenanted premises.

The appeal is dismissed and disposed of as aforesaid.

9. List before the Registrar for compliance of the order for deposit of costs on 26th March, 2012. In case, costs are not deposited, Registrar will list the matter before the Court so that further action as per law can be taken against the appellant.

ILR (2012) IV DELHI 119
I.A.

DCM SHRI RAM CONSOLIDATED ....PLAINTIFF

VERSUS

SREE RAM AGRO LTD. & ORS. ....DEFENDANTS

(MANMOHAN SINGH, J.)

I.A. NOS. 7028/2010 & 11464/2010 IN C.S. (OS) NO. : 1042/2010

DATE OF DECISION: 08.02.2012

Code of Civil Procedure, 1908—Order 39, Rule I and 2—Trade Marks Act, 1999—Section 11, 23, 28, 31 and 134—Copyright Act, 1957—Section 62—Trade Marks Rule, 2002—Rule 37—Plaintiff registered trade mark owner of expression "SHRIRAM" for vast range of products since 1960—By interim order, defendants restrained from manufacturing or selling any produce by name of "SHRIRAM CARTAP" which is deceptively similar trademark of plaintiff—Case of defendants that they have got registration of trade mark from registry—Date of registration relates back to date of application—Plaintiff is entitled to continue with suit for passing off which is still maintainable but defendants are residing and carrying on their business outside jurisdiction of this court—Plaintiff under action of passing off can not take advantage of section 134(2) of Act in order to invoke territorial jurisdiction—Plaint is liable to be returned because of lack of territorial jurisdiction—Held—Defendants did not amend written statement after obtaining registration nor defendants have filed any application for return of plaint—Defendants in their written statement have not denied existence of territorial jurisdiction of this Court—On date of institution, this court had jurisdiction to entertain and try proceedings on basis of provisions under law—One fails to understand as to why defendants are now challenging jurisdiction on passing off when in written statement in cause of action, defendants admitted territorial jurisdiction—Registration has been secured by defendants which has been although applied prior but, was prosecuted and obtained pursuant to interim orders passed by this court in matter—Registrar of Trade Marks has not cited previously registered trade mark of plaintiff as a matter of conflicting mark in examination report and proceeded to grant registration without citing plaintiff's prior registered mark and also perhaps not been informed about interim orders and seisin of dispute by this Court and granted registration contrary to Rule 37 of T M Rules—By ignoring mandatory provisions of Act and granting registration to defendants, it is clear that it is done with malafide intention, in order to defeat orders passed by court—It is a triable question whether registration of

defendants is actually a valid one or is it just entry wrongly remaining on register, depending upon inference which court is going to draw by way of impact of subsequent events—Objection qua jurisdiction at this stage can not be sustained and same is dismissed.

It is trite law that in the cases wherein objection has been raised on the counts of Order VII Rule 10 and 11 CPC without the application or specific plea on jurisdiction, then the same has to be dealt with by applying the principles that the plaint has to be assumed as correct. In case of objection on jurisdiction on demurer, if a formal and meaningful reading of the plaint discloses a cause of action qua jurisdiction, then the court can conveniently entertain the jurisdiction on the subject suit. **(Para 21)**

Further, this court is called upon to examine the impact of subsequent events which has occurred the pursuant to the assuming the jurisdiction by this court under the law. The circumstances attending the factum of registration obtained by the defendant also needs to be considered and needs to be tested in an in-depth trial by framing of issue. At this stage, it is suffice to state that the registration has been secured by the defendants bearing No. 1867816 which has been although applied prior but, was prosecuted and obtained pursuant to the interim orders passed by this court in the matter. The Registrar of Trade Marks has not cited the previously registered trade mark No.1092754 of the plaintiff as a matter of the conflicting the mark in the examination report and proceeded to grant the registration without citing the plaintiff's prior registered mark and also perhaps not been informed about the interim orders and seisin of the dispute by this court and granted the registration contrary to Rule 37 of the Trade Marks Rules, 2002. The same reads as under :

37. Acknowledgement and Search -

(1) Every application for the registration of a trade

mark in respect of any goods or services shall on receipt, be acknowledged by the Registrar. The acknowledgement shall be by way of return of one of the additional representations of the trade mark filed by the applicant along with his application, with the official number of the application duly entered thereon.

(2) Upon receipt of the application for registration of trade mark, the Registrar shall cause a search to be made amongst the registered trademarks and amongst the pending applications for the purpose of ascertaining whether there are on record in respect of the same goods or services or similar goods or services any mark identical with or deceptively similar to the mark sought to be registered and the Registrar may cause the search to be renewed at any time before the acceptance of the application but shall not be bound to do so. In these circumstances, this court is extremely doubtful as how this court should allow the factum of registration to be pressed into service which has been secured in complete ignorance of the orders passed by this court and flouting the clear provisions of the Act. **(Para 27)**

Important Issue Involved: (A) In cases wherein objection has been raised on counts of Order VII rule 10 and 11 CPC without the application or specific plea on jurisdiction, then the same has to be dealt with by applying the principles that the plaint has to be assumed as correct.

(B) Where originally, the plaintiff filed the combined action i.e. infringement of trade mark and passing off action and in written statement defendant admitted jurisdiction of the Court, plaint can not be returned on subsequent event of registration granted in favour of defendants in absence of amendment in written statement taking plea of lack of jurisdiction or application for return of plaint premised on the subsequent event.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Naveen Kumar, Advocate.

FOR THE RESPONDENT : Mr. Ajay Sahni, Advocate with Mr. Kamal Garg, Advocate.

CASES REFERRED TO:

1. *Marico Ltd.* vs. *Agro Tech Foods Limited;* 2010 (44) PTC 736 (Del.).
2. *Exphar SA and Anr.* vs. *Eupharma Laboratories Ltd. and Anr.;* 2004 (28) PTC 251 (SC).
3. *State Trading Corporation of India Limited* vs. *Government of the Peoples Republic of Bangladesh* (DB), 63 (1996) DLT 971.

RESULT: Objection qua jurisdiction dismissed.

MANMOHAN SINGH, J.

1. The plaintiff has filed the above-mentioned suit for permanent injunction against infringement of its trade mark "SHRIRAM" by the defendants along with an application under Order XXXIX, Rules 1 & 2 read with Section 151 CPC, bearing I.A. No.7028/2010.

2. The suit as well as the interim application was listed before the Court on 21.05.2010 and an ex parte ad-interim order was passed against the defendants restraining them, their agents, employees, associates, assigns etc. from manufacturing, storing, distributing, selling any produce by name of "SHRIRAM CARTAP" which is deceptively similar to the trademark of the plaintiff. By this order I propose to decide the abovementioned pending application after hearing of the parties.

3. Case of the Plaintiff

(a) The brief facts of the case are that the plaintiff is the registered trade mark owner of the expression "SHRIRAM" for the vast range of products since 1960. The plaintiff-company is one of the leading manufacturers of fertilizers, insecticides, pesticides, plastics, sugar, cement, plaster of paris etc.

(b) It is submitted that the mark "SHRIRAM" has been adopted by the plaintiff out of respect and reverence of their predecessor Sir Lala Shriram, who was an eminent industrialist, educationist and philanthropist and had set up the predecessor company of the plaintiff.

(c) It is further submitted that the "SHRIRAM" trade mark is registered in Class-5 of the goods mentioned in the schedule 4 of the Trade Marks Act, 1999 for "SHRIRAM CARTAP", "SHRIRAM GOLD", "SHRIRAM ACE 75", "SHRIRAM" (Logo), "SHRIRAM RAKSHAK" , "SHRIRAM ATTACK" , "SHRIRAM BADSHAH", "SHRIRAM BUTA 50" , "SHRIRAM CarZeb", "SHRIRAM DART", "SHRIRAM DOUBLE M", "SHRIRAM MATRIZIM 70", "SHRIRAM EDGE", "SHRIRAM MONO 36", "SHRIRAM PROFEN 40", "SHRIRAM SHERA", "SHRIRAM TRIDELTA", "SHRIRAM TriMax", "SHRIRAM TRIPHOS 40", "SHRIRAM WOOSAVER TC", "SHRIRAM ENDO" etc. for pesticides, insecticides and herbicides etc. In addition to this, it is stated that they are also using the same trade mark for "SHRIRAM PVC RESIN" (since 1967), "SHRIRAM UREA" (since 1977) and "SHRIRAM CEMENT" (since 1986).

(d) Thus, on account of constant user over a period of almost four decades, every product for fertilizers, pesticides or insecticides goods bearing the trade mark of "SHRIRAM" is identified with their product and their company.

(e) Plaintiff is proprietor of several "Shriram" trademarks in class 5 group. Shriram Cartap 4G, Shriram Gold, Shriram Ace and many others. The plaintiff is the user of the said trademark since 1960's for e.g. Shriram PVC Resin, Shriram Urea (since 1977). With efforts and hard work, Shriram has generated a good reputation and goodwill. Cores of money has been spent on the brand promotion and other brand related things.

(f) The expression "Shriram" has become synonymous with the high quality and premium standard of plaintiff's products. The defendants, small time traders, on the other hand have adopted the name and style of the plaintiff's product "Shriram" with the sole intention of obtaining illegal benefits from the plaintiff's brand name and use for their own benefit.

4. It is further submitted that the plaintiff and its promoters belong to the lineage of late Sir Lala Shriram. The expression "SHRIRAM" is the integral part of the name of the promoters of the plaintiff and their predecessors. The international reputation of the plaintiff's "SHRIRAM" brand is also apparent from its independent branding association with various global entities and today the annual turnover is more than Rs.3500/- crores.

5. Case of the Plaintiff against the Defendants

(i) Defendant No.1 is storing, selling and dealing through its partners, defendants No.2 & 3 as well as stockiest defendants No.4 & 5 of insecticides which is manufactured by defendant No.6 at its factory at Panchkula which is not only bearing the same trade mark of "SHRIRAM" but is also using practically the same dress code, colour scheme and thereby dishonestly infringing the trade mark of the plaintiff and passing off to the public, its own goods as the one which are being manufactured by the plaintiff.

(ii) Some of the products of the plaintiff's are Shriram Urea, Shriram Cartap 4G, Shriram Gold, Shriram SSP and many more. The plaintiff's products are widely available in Northern India e.g. Delhi, Rajasthan, Uttar Pradesh, Punjab. Apart from these products, plaintiff has also founded many educational institutions like Lady Shriram, Shriram College of Commerce, Delhi School of Economics. Hence, it is evident from this fact that plaintiff is the prior user of the trade name "Shriram" than the defendants.

(iii) The plaintiff states that they are using a mark "Shriram Cartap 4G (pesticide) vide registered trademark No. 1092754. The defendants have adopted the same trademark and also have intimated plaintiff's packaging style, get up with an dishonest intention and hence, the reputation of the plaintiff is hampered and the goods of the defendants are getting passed off as plaintiff's goods and as a result, a huge amount of loss is being suffered by the plaintiff. The general public is also being deceived by this act of the defendants.

(iv) The plaintiff states that the defendants have adopted the similar trademark as that of the plaintiff (in class 1 and class 5). The plaintiff also states that the dishonest intention of the defendants is very clear as they have adopted the similar trademark and has the intention of passing

off their goods as that of the plaintiff's. The intention of the defendants is also clear from the fact that the defendants have used similar packaging, lay out, colour combination printing fonts, stylization and the over all appearance is very similar with that of the plaintiff's goods and hence, it is very confusing for the general public.

(v) The plaintiff states that the defendants have knowingly adopted the trademark of the plaintiff and has the intention of harming the goodwill of the plaintiff. Due to the wrong intention of the defendants, the plaintiff's reputation is at stake and hence it is causing a huge loss.

6. The plaintiff states that they have joint ventures with M/s Bioseeds Inc of Panama known as M/s Shriram Bioseeds Genetic (India). Another JV is with M/s Yara Inc of Norway with "Shriram Energy" and together they have their reputed brand "Yara Liva".

7. As per plaintiff the defendant No. 1 is the partnership firm and defendants 2 & 3 are the partners of that firm. Defendants 4 & 5 are the dealers of the products of defendant No. 1. On 17.5.2010 the plaintiff's marketing representative came across defendant's products and in view of that, the plaintiff has filed the present suit.

8. It is also stated that earlier, in order to protect the mark SHRIRAM, the plaintiff filed the said civil suits bearing Suit No. 910/2009 and Suit No.1035/2009 before this Court and this Court vide its order dated 23.10.2009 granted ad-interim injunction against other defendants who were selling their product (POP) under the trademark similar to "SHIRIRM". The said order dated 23.10.2009 was also upheld by the Division Bench of this Court vide their order dated 25.03.2010 and in the suit bearing Suit No. 884/ 2010 also this Court has passed an ex-parte injunction in favor of the plaintiff vide order dated 7.5.2010.

Case of the Defendants

9. The defendants in their written statement have denied all the averments made in the plaint and have also raised various objections, inter alia, that the suit is not maintainable as the plaintiff has no locus to file the same. The trade mark of defendant 1-3 is different from that of the plaintiff in the set up style, the colour and the packaging, thus, no question of infringement of copyright and passing off arises.

10. In the written statement, it is stated that the trade name

"SHRIRAM" is common to trade name and hence, publici juris and the defendant following the Hindu religion adopted the said trade name honestly and bonafidely. The defendant denies that they are using the name and trade mark as that the plaintiff's.

11. In reply, it is stated by the plaintiff that plaintiff is one of the leading manufacturer of fertilizers, insecticides, pesticides, plastics, sugar, cement, plaster of Paris etc. the plaintiff is the successor of M/s DCM Ltd and it belongs to the lineage of Lala Shriram. Plaintiff has been using expression "Shriram" as trademark for its vast number of products since 1960's and with the passage of time, Shriram has acquired secondary meaning and has become exclusively associated with the products of the plaintiff.

12. The defendants also adopted the same dress code of that of the plaintiff's company and using it with ulterior bad motive. The defendants have adopted similar style of "Shriram Cartap 4G" of that of the plaintiff. The defendants have slightly altered the style of writing the name "Shriram". The plaintiff alleges that this amounts to infringement.

13. The plaintiff has also invoked the territorial jurisdiction on the ground that since the plaintiff is a public limited company having its registered office at 6th Kanchanjunga Building, 18 Barakhamba Road, Connaught Place, New Delhi- 110001, therefore, this Court has also the jurisdiction under Section 134 of the Trade Marks Act, 1999 (hereinafter called the "Act").

14. During the course of hearing of interim application, it was informed by Mr. Ajay Sahni, learned counsel appearing on behalf of the defendants that they have got the registration of the trade mark No.1867816 from the Registry. Photocopy of registration certification is also produced.

15. He further argued that under Section 23 of the Trade Marks Act, 1999 the date of registration relates back to the date of application i.e. 29.09.2009. He submits that in view of registration the defendants have got the rights under Section 28 of the Act irrespective of the fact that whether the registration is, rightly or wrongly, granted and even despite of interim order passed by the court.

16. However, he agrees that the plaintiff is entitled to continue with the suit for passing off which is still maintainable. But, the defendants are

residing and carrying on their business outside the jurisdiction of this Court, the plaintiff, under the action of passing off cannot take the advantage of Section 134 (2) of the Act in order to invoke the territorial jurisdiction.

17. As the two packing materials used by the parties are different, even the plaintiff cannot take the benefit of Section 62(2) of the Copyrights Act, 1957. Therefore, the plaint is liable to be returned under Order VII, Rule 10 CPC because of lack of jurisdiction.

18. Mr. Sahni did not challenge the registration granted in favour of the plaintiff pertaining to the trade mark SHRIRAM.

19. It is the admitted position that the defendants did not amend the written statement after obtaining the registration nor the defendants have filed any application for return of plaint under the provisions of Order VII Rule 10 CPC. It is also pertinent to mention that the defendants in their written statement have not denied the existence of territorial jurisdiction of this Court.

20. Section 134(2) of the Act provides an additional form of jurisdiction. If, at the time of institution of the suit or other proceedings, the plaintiff is actually or voluntarily resides or carrying on business or personally works for gain, the suit for infringement of trade mark etc. can be instituted in any Court inferior to a District Court having jurisdiction to try the suit. In the present case, the specific statement has been made by the plaintiff that the plaintiff has its office in New Delhi and the jurisdiction is invoked under Section 134 of the Act by the plaintiff.

21. It is trite law that in the cases wherein objection has been raised on the counts of Order VII Rule 10 and 11 CPC without the application or specific plea on jurisdiction, then the same has to be dealt with by applying the principles that the plaint has to be assumed as correct. In case of objection on jurisdiction on demurer, if a formal and meaningful reading of the plaint discloses a cause of action qua jurisdiction, then the court can conveniently entertain the jurisdiction on the subject suit.

22. The reference is invited to the judgment of Apex court in the case of **Exphar SA and Anr. Vs. Eupharma Laboratories Ltd. and Anr.;** 2004(28)PTC251(SC) wherein Ruma Pal, J. speaking for the Apex court has observed as under :

> **"Besides when an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true.** The submission in order to succeed must show that granted those facts the Court does not have jurisdiction as a matter of law. In rejecting a plaint on the ground of jurisdiction, the Division Bench should have taken the allegations contained in the plaint to be correct. However, the Division Bench examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of the Delhi High Court and also that the respondent No. 2 did not carry on business within the jurisdiction of the Delhi High Court"

23. Applying the same principles to the facts of the present case, I am of the view that if the plaint is read meaningfully, it is beyond the cavil of any doubt that plaint does discloses in the jurisdictional paragraph as to how this court has jurisdiction on the basis of clear applicability of section 134 of the Act of 1999. It follows from the above discussion that on the date of institution, this court had jurisdiction to entertain and try the proceedings on basis of the provisions under the law.

24. It is also pertinent to mention here that originally the plaintiff filed the combined action i.e. infringement of trade mark and passing off action also. The defendants in para 38 of the written statement have admitted the jurisdiction of this court. One fails to understand even if the contentions of Mr. Sahni are accepted that the suit, as of today for infringement, is not maintainable in view of registration (though no amendment is made in the written statement) as to why the defendants are now challenging the jurisdiction on passing off also when in the written statement in combine cause of action, the defendants admitted the territorial jurisdiction.

25. It is, however, the contention of the learned counsel for the defendants that this court should examine the subsequent event of registration which is granted in favour of the defendants. Till date, the written statement has not been amended to this effect and no plea has been taken on the basis of the lack of jurisdiction. In the absence of such plea in written statement or application for return of plaint premised on the subsequent event.

26. Therefore, in the absence of any amendment the said question has now become a mixed question of fact and law.

27. Further, this court is called upon to examine the impact of subsequent events which has occurred the pursuant to the assuming the jurisdiction by this court under the law. The circumstances attending the factum of registration obtained by the defendant also needs to be considered and needs to be tested in an in-depth trial by framing of issue. At this stage, it is suffice to state that the registration has been secured by the defendants bearing No. 1867816 which has been although applied prior but, was prosecuted and obtained pursuant to the interim orders passed by this court in the matter. The Registrar of Trade Marks has not cited the previously registered trade mark No.1092754 of the plaintiff as a matter of the conflicting the mark in the examination report and proceeded to grant the registration without citing the plaintiff's prior registered mark and also perhaps not been informed about the interim orders and seisen of the dispute by this court and granted the registration contrary to Rule 37 of the Trade Marks Rules, 2002. The same reads as under :

> **37. Acknowledgement and Search -**
>
> (1) Every application for the registration of a trade mark in respect of any goods or services shall on receipt, be acknowledged by the Registrar. The acknowledgement shall be by way of return of one of the additional representations of the trade mark filed by the applicant along with his application, with the official number of the application duly entered thereon.
>
> (2) Upon receipt of the application for registration of trade mark, the Registrar shall cause a search to be made amongst the registered trademarks and amongst the pending applications for the purpose of ascertaining whether there are on record in respect of the same goods or services or similar goods or services any mark identical with or deceptively similar to the mark sought to be registered and the Registrar may cause the search to be renewed at any time before the acceptance of the application but shall not be bound to do so. In these circumstances, this court is extremely doubtful as how this court should allow the factum of registration to be pressed into service which has been secured in complete ignorance of the orders passed by this court and flouting the clear provisions of the Act.

28. The Division Bench of this court in the case of **State Trading Corporation of India Limited v. Government of the Peoples Republic of Bangladesh (DB),** 63 (1996) DLT 971, wherein Hon'ble Justice R.C. Lahoti (as his lordship then was) observed about the cases involving the challenge of jurisdiction in variety of the circumstances in following terms:

> "A court seized of a suit and a prayer for the grant of ad interim relief may be faced with a doubt or challenge as to the availability of jurisdiction to try the suit in a variety of circumstances. The court has to act as under :- (a) In the case of inherent lack of jurisdiction apparent on the face of the record, court cannot exercise jurisdiction over the suit so as to pass any interlocutory order or grant interim relief; (b) If it appears from a bare reading of the plaint that the court does not have jurisdiction to try the suit, the plaint itself may be returned for presentation to a proper court under Order 7 Rule 10 CPC; (c) If the suit appears to be barred by any law, the plaint may be rejected under Order 7 Rule 11 Civil Procedure Code ; (d) It may be a disputed question of fact or law or both- whether court has jurisdiction over the suit or not. Such a question if it be a pure question of law it can be decided on hearing the parties on a preliminary issue. Such a challenge to the jurisdiction of the court to entertain the -suit being laid by the defendant as a pure question of law, it is incumbent upon the Judge to determine that question as a preliminary issue before making absolute the rule issued earlier; **(e) If the determination of jurisdiction of the Court is a question of fact or mixed question of fact and law requiring evidence to be adduced before recording a finding, the determination of the question may in appropriate, cases be liable to be postponed till after the determination of all or several other issues if the evidence to be adduced by the parties may be common on the issue of jurisdiction and such other issues." (Emphasis Supplied)**

29. It is established law that in an action before the civil court relating to infringement proceedings, the validity of the trade mark cannot be questioned more so at the prima facie stage. But, it cannot also be lost sight of that the registration is merely a prima facie proof of validity by virtue of section 31 of the Act. There is always a rebuttable presumption

available under the law in such cases where the circumstances attending the same speaks to the contrary, the court can at any stage draw inference to the contrary even in cases wherein there shall be prima facie presumption as to validity. (Kindly see the judgment of Division bench of this court in the case of **Marico Ltd. Vs. Agro Tech Foods Limited;** 2010 (44) PTC 736 (Del.) wherein this court observed in the context of lack of distinctiveness in the following terms:

> "A trademark is ordinarily used in relation to goods of a manufacturer. A trademark can be registered but ordinarily registration is not granted if the mark falls under sub-sections 1(a) to 1(c) of Section 9. The proviso however, provides for entitlement to registration although ordinarily not permissible under Sections 9 (1) (a) to (c), provided that the mark has acquired a distinctive character as a result of its use prior to registration or is otherwise a well known trademark. **Registration is only prima facie evidence of its validity and the presumption of prima facie validity of registration is only a rebuttable presumption." (emphasis Supplied))**

30. In the present case too, the situation like the one discussed above has occurred wherein the registration obtained by the defendant under some suspicious circumstances wherein the present suit was filed on 19.05.2010 and interim orders were passed on 21.05.2010 and the registration of the same very mark was granted on 16.03.2011. It is not disputed by the defendants that they prosecuted during the currency of the interim order when this court was in seisen of the dispute and it was not informed by the defendants to the Trade Mark Office about the interim orders passed by the Court. In a way, this Court has passed the order by comparing the two trade marks of the parties and the defendants have obtained the registration of the same very trade mark in order to frustrate the orders of this Court. Hence, there is clear violation of the provisions including Section 11 as the identical prior registered trade mark of the plaintiff was not cited as a conflicting mark as per the examination report handed over by the defendants, counsel and also the same is contrary to rule Rule-37 of the Trade Mark Rules, 2002 which provides as a duty of the registrar to examine the application by causing search of the previously pending and registered marks and perhaps the registrar was also not informed about this court being in seisen of the dispute and interim orders passed by this court. Thus, considerable doubts

can be expressed upon the validity of such registration.

31. By ignoring the mandatory provisions of the Act and granting registration to the defendants, it is clear that it is done with the malafide intention, in order to defeat the orders passed by the Court. The present case is not the only one, but in other cases also the similar situation has happened. Therefore, this Court is of the considered view that if the party will act in such a manner in the Trade Marks Office and get the registration without informing the interim orders passed by the Courts, the Court would be entitled to examine the conduct of the party.

32. All these facts needs more consideration in detail in trial and cannot be adjudicated on the basis of mere oral plea of the defendants that there is a registration in favour of the defendants and then what follows is a return of plaint simplicitor by mere operation of law.

33. The mute question is rather as to whether this court can be divested with the jurisdiction which it initially had by way of some subsequent events which have not even been pleaded and no objection on jurisdiction is taken at this stage in the written statement. In my opinion, the answer at this stage of the proceedings is negative and the jurisdiction if examined at this stage becomes a mixed question of fact and law as there are factual pleas which are required to be taken, the traversals of the same shall be taken soon after. Then, it becomes a triable question whether the registration of the defendants is actually a valid one or is it just an entry wrongly remaining on the register depending upon the inference which the court is going to draw by way of impact of subsequent events.

34. Resultantly, the objection qua the jurisdiction at this stage cannot be sustained and the same is dismissed.

C.S. (OS) No.1042/2010

List the matter before Joint Registrar on 02.03.2012 for completion of plaintiff's evidence.

ILR (2012) IV DELHI 134
W.P. (C)

OCEAN PLASTICS & FIBRES (P) LIMITED ....PETITIONER

VERSUS

DELHI DEVELOPMENT AUTHORITY & ANR. ....RESPONDENTS

(RAJIV SAHAI ENDLAW, J.)

W.P.(C). NO. : 11374/2006 DATE OF DECISION: 08.02.2012

Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (PP Act)—Section 4—Whether a writ impugning the order of determination of perpetual lease is not maintainable for the reason of it being open to the affected person to impugn such determination in proceedings under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (PP Act)—Brief Facts—Petitioner was granted perpetual lease of plot of land—Respondent DDA vide notice dated 10th May, 2000 to the petitioner averred, that the building over the said plot of land was being used for commercial purpose as Anukumpa banquet Hall—Construction was not as per the sanctioned plan—Mezzanine floor had been converted into a working hall-all this was in breach of the terms and conditions of the perpetual lease deed—Petitioner asked to stop and remove the breaches—Petitioner vide its reply dated 25th May, 2000 denied that any banquet hall was functioning on the property and stated that the electricity supply to the property had been disconnected because of the Central Pollution Control Board and the basement was lying closed on account of water seepage; the violations in the setbacks were stated to have been removed—DDA vide the said notice dated 21st November, 2005 determined the perpetual lease

deed—Called upon the petitioner to remove itself from the plot of land and deliver possession thereof—Petitioner sent a representation denying any breach of the perpetual lease deed conditions—DDA was requested to withdraw the notice of determination of lease—The Estate Officer of the respondent DDA issued the notice dated 5th May, 2006 under Section 4 of the PP Act and whereafter this writ petition was filed—DDA in its counter affidavit reiterated its case of banquet hall being run on the property in contravention of the perpetual lease conditions—Held—The Division Bench of this Court in *Ambitious Gold Nib* undoubtedly held that the correctness or otherwise of the allegations of the DDA on the basis of which the determination of the lease has been effected is to be decided by the Authority under the PP Act—It was further observed that whether the lessee had committed breach of terms of the lease deed or not and whether the determination of the lease was legal or not are matters to be adjudicated by the concerned authority under the PP Act and cannot be gone into in exercise of writ jurisdiction—Disputed questions of fact viz whether notices were served on the petitioner or not, whether the petitioner has used the premises as a Banquet Hall or not and whether the petitioner committed other breaches or not, cannot be adjudicated in writ jurisdiction—Petitioner has alternative suitable remedy before the Estate Officer—The petition thus, fails and is dismissed.

The Division Bench of this Court in Ambitious Gold Nib undoubtedly held that the correctness or otherwise of the allegations of the DDA on the basis of which the determination of the lease has been effected is to be decided by the authority under the PP Act. It was further observed that whether the lessee had committed breach of the terms of the lease deed or not and whether the determination of the lease was legal or not are matters to be adjudicated by the

concerned authority under the PP Act and cannot be gone into in exercise of writ jurisdiction. However, as far as the reliance by the petitioner on **Escorts Heart Institute** (supra) is concerned, the only question for adjudication therein was whether after determination of lease, proceedings for eviction before the Estate Officer are maintainable or whether a civil suit for eviction is required to be instituted. The Division Bench after adverting to the judgments of the Supreme Court in **Express Newspapers Pvt. Ltd Vs. Union of India** (1986) 1 SCC 133 and **Ashoka Marketing Ltd. Vs Punjab National Bank** (1990) 4 SCC 406 held that in accordance with the judgment of the Constitution Bench in **Ashoka Marketing Ltd** (supra) observations in Express Newspapers Pvt. Ltd that a civil suit is required to be filed were not good law and the proceedings under the PP Act were maintainable. Though Ambitious Gold Nib was cited before the Division Bench but the Division Bench in para 9 of the judgment expressly held that it was not faced with the question of jurisdiction of the Estate Officer to decide whether there was any breach and whether there was valid and justified determination of the lease or not. It thus cannot be said that Escorts Heart Institute has also followed Ambitious Gold Nib on the said aspect. **(Para 9)**

Undoubtedly a two Judges Bench of the Supreme Court subsequently in **Anamallai Club Vs. Govt. of Tamil Nadu** (1997) 3 SCC 169 and which was not noticed in Ambitious Gold Nib, without referring to Ashoka Marketing Ltd. did observe that the Estate Officer under the PP Act cannot go into the correctness of the termination of the lease or adjudicate the same. However, in the light of the judgment of the Constitution Bench in Ashoka Marketing Ltd. and the judgment of the Division Bench of this Court in Ambitious Gold Nib, this Bench has to ignore the observation in **Annamallai** (supra). I may also mention that I have in judgment dated 28th January, 2011 in CS(OS) No.1507A/2000 titled Airports Authority Of India Vs. M/S Grover International Ltd also held that the invalidity of termination

has to be set up as a defence in proceedings under the PP Act and cannot be subject matter of adjudication before any other fora. Reference was made to the Division Bench of this Court in **Fabiroo Gift House v. ITDC** 2003 (66) DRJ 243, also holding that such defences are adjudicable before the Estate Officer. **(Para 11)**

Even otherwise, I am of the opinion that the disputed questions of fact viz whether notices were served on the petitioner or not, whether the petitioner has used the premises as a Banquet Hall or not and whether the petitioner committed other breaches or not, cannot be adjudicated in writ jurisdiction. Moreover, the petitioner as aforesaid has alternative suitable remedy before the Estate Officer and which is already seized of the matter. **(Para 12)**

Important Issue Involved: Correctness or otherwise of the allegations on the basis of which the determination of the lease effected is to be decided by the authority under the PP Act—Whether the lessee had committed breach of the terms of the lease deed or not and whether the determination of the lease was legal or not are matters to be adjudicated by the concerned authority under the PP Act and cannot be gone into in exercise of writ jurisdiction.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Ms. Sonali Malhotra & Mr. Amit Sanduja, Advocates.

FOR THE RESPONDENT : Ms. Sangeeta Chandra, Advocate for DDA.

CASES REFERRED TO:

1. *DDA* vs. *Professor Ram Prakash* 2008(103) DRJ 57 (DB).
2. *Escorts Heart Institute & Research Centre Ltd.* vs. *DDA* 143(2007) DLT 472 (DB).

3. *DDA* vs. *Ambitious Gold Nib Manufacturing Co. (P) Ltd.* LPA 976/2004.
4. *Fabiroo Gift House* vs. *ITDC* 2003 (66) DRJ 243.
5. *Anamallai Club* vs. *Govt. of Tamil Nadu* (1997) 3 SCC 169.
6. *Ashoka Marketing Ltd.* vs. *Punjab National Bank* (1990) 4 SCC 406.
7. *Express Newspapers Pvt. Ltd.* vs. *Union of India* (1986) 1 SCC 133.

RESULT: Appeal dismissed.

RAJIV SAHAI ENDLAW, J.

1. The short point in controversy in this petition is as to whether a writ impugning the order of determination of perpetual lease is not maintainable for the reason of it being open to the affected person to impugn such determination in proceedings under the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (PP Act).

2. This writ petition has been filed impugning the notice dated 21st November, 2005 of the respondent no.1 DDA determining the perpetual lease with respect to the plot No. A-22 Mangolpuri Industrial Area, Phase II, New Delhi as well as the notice dated 5th May, 2006 subsequently issued by the respondent no.2 Estate Officer, DDA under Section 4 of the PP Act. Notice of the writ petition was issued and vide order dated 19th July, 2006 the Estate Officer was restrained from passing any final order pursuant to the notice (supra) under Section 4 of the PP Act issued to the petitioner. Pleadings have been completed and counsels have been heard.

3. The petitioner was granted perpetual lease of the aforesaid plot of land vide indenture dated 20th April, 1992. The respondent DDA vide notice dated 10th May, 2000 to the petitioner averred, that the building over the said plot of land was being used for commercial purpose as Anukumpa Banquet Hall; that the construction was not as per the sanctioned plan as the basement had been extended into the front, rear and side setbacks; that the mezzanine floor had been converted into a working hall; all this was averred to be in breach of the terms and conditions of the perpetual lease deed; the petitioner was asked to stop

and remove the breaches and failing which the petitioner was warned that action for cancellation of the lease will be initiated. The petitioner vide its reply dated 25th May, 2000 denied that any banquet hall was functioning on the property and stated that the electricity supply to the property had been disconnected because of the Central Pollution Control Board and the basement was lying closed on account of water seepage; the violations in the setbacks were stated to have been removed.

4. No further action was taken by the DDA till 21st November, 2005 vide notice (supra) of which date it was averred, that show cause notices dated 7th May, 1996, 4th March, 1998, 23rd June, 1999, 10th May, 2000, 31st March, 2001, 4th December, 2002 and 22nd September, 2005 had been issued regarding running of banquet hall on the property and which breach had not been stopped by the petitioner; that the respondent DDA vide the said notice dated 21st November, 2005 determined the perpetual lease deed and called upon the petitioner to remove itself from the plot of land and deliver possession thereof. The petitioner sent a representation dated 5th December, 2005 denying receipt of notices other than notice dated 10th May, 2000 (supra) and even otherwise denied any breach of the perpetual lease deed conditions. The respondent DDA was thus requested to withdraw the notice of determination of lease. The Estate Officer of the respondent DDA however issued the notice dated 5th May, 2006 (supra) under Section 4 of the PP Act and whereafter this writ petition was filed.

5. The counsel for the petitioner during the hearing has urged that the order of determination of lease is after five years of the notice dated 10th May, 2000; that inspite of denial by the petitioner of use of the premises as a banquet hall, no further reason/finding to this effect has been given in the order of determination of lease. She has also argued that under Clause IV (a) of the perpetual lease deed, forfeiture of lease and re-entry could not be effected without specifying the particular breach complained of and without requiring the lessee i.e. the petitioner to remedy the same. It is contended that determination of lease is violative of the said provision also.

6. The respondent DDA in its counter affidavit has reiterated its case of banquet hall being run on the property in contravention of the perpetual lease conditions. Reliance is placed on judgment dated 21st February, 2006 of the Division Bench of this Court in LPA 976/2004

titled **DDA Vs. Ambitious Gold Nib Manufacturing Co. (P) Ltd.** to contend that the pleas as raised by the petitioner in this petition are to be adjudicated by the Estate Officer and the writ petition is not maintainable. Needless to say that the petitioner in its rejoinder to the counter affidavit has reiterated its case.

7. The counsel for the respondent DDA has argued that the clause IV(a) was complied with in the notice dated 10th May, 2000 receipt whereof is admitted by the petitioner also; besides **Ambitious Gold Nib** (supra), attention is also invited to **Escorts Heart Institute & Research Centre Ltd. Vs. DDA** 143(2007) DLT 472 (DB) to contend that the principle laid down in Ambitious Gold Nib was followed therein also.

8. The counsel for the petitioner in rejoinder has referred to **DDA Vs. Professor Ram Prakash** 2008(103) DRJ 57 (DB) in support of her contention that no action after delay of five years could have been taken.

9. The Division Bench of this Court in Ambitious Gold Nib undoubtedly held that the correctness or otherwise of the allegations of the DDA on the basis of which the determination of the lease has been effected is to be decided by the authority under the PP Act. It was further observed that whether the lessee had committed breach of the terms of the lease deed or not and whether the determination of the lease was legal or not are matters to be adjudicated by the concerned authority under the PP Act and cannot be gone into in exercise of writ jurisdiction. However, as far as the reliance by the petitioner on **Escorts Heart Institute** (supra) is concerned, the only question for adjudication therein was whether after determination of lease, proceedings for eviction before the Estate Officer are maintainable or whether a civil suit for eviction is required to be instituted. The Division Bench after adverting to the judgments of the Supreme Court in **Express Newspapers Pvt. Ltd Vs. Union of India** (1986) 1 SCC 133 and **Ashoka Marketing Ltd. Vs Punjab National Bank** (1990) 4 SCC 406 held that in accordance with the judgment of the Constitution Bench in **Ashoka Marketing Ltd** (supra) observations in Express Newspapers Pvt. Ltd that a civil suit is required to be filed were not good law and the proceedings under the PP Act were maintainable. Though Ambitious Gold Nib was cited before the Division Bench but the Division Bench in para 9 of the judgment expressly held that it was not faced with the question of jurisdiction of the Estate Officer to decide whether there was any breach and whether there was

valid and justified determination of the lease or not. It thus cannot be said that Escorts Heart Institute has also followed Ambitious Gold Nib on the said aspect.

10. Though the judgment of the Division Bench of this Court in Ambitious Gold Nib is sufficient for this Bench to dismiss this writ petition but I may notice that it was submitted before the Apex Court in Ashoka Marketing Ltd. also that the question, whether a lease has been determined or not involves complicated questions of law and the Estate Officer who is not required to be an officer well versed in law cannot be expected to decide such questions and it must be thus held that the provisions of the PP Act have no application to a case when the person sought to be evicted had obtained possession of the premises as a lessee. However the said submission was not accepted by the Apex Court and it was held that merely because the Estate Officer was not required to be a person well versed in law cannot be a ground for excluding from the ambit of the PP Act the premises in unauthorized occupation of persons who had obtained possession as lessee. The Apex Court held, that a combined reading of Section 4 (providing for issuance of a notice to show cause to the person in unauthorized occupation), Section 5(providing for production of evidence in support of the cause shown by the noticee and giving of a personal hearing by the Estate Officer) and Section 8 (vesting in the Estate Officer for the purposes of holding an inquiry the same powers as are vested in a Civil Court) and Section 9 (conferring a right of appeal against an order of Estate Officer and which appeal has to be heard by the District Judge) showed that the final order that is passed in the proceedings under the PP Act is by a Judicial Officer of the rank of a District Judge; the same also suggested that the questions as to justification for determination of lease fall within the jurisdiction of the Estate Officer.

11. Undoubtedly a two Judges Bench of the Supreme Court subsequently in **Anamallai Club Vs. Govt. of Tamil Nadu** (1997) 3 SCC 169 and which was not noticed in Ambitious Gold Nib, without referring to Ashoka Marketing Ltd. did observe that the Estate Officer under the PP Act cannot go into the correctness of the termination of the lease or adjudicate the same. However, in the light of the judgment of the Constitution Bench in Ashoka Marketing Ltd.and the judgment of the Division Bench of this Court in Ambitious Gold Nib, this Bench has to ignore the observation in **Annamallai** (supra). I may also mention that

I have in judgment dated 28th January, 2011 in CS(OS) No.1507A/2000 titled Airports Authority Of India Vs. M/S Grover International Ltd also held that the invalidity of termination has to be set up as a defence in proceedings under the PP Act and cannot be subject matter of adjudication before any other fora. Reference was made to the Division Bench of this Court in **Fabiroo Gift House v. ITDC** 2003 (66) DRJ 243, also holding that such defences are adjudicable before the Estate Officer.

12. Even otherwise, I am of the opinion that the disputed questions of fact viz whether notices were served on the petitioner or not, whether the petitioner has used the premises as a Banquet Hall or not and whether the petitioner committed other breaches or not, cannot be adjudicated in writ jurisdiction. Moreover, the petitioner as aforesaid has alternative suitable remedy before the Estate Officer and which is already seized of the matter.

13. The petition thus fails and is dismissed. The final order before the Estate Officer having remained stayed for long, the respondent no.2 Estate Officer is now directed to pass the final order latest within three months of today. The petitioner having pursued this petition notwithstanding the reliance placed by the respondent No.1 DDA on the dicta of the Division Bench in Ambitious Gold Nib, the petitioner is also burdened with costs of Rs. 20,000/- payable to the respondent No.1 DDA within four weeks of today.

ILR (2012) IV DELHI 143
LPA

ASSEM ABBAS ....APPELLANT

VERSUS

RAJGHAT SAMADHI COMMITTEE & ANR. ....RESPONDENTS

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

LPA NO. : 97/2012 DATE OF DECISION: 09.02.2012

Constitution of India, 1950—Article 227—Writ Petition—Letters Patent Appeal—Industrial Dispute Act, 1947—Section 2 (j)—Industry—Rajghat Samadhi Act, 1951—Powers & Duties—The appellants engaged as security guard by Rajghat Samadhi Committee (RSC), appointed in September, 1997 and November 1998 respectively—Services terminated on 8.9.2000 and 12.02.2001 respectively—Appellants raised industrial dispute—Referred to Central Government Industrial Tribunal (CGIT) to adjudicate whether termination illegal and/or unjustified—Respondent took preliminary objection—Reference not maintainable as RSC not industry—CGIT returned the findings that respondent was industry—Vide common award directed reinstatement of the appellants with 25% back wages—RSC filed writ petition allowed by Single Judge—Petitioner preferred Letters Patent Appeal (LPA)—Held—That RSC was constituted under Rajghat Samadhi Act, 1951—Powers and duties of the committee defined—The committee empowered to make byelaws Inter-alia for appointment of such person as may be necessary—To determine the terms and conditions of services of such employee—The function of Committee inter-alia included organizing of special function on 2nd October, and 30th January to observe birth and death anniversary

of Mahatma Gandhi—Observed—The Samadhi attracts large number of tourists and other visitors including school children—These visitors are attracted to the Samadhi out of reverence for Mahatma Gandhi to pay respect to him and to imbibe the ideals from Gandhian atmosphere created and maintained at Samadhi—The Rajghat Samadhi thus, akin to place of worship—The test for ambit of definition of industry is production and/or of distribution of goods and services calculated to satisfy human wants and wishes—Excludes the activity, spiritual or religious—Appeal dismissed.

What follows from the above is that the only task performed by the respondent RSC is maintenance, preservation and administration of the Rajghat Samadhi. Axiomatically, anyone employed by the respondent RSC would also be employed only for performance of the said duties / task. A perusal of the website *'www.urbanindia.nic.in'* of the Ministry of Urban Development, Government of India which lists Rajghat Samadhi Committee as one of the Statutory Bodies shows that the RSC also organizes special functions on 2nd October and 30th January to observe the Birth and Death Anniversaries of Mahatma Gandhi and on these two occasions all-religion prayer, photo exhibition, sale of Gandhian literature tc. is held. Besides these annual functions, all-religion p ayer and spinning programmes are held regularly throughout the year. The Samadhi attracts a large number of tourists and other visitors including school children. The visitors are attracted to the Samadhi out of reverence for Mahatma Gandhi, to pay respect to him and to imbibe Gandhian ideals from the Gandhian atmosphere created and maintained at the said Samadhi. We find the Rajghat Samadhi is thus akin to a place of worship. We have, thus wondered as to whether places of worship can be treated as an industry.

(Para 4)

RSC is akin to religious or spiritual institutions discussed in judgments supra with which we concur and follow and which have never been considered an industry within the meaning

of I.D. Act. By no means can activities of RSC be treated as activity which would be "res commercium". In fact Beg, C.J. in **Bangalore Water-Supply & Sewerage Board** (supra) had observed that the question of workmen of such religious and spiritual institutions raising disputes should not arise. It is rather unfortunate that the appellants have raised these disputes against the Committee managing and administering the Samadhi of the apostle of peace and harmony.

(Para 6)

Important Issue Involved: (i) An activity to be qualified as industry requires to satisfy triple test whether systematic activity is carried out, which is organized by co-operation between employer and employee and for the production and/or distribution of goods and services calculated to satisfy human wants and wishes The activity which would be spiritual or religious would be excluded.

[Gu Si]

APPEARANCES:

FOR THE APPELLANT : Mr. S.K. Jaswal & Mr. L.K. Dixit, Advocates.

FOR THE RESPONDENTS : Mr. Mukti Bodh, Advocate for R-1. Mr. H.C. Bhatia, Advocate for R-2.

CASES REFERRED TO:

RESULT: Appeal dismissed.

A.K. SIKRI, ACTING CHIEF JUSTICE (ORAL)

Caveat No.132/2012 in LPA No.97/2012 & Caveat No.133/2012 in LPA No.98/2012

The Counsel for the respondent No.1 has appeared. The caveats stand discharged.

LPA 97/2012 & LPA 98/2012

1. The question which falls for consideration in this appeal is as to whether the respondent No.1 Rajghat Samadhi Committee (RSC) is an

industry within the meaning of Section 2(j) of the Industrial Disputes Act, 1947. The appellants were engaged as Security Guard by RSC. They were appointed in September, 1997 and November, 1998 and their services were terminated on 08.09.2000 & 12.02.2001 respectively. The appellants raised industrial disputes which were referred to the Central Government Industrial Tribunal (CGIT) for adjudication on the question whether the termination from service was illegal and / or unjustified. The respondent No.1 RSC took preliminary objection that the reference were not maintainable as the RSC was not an industry within the meaning of Section 2(j) of the ID Act. Specific issue was framed on this aspect. The CGIT returned a finding that the respondent No.1 RSC was an industry; on merits the termination of the appellants was held to be illegal and unjustified in law being in violation of Section 25F of the I.D. Act. As a consequence, the CGIT vide common award dated 29.03.2007 directed reinstatement of the appellants with 25% back wages. Against this award, the respondent No.1 RSC filed the writ petition being W.P.(C) No.7059/2007 and W.P.(C) No.7065/2007 which have been allowed by the learned Single Judge vide common order dated 18.08.2011. A perusal of order dated 18.08.2011 would show that on an earlier occasion, the same very Bench had taken a view that RSC was not an industry as envisaged under Section 2(j) of the I.D. Act and in view thereof the impugned award dated 29.03.2007 rendered by the CGIT has been set aside.

2. The earlier judgment which the learned Single Judge has referred, is the judgment dated 26.03.2010 rendered in W.P.(C) No.1059/2008 titled as **Kanhaiya Lal Vs. UOI.** Copy of the said judgment is annexed with the appeal paper book and we have gone through the same.

3. The respondent No.1 RSC is constituted under the Rajghat Samadhi Act, 1951. The Statement of Objects and Reasons of the said Act would reveal that the object of the Act was to ensure the proper maintenance, preservation and administration of the Rajghat Samadhi being the Shrine built in reverence for the Father of the Nation, Mahatma Gandhi. The Act constitutes a Committee named as the Rajghat Samadhi Committee, composition whereof is prescribed therein and vests the administration and control of the Samadhi in the said Committee. The powers and duties of the Committee are stipulated in Section 5 which reads as under:

"5. Powers and duties of the Committee. – Subject to such

rules as may be made under this Act, the powers and duties of the Committee shall be –

(a) to administer the affairs of the Samadhi and to keep the Samadhi in proper order and in a state of good repair;

(b) to organize and regulate periodical functions at the Samadhi;

(c) to do such other things as may be incidental or conclusive to the efficient administration of the affairs of the Samadhi."

The Committee has also been empowered to make bye-laws *inter alia* for appointment of such persons "as may be necessary to assist the Committee in the efficient performance of its duties and the terms and conditions of service of such employees"

4. What follows from the above is that the only task performed by the respondent RSC is maintenance, preservation and administration of the Rajghat Samadhi. Axiomatically, anyone employed by the respondent RSC would also be employed only for performance of the said duties / task. A perusal of the website *'www.urbanindia.nic.in'* of the Ministry of Urban Development, Government of India which lists Rajghat Samadhi Committee as one of the Statutory Bodies shows that the RSC also organizes special functions on 2nd October and 30th January to observe the Birth and Death Anniversaries of Mahatma Gandhi and on these two occasions all-religion prayer, photo exhibition, sale of Gandhian literature etc. is held. Besides these annual functions, all-religion prayer and spinning programmes are held regularly throughout the year. The Samadhi attracts a large number of tourists and other visitors including school children. The visitors are attracted to the Samadhi out of reverence for Mahatma Gandhi, to pay respect to him and to imbibe Gandhian ideals from the Gandhian atmosphere created and maintained at the said Samadhi. We find the Rajghat Samadhi is thus akin to a place of worship. We have, thus wondered as to whether places of worship can be treated as an industry.

5. Our research shows:

(i) That a Division Bench of the Andhra Pradesh High Court in **Tirumala Tirupati Devasthanam Vs. Commissioner of Labour** MANU/AP/0197/1977 faced with the question whether the Tirumala Tirupati Devasthanam which had employed certain workmen could be held to be an industry

and finding that the Tirumala Tirupati Devasthanam consisted of a group of religious institutions in Tirumalai and Tirupathi together regarded as one religious institution for the purposes of Charitable and Religious Endowments Act and that its main function was to arrange for the worship in its temples and to enable the pilgrims from all parts of India to visit temples and offer their prayers, held the same to be essentially a religious institution. It was further held that even though having regard to the enormous flow of pilgrims throughout the year, the Devasthanam has to maintain several departments viz. Transport Department for the convenience of the pilgrims, there could be no doubt that the essential character of the institution was that of a religious institution. It was held that in the circumstances, the Devasthanam could not be regarded as an industry within the meaning of the Trade Unions Act. Reliance was placed on **Workmen Vs. Madras Pinjrapole** 1962-II MANU/TN/0031/1963 laying down that where the activity in its essence is religious or spiritual, for instance a temple or church, it could not be considered as an industry.

(ii) The High Court of Punjab & Haryana also in **Shiromani Gurdwara Parbandhak Committee of Management Gurdwara Dakh Hwaran Sahib Vs. Presiding Officer Labour Court** MANU/PH/0700/2003 held the Gurdwara Parbandhak Committee to be not a commercial organization and not in the business of distribution of goods and services which satisfy human wants and the working of the Gurdwara Parbandhak Committee to be spiritual and religious with the objective to supervise and control the notified Sikh Gurdwaras under the Sikh Gurdwaras Act and not to be an industry. It was further held that distribution of Karah Parshad and operation of a free kitchen i.e. Langar would not bring the Gurdwara Parbandhak Committee under the purview of Industrial Disputes Act, 1947. It was observed that the functions performed by the Committee were purely religious.

(iii) A Division Bench of the Orissa High Court in **Harihar**

Bahinipaty Vs. State of Orissa MANU/OR/0014/1966 was also faced with the question whether the employees of the Shri Jagannath Temple Managing Committee form an industry within the meaning of the Industrial Disputes Act. It was held that Jagannath Temple is a spiritual institution with Lord Jagannath as the presiding Deity of the temple; the pilgrims visit the place for their spiritual benefit; the offerings that the pilgrims make to the deity are primarily by way of oblation to the deity although ultimately the offerings are sold to the public; that the predominant function of the temple was for spiritual benefit. Considered from all these aspects, it was held that Jagannath temple could not be an industry. It may be mentioned that the management of the Jagannath temple also under the Shri Jagannath Temple Act vested in the body constituted under the said Act. The Court held that institutions where spiritual rather than material needs were met / fulfilled could not be treated as an industry. It was further observed that a distinction has to be carved out of the need for maintenance of order, discipline, hygienic conditions and standard of cleanliness in such institution and if in aid thereof some systems were followed that alone would not make such an institution as an industry. Distinction was carved out between security personnel deployed for maintenance of law and order at public places and at such institutions. It was yet further held that when the main objective is spiritual, retaining the services of security personnel for keeping order and discipline and looking after the convenience of the pilgrims cannot convert such an institution into an industry.

(iv) The High Court of Kerala in **Cherinjumpatty Thampuratty Vs. State of Kerala** MANU/KE/0235/2004 held that a temple managed by the trustee would not fall within the definition of Section 2(j) of the I.D. Act and the dispute between the temple employee and the temple management is not an industrial dispute within the meaning of Section 2(k) of the Act. It was further observed that activities carried on in a temple are purely of a religious

nature and the temple has to function in an atmosphere different from that of an industrial and commercial undertaking.

(v) Mention may also be made of **The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt** AIR 1954 SC 282 though not concerned with I.D. Act but observing that tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day and that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion only.

(vi) That brings us to **Bangalore Water-Supply & Sewerage Board Vs. R. Rajappa** AIR 1978 SC 548; even while laying down the "Triple Test", of whether systematic activity is carried out, which is organized by co-operation between employer and employee and for the production and/or distribution of goods and services calculated to satisfy human wants and wishes, it was clarified in the majority judgment authored by Krishna Iyer, J. that the test of production and / or distribution of goods and services calculated to satisfy human wants and wishes would exclude the activities which would be spiritual or religious. Chief Justice M.H. Beg who concurred with the majority judgment by penning down separate opinion also in no uncertain terms excluded such an activity by observing that the services which are rendered purely for the satisfaction of spiritual or psychological urges of persons would be excluded.

6. RSC is akin to religious or spiritual institutions discussed in judgments supra with which we concur and follow and which have

never been considered an industry within the meaning of I.D. Act. By no means can activities of RSC be treated as activity which would be "res commercium". In fact Beg, C.J. in **Bangalore Water-Supply & Sewerage Board** (supra) had observed that the question of workmen of such religious and spiritual institutions raising disputes should not arise. It is rather unfortunate that the appellants have raised these disputes against the Committee managing and administering the Samadhi of the apostle of peace and harmony.

7. The conclusion therefore is that the respondent is not an industry and the reference of the dispute raised by the appellants to the Industrial Adjudicator was not maintainable and bad in law. Axiomatically, the Award in favour of the appellants on the said reference cannot stand. We accordingly though for the reasons aforesaid concur with the judgment of the learned Single Judge and dismiss these appeals. No order as to costs.

ILR (2012) IV DELHI 151
CM (M)

DALMIA CEMENT (BHARAT) LTD. ....PETITIONER

VERSUS

HANSALYA PROPERTIES LTD. & ANR. ....RESPONDENTS

(INDERMEET KAUR, J.)

CM(M) NO. : 557/2008 DATE OF DECISION: 14.02.2012

Court Fees Act 1870—Whether a suit requiring the defendant to execute a formal deed is one of specific performance and whether court fees is payable on the entire sale consideration or only on the valuation of the suit by the plaintiff—Order dated 09.04.2008 of the Trial Court directing the plaintiff to pay the ad-valorem court fee on the amount of sale consideration of Rs. 24,32,950/-, wherein the petitioner had filed a suit for perpetual, mandatory injunction and damages impugned—Held:- Wholesome reading of the plaint clearly shows that what the plaintiff had sought was not a relief of specific performance but it was a direction to the defendant to execute the formality of the sale deed which he had not cared to do in spite of his obligation under Section 55(1)(d) of Transfer of Property Act. It is not in dispute that the defendant has received the entire purchase money; and had also handed over possession of the flats to the plaintiff; Admittedly, the plaintiffs were in possession of the suit property at the time when the suit was filed. In these circumstances, the court fee appended to the plaint which was as per the valuation made by the plaintiff suffers from no infirmity.

This wholesome reading of the plaint clearly shows that what the plaintiff had sought was not a relief of specific performance but it was a direction to the defendant to execute the formality of the sale deed which he had not cared to do in spite of his obligation under Section 55(1)(d) of the Transfer of Property Act. It is not in dispute that the defendant had received the entire purchase money; and had also handed over possession of the flats to the plaintiff; Admittedly, the plaintiffs were in possession of the suit property at the time when the suit was filed. In these circumstances, the court fee appended to the plaint which was as per the valuation made by the plaintiff suffers from no infirmity. **(Para 9)**

Important Issue Involved: The value for the purposes of court fee and jurisdiction is based on the substance which is contained in the plaint; the mere astuteness in drafting the plaint will not be allowed to stand in the way of the court looking at the substance of the relief which is asked for.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. D.K. Malhotra, Advocate.

FOR THE RESPONDENT : Mr. H.L. Tiku, Sr. Advocate with Ms. Yashmeet Advocates.

CASE REFERRED TO:

1. *Kishore* vs. *Des Raj Seth* reported in DLT 1986 (iv) 571.

RESULT: Petition allowed.

INDERMEET KAUR, J. (Oral)

1. The order impugned before this court is the order dated 09.04.2008 vide which on a preliminary issue taken up by the Trial Court, the plaintiff had been directed to pay up the ad-valorem court fee on the amount of sale consideration of Rs.24,32,950/-. Plaintiff/petitioner is aggrieved by this finding.

2. Record shows that the present petitioner had filed a suit for perpetual, mandatory injunction and damages. Plaintiff is a company registered under the Companies Act; defendant No. 1 is a partnership firm comprising of defendant Nos. 2 to 4. In 1970, the father of the defendant No. 2 holding himself out as the owner of property bearing No. 15, Barakhamba Road, New Delhi and in his capacity as a partner of Hansalaya Properties Ltd. had made a multi storied building on the aforenoted premises comprising of floors/flats; undertaking was that each flat would consist of individual flats and purchase would be on ownership basis carrying all rights which are necessary for a complete and proper utilization and enjoyment of the said floors/flats. Negotiations between the plaintiff and the defendants ensued; letter dated 30.09.1970 as also another communication dated 01.10.1970 was exchanged between the parties. Pursuant thereto, the plaintiff had acquired rights of 11th and 12th floor of the said building; these rights had been purchased by the plaintiff. Other communications as noted in the plaint were also exchanged between the parties. Possession of the aforenoted flats was given to the plaintiff on 01.04.1977 and thereafter the parking area sold to the plaintiff was also handed over to the plaintiff-Company on 01.04.1978. Contention in the plaint is that the possession of the two floors was handed over to the plaintiff on 01.04.1977 and not on 31.03.1973 which was the stipulated date. Further contention in the plaint is that in spite of the entire sale

consideration having been paid by the plaintiff to the defendant, in fact an excess amount had been paid, sale deed has not been executed by the defendant in favour of the plaintiff. Cause of action has been detailed in para 22 and the valuation of the suit for the purposes of court fee and jurisdiction is detailed in para 23 which reads as follows:-

"23. That the value of the suit for the purposes of court fees is detailed below:-

(i) For damages as claimed in prayer d).	Rs. 394.00
(ii) For injunction as prayed in prayer (a), as it is not subject to any valuation under Article 17 Schedule II of the Court Fees Act, valued at Rs. 200/-	Rs. 20.00
iii) For injunction as prayed in prayer b) value at Rs. 130/-.	Rs. 13.00
iv) For injunction as prayed in prayer c) valued at Rs. 130/-.	Rs.13.00
	Rs. 440.00

That the value of the suit for the purposes of jurisdiction exceeds Rs.1,00,000/- and hence the Hon'ble Court has the pecuniary jurisdiction to try and entertain this suit."

3. The prayers made in the plaint are as follows:-

"In the premises it is, therefore, respectfully prayed that this Hon'ble court be pleased:

(a) to pass a decree of mandatory injunction or such other appropriate orders/directions in favour of the plaintiff company against the defendants directed them to execute a formal deed of conveyance and register the same in respect of the complete 11th and 12 the floors of the building in question and the parking area in the basement of the building which area is shaded in green in Annexure 'G', and thereby perfect the title of the plaintiff company which deed of conveyance will incorporate and include within itself the averments contained in para 17 in the plaint;

(b) To pass/grant a decree in favour of the plaintiff company against the defendants in the nature of perpetual/prohibitory injunction or any other injunction, in the nature, facts and circumstances of the present case, directing the defendant of the

presence case, directing the defendants not to create or attempt to create any disturbance or threat to the peaceful enjoyment of the aforesaid complete 11th and 12th floors and parking area in the basement which are shaded in green in Annexure 'C' and the pass/make any other orders/directions/reliefs which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case;

(c) to grant a decree of mandatory injunction in favour of the plaintiff company against the defendants directing them to demolish the obstructions, barricades on the portion of the Eastern side of the building (the side facing the Tolstoy Marg);

(d) To pass a decree for a sum of Rs. 3,000/- as nominal damages as prayed for in para 18 of the plaint;

(e) to award the cost of the present proceedings and proceedings incidental thereto in favour of the plaintiff company against the defendants; and

(f) and to pass such other orders and/or directions which in the fact and circumstances of the case may deem fit and proper to this Hon'ble Court."

4. Prayer 'a' is relevant for the controversy between the parties.

5. In the written statement an objection had been raised by the defendant about the maintainability of the suit in the present form; contention of the defendant was that the ad-valorem court fee is liable to be paid by the plaintiff and not a fixed court fee. A preliminary issued had accordingly been framed on 29.01.2008 which reads as under:-

"2. Whether the suit has been property valued for the purpose of court fee and jurisdiction? OPP

6. The impugned order has returned a finding that ad-valorem court fee is liable to paid by the plaintiff as the averments made in the plaint in fact discloses that the plaintiff is seeking a relief of specific performance which has been couched a relief for mandatory injunction yet this is not so.

7. Petitioner is aggrieved by this finding. This grievance of the petitioner appears to be well founded. There is no dispute to the proposition

that while dealing with this question i.e. whether the suit has been properly valued for the purposes of court fee and jurisdiction is a question which has to be considered in the light of the allegations which are made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on its merits. It is only the material allegations in the plaint which have to be construed and taken as a whole. There is no dispute to this proposition.

8. A wholesome reading of the plaint negatives the findings returned by the Trial Court. The averments as disclosed in the plaint clearly show that pursuant to negotiations and discussions and exchange of letters between the plaintiff and the defendant which had taken place including the communications dated 30.09.1970 and 01.10.1970 and thereafter, the plaintiff having paid the complete purchased money was handed over possession of these premises i.e. the 11th and 12th floor in April 1977; his grievance was that the stipulated dated was 31.03.1973 but the premises had been handed over to him only on 01.04.1977 in spite of the fact that complete payment had been made by him and only the formality of the execution of the sale deed had remained; the sale deed had till the filing of the suit not been executed by the defendant. Accordingly relief of mandatory injunction directing the defendant to execute the sale deed as also damages for not handing over the disputed premises in time to the plaintiff has been made. There is no quarrel on the relief for injunction prayed for the plaintiff.

9. This wholesome reading of the plaint clearly shows that what the plaintiff had sought was not a relief of specific performance but it was a direction to the defendant to execute the formality of the sale deed which he had not cared to do in spite of his obligation under Section 55(1)(d) of the Transfer of Property Act. It is not in dispute that the defendant had received the entire purchase money; and had also handed over possession of the flats to the plaintiff; Admittedly, the plaintiffs were in possession of the suit property at the time when the suit was filed. In these circumstances, the court fee appended to the plaint which was as per the valuation made by the plaintiff suffers from no infirmity.

10. There is also no quarrel to the proposition that the value for the purposes of court fee and jurisdiction is based on the substance which is contained in the plaint; the mere astuteness in drafting the plaint will not be allowed to stand in the way of the court looking at the substance

of the relief which is asked for. The substance of the relief which is sought for in the present case is clearly to the effect that the formality of the sale deed be executed by the defendant in favour of the plaintiff in view of the admitted position that complete purchase money has been made by the plaintiff to the defendant and he had also been handed over possession of the suit premises; in spite of this as also in view of the provisions of Section 55(d) of the Transfer of Property Act the said formality has not been completed.

11. In this factual scenario, the impugned order holding that what the plaintiff was seeking was the relief of specific performance is an illegality; this finding is liable to be reversed; it is accordingly set aside.

12. Reliance placed upon by the petitioner that the on the judgment on the Full Bench of this Court titled as Jugal **Kishore vs. Des Raj Seth** reported in DLT 1986 (iv) 571 is misplaced. This was a case where the plaintiff was not in possession; Court was of the view that the plaintiff is seeking a relief of possession; it was in that scenario that the plaintiff had been directed to pay ad-valorem court fee. This judgment is wholly inapplicable.

13. Petition is allowed and disposed of accordingly.

14. LCR be returned.

ILR (2012) IV DELHI 158
RFA

UNION OF INDIA ....APPELLANT

VERSUS

COX & KINGS (INDIA) LTD. ANR. ....RESPONDENTS

(VALMIKI J. MEHTA, J.)

RFA NOS. : 76/2004 AND 78/2004 **DATE OF DECISION: 21.02.2012**

Code of Civil Procedure, 1908—Section, 96—filed against judgment of the trial Court dated 23.05.2003 dismissing the suit for recovery of 4,46,027.65/- filed by the appellant/plaintiff against respondent No.1/ defendant No.1. Respondent No.2/Oriental Insurance Company Limited/defendant No.2 was a proforma party—Held—The trial Court was fully justified in holding that there was no negligence of defendant No. 1/respondent No. 1 in having lost any of the packages which were given to the defendant No. 1/ respondent no.1. The package which was given to it was of 47 kilograms (kgs.) as per Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986 and it is this consignment of 47 Kgs. as stated in Airlines Consignment Note C/No.: 09635970 which was delivered to the appellant/plaintiff at Calcutta. Surely, if only 47 Kgs. were delivered to defendant No. 1/respondent No.1 there does not arise any question of any loss being caused by it of the difference of 100 Kgs. and 47 Kgs. At best, the liability of defendant No.1/respondent No. 1 would be for taking short delivery, however, even that liability would not be there because to the knowledge of the appellant/plaintiff the main package had been broken open as is clear from the letter dated 6.10.1986 written to Sh. Mago at the Airport

Cargo Terminal and at best the negligence of defendant No.1/ respondent No.1 would be of taking short delivery. However, that negligence in itself cannot fasten the defendant No.1/respondent No. 1 with liability because it is not as if the appellant/plaintiff was not aware within the limitation period that it was the International Airport Authority of India which had given short delivery and therefore, the suit could well have been filed against the International Airport Authority of India within the limitation period for the loss caused during the period the consignment was in the custody of the International Airport Authority of India. The liability, therefore, for having lost the goods, was of the International Airport Authority of India and not of defendant No. 1/respondent No. 1.

In view of the aforesaid facts, the trial Court was fully justified in holding that there was no negligence of defendant No.1/respondent No.1 in having lost any of the packages which were given to the defendant No.1/respondent No.1. The package which was given to it was of 47 kgs. as per Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986 and it is this consignment of 47 kgs. as stated in Airlines Consignment Note C/No: 09635970 which was delivered to the appellant/plaintiff at Calcutta. Surely, if only 47 kgs were delivered to defendant No.1/respondent No.1 there does not arise any question of any loss being caused by it of the difference of 100 kgs. and 47 kgs. At best, the liability of defendant No.1/respondent No.1 would be for taking short delivery, however, even that liability would not be there because to the knowledge of the appellant/plaintiff the main package had been broken open as is clear from the letter dated 6.10.1986 written to Sh. Mago at the Airport Cargo Terminal and at best the negligence of defendant No.1/respondent No.1 would be of taking short delivery, however, that negligence in itself cannot fasten the defendant No. 1/respondent No. 1 with liability because it is not as if the appellant/plaintiff was not aware within the limitation

period that it was the International Airport Authority of India which had given short delivery and therefore the suit could well have been filed against the International Airport Authority of India within the limitation period for the loss caused during the period the consignment was in the custody of the International Airport Authority of India. The liability, therefore, for having lost the goods, was of the International Airport Authority of India and not of defendant No.1/respondent No.1. **(Para 10)**

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. R.V. Sinha and Mr. A.S. Singh, Advocates.

FOR THE RESPONDENTS : Mr. H.L. Raina Advocates for R-1.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 23.5.2003 dismissing the suit for recovery of Rs. 4,46,027.65/- filed by the appellant/plaintiff against respondent No.1/defendant No.1. Respondent No. 2/Oriental Insurance Company Limited/defendant No.2 was a proforma party.

2. The facts of the case are that the appellant/plaintiff had originally appointed one M/s Globe Commercial Agency in February, 1986 as a clearing agent. The respondent No.1 was, thereafter, substituted as a clearing agent in place of M/s Globe Commercial Agency in terms of letter dated 20.8.1986. One of the consignment belonging to the appellant/ plaintiff consisted of 10 TWT mounts, i.e. 6 TWT mounts were type VYJ2609E9 and 4 TWT mounts were type VYG2630F8. These mounts were packed in one skid. The total weight of this consignment was 100 Kgs. as per the Airway Bill No. 098-4541-6696. The consignment was dispatched by the supplier from Canada to New Delhi by the aforesaid Airway Bill dated 30.4.1986. This consignment was got released by defendant No.1/respondent No.1 on 9.12.1986 from International Airport Authority of India, Palam Airport, New Delhi and was dispatched to

Calcutta by Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986. It was the case of the appellant/plaintiff, as per the plaint, that when the package was opened at Calcutta it was found that the same contained only 6 TWT mounts out of 10 TWT mounts and, therefore, the consignment of 100 Kgs. was short as the weight which was found was only of 47 Kgs. of 6 TWT mounts instead of 100 kgs of 10 TWT mounts. It was pleaded that the appellant/plaintiff was thus caused loss due to the negligence of defendant No.1/respondent No.1 and, therefore, the claim of Rs. 1,85,201.90/- arose on account of short supply. The suit plaint also included a claim of Rs. 92,041.80/- towards ground rent in addition to certain incidental charges of Rs. 28,832/- totaling to Rs. 3,06,075.70/-. Interest of Rs. 1,39,951.95/- was also claimed. Originally, the insurance company/respondent No.2 was not added as a party, however, on an objection being taken by defendant No.1/respondent No.1 the insurance company was added as a party, however, most surprisingly only as a proforma defendant, and which would be a grave error as will be shown hereinafter.

3. Defendant No.1/respondent No.1 contested the claim and denied its liability on the ground that the consignment in question had already landed and was damaged before defendant No.1/respondent No.1 was appointed as a clearing agent. It was pleaded that loss of 4 TWT mounts was to the knowledge of the appellant/plaintiff, and there is no liability of defendant No.1/respondent No.1, inasmuch as, whatever consignment was delivered to defendant No.1/respondent No.1 at New Delhi, the same consignment was delivered to the appellant/plaintiff at Calcutta.

4. After the pleadings were completed, the trial Court framed the following issues:-

> "1. Whether the plaint has been signed and verified and suit has been instituted by a duly authorised person? OPP
>
> 2. Whether the suit is barred by limitation as alleged by the defendant? OPD
>
> 3. Whether the defendant had taken the delivery late and was negligent and the defendants are liable to pay the damages amounting to Rs.3,03,075.70 p. as claimed by the plaintiff? OPP
>
> 4. Whether the defendant are liable to pay interest amounting to Rs.92041.80 and Rs.13101.85 as claimed by the plaintiff? OPP

> 5. Whether the plaintiff is entitled to recover Rs.28832/- regarding insurance charges as claimed by the plaintiff? OPP
>
> 6. Whether the plaintiff is entitled to recover interest at the rate of 18% p.a. as claimed? OPP
>
> 7. Relief."

5. The main issue to be addressed was with respect to whether the defendant No.1/respondent No.1 was negligent and which was the subject matter of issue No.3. The trial Court has held that the appellant/plaintiff failed to prove the negligence of defendant No.1/respondent No.1, inasmuch as, what was delivered to defendant No. 1/respondent No.1 was the consignment of 47 Kgs. and it is this consignment in the form which was received, was delivered by defendant No. 1/respondent No.1 to the appellant/plaintiff at Calcutta. Some of the relevant observations of the trial Court for holding defendant No.1/respondent No.1 not liable, because whatever package was received by defendant No.1/respondent No.1 was delivered to the appellant/plaintiff in the same condition at Calcutta, are contained in paras 15-17 of the impugned judgment which read as under:-

> "15. Onus to prove this issue was upon the plaintiff and in discharge of that onus the plaintiff has examined the aforesaid 10 witnesses. PW-1 Shri K.D. Nindawat is the most material witness, who had deposed almost on all the material facts consistent to its claim and in addition to that he has exhibited the documents Ex.PW1/1 to Ex.PW1/21. The document Ex.PW1/1 is the tender notice, Ex.PW-1/2 is letter dated 10.8.1986 giving the contract to defendant No.1, Ex.PW1/3 is the letter written by Shri R B Tewari, which was objected to, Ex.PW-1/4 is the letter dated 12.6.86 which is also objected for proving the same on account of mode of proof, Ex.PW1/5 is the letter written by Oriental Insurance Co. to India Airlines, Ex.PW1/6 letter dated 2.3.1987 is reply, Ex.PW1/7 is letter for shipment under enquiry consisted of one packet only weighing 47 Kgs. Ex.PW1/8 is letter dated 18.12.86, written to Airport authority of India, Ex.PW1/9 is the letter dated 9.12.86 regarding consignment, Ex.PW1/10 is letter regarding request of waiver of the ground rent, Ex.PW1/11 is the letter dated 30.8.1986 by which the defendant was instructed to dispatch the said consignment to Calcutta, Ex.PW1/12 is letter

dated 18.12.1986 written to the defendant regarding seeking clarification about the delivery. Ex.PW1/13 is postal receipts, AD card is Ex. PW1/14, Ex.PW1/15 is the letter written by the plaintiff to the defendant regarding release of consignment, Ex.PW1/16 and Ex.PW1/17 are the postal receipts, Ex.PW1/18 is the letter dated 18.5.87, Ex.PW1/19 to Ex.PW1-21 are the postal receipts. At the same time certain documents are also marked which are marked A to Z, Z-1 to Z-15. On cross-examination, there appears no dispute regarding those documents and certain facts are admitted by this witness admitting to be correct that M/s Globe Commercial Agency was awarded a tender for the year 1986 which is not in dispute. He has further admitted the fact suggested by the defendant which are reproduced here as under: "It is correct that the consignment receipts are kept by the Airport Authority in their warehouse and after their authorization the same is received from the warehouse by the agent."

> "It is correct that the short of consignment was not reported at the time of taking delivery. Delivery was taken in the manner in which it was booked.
>
> It is correct that the consignment was complete booked. It is correct that he consignment was complete at the time of booking, the same has been complete at the time of delivery and the same was confirmed by airport authority that the consignment was complete. It is correct that one of the claims in the present suit is in respect of the short delivery of the consignment which was sent to Calcutta."

16. In view of these facts admitted by this witness, it appears that the consignment was delivered to the defendant as complete as admitted by this witness and in the same condition the same was dispatched to the ultimate consignee and there also in the same condition the same has been received. PW-2 Shri J J Bhalla, who was the asst. Manager, Cargo Sales Department, Air India did not state anything in favour of the plaintiff in respect of the record of air way bill No.098-4541-6696 as there was no record. PW-3 Shri K.K. Mehta deposed that the record has been weeded out and therefore the letter dated 30.5.88 was not traceable. PW-4 shri S L Arora also deposed nothing favourable

and material in favour of the plaintiff and against the defendant. PW-5 Shri R M Dubey, who has proved the document Ex.PW5/1 by which it is proved that the summoned record has been weeded out. PW-6 Shri Azad Singh has also proved the document Ex.PW-6/1 a report regarding the weeding out the record, PW-7 Shri A K Seth has also proved the document Ex.PW7/1 regarding weeded out of the original record maintained by them. PW-8 has already been discussed while deciding issue No.1 PW-9 Subhash Thadani has proved the document Ex.PW-9/1 to Ex.PW-9/3 in all. The document Ex.PW-9/1 is the document that is already exhibited as Ex.PW-1/5 Ex. PW9-3 is of two pages document bearing the signatures of M. Simoos. PW-10 Shri Avdhesh Kumar, who was the Sr. Manager Cargo but he had not produced the summoned record and nothing material was proved by him.

17. In view of the evidence led by the plaintiff by examining the aforesaid witnesses the substance of which has already been discussed, I find that the plaintiff bitterly failed to prove that the said consignment was damaged after the delivery of the same was taken by the defendant. It is the case of the plaintiff that the consignment was 100 kgs when it had started from Canada and that when it was delivered at the final stage at Calcutta it was 47 kgs. It is the case of the plaintiff that at the time of booking from Delhi to Calcutta it was 47 kgs. The document-Mark –C has been filed by the plaintiff and this document is dated 9.12.96 regarding the delivery and booking which is airway bill and by this document it is established that at the time of booking from Delhi the weight was 47 kgs. Admittedly the consignment has been received on 4.6.86 in India and the delivery have been given to the defendant on 9.12.86. Admittedly, the contract has been assigned to the defendant on 20.8.86. Therefore it is admitted fact of the plaintiff that the consignment has reached in India and was lying in India during the course of subsistence of the contract between the plaintiff and the M/s Globe Commercial Agency. No document has been proved by the plaintiff to establish that when the contract was assigned to the defendant and delivery was taken by the defendant, the weight was 100 kgs. It has been pointed out during the course of argument that at the joint inspection it was found that there were only 6 items and

consignment had already been broken and joint inspection conducted by the plaintiff and the defendant while the goods were lying at the cargo and it was found that there were only six TWT mounts and the consignment was not intact as it was sent by original consignee, I find that plaintiff bitterly failed to prove any negligence on the part of the defendant on any ground, and therefore, in those circumstances, I find that the plaintiff cannot be held entitled to claim any amount as pleaded in the plaint. Therefore, the plaintiff cannot be held entitled to recover suit amount from the defendant as claimed in the suit. So this issue stands decided in favour of the defendant and against the plaintiff."

(underlining added)

6. A reading of the aforesaid paras shows that the admitted document, being the Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986 showed that the package in question which was booked from Delhi for Calcutta, was only of 47 Kgs. It was this package which was delivered to the appellant/plaintiff at Calcutta. The trial Court has also correctly found that it is an admitted fact that the consignment had reached India and was lying in India during the subsistence of contract between the appellant/plaintiff and M/s Globe Commercial Agency and no document has been proved to establish that when the contract was assigned to defendant No.1/respondent No.1 the delivery taken by defendant No.1/respondent No.1 was of the weight of 100 kgs.

7. In addition to the aforesaid reasoning of the trial Court, I have examined the documents filed by the appellant/plaintiff itself in the trial Court. A reference to the original documents which are filed by the appellant/plaintiff in the trial Court along with its list of documents dated 29.7.1991 show that this consignment under the Airway Bill No. 098-4541-6696 remained untraceable for a long period of time i.e. from August, 1986 till almost the end of November, 1986. The appellant/plaintiff had written various letters to the International Airport Authority of India at Delhi with respect to several missing packages/consignments and one such missing consignment was the subject consignment. Some of the letters written in this regard to the relevant officials at the cargo terminal at Palam Airport, New Delhi are letters dated 6.10.1986, 8.10.1986 and 13.10.1986. In addition to the aforesaid letters, letters were written

to defendant No.1/respondent No.1 itself with respect to these missing packages and which are letters dated 20.10.1986 and 28.10.1986.

8. In fact, ultimately, the appellant/plaintiff vide its letter dated 15.11.1986 lodged a claim with the International Airport Authority of India for two missing packages under two airway bills and one of this package was the subject consignment. In the aforesaid letters which have been referred to, there are two letters which are very relevant. First is the letter dated 6.10.1986 written on behalf of the appellant/plaintiff to Sh. Mago, Assistant Director Cargo at Palam Airport, and the second is the claim dated 15.11.1986 lodged with respect to the subject consignment. Since these two letters are important, they are in totality reproduced below:-

(a)

"Department of Telecommunication

From:

Divisional Engineer Telegraphs
Regional Spares Organisation
Eastern Court New Delhi.

No.DE/RSO/MW8-749/TM/60
Dt.6.10.86

Sh. Mago
Asstt. Director Cargo
New International Cargo Terminal
Palam, New Delhi.

Subject:- Regarding non traceable of package received against two Air Way Bill.

The following two consignments have been marked for location but are not traceable except four packages. The details of consignments are as under.

Sl. No.	Consignment No:1	Consignment No:2
1.	Locator pass No.5122 Dt.24.9.86	64390 dt. 24.9.86
2.	AWB No: 098-4541-6674	098-4541-6696
3.	IWR Serial No. 11211	11222
4.	Location	1210
5.	Flight No. AI104 dt.5.6.86	AI104 dt.5.6.86

6.	No. of packages 01	01
7.	Weight 110 Kg	100Kgs
8.	Consignee Agent/GCA	GCA

For your ready reference the following information for location is given.

It is presumed that are big card board in which ten TWT Mounts were packed in ten small cardboard packages received fide AWB 098-4541-6696 has broken and small packages must have been separated. Similarly one big packages received against AWB098-4541-6674 must have broken and fifteen small packages must have been separated.

Similarly one big packages received against AWB098-4541-6674 must have broken and fifteen small packages must have been separated. The small packages can be located as per the following details given on them

(i) Letter of credit No. 16056 dt. 20.2.86

(ii) Name of consignee : Accounts Officer
(Cash) O/O General Manger
Maintenance Northern Telecom Regens
A-1/2 Phase-II Bentex Tower
Naraina New Delhi-28

(iii) Name and Address of ultimate consignee:
(i) Divisional Engineer (RSO) WTR
345 Mount Road Bombay.
(ii) Divisional Engineer (RSO)
Eastern Telecom Regen 69,
Ganesh Chander Avenue Calcutta.

(iv) Name of Supplier:- M/S Varian AG. Switzerland

Since the above two consignments are urgently needed and ground is abundantly increasing hence you are requested to kindly depute your staff at your earliest for tracing al the packages meant for each Air Way Bill.

The above information has been also given to Sh.P.K.Ratti after discussing the case.

Copy to
Sh. Mainker
Direcotr Cargo
II M/S Cox & Kings India Ltd.
For information and for n/a
As per above"

(b)

"Department of Telecommunication

From:

Divisional Engineer Telegraphs
Regional Spares Organisation
Eastern Court New Delhi.

No.DE/RSO/MW8-749/TM/75
Dt.15.11.86

The Director Cargo
IAAI New International Cargo
Terminal Indira Gandhi,
International Air Port
Palam, New Delhi.

Subject:- Claim in respect of two untraceable consignment received against AWB 098-4541-6674 flight No.AI 104 dt. 5.6.86 and AWB 098-4541-6696 Flight No: AI 104 dt. 5.6.86

The above two consignments were marked for location on 24.9.86 but to date the position of actual number of packages found against the each Air Way Bill has not been given to us despite our constant pursuance. Copy of our letter Ref. No.DE/RSO/MWB-749/TM/66 dt. 21.10.86 a reminder in respect of above two untraceable consignments with details of location of each consignment delivered to Sh. S.S. Ray Air port Officer IAAI Monkey farm New Delhi on 30.10.86 after discussing the intricacies by Asstt. Engineer (RSO) and copy has been duly received a copy of the same letter was also delivered in office of Director Cargo IAAI New International Cargo Terminal New-Delhi and has also been got received. Copy enclosed for your kind reference the case has again discussed on 7.11.86 with Sh. S.S.Ray.

Since much time has passed and there has been no progress

to date hence a claim is being lodged.

The details of claim in respect of above referred consignments are as under.

Sl. No.	B/E No:	Air Way Bill No:	C.I.F. Value in Rs. per B/E	Custom duty Paid	Total Amount of claim in Rs. i.e. Total @ 4 & 5
1.	**34114 4.7.86**	**098-4541-6696**	**Rs.298712.72**	**i. Rs.134420.95-45% ii. Rs.29871.05-10% Total = Rs.1,64,292.00**	**Rs.4,63,004**
2.	33142 30.6.80	098-4541-6674	Rs. 4,38,150.00	i. Rs.197166.60-45% ii. Rs. 43815.40-10% Rs. 240982.00-55% Total	Rs.6,79,132.00 _____ Rs.11,42,136.00

You are requested to kindly settle the above claim at your earliest please.

Encloser:-

1. Copy of our letter No. DE/RSO/MW8-749/TM66 dt. 21.10.86 With details of location vide which the case was discussed and copy delivered in O/O Director Cargo IAAI New Delhi and to Sh. S.S.Ray Air Port Officer Monkey farm IAAI

(R.B.Tewari)
Divisional Engineer
Regional Spares Organisation
Eastern Court New-Delhi

2. Transfer TR-6 Challan in r/o B/E 34114 dt. 4.7.86 i. For 134420.95 in r/o 45% duty ii. For '29871.05 in r/o 10% duty balance duty
3. TR-6 challan in r/o B/E No: 33142 dt. 30.6.86 i. For 197166.60 in r/o 45% ii. For 43815.40 in r/o 10% balance duty
4. Invoice, Air Way Bill, packing list

Copy to:

1. Chairman IAAI New Delhi for information
2. Asstt. Collector of Custom, New Delhi for information.
3. Sh. S.S.Ray Air Port Officer Monkey Farm IAAI for information."

9. Before proceeding further, I may also state that though these

letters are not exhibited before the trial Court, since they are documents in original filed by the appellant/plaintiff itself, they can be referred to and relied upon against the appellant/plaintiff. These documents, including the two letters, as reproduced above, show that the subject consignment was untraceable from August to November, 1986. Immediately, after the same was traced in December, 1986, the consignment in the form and condition it was received from the International Airport Authority of India by defendant No.1/respondent No.1, was dispatched to the appellant's/plaintiff's consignee at Calcutta. The letter dated 6.10.1986 reproduced above shows that the appellant/plaintiff was aware that the subject consignment had in fact been broken and the small packages were separated. Obviously, it is on account of this breakage, loss would have occurred with respect to 4 TWT mounts causing the difference in weight from 100 kgs. to 47 kgs. The correspondence between the appellant/plaintiff with the Airport Authority, as also the respondent No.1 shows that the subject consignment was not traced out till November, 1986 and the appellant/plaintiff was consequently forced to lodge a claim against International Airport Authority of India.

10. In view of the aforesaid facts, the trial Court was fully justified in holding that there was no negligence of defendant No.1/respondent No.1 in having lost any of the packages which were given to the defendant No.1/respondent No.1. The package which was given to it was of 47 kgs. as per Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986 and it is this consignment of 47 kgs. as stated in Airlines Consignment Note C/No: 09635970 which was delivered to the appellant/plaintiff at Calcutta. Surely, if only 47 kgs were delivered to defendant No.1/respondent No.1 there does not arise any question of any loss being caused by it of the difference of 100 kgs. and 47 kgs. At best, the liability of defendant No.1/respondent No.1 would be for taking short delivery, however, even that liability would not be there because to the knowledge of the appellant/plaintiff the main package had been broken open as is clear from the letter dated 6.10.1986 written to Sh. Mago at the Airport Cargo Terminal and at best the negligence of defendant No.1/respondent No.1 would be of taking short delivery, however, that negligence in itself cannot fasten the defendant No. 1/respondent No. 1 with liability because it is not as if the appellant/plaintiff was not aware within the limitation period that it was the International Airport Authority of India which had given short delivery and therefore the suit could well

have been filed against the International Airport Authority of India within the limitation period for the loss caused during the period the consignment was in the custody of the International Airport Authority of India. The liability, therefore, for having lost the goods, was of the International Airport Authority of India and not of defendant No.1/respondent No. 1.

11. In my opinion, there has been quite clearly a grave and glaring error on behalf of the appellant in not claiming relief from the insurance company/defendant No.2/respondent No.2, although, admittedly the consignment was insured. The insurance company, no doubt, had denied its liability but the facts of the case clearly show that the denial of liability was without reason and really the appellant/plaintiff would have succeeded in its claim against the insurance company if the same had been filed. However, for the reasons which are difficult to fathom the defendant No.2/respondent No. 2/insurance company was made only a proforma party and no relief was claimed against the insurance company. Once the goods are lost and they are covered by the insurance policy, the present was a clear-cut case to claim the loss from the insurance company and which unfortunately has not been done. The denial of liability by the insurance company was meaningless and it becomes clear from the letter dated 3.6.1988 written by the said insurance company to the appellant/plaintiff, Ex.PW1/5, in which loss of goods/consignment and it being otherwise covered under the policy was not denied. This letter reads as under:-

"THE ORIENTAL INSURANCE COMPANY LIMITED
(Subsidiary of General Insurance Corporation of India)
Divisional Office No. 8 (Code No. 21180)
Jeevan Vihar Building,
3rd Floor, Sansad Marg,
New Delhi -110001
Grams: ORIEIGHT
Telex : 66357 OFGI IN
Phones : 311924, 310871, 343987, 353628, 324043

21180/20/MCL/86/05396 3rd June, 88

The Divisional Engineer,
Department of Telecommunication,

Regional Spares Organisation,
Eastern Court,
New Delhi.

Dear Sir,

Re: Additional documents in respect of missing/short delivered consignment against AWB 098-4541-6674, 098-4541-6685, 098-4541-6696 and 098-4652-7423_____

We are in receipt of your letter No. DE/RSO/MW8-749/TM/Vol.2 dated 31.5.88 alongwith a copy of International Airport Authority of India's letter dated 30.5.88 and also your letter dated 2.5.88

We have examined the documents submitted to us in support of the claim on account of alleged shortage at Calcutta. We observe that according to International Airport Authority of India consignment per AWB No.0984541-6696 was delivered to you/your Clearing Agents at New Delhi against clean receipt in sound condition, meaning thereby that there was no shortage whatsoever at New Delhi. Subsequently part consignment weighing about 47 kgs, according to Indian Airlines letter there against clean receipt. It is claimed that at Calcutta only 6 TWTS were received and the other 4 were found short. It is obvious that no shortage had taken place during transit from New Delhi to Calcutta as only part consignment had been dispatched by your Clearing Agents. The ware abouts of remaining part consignment i.e. 4 TWTS should be known to you/your Clearing Agents. No explanation has been given to us as to how the same were handled and under what circumstances the same were lost. You are aware that as per insurance policy's terms & conditions liability arises thereunder only when it is shown beyond doubt that the loss occurred during currency of the policy owing to perils insured against. As revealed by the circumstances 4 TWTS which are being claimed as non-delivered in fact must be in the custody of your Clearing Agents/they are bound to account for. This is a matter which has to be sorted out by you with your Clearing Agents. We will come into the picture only if the said TWTS are shown to have been lost owing to perils insured against.

We hope the position is clear to you.

Yours faithfully,

SR. DIVISIONAL MANAGER"

12. A resume of the aforesaid facts shows the following:-

(i) The defendant No. 1/respondent No.1 was only a substituted clearing agent.

(ii) The consignment had reached the shores of India before defendant No. 1/respondent No. 1 took up the clearing agency contract.

(iii) The consignment was in fact damaged and the packages had dispersed while the consignment was in the possession of International Airport Authority of India.

(iv) This aspect of the main consignment being broken open and the small packages having been dispersed, was known to the appellant/plaintiff from August, 1986 itself.

(v) The period from August, 1986 to November, 1986 was the period when the subject consignment was not traceable and after it was traced the same was immediately airlifted to Calcutta by defendant No.1/respondent No. 1 as per Indian Airlines Consignment Note C/No: 09635970 dated 9.12.1986.

(vi) Defendant No.1/respondent No.1 received a package of 47 kgs. and delivered the package of 47 kgs. and therefore no case is made out of the defendant No.1/respondent No. 1 receiving a package of 100 kgs but delivering only 47 kgs.

(vii) The liability in this case would be of the International Airport Authority of India and not of defendant No.1/ respondent No.1 because short delivery was given by International Airport Authority of India and which fact was to the knowledge of the appellant/plaintiff.

(viii) The appellant/plaintiff ought to have in fact filed a suit and pursued its claim against the insurance company, and such claim if filed would have succeeded and decreed

against the insurance company as the loss of the consignment was admitted and which was during the currency of insurance policy, however, for the reasons best known to it, the appellant/plaintiff did not claim any relief against the insurance company/defendant No. 2/ respondent No.2.

13. In view of the above, I do not find any fault or error in the impugned judgment for the same to be set aside in this appeal. The trial Court has rightly dismissed the suit of the appellant/plaintiff. There could not be a claim for loss of goods, more so there was no loss caused by defendant No.1/respondent No.1. There also cannot be any claim for demurrage charges because the packages were not traced out by the International Airport Authority of India itself. There is also, in view of the aforesaid facts, no entitlement of the appellant/plaintiff with respect to the claim for the insurance charges incurred.

14. In view of the above, the present appeal is dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

RFA No. 78/2004

15. This appeal impugnes the judgment of the trial Court passed on the same date, i.e. 23.5.2003, and on which date the impugned judgment was passed which is the subject matter of RFA No. 76/2004. By the impugned judgment which is the subject matter of RFA No. 78/2004, the claim of M/s Cox & Kings (India) Limited (which is defendant No.1/ respondent No.1 in RFA No. 76/2004) was decreed on account of it having discharged the duties as clearing agent from September, 1984 to June, 1987. The clearing agent-M/s Cox & Kings (India) Limited proved the bills of charges, and which claim was decreed, inasmuch as the only defence by the defendant in the suit, i.e. the appellant, herein, was the claim against the clearing agent for having lost the goods received under the Airway Bill No. 098-4541-6696. Since, in the connected suit, the trial Court held that the clearing agent was not guilty of causing loss, it was held that the clearing agent was entitled to recovery of charges. Some of the relevant observations of the trial Court in this regard are contained in paras 11 to 13 of the impugned judgment and which read as under:-

"11. I have given thoughtful consideration to the submissions made by the ld. counsel for the plaintiff and contentions raised

by the ld. counsel for the defendants, gone through the evidence led by both the parties and the documents respectively proved by the witness and my findings on the aforesaid issues are recorded as under:

ISSUE NO.1

12. Onus to prove this issue was upon the plaintiff and in discharge of that onus the plaintiff had examined PW-8 Shri S.Bahumick, who has deposed that suit has been signed and verified by Shri R.D.Arya the then Chief General Manager and he has verified his signatures on the plaint. In view of cross-examination there appears no dispute regarding authority of Shri R.D. Arya of signing and verifying the plaint and institute the suit. In view of testimony of PW-8 in his examination-in-chief i.e. affidavit and there being no challenge, I find that Shri R.D. Arya was duly authorised to sign, verify and institute the suit for an on behalf of the plaintiff. So this issue stands decided in favour of this plaintiff and against the defendants.

ISSUE NO. 2

13. This issue has been framed in such term as the onus to prove this issue was upon the defendant, whereas, by reason of Section 3 of the Limitation Act it is always the burden and obligation of the plaintiff to establish institution of the suit within prescribed period of limitation, and in cases in the suit, the plaintiff fails to establish the institution of the suit before the expiry of the period of limitation the Court has no option but to dismiss the suit even though no defence is set up in that regard. Therefore, in view of the provision of Section 3 of Limitation Act it is the plaintiff who has to establish the institution of the suit within the prescribed period of limitation."

16. Since, I have dismissed RFA No. 76/2004 giving detailed reasoning, accordingly, the impugned judgment which has been passed, which is the subject matter of the present RFA, has to be sustained and it is held that the appellant/plaintiff was bound to pay the charges of the clearing agent for the relevant period.

17. This appeal is therefore dismissed, leaving the parties to bear

their own costs. Trial Court record be sent back.

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RFA

KANAK LATA JAIN & ORS. ....APPELLANTS

VERSUS

SUDHIR KUMAR JAIN & ORS. ....RESPONDENT

(VALMIKI J. MEHTA, J.)

RFA. NO. : 232/2011 DATE OF DECISION: 24.02.2012

Limitation Act, 1963—Partition Suit—Partition suit by heirs of R-defendants set up an alleged will that bequeathed the suit property to her daughter-in law-Will disbelieved by trial court passed order dated 31.01.2011 decreeing the suit of the respondent Nos. 1 and 2/plaintiffs for partition of the suit property belonging to the mother of the parties, R—The trial Court passed a preliminary decree declaring all the legal heirs of R, including the plaintiffs, to be 1/8th co-owners in the suit property—Defendants/Appellants contend that suit property was used as a godown by a partnership business of the parties and therefore, had in any event, acquired rights by adverse possession and the suit was barred by time—Held:- A civil case is decided on balance of probabilities. Once the appellants failed to prove that there was any Will of the mother-R and also failed to prove the plea of adverse possession, which in any case is looked at with dis-favour by the Courts, the trial Court was justified in arriving at a finding decreeing the suit for partition—Also held that there was no clinching proof

of claim of ownership by defendant—A party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner.

A civil case is decided on balance of probabilities. Once the appellants failed to prove that there was any Will of the mother-Smt. Rajmati Jain and also failed to prove the plea of adverse possession, which in any case is looked at with dis-favour by the Courts, the trial Court was justified in arriving at a finding decreeing the suit for partition. An appellate Court does not interfere with the findings and conclusions of the trial Court unless such findings are wholly perverse or illegal. I do not find any perversity or illegality in the impugned judgment which calls for interference by the Court in the appeal. **(Para 8)**

Important Issue Involved: It is a well-settled principal that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner.

[Sa Gh]

APPEARANCES:

FOR THE APPELLANT : Mr. M. Hussain, Advocate.

FOR THE RESPONDENTS : Mr. Sanjiv Kakra, Advocate with Mr. Atul Kumar, Advocate and Mr. Irfan Ahmad, Advocate for respondent No. 2. Mr. Ravinder Singh, Advocate with Mr. Maheem Pardhan, Advocate for respondent Nos. 3, 6, 7 and 8.

CASES REFERRED TO:

1. *Chatti Konati Rao and Ors.* vs. *Palle Venkata Subba Rao* (2010) 14 SCC 316.
2. *T. Anjanappa* vs. *Somalingappa* (2006) 7 SCC 570.
3. *T. Anjanappa & Ors.* vs. *Somalingappa & Anr.* (2006) 7 SCC 570.
4. *Karnataka Board of Wakf* vs. *Government of India and Ors.* (2004) 10 SCC 779.
5. *D.N. Venkatarayappa* vs. *State of Karnataka* (1997) 7 SCC 567).
6. *Mahesh Chand Sharma (Dr.)* vs. *Raj Kumari Sharma :* (1996) 8 SCC 128.
7. *Parsinni* vs. *Sukhi* (1993) 4 SCC 375.
8. *S.M. Karim* vs. *Bibi Sakina* AIR 1964 SC 1254.

RESULT: Appeal dismissed.

VALMIKI J. MEHTA, J. (ORAL)

1. The challenge by means of this Regular First Appeal (RFA) filed under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 31.1.2011 which decreed the suit of the respondent Nos.1 and 2/plaintiffs for partition of the suit property belonging to the mother of the parties, Smt. Rajmati Jain. The trial Court passed a preliminary decree declaring all the legal heirs of Smt. Rajmati Jain including the plaintiffs to be 1/8th co-owners in the suit property. The plaintiffs/respondent Nos.1 and 2 were also held entitled to rendition of account of the rental income received by the defendant Nos.1 to 3/appellants.

2. The facts of the case are that admittedly Smt. Rajmati Jain was the owner of the property bearing plot No.67, Mauza Shakurpur, Delhi bearing Municipal No.WZ-16 & 17, Golden Park, Rampura, Delhi admeasuring 224 sq. yds. Smt. Rajmati Jain expired on 6.4.1987 leaving behind eight legal heirs. The husband of Smt. Rajmati Jain i.e. Sh. Jagmohinder Lal Jain expired on 27.6.1987. In the plaint, it was pleaded that Smt. Rajmati Jain did not execute any Will during her lifetime, and since she died intestate, all her eight legal heirs being the plaintiffs and

the defendant Nos.2 and 4 to 8 became 1/8th co-owners of the suit property. It was pleaded in the plaint that the plaintiffs with the defendant Nos.2 and 4 had been carrying on a partnership business in the name and style of M/s. J.K. Medical Products since 1977 at 94-Darya Ganj, New Delhi and the suit property was used as a godown upto the year 1999. It was then pleaded in the plaint that when in August 2003 the plaintiffs/ respondent Nos.1 and 2 approached the defendant No.2/appellant No.2 for partition, the matter was delayed on one pretext or the other. It was pleaded that it transpired that the defendant No.1/appellant No.1 claiming herself to be the owner of the suit property sold the same to defendant Nos.2 and 3 by a sale deed. Defendant No.2 is the husband of defendant No.1 and defendant No.3 is the real sister of defendant No.1. The plaintiffs were shocked and surprised to receive the certified copy of the sale deed on 25.9.2003 in which it was alleged that the defendant No.1 had become owner of the suit property by virtue of the Will dated 10.1.1987 of the mother-late Smt. Rajmati Jain. It was pleaded that there was no valid Will of Smt. Rajmati Jain dated 10.1.1987 and consequently it was pleaded that the suit property was liable to be partitioned.

3. The suit was contested by the appellants/defendant Nos.1 to 3 while relying upon the Will dated 10.1.1987 allegedly executed by the mother Smt. Rajmati Jain. It was pleaded that by virtue of the Will dated 10.1.1987, Smt. Rajmati Jain bequeathed the suit property in favour of her daughter-in-law i.e. defendant No.1 and thereby she became sole owner of the suit property. It was pleaded that the defendant No.1 finally sold the property on 14.5.1998 to her husband-defendant No.2 and her sister, defendant No.3.

4. After completion of pleadings, the trial Court framed the following issues:-

> "1. Whether the will dated 10.01.1987 is a validly executed and legally enforceable document? OPD
>
> 2. Whether the suit has been properly valued for the purpose of court fees and pecuniary jurisdiction? OPP
>
> 3. Whether no cause of action has arisen against the defendants and in favour of the plaintiff for filing the present suit? OPD
>
> 4. Whether the suit is barred by limitation? OPD
>
> 5. Whether the plaintiff is entitled to the decree for partition and separate possession of suit property? OPP
>
> 6. Whether the plaintiff is entitled to the decree for rendition of accounts against defendants in respect of rent of suit property? OPP
>
> 7. Relief."

5. The main issue was really as to the ownership of the defendant No.1 by virtue of the alleged Will dated 10.1.1987 of the mother Smt. Rajmati Jain. In this regard, the trial Court in the impugned judgment in para 28 has noted that no Will of late Smt. Rajmati Jain has been placed on record, much less the original Will. Further, no attesting witness of the Will was summoned to prove the execution of the Will. It was held that since the alleged Will of Smt. Rajmati Jain was not proved consequently all the legal heirs of Smt. Rajmati Jain i.e. the plaintiffs, and defendant Nos.2and 4 to 8 were equal co-owners to the extent of 1/8th share each in the suit property.

I completely agree with the findings and conclusions of the trial Court inasmuch as surely if no Will is filed, much less the original Will, and no attesting witness summoned, surely the alleged Will dated 10.1.1987 was not proved.

6. So far as the issue of limitation is concerned, the trial Court has noted that the suit cannot be said to be barred by limitation as the suit property was used for storing as godown of the partnership business between the parties till the year 1999 and the demand for partition was made in the year 2003 and the suit was thereafter filed on 13.4.2005 i.e. within two years. The trial Court has rightly noted that the period of limitation for filing of the suit for partition is 12 years. Of course, 12 years will begin when the claim adverse to the plaintiffs/co-owners is notified to the world at large including the plaintiffs who are the concerned persons. There is no evidence which has been led on record that the alleged Will of the mother dated 10.1.1987 was ever brought to the notice of the respondent Nos.1 and 2/plaintiffs. The issue of limitation has been dealt with by the trial Court in para 34 of its judgment, with which I agree and which reads as under:-

> "34. Issue no.4 Whether the suit is barred by limitations? OPD

The onus to prove this issue is upon the defendants. In the written statement, defendants have simply mentioned that suit is barred by time. As per the plaintiff, the suit property was inherited by them as well as other legal heir after the death of their mother, Smt. Rajmati Jain and the plaintiffs and defendant no.2 were carrying the joint business by the name of M/s. J.K. Medical Products and the suit property was being used as a godown for storing the products till the year 1999. As per the plaintiff in the year 2003, they asked the defendant no.2 for partition which he initially avoided and subsequently stated that he is the owner of the suit property. Therefore on inquiry they came to know that defendant no.1 executed a sale deed in favour of defendant no.2 & 3 on the basis of the alleged will, thus right of the plaintiff and other legal heir was disputed by the defendant in the year 2003. The plaintiff reiterated the said fact in his examination in chief. During cross-examination he has admitted that he made enquiries with the office of Sub-Registrar regarding the will of Smt. Rajmati Jain dated 10.01.1987. He volunteered that he made the enquiry somewhere in 2003. He further stated that he came to know in the year 2003 that Smt. Kanaklata Jain was claiming her right on the suit property by virtue of will dated 10.01.87 executed by Smt. Rajmati Jain. In the entire cross-examination, PW1 has not been suggested that the suit is barred by limitation. As per the plaintiff they came to know that defendant no.1,2 & 3 were claiming absolute right in the suit property to the exclusion of legal heir of late Smt. Rajmati Jain in the year 2003. The present suit has been filed on 13.04.2005 i.e. within 2 years. The limitation for filing the suit for partition is 2 years from the date of denial of right. The present suit has been filed within the period of limitation. Defendants have thus failed to discharge the onus of issue no.4, same is accordingly decided against the defendant."

7. There is no issue which is framed with respect to the plea of ownership by adverse possession of the appellants/defendant Nos.1 to 3 and even if such issue was framed it was necessary that this issue should have been proved by leading clinching evidence showing the claim of ownership of the defendant No.1 for a consistent period of 12 years before filing of the suit i.e. nec vi, nec clam, nec precario i.e. open,

peaceful and continuous. Mere long possession is not adverse possession. The plea of adverse possession is not looked upon with favour especially when the parties are closely related to each other inasmuch as possession of one co-owner is treated to be possession for and on behalf of the other co-owner unless ouster is categorically proved. Nothing has been pointed out to me on behalf of the appellants/defendant Nos.1 to 3 that ouster was specifically ever made known to the plaintiffs/respondent Nos.1 and 2. The Supreme Court in its recent judgment reported as **Chatti Konati Rao and Ors. Vs. Palle Venkata Subba Rao** (2010) 14 SCC 316 has reiterated the law with respect to adverse possession in paras 12 to 15 of the said judgment, and which paras read as under:-

> "12. We have bestowed our thoughtful consideration to the submission advanced and we do not find any substance in the submission of Mr. Bhattacharya. What is adverse possession, on whom the burden of proof lie, the approach of the court towards such plea etc. have been the subject matter of decision in a large number of cases. In the case of **T. Anjanappa v. Somalingappa** (2006) 7 SCC 570, it has been held that mere possession however long does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owner's title. Relevant passage of the aforesaid judgment reads as follows:
>
> > "20. It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. 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. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence

of the adverse possessor actually informing the real owner of the former's hostile action."

13. What facts are required to prove adverse possession have succinctly been enunciated by this Court in the case of **Karnataka Board of Wakf v. Government of India and Ors.** (2004) 10 SCC 779. It has also been observed that a person pleading adverse possession has no equities in his favour and since such a person is trying to defeat the rights of the true owner, it is for him to clearly plead and establish necessary facts to establish his adverse possession. Paragraph 11 of the judgment which is relevant for the purpose reads as follows:

> 11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See **S.M. Karim v. Bibi Sakina** AIR 1964 SC 1254, **Parsinni v. Sukhi** (1993) 4 SCC 375 and **D.N. Venkatarayappa v. State of Karnataka** (1997) 7 SCC 567) 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. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. **Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma :** (1996) 8 SCC 128.

14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The Plaintiff is bound to prove his title as also possession within 12 years and once the Plaintiff proves his title, the burden shifts on the Defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the Defendant should be adverse to the Plaintiff and the Defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until possessor holds property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and possession was open and undisturbed. A person pleading adverse possession has no equities in his favour as he is trying to defeat the rights of the true owner and, hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The courts always take unkind view towards statutes of limitation overriding property rights.

Plea of adverse possession is not a pure question of law but a blended one of fact and law." (underlining added)

A reference to para 14 of this judgment shows that if the possession before the plea of adverse possession is accepted, the same must be open and hostile enough so that it is known by the parties interested in the property. The Supreme Court has reiterated this on the basis of similar observations made by the Supreme Court in its judgment reported as **T. Anjanappa & Ors. Vs. Somalingappa & Anr.** (2006) 7 SCC 570 and para 20 of which judgment has been referred to in para 12 of the judgment in the case of **Chatti Konati Rao** (supra).

8. A civil case is decided on balance of probabilities. Once the appellants failed to prove that there was any Will of the mother-Smt. Rajmati Jain and also failed to prove the plea of adverse possession, which in any case is looked at with dis-favour by the Courts, the trial Court was justified in arriving at a finding decreeing the suit for partition. An appellate Court does not interfere with the findings and conclusions of the trial Court unless such findings are wholly perverse or illegal. I do not find any perversity or illegality in the impugned judgment which calls for interference by the Court in the appeal.

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

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L.P.A.

VIJAYA LAXMI ....APPELLANT

VERSUS

ARCHAEOLOGICAL SURVEY OF INDIA & ORS. ....RESPONDENT

(S. RAVINDRA BHAT & S.P. GARG, JJ.)

LPA NO. : 982/2011, CM APPL. NO. : 21273/2011 (FOR STAY) **DATE OF DECISION: 24.02.2012**

Constitution of India, 1950—Article 227—Writ Petition—Letters Patent Appeal—Ancient Monument Act, 1958—Second respondent had purchased a property in Nizamuddin East—Sought permission to construct upon it—Local authorities MCD etc. to process the application for sanction of the plan after the Archaeological Survey of India (ASI) accorded the approval—By virtue of notification dated 16.06.1992 of ASI, all construction within 100 meters of the protected monuments were prohibited—The ASI used to consider application for permission within this area on case-to-case basis—Constituted an expert Committee—The High Court in an earlier LPA held that the notification constituting the Expert Committee and consequent permission accorded by it, beyond the authority conferred upon the ASI by Act—Had a snow boiling effect since ongoing construction at various stages throughout country jeopardized—The executive step-in and issued an ordinance setting up an Authority to oversee implementation of enactment and at the same time validating subject to certain condition, permission granted by expert committee from time to time—Later

on, the ordinance was replaced by an Act which amended the Ancient Monument Act, 1958—Appellant filed writ petition against the grant of permission—Contended the permission granted to the second respondent illegal and could not be implemented—The permissions conditioned upon time would be routinely extended and this defeats the very concept of prohibited area—ASI contented before Ld. Single Judge in view of the amended provision of the Act, the petition had been rendered merit less—Single Judge accepted the arguments that provision validates the permission and not the construction already carried out—The question which arose was whether the said permission was time bound—If so, whether the validation by amendment of the Act of the said permission permitted the extension of time for raising the construction—Court Observed—The permission as recommended by EAC and as granted by Director General, ASI were not time bound—Such condition of time was added by Superintending Archaeologist while communicating the permission to the applicant to ensure compliance—Observed—Countersigning Authority cannot add to the conditions attached to the permission by primary authority—Thus, superintending archaeologist as countersigning Authority, had no power to add to the condition attached to the permission—Appeal dismissed.

The impugned judgment had relied upon the decision – **V.P. State Road Transport Corporation v. ACP (Traffic)Delhi** 2009 (3) SCC 634 where the authority empowered to administer the orders of the competent authority, was held not to possess the powers of the primary authority and impose further conditions. In our opinion, the view taken by the learned Single Judge was correct. Besides, we notice that if the one year time limit had to be adhered to, the whole purpose of the proviso which the parties were concerned with in this case would have been defeated. This

is for the simple reason that the validation sought to achieve a basic objective, i.e. to ensure that the Expert Committee's recommendations, giving clearance to specific construction activities, were protected from the deleterious effects of the Division Bench ruling on 30.10.2009. If the time limits in such cases are to be read as an integral part of the permission, the entire object of enacting the proviso itself, in our opinion, would be defeated. Further, building activity planning is complex in metropolitan areas like Delhi where a potential user would have to seek permissions and approvals from multifarious bodies or authorities. In Delhi, for instance, such sanctions or permissions would have to be obtained from the MCD, in many cases, from the Delhi Urban Arts Commission, and in some instances, from the AAI and the NDMC and so on. If each body are to insist on time limit and themselves are unable to process the applications within the time, the concerned applicant would be deprived of the benefit of his property. Our attention was also drawn to the recent judgment of the Supreme Court in **ASI v. Narendra Anand,** Civil Appeal No. 2430/2006 dated 16.01.2012. We have been taken through the said judgment. Apart from quoting the relevant provisions of law, there is no direct interpretation of the two provisos with which the present case is concerned. That judgment set-aside the ruling of the Division Bench of this Court, which had in fact directed the ASI to confirm its position vis-a-vis the prohibited area. The Court noticed that with the coming into force of the amended Act, the Division Bench ruling could not be sustained.

(Para 6)

Important Issue Involved: The countersigning Authority cannot add to the conditions attached by the primary Authority.

[Gu Si]

APPEARANCES:

FOR THE APPELLANT : Dr. Saif Mahmood, Advocate.

FOR THE RESPONDENT : Sh. Jayant Tripathi, Advocate, for ASI. Sh. Shivram, Advocate, for Resp. No.2. Ms. Prerna Verma, Advocate, for Ms. Mini Pushkarna, Advocate, for MCD.

CASES REFERRED TO:

1. *ASI* vs. *Narendra Anand,* Civil Appeal No. 2430/2006 dated 16.01.2012.
2. *V.P. State Road Transport Corpn.* vs. *Assistant Commissioner of Police (Traffic) Delhi* 2009 (3) SCC 634.

RESULT: Appeal dismissed.

S. RAVINDRA BHAT (OPEN COURT)

1. The present appeal impugns a judgment of the learned Single Judge dated 10.10.2011 in W.P. (C) 4357/2011 by which the writ petitioner (who is the appellant here), had questioned the permission granted by the respondent – Archaeological Survey of India (ASI) to the second respondent to construct within 100 metres of the Humayun Tomb – a protected monument under the Ancient Monuments Act, 1958.

2. The facts necessary for the purpose of this judgment are that the second respondent apparently purchased the property – A-10, Nizamuddin East, New Delhi-16 and sought for permission to construct upon it. The local authorities, such as the Municipal Corporation of Delhi (MCD) etc. were to proceed with the application for sanction of the plans, after the ASI accorded its approval. By virtue of a Notification dated 16.06.1992 of the ASI, all constructions within 100 metres of protected monuments were prohibited. Apparently, over a period of time, the ASI used to consider applications for permissions within this area on case-to-case basis and had constituted an Expert Committee for this purpose. This Court, in a Division Bench judgment had occasion to deal with that practice. In L.P.A. No. 417/2009, by its judgment dated 30.10.2009, the Court held that the Notification constituting the Expert Committee and the consequent permissions accorded by it were beyond the authority conferred upon the ASI by the Act. This had a snow-balling effect since ongoing constructions at various stages throughout the country were

jeopardized. In order to obviate situation, the executive stepped in and issued an Ordinance, setting-up an authority to oversee implementation of the enactment and at the same time, validating, subject to certain conditions, the permissions granted by the Expert Committees from time to time. Later, the Ordinance was replaced by an Act, which amended the Ancient Monuments Act, 1958.

3. The appellant had complained that the permission granted to the second respondent by the ASI's Expert Committee dated 26.06.2008 was illegal and could not be implemented. Several contentions were made in the course of the writ proceeding; the ASI had, during the submissions before the learned Single Judge urged that in view of the amended provisions of the Act, the petition had been rendered meritless. The learned Single Judge, by the impugned judgment noticed the concerned law -the two provisos to Section 20(A)(3) of the amended Act. The relevant discussion, rejecting the appellant's contention is found in the following extract:

> "XXXXXX XXXXXX XXXXXX
>
> 18. I am satisfied with the argument of the counsel for the respondent no.1 ASI that the proviso aforesaid validates the permissions and not the constructions already carried out. The question which thus arises is, whether the said permission was time bound and if so, whether the validation by amendment aforesaid of the Act, of the said permission permits the extension of time for raising construction.
>
> 19. The permissions for raising construction notwithstanding the prohibition came to be granted on case to case basis, as aforesaid, pursuant to the direction of the Division Bench of this Court in **Narendra Anand**. Neither the judgment in **Narendra Anand** nor the note dated 8th June, 2006 (supra) constituting EAC for recommending grant of such permissions is shown to be containing any such condition requiring the permissions to be time bound. It is the case as aforesaid of ASI and which I have no reason to disbelieve that the permission as recommended by the EAC and as granted by the Director General ASI were not time bound and such condition of time was added by the Superintending Archaeologist while communicating the permission to the applicant, to ensure compliance. What is to be gauged in

the said scenario is the weightage to be given to such condition. I am of the view that the condition of time incorporated in such backdrop cannot be said to be going to the root of the permission, when neither the EAC nor the sanctioning authority had deemed it appropriate to make the permission time bound and when condition of time was introduced only by the authority which was to oversee compliance. The Apex Court in **V.P. State Road Transport Corpn. V. Assistant Commissioner of Police (Traffic) Delhi** 2009 (3) SCC 634 noticed the difference between conditions imposed by the primary authority and conditions imposed by the "countersigning authority" in that case. It was held that the jurisdiction to cancel the permit for breach of conditions imposed by the primary authority, is of the primary authority only and not of the counter signing authority. Similarly the proviso to Section 20(A) 3 with which we are concerned in the present case also talks of permission by the Director General, ASI on the recommendation of the EAC and which permission is not found to be time bound. Thus the said permission cannot be said to have ceased to be in existence for the reason of lapse of time imposed by the Superintending Archaeologist.

20. Time in such circumstances cannot also be said to be of essence. When time is not of essence, it is extendable. In the facts of the present case there are more than sufficient reasons for the respondent no.2 ECC having not been able to avail the permission within the time granted. Time is even otherwise not shown to have any relevance to the permission granted. During the course of hearing, the Minutes of the 15th and 19th Meetings of EAC held on 7th May, 2008 and 22nd January, 2009 were handed over. A perusal thereof shows that the conditions which weighed with the EAC for recommending permission for construction on subject property, were existence of several buildings between the protected monument and subject property and allowing construction on subject property of same height as other existing buildings not affecting the skyline any further. The said factors which resulted in grant of permission are not found to have any relevance to time. It is not the case of the petitioner that the buildings earlier existing and owing whereto it was earlier felt that construction on subject property will not affect the

skyline, have now ceased to exist.

21. Even otherwise, ASI save for within the prohibited/restricted area is not concerned with construction which is otherwise regulated generally by the municipal body. The Municipal body generally while granting sanction for construction limits the time therefor but which time is extendable. Imposition of such time is also to ensure compliances of the conditions subject to which such sanction is granted.

22. There is nothing in the Act also to show time to be of any relevance. Once the EAC and the Director General, ASI had in accordance with the state of affairs then prevailing permitted construction and which permission has now been validated by amending the Act, there is nothing to show in the amending Act that only those permissions time whereof had not expired were intended to be validated and not others. The Act was amended on 30th March, 2010 to allow/validate something which had been invalidated vide judgment dated 30th October, 2009 of the Division Bench of this Court. The Legislature cannot be held to be oblivious of the permissions so granted being time bound. The Legislature however chose to validate the permissions and which include permissions validity whereof, as fixed by the overseeing authority, had expired. The Legislature did not make any distinction between the permissions time whereof had expired and permissions time whereof had not expired. The only conclusion is that the benefit of the amendment is intended for all permissions. There is even otherwise no reason for discriminating between the two types of permissions.

23. I am therefore of the opinion that the permission was not time bound and the time fixed by the Superintending Archaeologist was neither part of the recommendation of the EAC nor the permission of the Director General, ASI.

XXXXXX XXXXXX XXXXXX"

4. It is urged by the appellant's counsel that the impugned judgment overlooked a very material aspect, i.e. openness of the time limit and also the extension of the time limits by the ASI from time to time, which defeats the purpose of the enactment as it permits construction on the

basis of a limited one-time extension in perpetuity. It is submitted that if the reasoning of the learned Single Judge were to be sustained, permissions conditioned upon time would be routinely extended and this defeats the very concept of a prohibited area which received statutory recommendation through controlling provisions of Section 20(A) itself.

5. As may be seen from the extract of the impugned judgment, learned Single Judge was of the opinion that the condition of time imposed was by the Superintending Archaeologist in this case even though the Director General, ASI as well as the Expert Advisory Committee had not communicated any such time limit. We are of the opinion that the contentions made are without merit. The findings in paras 18 and 19 are that the Superintending Archaeologist was merely concerned with compliance with the permission given and could not, of his own, impose further conditions since he was not the primary authority for the decision. It is argued that the actual permission granted by the DG ASI was not on the record.

6. The impugned judgment had relied upon the decision – **V.P. State Road Transport Corporation v. ACP (Traffic)Delhi** 2009 (3) SCC 634 where the authority empowered to administer the orders of the competent authority, was held not to possess the powers of the primary authority and impose further conditions. In our opinion, the view taken by the learned Single Judge was correct. Besides, we notice that if the one year time limit had to be adhered to, the whole purpose of the proviso which the parties were concerned with in this case would have been defeated. This is for the simple reason that the validation sought to achieve a basic objective, i.e. to ensure that the Expert Committee's recommendations, giving clearance to specific construction activities, were protected from the deleterious effects of the Division Bench ruling on 30.10.2009. If the time limits in such cases are to be read as an integral part of the permission, the entire object of enacting the proviso itself, in our opinion, would be defeated. Further, building activity planning is complex in metropolitan areas like Delhi where a potential user would have to seek permissions and approvals from multifarious bodies or authorities. In Delhi, for instance, such sanctions or permissions would have to be obtained from the MCD, in many cases, from the Delhi Urban Arts Commission, and in some instances, from the AAI and the NDMC and so on. If each body are to insist on time limit and themselves are unable to process the applications within the time, the concerned applicant

would be deprived of the benefit of his property. Our attention was also drawn to the recent judgment of the Supreme Court in **ASI v. Narendra Anand,** Civil Appeal No. 2430/2006 dated 16.01.2012. We have been taken through the said judgment. Apart from quoting the relevant provisions of law, there is no direct interpretation of the two provisos with which the present case is concerned. That judgment set-aside the ruling of the Division Bench of this Court, which had in fact directed the ASI to confirm its position vis-a-vis the prohibited area. The Court noticed that with the coming into force of the amended Act, the Division Bench ruling could not be sustained.

7. In view of the above discussion, we find no merit in the appeal, which has to fail; the appeal and all pending applications are accordingly dismissed.

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W.P.(C)

HARDWARI LAL AND ANR. ....PETITIONER

VERSUS

LAND ACQUISITION COLLECTOR/ADM (W) AND ANR. ....RESPONDENTS

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

W.P. (C) NO. : 1147/2012 DATE OF DECISION: 27.02.2012

Land Acquisition Act, 1894—Section 4, 6, 16, 18, 30, 31, 34—East Punjab Holdings (Consolidation of Fragmentation) Act, 1948—Section 42—Constitution of India, 1950—Article 226—Land of petitioners acquired for public purpose of Rohini Residential Scheme—Petitioners moved application seeking release of compensation in their favour—One AR objected before LAC that petitioners had got more land during

consolidation proceedings than was due to them at his cost and that land of petitioners belong to Gaon Sabha—Land Acquisition Collector, (LAC) disposed of objections finding that there is no merit in objections and there was no prima facie dispute of apportionment and directed release of compensation in favour of petitioners—AR filed proceedings before Financial Commissioner (FC) seeking implementation of certain documents, which petitioners claimed were forged—FC issued direction to Deputy Commissioner (West) to inquire into objections raised by AR qua consolidation and directed compensation be not released in favour of any party—Revenue authorities submitted that documents on basis of which AR had claimed rights, were not genuine and were based on forged documents—Revision Petition dismissed by FC and compensation including principal amount and interest released in favour of petitioners—Writ filed before High Court claiming interest in respect of delayed payment—Plea taken, compensation has not been paid by LAC to petitioners for period of delay when proceedings were pending before FC and period when inquiry in pursuance to order of FC, took place—If FC has passed a wrong order, petitioners should not be made to pay for it by sacrificing interest for that period of time—Held—LAC did not cause any delay and a decision was taken promptly on objections of AR that prima facie no case was established for reference of dispute qua apportionment—LAC is not a beneficiary of any amount but only seeks to distribute amount obtained from beneficiary of land—Interest is also paid by beneficiary—LAC was willing to disburse amount after dealing with objections of AR but for interdict by order of FC-LAC is not party which persuaded court to pass order which was ultimately held unsustainable—LAC was handicapped by reason of interdict of order passed by FC and thus, could not itself deposit amount with reference court—Petitioners

did not assail order of FC and thus accepted order—Acceptance of order of FC implies petitioners were satisfied with arrangement that inquiry should be made qua claim of AR and amount should not be disbursed till such inquiry is complete—If petitioners were aggrieved by these directions, nothing prevented petitioners from assailing the same in appropriate proceedings—Principle of restitution by LAC would not apply as LAC was not responsible for what happened—Petitioners have not claimed any relief against AR nor AR has been impleaded as a respondent in present proceedings.

It is in the contours of these facts that the issue of liability to pay interest has been discussed in para nos.23 to 27 of the said judgment, which read as under:

> "Liability of the consumers/purchasers to pay interest to the Coalfields:
>
> (b) for the period for which the restraint order passed by the Court remained in operation
>
> 23. On the principle which we have upheld just hereinabove, it would not have been necessary to enter into this aspect of the issue, however, it becomes necessary to deal therewith inasmuch as it was submitted on behalf of the consumers/purchasers that their non-payment of enhanced amount of royalty was protected by judicial orders, though of an interim nature, passed by the courts, and therefore, they should not be held liable for payment of interest so long as the money was withheld under the protective umbrella of the court order. Merely because the writ petitions were finally held liable to be dismissed, it cannot be urged that the interim orders passed by the courts were erroneous. Soon on dismissal of their writ petitions, the payment of the enhanced amount of royalty which was disputed earlier was promptly cleared

by the writ petitioners and, therefore, their act was bona fide. We find no merit in this submission either.

24. In our opinion, the principle of restitution takes care of this submission. The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see **Zafar Khan v. Board of Revenue, U.P.**) In law, the term "restitution" is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another. (See *Black's Law Dictionary,* 7th Edn., p. 1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that "restitution" is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done:

"Often, the result under either meaning of the term would be the same. ... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of \a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed-upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed."

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so

as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final decision. **The validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand** (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) **to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed.** There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

25. Section 144 CPC is not the fountain source of restitution, it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In **Jai Berham v. Kedar Nath Marwari** Their Lordships

of the Privy Council said: (AIR p. 271)

"It is the duty of the court under Section 144 of the Civil Procedure Code to 'place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed'. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly according to the circumstances towards all parties involved."

Cairns, L.C. said in **Rodger v. Comptoir D'Escompte de Paris**: (ER p. 125)

"[O]ne of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression, 'the act of the court' is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case."

This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it (A. *Arunagiri Nadar v. S.P. Rathinasami*[13]). In the exercise of such inherent power the courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.

26. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the "act of the court" embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the court being wrongful or

a mistake or error committed by the court; **the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party.** The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is real and substantial justice. **The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so.** Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding

out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.

27. Once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution. Such interest is not controlled by the provisions of the Interest Act of 1839 or 1978." **(Para 8)**

Important Issue Involved: Where LAC did not form any opinion that there was dispute of apportionment which required adjudication by a court and if release of compensation is stayed by Financial Commissioner exercising jurisdiction on a revision petition by an objector under Section 42 of the East Punjab Holdings (Consolidation of fragmentation) Act, 1948, principle of restitution by LAC to the petitioners would not apply as LAC was not to blame for what happened.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. B.S. Maan and Ms. Samita Maan, Advocates.

FOR THE RESPONDENT : Mr. Sanjay Kumar Pathak, Advocate.

CASES REFERRED TO:

1. *Sh.Hardwari Lal & Anr.* vs. *Land Acquisition Collector (W) & Ors.* WP(C) No.6580/2010.
2. *South Eastern Coalfields Ltd.* vs. *State of MP and Ors.* AIR 2003 SC 4482(1).

RESULT: Dismissed.

SANJAY KISHAN KAUL, J. (Oral)

1. The petitioners claims to be Bhumidars of the land measuring 22 bighas and 18 biswas of the land situated in the Revenue Estate of Village Mundka, Delhi allotted to the petitioners in the consolidation proceedings. A notification under Section 4 of the Land Acquisition Act, 1894 ('the said Act' for short) was issued on 21.03.2003 seeking to acquire 1703 bighas and 18 biswas of the land situated in the Revenue Estate of Village Mundka, Delhi including the land of the petitioners for the public purpose of Rohini Residential Scheme. The declaration under Section 6 of the said Act was issued on 19.03.2004 and award was passed bearing no.3/D.C./W/2005-06 dated 27.01.2006 determining the market value of the land of the petitioners and the other land owners. The possession of the land of the petitioners is stated to have been taken over under Section 16 of the said Act by R-1 on 19-20.01.2007 and 12.04.2007. The petitioners moved an application seeking release of compensation in their favour, but one Sh.Atma Ram filed objections dated 14.06.2007 before the Land Acquisition Collector/R-1. It was the case of Sh.Atma Ram that the petitioners had got more land during the consolidation proceedings than was due to them at his cost and that the land of the petitioners belong to the Gaon Sabha. However, R-1 disposed of the objections on 01.10.2007 finding that there was no merit in the objections and there was no prima facie dispute of apportionment within the meaning of Section 30 of the said Act. The R-1 directed release of compensation in favour of the petitioners.

2. The grievance of the petitioners now started as Sh.Atma Ram filed proceedings before the Financial Commissioner, Delhi as Case No.204/2007-CA under Section 42 of The East Punjab Holdings (Consolidation of Fragmentation) Act, 1948 ('the Consolidation Act' for short) seeking implementation of certain documents which the petitioners claimed were forged. In those proceedings, the LAC was also impleaded as a party apart from the petitioners. The Financial Commissioner in his wisdom admitted the petition and ordered maintenance of status quo. These proceedings were disposed of by the Financial Commissioner vide Order dated 21.02.2008. The Financial Commissioner issued direction to the Deputy Commissioner (West) to enquire into the objections raised by Sh.Atma Ram qua the issue of consolidation and submit a report to the

Court. It is important to note that para 14 of the order contains this direction and towards the end of para 13 it was observed as under:

> "However, in order that no prejudice is caused to either party, the compensation for the suit land also shall not be released in favour of any party."

3. The result of the aforesaid order was that the compensation was still not disbursed to the petitioners.

4. The revenue authorities submitted their enquiry report concluding that the documents on the basis of which Sh.Atma Ram had claimed rights were not genuine and were based on forged documents. The proceedings were, thus, revived before the Financial Commissioner and as the same were adjourned on couple of occasions, the petitioners filed WP(C) No.6580/2010 titled **Sh.Hardwari Lal & Anr. v. Land Acquisition Collector (W) & Ors.** In those proceedings, a direction was issued on 27.09.2010 by this Court directing the Financial Commissioner to dispose of the proceedings before him within a period of two months. The Financial Commissioner finally dismissed the revision petition filed by Sh.Atma Ram on 16.06.2011. The petitioners on 20.06.2011 claimed to have applied for release of the compensation and thus compensation was released on 02.08.2011 of Rs.1,23,08,156/- including principal amount and interest.

5. It is the plea of the petitioners that the amount of statutory interest under Section 34 of the said Act in respect of the delayed payment to the petitioners has not been released as the possession was taken over on 19-20.01.2007 and 12.04.2007 while the compensation was paid on 02.08.2011. In effect the compensation has not been paid by the LAC to the petitioners for the period of delay when the proceedings were pending before the Financial Commissioner and the period when the enquiry in pursuance to the order of Financial Commissioner took place. It is also the plea of the petitioners that the amount in question ought to have been deposited with the competent court and not withheld by the LAC himself.

6. Since the requests made by the petitioners in this regard on 29.08.2011and 19.11.2011 received negative response on 22.11.2011 stating that the amount could not be released due to orders passed by the Financial Commissioner, the present writ petition under Article 226 of the

Constitution of India has been preferred seeking the following prayer:

> "a) Pass a writ (s), order (s) or direction (s) in the nature of mandamus directing the respondents particularly respondent no.1 to pay the interest under Section 34 of the Land Acquisition Act, 1894 for delayed payment of compensation amount to the petitioners in respect of the acquired lands of the petitioners, which have been acquired by respondent no.1 vide award No.03/ DC/W/2005-06 dated 27.01.2006 to the petitioners"

7. The case of the petitioners is based on the principle of restitution i.e. if the Financial Commissioner has passed a wrong order, the petitioners should not be made to pay for it by sacrificing the interest for that period of time. In this behalf, learned counsel for the petitioners has relied upon the judgment of the Supreme Court in **South Eastern Coalfields Ltd. v. State of MP and Ors.** AIR 2003 SC 4482(1). In the said matter, the Supreme Court was examining the issue of delay in payment of royalty to the State of Madhya Pradesh under the Mines and Minerals (Regulation and Development) Act, 1957. In the first round of litigation, interim orders qua the payment of royalty at enhanced rates were granted and those proceedings ultimately did not succeed. The second round of proceedings began as the State Government demanded interest on the differential portion of the royalty which had not been paid and coal fields in turn demanded interest from the purchasers of the coal.

8. It is in the contours of these facts that the issue of liability to pay interest has been discussed in para nos.23 to 27 of the said judgment, which read as under:

> "Liability of the consumers/purchasers to pay interest to the Coalfields:
>
> (b) for the period for which the restraint order passed by the Court remained in operation
>
> **23.** On the principle which we have upheld just hereinabove, it would not have been necessary to enter into this aspect of the issue, however, it becomes necessary to deal therewith inasmuch as it was submitted on behalf of the consumers/purchasers that their non-payment of enhanced amount of royalty was protected by judicial orders, though of an interim nature, passed by the courts, and therefore, they should not be held liable for payment

of interest so long as the money was withheld under the protective umbrella of the court order. Merely because the writ petitions were finally held liable to be dismissed, it cannot be urged that the interim orders passed by the courts were erroneous. Soon on dismissal of their writ petitions, the payment of the enhanced amount of royalty which was disputed earlier was promptly cleared by the writ petitioners and, therefore, their act was bona fide. We find no merit in this submission either.

24. In our opinion, the principle of restitution takes care of this submission. The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see **Zafar Khan v. Board of Revenue, U.P.**) In law, the term "restitution" is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another. (See *Black's Law Dictionary,* 7th Edn., p. 1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that "restitution" is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done:

"Often, the result under either meaning of the term would be the same. ... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed-upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed."

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so as to

include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final decision. **The validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand** (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) **to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed.** There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

25. Section 144 CPC is not the fountain source of restitution, it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In **Jai Berham v. Kedar Nath Marwari** Their Lordships of the Privy Council said: (AIR p. 271)

"It is the duty of the court under Section 144 of the Civil Procedure Code to 'place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed'. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the court to act rightly and fairly

according to the circumstances towards all parties involved."

Cairns, L.C. said in **Rodger v. Comptoir D'Escompte de Paris:** (ER p. 125)

"[O]ne of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and when the expression, 'the act of the court' is used, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case."

This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it (A. *Arunagiri Nadar v. S.P. Rathinasami*[13]). In the exercise of such inherent power the courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.

26. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the "act of the court" embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; **the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party.** The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when

at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is real and substantial justice. **The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so.** Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation.

27. Once the doctrine of restitution is attracted, the interest is often a normal relief given in restitution. Such interest is not controlled by the provisions of the Interest Act of 1839 or 1978."

9. The aforesaid paragraphs set out the principle that if benefits are earned by an opposite under interim orders of the Court, it is permissible for the Court to restitute the party which has been deprived of the benefit. It has been elaborated that no one will suffer by an act of the Court is not a rule confined to an erroneous act of the court but embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law

10. We may notice an important fact that in that case i.e. **South**

Eastern Coalfields Ltd. v. State of MP and Ors. case (supra) the challenge laid to the enhancement of royalty was not by any of the coal fields but by the consumers/purchasers. The coal fields were, in fact, impleaded as respondents. The Supreme Court had set aside the decision of the High Court of Madhya Pradesh and directed the writ petitions filed in the High Court to be dismissed. This is qua the first round.

11. In order to appreciate the plea of the petitioners, we have to look to the scheme of the said Act. The scheme envisages that the authority seeking compulsory acquisition of land under the said Act has to approach the concerned Department/LAC. The compensation is deposited with the LAC and on conclusion of the acquisition proceedings, the compensation is paid by the LAC to the owner of the land. The LAC is not the beneficiary. It has no personal interest in the amount deposited with it. Part IV of the said Act deals with the apportionment of the compensation. The relevant Section 30 falling under Part IV of the said Act reads as under:

> **"30. Dispute as to apportionment.** - When the amount of compensation has been settled under section 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof, is payable, the Collector may refer such dispute to the decision of the Court."

12. In the present case, the LAC performed its obligations under Section 30 of the said Act and, in fact, rejected the claim made by Mr.Atma Ram. The operative portion of the order of the LAC dated 01.10.2007 reads as under:

> " So, in view of above, no prima facie dispute u/s 30 of the Land Acquisition Act, 1894 is made out and payment of compensation be released in favour of interested persons as per the latest revenue record."

13. The LAC, thus, did not form any opinion that there was dispute of apportionment which required adjudication by a Court. It is another matter that the Financial Commissioner thereafter exercised jurisdiction on a revision petition filed by Sh.Atma Ram under Section 42 of the Consolidation Act.

14. Learned counsel for the petitioners seeks to rely upon the Part V of the said Act dealing with payment. The relevant provisions referred to are under Section 31 (1) & (2) which read as under:

> "31. Payment of compensation or deposit of same in Court. -
>
> (1) On making an award under section 11, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award and shall pay it to them unless prevented by some one or more of the contingencies mentioned in the next sub-section.
>
> (2) If they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted:
>
> Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount:
>
> Provided also that no person who has received the amount otherwise than under protest shall be entitled to make any application under section 18:
>
> Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto."

15. Learned counsel for the petitioners contends that it was the bounded duty of the LAC to have deposited the amount of compensation in the Court to which reference under Section 18 of the said Act would be submitted. Learned counsel submits that the petitioners have sought reference for enhancement of compensation under Section 18 of the said Act though he concedes that these facts have not been set out in the present writ petition.

16. There can be no quibble, in our considered view, with the principles laid down by the Supreme Court qua the issue of restitution as enunciated in **South Eastern Coalfields Ltd. v. State of MP and**

Ors. case (supra). It is, however, an equitable principle which must be based on the facts of each case.

17. In our considered view, such a restitution to the petitioners at the cost of the R-1 would not be permissible for the following reasons:

(i) The LAC did not cause any delay but on the other hand when the compensation was sought to be disbursed to the petitioners and Mr.Atma Ram filed an application, a decision was taken promptly on 01.10.2007 holding that Sh.Atma Ram had not been able to establish any prima facie case for reference of the dispute qua apportionment under Section 30 of the said Act.

(ii) The LAC is not a beneficiary of any amount, but only seeks to distribute the amount obtained from the beneficiary of the land. The interest is also paid by the beneficiary. That beneficiary in turn had deposited the amount with the LAC and the LAC was willing to disburse the amount after dealing with the objections of Sh.Atma Ram but for the interdict by the order of the Financial Commissioner.

In **South Eastern Coalfields Ltd. v. State of MP and Ors.** case (supra), it is noted that the test is whether "on account of an act of the party persuading the court to pass an order held at the end as not sustainable", the other party has suffered impoverishment. In the facts of the present case, no order has been passed at the behest of R-1. The order was passed at the behest of Sh.Atma Ram. Thus, the LAC is not the party which persuaded the court to pass an order which was ultimately held unsustainable. It has also been observed that the injury would be undone by suitably commanding the party liable to do so. Once again, the LAC is not the party "liable to do so".

(iii) If the petitioners plead on the basis of the reference sought under Section 18 of the said Act that the amount of compensation ought to have been deposited in the civil court, no averments in this petition have been made and, in any case, the petitioners did not also call upon the LAC to deposit that amount in those proceedings. The LAC was handicapped by reason of the interdict of the order passed by the Financial Commissioner and thus could not itself have deposited the amount with the reference court under Section 31 of the said Act.

(iv) The Financial Commissioner passed an order on 21.02.2008. That order deemed it appropriate that an enquiry into the complaint made by Sh.Atma Ram should be carried out by the Deputy Commissioner (West). While passing the said direction, the Financial Commissioner was further pleased to direct that the compensation shall not be released in favour of any party so that the parties are not prejudiced. It is an undisputed position that this order was not assailed by the petitioners and the petitioners, thus, accepted this order. The acceptance of this order implies that the petitioners were satisfied with the arrangement that an enquiry should be made qua the claim of Sh.Atma Ram and that the amount should not be disbursed till such an enquiry is complete. If the petitioners were aggrieved by these directions, nothing prevented the petitioners from assailing the same in appropriate proceedings especially since the petitioners in their wisdom on account of delay in conclusion of proceedings by the Financial Commissioner post the report had moved this Court in WP(C) No.6580/2010 when directions were issued for early conclusion of the proceedings before the Financial Commissioner.

18. We are thus of the considered view that in the given facts and circumstances, the principle of restitution by R-1 to the petitioners would not apply as the R-1 was not to blame for what happened. Interestingly, the petitioners have not claimed any relief against Sh.Atma Ram nor Mr.Atma Ram has been impleaded as a respondent in the present proceedings.

19. Dismissed.

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CRL. REV. P.

STATE **....PETITIONER**

VERSUS

PRAVEEN AGGARWAL **....RESPONDENT**

(SURESH KAIT, J.)

CRL. REV. P. NO. : 107/2012 **DATE OF DECISION: 28.02.2012**

Prevention of Food Adulteration Act, 1954—Section 13—Petitioner/State assailed judgment of acquittal passed by learned Special Judge whereby learned Special Judge had set aside judgment and order on sentence passed by learned ACMM-II, New Delhi—Petitioner urged, learned ASJ had completely ignored report of CFL as well as report of public analyst which were not contradictory in any manner and minor variation of two reports was not fatal to prosecution—According to Respondents once Director of CFL had examined sample and gave certificate then said certificate is final and conclusive evidence of facts—Held:- Presumption attached to certificates issued by Directorate of CFL is only in regard to what is stated in it, as to contents of sample actually examined by Director and nothing more—Even after this certificate, it is open to accused to show that sample sent for analysis could not have been taken to be representative sample of article of food from which it was taken.

Ld. Spl. Judge after considering the submissions of both the counsels of the parties carefully, while relying upon the case of **MCD vs. Bishan Sarup,** Crl. 1972, PFA Cases (Delhi) 273 of this court has clearly held that the presumption attaching to the Certificates issued by the Directorate of

CFL is only in regard to what is stated in it, as to the contents of the sample actually examined by the Director and nothing more. It has been further observed in the said judgment that even after this certificate, it is open to the accused to show that the sample sent for analysis could not have been taken to be representative sample of the article of food, from which it was taken. Thus, in view of this clear judicial dicta, contention of the the accused, in view of the report of the Director, CFL is not allowed to raise objection that the sample was not representative, cannot be upheld at all. **(Para 10)**

Important Issue Involved: Presumption attached to certificates issues by Directorate of CFL is only in regard to what is stated in it, as to contents of sample actually examined by Director and nothing more—Even after, this certificate it is open to accused to show that sample sent for analysis could not have been taken to be representative sample of article of food from which it was taken.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Navin Sharma, APP for State.

FOR THE RESPONDENT : Nemo.

RESULT: Petition dismissed.

SURESH KAIT, J. (Oral)

Crl. M.A. 2626/2012

Exemption is allowed subject to just exceptions.

Criminal M.A. stands disposed of.

Crl. M.A. 2625/2012 (Delay)

For the reasons explained, delay of 110 days stands condoned. Criminal M.A. stands disposed of.

+ Crl. Rev. P. 107/2012

1. Vide the instant petition, the petitioner/State has assailed the impugned judgment dated 30.07.2011, whereby ld. Special Judge, NDPS has set aside the judgment dated 21.12.2010 and order on sentence dated 24.12.2010 passed by ld. ACMM-II, New Delhi District and respondent has been acquitted from all the charges.

2. Mr.Navin Sharma, learned counsel for the petitioner has stated that ld. Special Judge has got swayed away by the fact that according to the report of public analyst that the fat content was found to be 43.69% and according to CFL Report the same was found to be 45.26% and such minor variation ought not to have been fatal to the prosecution.

3. It is further submitted by the ld. APP that non-joining of the independent witnesses is not fatal to the case of prosecution and minor contradictions in the testimony of the Food Inspector and the SDM do not disprove the prosecution case. Minor contradictions had to be ignored.

4. It is further submitted that ld. ASJ has completely ignored the report of CFL dated 12.08.2005 as well as the public analyst and has reached on a conclusion on the basis of conjectures and surmises.

5. The case of the prosecution in brief as put up before the ld. Trial Court is as under:-

> "(a) On 19.03.2005 at about 8 p.m., Food Inspector Sh.Hukum Singh purchased a sample of Paneer, against a payment of Rs.57/- a food article for analysis from the shop of the appellant i.e. M/s. Aggarwal Sweets, Sweets India, 2/80B, Club Road, West Punjabi Bagh, New Delhi – 110026 where the said article was found stored for sale in an open tray bearing no legal declaration and the appellant was found to be owner of the shop.
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> (b) It was the case of the complainant before the ld. Trial Court that the sample was taken after properly cutting the Paneer it into smallest possible pieces with the help of a clean and dry knife, then mixed properly and thereafter divided into three equal parts. One of the counterparts of the sample was sent to the Public Analyst for analysis and as the report the sample was not upto the standards laid down, because milk fat of dried matter was found to be only 43.69% which is less than the prescribed

> minimum limit of 50%.
>
> (c) As per the appellant herein had desired to get the sample to be analysed by the Central Food Laboratory by invoking the provisions of Section 13(2) of the PFA Act, the same was sent to the CFL, Pune for analysis. Certificate NO. CFL/379/426/2005 issued by the Director, CFL, Pune dated 12/08/2005 also indicates that the sample does not conform the standards of Paneer, as per the PFA Rules, 1955, as the dried matter only contained 45.26% of Milk fat which is less than the prescribed minimum limit 50.0% of dry matter.
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> (d) On the basis of the entire evidence led before the ld. Trial Court before him, the ld. ACMM-II found the accused guilty of adulteration of food article and hence, convicted him, accordingly."

6. Being aggrieved, the judgment of ld. ACMM was assailed before the court of Sessions on the ground that evidence of complainant proved that the sample of paneer was not properly mixed and homogenized and that, therefore, the evidence shows that the sample taken from the shop of the appellant was not a representative sample. As argued by the respondent that the SDM, who appeared as PW-1 before the ld. Trial Court admitted in his cross-examination that sample of Paneer after being cut into small pieces was mashed with the help of hands and knife due to which some quantity of fact had stuck on the hands of the Food Inspector. He further argued that this testimony not only shows that the sample was taken in an improper manner, but it also falsifies the testimony of the Food Inspector Hukum Singh, PW-2, who in his cross-examination has denied that Paneer was mashed with the hands.

7. It is also argued by the respondent that if it is taken that 100 gm. of Paneer was analyzed in CFL then as per the report dated 12.08.2005, the dried material therein was found to be 37% i.e. 37 gms., out of which milk fat was found to be 45.26% of the dried material which translates into 16 gms. Approximately and it shows that Milk fat was less than permissible prescribed limit of 50% i.e. 18.5 gms, only to the extent of 2 gms.

8. The sample taken was not representative, is also apparent from the fact that though the report of the public analyst indicted the Fat

content was found to be 43.69%, CFL Report found the same as 45.26%, though it is scientifically proven fact that over the passage of time, the milk fat content in a sample of Paneer decreases.

9. I note that the ld. ASJ has recorded the submission of ld. Counsel for the State that once the director of CFL has examined the sample and has given his certificate the said Certificate, that is final and conclusive evidence of the facts, as stated therein the present case. Once the Director, FSL has given a report that the Fat contents in the sample Paneer was found less than the permissible limit, the same cannot be questioned by the accused.

10. Ld. Spl. Judge after considering the submissions of both the counsels of the parties carefully, while relying upon the case of **MCD vs. Bishan Sarup,** Crl. 1972, PFA Cases (Delhi) 273 of this court has clearly held that the presumption attaching to the Certificates issued by the Directorate of CFL is only in regard to what is stated in it, as to the contents of the sample actually examined by the Director and nothing more. It has been further observed in the said judgment that even after this certificate, it is open to the accused to show that the sample sent for analysis could not have been taken to be representative sample of the article of food, from which it was taken. Thus, in view of this clear judicial dicta, contention of the the accused, in view of the report of the Director, CFL is not allowed to raise objection that the sample was not representative, cannot be upheld at all.

11. I note ld. Special Judge was of the considered opinion as under:-

> "In my considered opinion, in the present case in view of the material contradiction between the testimony of the Public Analyst and Food Inspector with respect to the manner of taking the sample, the accused is entitled to the benefit of doubt for the said contradiction itself shows that the benefit of doubt for the said contradiction itself shows that the testimony of the Food Inspector is not trustworthy and therefore, non-joining of Public Witnesses does appear to have an effect in the facts of the present case. Further in my considered opinion, the accused is also entitled to the benefit of doubt in view of the deposition of the SDM that during the process of sampling, the Paneer was mashed by hand and some of it did get stuck to the hands of the Food Inspector. In view of such kind of deposition it cannot be ruled out that some of the dried matter of the Paneer without the moisture had got stuck to the hands of the Food Inspector which made the sample unrepresentative. Further it has been rightly pointed out by the ld. Counsel for the appellant that the scientific evidence is to the effect that with passage of time the fat content in Paneer decreases and since in the present case the reports of the Public Analyst and the CFL report seem to suggest that the fat content in the sample increased with passage of time, the accused is entitled to acquittal. In all judgments relied upon by the ld. Counsel for the appellant, it has been consistently held that if there is a variation between the report of the public analyst and CFL, which is beyond the accepted norms, the accused would be entitled to the benefit of doubt. In the present case, it is not scientifically acceptable that fact content in the sample of paneer was found to increase with passage of time. In view of my discussion herein above, I am of the considered opinion that the order of conviction in the present case cannot be upheld and that the appellant should have been given the benefit of doubt by the ld. Trial Court. Accordingly, the judgment dated 21.12.2010 and the order on sentence dated 24.12.2010 passed by the ld. ACMM-II are hereby set aside. The appellant stands acquitted. His bail bond stands cancelled. Surety stands discharged. A copy of this order be sent to the ld. TrialCourt for record. Trial Court Record be also sent back. Appeal file be consigned to Record Room."

12. In view of the material contradictions in the testimony of Public Analyst and Food Inspector with respect of the manner of taking sample, and in view of the deposition of SDM that during the process of sampling, the Paneer was mashed by hand and some of it did stuck to the hands of Food Inspector, the respondent is entitled to benefit of doubt. Even otherwise, the scientific evidence to the fact that with the passage of time, the fat content in Paneer decreases and since in the present case, the report of the Public Analyst and the CFL report has suggested that the fat content in the sample increased with the passage of time, which is scientifically incorrect.

13. I find no discrepancy in the order dated 30.07.2011 passed by ld. Special Judge, rather it is a reasoned order. Therefore, I am not inclined to interfere with the order.

14. Accordingly, Crl. Rev. P. No. 107/2012 is dismissed.

15. No order as to costs.

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DIRECTORATE OF GURDWARA ELECTIONS & OTHERS **....APPELLANTS**

VERSUS

DASHMESH SEWA SOCIETY (REGD.) & OTHERS **....RESPONDENTS**

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

LPA NO. : 128/2012 & 133/2012 DATE OF DECISION: 01.03.2012

Constitution of India, 1950—Respondents sought mandamus against appellants commanding them to immediately complete election process and conduct elections—Learned Single Judge, directed appellants to first complete process of preparation of fresh electoral rolls and process of delimitation of wards/ constituencies before notifying general elections to post of members of Respondent Delhi Sikh Gurudwara Management Committee (DSGMC)—Aggrieved, appellants preferred appeal urging election process had begun and the court could not have interfered with election process—Held:- The word election cannot be restricted to the electoral process commencing

from issuance of notification and has to be interpreted to mean every stage from date of notification calling for election and the courts cannot interfere in the electoral process—Election process had clearly begun by publication of schedule of election—Order of Single Judge set aside.

The rule of, non-interference with the election process and leaving of objections/disputes to be decided in election petition, is a near absolute one. In the present case it is not in dispute that the term of the elected body had expired on 8th February, 2011 and the elections were / are due since then. The learned Single Judge has sought to carve out a way around the rule of non-interference with the election process by observing that the elections had not been notified till then though were scheduled to be notified on 16th February, 2012. However, the rule, of Courts being prohibited from interfering with the electoral process, cannot be permitted to be defeated by instituting a legal proceeding just before the election notification. The term of elected bodies is always fixed and it is generally known as to when the next election will be notified. If it were to be held that though Courts cannot interfere once elections are notified but can so interfere before such notification, though election may be imminent and can also restrain issuance of such notification, as has been done in the impugned order, the ultimate effect thereof will be of interference with/delay of elections and which is not permitted. Moreover, the test laid down in **A.K.M. Hassan Uzzaman and Inderjit Barua** (supra) of the applicability of rule of non-interference is also 'when the election is imminent' and when the order of the court 'has the tendency or effect of postponing an election' and not of 'when election has been notified'. Thus the judgment of the learned Single Judge is definitely an interference by the Court in the electoral process and which is not permitted. **(Para 10)**

Important Issue Involved: The word election cannot be restricted to the electoral process commencing from issuance of notification and has to be interpreted to mean every stage from date of notification calling for election (and the courts cannot interfere in the electoral process).

[Sh Ka]

APPEARANCES:

FOR THE APPELLANTS : Mr. K.T.S. Tulsi, Sr. Advocate with Mr. Rajiv Nanda, Additional Standing Counsel for GNCTD, Mohd. Aslam Khan, Advocates.

FOR THE RESPONDENTS : Mr. A.K. Mishra, Advocate for R-1 & 2. Mr. Arjun Pant, Advocate for NDMC.

CASES REFERRED TO:

1. *Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha* vs. *State of Maharashtra* (2001) 8 SCC 509.
2. *Election Commission of India* vs. *Ashok Kumar* (2000) 8 SCC 216.
3. *V.S. Achuthanandan* vs. *P.J. Francis* (1999) 3 SCC 737.
4. *Anugrah Narain Singh* vs. *State of U.P.* (1996) 6 SCC 303.
5. *Boddula Krishnaiah* vs. *State Election Commissioner,* A.P. (1996) 3 SCC 416.
6. *A.K.M. Hassan Uzzaman* vs. *Union of India* (1982) 2 SCC 218.
7. *Inderjit Barua* vs. *Election Commission of India* (1985) 1 SCC 21.
8. *Lakshmi Charan Sen* vs. *A.K.M. Hassan Uzzaman* (1985) 4 SCC 689.

RESULT: Appeals allowed.

RAJIV SAHAI ENDLAW, J.

1. These intra court appeals by, (i) the Directorate of Gurdwara Elections, (ii) the Lieutenant Governor, Delhi, and (iii) the Government of NCT of Delhi, impugn the common judgment dated 7th February, 2012 of a learned Single Judge of this Court in WP(C) No. 4166/2011 and WP(C) No. 311/2012 preferred by the respondents (a) Dashmesh Sewa Society (Regd.) and Shiromani Akali Dal (Delhi-U.K.) and (b) Shri Harmohan Singh respectively. Vide the impugned judgment, the learned Single Judge has inter alia directed the appellants, to first complete the process of preparation of fresh electoral rolls and the process of delimitation of wards/ constituencies before notifying the general elections to the post of members of the respondent Delhi Sikh Gurdwara Management Committee (DSGMC). It may be stated that the appellants had vide public notice dated 27th /28th January, 2012, scheduled the said Elections on 11th March, 2012 with notification for conduct of elections and filing of nomination papers to be issued on 16th February, 2012. The Learned Single Judge has in the impugned judgment dated 7th February, 2012 inter alia observed, that since the elections were then yet to be notified on 16th February, 2012, the election process could not be said to have begun for the bar to stay thereof being attracted.

2. WP(C) No. 4166/2011 was filed in or about June 2011 pleading that, (a) DSGMC is a statutory body constituted under Section 3 of the Delhi Sikh Gurdwaras Act, 1971 for management of Sikh Gurdwaras and their properties; (b) DSGMC comprises of 46 members to be elected from various wards into which Delhi is to be divided in accordance with the provision of the Act, besides nine co-opted / nominated members; (c) the term of the Committee is of four years; (d) that the last election of the members of the DSGMC were held on 14th January, 2007 and the term of the Committee then elected expired on 8th February, 2011; (e) that on representation of the respondents/writ petitioners Dashmesh Sewa Society and Shiromani Akali Dal (Delhi-U.K.), the work of preparation of fresh electoral rolls and of delimitation was commenced but had not been completed; (f) that the Delhi Government was not serious about holding fresh elections for membership of DSGMC. Accordingly, mandamus was sought commanding the appellants to immediately complete the election process and conduct the elections.

3. Whilst the aforesaid writ petition was pending consideration,

WP(C) No. 311/2012 was filed in or about January 2012 pleading that though, feeling the need for preparation of fresh voter list and for delimitation of wards which were fixed 25 years ago, directions in this regard were issued by the Lieutenant Governor, Delhi as far back as on 4th June, 2010 but till then neither process had been completed; on the contrary, elections were being threatened to be held on the basis of incomplete voter lists and wards fixed 25 years ago. Accordingly, direction was sought for preparation of electoral rolls having photograph of individual voters and for completion of the exercise of delimitation in terms of the Minutes of Meeting held by the Lieutenant Governor on 5th October, 2011 and before conducting the elections to the membership of the DSGMC.

4. The appellant, Government of NCT of Delhi filed Status Report before the learned Single Judge in WP(C) No. 311/2012 disclosing that subsequent to the meeting held on 5th October, 2011, the Lieutenant Governor had reviewed the progress and directed, (a) that existing (old) electoral rolls be merged with the newly prepared electoral rolls and the name of the electors existing in both the lists may be deleted from the old list and the combined electoral rolls may be published and utilized for the general elections of the members to the DSGMC; (b) that the exercise earlier undertaken of preparation of fresh electoral rolls shall be treated as revision of electoral rolls; (c) that the electoral rolls for the forthcoming General Elections be prepared without photographs and the identity of the voters may be verified at the time of polling on the basis of other identity documents; (d) that to facilitate the conduct of the elections to the DSGMC at the earliest, the delimitation of the Gurdwara Wards may be deferred to be taken up after the election of the new Committee. It was also disclosed that the following schedule for finalization of electoral rolls and conduct of the general elections of the members of the DSGMC had been fixed.

"(a)	Publication of Draft Electoral Rolls	10.12.2011
(b)	Last date for filing Claims and Objections (allowing statutory period of 21 days)	31.12.2011
(c)	Final publication of Electoral Rolls	15.1.2012
(d)	Issuance of notification for conduct of General election (to the new DSGMC) and Commencement of filing of the nominations.	16.2.2012
(e)	Last date for making the nominations	22.2.2012
(f)	Scrutiny of nominations	23.2.2012
(g)	Withdrawal of nominations	25.2.2012
(h)	Day of Polling	11.3.2012
(i)	Counting of Votes and declaration of Results	17.3.2012"

In accordance with the aforesaid Status Report the Public Notice dated 27th/28th January, 2012 (supra) disclosing the election schedule was also issued.

5. The Learned Single Judge in the judgment impugned before us has found/observed/held :-

i. that the Lieutenant Governor had as far back as on 4th June, 2010 granted approval for preparation of fresh electoral rolls under Rule 32 of the Delhi Sikh Gurdwara Management Committee (Registration of Electors) Rules, 1973;

ii. that in the meeting held on 5th October, 2011 between the Lieutenant Governor and a delegation of Shiromani Akali Dal regarding conduct of elections of DSGMC, two crucial decisions had been taken. The first was to undertake the exercise of preparation of the fresh electoral rolls of DSGMC and the second was to undertake the delimitation of wards;

iii. that as per the decision in the meeting of 5th October, 2011 the work of preparation of electoral rolls was to be completed by 31st October, 2011 and whereafter objections thereto to be invited and decided. Similarly delimitation of wards was estimated to take another 2-3 months. The elections were thus contemplated to be held in May, 2012;

iv. However, as per the Status Report aforesaid a shortcut had been sought to be adopted; instead of completing the

process of preparation of fresh electoral rolls, it was proposed that the fresh electoral rolls to the extent that they had been prepared, be merged with the existing electoral rolls prepared in the year 2006 and which did not have photographs. Such deviation from the procedure agreed on 4th June, 2010/ 5th October, 2011 had been made purportedly owing to lukewarm response from the Sikh community in the process of enrolment of electors;

v. that such lukewarm response to preparation of fresh electoral rolls was owing to half hearted measures and lack of serious efforts therefor;

vi. that the merger of freshly and partly prepared electoral rolls with electoral rolls of the year 2006 would mean that a large number of voters would be included without photographs and which would be contrary to the amended Rules (supra) and may lead to bogus voting;

vii. that the decision to prepare fresh electoral rolls under Rule 32 (supra) could not have been reviewed after the process therefor had been set rolling and the reason given for review was not a good enough reason;

viii. there was nothing on record to suggest that fresh process of preparation of the electoral rolls was undertaken in the right earnest. Even the electoral rolls of the year 2006 were not freshly prepared ones; they were mere revision of electoral rolls last prepared in the early eighties;

ix. that the decision to prepare fresh electoral rolls was a conscious decision owing to the existing rolls having become stale and not containing the photographs. If there was a lukewarm response for preparation of the fresh electoral rolls, efforts should have been made to encourage the members of Sikh community to come forward. The solution was not to cut short and abort the said process which had been initiated and partially undertaken;

x. while the process of revision of electoral rolls could under the Rules be undertaken when election was held "to fill a casual vacancy", for general election to be held due to expiry of the tenure of the existing Committee, preparation

of fresh electoral rolls applied;

xi. that the procedure for revision and for preparation of fresh electoral rolls was the same; xii. that the appellants were proposing to short circuit the procedure and the process of merger as proposed was de hors the Rules;

xiii. the elections if permitted to be held on the basis of electoral rolls, as proposed to be prepared, were bound to cause heart burn and leave dissatisfaction among the members of the Sikh community and would also dent the purity of the election process and the credibility of the elected body;

xiv. that there was no reason for sudden change in the time frame for holding elections from May, 2012 to February, 2012 – there was no tearing hurry for preponing the proposed date of election by three months. Before an administrative decision having bearing on the conduct of elections of a statutory body is reviewed, there have to be very good grounds and reasons to justify the same. In the present case there were no reasons and the later decision to immediately hold elections was irrational, undemocratic, arbitrary and undermined the democratic process.

Accordingly the directions as aforesaid were issued.

6. The senior counsel for the appellants has argued that the learned Single Judge has erred in not following the well settled rule of, the election process once begun to be not interfered with. It is contended that the learned Single Judge has erred in presuming that the election process had not begun because the notification for the election was yet to be issued. Attention is invited to **A.K.M. Hassan Uzzaman Vs. Union of India** (1982) 2 SCC 218 and to **Inderjit Barua Vs. Election Commission of India** (1985) 1 SCC 21 holding that High Court in exercise of powers under Article 226 should not pass any orders, interim or otherwise which have the tendency or effect of postponing an election which is reasonably imminent and in relation to which its writ jurisdiction is invoked. It is urged that the election process begins not necessarily by the issuance of the election notification, as has been assumed by the learned Single Judge but when the election is imminent.

7. The senior counsel for the appellants with reference to the

Lakshmi Charan Sen Vs. A.K.M. Hassan Uzzaman (1985) 4 SCC 689 has argued that the fact that certain claims and objections are not finally disposed of and notwithstanding the fact that the electoral roll contain errors or have remained to be corrected or appeals with respect thereto are pending, cannot arrest the process of election and election has to be held on the basis of the electoral rolls in force on the last date for making nominations. Of course, such observations were made in the said judgment by the Supreme Court with reference to the rules for election to the West Bengal Legislative Assembly.

8. The senior counsel for the appellants had next invited attention to **Boddula Krishnaiah Vs. State Election Commissioner, A.P.** (1996) 3 SCC 416 reiterating that having regard to the important functions which the legislature has to perform in democratic countries, it has always been recognized to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over so that the election proceedings may not be unduly retarded or protracted.

9. Per contra, the counsels for the respondents have invited attention to **Election Commission of India Vs. Ashok Kumar** (2000) 8 SCC 216 laying down that anything done towards completing or in furtherance of election proceedings cannot be described as questioning the election and without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove obstacles therein. The counsel for the respondents have thus supported the judgment of the learned Single Judge by contending that the directions issued therein are in aid and assistance of the election and in fact conducive to the holding of a fair election.

10. Though the judgment of the learned Single Judge appears to be just and equitable but since the same nevertheless interferes with the election, we have examined the matter closely. The rule of, non-interference with the election process and leaving of objections/disputes to be decided in election petition, is a near absolute one. In the present case it is not in dispute that the term of the elected body had expired on 8th February, 2011 and the elections were / are due since then. The

learned Single Judge has sought to carve out a way around the rule of non-interference with the election process by observing that the elections had not been notified till then though were scheduled to be notified on 16th February, 2012. However, the rule, of Courts being prohibited from interfering with the electoral process, cannot be permitted to be defeated by instituting a legal proceeding just before the election notification. The term of elected bodies is always fixed and it is generally known as to when the next election will be notified. If it were to be held that though Courts cannot interfere once elections are notified but can so interfere before such notification, though election may be imminent and can also restrain issuance of such notification, as has been done in the impugned order, the ultimate effect thereof will be of interference with/delay of elections and which is not permitted. Moreover, the test laid down in **A.K.M. Hassan Uzzaman and Inderjit Barua** (supra) of the applicability of rule of non-interference is also 'when the election is imminent' and when the order of the court 'has the tendency or effect of postponing an election' and not of 'when election has been notified'. Thus the judgment of the learned Single Judge is definitely an interference by the Court in the electoral process and which is not permitted. Further, in the present case, the election process has clearly begun by publication on 27th / 28th January, 2012 of the schedule of election. The Apex Court in **V.S. Achuthanandan Vs. P.J. Francis** (1999) 3 SCC 737, though in the context of corrupt practices, held that the word election cannot be restricted to the electoral process commencing from issuance of notification and has to be interpreted to mean every stage from the date of notification calling for the election.

11. What however remains to be adjudicated is, the effect of the decision earlier taken by the Lieutenant Governor of having fresh electoral rolls prepared and undertaking the exercise of delimitation before holding the elections. The learned Single Judge has proceeded on the premise that once such a decision had been taken, the elections could not be held without the exercise so begun having been completed, unless good grounds for review of such decision existed. The learned Single Judge found no grounds for review by the Lieutenant Governor of the earlier decision.

12. We have examined the provisions of the Act and the Rules in this regard.

13. Section 5(1) of the Act prescribes the term of office of a

member of DSGMC as four years commencing "from the date on which the first meeting of the Committee is held under Section 15 and no longer". There is thus a prohibition in the Act itself against the term of office of a member being more than four years. However, Section 5(3) provides that the outgoing member shall continue in office until the notification of election or co-option of his successor is published under Section 12. Section 6 provides for division of Delhi into single member wards and empowers the Director Gurudwara Election to, by order determine the number of wards and the extent of each ward, and to from time to time alter or amend the number and extent of the wards. Section 7 provides for preparation of electoral rolls for every such ward. Section 8 qualifies a Sikh, of not less than 21 years of age and who has been ordinarily resident in a ward for not less than 180 days to be registered in the electoral roll of that ward. Section 9 confers a right to vote in every such person registered in the electoral roll. Section 12 empowers the Director, Gurdwara Elections appointed by the Central Government to hold the elections. Section 31 provides for settlement of disputes regarding elections, corrupt practices and electoral offences in respect of election of members of DSGMC. Rules 23, 25, 26 and 32 of the Rules (supra) are relevant for the present purpose and are set out hereinbelow:-

> **"23. Period for which the electoral roll is valid –** Save as otherwise provided in these rules, the electoral roll for the ward shall come into force immediately upon its final publication and shall remain in force for a period of until the final publication of a subsequent electoral roll for the ward.
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> **25. Special provision for preparation of electoral rolls on redelimitation of wards** – (1) If any ward is delimited anew in accordance with law and it is necessary urgently to prepare the electoral roll for such ward, the Director may direct that it shall be prepared-
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> (a) by putting together the electoral rolls of such of the existing wards or parts thereof as are comprised within the new ward; and
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> (b) by making appropriate alterations in the arrangements, serial numbering, and headings of the electoral rolls so compiled / and the electoral roll/electoral rolls of the ward/wards or part of the ward/wards whose electoral roll/electoral rolls or part thereof have thus been put together in terms of clause (a) shall stand modified to that extent.
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> (2) The electoral roll so prepared shall be published in the manner specified in Rule 22 and shall on such publication, be the electoral roll for the new ward.
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> **26. Revision of electoral rolls**- (1) The Director may, for reasons to be recorded in writing direct the revision of the electoral roll of a ward or part of ward in any year or before any election or by-election to fill a casual vacancy.
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> (2) The Administrator may, at any time, direct a special revision in the electoral roll in any ward or part of a ward in such manner as it may think fit.
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> (3) Subject to the provisions of the Act and these rules, the electoral roll for a ward as in force at the time of the issue of any direction under sub-rule (1) or sub-rule (2), shall continue to be in force until the completion of the revision of electoral rolls under sub-rule (1), or as the case may be, under sub-rule (2).
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> (4) When the electoral roll or any part thereof is so revised, it shall be prepared afresh and rules 4 to 22 shall apply except that no fresh application shall be necessary of a Sikh who is already registered as an elector and is resident of the same ward, provided, however, his application shall lie if his address in the same ward has changed or for any error or an omission in the entry relevant to him.
>
> **32. Fresh preparation of electoral rolls.**- The Administrator may, if it considers it expedient, direct the preparation of electoral roll afresh for a ward or part of the ward before a by-election or election and the rules 4 to 22 shall apply and the electoral roll or electoral rolls already in force shall cease on the final publication of the fresh electoral roll or electoral rolls."

What follows from the above is that notwithstanding the direction under Rule 32 for preparation of electoral roll afresh, the electoral roll of

the year 2006 is to remain in force until the final publication of a subsequent electoral roll.

14. Once it is so, what follows axiomatically is that the election, if fall due, between the date preparation of electoral roll afresh is directed and the publication of fresh electoral rolls, has to be on the basis of the electoral roll valid as on the date of the election and which in the present case is electoral roll of the year 2006. There is no reason to not apply the same principle to delimitation also i.e. the wards as in existence shall continue till fresh delimitation is completed.

15. What emerges is that the direction for preparation of electoral rolls afresh or for delimitation (and which swayed heavily with the learned Single Judge) cannot hold up the process of election inasmuch as the electoral rolls of the wards, as exist, remain valid notwithstanding such a direction having been issued. Also, Section 5 of the Act, by using the expression "and no longer", is indicative of the legislative intent of not allowing the term of office of a member of the Committee to be more than four years. In the present case the said term has already expired and which is found to be in contravention of the Statute.

16. The senior counsel for the appellants has also produced before us the files of the office of the Lieutenant Governor and we have perused the same to decipher the reasons for which the exercise initiated and undertaken of preparation of fresh electoral rolls and of delimitation having not been completed and/or the reasons for directing elections to be held notwithstanding the same. From a perusal thereof we find that the proposal for delimitation and for preparation of fresh electoral rolls was mooted long back in March, 2010 and approval therefor accorded on 4th June, 2010 and various steps therefor also taken. When the term of 4 years of the Committee elected in the year 2007 came to an end on 8th February, 2011, the same was extended since the said process was underway. However it appears that filing of the writ petitions aforesaid, seeking directions for immediate holding of elections and realizing that the work of delimitation and preparation of fresh electoral rolls would take considerable time, a decision was taken to not hold up the elections which were already due any longer for the said reason. Accordingly, the election schedule was announced. We are also of the opinion that even though the Lieutenant Governor at one point of time appears to have decided to hold the election in or about May, 2012 only after making

fresh efforts for completing the process of delimitation and preparation of fresh electoral rolls but subsequently changed his mind, to give precedence to the holding of election.

17. Considering the nature of the decisions, to undertake process of delimitation and preparation of fresh electoral rolls, to defer holding of elections till completion of such process and thereafter of holding the election notwithstanding such process having not been completed, we are of the view that the test applied by the learned Single Judge of the Lieutenant Governor being not entitled to change his mind unless sufficient or good reason for such change existed, was not to be attracted. Such decisions are purely administrative decisions and there is no bar to the deciding authority changing the same, as long as the ultimate decision is in consonance with law.

18. We, as aforesaid are of the view that the decision of the Lieutenant Governor to not defer the elections any further and to hold the elections is in accordance with law. Rather, in view of the language of Section 5(1) to the effect that the term of the Committee shall not be longer than 4 years, the decision earlier taken to defer the election for the reason of work of preparation of fresh electoral rolls and delimitation being underway was erroneous. As per the Rules, as interpreted above, preparation of fresh electoral rolls and delimitation is not to come in the way of election when due and election is to be held in accordance with the electoral rolls as existing on that date. Even in **Inderjit Barua,** election was sought to be stayed on the ground that the electoral rolls had not been revised as required and the elections were to be held on the basis of old electoral rolls. However the Apex Court held that even such a route which will have the effect of stay of the elections is not open. It was held that the old electoral rolls could not be condemned as invalid and if any person had objection thereto, it was still open to that person to raise the same. It was yet further held that the Court could not issue any direction not to hold the election until the revision of the electoral rolls is completed. Similarly in **Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra** (2001) 8 SCC 509 it was observed that the Court would not stay the continuation of the election process even though there may be some alleged irregularity or breach of rules while preparing the electoral rolls.

19. Mention at this stage may also be made of **Anugrah Narain Singh v. State of U.P.** (1996) 6 SCC 303 where the Supreme Court held that it is the mandate of the Constitution that every Municipality (elections whereto were challenged in that case) shall have a life span of five years and thereafter fresh elections have to be held and so far as preparation of electoral rolls is concerned there are sufficient safeguards against any abuse or misuse by providing for appeals in regard to inclusion, deletion or correction of names and there is hardly any scope for a Court to intervene under Article 226 of the Constitution. It was further held that if this is allowed to be done, every election will be indefinitely delayed and Courts should not intervene on the basis of allegations as to preparation of electoral rolls.

20. The process of delimitation and of preparation of fresh electoral rolls is undoubtedly a lengthy process and no error can be found in the Lieutenant Governor subsequently deciding to give more weightage to the holding of elections. As aforesaid, the Act expressly contains a prohibition against the elected members continuing beyond the terms of four years. Moreover, the Rules having sufficiently provided as aforesaid for the existing electoral rolls and wards to continue till fixation of fresh one, there is no reason for this Court to interfere in the decision of the Lieutenant Governor and which is in consonance with the Act and the Rules, howsoever, laudable the reasons which prevailed with the learned Single Judge.

21. We have also satisfied ourselves that the decision to merge the new electoral rolls with the old one is in the spirit of the Rules. It may be noticed that even after the elections are announced, the draft electoral rolls are published and objections invited thereagainst. We are satisfied that the process of merger is to enable any new voters in the ward to get enrolled and which they would have been entitled to even after publication of the existing electoral rolls of the year 2006 as draft electoral rolls.

22. We therefore allow these appeals, set aside the judgment of the learned Single Judge and dismiss the writ petitions. It is however clarified that the work of delimitation and/or preparation of fresh electoral rolls if found to be necessary shall be undertaken immediately after the elections and ought be completed well in time so that such a situation does not occur when the next elections become due. The appellants shall now be

entitled to fix a fresh schedule for the general elections to the post of members of DSGMC.

The appeals are disposed of. No order as to costs.

ILR (2012) IV DELHI 234
CRL. M.C.

SWISS TIMING LTD. ....PETITIONER

VERSUS

CBI & ANR. ....RESPONDENTS

(MUKTA GUPTA, J.)

CRL. M.C. NO.: 18/2012 & CRL.M.A. NO. 59/2012 **DATE OF DECISION: 05.03.2012**

Code of Criminal Procedure, 1973—Section 105—Prevention of Corruption Act, 1988—Section 13—Indian Penal Code, 1860—Section 120B & 420—Petitioner Company charge sheeted along with other accused by CBI for alleged commission of offences under Section 120-B, read with Section 420 IPC and Section 13 (2) read with Section 13(1)(d) of Act—Petitioner summoned through its CEO by diplomatic channels through Ministry of External Affairs, Interpol—Accordingly Embassy of India, Berne sent letter enclosing summons in original informing him about next date of hearing before Special Judge, Delhi—Petitioner though admitted service of summons, but urged service as not in compliance with Exchange of letters—Accordingly, Learned Special Judge issued fresh summons to petitioner as per Exchange of letters which was forwarded by Embassy of India at Berne to FOJ in Switzerland which further informed Indian

Embassy that summons were issued—However, petitioner again admitted delivery of fresh summons but disputed validity of service and filed two applications before learned Special Judge—Learned Special Judge disposed of applications holding petitioner duly served and intentionally avoided appearance to delay trial—Orders challenged by petitioner urging, FOJ at Berne not competent authority to serve summons on petitioner and notification not issued as per Section 105 Cr.P.C.—Moreover, Letter of Exchange dated 20.02.1989 between India and Switzerland relates only to purpose of investigations—Held:- In case of summons to an accused issued by a court in India shall be served or executed at any place in any Country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such Country or place for service or execution of summons or warrants in relation to the criminal matters, may be sent in duplicate in such forms, directed to such Court, Judge or Magistrate and sent to such authority for transmission, as the Central Government may by notification specify in this behalf—Though serving or execution of summons at a place or country is mandatory, however, sending of such summons or warrants to such court, Judge or Magistrate and to such authority for transmission as may be notified is directory in nature—Exchange of letters dated. 20.02.1989 is a binding treaty between India and Switzerland, even applicable for service of summons to compel the presence of a person who is accused of an offence for trial and for determining whether to place such person on trial—Summons served through FOJ, designated agency as per Swiss Federal laws amounted to valid service of summons.

A perusal of Section 105 (1) (ii) Cr.P.C. provides that in case of summons to an accused issued by a Court in India

shall be served or executed at any place in any Country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such Country or place for service or execution of summons or warrants in relation to the criminal matters, may be sent in duplicate in such forms, directed to such Court, Judge or Magistrate and sent to such authority for transmission, as the Central Government may by notification specify in this behalf. Thus, though the serving or execution of the summons at a place or Country is mandatory, however sending of such summons or warrants to such Court, Judge or Magistrate and to such authority for transmission as may be notified is directory in nature. The reason for the second portion of clause (ii) of Section 105 (1) being directory in nature is that the Indian Government cannot determine the authority or the Court, Judge or Magistrate of another Sovereign State. To that extent it has to follow the authority specified by the contracting State. A perusal of the Exchange of letters dated 20th February, 1989, which the Petitioner initially admitted to be the treaty between India and Switzerland shows that it relates not only to mutual assistance with regard to matters pending investigation but also pending trial. The Exchange of letters dated 20th February, 1989 between India and Switzerland is reproduced as under:

"LE CHEF 3003 Berne, 20 February 1989
DEPARTMENT FEDERAL
AAFAIRES ENTRANGERES

Excellency,

I have the honour to acknowledge receipt of your letter 20th February, 1989, which read as follows:

"Your Excellency,

I have the honour to refer to the exchange of views between the delegations of India and Switzerland on the question of providing mutual assistance in criminal matters, and on the basis of the understanding reached between the two delegations, the Government of India

proposes to the Government of Switzerland that the authorities of both countries competent to investigate offences shall provide to each other, on the basis of reciprocity and in accordance with their national law, the widest measure of assistance in criminal matters as follows:

1. Cooperation between law enforcement authorities may include assistance in locating witnesses, obtaining statements and testimony of witnesses, production and authentication of judicial or business records, service of judicial or administrative documents and restitution of objects or valuables originating from the offences for the purpose of returning them to the entitled persons. Further within the limits of the law of the requested State, information will also be provided on the assets owned or possessed by persons who are the subjects of the investigation in the requesting country.

2. Taking of evidence and production of documents by the use of compulsory measures for the purpose of criminal proceedings in India or Switzerland as far as the facts described in the request would also be an offence punishable under the laws of both countries. For this purpose, India and Switzerland regard the expression "criminal proceedings" as including trial of a person for an offence or a proceeding to determine whether to place a person who is accused of an offence on trial for that offence. Under Indian law the competent authority to ask for assistance abroad is the Court, tribunal, judge or magistrate exercising jurisdiction. Under Swiss law the competent authority to ask for assistance abroad is any examining magistrate, notwithstanding the denomination of 'Bezirksanwait, Untersuchurfgsrichter, judge d. instruction, Verhorrichter" a. s. o. and all judicial authorities.

3. Taking statements of persons without the use of compulsory measures.

4. Provision of publicly available documents and records being documents and records that are available to the public as being part of a public register or that are otherwise available to the public for purchase.

5. Service of documents which does not involve exercise of any measure to compel any person to comply with any requirement set out in those documents.

6. Investigation of crime by Police or other law enforcement agencies not involving the exercise of any measure to compel any person to answer questions or to provide information.

7. There may be other ways in which assistance could be rendered in criminal matters and India and Switzerland would be prepared to consider whether other forms of assistance could be provided in particular cases upon request.

It is understood that assistance shall be granted, in accordance with the law of the requested state, in the investigation or prosecution of criminal offences, including murder, inflicting serious bodily harm, theft, fraud, embezzlement, abuse of official powers or institution to obtain unlawful profits, extortion, blackmail, forgery, counterfeiting of currency, fabrication of false evidence, bribery, knowingly and willingly making fraudulent statements or representations in matters which are within the jurisdiction of any department, agency, or authority of the requesting state, as well as dealing in narcotic drugs and psychotropic substances. **(Para 15)**

Important Issue Involved: In case of summons to an accused issued by a court in India shall be served or executed at any place in any Country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such Country or place for service or execution of summons or warrants in relation to the criminal matters, may be sent in duplicate in such forms, directed to such Court, Judge or Magistrate and sent to such authority for transmission, as the Central Government may by notification specify in this behalf. Though, serving of execution of summons at a place or country is mandatory, however sending of such summons or warrants to such court, Judge or Magistrate and to such authority for transmission as may be notified is Directory in nature.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Amit Desai, Sr. Advocate with Mr. Vijay Sondhi, Mr. Anirban Bhattacharya, Ms. Sujatha Balachander, Mr. Kapil Madan, Advocates.

FOR THE RESPONDENT : Mr. Dayan Krishnan, Mr. Gautam Narayan, Spl. Counsels for CBI with Mr. Nikhil Menon, Advocate Mr. Neeraj Chaudhary, CGSC for UOI.

CASES REFERRED TO:

1. *Bhavesh Jayanti Lakhani* vs. *State of Maharashtra and Ors.* (2009) 9 SCC 551.
2. *Daya Singh Lahoria* vs. *Union of India & Ors.* (2001) 4 SCC 516.
3. *Balan Nair* vs. *Bhavani Amma Valsalamma & Ors.* AIR 1987 KERALA 110.
4. *Hemendra Nath Chowdhury* vs. *Smt. Archana Chowdhury* AIR 1971 CALCUTTA 244.
5. *Jamatraj Kevalji Govani* vs. *State of Maharasthra* AIR 1968 SC 178.

RESULT: Petition dismissed.

MUKTA GUPTA, J.

1. The challenge in the present petition is to the orders of the learned Special Judge, CBI Court, Patiala House dated 15th December, 2011 and 19th December, 2011 whereby the learned Special Judge held that the purported service of summons upon the Petitioner was valid in law and consequently vide its order dated 19th December, 2011 observed that the Petitioner is deliberately avoiding appearance before the Trial Court and thus legal consequences would follow.

2. Learned counsel for the Petitioner contends that initially summons were issued to the Indian Embassy at Berne, Switzerland which on 9th June, 2011 by its covering letter sent the same to the Petitioner by registered A.D.

The Petitioner challenged this process and in this regard made communications to the Swiss authorities, who in turn communicated the same to the Indian Embassy on 7th July, 2011. It is contended that the order passed by the learned Trial Court issuing summons, which were served to the Petitioner by registered A.D. through Indian Embassy at Berne, were not compliant to the International treaties or even the domestic law. The Petitioner filed an application before the Trial Court on 14th July, 2011 challenging the delivery of summons dated 23rd May, 2011 placing on record the factum of the purported and illegal service together with the letter dated 7th July, 2011 issued by Federal Office of Justice (in short 'FOJ') to the Indian Embassy at Berne, Switzerland. Thus, the learned Special Judge upon hearing the Petitioner and the Respondent No.1 vide its order dated 5th August, 2011 was pleased to allow the application, issued fresh summons returnable on 4th November, 2011 and directed effecting of service of fresh summons in compliance with the provisions of MOU/ Exchange of letters dated 20th February, 1989 between the two Countries.

3. On an application filed by the CBI seeking extension of time, the date fixed for service of summons on the Petitioner was extended to 14th

December, 2011. Thereafter a request made by the Indian Embassy at Berne to the FOJ in Switzerland seeking legal assistance along with the fresh summons dated 3rd September, 2011 in original issued by the learned Special Judge and other translated copies was delivered at the office of the Petitioner in Switzerland. The Petitioner thus consulted his Attorneys and on behalf of the Petitioner a letter dated 9th December, 2011 was addressed to the FOJ, Districts Attorney's office in Biel/ Bienne, Switzerland and the General Attorney of Canton of Berne raising issues challenging the validity of the service of summons dated 3rd September, 2011. Vide letter dated 13th December, 2011 the FOJ replied to the Swiss Attorneys of the Petitioner and sought time to review the issues mentioned in the letter of the Petitioner. On 14th December, 2011 i.e. the date mentioned in the fresh summons dated 3rd September, 2011 for the appearance of the Petitioner, counsel for the Petitioner filed an application before the learned Special Judge placing on record the factum of invalid/ improper and illegal service. Respondent No.1 also filed an application on the same date placing on record the communication received from the Indian Embassy, Berne along with information from the Swiss authorities.

4. The objections of the Petitioner to the said service and proof of service are that in the eyes of law, no service has been effected on the Petitioner as the letter of the Swiss authorities itself state that a notification has been issued, without stating that the same has been delivered. Further, the service of summons on accused persons between India and Switzerland is not covered by the MOU/Exchange of letters dated 20th February, 1989. The assistance agreed to between the two Countries by the said MOU/Exchange of letters in criminal matters relates to the purpose of investigation alone. Further, the request for assistance was not made to the competent authority and the necessary translations as required under the said MOU/Exchange of letters were missing.

5. Learned counsel for the Petitioner contends that there is no concept of criminal trial in the absence of an accused. The purpose of issuing summons to an accused is to compel his appearance before the Trial Court to face inquiry, plead to the charge, undergo trial and be available to face the judgment. According to the learned counsel, Chapter VII of the Code of Criminal Procedure provides for the procedure to compel the presence by issue of summons and the same are unlike the

summons in a civil proceeding. Reliance is placed on **Parambot Thayunni Balakrishna Menon Vs. Govind Krisnan & Anr.** AIR 1959 Madras 165 to contend that knowledge of summons is not sufficient. The service of summons should be effected in a criminal proceeding so as to compel the presence of the accused. Since the summons issued in the criminal proceedings are to compel the presence before the Trial Court, thus the same affects the right of life and liberty of an accused and the same can be served only by following the procedure established by law. Thus, as held in **Parambot Thayunni** (supra) summons to compel the appearance have to be served personally in criminal matters. It is contended that the provisions of Section 65 Cr.P.C. comes into operation only after Sections 61 & 64 Cr.P.C. are duly and meticulously complied with. Relying upon **Balan Nair Vs. Bhavani Amma Valsalamma & Ors.** AIR 1987 KERALA 110 and **Hemendra Nath Chowdhury Vs. Smt. Archana Chowdhury** AIR 1971 CALCUTTA 244 it is contended that service by post or defective service is not in conformity to the procedure established by law. For summons to compel appearance, provision has been made under Section 105 Cr.P.C., which was amended with effect from 25th May, 1988. Section 105 (1)(i) Cr.P.C. applies to the territories in India to which Cr.P.C. does not apply and Section 105 (1)(ii) Cr.P.C. applies to other Countries where arrangements have been made. Section 105 (2) Cr.P.C. relates to summons received in India. The statutory scheme as envisaged should be strictly complied with. In terms of Section 105(1)(ii) Cr.P.C. the summons to be served on a person to compel appearance in another country is a Court to Court process. Admittedly, in case of a conflict between a treaty law and the municipal law, the municipal law will prevail as held in **Bhavesh Jayanti Lakhani v. State of Maharashtra and Ors.** (2009) 9 SCC 551. The law is clear that strict construction application is required in extradition or summons process law, in view of the consequences that follow on non-appearance pursuant to service of summons. In case, substantive rights of a person are violated, the superior Court will entertain the petition to enforce rights of the human-beings.

6. In the present case, the request from the Indian Embassy to the FOJ & P is itself not translated and the summons have not gone to a Court in Switzerland. Thus there is no necessary compliance of the mutual agreement between the two Countries. The Exchange of letters dated 20th February, 1989 between India and Switzerland relates to i vestigation only. It does not relate to compelling presence in a Court as

an accused in India or Switzerland. Further, Section 105 Cr.P.C. requires for issuance of a notification, which notification has not been issued as yet. No document has been received by the Swiss Court as the summons from the Indian Embassy in Berne, Switzerland has been addressed to the FOJ, Switzerland. In view of non-enclosing the translation and the fact that the summons were not addressed to the proper authorities, the authorities as well as the Petitioners were under the impression that it was a "Letter Rogatory".

7. According to learned counsel for the Petitioner, the Federal Act on International Mutual Assistance in Criminal Matters (IMAC) deals with service of summons and according to Article 69 of IMAC sending of letters does not contemplate service of summons. The Petitioner can pray that he should be given necessary protection in case he has to appear. The procedures cannot be bye-passed. Relying upon **Daya Singh Lahoria Vs. Union of India & Ors.** (2001) 4 SCC 516 it is contended that the rights of a citizen cannot be taken away except in strict compliance of the law laid down. The procedural law is to ensure that there is enough safety and rights are guaranteed. Thus, the impugned orders of the learned Trial Court declaring service to be complete and consequences to follow are liable to be set aside.

8. Per contra learned counsel for the Respondent contends that the present petition as framed is not maintainable as the Petitioner states that it is not submitting itself to the jurisdiction of this Court and is appearing under protest. Thus a person, who does not submit to the jurisdiction, can claim no relief from the Court. Learned counsel contends that the summons dated 3rd September, 2011 have admittedly been served on the Petitioner and thus the issues raised are academic in nature. The Exchange of letters dated 20th February, 1989, which constitutes a treaty between India and Switzerland with respect to the mutual assistance in legal matters, contemplates service of summons. The treaty provides for legal assistance in investigation as well as in prosecution of criminal offences including offences involving fraud, abuse of official powers to obtain unlawful profits etc. The procedure followed by the Trial Court in respect of serving the summons dated 3rd September, 2011 is in accordance with the provisions of the treaty. Therefore, this Hon'ble Court will desist from substituting its view for the view of the requested State.

9. Learned counsel for CBI points out to the letter of learned

counsel for the Petitioner in Switzerland, who vide letter dated 9th December, 2011 stated to the Swiss authorities to refrain from delivering the proof of delivery to the Indian authorities. According to the learned counsel, this conduct of the Petitioner in asking not to deliver the proof of delivery to Indian authorities is wholly unbecoming and the present petition is liable to be dismissed on this short ground itself. In the application filed before the learned Trial Court, the Petitioner has admitted that fresh summons have been delivered in strict compliance of the Exchange of letters and thus now in the present petition the Petitioner cannot claim that the Exchange of letters is not applicable to summons for procuring the attendance and pertains only at the stage of investigation. In the first application the Petitioner admitted that the arrangement for procuring the attendance between two Countries was Exchange of letters entered into on 20th February, 1989. The Exchange of letters include an arrangement for dealing with the procedure during trial and both the authorities i.e. Indian and Swiss accept that Exchange of letters constitute a treaty.

10. According to the learned counsel, the Exchange of letters provides for service of judicial documents which include summons for appearance. A perusal of the summons dated 3rd September, 2011 establishes that the same is not compulsive and only requires appearance on the date fixed before the Trial Court. It is pertinent to note that even the IMAC expressly contemplates and provides for rendering of assistance with regard to service of summons (Article 63). Furthermore, the IMAC expressly contemplates service of summons even through compulsive processes based on the principle of double criminality. The request for assistance sought in respect of service of the summons was duly acceded to and executed by the Swiss authorities as communicated vide their note verbale dated 22nd November, 2011. It is therefore clear that the request was in accordance with the provisions of the treaty as well as the IMAC. Had this not been the position, the request would not have been executed as was done in the past vide letter dated 7th July, 2011. The contention that the service of summons is vitiated owing to the fact that the request for assistance dated 31st October, 2011 was in English and not translated is wholly without merit. It is submitted that this request was meant only for the Swiss authorities and not for the accused. No prejudice whatsoever has been caused to the Petitioner in this respect.

11. Learned counsel for the CBI further submits that Section 105 Cr.P.C. does not provide for a Court to Court mandatory procedure as

it is inter-countries and one country cannot control the procedure of another. Section 105 Cr.P.C. comprises of two parts; where in the first portion the word 'shall' is used and is thus mandatory and in the second portion the word 'may' is used and is thus directory in nature. The issue of one provision containing both mandatory and directory provisions came up for consideration before the Hon'ble Supreme Court in **Jamatraj Kevalji Govani Vs. State of Maharasthra** AIR 1968 SC 178 wherein their Lordships interpreted that the use of the word 'may' in the first part and 'shall' in the second part firmly establishes this difference. It is stated that any other interpretation will lead to absurdity. Further non-issuance of Notification under Section 105 Cr.P.C. is irrelevant as neither the Parliament can impose its will on any other sovereign jurisdiction nor this Country can change the designated authority in other Country. It is thus contended that the impugned judgment of the learned Trial Court is just and proper and every care has been taken to see that the requirements of the treaty and the law are satisfied while serving summons to the Petitioner.

12. I have heard learned counsel for the parties. The facts giving rise to filing of the present petition by the Petitioner are that on 23rd May, 2011 the learned Special Judge was pleased to take cognizance on the charge-sheet filed by the CBI in RC No.DAI-2010-A-0044 alleging commission of offences under Section 120-B read with 420 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 arraying the Petitioner as accused No.11. The learned Special Judge vide order dated 23rd May, 2011 directed that summons be issued to the company through its CEO by diplomatic channels through Ministry of External Affairs, Interpol returnable on 14th July, 2011. On 9th June, 2011 a letter was sent by the Embassy of India, Berne to the Petitioner informing it about the next date of hearing and enclosing summons in original. In response to the above-said request of the Embassy of India on a letter written by the Petitioner to the FOJ, the FOJ, Switzerland vide letter dated 7th July, 2011 informed that the requested assistance was being denied owing to the fact that in terms of the Exchange of letters the summons to a firm in Switzerland, German speaking canton were required to be translated into German. It was further stated that the summons were required to be received more than 30 days before the date of hearing fixed and the summons should be enclosed with the summary of the case. Pursuant to service of summons, an application

was filed on behalf of the Petitioner before the learned Special Judge though admitting the service of summons, however stating that the said service of summons was not in compliance with the Exchange of letters. The Learned Special Judge thereafter issued fresh summons to the Petitioner, as per the Exchange of letters, vide order dated 3rd September, 2011.

13. The said summons were forwarded by the Embassy of India at Berne to the FOJ in Switzerland which further informed the Indian Embassy on 22nd November, 2011 that the summons had been issued. The Embassy of India sent an E-mail to the Respondent herein informing that the Swiss authorities have responded to the request for service of summons in the form of a note verbal dated 22nd November, 2011. On 14th December, 2011 the Petitioner filed two applications before the learned Special Judge though admitting delivery of summons dated 3rd September, 2011, however disputing the validity of service of summons. It was stated that the filing of the applications by the Petitioner ought not to be treated as submitting to the jurisdiction of the learned Special Court or admitting that the service of summons was legal and valid in accordance with law. On the said applications of the Petitioner, the learned Special Judge vide impugned order dated 15th December, 2011 held that there was no ground to allow the plea of the Petitioner and to hold that it has not been legally served in this case. The learned Special Judge further held that the Petitioner has been duly served and as it appeared that the Petitioner was intentionally avoiding appearance before the Court only with a view to further delay the trial, thus legal consequences would follow.

14. The issues involved in the present petition are the interpretation of Section 105 Cr.P.C., whether the Exchange of letters dated 20th February, 1989 between India and Switzerland constitutes a binding treaty, whether the same relates to the process of enquiry and trial to compel presence of an accused before the Court and whether a notification under Section 105 Cr.P.C. is mandatory in nature. The relevant portion of Section 105 Cr.P.C. reads as under:

> "105. Reciprocal arrangements regarding processes. (1) Where a court in the territories to which this Code extends (hereafter in this section referred to as the said territories desires that-

(i) Within the local jurisdiction of a court in any State or area in India outside the said territories, it may send such summons or warrant in duplicate by post or otherwise, to the presiding officer of that court to be served or executed; and where any summons referred to in clause (a) or clause (c) has been so served, the provisions of section 68 shall apply in relation to such summons as if the presiding officer of the court to whom it is sent were a Magistrate in the said territories;

(ii) In any country of place outside India in respect of which arrangements have been made by the Central Government with the Government of such country or place for service or execution of summons or warrant in relation to criminal matters (hereafter in this section referred to as the contracting State), it may send such summons or warrant in duplicate in such form, directed to such court, Judge or Magistrate, and sent to such authority for transmission, as the Central Government may, by notification, specify in this behalf."

15. A perusal of Section 105 (1) (ii) Cr.P.C. provides that in case of summons to an accused issued by a Court in India shall be served or executed at any place in any Country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such Country or place for service or execution of summons or warrants in relation to the criminal matters, may be sent in duplicate in such forms, directed to such Court, Judge or Magistrate and sent to such authority for transmission, as the Central Government may by notification specify in this behalf. Thus, though the serving or execution of the summons at a place or Country is mandatory, however sending of such summons or warrants to such Court, Judge or Magistrate and to such authority for transmission as may be notified is directory in nature. The reason for the second portion of clause (ii) of Section 105 (1) being directory in nature is that the Indian Government cannot determine the authority or the Court, Judge or Magistrate of another Sovereign State. To that extent it has to follow the authority specified by the contracting State. A perusal of the Exchange of letters dated 20th February, 1989, which the Petitioner initially admitted to be the treaty between India and Switzerland shows that it relates not only to mutual assistance with regard to matters pending investigation but also pending trial. The Exchange of letters dated 20th February, 1989 between India

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"Your Excellency,

I have the honour to refer to the exchange of views between the delegations of India and Switzerland on the question of providing mutual assistance in criminal matters, and on the basis of the understanding reached between the two delegations, the Government of India proposes to the Government of Switzerland that the authorities of both countries competent to investigate offences shall provide to each other, on the basis of reciprocity and in accordance with their national law, the widest measure of assistance in criminal matters as follows:

1. Cooperation between law enforcement authorities may include assistance in locating witnesses, obtaining statements and testimony of witnesses, production and authentication of judicial or business records, service of judicial or administrative documents and restitution of objects or valuables originating from the offences for the purpose of returning them to the entitled persons. Further within the limits of the law of the requested State, information will also be provided on the assets owned or possessed by persons who are the subjects of the investigation in the requesting country.

2. Taking of evidence and production of documents by the use of compulsory measures for the purpose of criminal proceedings in India or Switzerland as far as the facts described in the request would also be an offence punishable under the laws of both countries. For this purpose, India and Switzerland regard the expression "criminal proceedings" as including trial of a person for an offence or a proceeding to determine whether to place a person who is accused of an offence on trial for that offence.

Under Indian law the competent authority to ask for assistance abroad is the Court, tribunal, judge or magistrate exercising jurisdiction. Under Swiss law the competent authority to ask for assistance abroad is any examining magistrate, notwithstanding the denomination of 'Bezirksanwait, Untersuchurfgsrichter, judge d. instruction, Verhorrichter" a. s. o. and all judicial authorities.

3. Taking statements of persons without the use of compulsory measures.

4. Provision of publicly available documents and records being documents and records that are available to the public as being part of a public register or that are otherwise available to the public for purchase.

5. Service of documents which does not involve exercise of any measure to compel any person to comply with any requirement set out in those documents.

6. Investigation of crime by Police or other law enforcement agencies not involving the exercise of any measure to compel any person to answer questions or to provide information.

7. There may be other ways in which assistance could be rendered in criminal matters and India and Switzerland would be prepared to consider whether other forms of assistance could be provided in particular cases upon request.

It is understood that assistance shall be granted, in accordance with the law of the requested state, in the investigation or prosecution of criminal offences, including murder, inflicting serious bodily harm, theft, fraud, embezzlement, abuse of official powers or institution to obtain unlawful profits, extortion, blackmail, forgery, counterfeiting of currency, fabrication of false evidence, bribery, knowingly and willingly making fraudulent statements or representations in matters which are within the jurisdiction of any department, agency, or authority of the requesting state, as well as dealing in narcotic drugs and psychotropic substances.

16. Thus the expression "criminal proceedings" in the Exchange of letters includes trial of a person for an offence or a proceeding to

determine whether to place a person who is accused of an offence on trial for that offence. The agreement clearly stipulates that the assistance shall be granted in accordance with law of the requested State in the investigation or prosecution of criminal offence including embezzlement, abuse of official powers or institution to obtain unlawful profits bribery, etc. The agreement further provides that the request of mutual assistance and their enclosures shall be transmitted through diplomatic channels. Thus, the Exchange of letters dated 20th February, 1989 is a binding treaty between India and Switzerland, even applicable for service of summons to compel the presence of a person who is accused of an offence for trial and for determining whether to place such person on trial.

17. In the present case, there is no dispute that the request was made through diplomatic channels and on being received by the Swiss authorities, it was forwarded to FOJ. It may be further noted that FOJ at Berne issued a communication to the Embassy of India at Berne, Switzerland on 7th July, 2011 stating that:

> "Service of documents is a formal act of jurisdiction and thus an official act. In accordance with the Exchange of letters the service of summonses has to be communicated by diplomatic channels. It means that the submission of such requests for service must be instigated by the Federal Office of Justice. The Exchange of letters also stipulates that Switzerland demands that all requests for mutual assistance and annexes/ service of documents be accompanied by a translation into one of the official Swiss languages (German, French or Italian) and vice versa in Hindi or English. The requesting authority may further note that English is not an official Swiss language. As the request concerns a firm in a Swiss German speaking canton, the documents have to be provided together with a German translation. The service of a summons to persons living in Switzerland in order to appear as defendants or witnesses in foreign criminal proceedings is a special type of service. Switzerland requires that summonses for defendants reach the Federal Office of Justice at least thirty days before the date set for their appearance. The Embassy is therefore asked to inform the requesting Indian authority that the documents to be served have to be received by our Office more than 30 days before the hearing. Persons who have been summoned may

not suffer legal or material prejudice in either the requesting or the requested state if they do not comply with the summons. Consequently, anyone accepting a summons to appear before a foreign authority is under no obligation to appear abroad. Summonses containing threats of compulsion will not be served. If the summons is unsuccessful, it is still possible via legal assistance channels to request that the person concerned be interviewed. Travel and accommodation expenses, as well as the witness's allowance, must be borne by the requesting state."

18. Thus the contention of the learned counsel for the Petitioner that it is a Court to Court procedure as envisaged under Section 105 Cr.P.C. and the FOJ at Berne was not competent authority to serve summons on the Petitioner is misconceived. The learned Special Court issued the summons as per the procedure laid down, vide order dated 3rd September, 2011 in conformity with the letter sent by the FOJ.

19. It is an admitted position that the summons have been served on the Petitioner which fact the Petitioner has admitted in its application dated 14th December, 2011 filed before the learned Special Court wherein in para 7 it has been clearly stated that the applicant was delivered the summons dated 3rd September, 2011 issued by the Special Court and other documents. This fact is further fortified in a letter address by the lawyer of the Petitioner to Swiss authorities dated 9th December, 2011 wherein it has been noted that the proof of delivery to the Indian authorities should be refrained from. Though on the receipt of the first summons, which was sent by the registered post, the contention of the Petitioner before the learned Special Judge was that the service of summons is regulated by the Exchange of letters, on a service made to the Petitioner in terms of the Exchange of letters, the endeavour of the Petitioner is to wriggle out of the same and it is now canvassed that service of summons is not in accordance with law as the service of summons in criminal matters are not regulated by the Exchange of letters.

20. The Petitioner before this Court has strenuously relied upon Federal Act of International Mutual Assistance in Criminal matters (in short IMAC) dated 20th March, 1981, which contemplating the provisions governing the service of summons. According to the learned counsel, Article 68 of the IMAC relates to service of documents and not service of summons which is dealt in Article 69 and thus, Article 68 corresponds

to Clause 5 of the Exchange of letters. According to the Petitioner, the parameters of Article 69 which deal with service of summons are excluded in the Exchange of letters and thus, there is no binding treaty between Switzerland and India which deals with service of summons to compel presence. It may be noted that IMAC provides that in case private international agreement do not provide otherwise, this Act shall govern all procedures for International Cooperation in criminal matters, especially in extradition of person who are subject of criminal prosecution or convicted and assistance aimed at supporting criminal proceedings abroad. As per Article 17 read with Article 79 (a) of the IMAC, the Federal office of Justice of the Federal Department of Justice and Police, Switzerland is the designated authority, which is authorized to interact with foreign authorities in the sphere of judicial assistance. Thus, the authority being nominated by the Switzerland will prevail for communication of judicial documents in Switzerland. The use of the word Court, Judge or Magistrate under Section 105 Cr.P.C. not being mandatory would not vitiate the service of summons through the designated agency competent to serve the summons as per Swiss Federal laws and would be a valid service of summons.

21. The issuance of notification as provided for under Section 105 Cr.P.C. is not a mandatory procedure. The word used in Section 105(1)(ii) is 'may'. The non-issuance of the Notification will not render nugatory the binding nature of the Exchange of letters between the two Countries.

22. Thus, I find no force in the contentions raised by the learned counsel for the Petitioner. The Petition and application are dismissed.

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CRL. REV. P.

INDER SINGH BIST ....APPELLANT

VERSUS

STATE ....RESPONDENT

(PRATIBHA RANI, J.)

CRL. REV. P. NO. : 746/2006 & 545/2006 **DATE OF DECISION: 27.04.2012**

Code of Criminal Procedure, 1973—Section 299—Charge sheet was laid under Section 302/307/34 IPC against accused persons which also included name of two appellants as accused persons—However, appellants absconded during trial and were declared proclaimed offenders—Trial of other two co accused persons ended in their acquittal as none of prosecution witnesses to occurrence as well as complainant had supported case of prosecution—Thereafter, appellants were apprehended and were also sent to face trial under same offences—They pleaded discharge from offences before learned ASJ on ground that as trial of other two accused persons had resulted in acquittal and evidence to be produced by prosecution in case two appellants were made to face trial, would remain same and ultimately, case would result in their acquittal also—However, learned ASJ turned down their pleas and they were charged for having committed offences punishable under Section 302/307/34 IPC and were ordered to face trial—Aggrieved by said order, appellants preferred petition urging that same witnesses had not identified other accused persons facing trial at that time and

same would happen during trial of said petitioners also—Thus, they be discharged—On behalf of State, it was urged at stage of framing of charge, Court has to consider statement of witnesses recorded under Section 161 of the Code and other material collected by prosecution to prove its case—Statements of witnesses recorded during trial of co accused persons can at most be treated as under Section 299 of Code against said two appellants and same can be read against them only in contingency i.e. witness is not available being dead or incapable giving evidence or his personal presence cannot be procured without an amount of delay, expense or inconvenience—Also, witnesses had mainly deposed during trial of co accused persons against those accused persons only and had no occasion to identify appellants and to depose about their role in alleged occurrence—Hence, acquittal of co accused is no bar to trial of appellants who had absconded at that time—Held:- Where evidence is inseparable and indivisible and on same set of evidence, co-accused have been acquitted then remaining accused need not face trial—However, if evidence is separable and divisible and there are specific allegations and accusations against accused who were not there in case at time of trial of co-accused who were acquitted, then it would be a subject matter of trial.

This Court should not meticulously analyze the case before the trial takes place to find out whether the case would result in conviction or acquittal. It is also trite that when a party approaches the Court for quashing of charge, this Court is not required to embark upon sifting the entire evidence and judge whether the accused is guilty or not. The only consideration before this Court should be whether there is prima facie indication of the involvement of the accused alleged in the cases or not. **(Para 27)**

Important Issue Involved: Where evidence is inseparable and indivisible and on same set of evidence, co-accused have been acquitted then remaining accused need not face trial—However, if evidence is separable and divisible and there are specific allegations and accusations against accused who were not there in case at time of trial of co-accused who were acquitted, then it would be a subject matter of trial.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Rakesh Kumar Khanna, Sr. Advocate with Mr. Fazal Ahmed, Advocate. Mr. R.P. Khatana, Advocate.

FOR THE RESPONDENT : Mr. Navin Sharma, APP for the State.

CASES REFERRED TO:

1. *Jaswinder Singh* vs. *State of Punjab* Crl. Misc. No.M-15621/2011.
2. *Urmila Devi* vs. *State* 2006 (91) DRJ 341.
3. *Rajan Rai* vs. *State of Bihar* (2006) 1 SCC 191.
4. *Raju Rai* vs. *State of Bihar* 2006 (1) KLT (SC) (SN) 8: 2005(7) Supreme 459.
5. *Santosh Kumar Maity* vs. *State of Orissa* 2006 (4) Crimes 417.
6. *Moosa* vs. *Sub Inspector of Police* 2006 Crl.L.J 1922.
7. *Subramanium Sethurainan* vs. *State of Maharashtra* 2005 SCC (Crl.) 242.
8. *Zandu Pharmaceutical Works Ltd.* vs. *Mohd. Sharaful Hague* 2005 SCC (Crl.) 283.
9. *Arun Kumar* vs. *State of Kerala* Crl.M.C.Nos.1053, 1067 & 1078/2005.
10. *Central Bureau of Investigation* vs. *Akhilesh Singh* 2005(1) SCC 478.

11. *State of M.R.* vs. *Awadh Kishore Gupta* 2004(1) KLT (SC)(SN) 35: (2004) SCC (Crl.) 353.
12. *State of A.P* vs. *Golconda Linga Swamy* 2004 (3) KLT (SC)(SN) 95: 2004 SCC (Crl.) 1805.
13. *Megh Singh* vs. *State of Punjab* 2004 SCC (Crl.)
14. *Gorle Section Naidu* vs. *State of A.P.* AIR 2004 SC 1169.
15. *Gangadhar Behera* vs. *State of Orissa* 2003 SCC (Crl.) 32.
16. *Joy* vs. *State of Kerala* 2002(3) KLT 425.
17. *Nirmal Singh* vs. *State of Haryana* AIR 2000 S.C 1416.
18. *Sunil Kumar* vs. *State* 2000 (1) Crimes 73 (Delhi).
19. *Urmila Sahu* vs. *State of Orissa* 1998 Crl.L.J 1372.
20. *Mst. Harkori* vs. *State of Rajasthan* AIR 1998 SC 1491.
21. *State of Bihar* vs. *Rajendra Agrawalla* 1996 SCC (Crl.) 628.
22. *Amarjit* vs. *State* 1996 (1) C.C. Cases 465 (Delhi).
23. *Rupan Deol Bajal* vs. *Kanwar Pal Singh Gill* 1995 SCC (Crl.) 1059.
24. *Ranbir Yadav* vs. *State of Bihar* AIR 1995 S.C 1219.
25. *Gurpreet Singh @ Khinder* vs. *State of Punjab* 1995(2) CLR 100 (P & H).
26. *Minakshi Bala* vs. *Sudhir Kumar* 1994 SCC (Crl.) 1181.
27. *Santosh De and Anr.* vs. *Archna Guha and Ors.* 1994 (1) SCALE 423.
28. *Raja Ram* vs. *State of M.P. 1994 SCC (Crl.) 573.*
29. *Chand Dhawan* vs. *Jawahar Lal 1992 SCC (Crl.) 636.*
30. *Chellappan vs. State of Kerala* 1992(1) KLT 609.
31. *Hui Chi-ming* vs. *R.* (1991) 3 ALL.ER 897.
32. *Karpoori Tahkur* vs. *Baikunth Nath Dey* 1990 SCC (Crl.) 642.

33. *North West Water Ltd.* vs. *Binnie & Partners* (1990) 3 All ER 547.
34. *Madhavarao J. Scindia* vs. *Sambhajirao C. Angre* 1988 SCC (Crl.) 234.
35. *Felix* vs. *State and Ors.* 1980 KLT 612.
36. *Ali Hasan* vs. *State* 1975 Crl.L.J 345.
37. *Sat Kumar* vs. *State of Haryana* AIR 1974 S.C. 294.
38. *Balakrishna Pillai* vs. *State of Kerala* 1971 KLT SN.3.
39. *Mohammed Moinuddin* vs. *The State of Maharashtra* 1971 SCC Crl.L.J 617.
40. *Har Prasad* vs. *State of Madhya Pradesh* AIR 1971 S.C. 1450.
41. *Lalta and Ors.* vs. *The State of U.P.* Crl.A.185/1966.
42. *Kharkan* vs. *State of U.P.* 1965 (1) Crl.L.J. 116.
43. *Manipur Administration* vs. *Thokchom Bira Singh* (1964) 7 SCR 123.
44. *Banwari Godara* vs. *The State of Rajasthan* Crl.A.141/1960.
45. *Sealfron* vs. *United State* (1948) 332 US Rep. 575.
46. *Ramaswami Goundan* vs. *Subbaraya Goundan* AIR (35) 1948 Madras 388.
47. *Emperor* vs. *Sukh Dev* 1929 Lahore 705.

RESULT: Petitions dismissed.

PRATIBHA RANI, J.

1. The present petitions lay a challenge to the impugned orders passed by the learned Addl. Sessions Judge, Delhi, whereby the petitioners were charged for having committed the offences punishable under Sections 302/307/34 IPC. (Criminal Revision No.746/2006 has been filed by the petitioner Inder Singh Bisht impugning the order dated 12.12.2002 and Criminal Revision No.545/2006 has been filed by petitioner O.P.Chaudhary impugning the order dated 25.02.2005, vide which they were separately charged in Sessions Case No. 12/05)

2. The facts of the case which are common to both the petitions, as set out in the impugned order dated 12.12.2002 are as under:" Before the application for discharge of accused is considered, it will be appropriate to set out the case of prosecution against him. Prosecution case is that Om Parkash, who is nephew of accused N.P. Singh, along with another person called Choudhary went to the house of Ram Singh and Manoj Kumar in a jeep; put them in jeep, brought them to their kothi in Vasant Kunj and there these two persons were allegedly tortured, apart from injured Manoj Kumar, Ram Singh, Raju, Pardip, Ganga and Nahar Singh were also brought to the same place of accused persons. Deceased Arjun was also brought there. These persons were allegedly confined in the house of accused Om Parkash Choudhary and given beatings by accused persons. Out of the torture allegedly given to Arjun by accused Om Parkash, N.P. Singh; Om Parkash Choudhary and I.S. Bist, Present accused, he died due to multiple injuries present on his body. Other persons also sustained injuries at the hand of accused persons, therefore, present case under above mentioned Sections was filed against accused persons. Role assigned to accused I.S. Bist is that he along with O.P. Choudhary and others was present in the house and he performed the role of recording the confessional statement of the persons allegedly tortured by accused O.P. Choudhary and others. In the statement of Manoj Kumar, Ram Singh, Pardip and others witnesses, it is mentioned that accused persons O.P. Choudhary and N.P. Singh had brought the abovenamed injured and deceased to the house in question where they were beaten with the help of iron rod and steel pipes. Even the freeze water is alleged to have been poured upon them and thereafter they were beaten up. Accused O.P. Singh, N.P. Singh and O.P. Choudhary @ Omi Choudhary collectively gave beating to Arjun and others to extract confession. Apart from that he was made to inhale the smoke produced by burning chillis. The role assigned to accused I.S. Bist is that accused N.P. Singh gave a pen to I.S. Bist and asked him to record the confession for future use which he wrote on a paper and obtained the signature of the persons allegedly tortured. He also asked the injured persons that he had noted down their names and addresses and if any of the injured persons disclosed anything to that person, he will get their parents kidnapped. These witnesses have also stated that accused persons subjected them to severe beatings as a result of which Arjun died."

3. On behalf of petitioners, it has been submitted that both the co-

accused persons namely N.P.Singh and O.P.Chaudhary have been acquitted by the learned Trial Court for the reason that none of the prosecution witnesses to the occurrence as well as the complainant, who is the wife of the injured Ram Singh, supported the case of prosecution resulting in acquittalof the two accused persons facing trial at that time. The evidence to be produced by the prosecution in case these two accused are also made to face trial, would remain the same and ultimately the case will result in acquittal of these petitioners also which will be at the cost of wastage of precious time of the Court. It has been submitted that once the witnesses have been examined by the Court during the trial against co-accused, charge cannot be framed merely on the basis of complaint and statement of witnesses recorded under Section 161 Cr.P.C., but the statements of witnesses made during trial. If the statements made during trial by the prosecution witnesses are considered the case is to ultimately result in acquittal and in these circumstances it is necessary that the order framing charge be quashed. It has also been submitted on behalf of the petitioners that in both the impugned orders, the learned ASJ specifically mentioned that the inherent powers to quash the charge are vested only in High Court and due to this handicap proceedings against the petitioners could not be quashed by the learned ASJ.

4. It has also been submitted on behalf of the petitioners that the manner in which the witnesses have not identified the persons facing trial at that time, the same may happen if these petitioners are also made to face trial, as basically none of the witnesses have named these petitioners during their statements before the Court as offenders and even the role assigned to I.S.Bisht is minimal i.e. allegedly extracting confession at the behest of N.P.Singh, who already stands acquitted. In support of their contention, learned counsel for the petitioners have relied upon the decisions of (i) **Urmila Devi vs. State** 2006 (91) DRJ 341; (ii) **Sunil Kumar vs. State** 2000 (1) Crimes 73 (Delhi); (iii) **Jaswinder Singh vs. State of Punjab** Crl. Misc. No.M-15621/2011 decided on 03.02.2012; (iv) **Gurpreet Singh @ Khinder vs. State of Punjab** 1995(2) CLR 100 (P & H); (v) **Amarjit vs. State** 1996 (1) C.C. Cases 465 (Delhi); (vi) **Santosh Kumar Maity vs. State of Orissa** 2006 (4) Crimes 417 and (vii) **Central Bureau of Investigation vs. Akhilesh Singh** 2005(1) SCC 478.

5. The judgment of **Sunil Kumar** (supra) lays down that where the evidence relied against all the accused is inseparable and indivisible and

if some of the accused have been acquitted, the remaining accused cannot be treated differently on the basis of the same evidence.

6. The decision of **Jasvinder Singh** (supra) is also on identical footing i.e. where the evidence against all the accused persons is inseparable and indivisible and if some of the accused persons have been acquitted, the remaining accused persons cannot be treated differently on the basis of same evidence.

7. In **Amarjit's** case (supra), it was held that where the coaccused stand acquitted on the ground that the prosecution witness is not worthy of reliance, then on the same evidence the other accused, who was declared P.O, cannot be permitted to undergo ordeal of a trial.

8. The decision of **Santosh Kumar vs. State of Orissa** (supra) is on the point that where the principle accused having already faced trial and having been acquitted, continuance of criminal proceedings against co-accused would amount to abuse of process of law.

9. In **CBI vs. Akhilesh Singh** (supra), it was held that once the main accused, who is alleged to have hatched the conspiracy was discharged and matter had attained finality, no purpose would be served in further proceedings against co-accused.

10. Mr.Navin Sharma, learned APP for the State submitted that at the stage of framing of charge, the Court has to consider the statements of witnesses recorded under section 161 Cr.P.C. and other material collected by the prosecution to prove its case. It has been further submitted that the statements of the witnesses recorded during trial against coaccused can at the most be treated as under Section 299 Cr.P.C. against these two petitioners and the same can be read against them only in the contingency viz. (i) the witness is not available being dead or incapable of giving evidence or (ii) his personal presence cannot be procured without an amount of delay, expense or inconvenience, only then such circumstances should be taken into consideration and the evidence recorded under Section 299 Cr.P.C. may be accepted in evidence to be used against such accused persons.

11. Learned APP for the State further submitted that these two petitioners were absconding during trial and the witnesses have mainly deposed only against the accused persons facing trial at that time. The

witnesses had no occasion to identify these petitioners and depose about their role in the alleged occurrence. Hence, acquittal of the co-accused is no bar to the trial of these petitioners who were absconding at that time in view of the fact that the evidence to be produced against them is separable and divisible. In support of his submissions, learned APP has relied upon (i) **Urmila Sahu v. State of Orissa** 1998 Crl.L.J 1372; (ii) **Mohammed Moinuddin vs. The State of Maharashtra** 1971 SCC Crl.L.J 617; (iii) **Sat Kumar v. State of Haryana** AIR 1974 S.C. 294; (iv) **Ranbir Yadav v. State of Bihar** AIR 1995 S.C 1219; (v) **Nirmal Singh v. State of Haryana** AIR 2000 S.C 1416 and (vi) **Har Prasad v. State of Madhya Pradesh** AIR 1971 S.C. 1450.

12. The main thrust of arguments of both the petitioners is on the judgment of this Court in **Urmila Devi vs. State** (supra). The facts of the said case were that **Urmila Devi,** mother-in-law; Banarasi Das, father-in-law and Mahesh Kumar, husband were sent to face trial for having committed the offences punishable under Sections 498-A/304B/34 IPC. The three accused were acquitted by the learned ASJ and when the petitioner Urmila Devi joined the proceedings she was charged for having committed the offences punishable under Sections 498A/304B/34 IPC which order was challenged before this Court on the ground that no useful purpose would be served by subjecting the petitioner to a full-fledged trial.

13. The learned Single Judge considered the facts and circumstances of the case and the conclusion arrived at by the learned ASJ while acquitting the three accused recorded in the order of acquittal dated 24.09.2003, extracted in para-18 of the judgment is as under:

> 18. The order of acquittal dated 24.9.2003 passed by the learned Additional Sessions Judge in respect of other accused clearly records **that it is doubtful as to whether the deceased (Meenu) was subjected to cruelty or harassment for the sake of dowry by any of the accused persons. The learned Additional Sessions Judge, therefore, concluded that the prosecution has not been able to prove its case against any of the accused persons and that it would not be safe to act upon the testimony of the prosecution witnesses. When such a finding has been recorded in respect of the co-accused and where the evidence against the present petitioner is neither separable nor divisible from that against the co-accused, it would not be in the interest of justice to permit the present petitioner to be subjected to a trial when the end result is more than clear.** Subjecting the present petitioner to trial would be an exercise in futility."

14. A bare reading of the above judgment makes it ample clear that it was only in view of the finding that a doubt had been created in the case of prosecution whether the deceased was subjected to cruelty for the sake of dowry by the accused persons that the learned Single Judge came to the conclusion that the allegations against the petitioner Urmila Devi were not inseparable and indivisible resulting in quashing of charge against petitioner Urmila Devi.

15. Sofar as reliance placed by counsel for the petitioners on the aforesaid decisions is concerned, these are of no help to the case of petitioners, as these judgments do not lay down any straitjacket formula that whenever any principal accused or some of the accused are acquitted, co-accused must also be acquitted, as trial against them would amount to abuse of process of law. It is the facts and circumstances of each case that have to be considered by the Court while dealing with the effect of acquittal of the principal accused or some of the other accused at some subsequent stage when the absconding accused persons join the proceedings to face the trial.

16. The apparent conflict in the rulings of Division Bench and Single Bench of the Kerala High Court on the issue led to reference to the Full Bench in the circumstances detailed in para-1 of the report **Moosa vs. Sub Inspector of Police** 2006 Crl.L.J 1922, as under:

> "1. The above Criminal Miscellaneous Cases are filed under Section 432 of the Code of Criminal Procedure seeking to quash the criminal proceedings initiated against the petitioners herein on the ground that the co-accused in the respective cases were acquitted on trial. The case of the petitioners who were absconders were separated and are now proceeded with in their respective cases. The co-accused against whom case was proceeded with earlier were finally acquitted on appreciation of the evidence in each of the cases above. It was contended that as the prosecution failed to prove the guilt of any of them, no useful purpose will

be served by conducting trial against them and it will be an abuse of process of the court and to secure the ends of justice further proceedings against the petitioners is to be quashed. In support thereof reliance was placed on the decision of a Division Bench of this Court in **Arun Kumar v. State of Kerala** Crl.M.C.Nos.1053, 1067 & 1078/2005 came up for consideration before a Learned Judge of this Court who after referring to the decisions in **Joy v. State of Kerala** 2002(3) KLT 425, **Chellappan v. State of Kerala** 1992(1) KLT 609, **Balakrishna Pillai v. State of Kerala** 1971 KLT SN.3, **Felix v. State and Ors.** 1980 KLT 612 and also Arun Kumar's case cited supra, was of the view that there is apparent conflict in the Division Bench and Single Bench rulings of this Court and the matter required to be referred to a Full Bench.

In the reference order, Ramkumar, J expressed his feeling that granting relief to an absconder accused may give a wrong message to a law abiding co-accused who stood trial that it was foolish on his part to attend the process of trial and its result will be that like-minded accused persons also will be tempted to adopt elucive tactics for the eventual report to such short-cut method. Subsequently, Crl.M.C.Nos.3102-3300, 3460 and other connected matters which came up for consideration before a Division Bench of this Court also were referred to the Full Bench."

17. The Full Bench of Kerala High Court after detailing brief history of the legislation behind the incorporation of a provision like Section 482 Cr.P.C., discussed its object and details, and the extent of the powers and circumstances under which it is generally exercised. The Full Bench referred to the various judgments delivered by the Apex Court, Kerala High Court and other High Courts detailed hereunder:

1. **Joy v. State of Kerala** 2002 (3) KLT 425
2. **Chellappan vs. State of Kerala** 1992(1) KLT 609
3. **Emperor v. Sukh Dev** 1929 Lahore 705
4. State of U.P. (1959 Allahabad 69)

5. **Dr.Raghubir Saran v. State of Bihar**
6. **Madhavarao J. Scindia v. Sambhajirao C. Angre** 1988 SCC (Crl.) 234
7. **State of Karnataka v. L.Muniswamy**
8. **Karpoori Tahkur v. Baikunth Nath Dey** 1990 SCC (Crl.) 642
9. **Chand Dhawan v. Jawahar Lal** 1992 SCC (Crl.) 636
10. **State of Haryana v. Ch.Bhajan Lal**
11. **Minakshi Bala v. Sudhir Kumar** 1994 SCC (Crl.) 1181
12. **State of Bihar v. Rajendra Agrawalla** 1996 SCC (Crl.) 628
13. **Satish Mehra v. Delhi Administration**
14. **Pepsi Foods Ltd. v. Special Judicial Magistrate**
15. **Ashok Chaturvedi v. Shitul H. Chanchani**
16. **Arun Shankar Shukla v. State of U.P.** 1999 SCC (Crl.) 1076
17. **Dinesh Dutt Joshi v. State of Rajasthan**
18. **State of Karnataka v. M.Devendrappa**
19. **B.S.Joshi v. State of Haryana**
20. **State of M.R. v. Awadh Kishore Gupta** 2004(1) KLT (SC)(SN) 35: (2004) SCC (Crl.) 353
21. **State of A.P v. Golconda Linga Swamy** 2004 (3) KLT (SC)(SN) 95: 2004 SCC (Crl.) 1805
22. **Central Bureau of Investigation v. Akhilesh Singh**
23. **Subramanium Sethurainan v. State of Maharashtra** 2005 SCC (Crl.) 242
24. **Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Hague** 2005 SCC (Crl.) 283

25. **Rupan Deol Bajal v. Kanwar Pal Singh Gill** 1995 SCC (Crl.) 1059

26. In **Pritam Singh v. The State of Punjab**

27. **Manipur Administration v. Thokchom Bira Singh** (1964) 7 SCR 123

28. **Kharkan v. State of U.P.** 1965 (1) Crl.L.J. 116

29. **State of Andhra Pradesh v. Kokkiliagada Meerayya**

30. **Gopal Prasad Sinha v. State of Bihar**

31. **Masud Khan v. State of Uttar Pradesh**

32. **Amritlal Ratilal Mehra v. State of Gujarat**

33. **Mcllkenny v. Chief Constable** (1980) 2 All ER 227

34. **North West Water Ltd. v. Binnie & Partners** (1990) 3 All ER 547

35. **Banwari Godara v. The State of Rajasthan** (Crl.A.141/1960

36. **Lalta and Ors. v. The State of U.P.** Crl.A.185/1966

37. **The Assistant Collector of Customs and Anr. v. LR.Malwani and Anr.**

38. **Mst. Harkori v. State of Rajasthan** AIR 1998 SC 1491

39. **Sealfron v. United State** (1948) 332 US Rep. 575

40. **Ali Hasan v. State** 1975 Crl.L.J 345

41. **Raja Ram v. State of M.P.** 1994 SCC (Crl.) 573

42. **Ramaswami Goundan v. Subbaraya Goundan** AIR (35) 1948 Madras 388

43. **Gangadhar Behera v. State of Orissa** 2003 SCC (Crl.) 32

44. **Gurcharan Singh v. State of Punjab**

45. **Bijoy Singh v. State of Bihar** 2003 SCC (Crl.) 1093

46. **Sucha Singh v. State of Punjab**

47. **Megh Singh v. State of Punjab** 2004 SCC (Crl.)

48. **Gorle Section Naidu v. State of A.P.** AIR 2004 SC 1169

49. **Raju Rai v. State of Bihar** 2006 (1) KLT (SC) (SN) 8: 2005(7) Supreme 459

50. **Arunkumar v. State of Kerala**

18. After considering the above mentioned fifty judgments, the Full Bench of Kerala High Court summarized the legal position as under:"

53. In the light of the above discussions, we may summarise the legal position as follows:

(i) The inherent powers of the High Court reserved and recognized under Section 482 Cr.P.C. of the Code of Criminal Procedure are sweeping and awesome; but such powers can be invoked only (a) to give effect to any order passed under the Code of Criminal Procedure or (b) To prevent abuse of process of any court or (c) otherwise to secure the ends of justice. Such powers may have to be exercised in an appropriate case to render justice even beyond the law.

(ii) considering the nature, width and amplitude of the powers, it would be unnecessary, inexpedient and imprudent to prescribe or stipulate any straight jacket formula to identify cases where such powers can or need not be invoked.

(iii) But such powers can be invoked only in exceptional and rare cases and cannot be invoked as a matter of course. Where the Code provides methods and procedures to deal with the given situation, in the absence of exceptional and compelling reasons, invocation of the powers under Section 482 of the Code of Criminal Procedure is not necessary or permissible.

(iv) The fact that an accused can seek discharge/dropping of proceedings/acquittal under the relevant provisions of the Code in the normal course would certainly be a justifiable reason, in the absence of exceptional and compelling reasons, for the High Court not invoking its extraordinary powers under Section 482 Cr.P.C.

(v) In a trial against the co-accused the prosecution is not called upon, nor is it expected to adduce evidence against the absconding co-accused. In such trial the prosecution cannot be held to have the opportunity or obligation to adduce all evidence against the absconding co-accused. The fact that the testimony of a witness was not accepted or acted upon in the trial against the co-accused is no reason to assume that he shall not tender incriminating evidence or that his evidence will not be accepted in such later trial.

(vi) On the basis of materials placed before the High Court in proceedings under Section 482 of the Code of Criminal Procedure (which materials can be placed before the court in appropriate proceedings before the subordinate courts) such extraordinary inherent powers under Section 482 of the Code of Criminal Procedure cannot normally be invoked, unless such materials are of an unimpeachable nature which can be translated into legal evidence in the course of trial.

(vii) The judgment of acquittal of a co-accused in a criminal trial is not admissible under Sections 40 to 43 of the Evidence Act to bar the subsequent trial of the absconding co-accused and cannot hence be reckoned as a relevant document while considering the prayer to quash the proceedings under Section 482 Cr.P.C. Such judgments will be admissible only to show as to who were the parties in the earlier proceedings or the factum of acquittal.

(viii) While considering the prayer for invocation of the extraordinary inherent jurisdiction to serve the ends of justice, it is perfectly permissible for the court to consider the bona fides – the cleanliness of the hands of the seeker. If he is a fugitive from justice having absconded or jumped bail without sufficient reason or having waited for manipulation of hostility of witnesses, such improper conduct would certainly be a justifiable reason for the court to refuse to invoke its powers under Section 482 of the Code of Criminal Procedure.

(ix) The fact that the co-accused have secured acquittal in the trial against them in the absence of absconding co-accused cannot by itself be reckoned as a relevant circumstance while considering

invocation of the powers under Section 482 of the Code of Criminal Procedure.

(x) A judgment not interparties cannot justify the invocation of the doctrine of issue estoppels under the Indian law at present.

(xi) Conscious of the above general principles, the High Court to consider in each case whether the powers under Section 482 of the Code of Criminal Procedure deserve to be invoked. Judicial wisdom, sagacity, sobriety and circumspection have to be pressed into service to identify that rare and exceptional case where invocation of the extraordinary inherent jurisdiction is warranted to bring about premature termination of proceedings subject of course to the general principles narrated above. "

19. In the case of **Rajan Rai vs. State of Bihar** (2006) 1 SCC 191, the investigating officer submitted charge sheet against six accused on which basis the trial proceeded but one accused (Rajan Rai) absconded. Consequently, his trial was separated and the trial against five other accused persons proceeded but out of them, one accused died before the commencement of the trial, therefore, trial was held against four accused persons, who were convicted and sentenced by the trial court. The four convicted accused persons filed appeal in the High Court against their conviction, which was allowed by the High Court and all four of them were acquitted. The acquittal judgment attained finality.

20. It may be mentioned that during the pendency of the appeal preferred by the aforesaid four accused, the absconded accused Rajan Rai was apprehended and his trial was held separately, who was ultimately convicted by the trial court. He also preferred an appeal in the High Court but his appeal was taken up after disposal of the first appeal filed by four other accused persons and his Learned Counsel argued that four coaccused persons had already been acquitted, therefore, Appellant Rajan Rai was also entitled to the benefit of that judgment. The Apex Court held that the judgment of acquittal rendered by the High Court in appeal arising out of the earlier sessions trial was not relevant under the other provisions of the Evidence Act and was clearly irrelevant and could not have been taken into consideration by the High Court. The Apex Court opined that the decision in the case had to turn on the evidence led in it. The case of the accused, who was tried subsequently had to be

decided only on the basis of evidence led during the course of his trial and the evidence led in the case of previously tried accused persons was irrelevant. The Apex Court while propounding the aforesaid principles, relied upon the decision of Privy Council in **Hui Chi-ming v. R.** (1991) 3 ALL.ER 897. In that case, the Privy Council held that evidence of the outcome of an earlier trial arising out of the same transaction was irrelevant and therefore inadmissible since the verdict reached by a different jury, whether on the same or different evidence, in the earlier trial amounted to no more than evidence of the opinion of that jury. Further, it was laid down that a person could properly be convicted of aiding and abetting an offence even though the principal offender had been acquitted and accordingly, the trial Judge had rightly excluded evidence of the principal offender's acquittal of murder.

21. In the instant case, during trial of co-accused N.P.Singh and O.P.Chaudhary, no doubt, the prosecution witnesses have not fully supported the case of prosecution. But it was mainly on the identity of the persons facing trial at that time i.e. N.P.Singh and O.P.Chaudhary not being proved that they have been acquitted. So far as the incident is concerned, except PW -Pradeep, who stated that he received the injuries in factory, but admitted that he was also removed to hospital along with other injured persons by the police, others have deposed about the incident in which Arjun died and others suffered injuries. Here, it is necessary to refer their version that they could identify the persons involved in the incident.

> "PW2 Ram Singh deposed that "I cannot tell the names of the persons who gave beatings but I can identify them if shown to me."
>
> PW1 Neelam Devi deposed about her husband being taken by two persons from the house for making some inquiry and that next day she had approached the police by visiting the police station in connection with the occurrence. She has stated that "I can identify the person who took away my husband, if shown to me".
>
> PW6 Raju, another injured, deposed that "I do not know who were the person who made me sit in the vehicle or the persons who were already sitting in the vehicle. I do not know the name of other two labourers who were already present there. Then four persons started giving beatings to me, Badal and two labourers with dandas."
>
> I do not know who took me from my house or gave beatings to me but I may identify them if shown to me."

22. It is necessary to mention here that so far as the complainant Neelam is concerned, she is a witness only to the incident of her husband Ram Singh and one Manoj being taken from the house after the midnight and on their failure to return, her contacting the police for their rescue. She also stated that she could identify the person who took away her husband.

23. This Court cannot ignore that the nature of incident is such that all the persons suspected to be behind the theft allegedly committed at the house of N.P.Singh were huddled at the house of N.P.Singh and allegedly tortured to enquire and interrogate into the incident of theft. Due to the extreme torture given in most inhuman manner, Arjun was found dead at the spot by the police. His post mortem report speaks of the degree of the torture he was subjected to. At that time, all the persons allegedly involved in the occurrence were named by all the injured in their statements before the I.O. so there was hardly any need for getting the TIP conducted. The Court would appreciate the credibility and truthfulness of the witnesses on overall consideration of the events without being swayed by the fact that the witness does not support the prosecution version in its entirety.

24. It is pertinent to record here that the learned ASJ, who acquitted the co-accused persons N.P.Singh and O.P.Chaudhary had also heard arguments on the point of charge when the petitioner I.S.Bisht joined the proceedings and vide his detailed and well reasoned order, the petitioner I.S.Bisht was charged for the offence punishable under Sections 302/307/34 IPC. The legal position is well settled that acquittal can be in absentia. Power to discharge the accused is also vested in the learned ASJ. There was nothing to prevent the learned ASJ to acquit all the accused persons chargesheeted by the police while disposing of the cases vide his judgment, on which the petitioners are now relying to seek quashing of order on charge and the charge. The learned ASJ, who conducted the trial and decided the case of co-accused, was satisfied that the petitioner I.S.Bisht had to stand trial in view of the material

available on record. In the facts and circumstances, the case of another co-accused O.P.Chaudhary who joined the proceedings even after I.S.Bisht, was on no separate footing. Thus, the successor Court ordered to frame charge against him also.

25. The evidence led by the prosecution at the time when the co-accused N.P.Singh and O.P.Chaudhary were being tried, and to be adduced qua these two petitioners is separable and divisible, thus distinguishing the facts of this case from the facts of the cases relied upon by the petitioner.

26. Merely because some of the accused are acquitted in a trial separately held, the other accused is not entitled to benefit of acquittal order in all cases. It is settled law that where the evidence is inseparable and indivisible and on the same set of evidence the co-accused have been acquitted then the remaining accused need not face trial. However, if the evidence is separable and divisible and there are specific allegations and accusations against the accused who were not there in the case at the time of trial of co-accused who were acquitted, then it would be a subject matter of trial.

27. This Court should not meticulously analyze the case before the trial takes place to find out whether the case would result in conviction or acquittal. It is also trite that when a party approaches the Court for quashing of charge, this Court is not required to embark upon sifting the entire evidence and judge whether the accused is guilty or not. The only consideration before this Court should be whether there is prima facie indication of the involvement of the accused alleged in the cases or not.

28. So far as the quashing of the order on charge and the charge is concerned, the inherent power should not be exercised to stifle a legitimate prosecution case in exercise of power under Section 482 Cr.P.C. Reliance in this regard can be placed on the decision of **Santosh De and Anr. vs. Archna Guha and Ors.** 1994 (1) SCALE 423 wherein it was observed as under:"

> 15. The facts of this case impel us to say how easy it has become today to delay the trial of criminal cases. Any and every single interlocutory order is challenged in the superior courts and the superior courts, we are pained to say, are falling prey to their stratagems. We expect the superior courts to resist all such attempts. Unless a grave illegality is committed, the superior courts should not interfere. They should allow the court which is seized of the matter to go on with it. There is always an appellate court to correct the errors. One should keep in mind the principle behind Section 465 Cr.P.C. Any and every irregularity or infraction of a procedural provision cannot constitute a ground for interference by a superior court unless such irregularity or infraction has caused irreparable prejudice to the party and requires to be corrected at that stage itself. Such frequent interference by superior courts at the interlocutory stages tends to defeat the ends of justice instead of serving those ends. It should not be that a man with enough means is able to keep the law at bay. That would mean the failure of the very system."

29. Having noted the proposition of law and the facts and the material available on record against these two petitioners and taking into consideration the nature of evidence which is clearly separable and divisible and that the witnesses have to be given an opportunity to identify the offenders, I find that there is no jurisdictional error or illegality committed by the learned ASJ while passing the impugned orders. Power vested in this Court under Section 397/401 Cr.P.C. is a limited power to be exercised in exceptional circumstances which do not exist in the instant cases.

30. Both the petitions are devoid of any merit and the same are hereby dismissed.

31. Trial Court record be sent back forthwith. Both the petitioners are directed to appear before the concerned Trial Court on 14.05.2012.

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FAO (OS)

BUDHIRAJA MINING & CONSTRUCTIONS LTD. ....APPELLANT

VERSUS

IRCON INTERNATIONAL LTD. & ANR. ....RESPONDENT

(SANJAY KISHAN KAUL & RAJIV SHAKDHER, JJ.)

FAO (OS) NO. : 449/2007 & 451/2007 **DATE OF DECISION: 03.05.2012**

Arbitration and Conciliation Act, 1996—Section 33—Indian Evidence Act, 1872—Section 114—Dispute arose qua contract awarded by Respondent to appellant for carrying out earth work for railway formation in construction of minor bridges—To settle dispute, Arbitration clause invoked, arbitrator made and published award in favour of appellant, amount was to be paid within two months from date of award—Appellant found clerical mistakes in award and thus filed application under Section 33 of Act—Application was sent on 18.06.2002 by UPC addressed to arbitrator and copy of it was sent to Respondent also—Learned Arbitrator was not available in Delhi from 18.06.2002 to 28.06.2002 though his office and residence remained open—Another communication was sent by appellant dated 22.07.2002 once again under UPC making reference to earlier application dated 18.06.2002 received by learned Arbitrator—Appellant was informed by office of Arbitrator about non receipt of application dated 18.06.2002—Respondent opposed second application of appellant on ground that no application dated 18.06.2002 was moved by appellant and subsequent application was time barred—However, learned Arbitrator made necessary corrections in award

by way of two applications moved by appellant—Aggrieved by said order, Respondent filed objections—Learned Single judge though sustained plea of limitation and reached to a conclusion in favour of Respondent but did not examine merits of the claim of appellant seeking correction—Thus, aggrieved appellant preferred appeal—According to Respondent application dated 18.06.2002 sent under UPC could not raise presumption in favour of appellant—Held:- Sending a communication by UPC is a mode of service as an acceptable mode of service and a presumption can be drawn under Section 114 (f) of Indian Evidence Act, 1872 in that regard—This, however, does not mean that presumption is not rebuttable and must follow in any case since there may be surrounding circumstances which may create suspicion or other facts may be brought to notice which would belie plea.

It is not in dispute in the present case that letter was properly addressed to the arbitrator. It is posted, as per the UPC receipt, and thus, it will be presumed that the letter reached the destination at a proper time according to the regular course of business of the post office. No doubt in case of a registered letter the presumption would apply with greater force as observed aforesaid. This principle continues to be followed till date including in the recent judgment in **Samriti Devi & Anr. vs Sampurna Singh & Anr.** AIR 2011 SC 773. **(Para 17)**

There are pronouncements of this court also dealing with the issue of presumption of service under Section 114, illustration (f) of the Evidence Act read with Section 27 of the General Clause Act, 1897. In **Ram Murti vs Bhola Nath & Anr.** 22 (1982) DLT 426, it has been observed that such a presumption would arise but would be rebuttable. The learned Single Judge of this court observed that "the presumption under the said two provisions is rebuttable but in the absence of proof to the contrary the presumption, of proper

service or effective service on the addressee, would arise." To the same effect are the observations made in **Madan Lal Seth vs Amar Singh Bhalla** 18 (1980) DLT 427 and **Om Prakash bahal vs A.K.** shroff AIR 1973 Del. 39.

(Para 18)

Important Issue Involved: Sending a communication by UPC is a mode of service as an acceptable mode of service and a presumption can be drawn under Section 114 (f) of Indian Evidence Act, 1872 in that regard—This, however, does not mean that presumption is not rebuttable and must follow in any case since there may be surrounding circumstances which may create suspicion or other facts may be brought to notice which would belie plea.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Anil Seth & Mr. M.K. Pathak, Advocates.

FOR THE RESPONDENT : Mr. K.R. Gupta & Mr. Nitin Gupta, Advocates.

CASES REFERRED TO:

1. *Samriti Devi & Anr.* vs. *Sampurna Singh & Anr.* AIR 2011 SC 773.
2. *Ram Murti* vs. *Bhola Nath & Anr.* 22 (1982) DLT 426.
3. *Madan Lal Seth* vs. *Amar Singh Bhalla* 18 (1980) DLT 427.
4. *Om Prakash bahal* vs. *A.K. shroff* AIR 1973 Del. 39.
5. *Harihar Banerji* vs. *Ramshashi Roy* AIR 1918 PC 102.

RESULT: Appeals allowed.

SANJAY KISHAN KAUL, J. (ORAL)

1. The respondent awarded the contract to the appellant for carrying out earth work for railway formation in construction of minor bridges in

pursuance to agreement dated 06.12.1990. The contract contained an arbitration clause and in view of disputes arising inter se the parties, the appellant invoked the arbitration clause vide letter dated 01.04.1990. On account of failure on the part of the respondent to appoint an arbitrator proceedings were filed in court which culminated in the appointment of Justice P.K. Bahri (Retd.) as the sole arbitrator vide order dated 17.01.2001. The arbitrator made and published an award dated 23.05.2002 awarding a sum of Rs 6,04,807/- in favour of the appellant to be paid within two months from the date of the award failing which it was to carry interest at the rate of 12% per annum. Parties were directed to bear their own costs.

2. It is the case of the appellant that the award contained clerical mistakes which were required to be corrected and thus they filed an application under Section 33 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the said Act) dated 18.06.2002. The correction was sought in the award qua the amount allowed to the appellant for the quantity of work stated to be not recorded in the measurement book. The application is stated to have been sent by UPC to the address of the arbitrator with a copy sent to the respondent. The learned arbitrator was not available in Delhi from 18.06.2002 to 28.06.2002, and though the office and residence of the arbitrator is stated to have remained open the application was not received in the office. Another communication was sent by the appellant dated 22.07.2002 once again under UPC which was received by the arbitrator making a reference to the earlier application dated 18.06.2002 and the fact that it was pending disposal.

3. The respondent, being desirous of releasing the payment as per the award dated 23.05.2002, informed the appellant telephonically, accordingly. The payment was tendered to the appellant and was received on 23.07.2002. The receipt executed on the letter head of the appellant is in the following terms:

> "Received cheque No. 426386 dated 22.07.2002 for Rs. 15,71,982/- (Rupees Fifteen lakhs seventy one thousand nine hundred eighty two only) with thanks from M/s IRCON International Ltd. against the award dated 23.05.02 of Case no. 203/2001 pronounced by Hon'ble Justice P.K. Bahri (Retd.) subject to our application dated 18.06.2002 awaiting disposal.

For BUDHIRAJA MINING &
CONSTRUCTIONS LTD.
Sd/-
DIRECTOR
23/7/02"

4. Thus the appellant while acknowledging receipt of the amount tendered under the award dated 23.05.2002 specifically, stated that the amount was being received subject to the decision in the application dated 18.06.2002 filed by the appellant before the arbitrator.

5. The appellant was informed by the office of the arbitrator about the non-receipt of the application dated 18.06.2002, in response thereto a communication dated 29.07.2002 was sent by the appellant along with sending another copy of the application dated 18.06.2002. This application was opposed by the respondent inter alia on the ground that, no application dated 18.06.2002 has been moved by the appellant and that the respondent had not received any copy of such an application. It appears that, at that stage, as a measure of abundant caution, the appellant also filed an application under Section 5 of the Limitation Act, 1963, (in short Limitation Act) seeking condonation of delay, if any, predicated on the premise that the application dated 18.06.2002 was not received by the arbitrator.

5.1 The arbitrator thereafter proceeded to deal with these two applications. The said applications were disposed of vide dated 11.08.2003. The operative part of this order directed that the amount payable in para 19 of the award dated 23.05.2002 should read as Rs 5,48,093/- in place of Rs 29,448/- and thus in the last paragraph the amount awarded should read as Rs 11,52,900/-. Consequently, a sum of Rs 5,18,545/- was awarded, in addition to the amount earlier awarded to be paid within two months of the date of the order, failing which interest was directed to be payable at the rate of 12% per annum.

6. The respondent aggrieved by this order filed objections under Section 34 of the said Act. These objections encompassed both the plea of the absence of any application being filed on 18.06.2002 and consequently the application being barred by time as also the merits of the defence against any such correction. In terms of the impugned order of the learned Single Judge dated 24.09.2007, the plea of limitation was sustained and a conclusion reached in favour of the respondent as a consequence thereof the merits of the claim of the appellant seeking

correction have, however, not been examined.

7. A perusal of the impugned order shows that the learned Single Judge has primarily dealt with the scope of the power of the arbitrator under Section 33 of the said Act and the time prescribed therein. It is the conclusion of the learned Single Judge that the provisions of the Limitation Act would not apply to the said Act qua the provisions in question and thus the subsequent application sent by the appellant was barred by time being beyond the period of 30 days from the date of the award, while the earlier application had not been received by the arbitrator.

8. It is, however, our view, that before proceeding to examine the issue of the applicability of the Limitation Act to the provisions of the said Act, the first question which ought to be examined was whether an application dated 18.06.2002 had been made by the appellant, because if it was so, it is not in dispute that such an application would be within time. This aspect has received the attention of the learned arbitrator by way of an elaborate discussion in the award.

9. If the order dated 11.08.2003 is perused in this behalf, we find that as per the respondent, the dispatch of the application dated 18.06.2002 and its alleged non-receipt was surrounded by suspicious circumstances and that the mere dispatch of the application under UPC could not raise a presumption in favour of the appellant. This plea has been negated by the learned arbitrator in para 5 on the basis of two facts:

(i) the appellant sending a subsequent communication dated 22.07.2002, wherein there is a reference to the earlier pending application of 18.06.2002; and

(ii) on the receipt of the amount awarded under the award dated 23.05.2002, the appellant specifically referring to the same and alluding to the fact that the receipt was subject to the result of the application of the appellant dated 18.06.2002, pending with the arbitrator.

10. The learned arbitrator thereafter in para 30 has proceeded to note that he received the subsequent communication, though the earlier communication dated 18.06.2002 was not received, although both had been sent under UPC. The respondent is stated to have denied having received both communications. (Learned counsel for the respondent,

however, clarifies that he was not disputing the receipt of the second communication dated 22.07.2002 as well as the application sent on 29.07.2002, but on a court query admits that there was no specific response sent to the letter dated 22.07.2002 disputing the averments made therein of the factum of the existence of the communication dated 18.06.2002, though such a plea was taken before the learned arbitrator)

11. The learned arbitrator has proceeded to believe the plea of the appellant that an application dated 18.06.2002 was sent and there was no endeavour on the part of the appellant to manufacture an UPC in that regard. The arbitrator, in this respect, thus held: *"I hold that the claimant did send the application under Section 33 of the Act on 18.06.2002"*. Thereafter the learned arbitrator has observed that unfortunately the same has not been received at his residence, and thus, there is a good case made out for condonation of delay under Section 5 of the Limitation Act. It appears that the second part of the observation really is a pointer to a measure taken by way of abundant caution since once the arbitrator came to the conclusion that there was in application sent, which was dated 18.06.2002, which an ordinary course would have reached the arbitrator well before lapse of the prescribed thirty (30) days period from the date of the award dated 23.05.2003, the occasion for applicability of Section 5 of the Limitation Act would really not arise.

12. The learned Single Judge in the impugned order dated 24.09.2007 has referred to the acknowledgement of the payment by the appellant on 23.07.2002 but has failed to notice an important fact, i.e., the acknowledgement itself was conditional upon the fate of the application dated 18.06.2002, apart from the receipt issued by the appellant. 13. In order to appreciate Section 33 of the Act we reproduce the provision as under:

> "33. Correction and interpretation of award; additional award. –
>
> (1) Within thirty days from the receipt of the arbitral award, unless another period of time has been agreed upon by the parties – (a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
>
> (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to given an interpretation of a specific point or part of the award.
>
> (2) If the arbitral tribunal considers the request made under sub-section (1) to be justified, it shall make the correction or give the interpretation within thirty days from the receipt of the request and the interpretation shall form part of the arbitral award.
>
> (3) The arbitral tribunal may correct any error of the type referred to in clause (a) of sub-section (1), on its own initiative, within thirty days from the date of the arbitral award.
>
> (4) Unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.
>
> (5) If the arbitral tribunal considers the request made under sub-section 94) to be justified, it shall make the additional arbitral award within sixty days from the receipt of such request.
>
> (6) the arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under sub- section (20 or sub-section (5).
>
> (7) Section 31 shall apply to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section."

14. A reading of the aforesaid provision shows that the time period of 30 days is prescribed from the receipt of the arbitral award (unless another period of time has been agreed upon by the parties) for a party to request the arbitral tribunal to correct any computation error, any clerical or typographical error or any other error of a similar nature occurring in the award. Sub-section (2) of Section 33 prescribes that if the arbitral tribunal finds such a request justified, the correction would be made within 30 days from the receipt of the request. Sub-section (3) of Section 33 also provides that the arbitral tribunal on its own initiative may correct such an error within 30 days, albeit from the date of the arbitral award. It is in this part that a distinction is made qua the date on

which the prescribed time frame starts in a situation wherein the Arbitrator seeks to make a suo moto correction.

15. In the facts of the present case, the dispatch of a communication dated 18.06.2002, even under UPC, ought to have been received by the arbitrator within 48 hours in the usual course. There would still have been time left for the expiry of 30 days, even if we presume that such an application ought to be received by the arbitrator within 30 days of the date of the arbitral award; though the requirement under sub-Section (1) of Section 33 is only for the party to make a request within 30 days of the receipt of the arbitral award. Thus if the application of 18.06.2002 is considered the same is well within time.

16. As to the facts of sending a communication by UPC, in the usual course of things it cannot be said that any unusual practice has been adopted. Such a mode of service is an acceptable mode of service and a presumption can be drawn under Section 114(f) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act) in that regard. This, however, does not mean that the presumption is not rebuttable and must follow in any case since there may be surrounding circumstances which may create suspicion or other facts may be brought to notice which would belie the plea. We may usefully refer to the observations in **Harihar Banerji v. Ramshashi Roy** AIR 1918 PC 102 for the proposition that if a letter is properly directed in this behalf and proved to be posted then, it presumed that in regular course of business it would reach its intended destination. We extract the relevant portion as under:

> "If a letter properly directed, containing notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office, and was received by the person to whom it was addressed. That presumption would appear to their Lordships to apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself."

17. It is not in dispute in the present case that letter was properly addressed to the arbitrator. It is posted, as per the UPC receipt, and thus,

it will be presumed that the letter reached the destination at a proper time according to the regular course of business of the post office. No doubt in case of a registered letter the presumption would apply with greater force as observed aforesaid. This principle continues to be followed till date including in the recent judgment in **Samriti Devi & Anr. vs Sampurna Singh & Anr.** AIR 2011 SC 773.

18. There are pronouncements of this court also dealing with the issue of presumption of service under Section 114, illustration (f) of the Evidence Act read with Section 27 of the General Clause Act, 1897. In **Ram Murti vs Bhola Nath & Anr.** 22 (1982) DLT 426, it has been observed that such a presumption would arise but would be rebuttable. The learned Single Judge of this court observed that "the presumption under the said two provisions is rebuttable but in the absence of proof to the contrary the presumption, of proper service or effective service on the addressee, would arise." To the same effect are the observations made in **Madan Lal Seth vs Amar Singh Bhalla** 18 (1980) DLT 427 and **Om Prakash bahal vs A.K.** shroff AIR 1973 Del. 39.

19. We may also refer to the provisions of Section 16 of the Evidence Act with its illustrations which read as under:

> "16. Existence of course of business when relevant. – When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.
>
> Illustrations
>
> (a) The question is, whether a particular letter was dispatched.
>
> The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that particular letter was put in that place are relevant.
>
> (b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

20. Illustration (b) of Section 16 deals with the question whether a particular letter reached the addressee. The fact of it being posted in due course and was not returned is a relevant fact. The learned arbitrator himself has given weight to the fact that at the relevant stage of time he

was not in Delhi. The other documents of the contemporaneous time and the subsequent communication show that it has been the consistent stand of the appellant that the application was sent on 18.06.2002 under the cover of the UPC. This includes the acknowledgement of payment as well as the subsequent letter dated 22.07.2002. We are thus of the view that this factual finding of the arbitrator did not warrant any interference by the learned Single Judge in exercise of jurisdiction under Section 34 of the said Act and it was not necessary to go into the issue of condonation of delay in filing the application.

21. Learned counsel for the respondent sought to draw strength from the provisions of Section 3 of the said Act to contend that what has been sent ought to have been received by the arbitrator. Section 3 of the said Act reads as under:

> "3. Receipt of written communication. – (1) Unless otherwise agreed by the parties, –
>
> (a) Any written communication is deemed to have been received if it is delivered to the addressee personally or at his place of business, habitual residence or mailing address, and
>
> (b) If none of the places referred to in clause (a) can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it
>
> (2) The communication is deemed to have been received on the day it is so delivered.
>
> (3) This section does not apply to written communication in respect of proceedings of any judicial authority."

22. In our view, all that section 3 of the said Act states, is that, the written communication is deemed to have been received, if: (i) it is delivered to the addressee personally; or (ii) delivered at the place of business of the addressee; or (iii) delivered at the habitual residence of the addressee; or (iv) delivered at the mailing address of the addressee. It does not deal with the issue of presumption as to service once the

document is put through the post in the normal course and that too under UPC, which is a acknowledgement of document being put into post. Section 3 of the Act does not exclude delivery through post.

23. We thus set aside the impugned order of the learned single Judge dated 24.09.2007. However, the matter cannot rest at this since, the merits of the plea of the respondent under the application under Section 34 of the said Act has not been dealt with by the learned Single Judge. It is agreed by learned counsels for the parties that this would require the attention of the learned Single Judge and an adjudication on that aspect. Thus, the matter will have to be remitted to the learned single Judge dealing with the matters to decide the objections of the respondent on merits of the claim qua the issue of there being a clerical mistake in the award, the findings of which is in favour of the appellant.

24. The appeals are, accordingly, allowed leaving parties to bear their own cost.

25. OMP Nos. 431/2003 and 432/2003 be listed before the learned Single Judge on 09.05.2012 for further directions.

ILR (2012) IV DELHI 284
CRL. APPEAL

SHAMIM @ BHURA ....APPELLANT

VERSUS

THE STATE OF DELHI ....RESPONDENT

(M.L. MEHTA, J.)

CRL. APPEAL NO. 324/2011 DATE OF DECISION: 04.05.2012

Indian Penal Code, 1860—Section 489B—Appellant assailed judgment convicting him under Section 489B of Code—Appellant urged, besides other lacunas in prosecution case, it further failed on ground that no

public witness was joined by police inspite of appellant being apprehended from a crowded place, thus, alleged recovery of Indian currency notes was planted on appellant—Held:- Presumption that a person acts honestly and legally applies as much in favour of police officers as of other—It is not proper and permissible to doubt evidence of police officers if there is no proof of ill-will, rancor or spite against accused—Judicial approach must not be to distrust and suspect their evidence on oath without good and sufficient ground thereof.

It is no doubt correct that there were no independent witnesses to substantiate the prosecution case, but this cannot be made the sole ground for throwing out the entire prosecution case. It is experienced that there is not only general apathy and attitude of indifference and reluctance of general public in joining the police, there is equal amount of insensitivity as well. Neither the Police nor the public could be said to be solely responsible for this state of affairs. The public does not want to be dragged in police and criminal cases and want to avoid them because of long drawn trials and unnecessary harassment. The Courts cannot be oblivious of this general state of affairs. Further, in a case where the statements of Police officials inspire confidence and are corroborated by material evidence, then there is no reason to doubt their testimony only on the ground that they are Police officials. **(Para 8)**

Important Issue Involved: Presumption that a person acts honestly and legally applies as much in favour of police officers as of other—It is not proper and permissible to doubt evidence of police officers if there is no proof of ill-will, rancor or spite against accused—Judicial approach must not be to distrust and suspect their evidence on oath without good and sufficient ground thereof.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. R.S. Juneja, Advocate with Mr. Lalit Yadav, Advocate.

FOR THE RESPONDENT : Ms. Fizani Husain, APP.

CASE REFERRED TO:

1. *Aner Raja Khima* vs. *State of Saurashtra,* AIR 1956 SC 217.

RESULT: Appeal dismissed.

M.L. MEHTA, J.

1. This is an appeal under Section 374 Cr.P.C. assailing the judgment dated 22.12.2010 whereby the appellant was convicted under Section 489B IPC and was sentenced for a period of 4 years RI with fine of Rs.15,000/-.

2. It is the case of prosecution that ASI Devender received secret information that the appellant used to sell fake Indian currency notes for half price near Gagan Cinema and such information was noted down by him vide DD No.6. After directions from the ACP, a raiding party consisting of ASI Devender, Head Constable Pramod, Head Constable Dilawar, Constable Ravinder, Constable Kishan Kumar, Constable Anju and Constable Parvez Alam was formed and the party reached near SDM Office, Sunder Nagri along with the secret informer on 06.04.2007 at about 3.30 P.M. At about 4.15 P.M., the appellant/accused came towards Gagan Cinema and on the direction of the secret informer, Constable Ravinder, who was deputed as a decoy customer, went towards him. Constable Ravinder purchased one note of Rs.1,000/- and two notes of Rs.5,00/- from the accused and signaled the raiding party by waiving his hands. The abovementioned notes were found to be fake and on search of the accused, 29 fake Indian currency notes of Rs.1,000/- and 38 fake Indian currency notes of Rs.500/- were recovered. After completion of investigation, the appellant was chargesheeted under Section 489B IPC. The currency notes were examined by A.M. Behere, Asstt. Works Manager (PW-8) who gave his reports that the notes were not genuine. The prosecution examined eight Police officials as witnesses to substantiate its case and after examining the witnesses and material on record, the appellant was found guilty under Section 489B IPC. Hence the present

petition. 3. It is submitted by the learned counsel for the appellant that the Trial Court has not properly appreciated the material contradictions in the statements of prosecution witnesses and hence the judgment passed by the learned Trial Court suffers from infirmity and is liable to be set aside. It is submitted that the FIR was lodged after considerable delay which casts a shadow on the prosecution case. The impugned judgment has further been challenged on the ground that no public witnesses were joined by the Police in spite of the fact that the spot from where the appellant was apprehended is a crowded place and there were a lot of people around at the relevant time. It has been further submitted by the counsel for the appellant that no copy of seizure memo was given to the appellant on the spot or even afterwards. It has been further argued that the prosecution has not been able to show that from where the Rs.1,000/- currency note was taken by the Police which was used by them in the case for trapping the appellant. Finally, it is submitted that the sentence imposed by the Trial Court is very harsh considering the fact that the appellant has 3 dependent daughters and further the appellant was not given the benefit under Section 360 Cr.P.C. and Section 4 of the Probation of Offenders Act.

4. On the other hand, the learned APP for the State submitted that all the contentions raised by the counsel for the appellant were dealt with in the judgment of the learned ASJ and were answered to the satisfaction of the Trial Court by PW-4, ASI Devender. It has been further submitted that the prosecution has been able to prove the guilt of the appellant beyond reasonable doubt and the order of the learned ASJ requires no interference. It has been further argued that keeping in mind the nature of the offence, which is economic in nature and prejudicial to the economic interest of the country, the sentence of imprisonment is just and reasonable and so need not be disturbed.

5. I have heard rival submissions and perused the impugned judgment as well as Trial Court record.

6. It is noted that the material witnesses examined by the prosecution were PW-2, HC Ravinder, PW-4 ASI Devender and PW-5 HC Pramod Kumar. From the perusal of the Trial Court record, it is seen that HC Ravinder and HC Pramod Kumar were cross examined at length, but nothing could be elicited out of them that would cast any doubt on the prosecution case. They corroborated the statements of each other on all

material aspects and their testimonies inspire credence. ASI Devender was not cross examined despite the fact that several opportunities were given to the appellant for the same. Not only that, he was even recalled for cross examination on the request made by the appellant vide application under Section 311 Cr.P.C., but even then he was not cross examined. Again request was made to recall him for cross examination, which was declined. This order remained confirmed upto the Supreme Court. Hence his testimony remained unassailed and rather accepted as unchallenged. Consequently, nothing can be read into the plea of the counsel for the appellant that there were contradictions in the statements of the witnesses and were wrongly relied upon by the learned Trial Court.

7. Moving on as per the records, the appellant was apprehended with fake currency notes by the Police officials at 4.35 P.M. and the FIR was lodged at 7.25 P.M. I find no merit in the plea of the learned counsel for the appellant that there was delay in the lodging of FIR. There are certain procedures that had to be followed and a gap of three hours from the time of occurrence cannot be termed as inordinate delay.

8. Dealing with the next contention of the learned counsel for the appellant, it is noted that there were no independent witnesses to testify the recovery of the fake Indian currency notes from the appellant. However, from the perusal of the Police officials' statements, it is seen that the passers-by were asked by the raiding party to join, but they declined and went away. It is no doubt correct that there were no independent witnesses to substantiate the prosecution case, but this cannot be made the sole ground for throwing out the entire prosecution case. It is experienced that there is not only general apathy and attitude of indifference and reluctance of general public in joining the police, there is equal amount of insensitivity as well. Neither the Police nor the public could be said to be solely responsible for this state of affairs. The public does not want to be dragged in police and criminal cases and want to avoid them because of long drawn trials and unnecessary harassment. The Courts cannot be oblivious of this general state of affairs. Further, in a case where the statements of Police officials inspire confidence and are corroborated by material evidence, then there is no reason to doubt their testimony only on the ground that they are Police officials. In **Aner Raja Khima Vs. State of Saurashtra,** AIR 1956 SC 217, it was observed that the presumption that a person acts honestly and legally applies as

much in favour of police officers as of other. It is not proper and permissible to doubt the evidence of police officers if there is no proof of ill-will, rancor or spite against the accused. Judicial approach must not be to distrust and suspect their evidence on oath without good and sufficient ground thereof.

9. The next contention of the learned counsel for the appellant is that seizure memo was not handed over to the appellant at any time. This plea is patently absurd and untenable as seizure memo is not for the perusal of the accused, but is for the purpose of being put before the Trial Court for the purpose of proof of recovery of the things mentioned therein as also for the examination of the seized material. There is nothing pointed out to doubt the veracity of seizure memo which was undisputed and signed by the appellant. The seizure memo duly stands proved in the testimony of PW-2. Assuming that the copy thereof was not given to the appellant, no prejudice is shown to have been caused to him.

10. Regarding the contention of the learned counsel for the appellant that it has nowhere been recorded that from where came the Rs.1,000/- note, which was allegedly used by the decoy customer HC Ravinder to trap the appellant. From the perusal of record, it is seen that the Rs.1,000/- note beaing No.2CL 515305 was handed over by ASI Devender to HC Ravinder after putting his initial on the same and was sealed in an envelope and marked at Sl. No.2 and seized vide seizure memo Exhibit PW-2/E. It is evident that all necessary steps were taken by the Police officials regarding the genuine currency note used by them and nothing can be pointed out to show that there was any irregularity on their part.

11. From the perusal of the material on record and submissions made by the learned counsel for the appellant, I find no irregularity committed by the police officials who conducted the entire operation and investigation and it is evident that the appellant was rightly convicted by the learned Trial Court after careful consideration of entire facts and circumstances and evidence that was produced before it. The pleas raised by the counsel for the appellant are without any merit and untenable. Keeping in view the nature of offence committed by the appellant, the sentence imposed on him is just and meets the ends of justice. It balances the mitigating factors pointed out by the counsel for the appellant, with the requirement of providing deterrence to the people of the society. I find no reason to disturb the sentence of imprisonment imposed on the

appellant.

12. In view of the above discussion, I find no perversity or illegality in the judgment of conviction and order on sentence passed by the learned Trial Court. The appeal being devoid of any merit is hereby dismissed.

ILR (2012) IV DELHI 290
CRL. M.C.

HAWA SINGH .....PETITIONER

VERSUS

CBI ....RESPONDENT

(PRATIBHA RANI, J.)

CRL. M.C. NO. : 92/2012 DATE OF DECISION: 07.05.2012

Code of Criminal Procedure, 1973—Section 482—Prevention of Corruption Act, 1988—Section 27—Petitioner preferred petition seeking discharge in criminal case filed by CBI against him on ground sanction granted to prosecute against him, was not valid—He had moved application before learned Special Judge seeking discharge on ground of invalidity of sanction which was dismissed and thus, petitioner preferred petition under Section 482 of Code—On behalf of CBI, it was urged once charge was framed in warrant trial case, instituted either on complaint or on police report, trial court had no power under code to discharge accused—Trial Court could either acquit or convict accused unless it decided to proceed under Section 325 and 360 of Code, except where prosecution must fail for want of fundamental

defect, such as want of sanction—Also, sanction order was perfectly authenticated and duly authorized, therefore, discharge could not be sought on ground of invalidity and that too, at stage when case was fixed for final arguments—Held:- Court is not to go into technicalities of sanctioning order—Justice cannot be at beck and call of technical infirmities—Court is only bound to see that sanctioning authority after careful consideration of material that is brought forth, has passed an order that shows application of mind.

The intention of the legislature in providing for a sanction is merely to afford a reasonable protection to public servant in discharge of their official duties. The requirements of law are satisfied if from the record the prosecution is able to show that the sanction was accorded by the competent authority in respect of allegations forming subject matter of chargesheet filed against the accused, after applying mind to the facts and material submitted to him to satisfy whether to grant or refuse the sanction. **(Para 17)**

Important Issue Involved: Court is not to go into technicalities of sanctioning order—Justice cannot be at back and call of technical infirmities—Court is only bound to see that sanctioning authority after careful consideration of material that is brought forth, it has passed an order that shows application of mind.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. H.K. Sharma, Advocate.

FOR THE RESPONDENT : Ms. Sonia Mathur, Advocate.

CASES REFERRED TO:

1. *Jagdish Chandra Makhija* vs. *State (CBI)* 2011 (3) JCC 1847.
2. *State of H.P.* vs. *Nishant Sareen* 2011 (1) AD (SC) 222.

3. *State of M.P.* vs. *Jiyalal* AIR 2010 SC 1451.
4. *T.A. Rambabu* vs. *State of Karnataka,* 2009, Cr.LJ 629 (Karn.).
5. *State of Karnataka* vs. *Ameer Jan* 2008 Sri.L.J. 347.
6. *Darshan Lal* vs. *State (CBI)* Crl.Appeal No.73/2001 decided on 31.07.2009.
7. *Mansukhlal Vithaldas Chauhan* vs. *State of Gujarat* AIR 1997 SC 3400.
8. *Santosh De & Anr.* vs. *Archna Guha & Ors.* (1994) 2 SCC 420.
9. *State of Bihar* vs. *P.P.Sharma,* AIR 1991 SC 1260.
10. *State of Punjab* vs. *Bhim Sain* 1985 Cri.L.J. 1602.
11. *Mohd. Iqbal Ahmed* vs. *State of A.P.* (1979) 4 SCC 172.
12. *Gurbachan Singh* vs. *State,* AIR 1970 Delhi 102.
13. *Indu Bhushan Chatterjee* vs. *State of W.B.* AIR 1958 SC 148.
14. *Jaswant Singh* vs. *State of Punjab* AIR 1958 SC 124.

RESULT: Petition dismissed.

PRATIBHA RANI, J.

1. The petitioner has filed this petition under Section 482 CrPC read with Section 27 of the PC Act, 1988 seeking discharge in CC No. 09/2006 (RC No.DAI-2004-A-0046/DLI).

2. The petitioner challenged the validity of sanction Ex.PW4/A and filed an application before learned Special Judge seeking discharge on the ground of invalidity of the sanction. The said application was dismissed vide order dated 29.11.2011 which is impugned before this Court.

3. Vide impugned order, learned Special Judge held that the sanction order did not suffer from any infirmity or non-application of mind by the authority to grant sanction for prosecution. Sanction was held to be valid and application of the accused was dismissed.

4. In brief, the case of the petitioner is that he was facing trial in the above noted case and during pendency of the trial, he filed an application

seeking discharge on the ground of invalidity of the sanction which has been dismissed by learned Special Judge vide impugned order dated 29.11.2011. In the interregnum period his statement under Section 313 CrPC was also recorded and while answering the questions bearing No.86 to 90, also validity of the sanction and it being accorded by the authority competent to remove him, was disputed.

5. Notice of the petition was sent to CBI. I have heard Mr.H.K.Sharma, counsel for the petitioner and Ms.Sonia Mathur, APP for CBI.

6. At the outset, I would like to observe that when the case was at the stage of final arguments, Court had already heard final arguments in part, the application seeking discharge challenging the validity of sanction, was undesirable particularly in view of Section 19 (3)(a) of Prevention of Corruption Act.

7. As per Section 5 of the Prevention of Corruption Act, 1988, the Special Judge is required to follow the procedure prescribed for warrant trial cases in Code of Criminal Procedure, 1973 (2 of 1974). The trial in a warrant case starts with framing of charge. Once charge has been framed in a warrant trial case, instituted either on a complaint or on a police report, the trial Court has no power under the Code of Criminal Procedure, 1973 (2 of 1974) to discharge the accused. The trial Court can either acquit or convict the accused unless it decides to proceed under Sections 325 and 360 of Code of Criminal Procedure, 1973 (2 of 1974), excepting where the prosecution must fail for want of a fundamental defect, such as want of sanction. An order of acquittal must be based upon a 'finding of not guilty' turning on the merits of the case on appreciation of evidence, at the conclusion of the trial.

8. The mere fact that after seeking approval from the competent authority, sanction order has been authenticated by Under Secretary, duly authorized for the said purpose under Government of India (Transaction of Business Rules), discharge could not have been sought on the ground of invalidity of the sanction order and that too at the stage when the case was fixed for final arguments.

9. In the instant case, it cannot be contended that there is no sanction at all. Infact, it is the very sanction order that has been challenged before learned Special Judge while seeking discharge which is now sought

to be quashed by filing this petition.

10. The impugned order has been challenged by the petitioner claiming it to be bad in eyes of law and based on surmises and conjunctures on the following grounds :

(i) On the application filed by the CBI to summon the sanctioning authority and PW-4 Under Secretary who authenticated the sanction order, they were allowed to be summoned by the Court. However, as both these witnesses were not produced, the statement of PW-4 cannot be read in evidence.

(ii) Vide order dated 27.07.2011 learned Special Judge accepted the contention of prosecuting agency that sanction has not been proved yet and ordered for recalling PW-4 and also summoned the sanctioning authority. But subsequently, the evidence was closed. The application filed by the petitioner seeking discharge was dismissed vide impugned order dated 29.11.2011, which shows perversity.

(iii) The Court allowed the application under Section 311 CrPC and despite that the witnesses were not produced which has caused serious prejudice to the petitioner.

(iv) The sanction order Ex.PW4/A was signed by the Under Secretary who is not the sanctioning authority.

(v) Ex.PW4/A the sanction order does not disclose who is the sanctioning authority as neither the sanctioning authority is referred by name nor by designation but as competent authority.

(vi) Sanctioning authority being not cited as a witness, opportunity to fairly defend to prove that sanction has not been given after application of mind, is denied. It has caused serious prejudice to the petitioner.

(vii) The original file produced from the department which was placed before the competent authority for grant of sanction show that it was a case of total non-application of mind by the sanctioning authority. He has simply written the word 'Approved' and that itself shows that the note which was prepared by Under Secretary and sent to him through Deputy Secretary, was approved without application of mind to the facts of the case. This in itself is sufficient to declare the sanction invalid.

11. The contention of learned counsel for the petitioner that in view

of non-production of sanctioning authority and PW-4 after the application under Section 311 CrPC of CBI was allowed and now statement of PW-4 cannot be read in evidence, appears to be attractive at the first glance but without any force. No doubt, the prayer of the CBI to examine sanctioning authority and re-examine PW-4 the Under Secretary to obtain certain clarifications regarding some matter already on record was allowed and on failure of the CBI to examine them, opportunity was closed. However, there does not seem to be any conflict in the two orders. In the application under Section 311 CrPC, the prayer of the CBI was allowed and if the sanctioning authority was not produced or the clarification from PW-4 regarding some matter, already on record, could not be obtained by CBI, the prejudice, if any, was caused to CBI and not to the petitioner as examination-in-chief and cross examination of PW-4 by counsel for the petitioner was complete.

12. Learned counsel for the petitioner has relied upon **Mansukhlal Vithaldas Chauhan vs. State of Gujarat** AIR 1997 SC 3400, **Mohd. Iqbal Ahmed vs. State of A.P.** (1979) 4 SCC 172; **State of H.P. vs. Nishant Sareen** 2011 (1) AD (SC) 222; **State of Karnataka vs. Ameer Jan** 2008 Sri.L.J. 347; **Salauddin, Nisar Ahmed Bhat vs. State of A.P.** in Writ Petition No.7594 of 1996 decided on 29th August, 1996 (A case under Terrorist and Disruptive Activities (Prevention) Act, 1987 'hereinafter referred to as TADA'); **State of M.P. vs. Jiyalal** AIR 2010 SC 1451 in support of his contention.

13. On behalf of CBI, Ms.Sonia Mathur, APP submitted that under the Business Rules of Government of India, Under Secretary is duly authorized to convey the sanction. She has further submitted that sanction infact has been accorded by the Joint Secretary Mr. T.Sugathan and he was the authority competent to grant sanction and also remove the petitioner from service.

14. Learned APP for CBI further submitted that the original file containing all the documents/material was sent to the sanctioning authority for his satisfaction and after application of mind by the competent authority the sanction has been accorded and the Under Secretary was directed by the Sanctioning Authority to issue the sanction order. Not only that, the CBI has got the file produced before this Court also to satisfy that all the material was placed before the sanctioning authority and thereafter approval was given by the Joint Secretary, who is competent authority to accord

sanction in this case, for prosecution of the petitioner. Learned APP for CBI has relied upon decision of Co-ordinate Bench of this Court in **Jagdish Chandra Makhija vs. State** (CBI) 2011 (3) JCC 1847 and **Jiyalal's** case (Supra).

15. First of all, it is necessary to mention here that the object of sanction under Prevention of Corruption Act is that the authority giving the sanction should be able to consider the material to satisfy that on the basis of evidence produced before him, sanction for prosecution be granted or refused.

16. In the case **Jaswant Singh v. State of Punjab** AIR 1958 SC 124, it was held as under :-

> ' The object of the provision for sanction is that the authority giving the sanction should be able to consider for itself the evidence before it comes to a conclusion that the prosecution in the circumstances be sanctioned or forbidden.'

17. The intention of the legislature in providing for a sanction is merely to afford a reasonable protection to public servant in discharge of their official duties. The requirements of law are satisfied if from the record the prosecution is able to show that the sanction was accorded by the competent authority in respect of allegations forming subject matter of chargesheet filed against the accused, after applying mind to the facts and material submitted to him to satisfy whether to grant or refuse the sanction. Section 19(3)(a) Prevention of Corruption Act, 1988 provides as under :

> 'Sec.19 -**Previous sanction necessary for prosecution** –
>
> (1) xxx xxx
>
> (2) xxx xxx
>
> (3) Nothwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), (a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;'

18. There is no provision in TADA analogous to Section 19(3)(a) of Prevention of Corruption Act and the sanction as required under Section 19 of the Prevention of Corruption Act cannot be compared with the requirement of Section XXA of TADA the purpose of which is to secure a well-considered opinion of a superior authority in the echelon of administration of the police department before a person is actually proceeded against and prosecuted before the designated Court.

19. Before dealing with the contentions raised by learned counsel for the petitioner and to ascertain whether the relevant material was placed before the sanctioning authority and he has accorded the approval after application of mind, it is necessary to refer to the sanction order Ex.PW4/A. Paras 1 to 3 of the sanction order contain the details of the allegations made by the complainant, registration of the FIR and the trap being laid. The sanction order further refers to the CFSL report on the hand washes as well as sofa seat wash which confirmed the presence of phenolphthalein in exhibit marked as LHWT. After referring to the pre-trap conversation recorded before and during the trap and other related documents showing that the petitioner demanded and accepted illegal gratification of Rs.5,000/-from the complainant by exploiting his official position as public servant which constituted an offence punishable under Section 7 and 13 (2) read with 13(1)(d) of Prevention of Corruption Act, 1988 (at 49 of 1988). Paras 5 and 6 of the sanction order needs to be reproduced to ascertain what material was perused by the sanctioning authority before according approval. Paras 5 and 6 of the sanction order Ex.PW4/A are extracted below :

> '5. AND WHEREAS, authority competent to remove the said Sh. Hawa Singh from the office, **after carefully examining the entire records of the case including the statements recorded u/s 161 Cr.P.C., complaint, FIR and other material relevant in regard to the said allegations** and circumstances of the case, consider that Sh. Hawa Singh should be prosecuted in the Court of Law for the said offences and other offence made out of said allegations.
>
> 6. Now, therefore, the competent authority has accorded sanction under Section 19 of the Prevention of Corruption Act, 1988 for the prosecution of the said Sh. Hawa Singh for the said offences and any other offences punishable under any other provision of law in respect of the acts aforesaid and for taking cognizance of the said offences by the Court of Competent Jurisdiction."

20. In the case **Indu Bhushan Chatterjee v. State of W.B.** AIR 1958 SC 148, it was held as under :

> 'Where the sanctioning authority went through all the relevant papers placed before him and accorded sanction, it was held it was a valid sanction if the papers before him gave him the necessary material to take a decision to accord sanction.'

21. The reliance placed by learned counsel on **Mansukhlal Vithaldas Chauhan vs. State of Gujarat** (Supra) is of no help to the petitioner as there is no material on record to suggest that any pressure was put on the sanctioning authority to accord sanction. The reliance on this authority is of no advantage to the petitioner for the simple reason that in Mansukhlal's case sanction was given by the competent authority on the Mandamus/directions issued by the High Court and therefore the sanction was held to be invalid without any application of mind and being accorded mechanically in obedience of the Mandamus issued by the High Court.

22. So far as reliance placed on **Mohd. Iqbal Ahmed vs. State of A.P.** (Supra) and **State of H.P. vs. Nishant Sareen** (Supra) is concerned, the legal position is well settled in this regard and there cannot be any quarrel about it. The sanction order Ex.PW4/A (paras 5 and 6) clarifies the confusion, if any, in the mind of the petitioner about the material being perused by the competent authority for satisfying himself before granting sanction.

23. Reliance placed by learned counsel for the petitioner on **State of Karnataka vs. Ameer Jan** (Supra) is also of no help to the petitioner as the original file containing approval by the sanctioning authority has been produced even before this Court which is sufficient to satisfy that the sanctioning authority had all the relevant material before it while according approval to prosecute the petitioner.

24. Reliance on the report **State of M.P. vs. Jiyalal** (Supra) had been placed by the petitioner as well as CBI. While the report had been referred by the petitioner to show that a serious failure of justice had been caused to him, the CBI had cited it in support of its contention that non-examination of sanctioning authority had no adverse effect on the

validity of the sanction. Learned counsel for the petitioner has relied upon para 7 of the judgment while CBI had relied upon paras 7 and 8 of the judgment. Hence, both the paras are reproduced as under :-

> 7.In the case before us, even if it were to be accepted that there has been an "error, omission or irregularity" in the passing of the sanction order, the learned Single Judge of the High Court has not made a finding which shows that a serious failure of justice had been caused to the respondent. In the absence of such a finding it was not correct for the High Court to set aside the conviction and sentence given by Special Judge.
>
> 8.It was also not justified for the learned Single Judge to hold that the District Magistrate who had passed the sanction order should have been subsequently examined as a witness by the prosecution in order to prove the same. The sanction order was clearly passed in discharge of routine official functions and hence there is a presumption that the same was done in a bona fide manner. It was of course open to the respondent to question the genuineness or validity of the sanction order before the Special Judge but there is no requirement for the District Magistrate to be examined as a witness by the prosecution..

25. Reliance by the petitioner on **Jiayalal's** case (Supra) does not advance his case any further as this Court had failed to notice a serious failure of justice being caused to him by non-examination of sanctioning authority or by just writing 'Approved' and direction to Under Secretary to issue the sanction order. His contention is that the competent authority simply wrote the words 'Approved' which shows lack of application of mind, as held in **Salauddin's** case (Supra), the sanction has to be declared to be invalid and proceedings to be quashed. The answer to this argument has been furnished by the decision in **Salauddin's** case which was under TADA, though cited to promote the case of the petitioner but ultimately turned against him. In the **Salauddin's** case, in paras 5, 7 and 8, it was observed as under :

> '(5) Sri K.G.Kannabhiran, the learned senior counsel contended that (i) prior approval required under sub-section (1) of Section 20-A is a threshold condition precedent to launch criminal prosecution under the Act; although the power to accord prior

approval conferred upon the prescribed police officer is a discretionary one, that power should be exercised sparingly and for valid reasons and after due application of mind to the materials placed before him; sanction of prior approval is not a routine and mechanical act; the sanctioning authority, before sanctioning approval should be satisfied that the grounds are made out for launching prosecution under the Act; in the present case the endorsement of the Commissioner of Police **"seen. Permitted"** does not reflect due application of mind on the part of the Commissioner of police and his subjective satisfaction and therefore it should be held that there was no proper prior approval under sub-section (1) of Section 20-A; (ii) that the competent authority to grant prior approval under Sec.20-A (1) within the territory of Corporation of Hyderabad is the concerned deputy Commissioner of Police, being equivalent in official status to that of District Superintendent of Police and in this case prior approval is sanctioned by the Commissioner of Police, Hyderabd and therefore it should be held that there is no approval accorded by the competent statutory authority; (iii) the Fourth Metropolitan Sessions Judge, Hyderabad by his order dated 11.03.1994 in Crl.M.P. No.368/94, while granting bail to some of the accused, recorded the finding that prior approval under Sec.20-A(1) was not obtained; it was not open for the prosecution now to invoke the provisions of the Act; further, the same learned Judge in his order dated 13.04.1994 in Crl.M.P. No.520/94 held that the endorsement of the commissioner of Police dated 11.11.1993 "seen. Permitted" does not amount to prior approval for want of due application mind; these two orders remain unchallenged and therefore the State is bound by those findings and it is impermissible for the State to contend anything contrary to those findings and they are estopped from doing so; the learned Senior Counsel would press into service the principle of "issue estoppel" in support of his contention; (iv) previous sanction under sub-section (2) of Section 20-A of the Act was obtained only in respect of Accused No.1 to 7 and there is no sanction under the said sub-section as regards the Accused No.8 (the petitioner in W.P.No.7594/96) is concerned and therefore the Designated Court ought not to have taken cognizance of offences under the provisions of the act against the Accused No.8.

(7) Section 20-A was inserted into the Act by Amendment Act 43 if 1993 and it came into force with effect from 22-051993. Section 20-A reads as under :-

> 20-A Cognizance of offence:-(1) Notwithstanding anything contained in the Code, no information about the commission of an offence under this Act shall be recorded by the police without the prior approval of the District Superintendent of Police. (2) No Court shall take cognizance of any offence under this Act without the previous sanction of the Inspector-General of Police or as the case may be, the Commissioner of Police."

(8) Two prior sanctions contemplated under Section 20-A are sine qua non for recording any information about the commission of an offence and for taking cognizance of any offence. The Act was enacted in the background of escalation of terrorist activities in many parts of the country in order to combat and cope with terrorist and disruptive activities effectively providing for constitution of special designated courts and laying down drastic procedures, a departure from the procedure observed in the regular criminal law courts. This special procedure in the Act tends to trench upon the ordinary, general processorial rights of the citizens and persons, but it had become necessary evil to protect the larger national and community interest. The fundamental freedoms conferred and the goals cherished by the Constitution could never be enjoyed and achieved in society besieged by anti-social and terrorist activities. At the same time, it is of paramount importance that innocent people should not be hauled up as terrorists under the Act subjecting them to rigour of hard procedure and enhanced sentences at the instance of the ordinary, field level police officers who are entrusted with the duty of maintenance of law and order. Therefore, it appears to our mind that the purpose of the two sanctions contemplated under Section 20A of the Act is to secure a well-considered opinion of a superior authority in the echelon of administration of the police department before a person is actually proceeded against and prosecuted before the designated Court..

26. Mr.H.K.Sharma, learned counsel for the petitioner has submitted

that in paras 42 and 43 of **Salauddin's** case the sanction accorded qua the petitioner was held to be invalid and therefore, in para 46, cognizance was treated to be non-est in law as Commissioner of Police while according sanction made endorsement 'Seen. Permitted'. and on this analogy, in this case also 'Approved' written by the sanctioning authority cannot be termed to be valid sanction accorded after due application of mind to the facts and material produced before him.

27. Learned counsel for the petitioner failed to notice para 14 of the report in **Salauddin's** case which is just contrary to the submissions made by learned counsel for the petitioner, extracted below :-

> (14) The original records placed before us disclose that Sri Shyam Rao, Inspector of Police, East Zone, Team-I, C.C.S., submitted a letter bearing no.Cr/151/93/e-2/1-1/93, dated 11.11.1993 to the Commissioner of Police, Hyderabad seeking approval to add the provisions of the Act in the FIR enclosing a copy of the complaint lodged by Sri T.V.Raju, Inspector of Police (SIT) on the previous day. **The Commissioner of Police made an endorsement on the said letter on 11.11.1993 itself to the following effect : "seen. Permitted".** Since a copy of the complaint lodged by Sri T.V.Raju on 10.11.1993 was appended to the letter, we have no reason to suppose that the Commissioner of Police read the letter only and not the copy of the complaint. The complaint taking it on its face value, dearly discloses commission of offence-under the act. If that is so, then what is the meaning of the endorsement of the commissioner of Police in the letter? **The endorsement 'seen' in the content of the case, meant that the Commissioner perused both the letter and the copy of the complaint. There was sufficient as well as relevant materials before the commissioner to record his subjective satisfaction about the commission of offences under the Act and for according approval under sub-section (1) of Section 20-A.** This is borne out from the original records. Therefore, it cannot be said that the sanction accorded by him is invalid merely because he did not record reasons for according the approval. Approval under Section 20-A(1) not being a judicial or quasi-judicial act, it need not be based on any legal evidence nor is illegally necessary to give reasons for accordingly approval for lodging the complaint. **After perusal of the original records,**

we are fully satisfied that the commissioner of police accorded approval after due application of mind and satisfying himself that the offences under the Act were committed..

28. Not only this, in paras 42 and 43 of the report, the conclusion arrived is not what has been submitted before this Court. The sanction 'Seen' Permitted' accorded in respect of seven accused persons listed therein was considered to be valid. Since the list did not include name of accused No.8, that cognizance taken against him, was held to be without jurisdiction. For the benefit of the petitioner, para 42 and 43 are extracted hereunder as above conclusion is clearly discernible on bare reading of these paragraphs :

'(42) **From this order it is clear that the Commissioner of Police has accorded previous sanction to prosecute seven persons listed therein under the provisions of the Act as well as certain other provisions of the Indian Arms Act and Explosive Substances Act after recording his subjective satisfaction. The list of seven persons named therein does not include the name of the petitioner in W.P.No.7594/96 who is arrayed as accused No.8 in SC No.595/94 on the file of the Designated Court. In that view of the matter it should be held that there is no sanction to prosecute Md. Salauddin, the petitioner in W.P.No.7594/96.** Therefore it should be held that taking cognizance of the offences under the provisions of the Act against Md. Salauddin, should be held to be one without jurisdiction and we hold accordingly.

(43) The resultant position is **that there is proper sanction by the Commissioner of Police both under sub-sections (1) and (2) of Section 20-A as regards the accused 1 to 7 are concerned. There is also proper sanction under sub-section (1) of Section 20-A of the Act as regards the Accused No.8 is concerned.** Therefore, it has become necessary to declare that the action of the Designated Court in taking cognizance of offences under the provisions of the Act against the accused No.8 is one without jurisdiction and a nullity. In other words W.P.No.7594/96 is entitled to be allowed whereas W.P.No.7700/96 is liable to be dismissed.'

29. The contention of learned counsel for the petitioner that Under Secretary PW-4 Mr.Rajnish Tingal is not the author of the sanction order and was not the authority competent to remove the petitioner from service and the sanctioning authority has not been cited and examined as a witness, is liable to be rejected in view of various pronouncements in this regard including Jiyalal's case.

30. In the case **T.A. Rambabu vs. State of Karnataka,** 2009, Cr.LJ 629 (Karn.), it was held as under :

'The Petitioner, an employee of State Government who was prosecuted for offences under Secs. 7 and 13 of P.C. Act after obtaining sanction signed by the Under-Secretary by order and in the name of the Governor of Karnataka challenged the validity of sanction order in the writ petition. The High Court after referring to the decisions of the Supreme Court on sanction held that there is a presumption of official acts to have been done in proper manner and in accordance with procedure. In the facts and circumstances of the case, the High Court held that no reason exists to doubt the sanction at the threshold and dismissed the writ petition.'

31. The effect of non-examination of sanctioning authority has also been discussed in **State of Punjab vs. Bhim Sain** 1985 Cri.L.J. 1602, it was held as under :

'There the Deputy Secretary, Revenue according sanction to prosecute, himself made the statement on oath that he, under the rules of business, was authorized to sign for and on behalf of the Governor of Punjab and also proved the signatures of the Revenue Minister on the concerned file, the sanction could not be said to be invalid on the ground that copy of rules of business was not produced and application of mind by the Minister could not be inferred on the basis of mere appending of signature by him.'

It was further held as under :

'There is a presumption that all official acts have been done by the respective functionaries in discharge of the duties enjoined on them under the law. When the sanction file had been put up before the Minister, containing a self-explanatory note, whereupon

he appended his signatures, it was to be presumed that he had applied his mind thereto and thereafter as a token of accord put his signatures thereon.'

32. In the case **Gurbachan Singh v. State,** AIR 1970 Delhi 102, in paras 28 and 29, it was held as under:

> .28. Mr. Sharma lastly argued that the officer who accorded the sanction has not been examined as a witness and all that had been done was that a Head Assistant (Lekh Raj PW-1) from the office of the Controller had been examined. He had only proved the signature of that Officer but there was no evidence to establish that the officer according the sanction, had applied his mind to the facts of the case.
>
> 29. There is no merit in this argument. The sanction order (Ex.P1) sets out the material facts and the offences disclosed by those facts. There is a presumption about official acts having been regularly performed. In the absence of any evidence to the contrary, it cannot be held that the officer granting the sanction acted mechanically without applying his mind to the material placed before him..

33. In another case **State of Bihar v. P.P.Sharma,** AIR 1991 SC 1260, it was observed as under :

> 'The order of sanction is only an administrative act and not a quasi-judicial one nor is a lis involved. Therefore the order of sanction need not contain detailed reasons in support thereof. But the basic facts that constitute the offence must be apparent on the impugned order and the record must give the reasons in that regard. The question of giving opportunity to the public servant at that stage does not arise. Proper application of mind to the existence of prima facie evidence of the commission of the offence is only a precondition to grant or refuse the sanction. When the Government accorded sanction, Sec.114(e) of the Evidence Act raises presumption that the official acts have been regularly performed.'

34. Thus it has emerged on record that the competent authority has accorded 'approved' to prosecute the petitioner after due application of mind to the material placed before him. The Under Secretary who issued

the sanction order was duly authorized under Government of India (Transaction of Business Rules) to issue the sanction order and non-examination of sanctioning authority by the prosecution does not have the effect of declaring the sanction to be invalid. It would be apt to quote a decision of this Court in **Darshan Lal vs. State** (CBI) Crl.Appeal No.73/2001 decided on 31.07.2009 (MANU/DE/3460/ 2009) wherein the Court was constrained to make observation in such like cases wherein validity of the sanction is being challenged on technical grounds including that sanction order is reproduction of the draft sanction letter. Deploring such tactics, the Court observed in paras 21 and 25 of the report as under :

> .21. The Court is not to go into the technicalities of the sanctioning order. Justice cannot be at the beck and call of technical infirmities. The Court is only bound to see that the sanctioning authority after the careful consideration of the material that is brought forth it, has passed an order that shows application of mind.
>
> 25. In my considered opinion, it would be incorrect to conclude that simple because the sanctioning order Ex.PW3/ A is a virtual reproduction of the draft sanction letter Ex.DW1/DA, the same would be deemed to have been passed without any application if mind. There is no necessary concomitant corollary between the two..

35. It is painful to note that when the case was on the verge of final disposal, discharge was sought by the petitioner raising all kinds of objections to challenge the validity of the sanction order. Learned Special Judge had no option but to decide the application seeking discharge and return a finding on the issue of validity of the sanction. Thereafter instead of letting the trial to conclude, this petition under Section 482 CrPC has been filed, invoking inherent jurisdiction of this Court which though unrestricted and undefined, should be exercised in appropriate cases to do real and substantial justice. In the facts and circumstances of this case, it would be suffice to quote the observation of the Apex Court made in para 15 of the case **Santosh De & Anr. vs. Archna Guha & Ors.** (1994) 2 SCC 420 which is extracted hereunder:

> 15. The facts of this case impel us to say how easy it has become today to delay the trial of criminal cases. An accused so minded can stall the proceedings for decades together, if he has

the means to do so. Any and every single interlocutory order is challenged in the superior courts and the superior courts, we are pained to say, are falling prey to their stratagems. We expect the superior courts to resist all such attempts. Unless a grave illegality is committed, the superior courts should not interfere. They should allow the court which is seized of the matter to go on with it. There is always an appellate court to correct the errors. One should keep in mind the principle behind Section 465 CrPC. Any and every irregularity or infraction of a procedural provision cannot constitute a ground for interference by a superior court unless such irregularity or infraction has caused irreparable prejudice to the party and requires to be corrected at that stage itself. Such frequent interference by superior courts at the interlocutory stages tends to defeat the ends of justice instead of serving those ends. It should not be that a man with enough means is able to keep the law at bay. That would mean the failure of the very system..

36. Finding no merits in the petition, the same is hereby dismissed.

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CRL. M.C.

STATE OF NCT OF DELHI ....PETITIONER

VERSUS

ABU SALEM ABDUL QAYOOM ANSARI ....RESPONDENT

(V.K. SHALI, J.)

CRL. M.C. NO. : 1764/2011 DATE OF DECISION: 11.05.2012

Code of Criminal Procedure, 1973—Section 321—Maharashtra Control of Organized Crime Act, 1999—Sections 3(2) & 3(4)—Extradition Act, 1962—Section 21—Respondent was named as one of accused in FIR

No. 88/2002, under Section 387/506/507/201/120-B IPC and Section 3(2), Section 3(4) of MCOCA, read with Section 120B IPC—Charge-sheet was laid against five accused persons, out of which four were sent to stand trial but Respondent was shown as absconder—Trial commenced against four accused persons, in the meanwhile, Respondent was located in Portugal—In pursuance of an existing Interpol notice and Red Corner Notice, extradition proceedings against him were initiated—Government of Portugal granted extradition subject to specific condition that Respondent would not be visited with punishment of death or imprisonment for a term more than 25 years—Said specific condition was solemnly assured by Government of India and accordingly, extradition of Respondent was granted by Government of Portugal in respect of 8 cases against him—Although competent authority granted sanction under Section 23 (2) of MCOCA to prosecute respondent and Supplementary chargesheet was also filed against him before the Designated Court—However, after filing of charge sheet, Government of NCT of Delhi, reconsidered case of Respondent in view of extradition condition laid by Government of Portugal and solemn assurance given by Government of India—Hence, prosecution filed application under Section 321 of Code seeking permission from Designated Court to withdraw prosecution of Respondent for offences punishable under Section 3 (2) & 3(4) of MCOCA read with Section 120-B IPC as both these offences were not in line with conditions imposed in Extradition Order—Learned Designated Court dismissed application—Aggrieved, State preferred petition for setting aside order as well as quashing of framing of charges against Respondent—Held:- Power of seeking withdrawal of prosecution is essentially an executive function and Special Public Prosecutor, unlike a Judge, is supposed to receive a request seeking withdrawal of prosecution

from Executive—It is after receipt of such request from Executive, Special Public Prosecutor is required to apply his mind and then decide as to whether case is fit to be withdrawn from prosecution and leason for withdrawal could be social, economic or even political—Withdrawal of prosecution must be bonafide for a public purpose and in interest of justice—Further, while undertaking such an exercise, Special Public Prosecutor is not required to sift the evidence, which has been gathered by prosecution as sought to be produced or is produced before the Court.

In S.K. Shukla & Ors. –vs- State of U.P. & Ors., AIR 2006 SC 413 relied upon in **Sheonandan Paswan's** case (supra). It was held that the settled law laid down by the Supreme Court has been that the withdrawal from the prosecution is an executive function of the Public Prosecutor and the ultimate decision to withdraw from the prosecution is his. Before an application is made under Section 321, the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any outside influence. The Government may suggest to the Public Prosecutor that a particular case may not be proceeded with, but nobody can compel him to do so. However, Section 321 of the Code does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. If the Public Prosecutor received such instructions, he cannot be said to act on extraneous influence. On the contrary, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government, since a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government. Unlike the Judge, the Public Prosecutor is not an absolutely independent officer. He is appointed by the government for conducting in court any prosecution or other proceedings on behalf of the Government concerned. The relationship between the Public Prosecutor and the Government is same as that of a counsel and his client. If

the Government gives instructions to a Public Prosecutor to withdraw from the prosecution of a case, the latter, after applying his mind to the facts of the case may either agree with the instructions and file an application stating grounds of withdrawal or disagree therewith having found a good case for prosecution and refuse to file the withdrawal application. In the latter event the Public Prosecutor will have to return the brief and perhaps to resign, for, it is the Government, not the Public Prosecutor, who is in the know of larger interest of the State. The Public Prosecutor cannot act like a post box or act on the dictate of the State Governments. He has to act objectively as he is also an officer of the Court. At the same time court is also not bound by that. The courts are also free to assess whether the prima face case is made or not. The court, if satisfied, can also reject the prayer.' **(Para 24)**

Important Issued Involved: Power of seeking withdrawal of prosecution is essentially an executive function and Special Public Prosecutor, unlike a Judge, is supposed to receive a request seeking withdrawal of prosecution from Executive—It is after receipt of such request from Executive Special Public Prosecutor is required to apply his mind and then decide as to whether case is fit to be withdrawn from prosecution or not and reasons for seeking withdrawal of prosecution could be social, economic or even political—Withdrawal of prosecution must be bonafide for a public purpose and in interest of justice and further while undertaking such an exercise.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Hiren Rawal, ASG with Mr. Pawan Sharma, Standing Counsel & Mr. Harsh Prabhakar, Advocate.

FOR THE RESPONDENT : Mr. M.S. Khan, Advocate.

CASES REFERRED TO:

1. *Abu Salem Abdul Qayoom Ansari* vs. *State of Maharashtra & Anr.* in Crl. Appeal Nos.990/2006 & 1142-43/2007 and WP(Crl.) 171/2006.
2. *S.K. Shukla & Ors.* vs. *State of U.P. & Ors.,* AIR 2006 SC 413.
3. *Abdul Karim etc.* vs. *State of Karnataka & Ors. etc.,* AIR 2001 SC 116.
4. *Sheo Nandan Paswan* vs. *State of Bihar,* AIR 1987 SC 877.
5. *Sheonandan Paswan* vs. *State of Bihar and Ors.* 1987CriLJ793.
6. *Rajender Kumar* vs. *State,* AIR 1980 SC 1510.
7. *M.N. Sankarannaraya Nair* vs. *P.V. Balakrishnan,* AIR 1972 SC 496.

RESULT: Petition allowed.

V.K. SHALI, J.

1. This is a petition filed under Section 482 Cr.P.C. for setting aside the order dated 28.8.2009 passed by Ms. Pinki, the Designated Court MCOCA/POTA/TADA (hereinafter referred to as =Designated Court'), dismissing the application of the petitioner under Section 321 of the Cr.P.C. seeking withdrawal of charges under Sections 3(2) and 3(4) of Maharashtra Control of Organised Crime Act (hereinafter referred to as MCOCA) read with Section 120-B of the IPC. It has also been prayed that a consequential order quashing the framing of the charges by the Designated Court be also passed. It may be pertinent to mention here that by the impugned order, the Designated Court had rejected the request of the petitioner seeking withdrawal of charges against the respondent/accused in respect of the aforesaid offences.

2. Briefly stated, the facts of the case are that, on 4.4.2002, a case under Section 506 of the IPC was registered at PS:Greater Kailash, New Delhi by the Special Cell of Police at the instance of one Ashok, who stated that he had received threats on telephone. After the registration of the FIR No.88/2002 under Section 387/506/507/201/120-B IPC, the investigations of the case were handed over to the Special Cell, Delhi

Police. In pursuance to the investigations, two persons, namely, Pawan Mittal and Sajjan Soni were arrested on 6.5.2002 and subsequent thereto, Mohd. Ashraf @ Babloo, Mazid Khan @ Raju Bhai and Chanchal Mehta were also arrested. During the course of the investigation, as there were allegations of extortion against the respondent/accused, Sections 3(2) and 3(4) of the MCOCA and Section 120-B IPC were added. On 31.7.2002, a Chargesheet under Sections 387/506/507/201/120-B of the IPC read with Sections 3(2) and 3(4) of MCOCA was filed before the Designated Court. The respondent/accused herein, Abu Salem Abdul Qayoom Ansari was shown to be an absconder in the Chargesheet. The Designated Court took cognizance of the aforesaid offences on 1.8.2002 against the aforesaid five accused persons and proceeded ahead with the Trial. Presently, the said case is stated to be at the stage of arguments.

3. On 18.9.2002, the respondent, Abu Salem Abdul Qayoom Ansari was detained at Lisbon in Portugal, as he was found in possession of false identity/travel documents. There was an existing Interpol Notice and a Red Corner Notice was issued against him by the Interpol on the request of the Government of India in 1993 for his involvement in Bombay Bomb Blast case. The extradition proceedings against the respondent/accused were initiated on the basis of the requests of the Investigating Agencies. Necessary request in this regard was made by the Government of India in respect of nine cases, to the Government of Portugal, including the present one. Though, initially a request for deportation of the accused/respondent was made, but the said request was not favourably considered and it was requested by the Ministry of External Affairs, Government of Portugal, on 4.10.2002, to present a formal request for extradition which must fulfill the requirements of Portuguese law. It may also be pertinent to mention here since there was no Extradition Treaty between the two countries, by virtue of Section 21 of the Extradition Act, 1962 (hereinafter referred to as the 'Act'), a Notification, extending the applicability of the Act to the Republic of Portuguese was issued by the Government of India on 13.12.2002. On 17.12.2002, the Hon'ble Deputy Prime Minister of India had written a letter to the then Hon'ble Minister of Foreign Affairs of Portuguese, giving assurance that in case the respondent/accused is extradited by the Government of Portugal for his trial to India, then he would not be visited by death penalty or imprisonment for a term beyond 25 years. On 28.3.2003, the Ministry of External Affairs, Government of Portugal, on

the solemn assurance of the Government of India coming from the highest quarters, decided to grant his extradition in respect of 8 cases, and that too only in respect of specific offences mentioned in the Extradition Order. It may be pertinent to mention here that at the time when a request for extradition of the respondent/accused was made to the Government of Portugal, giving the details of 9 cases, including the case in hand, the various sections in respect of which the involvement of the respondent/accused was found, were specifically mentioned therein. Meaning thereby that in respect of FIR No.88/2002 registered by PS:Greater Kailash, New Delhi not only the offence under Sections 387/506/507/120-B IPC was mentioned, but also a mention was made of Sections 3(2) and 3(4) of MCOCA. The Government of Portugal granted the extradition with the specific condition, as has been stated hereinabove, with the solemn assurance that the respondent/accused would not be visited with the punishment of death or imprisonment for a term of more than 25 years vide order dated 28.3.2003. Obviously, this meant that he could not be tried for the offences under Sections 3(2) and 3(4) of MCOCA and Section 120-B of the IPC because these offences carried punishment, which was prohibited in the Extradition Order.

4. On 27.1.2005, the respondent/accused, not being satisfied with the Order of Extradition passed by the High Court at Lisbon, challenged the said order before the Supreme Court of Justice, Portugal. The said appeal of the respondent/accused was rejected on 27.1.2005. It may also be pertinent to mention here that despite the specific request of the Government of the India to the Government of Portugal to extradite the respondent/accused under the provisions of MCOCA and Section 120-B of the IPC also, the said request was not acceded to and the respondent/accused was permitted to be tried, after extradition, only for the offences under Section 506/507/387 IPC.

5. The respondent/accused was brought to India on 11.11.2005 by the Mumbai Police. He was produced before a Delhi Court on 22.5.2007 in respect of FIR No.39/2002 registered by PS: Special Cell, Delhi and the Production Warrants in the case in hand were also issued. On 1.6.2007, a formal arrest of the respondent/accused in respect of the present FIR No.88/2002 was shown.

6. On 16.8.2007, sanction under Section 23(2) of MCOCA was granted by the competent authority to prosecute the respondent/accused.

On 20.8.2007, a Supplementary Chargesheet against the respondent/accused was filed before the Designated Court in the present case. After filing of the Chargesheet itself, the Government of NCT of Delhi considered the case of the respondent and it took a decision that as the respondent/accused was extradited by a sovereign foreign country on solemn assurance of the Government of India from the highest quarters to the effect that he would not be tried and visited with a punishment of death or imprisonment of more than 25 years, therefore, he could not be tried for the offence under Sections 3(2) and 3(4) of MCOCA and Section 120-B of the IPC, as both these offences were not in line with the conditions imposed in the Extradition Order. Accordingly, the Government was of the view that it is a fit case wherein an application under Section 321 Cr.P.C. should be filed, seeking permission of the Designated Court to withdraw the prosecution of the respondent/accused for the said offences.

7. On 26.2.2008, the Government of NCT of Delhi forwarded a proposal in this regard to the Director of Prosecution, so that the concerned Special Public Prosecutor could examine the matter and take appropriate action independently seeking withdrawal of the prosecution of the respondent/accused for the said offences after due application of his mind.

8. The Special Public Prosecutor, after considering the entire gamut of the facts and the background in the light of Extradition Order, took an independent and informed decision after subjective satisfaction that it was a fit case where an application seeking permission of the Designated Court for the withdrawal of the offences under Sections 3(2) and 3(4) of the MCOCA and Section 120-B IPC should be filed. It may be pertinent to mention here that this application was filed when the charges against the respondent/accused were yet to be framed. This application u/S 321 Cr.P.C. seeking withdrawal of prosecution for the aforesaid offences was filed in Court on 27.2.2008 and the arguments were heard by the Designated Court. After hearing the arguments, the Designated Court passed a detailed order on 28.8.2009, rejecting the application of the Special Public Prosecutor by observing that the application seeking permission of the withdrawal was not bonafide. It was held that the said decision was not taken independently by the Special Public Prosecutor and that the withdrawal was not in the larger public interest. It is this finding of the Designated Court, which has been challenged in the present

petition.

9. It may also be pertinent to mention here that in the meantime new developments had taken place in respect of not only this case, but some of the other cases also in which the respondent/accused was facing the trial. So far as the present case is concerned, the Designated Court framed the charges against the respondent/accused not only in respect of offences under Sections 387/506/507/201/120-B IPC, but also the offences for which the prosecution was sought to be withdrawn, i.e. Sections 3(2) and 3(4) of MCOCA.

10. On 10.9.2010, Crl.A.990/2006 filed by the respondent before the Hon'ble Supreme Court along with Crl.A.1142-43/2007 and WP(Crl.) 171/2006 came to be decided. By the said proceedings, the respondent/accused, who was the petitioner /appellant in the appeals before the Hon'ble Supreme Court, had canvassed that he could be tried by a Designated Court (of Mumbai) only in respect of offences for which the Extradition Decree was passed and no other. The aforesaid petition mainly related to the cases registered in Mumbai. The Hon'ble Supreme Court of India held that the respondent/accused could be tried for the offences for which his extradition was permitted. In addition to this, he could also be tried for a lesser offence made-out from the same facts which were considered for his extradition. Therefore, it was held that the charges under the provisions of MCOCA and Section 120-B IPC are liable to be quashed and were accordingly set aside on the ground of principles of speciality also. The present petition was filed on 25.5.2011, assailing the order dated 28.8.2009 passed by the Designated Court.

11. I have heard Mr. Hiren Rawal, the learned ASG appearing for the petitioner and also the learned counsel for the respondent. As a matter of fact, the learned counsel for the respondent did not contest the matter at all, so far as the submissions which are made by the learned ASG are concerned. In fact, he has contended that he has separately filed the petitions bearing Crl. Rev. Pet. Nos.591/2009 and 654/2010, assailing this very order regarding the non-grant of permissions to the petitioner seeking withdrawal of the charges against the respondent/accused under Sections 3(2) and 3(4) of the MCOCA and Section 120-B of the IPC.

12. The learned ASG has made three broad submissions before this Court for setting aside the order passed by the Designated Court. The first contention of the learned ASG is that the reasoning for rejection of

the application of the petitioner by the Designated Court is totally erroneous and it has misdirected itself in observing that merely because at the time of the grant of extradition of the respondent/accused to India, the Portuguese Authorities were aware that the proceedings pending against him are under Section 3(2) and 3(4) of the MCOCA and 120-B of the IPC, which made punishable the commission of an organized crime, therefore, it could be said that they had tacitly given permission to try the respondent/accused for an offence of organized crime in which he was indulging in to obtain large sums of money by administering threats of extortion.

13. The second reason which is given by the Designated Court for the rejection of the permission under Section 321 Cr.P.C. is that the Government of India had given solemn assurance to the sovereign government of Portugal that the respondent would not be sentenced to death or imprisonment for more than 25 years and if that be so, Section 34C of the Extradition Act, 1962 provides that if an offence is punishable with death, then the UOI has the power to commute the said sentence of death into life imprisonment. Extending the said reasoning further, the Designated Court had observed that the President of India and the Governors of the States hold identical powers of remission under Articles 72 and 161 of the Constitution of India and by virtue of these three provisions, the respondent/accused, even if he is permitted to be tried for offences under Sections 3(2) and 3(4) of MCOCA and Section 120-B of the IPC, it can be ensured that the assurance, which has been given by the Government of India to the Portuguese Government, can be honoured.

14. The third reasoning, which has been given by the Designated Court, is to the effect that the application seeking withdrawal of the charges by the Prosecutor is not bonafide and the power of the Court to grant the consent is only supervisory, but, while exercising that power, it must be shown by the Prosecutor that he has independently applied his mind, which, it seems, the Designated Court found to be lacking.

15. It has been contended by Mr. Rawal, the learned ASG that on all the three counts the reasoning given by the Designated Court for rejection of the application of the petitioner under Section 321 Cr.P.C. was erroneous and bereft of any merit. In this regard, the learned ASG has contended that the first principle which was violated was the principle of speciality which is enshrined in Section 21 of the Extradition Act:-

"21. Accused or convicted person surrendered or returned by foreign State not to be tried for certain offences.ù Whenever any person accused or convicted of an offence, which, if committed in India would be an extradition offence, is surrendered or returned by a foreign State, such person shall not until he has been restored or has had an opportunity of returning to that State, be tried in India for an offence other than -

(a) the extradition offence in relation to which he was surrendered or returned; or

(b) any lesser offence disclosed by the facts provided for the purposes of securing his surrender or return other than an offence in relation to which an order for his surrender or return could not be lawfully made; or (c) the offence in respect of which the foreign State has given its consent.. (Emphasis supplied)

16. It has been further contended by Mr. Rawal, the learned ASG that a perusal of the aforesaid Section would show that once a person is extradited by the extraditing State to the recipient State, he could be tried only for such offences for which his custody was surrendered or, at best, he could be tried for offences which are lesser offences disclosed on the basis of same facts. It has been contended by Mr. Rawal, the learned ASG that, admittedly in the instant case, the extradition of the petitioner was sought in respect of nine cases, out of which extradition was given only in eight cases, out of which one was the case in hand. No doubt, the offence under Section 3(2) and 3(4) MCOCA and Section 120-B IPC was mentioned in respect of FIR No.88/2002, in addition to other offences, that is, putting person in fear of death of grievous hurt, in order to commit extortion (Section 387 IPC), punishment for criminal intimidation (Section 506 IPC), criminal intimidation by an anonymous communication (Section 507 IPC) and causing disappearance of evidence of offence, or giving false information to screen offender (Section 201 IPC), but the Government of Portugal had given permission to extradite the respondent/accused only for the purpose of facing the trial in respect of latter offences other than the offence of conspiracy, under Section 120-B IPC and under Section 3(2) and 3(4) of MCOCA. Therefore, he could not be tried for these offences. It has also been contended that apart from the principle of speciality, if the petitioner is permitted to be prosecuted and tried for an offence for which he was not extradited, it

will result in not adhering to the solemn assurances given by the highest quarters of the Government of India to the Government of Portugal and, therefore, it will not be in keeping with the international norms of observing the commitments which had been assured by the Government of India.

17. It has further been contended that in the instant case, the application for seeking withdrawal of the prosecution against the respondent/accused was filed in the year 2008, much before the charges against the respondent/accused were framed. It is stated that the application was not only filed by the Special Public Prosecutor after due application of his mind and in the larger public interest but also in the interest of maintenance of international relations and thus it became a political decision. It has been further contended that as the matter was pending before the Apex Court involving the same question which was raised by the respondent/accused himself by Crl. Appl. No.990/2006 and Crl. Appl. Nos.1142-43/2007 and WP(Crl.) No.171/2006 before the Apex Court in a matter arising from the Bombay Courts, the petitioner was awaiting the decision of the said cases and the moment said judgment was received, this application was filed.

18. The learned ASG, Mr. Rawal, has also drawn the attention of the Court to the observations made by the Apex Court in the judgment of **Abu Salem Abdul Qayoom Ansari –vs- State of Maharashtra & Anr.** in Crl. Appeal Nos.990/2006 & 1142-43/2007 and WP(Crl.) 171/2006, wherein the Apex Court had also upheld the contention of the respondent/accused that he could not be tried by the Designated Court at Mumbai in respect of those offences for which no extradition was granted. The necessary observations made by the Apex Court are as under:-

10) The contention of the appellant that he is being tried for the offences for which he has not been specifically extradited, has been rejected by way of the impugned order on the ground that the extradition has been granted for the offences of higher degree and the additional offences for which he is being tried are subsumed/included in the said higher degree of offences and the trial would be permissible by virtue of clause (b) of Section 21 of the Extradition Act, 1962. As pointed out earlier, apart from the appeals against the order of the Designated Court, the appellant has also preferred a writ petition seeking to invoke the

extraordinary writ jurisdiction of this Court on the ground that the trial for the offences for which he has specifically not been extradited is violative of the fundamental rights enshrined under Article 21 of the Constitution of India which guarantees a fair trial with due process of law.

11) The term 'extradition' denotes the process whereby under a concluded treaty one State surrenders to any other State at its request, a person accused or convicted of a criminal offence committed against the laws of the requesting State, such requesting State being competent to try the alleged offender. Though extradition is granted in implementation of the international commitment of the State, the procedure to be followed by the courts in deciding, whether extradition should be granted and on what terms, is determined by the municipal law of the land. Extradition is founded on the broad principle that it is in the interest of civilised communities that criminals should not go unpunished and on that account it is recognised as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice.

19. I have carefully considered the submissions made by the learned ASG and also have gone through the impugned order.

20. Before dealing with the issue, it would be worthwhile to see the scope of the power of judicial review which the Court is to exercise with regard to Section 321 of the Cr.P.C. Section 321 of the Cr.P.C. has been the subject-matter of judicial pronouncements by the Apex Court in a number of decisions. By now, the Apex Court has laid down a number of guiding factors which the Court has to consider while granting permission under Section 321 Cr.P.C. for withdrawal of the prosecution. In **M.N. Sankarannaraya Nair –vs- P.V. Balakrishnan,** AIR 1972 SC 496, it was observed as under:-

.5. The Public Prosecutor may withdraw from the prosecution. To seek permission to withdraw from the prosecution, the essential consideration which is implicit in the grant of the power is that it should be in the interest of administration of justice.. Further, it was observed that the Court has to apply its mind to ensure that withdrawal is not for extraneous purposes.

21. In case titled **Rajender Kumar –vs- State,** AIR 1980 SC 1510, the Court, after examining various judgments, had summed up the considerations as under:-

.1. Under the scheme of the Code prosecution of an offender for a serious offence is primarily the responsibility of the Executive.

2. The withdrawal from the prosecution is an executive function of the Public Prosecutor.

3. The discretion to withdraw from the prosecution is that of the Public Prosecutor and none else, and so, he cannot surrender that discretion to someone else.

4. The Government may suggest to the Public Prosecutor that he may withdraw from the prosecution but none can compel him to do so.

5. The Public Prosecutor may withdraw from the prosecution not merely on the ground of paucity of evidence but on other relevant grounds as well in order to further the broad ends of public justice, public order and peace. The broad ends of public justice will certainly include appropriate social, economic and, we add, political purposes Sans Tammany Hall enterprise.

6. The Public Prosecutor is an officer of the Court and responsible to the Court.

7. The Court performs a supervisory function in granting its consent to the withdrawal.

8. The Court's duty is not to reappreciate the grounds which led the Public Prosecutor to request withdrawal from the prosecution but to consider whether the Public Prosecutor applied his mind as a free agent, uninfluenced by irrelevant and extraneous considerations. The Court has a special duty in this regard as it is the ultimate repository of legislative confidence in granting or withholding its consent to withdrawal from the prosecution..

It was further observed as under:-

'13-A. We may add it shall be the duty of the Public Prosecutor

to inform the Court and it shall be the duty of the. Court to appraise itself of the reasons which prompt the Public Prosecutor to withdraw from the prosecution. The Court has a responsibility and a stake in the administration of criminal justice and so has the Public Prosecutor, its 'Minister of Justice'. Both have a duty to protect the administration of criminal justice against possible abuse or misuse by the Executive by resort to the provisions of Section 361 Criminal Procedure Code. The independence of the judiciary requires that once the case has travelled to the Court, the Court and its officers alone must have control over the case and decide what is to. be done in each case.'

22. In **Sheo Nandan Paswan –vs- State of Bihar,** AIR 1987 SC 877, it was observed as under:-

.70. The section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations on which the Court is to grant its consent. The initiative is that of the Public Prosecutor and what the Court has to do is only to give its consent and not to determine any matter judicially. The judicial function implicit in the exercise of the judicial discretion for granting the consent would normally mean that the Court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.

71. The Court's function is to give consent. This section does not obligate the Court to record reasons before consent is given. However, I should not be taken to hold that consent of the Court is a matter of course. When the Public Prosecutor makes the application for withdrawal after taking into consideration all the materials before him, the Court exercises its judicial discretion by considering such materials and on such consideration, either gives consent or declines consent. The section should not be construed to mean that the Court has to give a detailed reasoned order when it gives consent. If on a reading of the order giving consent, a higher Court is satisfied that such consent was given

on an overall consideration of the materials available, the order giving consent has necessarily to be upheld.

72. It would be useful to compare the scope of the Court's power under Section 321 with some other sections of the Code. There are some provisions in the Code which relate to the manner in which Courts have to exercise their jurisdiction in pending cases when applications are made for their withdrawal or when the Court finds that there is no ground to proceed with the cases. Sections 203, 227, 245, 257 and 258 are some such sections. Section 203 of Criminal P.C. empowers a Magistrate to dismiss a complaint at the initial Stage itself if he is of opinion that there is no sufficient ground for proceeding. But, before doing so, the Magistrate is called upon to briefly record his reasons for so doing. The Section reads as follows:

.....

The section does not insist upon a reasoned order by the Magistrate while giving consent. All that is necessary to satisfy the section is to see that the Public Prosecutor acts in good faith and that the Magistrate is satisfied that the exercise of discretion by the Public Prosecutor is proper..

23. In case titled **Abdul Karim etc. –vs- State of Karnataka & Ors. etc.,** AIR 2001 SC 116, it was observed as under:-

.18. The law as it stands today in relation to applications under Section 321 is laid down by the majority judgment delivered by Khalid, J. in the Constitution Bench decision of this Court in **Sheonandan Paswan v. State of Bihar and Ors.** 1987CriLJ793. It is held therein that when an application under Section 321 is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. What the court had to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The court, after considering the facts of the case, has to see whether the application suffers from such improprieties or illegalities as would cause manifest injustice if consent was given. When the Public Prosecutor makes an application for withdrawal after taking into consideration all

the material before him, the court must exercise its judicial discretion by considering such material and, on such consideration, must either give consent of decline consent. The section should not be construed to mean that the court has to give a detailed reasoned order when it gives consent. If, on a reading of the order giving consent, a higher court is satisfied that such consent was given on an over all consideration of the material available, the order giving consent has necessarily to be upheld. Section 321 contemplates consent by the court in a supervisory and not an adjudicatory manner. What the court must ensure is that the application for withdrawal has been properly made, after independent consideration by the Public Prosecutor and in furtherance of public interest. Section 321 enables the Public Prosecutor to withdraw from the prosecution of any accused. The discretion exercisable under Section 321 is fettered only by a consent from the court on a consideration of the material before it. What is necessary to satisfy the section is to see that the Public Prosecutor has acted in good faith and the exercise of discretion by him is proper.

19. The law, therefore, is that though the Government may have ordered, directed or asked a Public Prosecutor to withdraw from a prosecution, it is for the Public Prosecutor to apply his mind to all the relevant material and, in good faith, to be satisfied thereon that the public interest will be served by his withdrawal from the prosecution. In turn, the court has to be satisfied, after considering all that material, that the Public Prosecutor has applied his mind independently thereto, that the Public Prosecutor, acting in good faith, is of the opinion that his withdrawal from the prosecution is in the public interest, and that such withdrawal will not stifle or thwart the process of law or cause manifest injustice.

20. It must follow that the application under Section 321 must aver that the Public Prosecutor is, in good faith, satisfied, on consideration of all relevant material, that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice. The material that the Public Prosecutor has considered must be set out, briefly but concisely, in the application or in an affidavit annexed to the

application or, in a given case, placed before the court, with its permission, in a sealed envelope. The court has to give an informed consent. It must be satisfied that this material can reasonably lead to the conclusion that the withdrawal of the Public Prosecutor from the prosecution will serve the public interest; but it is not for the court to weigh the material. The court must be satisfied that the Public Prosecutor has considered the material and, in good faith, reached the conclusion that his withdrawal from the prosecution will serve the public interest. The court must also consider whether the grant of consent may thwart or stifle the course of law or result in manifest injustice. If, upon such consideration, the court accords consent, it must make such order on the application as will indicate to a higher court that it has done all that the law requires it to do before granting consent.

.....

42. The satisfaction for moving an application under Section 321 Cr.P.C. has to be of the Public Prosecutor which in the nature of the case in hand has to be based on the material provided by the State. The nature of the power to be exercised by the Court while deciding application under Section 321 is delineated by the decision of this Court in **Sheonandan Paswas v. State of Bihar and Ors.** : 1987CriLJ793. This decision holds that grant of consent by the court is not a matter of course and when such an application is filed by the Public Prosecutor after taking into consideration the material before him, the court exercises its judicial discretion by considering such material and on such consideration either gives consent or declines consent. It also lays down that the court has to see that the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law or suffers from such improprieties or illegalities as to cause manifest injustice if consent is given..

24. In **S.K. Shukla & Ors. –vs- State of U.P. & Ors.,** AIR 2006 SC 413 relied upon in **Sheonandan Paswan's** case (supra). It was held that the settled law laid down by the Supreme Court has been that the withdrawal from the prosecution is an executive function of the Public

Prosecutor and the ultimate decision to withdraw from the prosecution is his. Before an application is made under Section 321, the Public Prosecutor has to apply his mind to the facts of the case independently without being subject to any outside influence. The Government may suggest to the Public Prosecutor that a particular case may not be proceeded with, but nobody can compel him to do so. However, Section 321 of the Code does not lay any bar on the Public Prosecutor to receive any instruction from the Government before he files an application under that section. If the Public Prosecutor received such instructions, he cannot be said to act on extraneous influence. On the contrary, the Public Prosecutor cannot file an application for withdrawal of a case on his own without instruction from the Government, since a Public Prosecutor cannot conduct a case absolutely on his own, or contrary to the instruction of his client, namely, the Government. Unlike the Judge, the Public Prosecutor is not an absolutely independent officer. He is appointed by the government for conducting in court any prosecution or other proceedings on behalf of the Government concerned. The relationship between the Public Prosecutor and the Government is same as that of a counsel and his client. If the Government gives instructions to a Public Prosecutor to withdraw from the prosecution of a case, the latter, after applying his mind to the facts of the case may either agree with the instructions and file an application stating grounds of withdrawal or disagree therewith having found a good case for prosecution and refuse to file the withdrawal application. In the latter event the Public Prosecutor will have to return the brief and perhaps to resign, for, it is the Government, not the Public Prosecutor, who is in the know of larger interest of the State. The Public Prosecutor cannot act like a post box or act on the dictate of the State Governments. He has to act objectively as he is also an officer of the Court. At the same time court is also not bound by that. The courts are also free to assess whether the prima face case is made or not. The court, if satisfied, can also reject the prayer..

25. A perusal of the aforesaid authorities would clearly show that the power of seeking withdrawal of the prosecution is essentially an executive function and the Special Public Prosecutor, unlike a Judge, is supposed to receive a request seeking withdrawal of the prosecution from the Executive. It is after the receipt of such request from the Executive that the Special Public Prosecutor is required to apply his mind and then decide as to whether the case is fit to be withdrawn from the

prosecution or not and the reasons for seeking withdrawal of the prosecution could be social, economic or even political, as has been approved by the Courts. In some of the judgments, the Apex Court has observed that the withdrawal of the prosecution must be bonafide for a public purpose and in the interest of justice and further while undertaking such an exercise, the Special Public Prosecutor is not required to shift the evidence, which has been gathered by the prosecution as sought to be produced or is produced before the Court.

26. Keeping these parameters in view, in the instant case, let us now examine as to whether the Special Public Prosecutor had applied his mind bonafide for the withdrawal of the prosecution against the respondent/accused. It is not in dispute that at the time when the extradition of the respondent/accused was granted by the Government of Portugal, the permission was granted to try the respondent/accused for the specified offences. These offences did not include the offence under Section 3(2) and 3(4) of MCOCA and Section 120-B of the IPC which is an offence of conspiracy to do an illegal act, which, in the instant case, was extortion and criminal intimidation of a person. The Designated Court has drawn an inference and observed that these offences were mentioned along with the FIR. The Court had also dealt with the definition of =organised crime', as given under the MCOCA and then concluded that as these offences were mentioned in the letter of request of the Government of India seeking extradition, therefore, they being heinous crimes, it is tacitly deemed that the Government of Portugal had the knowledge that he would be tried for such an offence. Alternatively, the Designated Court has observed that even if such permission is assumed to have not been given by the Government of Portugal, even then the Government of India can keep its assurance of not visiting the respondent/accused with a penalty of death or the penalty of imprisonment of more than 25 years by exercising executive power of remission under Articles 72 and 161 of the Constitution of India. In addition to these, the Government could also, by invoking Section 34C of the Extradition Act, 1962, commute the death sentence into sentence of life imprisonment. With utmost respect, although the learned Designated Court has correctly reproduced the case law in the impugned order, however, there has been an erroneous application of the same. The reasoning, which has been given by the Designated Court for denying the permission, is also totally erroneous. The question, which was involved in the application, was as to whether

seeking the withdrawal of prosecution under Section 3(2) and 3(4) of MCOCA and Section 120-B of the IPC was bonafide and secondly whether it was in the larger public interest or was it a political decision which was taken by the Government of India in the larger public interest, as it had given an assurance to the Government of Portugal that in case the respondent/accused is extradited by the Government of Portugal for his trial to India, then he would not be visited by death penalty or imprisonment for a term beyond 25 years. The question which the Designated Court was to consider was whether the learned Prosecutor had applied his mind to the request seeking withdrawal of these charges or not. This was not done. On the contrary, it erroneously embarked on the inquiry as to whether there could be deemed consent of the extraditing State for prosecution of the accused for offences for which the extradition was not specifically permitted. This, in my view, was totally beyond the scope of the Designated Court.

27. There is no denial of the fact that in the comity of nations in the world, our country commands a lot of respect and it is not only because of its rapid development which has taken place in the field of science and technology, but also for its principled stand which has been taken by the Government of India right after the independence. This stand of the Government of India, by not aligning with any of the group of super powers, by adopting the concept of Panchsheel and by adopting a neutral attitude on the world issues before various international foras and sending for peace keeping mission to different countries have all added and enhanced the prestige of the country and, therefore, if any assurance is given by the sovereign Government of India of the day that is taken very seriously in the countries of the world. Similarly, if the sovereign Government of India at a given point of time has given a solemn assurance to a Foreign State to extradite a criminal who was desperately wanted by our country for trial then we ought to have honoured that commitment. This was a political decision. In the instant case, none other than the then Deputy Prime Minster of India, Mr. L.K. Advani, had given solemn assurance to the sovereign Government of Portugal that in case the respondent/accused is extradited to India, he will be punished in accordance with the Extradition Order. Moreover, despite the fact that there was no Extradition Treaty between the two countries and by the fiction of law, the extradition was obtained by extending the provisions of the Extradition Act, 1962, therefore, the Court should have

permitted that assurance to be adhered to and implemented. Otherwise, in case the prosecution is not permitted to be withdrawn in terms of the assurance given by the Government of India not only the stand of our Government in the international arena would have been falsified, but in future also the foreign countries will be loath to take our assurance seriously. There are the political implications which the country would have to face in the long run in case we do not adhere to the assurance which has been given to a sovereign government. The Designated Court has failed to appreciate this concern of the Government of India in making a request to the Special Public Prosecutor to seek withdrawal only because of this reason and which has been bonafidely approved by the Special Public Prosecutor. The Court's power was only supervisory in this regard. Therefore, this reasoning, which has been given by the Designated Court, is totally erroneous and deserves to be set aside.

28. The other aspect of the matter is that the Government of Portugal having learnt about the trial of the respondent for an offence other than the one for which he was extradited, followed the principle of speciality. In this regard, reference can be made to Section 21(2) of the Extradition Act, 1962. The Government of Portugal, because of the violation of the principle of speciality, had already approached its judicial forums and obtained an order from the High Court of Portugal against the Government of India for repatriation of the respondent/accused back to Portugal. No doubt, against the said order of repatriation and revocation of the Order of Extradition, the Government of India has preferred an appeal and presently, the said appeal is pending before the superior appellate court for adjudication, but in case the order of the Designated Court is not set aside, i.e., the prosecution of the respondent/accused is not permitted to be withdrawn in respect of offences of MCOCA and the criminal conspiracy, they would fatally affect the interest of the Government of India, inasmuch as it will be under an obligation to repatriate the respondent/accused to the sovereign Government of Portugal, because of which the petitioner will not be able to face the trial for any of the offences for which he is facing trial, namely for offences u/S 387/506/507/201 IPC. So a decision has to be taken by this Court obviously for offences for which extradition is granted or no trial at all for any offence whatsoever.

29. Therefore, for the above-mentioned reasons, I feel that the

order, which has been passed by the Designated Court, is totally erroneous, bereft of any rationality and is not in consonance with the law laid down by the Apex Court. The Apex Court also in **Abu Salem's** case (supra) only has observed that he could be prosecuted only for offences for which he was extradited by the Bombay Courts. Accordingly, the impugned order is set aside and the petitioner is permitted to withdraw the prosecution of the respondent/accused for offences under Sections 3(2) and 3(4) of MCOCA and Section 120-B of IPC. I have been informed that the Designated Court has already framed the charges against the respondent/accused for the aforesaid offences vide order dated 1.5.2010. Since the petitioner is permitted to withdraw the prosecution of the respondent/accused for the aforesaid offences, as a necessary consequence of the same, the order dated 1.5.2010, directing framing of charges for the offences under MCOCA as well as the criminal conspiracy are also set aside.

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CRL. REV. P.

STATE **....PETITIONER**

VERSUS

LAL SINGH & ORS. **....RESPONDENT**

(MUKTA GUPTA, J.)

CRL. REV. P. NO. : 425/2009 **DATE OF DECISION: 16.05.2012**

Code of Criminal Procedure, 1973—Section 155—Indian Penal Code, 1860—Section 186, 353, 323, 34—Petitioner/State challenged order of learned Additional Session Judge (learned ASJ) whereby learned ASJ had set aside order of learned Metropolitan Magistrate (MM) dismissing application of Respondents seeking discharge under Section 155 (2) of Code—According

to petitioner, complainant/Labour Inspector visited Mother Dairy Office to deliver letter meeting—After delivering letter, when he was coming back to his office Respondents came there, abused him and also gave him beatings—On allegations of complainant, complaint was filed on basis of which FIR under Section 186/353/34 IPC was registered—After investigation, charge sheet was laid—Learned Metropolitan Magistrate after hearing parties on framing of charge, ordered that no offence under Section 186/353/34 IPC was made out, however, Respondents were held liable to be prosecuted for offence punishable under Section 323/34 IPC—Respondents then filed application before learned MM under Section 155 (2) of Code seeking discharge on ground that Section 323 IPC was non cognizable offence which could not had been investigated without prior permission of learned MM—Application dismissed as not maintainable—Aggrieved Respondents preferred revision petition before learned ASJ which was allowed holding that Magistrate should not have converted case under Section 323 IPC because neither cognizance was taken of that offence initially nor police had alleged any offence under Section 323/3 IPC was made out—Also, permission was not sought by police to investigate case of non cognizable offence which is mandatory—Petitioner challenged said order and urged investigation does not stand vitiated warranting quashing of FIR in case where initially FIR was registered for cognizable offence, however, charge was framed for non cognizable offence—Held:- Even if the Police does not file a charge-sheet for a particular offence, though made out on the facts of the case, nor does the Magistrate take cognizance thereon, at the stage of framing of the charge, Learned Trial Court is supposed to apply its independent mind and come to the conclusion as to what offences are made out from the evidence collected by the prosecution. At

that stage the Trial Court is not bound by the offences invoked in the charge-sheet or the offences for which cognizance has been taken—In such a situation the charge-sheet has to be treated as a complaint in view of the explanation to Section 2 (d) Cr. P.C. and the Police Officer filing the charge-sheet as complainant.

I have heard learned counsel for the parties. The issue whether the investigation stands vitiated warranting quashing of the FIR in a case where initially FIR is registered for cognizable offence however the charge is framed for non-cognizable offence, was referred to the Division Bench of this Court in **N.K. Sharma Vs. State** CRLMM 2042/2001 in view of the conflict indecisions of the Learned Single Judges of this Court in **Mamchand & Ors. Vs. State** 78 1999 DLT 2 and **Ranbir Prakash Vs. State** 27 (1985) DLT 242. Answering the reference it was held:

> "It is one thing to say that the allegations made in the first information report does not disclose a cognizable offence and it is another thing to say that either upon investigation or at the time of trial the Court having regard to the materials on record come to a conclusion that in fact the accused is guilty of offence which was non-cognizable in nature.
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> Furthermore even at this stage, the accused persons cannot take recourse of the provisions of Section 482 of the Code of Criminal Procedure praying for quashing of first information report inasmuch as not only charge-sheet has been filed but cognizance of the offence has been taken by the Magistrate concerned in exercise of his power under Section 190 of the Code of Criminal Procedure. The very fact that the learned Magistrate upon application of his mind on the basis of the material which was pressed before him pursuant to or in furtherance of the investigation carried out satisfied himself that there exists materials for taking cognizance of a cognizable offence and further more

> even came to the conclusion that an order directing charge under Section 324/34 IPC should be framed, it cannot be said that in this situation, Section 155(2) of the Criminal Procedure Code would come into play. The decision of the learned Single Judge of this Court in **Mam Chand** (supra) must be viewed from that angle. In that case the learned Single Judge has come to the conclusion that having regard to the material on record no cognizable offence was found to have committed. In that view of the matter and relying upon the decisions referred to therein it was held:-
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> "I do not find much substance in the contention urged on behalf of the State that since the FIR was registered under Section 324 IPC and the said offence being cognizable, there was no bar in the police investigating the case. Once, on the circumstances prevalent at the time of registration of the case, it is evident that a non-cognizable offence is not made out, permitting the police to first register a cognizable offence, carry out investigations and ultimately if it is found that a cognizable offence was not made out, would be giving a long rope to the police. The nature of the offence is to be gathered from the facts available at the relevant time and if there is a doubt as to whether a cognizable offence is made out or not, the police can report it to the Magistrate concerned and obtain appropriate orders.
>
> On the one hand, no prejudice will be caused to the prosecution by adopting a safer course and on the other it will eliminate the possibility of misuse of power by the police. This approach will also be in consonance with the spirit and intention of Section 155 of the Code." On the other hand the Apex Court in H.N. Rishbud (supra) categorically held that even if there was certain irregularities at the time of first information report or complaint, the same would not vitiate the

trial in the following terms:-

"The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 Cr.P.C. as the material on which cognizance is taken. But if cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 Cr.P.C. is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is marked contrast with that of the other sections of the group under the same heading, i.e., Section 193 and 195 to 1999.

These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, Clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either Clause (a) or (b) of Section 190(1). (whether it is the

one or the other we need not pause to consider and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537 Cr.P.C. which is in the following terms is attracted:

"Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge proclamation, order, judgment or other proceedings before or during trial or in a enquiry or other proceedings under this code, unless such error omission or irregularity has in fact occasioned a failure of justice."

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in **'Prabhu v. Emperor,** AIR 1944 PC 73 (C) and **'Lumbhardar Zutshi v. The King'** AIR 1950 PC 26 (D). These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present case with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation

does not vitiate the result, unless miscarriage of justice has been caused thereby."

There is another aspect of the matter which must also be taken note of viz. the definition of 'complaint' as contained in Section 2(d) of the Code of Criminal Procedure, which reads as under:-

"2(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation – A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.;

The functions of explanation as stated by the Apex Court in **S.Sundaram Pillai etc., Vs. R. Pattabiraman** AIR 1985 Supreme Court 582 are:-

"The object of an explanation to a statutory provision is-

a) to explain the meaning and intendment of the Act itself

b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserved.

c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful.

d) an explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purpose and intendment of the enactment, and right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance

in the interpretation of the same."

Thus by reason of the aforementioned explanation appended to Section 2(d); intendment of the Act itself has been manifested. Thus even if the learned Magistrate could not have taken cognizance on the basis of the report filed by the police authorities under Section 173 of the Code of Criminal Procedure he could have treated the said charge-sheet to be a complaint and take cognizance thereupon. This is pointed out only for the purpose of showing that even if the matter is considered from this angle we have no other option but to reach to the conclusion that the trial in a case of this nature would not be vitiated." **(Para 4)**

Important Issue Involved: Even if the Police does not file a charge-sheet for a particular offence, though made out on the facts of the case, nor does the Magistrate take cognizance thereon, at the stage of framing of the charge the Learned Trial Court is supposed to apply its independent mind and come to the conclusion as to what offences are made out from the evidence collected by the prosecution. At that stage the Trial Court is not bound by the offences invoked in the charge-sheet or the offences for which cognizance has been taken.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Manoj Ohri, APP.

FOR THE RESPONDENTS : Mohd. Irfan, Advocate.

CASES REFERRED TO:

1. *N.K. Sharma* vs. *State* CRLMM 2042/2001.
2. *Mamchand & Ors.* vs. *State* 78 1999 DLT 2.
3. *Ranbir Prakash* vs. *State* 27 (1985) DLT 242.
4. *Century Spinning and Manufacturing Co. Ltd. and Ors.* vs. *State of Maharashtra* ((1972) 3 SCC 282.

5. *Lumbhardar Zutshi* vs. *The King* AIR 1950 PC 26 (D).

6. *Prabhu* vs. *Emperor,* AIR 1944 PC 73 (C).

RESULT: Petition allowed.

MUKTA GUPTA, J. (ORAL)

1. By this petition the State challenges the order of the Learned Additional Sessions Judge dated 12th December, 2008 whereby the Learned Additional Sessions Judge set aside the order of the Learned Metropolitan Magistrate dated 2nd September, 2008 dismissing the application of the Respondents seeking discharge under Section 155 (2) Cr.P.C.

2. Briefly the facts giving rise to the filing of the present petition are that the complainant Madan Gopal Arora was working as a Labour Inspector at Labour Department in Jhilmil Colony, Vishwakarma Nagar, Shadara and on 17th December, 2007 at about 10.30 AM he had gone to deliver a letter of meeting at the Mother Dairy office. After delivering the letter to the Assistant Manager, Mother Dairy Shri R.T. Wadhwa and Vice-President Shri Rajbir when he was coming back to his office, the Respondents came and abused the complainant and gave beatings. On the allegations of the complainant FIR No. 624/2007 under Section 186/353/34 IPC was registered at PS Mandawali and after investigation charge-sheet was filed for offence punishable under Section 186/353/34 IPC.

3. The Learned Metropolitan Magistrate after hearing the parties on the order on charge came to the conclusion that no offence under Section 186/353/34 IPC was made out and the Respondents were liable to the prosecuted for offence punishable under Section 323/34 IPC. Thus, vide order dated 3rd June, 2008 the Learned Metropolitan Magistrate directed framing of notice against the Respondents under Section 323/34 IPC. The Respondents filed an application before the Learned Metropolitan Magistrate under Section 155 (2) Cr.P.C. seeking discharge in view of the fact that offence under Section 323 IPC is a non-cognizable offence and the Police could not have investigated the offence without the prior permission of the Learned Metropolitan Magistrate. Relying on **Chaman Prakash Vs. State** 2007 (3) JCC 1983 the Learned Metropolitan Magistrate dismissed the application as not maintainable. Aggrieved by the said order dated 2nd September, 2008 the Respondents filed a revision petition before the Learned Additional Sessions Judge. The Learned Additional Sessions Judge vide the impugned order dated 12th December,

2008 set aside the order of the Learned Metropolitan Magistrate dismissing the application under Section 155 (2) Cr.P.C. on the ground that the Magistrate should not have converted the case under Section 323/34 IPC because neither the cognizance was taken of that offence initially nor Police has alleged that any offence under Section 323/34 IPC was made out nor any permission has been sought by the Police to investigate the case of non-cognizable offence which is mandatory in nature. Hence the present petition.

4. I have heard learned counsel for the parties. The issue whether the investigation stands vitiated warranting quashing of the FIR in a case where initially FIR is registered for cognizable offence however the charge is framed for non-cognizable offence, was referred to the Division Bench of this Court in **N.K. Sharma Vs. State** CRLMM 2042/2001 in view of the conflict indecisions of the Learned Single Judges of this Court in **Mamchand & Ors. Vs. State** 78 1999 DLT 2 and **Ranbir Prakash Vs. State** 27 (1985) DLT 242. Answering the reference it was held:

> "It is one thing to say that the allegations made in the first information report does not disclose a cognizable offence and it is another thing to say that either upon investigation or at the time of trial the Court having regard to the materials on record come to a conclusion that in fact the accused is guilty of offence which was non-cognizable in nature.
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> Furthermore even at this stage, the accused persons cannot take recourse of the provisions of Section 482 of the Code of Criminal Procedure praying for quashing of first information report inasmuch as not only charge-sheet has been filed but cognizance of the offence has been taken by the Magistrate concerned in exercise of his power under Section 190 of the Code of Criminal Procedure. The very fact that the learned Magistrate upon application of his mind on the basis of the material which was pressed before him pursuant to or in furtherance of the investigation carried out satisfied himself that there exists materials for taking cognizance of a cognizable offence and further more even came to the conclusion that an order directing charge under Section 324/34 IPC should be framed, it cannot be said that in this situation, Section 155(2) of the Criminal

Procedure Code would come into play. The decision of the learned Single Judge of this Court in **Mam Chand** (supra) must be viewed from that angle. In that case the learned Single Judge has come to the conclusion that having regard to the material on record no cognizable offence was found to have committed. In that view of the matter and relying upon the decisions referred to therein it was held:-

> "I do not find much substance in the contention urged on behalf of the State that since the FIR was registered under Section 324 IPC and the said offence being cognizable, there was no bar in the police investigating the case. Once, on the circumstances prevalent at the time of registration of the case, it is evident that a non-cognizable offence is not made out, permitting the police to first register a cognizable offence, carry out investigations and ultimately if it is found that a cognizable offence was not made out, would be giving a long rope to the police. The nature of the offence is to be gathered from the facts available at the relevant time and if there is a doubt as to whether a cognizable offence is made out or not, the police can report it to the Magistrate concerned and obtain appropriate orders.

On the one hand, no prejudice will be caused to the prosecution by adopting a safer course and on the other it will eliminate the possibility of misuse of power by the police. This approach will also be in consonance with the spirit and intention of Section 155 of the Code." On the other hand the Apex Court in H.N. Rishbud (supra) categorically held that even if there was certain irregularities at the time of first information report or complaint, the same would not vitiate the trial in the following terms:-

> "The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we

are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the Court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises.

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 Cr.P.C. as the material on which cognizance is taken. But if cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190 Cr.P.C. is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is marked contrast with that of the other sections of the group under the same heading, i.e., Section 193 and 195 to 1999.

These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, Clauses (a), (b) and (c) of Section 190(1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either Clause (a) or (b) of Section 190(1). (whether it is the one or the other we need not pause to consider and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537 Cr.P.C. which is in the following terms is attracted:

> "Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge proclamation, order, judgment or other proceedings before or during trial or in

a enquiry or other proceedings under this code, unless such error omission or irregularity has in fact occasioned a failure of justice."

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in **'Prabhu v. Emperor,** AIR 1944 PC 73 (C) and **'Lumbhardar Zutshi v. The King'** AIR 1950 PC 26 (D). These no doubt relate to the illegality of arrest in the course of investigation while we are concerned in the present case with the illegality with reference to the machinery for the collection of the evidence. This distinction may have a bearing on the question of prejudice or miscarriage of justice, but both the cases clearly show that invalidity of the investigation has no relation to the competence of the Court. We are, therefore, clearly, also of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby."

There is another aspect of the matter which must also be taken note of viz. the definition of 'complaint' as contained in Section 2(d) of the Code of Criminal Procedure, which reads as under:-

"2(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation – A report made by a police officer in a case which discloses, after investigation, the commission

of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.;

The functions of explanation as stated by the Apex Court in S.Sundaram Pillai etc., Vs. R. Pattabiraman AIR 1985 Supreme Court 582 are:-

"The object of an explanation to a statutory provision is-

a) to explain the meaning and intendment of the Act itself

b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserved.

c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful.

d) an explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purpose and intendment of the enactment, and right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

Thus by reason of the aforementioned explanation appended to Section 2(d); intendment of the Act itself has been manifested. Thus even if the learned Magistrate could not have taken cognizance on the basis of the report filed by the police authorities under Section 173 of the Code of Criminal Procedure he could have treated the said charge-sheet to be a complaint and take cognizance thereupon. This is pointed out only for the purpose of showing that even if the matter is considered from this angle we have no other option but to reach to the conclusion that the trial in a case of this nature would not be vitiated."

5. In the present case the FIR was registered under Section 186/353/34 IPC. Charge-sheet was filed for offences under Section 186/353/

34 IPC and the cognizance was taken thereon for the said offences. Thus, prima facie Learned Metropolitan Magistrate was of the view that offences under Section 186/353/34 IPC are made out. It is eventually at the time of charge that the Learned Metropolitan Magistrate came to the conclusion that only offences under Section 323/34 IPC are made out. In view of the fact that no permission to investigate the same under Section 155 (2) Cr.P.C. was taken from the Learned Metropolitan Magistrate the entire investigation cannot be said to have vitiated as held by the Hon'ble Supreme Court in **H.N. Rishbud** (supra) nor the Respondents can claim discharge on that basis. In such a situation the charge-sheet has to be treated as a complaint in view of the explanation to Section 2(d) Cr.P.C. and the Police officer filing the charge-sheet as complainant. Thus, the order of the Learned Additional Sessions Judge setting aside the order of the Learned Metropolitan Magistrate is illegal.

6. There is yet another illegality in the order of the Learned Additional Sessions Judge. The Learned Additional Sessions Judge held that the Learned Magistrate could not have converted the case to one under Section 323/34 IPC because neither cognizance was taken of that offence nor the Police had alleged that any offence under Section 323/34 IPC was made out. The law on the point is well-settled. Even if the Police does not file a charge-sheet for a particular offence, though made out on the facts of the case, nor does the Magistrate take cognizance thereon, at the stage of framing of the charge the Learned Trial Court is supposed to apply its independent mind and come to the conclusion as to what offences are made out from the evidence collected by the prosecution. At that stage the Trial Court is not bound by the offences invoked in the charge-sheet or the offences for which cognizance has been taken.

7. In **Century Spinning and Manufacturing Co. Ltd. and Ors. Vs. State of Maharashtra** ((1972) 3 SCC 282 their Lordships held:

> 17. Coming now to the facts of this case, in our view, the question principally depends on the scope and effect of the notification, dated September 22, 1949, the circular, dated November 2, 1964, and the Deviation Order, dated June 25, 1965. If, on this material, the Court comes to the conclusion that there is no ground for presuming that the accused has committed an offence, then it can appropriately consider the charge to be

> groundless and discharge the accused. The argument that the Court at the stage of framing the charges has not to apply its judicial mind for considering whether or not there is a ground for presuming the commission of the offence by the accused is not supportable either on the plain language of the section or on its judicial interpretation or on any other recognized principle of law. The order framing the charges does substantially affect the person's liberty and it is not possible to countenance the view that the Court must automatically frame the charge merely because the prosecuting authorities, by relying on the documents referred to in Section 173, consider it proper to institute the case. The responsibility of framing the charges is that of the Court and it has to judicially consider the question of doing so. Without fully adverting to the material on the record it must not blindly adopt the decision of the prosecution.

8. In view of the aforesaid discussion the impugned order dated 12th December, 2008 is set aside. The Learned Trial Court will now proceed against the Respondents for offence under Section 323/34 IPC treating the charge-sheet as a complaint in terms of Section 2(d) of the Cr.P.C. Petition is accordingly disposed of.

9. Trial Court Record be sent back.

ILR (2012) IV DELHI 345
WRIT PETITION (CIVIL)

GUPTA PERFUMERS (P) LTD. ....PETITIONER

VERSUS

INCOME TAX SETTLEMENT COMMISSION & ORS. ....RESPONDENTS

(SANJIV KHANNA & R.V. EASWAR, JJ.)

WRIT PETITION (CIVIL) NO. : 4368/2010 DATE OF DECISION: 18.05.2012

Income Tax Act, 1961—Section 245—Petitioner challenged order passed by Settlement Commission whereby it had accepted settlement application of petitioner in part—Also, it observed: *"No immunity is granted in respect of income contained in the seized papers on the basis of which computation of income has been made in the settlement application and which has been held not to belong to the applicant company by us. The department will be free to initiate penalty and prosecution proceedings, in respect of these papers in appropriate hands as per law".* According to petitioner, said observation of Settlement Commission required to be set aside being destructive of very objective, letter and spirit behind settlement provisions elucidated in Section 245D (4) and 245-I of Act—Also, settlement is contrary to law as order ceases to be conclusive, final and is uncertain—Held:- Under Act, Income Tax Officer can and he must, tax right person and right person alone—"Right person" is person who is liable to be taxed according to law with respect to a particular income, the expression "wrong person" is obviously used as opposite of expression of right person—Merely because a "wrong person" is taxed with respect to a particular income, Assessing Officer is not precluded from taking "Right person" with respect to that income—Settlement Commission had substantially accepted surrender of income made by petitioner and also granted them immunity from penalty and prosecution—Computation of taxable income in case of petitioner does not mean that said papers or seized materials cannot be used if they disclose or relate to income of a third person.

The contention of the petitioner that this leaves the order of the Settlement Commission incomplete and non-conclusive is without merit. The order of the Settlement Commission is certainly complete and conclusive as far as petitioner is concerned. The said third persons were not before the Settlement Commission and the Settlement Commission was not examining their application. The impugned order does not become unconclusive or bad for the said reason. Section 245 I is also not violated for there cannot be any reopening in the case of the petitioner, unless fraud etc. has been played. **(Para 18)**

Important Issue Involved: Under Act, Income Tax Officer can and he must, tax right person and right person alone—"Right person" is person who is liable to be taxed according to law with respect to a particular income, the expression "wrong person" is obviously used as opposite of expression of right person—Merely because a "wrong person" is taxed with respect to a particular income, Assessing Officer is not precluded from taking "Right person" with respect to that income.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. O.S. Bajpai, Sr. Advocate with Mr. V.N. Jha, Advocate.

FOR THE RESPONDENT : Ms. Rashmi Chopra, Sr. Standing Counsel.

CASES REFERRED TO:

1. *Prestige Lights Ltd.* vs. *State Bank of India,* (2007) 8 SCC 449.
2. *Electronics Corporation of India* vs. *Secy. Revenue Dept., Govt. of A.P.* (1999) 4 SCC 458).
3. *ITO* vs. *Atchaiah,* (1996) 1 SCC 417.

RESULT: Petition dismissed.

SANJIV KHANNA, J.

1. In Merchant of Venice, Portia disguised as young law clerk had propounded that the bond only allowed Shylock to remove the flesh, not the blood of Antonio. Further damning Shylock's case, she said that he must cut one pound of flesh, no more, no less; she asserted "if the scale do turn/But in the estimation of a hair/though diest and all thy goods are confiscate." The impugned order passed by the Settlement Commission deserves to be upheld for the petitioner herein- Gupta Perfumers (P) Ltd. it is apparent is caught in their own web, which they stoutly and strongly deny. Even now in the writ petition they have urged and argued that their conduct and actions were bonafide and solely guided by the noble and honourable desire to come clean with their inglorious past. The petitioner claims that they without any motive or intention to help a third person, declared undisclosed taxable income of Rs. 1,36,08,897/-. We record that the undisclosed income has been partly accepted and immunity from penalty and prosecution stands granted, but the "wrong" is checkmated and corrected by the Settlement Commission.

2. To appreciate the controversy, necessary basic facts may be noticed.

3. Gupta Perfumers (P) Ltd., the petitioner is a company that was incorporated on 15th February, 1973. It was engaged in the business of manufacture of perfumery compounds and flavoured essence concentrate also known as industrial fragrance and flavoured concentrates etc. The manufacture and sale as admitted and stated by the petitioner was closed in the year 1987. The petitioner claims that they retained the corporate structure and its business activities remained confined to investment of funds.

4. On 15th May, 2009, the petitioner filed an application for settlement and vide order dated 30th July, 2009 under Section 245D, the application was held to be valid for the assessment years 2005-06, 2007-08, 2008-09 and 2009-2010. The application for assessment year 2006-07 was declared to be invalid. In the application, it was stated that after interval of 14 years, during 2001-02, the petitioner had again resumed their manufacturing activities. The income from manufacture and sale remained at a very low key till 2008-09.Cash book, ledger etc. kept on day to day basis, were misplaced and not available. A summary of sales and figures of receivable was recorded in a memorandum and other loose papers etc., which were in the custody of Virender Kumar Gupta. The profits/ income as declared was on the basis of 'net of sales' in the financial year 2008-09. Advances from customers against the sale of goods, were included. Owing to non-availability of necessary proof of acceptability of such advances, an aggregate of Rs.25,38,969/- was surrendered and stated as a part of the undisclosed income declared of Rs.1,36,08,897/-. Receivables of Rs.61,72,021/- (net) were accounted for in the undisclosed income. The total net taxable income declared including the amount declared in the return for the assessment years in question was Rs.2,41,70,205/-.

5. The Settlement Commission by the impugned order dated 28th May, 2010, has accepted the settlement application in part and computed the income of the petitioner as under: -

Asstt. Yr.	Income returned as per Return of Income (Rs.)	Income offered before ITSC (Rs.)	Income Decided by the ITSC (Rs.)
2005-06	3,54,700	1,84,154	5,38,854
2007-08	3,46,289	70,464	4,16,753
2008-09	3,50,450	12,31,709	15,82,159
2009-10	*1,19,57,396	**66,93,849	1,86,51,245

*As shown in the Computation sheet filed with the return before deduction u/s 80I. *

*As shown in the SOF before claim of deduction u/s 80I."

6. The grievance of the petitioner is against the following

observations and findings recorded by the Settlement Commission:-

> "No immunity is granted in respect of income contained in the seized papers on the basis of which computation of income has been made in the settlement application and which has been held not to belong to the applicant company by us. The department will be free to initiate penalty and prosecution proceedings in respect of these papers in appropriate hands as per law."

7. The contention of the petitioner before us is that the aforesaid directions/observations should be set aside as they are destructive of the very object, letter and spirit behind settlement provisions and the statutory and salutary purpose enshrined and elucidated in Section 245D(4) and 245-I of the Act. The settlement is contrary to law as the order ceases to be conclusive and final and is uncertain. It was urged that the petitioner does not want that the entire order of the Settlement Commission should be set aside but it was interested and wanted that the aforesaid quoted observations should be struck down and deleted. In the alternative, it was submitted that if the petitioner had failed to make full and true disclosure, it was the duty of the Settlement Commission to dismiss the settlement application and not accept the undisclosed income declared.

8. We have considered, the contentions raised by the petitioner but as observed above, do not find any merit in the same.

9. On 10th & 11th February, 2009, search and seizure operations were conducted in the case of M/s Gupta & Co. (P) Limited, M/s C.H. Steel (India) Pvt. Ltd., MJI Tech (P) Ltd., VKG Electronics (P) Ltd. and Rita Devi Shanti Sagar Family Welfare Trust. In these operations, several documents were seized from the custody of Virender Kumar Gupta, Gupta and Co. (P) Ltd. etc. Search, however, was not conducted in the case of the petitioner, though a group company. As per amendments made by the Finance Act, 2007 w.e.f. 1st June, 2007, that no settlement application can be filed by the person subjected to search and seizure action. Thus, as on 15th May, 2009, the persons searched could not have moved or filed an application for settlement. The petitioner, however, not being a person subjected to search was competent and had filed the application on 15th May, 2009 for settlement.

10. As per the application, the petitioner was managed by promoter/ Directors; Sudhir Jain, Sharad Jain and Sudha Gupta, w/o of Virender Kumar Gupta. In the application, the petitioner had stated that the

companies/entities subjected to search/survey operations were carrying on their business independently, wholly unconnected with the petitioner. There were no dealings amongst them inter-se, except that other companies/entities had provided financial assistance on interest to Gupta & Co. (P) Ltd. The application referred to several documents seized from the business/ residential premises at the time of search.

11. It was stated and the Settlement Commission has quoted extracts from the application that the petitioner was maintaining financial records in regular course in the form of cash book, ledger with proper supporting material/evidence. The major component of the cost was the labour charges which were by supported by wage sheets maintained on regular basis. Virender Kumar Gupta being an elderly person was acting as an ombudsman of the family and was maintaining a memorandum of record, containing summary of sales etc. The transactions were entered in the cash book and the surplus generated was kept in a pool maintained by the Directors. Due to lack of care on the part of the staff members, accounts relating to the manufacturing activities, cash books etc, were misplaced. However, the summary of sales recorded on day to day basis in the memorandum which were kept in the custody of Virender Kumar Gupta were available and these were made the basis of computation of the undisclosed income.

12. The Commissioner of Income Tax in his response under Rule 9, had raised the following objections:-

> a. Undisclosed income offered for tax did not belong to the petitioner and belonged to the companies/others who had been subjected to search.
>
> b. Documents marked Annexures A-3, A-5 and A-6, found at the residence of Virender Kumar Gupta and other documents found and seized from the office of Gupta & Co. (P) Ltd. do not pertain to the petitioner but pertain to undisclosed income of third parties who had been subjected to search. These documents form the basis of income offered for settlement, do not reflect to the income earned by the petitioner.
>
> c. Books of accounts of petitioner for the period 1st April, 2004 to 31st March, 2008, seized from one of the computers do not reflect or show any transaction relating to manufacturing/trading activities. Materials seized do not show or indicate that the

petitioner had explicitly or implicitly carried on business activities.

d. Statement of Virender Kumar Gupta, Director of Gupta & Co. (P) Ltd. recorded under Section 132 (4) of the Act, did not support the claim of the petitioner that the seized documents relate to the business transactions of the petitioner.

e. Virender Kumar Gupta had not stated or claimed that the petitioner was carrying on manufacturing activities.

f. Ashok Kumar Gupta, an employee of Gupta & Co.(P) Ltd. for the last 36 years had categorically stated that the petitioner was in the business of manufacture odoriferous substances upto 1986 but after that no business activities were carried on. Other Directors had also not stated that the petitioner had carried on any business.

g. The alleged manufacturing address namely I-8 DSIIDC Industrial Complex, Nangloi, Delhi did not have water connection or electricity connection. Statements of neighbours do support the contention that manufacturing activities were undertaken at the said address.

h. Benefit under Section 80-I, as claimed should be denied as the auditors had not been able to certify that the conditions stipulated in the said Section had been satisfied by the petitioner.

i. Declaration made with the Assistant Commissioner of Central Excise, Anti Evasion on 23rd September, 2008, did not find place in the records i.e. inward/diary register.

13. The petitioner strongly and assertively contested the said contentions. It was submitted that none of the Directors were asked as to the recent activities of the petitioner company. Ashok Kumar Gupta was an executive of Gupta & Co.(P) Ltd. and had nothing to do with the petitioner. The petitioner enclosed photocopies of some cash memos, affidavits of Mukesh Chand Misra and Anukesh Kapur. It was stated that the manufacturing activities were assiduously kept away from public sight and were carried on at odd hours so as to avoid detection. In these circumstances, enquiries conducted in the neighbourhood should be ignored. The fact that in the material seized there was no indication of business activities of the petitioner was inconsequential as the petitioner was admitting the same, stating that it goes to show that the petitioner

was carrying on its activities outside the declared accounts and the same were kept away from the knowledge of public at large. It was asserted that;-

> "no prudent person would like to own and discharge such a huge liability only for the sake of 'fictional after thought' (quote) as has been alleged by the learned CIT in his report. Further, the plea that the application should be rejected by the Hon'ble Income Tax Settlement Commission, itself is erroneous and the same militates not only against the express provisions of chapter XIXA but also the spirit thereof."

14. The Settlement Commission after considering the various facets, evidence on record including statements of Virendra Kumar Gupta, Ashok Gupta, in a detailed and well reasoned order has reached the following findings:-

a. Statements of Sharad Jain recorded on 19th May, 2009 and 10th May, 2010, do not support the claim of the petitioner that they were carrying on manufacturing activities. The books of acc unts stated to be available were not produced, though it was adverted that they shall be furnished. Similarly, the statement of Virendra Kumar Gupta recorded on 21stMay, 2009, did not support the claim of the petitioner that due to lack of care on the part of the staff members, accounts relating to manufacturing activities like cash book, ledger etc. were misplaced. The accounts were in fact were never available as there was no manufacturing activity. The above findings were corroborated by the fact that no material or evidence was found in the search that the petitioner was engaged in manufacture/trading.

b. The plea that the books of accounts have been misplaced was specious and should be rejected.

c. Affidavits of Anukesh Kapoor and Mukesh Chand Mishra were not reliable and do not support the contention that the petitioner was engaged in manufacturing activities.

d. It was strange that the petitioner had claimed huge turnover but could not mention and give details of purchasers and sellers except the two persons.

e. Ashok Gupta, an employee for last 36 years, who had

categorically stated that no business activity was carried on since 1986 or 1987 merits credence and acceptance.

f. Intimation given to the Central Excise authorities on 23rd May, 2008, did not find place in the records maintained by the Central Excise authorities.

g. Evidence relied by the petitioner that it was carrying on manufacturing activities pertains to the period after the date of search and did not relate to the pre-search period.

h. Field inquiry report of the Inspector enclosed with the report of the Commissioner under Section 245D(3) proves that no manufacturing activities as claimed were undertaken.

i. Few documents relied upon by the petitioner to justify its claim, mention the name of Gupta & Co. (P) Ltd. The link between Gupta & Co. (P) Ltd. and some of the seized papers was shown. When the documents claimed by the petitioner showed up in the books of the accounts of the Gupta & Co.(P) Ltd. The petitioner stated that the bills issued by Gupta & Co. (P) Ltd. were just used as a cover. The explanation was doubted as in such a case, why would these bills find mention in the books of Gupta & Co.(P) Ltd.

j. As per the amendment brought by Finance Act, 2007 w.e.f. 1.6.2007, no settlement application can be filed by a person subjected to search and seizure action. The apparent reason for the petitioner company owning up the seized papers appears to be to prevent consideration of the seized papers in the rightful hands during the regular search and seizure assessment of that person.

15. The Settlement Commission accordingly held as under:-

"90. We are, therefore, unable to accept the applicant's contention that the seized papers belong to it. Without entering into the correctness or otherwise of the income offered on the basis of these papers, we hold that the department will be free to take appropriate action in appropriate hands for taxing the income contained in the seized papers referred to in the SOF. We also add that the department will be free to work out the correct income contained in these documents.

91. Section 245C(3) states that an applicant made under sub-section (i) shall not be allowed to be withdrawn by the applicant. Thus, the settlement application filed cannot be allowed to be withdrawn even when it is held that the seized papers on which the applicant has based its computation of income do not belong to it.

92. Section 245D(4) empowers the Commission to pass order in accordance with the provisions of the Income Tax Act as it thinks fit. The applicant has persisted till the very end with its claim of carrying on manufacturing activities and specifically stating in para 14 of reply filed on 27.4.10 "the applicant assiduously tried to keep its activities under a cover away from the public sight." It has also been specifically stated that the activities were being carried on at odd hours. In support of his contention the applicant has emphasized payment of Excise duty totaling to Rs.40,72,210/-. Considering all those facts, we accept the income shown by the applicant as such.

93. The applicant has prayed for immunity from penalty and prosecution. No immunity is granted in respect of income contained in the seized papers on the basis of which computation of income has been made in the settlement application and which has been held not to belong to the applicant company by us. The department will be free to initiate penalty and prosecution proceedings in respect of these papers in appropriate hands as per law."

16. As noticed above immunity was granted from penalty and prosecution in respect of income declared for Assessment Years 2005-06, 2007-08 to 2009-10. Deduction u/s 80-IB of the Act was not granted after recording the above facts and also noticing that the petitioner company's own auditors were unable to certify that all conditions prescribed u/s 80IB have been fulfilled. The petitioner had requested that for the AY 2009- 10, deduction of Rs. 28,36,098/- u/s 43B of the Act should be allowed as the excise duty had been paid before filing of the return. The Settlement Commission did not accept the claim on the ground that payment of excise duty was not relatable to the income offered before the Commission (this aspect has not been argued before us). The immunity granted, it was clarified, may be withdrawn at anytime

if the Settlement Commission was satisfied that the petitioner has concealed or given false evidence during the course of the settlement proceedings.

17. It is apparent from the impugned order that confronted with the above situation, the Settlement Commission has substantially accepted the surrender of income made by the petitioner and also granted them immunity from penalty and prosecution. In our opinion, the Settlement Commission had rightly observed that no third person can gain from the immunity in case the seized papers relate to the third person. The seized papers can be used and utilized against third persons. The computation of taxable income in the case of the petitioner does not mean that the said papers or seized materials cannot be used if they disclose or relate to income of a third person. The petitioner has substantially succeeded as far as their declaration of the undisclosed income is concerned. In case the seized documents/ material relate to a third person and disclose undeclared income of the third person, the Revenue is certainly entitled to rely and use the evidence and material against the said person. The petitioner is not entitled to and cannot claim immunity for and on behalf a third person. If and when the Revenue relies upon and refers to a document in the case of a third person, the said person can contest the charge and explain. The impugned order only clarifies and puts the record straight that the order of the Settlement Commission shall not be a shield in proceedings against a third person. The third person must rely upon and meet the charge on merits. The petitioner has repeatedly stated on oath and asserted that the settlement application was not filed to benefit or secure advantage to a third person, whether related or not. Therefore, the petitioner should not have any grievance and objection to the said observation because they are not affected or prejudiced. The said direction can at best be used against a third person and not against the petitioner. We may, in this regard, reproduce what has been held by the Supreme Court in **ITO v. Atchaiah,** (1996) 1 SCC 417 :

> "7. In our opinion, the contention urged by Dr Gauri Shankar merits acceptance. We are of the opinion that under the present Act, the Income Tax Officer has no option like the one he had under the 1922 Act. He can, and he must, tax the right person and the right person alone. By "right person", we mean the person who is liable to be taxed, according to law, with respect to a particular income. The expression "wrong person" is obviously used as the opposite of the expression "right person". Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taking the right person with respect to that income. This is so irrespective of the fact which course is more beneficial to the Revenue. In our opinion, the language of the relevant provisions of the present Act is quite clear and unambiguous. Section 183 shows that where Parliament intended to provide an option, it provided so expressly. Where a person is taxed wrongfully, he is no doubt entitled to be relieved of it in accordance with law* but that is a different matter altogether. The person lawfully liable to be taxed can claim no immunity because the Assessing Officer (Income Tax Officer) has taxed the said income in the hands of another person contrary to law. We may proceed to elaborate."

18. The contention of the petitioner that this leaves the order of the Settlement Commission incomplete and non-conclusive is without merit. The order of the Settlement Commission is certainly complete and conclusive as far as petitioner is concerned. The said third persons were not before the Settlement Commission and the Settlement Commission was not examining their application. The impugned order does not become unconclusive or bad for the said reason. Section 245 I is also not violated for there cannot be any reopening in the case of the petitioner, unless fraud etc. has been played. Section 245-I reads as under:-

> "245-I Every order of settlement passed under sub-section (4) of section 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force."

The said Section states that the order of the Settlement Commission under Section 245D(4) shall be conclusive as to the matters stated therein and save and otherwise provided no matter in the said order shall be reopened in any proceedings. The use of words 'save & otherwise provided' in this Chapter refers to the reopening of the matters, which are conclusively decided. The conclusiveness attached to the orders of the Settlement Commission relates to the matters stated in the orders of the Settlement Commission. Thus, this does not mean that the Settlement

Commission was required to and it was mandatory to decide and go into the question of undisclosed income earned by third parties. It is this aspect which is not decided by the Settlement Commission. The order meets the requirement of Section 245-I and is not contrary to the mandate of the said Section. The conclusiveness is attached to the averments and the findings recorded in the order of the Settlement Commission and Section 245I does not restrict the power and scope of what order should be passed by the Settlement Commission. What order or direction should be given by the Settlement Commission depends upon the facts and circumstances of each case and what is fair, just, equitable and warranted.

19. The argument of the petitioner that the settlement application should have been rejected as the petitioner had not made full and true disclosure, has to be rejected on the principle of approbate and reprobate. It is not the case of the petitioner that they did not make the full and true disclosure and in fact they still insist that they had made full and true disclosure. The Settlement Commission has accepted that the undisclosed income declared by the petitioner. Immunity has also been granted to the petitioner. The petitioner does not claim that it had tried to protect or had disclosed undeclared income of a third person. It is the case of the petitioner that the papers do not belong to a third person. The Settlement Commission has left that issue open to be decided, if required by the Income Tax authorities in a case of a third person. However, as far as petitioner is concerned, the Settlement Commission has accepted the disclosure made by them and accordingly brought it to tax. 20. Section 254C(1) of the Act reads:-

"245C. APPLICATION FOR SETTLEMENT OF CASES.

(1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner as may be prescribed, and containing a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of income-tax payable on such income and such other particulars as may be prescribed, to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided :

Provided that no such application shall be made unless, -

(a) The assessee has furnished the return of income which he

is or was required to furnish under any of the provisions of this Act; and

(b) The additional amount of income-tax payable on the income disclosed in the application exceeds one hundred thousand rupees."

What the Section requires is that the applicant before the Settlement Commission must disclose in the prescribed form "full and true disclosure of his income" and the manner in which the income is derived. The Settlement Commission has accepted the full and true disclosure made by the petitioner, though there is dispute about the manner in which the undisclosed income was earned. The petitioner cannot insist and claim that their application should have been dismissed as they had failed to make disclosure on the manner in which the said income was earned. The Settlement Commission has taken on record the reasoning given by the petitioner for earning the said income and expressed dissatisfaction. Even before us the petitioner insists that it had made fully and true disclosure and also stated the manner in which the said income was earned. The petitioner cannot challenge and question the order of the Settlement Commission being the beneficiary of the order. Revenue has accepted the order. The petitioner should not be permitted to plead and make self destructive submissions. A litigant cannot and should not be allowed to urge reverse of what was pleaded before the statutory form/ court (See **Electronics Corporation of India V/s. Secy. Revenue Dept., Govt. of A.P.** (1999) 4 SCC 458). In **Prestige Lights Ltd. v. State Bank of India,** (2007) 8 SCC 449, it has been observed that "It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a writ court will indeed bear in mind the conduct of the party who is invoking such jurisdiction." Moreover as held above, with regard to the seized documents, it has been averred and held by the Settlement Commission that it will be open to the department/ Revenue to rely upon same and if they relate to a third person use them to compute undisclosed income of the third person. The petitioner we do not think can question and challenge such finding.

21. In view of the aforesaid, we do not find any merit in the present writ petition and the same is dismissed with costs of Rs.20,000/-.

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CRL. A.

JAMES EAZY FRANKY ....APPELLANT

VERSUS

D.R.I. ....RESPONDENT

(SURESH KAIT, J.)

CRL. A. NO. : 372/2009 DATE OF DECISION: 22.05.2012

Narcotics and Psychotropic Drugs Act, 1985—Section 21—Appellant assailed his conviction under Section 21 (C) of Act on various grounds—According to appellant, learned Special Judge glossed over various irregularities carried out by Department in effecting alleged recovery of contraband from possession of appellant—Prosecution failed to prove conscious possession of contraband by appellant as entire process of recovery was jeopardized in absence of authentic witness to alleged recovery of contraband from possession of appellant—On other hand, it was urged on behalf of DRI, prosecution has proved recovery and seizure of 4.244 kg. of heroin having purity percentage 65.9% to 87.1% from possession of accused, therefore, he was appropriately convicted and sentenced—Held:- Though, Act lays down stringent punishment for offence committed thereunder and as such, casts a heavy duty upon Courts to ensure that there remains no possibility of an innocent getting convicted, officers concerned with investigation of offences under Act must produce best and unimpeachable evidence to satisfy Courts that accused is guilty because no chance can be taken with liberty of a person—No doubt that drug tracking is a serious matter but investigations into such offences also have to be serious and not perfunctory.

The provisions of NDPS Act, 1985 were amended by the Amending Act 9 of 2001, which rationalised the structure of punishment under the Act by providing graded sentences linked to the quantity of narcotic drug or psychotropic substance in relation to which the offence was committed. The application of strict bail provisions was also restricted only to those offenders who indulged in serious offences. **(Para 159)**

Important Issue Involved: Though, Act lays down stringent punishment for offence committed thereunder and as such casts a heavy duty upon Courts to ensure that there remains no possibility of an innocent getting convicted—Officers concerned with investigation of offences under Act must produce best and unimpeachable evidence to satisfy Courts that accused is guilty because no chance can be taken with liberty of a person—No doubt that drug tracking is a serious matter but investigations into such offences also have to be serious and not perfunctory.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Vikas Gupta and Mr. Ravinder Singh, Advocates.

FOR THE RESPONDENT : Mr. Satish Aggarwal, Ms. Mala Sharma and Ms. Pooja Bhaskar, Advocates.

CASES REFERRED TO:

1. *State of Punjab* vs. *Hari Singh & Ors.* (2209) 2 SCC 198 Crl.
2. *Vijaysinh Chandubha Jadeja* vs. *State of Gujarat* (2011) 1 SCC (Cri) 497.
3. *Ramdass & Anr* vs. *The State (NCT of Delhi)* 2011 JCC 156.

4. *State of Punjab* vs. *Lakhwinder Singh & Anr.* 2010 (3) JCC (Narcotics) 142.

5. *Sarju* vs. *State of U.P*(2010) 2 SCC (Cri) 1510.

6. *Ajmer Singh* vs. *State of Haryana* Crl. Appeal No. 436 of 2009 - 2010(2) SCR 785.

7. *Nor Aga* vs. *State of Punjab &Anr.* 2008 (3) JCC Narcotics SCC (S.67).

8. *Ritesh Chakravorty* vs. *State of Madhya Pradesh* – 2006(3) JCC (Narcotics) 150.

9. *Karam Chand* vs. *The State(Delhi)* 2006 (1) JCC 12.

10. *Babubhai Udesinh Parmar* vs. *State of Gujarat,* (2006) 12 SCC 268].

11. *Alok NathDutta* vs. *State of West Bengal* 2006 (13) SCALE 467.

12. *Eze Val Okek* vs. *NCB* 2005 (1) JCC (Narcotics) 57.

13. *Birendra Rai & Ors.* vs. *State of Bihar* – 2005(1) CC Cases (SC) 61.

14. *Sanjiv Kumar* vs. *State of H.P.* – 2005(1) Crimes 358 (H.P) (D.B).

15. *Raj Kumar* vs. *State of* Punjab (2005) 1 JCC (Narcotics).

16. *Eze Val Okeka @ Valeza* vs. *NCB 2005 (1) JCC* (Narcotics) 57.

17. *Surendera Singh & Chintu* vs. *UOI* 2005 (1) JCC (Narcotics).

18. *Parmananda Pegu* vs. *State of Assam* – 2004 (4) RCR (Crl) 955.

19. *State of West Bengal* vs. *Babuchkerverty* JT 2004 (7) SC 216.

20. *Superintendent of Customs* vs. *Bhana Bhai Khalap Bhai Patel* – 2004(1) JCC 198.

21. *Banti @ Guddu* vs. *State of M.P.* – (2004) 1 SCC 414.

22. *Rajesh JagdambaAvasthi* vs. *State of Goa,* 2004 (4) Crimes 347 (SC).

23. *CBI* vs. *Ashiq Hussain Faktoo & Ors.* – 2003(2) JCC 316.

24. *Megh Singh* vs. *State of Punjab* – 2003 VIII AD (SC) 27.

25. *Madan Lal & Anr.* vs. *State of Himachal Pradesh* – 2003(3) JCC 1330.

26. *Jagdish* vs. *State of Madhya Pradesh* – 2002(1) JCC 54.

27. *Subhash Chand Mishra* vs. *State* 2002 (2) JCC 1379.

28. *Bahadur Singh* vs. *State of Madhya Pradesh* 2002 (1) JCC 12 SC.

29. *Nallabothu Venkaiah* vs. *State of Andhra Pradesh* – 2002 (3) JCC 1582.

30. *Pawan Mehta* vs. *State* – 2002 Drugs Cases 183 (Delhi High Court).

31. *Krishna Mochi & Ors.* vs. *State of Bihar & Ors.* – 2002(2) CC Cases (SC) 58.

32. *Khet Singh* vs. *Union of India* AIR 2002 SC 1450.

33. *Ravinder Singh @ Bittu* vs. *State of Maharashtra* – 2002(2) JCC 1059 (SC).

34. *Bahadur Singh* vs. *State of Madhya Pradesh* – 2002(1) JCC 12.

35. *Kalema Tumba* vs. *State of Maharashtra* – JT 1999 (8) SC 293.

36. *PonAdithan* vs. *Deputy Director, Narcotics Control Bureau, Madras* [(1999) 6 SCC 1].

37. *T. Shankar Prasad* vs. *State of Andhra Pradesh* – Crl. Appeal No.909 of 1997.

38. *K.I. Pavunny* vs. *Asstt. Collector* (1997) 3 SCC 721.

39. *Surjeet Singh* vs. *UOI* – AIR 1997 SC 256.

40. *Narcotics Control Bureau – Allauddin @ Mir @ Malik &*

Anr. – Crl. Appeal No.111/1997.

41. *Gulam Rasool* vs. *State of Punjab* – 1994(3) RCR 750 (DB)(P&H).

42. *Valsala* vs. *State of Kerala* 1993 SCC (Crl) 1028.

43. *K.T.M.S. Mohd. & Anr.* vs. *UOI* – 1992 SCC (Cr) 572.

44. *Raj Kumar Karwal* vs. *UOI & Ors.* – 1991 Cr.L.J. 97 (SC).

45. *State of U.P.* vs. *Anil Singh* – AIR 1988 SC 1998.

46. *Karam Singh & Ors.* vs. *State* – 1981 Cr.L.J. NOC 123 (Raj).

47. *State of Rajasthan* vs. *Daulat Ram* AIR 1980 SC 1314.

48. *Inder Singh & Anr.* vs. *State (Delhi Administration)* – AIR 1978 SC 1091.

49. *Shankaria* vs. *State of Rajasthan* – AIR 1978 Supreme Court 1248 (para 49).

50. *Dalbir Kaur & Ors.* vs. *State of Punjab* – 1977 Cr.L.J. 273 (SC).

51. *Chander Bhan Ram Chand* vs. *The State* – 1971 Cr.L.J. 197 (P&H).

52. *Hem Raj Devi Lal* vs. *State of Ajmer* – AIR 1954 SC 462 (SC).

RESULT: Appeal allowed.

SURESH KAIT, J.

1. Vide the instant Appeal, the appellant has challenged the impugned judgement dated 22.03.2009 passed by ld. Special Judge, NDPS, New Delhi in Sessions Case no.38-A/05, whereby the appellant has been held guilty and convicted for the offence punishable under Section 21 (C) of NDPS Act.

2. Also challenged the order on Sentence dated 25.03.2009, whereby he was sentenced to undergo RI for a period of 12 years with a fine of Rs.1,50,000/- and in default of payment of the fine further sentenced to undergo RI for a period of 1+ years.

3. Benefit of Section 428 Cr.P.C. has also been extended to the convict.

4. The case of the prosecution before the Trial Judge, in brief was that on the basis of specific intelligence that one person of African original, travelling in a Indica-V2 Car bearing registration no. RJ-02-TEP-56822 was carrying about 4 Kgs. of heroin, a surveillance was mounted on NH-8 at Bilaspur Toll Tax Barrier on 02.04.2005 by the officers of DRI. Further the intelligence suggested that car would be coming from Jaipur side to Delhi between 13.15 Hrs. to 15.00 Hrs. Accordingly, the said vehicle came at about 13.50 Hrs. and was spotted while leaving the toll tax barrier towards Delhi and started follow-up through heavy traffic. As soon as, it was confirmed that there was a male of African Original sitting in the said Car, the same was intercepted at about 14.30 Hrs, just after Mahipalpur Crossing in Delhi on NH-8.

5. It is further case of the DRI that at the time of interception, car was found to be occupied by one Driver of Indian origin, a man of African origin, two women and a child. The officers disclosed their identity and asked the occupants of the car about their identity. They identified themselves as Rajesh Yadav (Driver of the car), James Ezea Franky, Nizerian Citizen (Appellant), Angela Julie and Suzanna Saili with her 5 year old daughter namely Chi Chi.

6. On enquiry by the officers, the appellant admitted that he was carrying Narcotic Drugs with him in the Car. Accordingly, Notice under Section 50 of NDPS Act was served upon the Appellant and driver Rajesh Yadav as well. The appellant expressed his consent to be searched by any officer of DRI and that he may not be searched at heavily crowded and a congested spot, therefore he was escorted to DRI Office at CGO Complex, Lodhi Road. To the notice served upon him under Section 50 of NDPS Act, he declined to require the presence of any Magistrate or Gazetted Officer and similarly driver Rajesh Yadav gave his consent for his search and of his Car by any Officer of DRI and also declined to require the presence of any Magistrate or Gazetted Officer.

7. The Officers of DRI served summons under Section 67 of NDPS Act to both the ladies who also escorted to the Office of DRI. Both the ladies mentioned above were also served notice under Section 50 of NDPS Act, but nothing incriminating was recovered in their search

conducted by Mrs. Anju Singh, IO of the case. From the search of driver Rajesh Yadav, Toll Booth Receipts ACM 134077 dated 20.04.2005 and business cards were recovered and nothing incriminating was recovered.

8. However, from the personal search of the appellant, a paper on which Jaipur Road, Rajasthan, Main Road, Kotputli was written in green ink by pen, Indian Currency of Rs.3,600/-, US$ 2000, two mobile phone sets were recovered and in search of the Car led to recovery of bag of Feroze-grey-black colour of "Genovaclub" from rear seat and documents i.e. temporary registration Certificate no. 0056822 dated 30.03.2005, Insurance Cover note from the Dash Board of the Car were recovered.

9. Further, the case of DRI is that on opening the bag, three packets taped over with brown adhesive tapes were found and one more packet was found inside the bag which was kept in a packet polythene bag. The bags were removed and the packets were found plain polythene packets containing white powder and granules secured in double polythene transparent bags giving pungent smell and further out of four bags, 3 were moisturised. Thereafter a pinch of powder was taken from all four bags and tested with UN filed drug testing kit which revealed the presence of Heroin in all the four packets marked A to C and were weighed on electronic balance having found gross weight as 4.387 Kgs. and net weight as 4.244 Kgs. and same seized under Section 42 of NDPS Act. Three samples of 5 gm. each from each of the packets were drawn and marked A-1 to A-3 to D-1to D-3 respectively kept in a small press lockable polythene packets and then in a brown envelopes sealed with DRI Seal or a paper slip bearing signatures of witnesses, signatures of Appellant, both the ladies mentioned above, Rajesh Yadav and Officers of DRI.

10. Similarly, seized heroin packets were stapled and kept in a light yellow envelopes marked A to D and were sealed with DRI Seal in the above manner along with a packet and other material recovered was kept in a metallic packets with lock and wrapped in cloth and stitched and sealed with DRI Seal in the above manner. Personal search belongings of the appellant were also seized and sealed. Thereafter, the car was also seized along with the papers. After recovery and seizure, the appellant, driver and both the ladies mentioned above gave their statement under Section 67 of NDPS Act.

11. Thereafter, the Appellant was arrested on 21.04.2005. Samples were sent to CRCL on 21.04.2005 itself and results thereon were obtained vide letter dated 06.06.2005 with opinion that the samples were having diacetylmorphine with purity of 65.9 to 87.1%. The seized Narcotic drugs and articles were deposited in New Custom House, New Delhi on 21.04.2005 in intact condition and Car was deposited in CWC Safdarjung. DRI seal was obtained on 20.04.2005 at 1.50 Hrs and return after completion of all formalities on 21.04.2005. Test memos in duplicate were prepared at the spot on 20.04.2005 on 20.04.2005 itself and signed by the complainant on 21.04.2005.

12. After completion of investigation, complaint was filed against appellant for possessing, transporting and importing Heroin from Rajasthan, for the offence punishable under Section 21 and 27 –A of NDPS Act.

13. Ld. Trial Judge framed charges against the appellant under Section 21 (C) vide its order dated 04.03.2006, to which he pleaded not guilty and claimed trial.

14. In order to prove its case, DRI examined as many as 20 witnesses. Thereafter Statement of appellant was recorded under Section 313 Cr.P.C. In his defence, appellant examined DW-1 Ajay Kumar Singh, Protect Director, National Highway-8 who deposed that the distance of Rajasthan Haryana boarder is about 83 KMs from Boarder of Delhi Gurgaon and filed rough sketch plan as Ex.DW1/A. In cross-examination he deposed that Delhi Gurgaon Boarder is about 24 KMs from Rajghat. He further deposed that Ex.PW2/E-3 appears to have been issued by National Highway Authority from Villaspur.

15. Learned Trial Judge after considering the facts and circumstances opined that the DRI has successfully proved beyond reasonable doubts on record. There was a secret information regarding transportation of the heroin which was informed to the senior officers, who after discussion, constituted a raiding party. Pursuant thereof, the appellant was intercepted while sitting in a Indica car in which appellant alongwith two other ladies were coming from Jaipur towards Delhi. Since the place of interception was not suitable, therefore, appellant and driver were brought to DRI office after giving them notice under Section 50 of NDPS Act alongwith other occupants of the car where the search of person and baggage conducted in the presence of department witnesses. In search from the bag of appellant, four packets were recovered containing about 4.244

KGs heroin and same were tested with field test kit and same were giving positive for heroin. Out of them, three samples of 5 grams each were taken out of the heroin recovered and the samples were sealed with the seal of DRI alongwith the paper slip bearing the signature of the appellant, independent witnesses, seizing officer and other occupant of the car including the driver. Panchnama was prepared and also duly proved on record. Compliance of Sections 42,50, 55 & 57 of NDPS Act has also been proved besides the statement of the appellant under Section 67 of the Act and further when her two companions Angela Julie and Suzanna Saili had narrated the similar circumstances and rather supported the version of the DRI.

16. Learned Trial Judge has also opined that the DRI has successfully proved beyond reasonable doubt that the contraband i.e. heroin was in conscious possession of the appellant, which was recovered by the DRI. In the present case, appellant was apprehended at Mahipalpur Boarder. The apprehension and timing of apprehension are specifically and stated by the witnesses. Even the defence could not put any dent in the story of the DRI that he was not apprehended in the manner as stated by the DRI.

17. Similarly, the recovery and panchnama proceedings in DRI office has also duly established by DRI. In nutshell, the DRI has successfully established the conscious possession of the contraband by the appellant as well as the recovery from him which are the essential ingredients under NDPS Act, hence as discussed above in detail the only inference can be drawn from the circumstances and the statement made by the appellant under Section of the NDPS Act is that the statement was voluntarily and from no stretch of imagination it can be inferred that it was under forced circumstances.

18. It is further recorded by learned Trial Judge that DRI has proved the case property and samples remained intact condition. The CRCL report proves that the recovered heroin was having purity of 65.9% to 87.1% and thus, the net recovery of 4.244 KGs even after considering the purity is a 'commercial quantity' recovered from the possession of the appellant which the appellant was transporting and possessing illegally in contravention of Section 8 of NDPS Act.

19. Accordingly, learned Trial Judge found the appellant guilty of

committing offence punishable under Section 21 (c) of the NDPS Act. Consequently, appellant was convicted for the offence mentioned above.

20. Learned Special Judge further failed to notice that the agency received specific secret information which is Ex.PW3/A regarding the alleged car carrying the contraband before 11:00 AM on 20.04.2005 and the same was put up before the senior officers of the department for authorization, whereas, in the statement of the driver PW 11 recorded under section 67 of the NDPS Act, which is Ex.PW6/B has categorically stated that the call was made by the Hotel staff to requisition the Taxi, in which the Appellant was apprehended, at 11:30 AM. PW 11 about the time at which time call for taxi was received by him and the time he reached the hotel.

21. It is only too curious as to how did the Department got specific information regarding the Taxi number RJ 027 TEP 56822 and exact description of the car even before the Appellant herein availed its services at random. This casts a serious doubt as to the veracity of the story of the prosecution and speaks volumes about the entire story being concocted, as PW 11 has also deposed that he had a fleet of 6 vehicles at that time.

22. To strengthen ld. Counsel for the petitioner has relied upon a case of **Sarju Vs. State of U.P**(2010) 2 SCC (Cri) 1510 wherein it is held as under: "That there is indeed need to protect society from criminals. The societal intent in safety wills suffer if persons who committed crime are let off because the evidence against them is to be treated as if it does not exist. The answer therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but means to achieve it must remain above board. The remedy cannot be worse than the deceive itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducting by the investigating agencies during search operations and may also undermine respect for the law and may have the effects of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trail is contrary to our justice. The use of evidence collected in reach of the safe guard provided by section 50 of the trial,

would render the trail unfair."

23. It is further submitted that ld. Special Judge did not take into account the aspect that the case of the prosecution is that, the appellant received delivery of the alleged heroin recovered from his possession from one Bajju Singh. That it is pertinent to mention here that there is no witness to this alleged transaction. This claim of the prosecution is further belied by the testimony of PW 11, the driver of the apprehended vehicle, who categorically stated that they did not stop anywhere on their way to Delhi and that they stopped for the first time only when they were allegedly apprehended at Mahipalpur. Moreover, no efforts were made to identify or apprehend the said Bajju Singh, therefore, leading to the view that, in fact, the story of the prosecution is frivolous and lacks any concrete evidence. Thus, the false implication of the Appellant in this case is a serious possibility in the entire gamut of facts.

24. Learned Special Judge has completely discarded the retraction statement tendered by the Appellant at least 3 times before the Learned Trial Court, in which, the Appellant has categorically stated that his statement under section 67 NDPS Act, 1985 was obtained under duress, coercion and torture.

25. Ld. Counsel for the appellant has relied upon a case of **Alok Nath Dutta v. State of West Bengal** [2006 (13) SCALE 467 wherein it is held as under:-

> "We are not suggesting that the confession was not proved, but the question is what would be the effect of a retracted confession. It is now a well- settled principle of law that a retracted confession is weak evidence. The court while relying on such retracted confession must satisfy itself that the same is truthful and trustworthy. Evidences brought on records by way of judicial confession which stood retracted should be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon." [See also **Babubhai Udesinh Parmar v. State of Gujarat,** (2006) 12 SCC 268].
>
> In **PonAdithan v. Deputy Director, Narcotics Control Bureau, Madras** [(1999) 6 SCC 1], whereupon reliance has been placed by the High Court, this Court had used retracted confession as a corroborative piece of evidence and not as the evidence on the basis whereof alone, a judgment of conviction could be recorded."

26. It is further submitted that the Ld. Special Judge failed to appreciate the fact that PW2, I.O. Arvind Kumar Sharma, who admitted in his cross examination that the sealed packets of samples as well those of the allegedly seized contraband, could be opened without tempering the seals.

27. It is further submitted that Learned Special Judge failed to note the inconsistencies in sampling the seized heroin. As the Test Memo which is Ex.PW2/L, the weight of the 4 samples received was 5 grams each, whereas, the report received from the CFSL on the 4 samples drawn from the seized material, A1, A2, A3, A4 which is **Ex.PW2/N** states the weight as 6.6 grams, 6.6 grams, 6.7 grams and 7.5 grams respectively. That further, the word **'gross'** of the CFSL report, has been overwritten on the word **'net'**. All these inconsistencies point towards the malafide intention on part of the department. The CFSL report **Ex.PW 2/N** and the questions put to appellant under Section 313 Cr.P.C. talks of white colour substance, however, the case property opened in the court by PW2 i.e IO found of brown colour.

28. On colour and weight learned counsel has referred the case of of **Eze Val Okeka @ Valeza V. NCB** 2005 (1) JCC (Narcotics) 57 wherein it is observed as under:-

> "Narcotics drugs and Pschotropic Substance Act, 1985- sec 21 (c)- conviction and Substance- Sustainability of- appellant had no connection with the premises from where Contraband (Herion) was recovered from his possession- Statement of the landlord was not recorded to establish the fast that appellant usedto reside therein- Tenant of the premises was somebody else- Public witness did not support the prosecution case- no attempt to join any respectable witness of the locality in the raiding party- Absence of entries in the log book of the vehicle used by raiding party- casts a shadow of doubt- Moreover prosecution failed to prove case beyond reasonable doubt- Possibility of tampering with the investigating agency was there- Non- production of public witness and Non- Joining of neighbors in raiding party – Hence conviction and sentence set aside- Appellant allowed.

Criminal Examiner-Appreciation of- Deposed that what was analyzed was of white colour powder, whereas the prosecution case is that the powder recovered from the appellant was of brown colour- Under such circumstance it is difficult to held that what was recovered was actually chemically tested."

29. Mr.Gupta, learned counsel argued that the prosecution case has not been supported by the public witness PW- 7 Shanmugham. It is true that he was declared hostile but that does not provide any strength to the prosecution which was under an obligation to prove beyond reasonable doubt that the Heroin in question was recovered from the appellant as alleged. The investigating officer had made no attempt whatsoever to join any respectable witness of the locality in the raiding party. PW-7 Shanmugam as well as Ravi Tiwari, who was not produced in trial court, were only watchman of the area and as such, were not respectable residents of the locality. The investigating officer had sufficient time and opportunity to go to the other residents of the building or the neighbouring houses and make request to them to join the raiding party.

30. In **State of West Bengal vs. Babuchkerverty** JT 2004 (7) SC 216 the Supreme Court while examining the provision of the act and the quality of the evidence required for conviction of an accused thereunder clearly observed in Para 28 of the judgment that in the case where mandatory provisions are not complied with and where independent witnesses are not examined, the accused would be entitled to acquittal. In the present case also, firstly; the quality of public witnesses allegedly joined in raiding party was not up to the mark, secondly; out of two witnesses one was not produced at all and the other who was examined in the court did not support the prosecution case and rather support the defence by saying that when the door of the premises opened, two persons from inside had run away. He also stated that the appellant came there later. This creates the serious lacuna in the prosecution case.

31. It is further submitted that in this case the prosecution miserably failed to prove on record that the article recovered from the appellant was properly sealed, properly preserved and then sent to the CRCL for analysis in the same condition and none had tempered with it before it was examined by the comical Examiner. The first and foremost reason for holding so is that the seal with which recovered article and sample was sealed at the spot was not handed over to any public witness after

the sealing process was over and instead it was handed over to an official witness PW-8 only. This was highly improper. There is no explanation as to why the seal was not handed over to any public witness especially, when he was available to ensure that the recovered article was not tempered with; during the period case property remained with the investigating officer or with the authorized officer under Section 53 of the Act. Regarding the seal, PW8 C.B. Singh, Superintendent, NCB deposed that this seal was handed over after alleged recovery of the articles, then handed back the seal to PW-12 N.S. Ahlawat, Assistant Director on the same day. If the seized article as well as seal remained with PW- 12 only from the time of seizure till the time sample ware sent to CRCL for analysis, there is no guarantee that the samples were not tempered with, during that period. Furthermore the prosecution was under an obligation to establish on record as to who had taken the sample of contraband from PW-12 and taken those to CRCL. The person who had taken the samples to CRCL was not examined before the court. In the testimony of PW-8 C.B. Singh, superintendent, NCB, it was also brought that the seized article could be taken out of the packet without disturbing the seals. It shows that the sealing was not proper and as such possibility of tempering with the sample was there. No malkhana register have been produced nor entries therein proved before the court to show as to at what time and on what date the article and samples allegedly recovered from the appellant were deposited in the malkhana and on what date and time and by whom the samples taken out for CRCL analysis.

32. Learned counsel submitted that besides all these, it has come in the testimony of PW-3, the Chemical Examiner who analyzed the case property was an 'off white' colour powder, whereas the prosecution case is that the powder recovered from the appellant was of brown colour. It has also come in the testimony of PW3, Narinder Singh Chemical Examiner, CRCL had the sample been of brown powder, the report would have been different. Therefore, his statement, makes it very difficult for the Court to hold that, the article which was recovered from the appellant was the same which was examined by the Chemical Examiner. It also shows that there may be tampering of article allegedly recovered from the appellant before it reached to CRCL for analysis.

33. In **"Valsala vs. State of Kerala** 1993 SCC (Crl) 1028," Supreme Court while dealing with the contention as to whether the article seized to was sent to Chemical Examiner observed that the evidence adduced

in the case was wholly insufficient to conclude that what was seized from the appellant was sent to the chemical Examiner and through it was purely a question of fact but was an important link. In view of doubt in regard to the proper custody and sending of the sample of the article for analysis, the accused was given the benefit of doubt and acquitted.

34. In **State of Rajasthan vs. Daulat Ram** AIR 1980 SC 1314 the Apex Court while dealing with an offence under Opium Act held that it was the duty of the prosecution to prove that while in their custody the sample was not tempered with before reaching the public analyst.

35. This Court also in the case of **Subhash Chand Mishra Vs. State** 2002 (2) JCC 1379 relied upon several judgments of this court and came to the conclusion that the prosecution is under the obligation to prove the sample delivered to CRCL was in the same condition and there was no possibility of tempering with it. In the view of several doubts in the prosecution in regard to the connection of the appellant with the premises in question, recovered of Heroin from him, the possibility of tempering with the recovered article during the period it remained with the investigating agency, the non- production of public witness and non-joining of neighbours, this court is not in position to hold that the prosecution has succeeded in establishing its case against the appellant beyond reasonable doubt. The act lays down stringent punishment for the offence committed thereunder and as such casts a heavy duty upon the courts to ensure that there remains no possibility of an innocent getting convicted. The officers concerned with the investigation of offences under the act must produce best and unimpeachable evidence to satisfy the courts that the accused is guilty because no chance can be taken with the liberty of a person. No doubt that the drug tracking is a serious matter but the investigations into such offences also have to be serious and not perfunctory.

36. Learned counsel appearing on behalf of appellant has referred on **Nor Aga v. State of Punjab &Anr.** 2008 (3) JCC Narcotics SCC (S.67) wherein it has been observed as under:-

> "The fate of these samples is not disputed. Two of them although were kept in the malkahana along with the bulk but were not produced. No explanation has been offered in this regard. So far as the third sample which allegedly was sent to the Central

> Forensic Science Laboratory, New Delhi is concerned, it stands admitted that the discrepancies in the documentary evidence available have appeared before the court, namely:
>
> i) While original weight of the sample was 5 gms, as evidenced by Ex. PB, PC and the letter accompanying Ex.PH, the weight of the sample in the laboratory was recorded as 8.7 gms.
>
> ii) Initially, the colour of the sample as recorded was brown, but as per the chemical examination report, the colour of powder was recorded as white.
>
> We are not oblivious of the fact that a slight difference in the weight of the sample may not be held to be so crucial as to disregard the entire prosecution case as ordinarily an officer in a public place would not be carrying a good scale with him. Here, however, the scenario is different. The place of seizure was an airport. The officers carrying out the search and seizure were from the Customs Department. They must be having good scales with them as a marginal increase or decrease of quantity of imported articles whether contraband or otherwise may make a huge difference under the Customs Act."

37. Also, in **Karam Chand v. The State(Delhi)** 2006 (1) JCC 12, this Court has discussed on weight and samples recovered as under:-

"31. The net weight of samples purportedly sent and actually found at CRCL is as under:

Net Wt of sample purportedly sent	Net Wt. actually found at CRCL
1 Kg.	961.1 gms.
200 gms.	183.7 gms.
200 gms.	183.7 gms.
1 Kg.	963.9 gms.
200 gms.	169.7 gms.

32. Evidently, net weight of all the five samples was found much less than what sealed sample parcels purported to contain. The deficit is not insignificant. The prosecution has no explanation for such deficit. Suspicion regarding tampering with sealed sample parcels in the backdrop of prosecution failure to prove that CRCL

forms were actually deposited in the Malkhana and that the same had been delivered at CRC Laboratory, Pusa Road, along with sealed sample parcels grows stronger.

33. In **Rajesh JagdambaAvasthi v. State of Goa,** 2004 (4) Crimes 347 (SC), where the parcel which was said to contain 115 gms.ofCharas was found to contain only 82.54 gms. of Charas, it was not considered to be a minor discrepancy and the Supreme Court proceeded to observe:

"The charas recovered from him was packed and sealed in two envelopes. When the said envelopes were opened in the laboratory by the Junior Scientific Officer, PW 1, he found the quantity to be different. While in one envelope the difference was only minimal, in the other the difference in weight was significant. The High Court itself found that it could not be described as a mere minor discrepancy. Learned counsel rightly submitted us that the High Court was not justified in upholding the conviction of the appellant on the basis of what was recovered only from envelope A ignoring the quantity of charas found in envelope B. This is because there was only one search and seizure, and whatever was recovered from the appellant was packed in two envelopes. The credibility of the recovery proceeding is considerably eroded if it is found that the quantity actually found by PW 1 was less than the quantity sealed and sent to him. As he rightly emphasized, the question was not how much was seized, but whether there was an actual seizure, and whether what was seized was really sent for Chemical analysis to PW1. The prosecution has not been able to explain this discrepancy and, therefore, it renders the case of the prosecution doubtful." 38. In the present case also, he submitted that the discrepancy in the weight of the contents of the sample parcels sealed at the spot and that which was actually found at CRC Lab can by no means be reconciled. Consequently, the credibility of the alleged recovery proceedings stands considerably eroded. It is, in the circumstances, rendered difficult to find beyond reasonable doubt that the samples sent to CRCL actually represented the lot allegedly recovered from the respective appellants.

39. Mr.Gupta, further argued that the Special Judge failed to notice

the glaring contradictions in the story of the prosecution which could have been instrumental in exonerating the Appellant. This is clear from the major contradictions in the timings of the alleged events. The appellant was allegedly intercepted by the arresting team at 2:30 PM on 20.04.2005 and notices under section 67 of NDPS Act are alleged to be served at 3:00 PM in which the quantities of the contraband are also mentioned. Interestingly enough, the bags allegedly containing the contraband were first checked at 3:20 PM at the DRI office. This entire sequence of contradictions is conveniently ignored by the Learned Special Judge, which in fact raises serious questions on the very recovery of the contraband from the possession of the Appellant herein.

40. Further it is argued that PW 18, then Deputy Director of the prosecuting agency deposed that he came to know about the raid and interception at 2:50 PM, which, again, is highly improbable as the alleged interception itself took place at 2:30 PM on 20.04.2005. He further went to the extent of saying that he knew the weights of the seized contraband at 2:30 PM, which again is highly contradictory as the weights of the material seized was known only after 3:20 PM.

41. Learned Special Judge, further glossed over the irregularities carried out by the Department in effecting the alleged recovery of contraband from the possession of the Appellant, for instance, after apprehending, the Appellant was taken to the DRI office in a DRI vehicle and the keys of the alleged apprehended car were taken by the DRI officials and the same was also driven to the DRI office and was further searched in the absence of the Appellant. Hence, there arises no question of any conscious possession of contraband by the Appellant as the entire process of recovery is jeopardized by the mere fact that there has been no authentic witness to the alleged recovery of contraband from the possession of the Appellant. The Appellant actually deserves to be acquitted on this short point alone.

42. On the point of conscious possession and personal search, learned counsel for appellant relied upon **Bahadur Singh vs. State of Madhya Pradesh** 2002 (1) JCC 12 SC, wherein it has been observed as under:-

> "According to the prosecution there were two independent witnesses in whose presence the poppy straw was recovered and seized. The prosecution, however, examined only one of

them, namely, Pawan Kumar Sharma, PW1. PW1 did not support the prosecution and was declared hostile. He though admitted his signatures as a punch witness to the documents but denied that in his presence 3.900 kgs. of poppy straw was recovered and seized from the driver, Bahadur Singh and cleaner, Amreek Singh. The conviction was, however, based on the sole testimony of Investigating Officer, Head Constable Gontiya, PW3.

There are serious material discrepancies in the evidence in respect of recovery and seizure. PW4, a constable, stated in the cross-examination that when Pawan Kumar Sharma reached Kabir Chowk where the truck was apprehended PW3 told him that there is poppy straw in the truck and when they reached there, PW3 had already taken the search of the truck. There are also serious discrepancies in respect of the deposit of the seized poppy straw in the Maalkhana. The deposit is shown to have been made under Entry No.68-A dated 11th October, 1997. The date of the incident is 10th October, 1997. The Entry above Entry 68-A, is Entry No.68 dated 15th October, 1997. The Entry after Entry 68-A, is Entry No.69. That is also dated 15th October, 1997. The concerned police official who made these entries was not examined by the prosecution but was examined as a defence witness. His explanation to the aforesaid entries was that he forgot to make an Entry of the seized material in the Maalkhana register and made the entry later after '15th day'. The explanation is far from satisfactory. Assuming he forgot to make the entry, that then cannot be made by interpolation as aforesaid. The entry could be made at its appropriate place under the correct date on which it was actually made and delay in making the entry could be explained. He further deposed that since no cash was deposited he did not make any Entry for receipt of Rs.27,000/- connected with the crime. In respect of this amount, PW3, the Investigating Officer, in cross-examination stated as under:

"During arrest, 54 currency note of Rs.500 denomination each were seized from Bahadur Singh, which was Rs.27,000/- in all and it is true. It is wrong to say that Rs.27,000/- were never returned to Bahadur Singh. Head MoharrirJagat Ram of police station has got the receipt of the refund of that money. It is wrong to say that for harassing accused Bahadur Singh and

Amreek Singh, I entered in their truck and searched the truck unnecessarily and the accused were unnecessarily arrested. It is wrong to say that Rs.27,000/- were not returned to accused persons."

43. Learned counsel also cited **Surendera Singh & Chintu Vs. UOI** 2005 (1) JCC (Narcotics) wherein it has been held as under:-

"Narcotic Drugs- and Psychotropic substance Act, 1985- sec. 18- conviction and sentence- contraband article seized from a Room- Room was not owned and possessed by the accused- Accused was present in room tried to run away seeing the police party- It would not constitute any offence because the room from where contraband articles were recovered was not being possessed by the Accused Appellant- Hence conviction and sentence cannot be sustained.

NDPS case- Search of a person- How to be conducted- The person searching the accused is required to offer himself for his personal search before entering in the premises- officer conducting search did not offer for their search and hence conviction and sentence cannot be sustained."

44. That Learned Special Judge further failed to ensure a proper compliance of the provisions of section 313 of the Code of Criminal Procedure in the interest of justice and in order to give the appellant a fair opportunity to defend his case effectively. He referred to questions Nos.7,12,14,15,19,23, 25, 28, & 38 put to appellant which reads as under:-

Q7 It is further in evidence against you that thereafter, notices under Section 50 of NDPS Act, were served upon you, Ex.PW2/A and Rajesh Yadav, Ex.PW2/B and were informed in the said notices that it was their legal right to be searched in the presence of any Magistrate or a gazetted Officer, if they desire so, to which you said that you did not require the presence of any Gazetted Officer or Magistrate for the search. However, you requested that the said search be carried out in the DRI office. This option was reduced into writing on the face of the said notice by you. What do you have to say?

Ans. It is incorrect. However, I was tortured to write on many

papers as per the dictation of DRI officers namely Sh. Arvind Kumar Sharma in DRI office. My signatures were also taken forcibly on many blank papers and on semi written papers and small paper slips under torture by the officers of DRI in DRI office.

Q12 It is further in evidence against you that thereafter, the car was searched, which resulted in the recovery of car's registration certificate, Ex.PW2/E1, insurance papers, Ex.PW2/E3, delivery challan Ex.PW2/E2, from the dash board of the car and feroze grey black colour bag, near the rear seat of the car was found. All the documents mentioned above were taken into possession for further enquires. What do you have to say?

Ans. It is incorrect as nothing was searched in my presence.

Q14 It is further in evidence against you that on removing the adhesive tape one by one of each packet, recovered plain polythene bag and on further examination of the said polythene bag, recovered off white powdery and granular substance, from which pungent smell was emanating. What do you have to say?

Ans. It is incorrect.

Q15 It is further in evidence against you that from the blue and white polythene bag, there was another black colour polythene bag was found, from which another packet wrapped in adhesive tape was found which was also opened after removing the adhesive tape and recovered off white powdery and granular substance from which pungent smell was emanating. What do you have to say?

Ans. It is incorrect.

Q19 It is further in evidence against you that the remaining quantity of heroin were kept back in their respective packets and stapled and after this, all these packets were separately kept in envelopes and were respectively marked as A, B, C, and D corresponding to the marking made previously and those packets were further sealed with DRI seal over a paper slip bearing signatures of panch witnesses, you, Rajesh Yadav, Suzana Saillo,

Angela Juile and PW2. What do you have to say?

Ans. It is incorrect. However, I was tortured to write on many papers as per the dictation of DRI officers namely Shri Arvind Kumar Sharma in DRI office. My signatures were also taken forcibly on many blank papers and on semi written papers and small paper slips under torture by the officers of DRI in DRI office.

Q23 It is further in evidence against you that the test memos, Ex.PW2/L and Ex.PW2/N, were also prepared at the spot. The panchnama, Ex.PW2/D was also prepared and the same was read over and explained to all the concerned people. The site plan, Ex.PW2/E was also prepared. Facsimile seal of the DRI was also appended on the pachnama and the test memos. What do you have to say?

Ans. It is incorrect.

Q25 It is further in evidence against you that in pursuance to the summons Ex.PW2/C, you appeared before PW2 Shri Arvind Kumar Sharma on 20.04.2005 to tender your voluntary statement, Ex.PW2/F under the NDPS Act and in your statement, you admitted the aforesaid recovery and seizure and other incriminating facts. What do you have to say?

Ans. It is incorrect. However, I was tortured to write on many papers as per the dictation of DRI officers namely Shri Arvind Kumar Sharma in DRI office. My signatures were also taken forcibly on many blank papers and on semi written papers and small paper slips under torture by the officers of DRI in DRI office. I had not tendered any voluntary statement to the officers of DRI. However, I had retracted the contents of the said statement when I was produced before the Court vide my retraction Ex.DXZ and DXZ-1.

Q28 It is further in evidence against you that in pursuance to the summons, Ex.PW7/A and Ex.PW7/B issued to Ms.Angela Julie and Suzanna Salio, they tendered their statements, Ex.PW7/C and Ex.PW7/D respectively before PW7 Sh.Devnedera Singh, in which they admitted the aforesaid recovery, seizure and other

incriminating facts. What do you have to say?

Ans. It is incorrect.

Q38 It is further in evidence against you that PW2 Sh.Arvind Kumar Sharma conducted enquiries regarding Ms.Suzana Sailo, Okatth Chika Anthony and submitted the enquiry reports, which are Ex.PW2/S to Ex.PW2/U respectively. What you have to say?

Ans. It is incorrect. PW2 facilitated Ms.Suzana Sailo, Oktath Chika Anthony and Rajesh Yadav to leave the DRI office and I was implicated in the present false case, though I have nothing to do with the present case."

45. Learned counsel submitted that the no incriminating evidence was put to the accused with respect to the case property. The question no 14 put to the accused with respect to the white powder and granular substance recovered is different from the brown colour powder which was opened in the court when by the IO when the case property was opened.

46. It is submitted that no question of conscious possession was put to appellant, therefore, it is clear that noncompliance of Section 313 Cr. P.C.. He relied upon **Raj Kumar v. State of Punjab** (2005) 1 JCC (Narcotics) wherein it has observed as under:-

> "In the present case the beg contained 8.250 kg of Opium was lying on the seat between the two appellants. Both appellants had been charged for possession of Opium but neither of them had been asked any question in their statement under sec. 313 CrPC. that they were in conscious possession of opium. Therefore neither the presumption of under sec 35 nor the presumption under sec 54 of the Act would be attracted.
>
> Section 35 provides that in any prosecution for an offence under the Act which requires the culpable mental state of the accuse (conscious possession), the court shell presume the existence of such mental state but it shall be a defence for accused to prove the fact that he has no such mental state with respect to the Act charged as an offence in the prosecution. There is an explanatory clause which states that "culpable mental state" including "intention, motive, knowledge of a fact and belief in or reason

> to believe, a fact."

47. Learned counsel relied upon **State of Punjab Vs. Hari Singh and Ors** (2009) 2 SCC 198 (Cri) wherein it is held as under:-

> "In the present case through, there was evidence regarding conscious possession, but, unfortunately, no question relating to possession, much less conscious possession was put to the accused under sec 313 Cr.P.C. The questioning under section 313 Cr.P.C is not an empty formality.
>
> When the accused was examined under section 313 Cr. P.C., the essence of accusation was not brought to his notice, more particularly, that possession aspect, as was observed by this court in Avtar Singh v. State of Punjab. The effect of such omission vitally affects the prosecution case.

48. He submitted that Learned Special Judge failed to appreciate that the story of the prosecution could not stood on its feet in the face of material contradictions in the testimonies of the prosecution witnesses. PW 8 deposed that the seal was obtained at 1:15 PM on 20.04.2005 while PW 2 I.O. stated that the arresting team left the DRI office at 11:50 AM. PW 2 further states that test memos were prepared at the spot of arrest, which allegedly happened on 20.04.2005, whereas the date on the test memo Ex.PW2/L is 21.04.2005, further creating doubts on the entire case of the prosecution.

49. Learned counsel further submitted that there are interpolations on dates which prove that the prosecution had tempered the evidence. He has referred **Ramdass & Anr Vs. The State (NCT of Delhi)** 2011 JCC 156, wherein it is held as under:-

> "One cannot lose sight of the fact that such inadvertent mistakes happens sub-consciously when the author of the document or its signatory is not conscious of the actual date. In the normal course of circumstances, in such cases, the author or signatory of the document is always likely to append the date proceeding to the actual date on the document. On perusal of Ex.PW2/ DA, we find that it is not only purported to have been signed on the date subsequent to the date of occurrence but the month is also not the same. It is highly improbable that such an inadvertent

mistake could have been committed by the investigating officer. This circumstance raises a strong possibility that purported statement of the witness Ex.PW2/DA has been subsequently introduced by the investigating officer on an afterthought to project PW2 Vijender as an eye witness and make the prosecution story suspect."

50. He further argued that the Special Judge has completely glossed over the testimony of PW 13, an alleged panch witness, which belies the entire story of the prosecution regarding arrest of and recovery from the Appellant. PW 13 states that there were only 5 persons in all in the alleged intercepting team, i.e., himself , 1 driver, and 3 officers including I.O. Arvind Kumar Sharma. Whereas, it is stated by PW 2 I.O. Arvind Kumar Sharma that there were 7 persons in the arresting party consisting of 5 officers and 2 panch witnesses.

51. Learned Special Judge further failed to appreciate that PW 13 stated that he was absent from his office only from 12:00 to 2:00 PM on 20.04.2005, the alleged date of arrest of the appellant, and that he had returned to his office at the CGO Complex at 2:00 PM on that date. This clearly indicates that the alleged interception and seizure from the Appellant which is allegedly happened at 2:30 PM. Therefore, either event did not happen at all or it happened in the absence of PW 13, the alleged panch witness, which itself is a grave irregularity and is sufficient to absolve the appellant from the allegations.

52. He further submitted, learned Special Judge failed to notice that PW 13 is, actually a planted witness which is clear from the aspect that in his testimony he stated that he could read English and he was told that the words 'box', 'mobile', 'money' etc. were written on the slips signed by him, whereas, no such words were actually found on those slips apart from the signatures.

53. He pointed out that learned Special Judge also failed to appreciate the glaring lacuna in the story of the prosecution that the second alleged *panch* witness, namely Shiv Mangal, was untraceable despite the fact that his address was same as that of the first *panch* witness, PW 13. This only points out that the entire story of the prosecution is false and frivolous.

54. Further, it is submitted that the Learned Trial Judge also failed

to test the veracity of the Notice under section 50 NDPS Act which is ExPW2/A, served upon the Appellant as it has no signatures of any witnesses whatsoever and further, neither the provisions of Section 42 of NDPS Act, 1985 complied with.

55. Learned counsel relied upon **Vijaysinh Chandubha Jadeja v. State of Gujarat** (2011) 1 SCC (Cri) 497 wherein it has been held as under:-

"In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

As observed in Re Presidential Poll14,(SCC p.49, para 13)"it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole"

We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance

with the dictum laid down in **Baldev Singh's** case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.

56. The Learned Special Judge further failed to test the veracity of the Panchnamas. This is evident from the fact that the complaint of the prosecution does not mention the seizure of mobile phones from the person of the appellant, whereas such seizure is mentioned in the Panchnama. This puts the genuineness of the Panchnama under heavy suspicion. It is also pointed out towards the likelihood that the Panchnama as well as all other documents were prepared only at the DRI office as a material afterthought and that the entire case of the prosecution is a fallacy.

57. He has submitted that the Learned Special Judge has disregarded the fundamental principle of criminal law that any benefit of doubt should go in favour of the accused, of the prosecution failed to prove its case on its own strength and not on the weakness of the defence. Therefore, learned Judge has committed grave error of law by arriving at the judgment convicting the Appellant based on an extremely flimsy trail of evidence, wherein, just only one officer was examined from the arresting party by the prosecution.

58. Moreso, there were only 4 statements under section 67 of NDPS Act on record which included the Appellant, a driver of the allegedly apprehended car and 2 ladies who were allegedly travelling with the Appellant in the said car. Ironically, these 2 ladies were not examined during the trial, therefore, depriving the prosecution of any weight or reliance, to gain from the statements of the 2 ladies recorded under section 67 of the NDPS Act Ex.PW7/C and Ex.PW7/D. It goes against all tenets of criminal jurisprudence when a conviction is based upon such unreliable and weak pieces of evidence, wherein just one officer, i.e. the I.O., the complainant in the case, has been examined to prove the entire case.

59. The MLC, which is Mark G conducted on the appellant by the Doctor of Ram Manohar Lohia Hospital, does not bear the name and the stamp of the Doctor who is alleged to have performed the MLC. More

interestingly, against the column of BP the pulse of the appellant is recorded, and against the column of the pulse, BP is recorded, which is highly improbable of any Doctor practicing at RML hospital, which cast serious doubt on the authenticity of the MLC, thus weakens the case of the prosecution.

60. Learned counsel argued, other officers who allegedly participated in the interception and raid were not even named in the complaint, neither were they examined during the trial nor their statements were recorded anywhere by the agency.

61. Mr.Gupta, learned counsel argued that learned Special Judge disregarded all likelihood of the appellant being falsely implicated in the case by organized fake recoveries orchestrated by the DRI officials in order to claim rewards from the government. This aspect has been proved by PW 18, Deputy Director, DRI who has stated that the officials were suitably rewarded on showing such seizures.

62. The Special Judge also failed to appreciate, while convicting the appellant, material inconsistencies in the case of the prosecution. Moreso, the Learned Special Judge erred in not considering that in case of two possible views, then the benefit of doubt ought to be exercised in favour of the accused.

63. The presumption of innocence and proof beyond a reasonable doubt postulates that the evidence led in the court during trial by the prosecution has to be subjected to a minute and meticulous examination. Because of these cardinal principles of criminal jurisprudence the deposition / statements of the witnesses in the court cannot be accepted at their face value as gospel true, but it is imperative that their veracity be tested on a strict touch stone. In the present case the Court ought to consider that such witnesses have to be weighed with caution and ought not to be made the sole basis for the conviction in the absence of any clear testimony.

64. While refuting the submission of learned counsel for petitioner, Mr.Satish Aggarwala, learned counsel for DRI submitted that this is a case of recovery and seizure of 4.244 kgs. of heroin, having purity percentage 65.9% to 87.1%. In support of the case, the prosecution examined the witnesses, who, all supported the case of prosecution, which led to conviction of appellant.

65. PW1 Shri R.P. Meena, who proved the acknowledgment receipt as Ex.PW1/A, test report as Ex.PW1/B, final test report as Ex.PW1/C, polythene pouches containing off white powdery substance Mark A-1 to D-1 as Ex.P-1 to P-4, four envelopes marked A-1 to D-1 as Ex.P-5 to Ex.P-8, yellow colour envelope as Ex.P-9 & paper slips Ex.P-10 to Ex.P-13.

66. In cross-examination, he denied the suggestion that the samples and paper slip were tempered with. He denied to the suggestion that the documents were also fabricated in the present case to implicate the accused. He also denied to the suggestion that the seal affixed on Ex.PW1/B and Ex.PW1/D-1 were also tempered with. To the suggestion that Ex.PW1/C was prepared by Yogender Kumar and it was merely signed by him and Shri D.K. Beri. He has further denied the suggestion that he has not analyzed the sample in the present case nor the analysis was supervised by Shri D.K. Beri.

67. PW2 Shri Arvind Kumar Sharma, the complainant, who proved the notice to the accused under Section 50 of NDPS Act as Ex.PW2/A, notice under Section 50 to Rajesh Yadav as Ex.PW2/B, summons dated 20.4.2005 to accused as Ex.PW2/C, panchnama dated 20.4.2005 as Ex.PW2/D, site plan as Ex.PW2/E, RC certificate as Ex.PW2/E-1, delivery challan as Ex.PW2/E-2, certificate of insurance company as Ex.PW2/E-3, receipt issued by National Highway Authority as Ex.PW2/D-4, Business card as Ex.PW2/E-5, paper slip of Jaipur Road, Rajasthan as Ex.PW2/E-6, statement of accused as Ex.PW2/F, report under Section 57 of the Act as Ex.PW2/G, summons to accused as Ex.PW2/H, statement of the accused dated 21.4.2005 as Ex.PW2/I, arrest memo as Ex.PW2/J, paper slips as P-10 to P-13, polythene pouches containing off white powder as P-1 to P-4, four envelopes marked A-1 to D-1 as P-5 to P-8, yellow envelope as P-9, forwarding letter as Ex.PW2/K, test memo as Ex.PW2/L, deposit memo PW-2/M, test memo as Ex.PW2/N, summons to Ashok Kumar as Ex.PW2/O, statement of Ashok Kumar as Ex.PW2/P, documents submittd by Ashok Kumar as Ex.PW2/P-1 to P-2, summons to Joginder Singh as Ex.PW2/Q, statement of Joginder Singh as Ex.PW2/R, copy of election I. Card as Ex.PW2/R-1, enquiry report dated 5.5.2005 as Ex.PW2/S, Enquiry report dated 1.8.2005 as Ex.PW2/T, enquiry report dated 5.8.2005 as Ex.PW2/U, the investigation report dated 6.10.2005 as Ex.PW2/V, copy of seal movement register at Sr. No.16 of point X to X-1 as Mark F, copy of application to the Special Court for enquiry in

jail as Ex.PW2/W.

68. During his cross examination, he has voluntarily stated that the packets were damaged due to moisture and the box was in rusted condition due to moisture.

69. He further deposed that the sitting arrangement was not remained same till reaching the DRI office and was changed at Mahipalpur Crossing itself, after the interception of the vehicle in question. He has specifically stated that he did not talk to anybody in the office after the interception till reaching in the DRI office and nobody from the raiding party in his presence talked to any officer in the office.

70. He further stated that the notice was prepared at the spot while sitting in the Gypsy after interception and no proceedings were recorded separately at the point of interception while preparing or serving then notice to the occupants of the car.

71. He has denied the suggestion that the accused was unable to read and understand the English language by reading, except copying the vernacular. He has further specifically stated that there was one facsimile of DRI seal which he used during his tenure in the office and all the facsimile of the seals were looking like one. He further stated that seal was being kept by the custodian. He has denied the suggestion that no seal was used or tampered with.

72. PW3, Shri K.S. Ratra has proved the intelligence report as Ex.PW3/A. During his cross examination, he denied the suggestion that he intentionally did not submit the report Ex.PW3/A to his immediate superior officer, as he alongwith Deputy Director had already planned to implicate the accused in the present case. He has further denied the suggestion that the document Ex.PW3/A was not prepared on 20.4.2005 at 11 a.m. He has further denied the suggestion that the said document was concocted / fabricated and prepared later on, with the connivance of Deputy Director and other officer of DRI to implicate the accused. He further denied the suggestion that he was deposing falsely.

73. PW4 Shri R.S. Kashyap , who has proved the deposit memo as Ex.PW2/M. During his cross examination, he has denied the suggestion that the case property has been tempered with. He further denied the suggestion that he was deposing falsely in this regard. He has specifically stated that he has no knowledge as to who had prepared Ex.PW2/M.

74. PW5 Shri N.D. Azad has proved report under Section 57 of NDPS Act, Ex.PW2/G, letter to Nigerian Embassy as Ex.PW5/A, Deposit memo as Ex.PW2/M, covering letter alongwith correspondence from mobile telephone operator supplying the call details from Idea cellular Co. as PW-5/B, letter of Reliance Infocom containing call details of mobile mentioned in the covering letter running into 14 pages as Ex.PW5/C, covering letter containing call details from Bharti Cellular Ltd. regarding mobile No. mentioned in the letter – computer print out running into 4 pages as Ex.PW5/D, subscriber details from Reliance Infocom pertaining to mobile No. mentioned in the covering letter Ex.PW5/E as Ex.PW5/E, letter from Reliance Infocom alongwith annexures running into two pages as Ex.PW5/F, covering letter from Idea Cellular Ltd. alongwith annexure A and B as Ex.PW5/G, covering letter from Bharti Televentures Ltd. as Ex.PW5/H.

75. In the cross-examination, he has specifically stated that no statement of any lady Nigerian was shown to him at any point of time, however, he was told that one statement of Nigerian lady was recorded by one lady officer. He denied the suggestion that all the communications and telephone details were fabricated and manipulated in order to implicate the accused. He has further denied the suggestion that they have implicated the accused in the present case by preparing the manipulated documents and that he was deposing falsely.

76. PW6Shri Vinod Kumar Sharma has proved summons to Rajesh Yadav, driver of the vehicle in question as Ex.PW6/A and statement of Rajesh Yadav as Ex.PW6/B. During his cross examination, he has specifically stated that before recording the statement, the driver was briefed that he has been given the summons and he was to give the correct information. He further stated that statement was not recorded specifically in question answer form. The witness was told to narrate the story and accordingly narrated. He had not asked any specific question while narrating his role. He has denied the suggestion that the accused was falsely implicated. He has further denied the suggestion that the statement facilitating the driver to out of the case was prepared by him at the instance of senior officers of DRI to implicate the accused. He further denied the suggestion that Ex.PW6/B, was dictated by him to the driver to implicate the accused and the driver was shown as innocent. He has also stated that he was not aware at what time panchnama was concluded, as the panchnama was not prepared in his presence nor he

knew who were the persons present at the time of preparing the panchnama or who signed the same.

77. PW7 Shri Devendra Singh has proved the summons to Ms.Angela Julie as Ex.PW7/A, summons to Ms.Suzanna Sailo as Ex.PW7/B, statement of Ms. Angela Julie dated 20.4.2005 as Ex.PW7/C, statement of Ms. Suzanna Sailo as Ex.PW7/D. During his cross examination, he has stated that he was orally asked by Shri N.D. Azad to record the statements of Angela Julie and Suzzsanna Sailo. He has denied the suggestion that the department was determined to implicate the accused in the present case and that is why the lady officer was not asked to record the statement and he recorded the statement to facilitate the said two ladies to escape. He further stated that there was no sticker or the name affixed on any unit of the luggage indicating the ownership of the said luggage. He further stated that summons were served upon above mentioned two ladies in the vehicle itself when they were intercepted at Mahipalpur. He further stated that their team was not briefed by anyone nor any secret information was shown to their team. He further stated that whatever questions were put, those ladies answered and he recorded in the statement form. He has denied the suggestion that he deliberately recorded the statements of ladies to facilitate of those ladies to go and to falsely implicate the accused in the present case. He has further denied the suggestion that the accused has been falsely implicated in the present case. He further denied the suggestion that he was deposing falsely.

78. PW8 Shri Sanjay, tax Assistant has proved the copy of the seal movement register as Ex.PW2/X. During his cross examination, he has stated that he was given oral directions on 20.4.2005 by Shri N.D. Azad to deliver the seal to Shri Arvind Kumar Sharma and the same was entered in the record. He further stated that he did not maintain about the record of delivering the seal and the record of the same remained with Shri N.D. Azad. He further stated that there is only one seal in DRI and Shri N.D. Azad is the custodian of that seal. He further stated that he recorded the direction issued by Shri N.D. Azad in the seal movement register. He had admitted his writing at point X to on Ex.PW2/X. He has denied the suggestion that he has made the entries at point X to X on a waste paper which is nothing to do with the seal of DRI. He has further denied the suggestion that he made the entry on Ex.PW2/X after 22.4.2005 on the instruction of Shri Arvind Kumar Sharma to implicate the accused in the present case. He has denied the suggestion that neither

he handed over the seal to Shri Arvind Kumar Sharma on 20.4.2005 nor the same was ever returned to him by Shri Arvind Kumar Sharma on 21.4.2005. He has further denied the suggestion that the entry made at point X to X on Ex.PW2/X is manipulated and fabricated to implicate the accused in the present case and that he was deposing falsely.

79. PW9, Shri Jai Bahadur, has proved the receipt of CRCL as Ex.PW1/A. During his cross examination, he denied the suggestion that there is no seal available in the DRI which bears only facsimile of Directorate of Revenue Intelligence. He further stated that he deposited all the papers in CRCL whatever he had carried with him. He specifically stated that Ex.PW2/L i.e. Test memo was visible and words 'Directorate of Revenue Intelligence Rev Intelligence' are visible. He further stated that he handed over the documents and pullandas to Shri R.P. Meena, who compared the seal on the test memo as well as on the pullandas in his presence and he has not pointed out any deficiency. He has denied the suggestion that the samples and the test memos were tampered with. He has further denied the suggestion that he was depositing falsely in this regard.

78. PW10 Mrs. Anju Singh has testified the issuance of notice under Section 50 of NDPS Act, to Suzanna Sailo and Angela Julie and conducted their personal search in which nothing was recovered from their possession and has also talked about his presence during recording of their statement before Shri Devendra Singh, I.O. In her cross examination, she has stated that he had explained the provisions of Section 50 of NDPS Act, 1985, to both the ladies. She had denied the suggestion that both the ladies were tortured and compelled to write the option on Ex.PW10/DA and PW-10/DB as given by her. She has further denied the suggestion that no required proceedings against these ladies were conducted as the DRI wanted to made them free in the present case and wanted to implicate the accused. She has further denied the suggestion that she was not asked to record the statements as the DRI wanted to implicate the accused in the presence case through Shri Devender Singh. She has further denied the suggestion that accused was arrested in the case falsely and that she was deposing falsely.

79. PW11 Shri Rajesh Yadav who admitted his statement, Ex.PW6/B. He was declared hostile and was cross examined by the prosecution. During his cross examination, he has admitted his signatures on Ex.PW2/

B which was in his own handwriting. He has also admitted his signatures on the panchnama of recovery and seizure, Ex.PW2/E, Ex.PW2/E4 and also on Ex.PW2/E6. He also admitted that the officers told him that the search of the person and vehicle was to be conducted. He further admitted service of notice, Ex.PW2/B and his reply on the same and his signatures below the reply. He further admitted that some powder was taken by the officers from each packet and was tested and he was told that the same was narcotic drug. He also admitted that drawl of samples from each packet. He further admitted recovery of two mobile phones and currency from the possession of the accused. He further admitted sealing of the sample and remaining contraband with seals.

80. He further deposed in his cross examination that the contraband was kept in the trunk alongwith the bag from which the contraband was recovered alongwith other goods and wrapping of the trunk. On the one hand he said that he did not remember if the paper Ex.PW2/E-6 was recovered from the possession of the accused but admitted his signatures. He further admitted his signatures on he paper slips Ex.P-1 to Ex.P-8 which were used for sealing the sample packets. He further admitted the car was the same from which the recovery was effected. He admitted his signatures on the paper slips Ex.P-17, P-23, P-25, P-29, P-33 and P-37. He further admitted recovery of two mobile phones Ex.P-18 and P-19 and Indian and foreign currency Ex.P-21 from the possession of the accused, which were sealed with DRI seal in separate envelope, Ex.P-22 (Colly.). He further admitted recovery of four packets Ex.P-27, PW-31, P-35 and P-39 containing the substance, bag alongwith plythene Ex.P-24 and adhesive tapes Ex.P-28,Ex.P-32, P-36 and P-40 from the possession of the accused. He further admitted taking out of eight samples on the relevant date and were sealed in paper envelopes separately.

81. During his cross-examination by the defence counsel, he admitted that he received telephone call on mobile No.9414215955 asking for the vehicle. He further admitted that at the time of occupying the car, one lady occupied the front seat whereas the gentleman accused and one lady sat on the back seat. He also admitted that the writing work was done prior to dinner and admitted signing of papers. He further admitted that all the papers he signed were prepared in the office of CGO Complex and were hand written. He further admitted that he had gone through the documents which were signed by him. He further admitted the colour of the substance and weight of the same was 4.250 kgs. He denied the

suggestion that he was not present and deposing falsely. He further admitted the search of the accused and both the ladies when they reached in the office. He denied the suggestion that he was involved in the dealings with narcotic drugs. He further denied the suggestion that the drug was being carried by him in their vehicles. Also denied that narcotic substance was not recovered from the accused. He further denied the suggestion that he had blindly signed all the documents which were not prepared in his presence to escape his skin from the sin of carrying drugs. He further denied the suggestion that the accused has been falsely implicated in the present case at his behest and he had shown as witness in the same. He further denied the suggestion that he was deposing falsely.

82. Attention was also invited to the application filed by Rajesh Yadav dated 24.11.2005, which is available on the judicial file of the trial court, wherein he has admitted about tendering of the statement under Section 67 of NDPS Act. In the said application, he nowhere stated that he was forced to make that statement.

83. PW12 Shri Ved Prakash has proved the letter of Shri Rakesh Debas Ex.PW5/C and call details running into 14 pages, Mark A and identified the signatures of Shri Rakesh Debas on Ex.PW5/C. He also admitted his letter dated 15.7.205, providing the call details as Ex.PW5/F and call details as Ex.PW12/A.

84. During his cross examination, he stated that Ex.PW12/DA did not bear the name of the subscriber of the telephone numbers available on those documents.

85. PW13 Shri Ram Sharan Verma admitted his signatures on panchnama Ex.PW2/D and on the documents, EEx.PW2/E, E-1,E-2, E-3, E-4, E-5 and E-6. He was cross examined by the prosecution since he was not deposing the full facts.

86. During his cross examination by the prosecution, he admitted the recovery of white powder and weight of 4 kgs. He further admitted drawing of samples and sealing. He admitted his signatures on Ex.P-1 to P-8 which were used for sealing the samples. He also admitted that the recovered packets were sealed. He further admitted that the foreign and Indian currency and two mobile phone recovered from the accused was sealed. He also admitted his signatures on the paper slips Ex.P-17, P-23,

P25, P=29, P-33 and P-37. He further admitted that the sample pouches were sealed in papers envelopes separately.

87. During his cross examination by the defence, he had denied the suggestion that he was deposing falsely being stock witness of DRI and he had not joined any proceedings conducted by DRI on 20.4.2005. He further denied the suggestion that he had not accompanied the raiding party. He further denied the suggestion that he was not present in the DRI office at the time of preparation of documents. He further denied the suggestion that his signatures were taken on blank paper on inducement by the officers. He also denied that the documents were fabricated and manipulated to implicate the accused. He deposed that he did not remember how many times the seal was affixed and by whom, but admitted the seal was being used while sealing the packets and box. He has denied the suggestion that no seal was used in his presence. He had further denied the suggestion that he had not gone to Haryana Rajasthan border on 20.04.2005. He further denied that he had not joined any proceedings with DRI officials on 20.04.2005 and his signatures were obtained by Shri Arvind Kumar Sharma. Also denied that the accused was tortured in his presence by DRI officers and out of torture and coercion signatures of the accused were taken on many blank papers. He further denied the suggestion that he was deposing falsely.

88. PW14 Shri R.K. Singh, Nodal Officer, Bharti Airtel Ltd. had proved the letter dated 13.5.2005, Ex.PW5/D, details of mobile No.9818933079 running into 3 pages as Ex.PW14/A, call details of mobile No.9818155531 as Ex.PW14/B, letter dated 16.8.2005 of Capt. Rakesh Bakshi as E.PW-5/H and had identified his signatures. During his cross examination, he denied the suggestion that he had given those printouts after manipulating the same to implicate the accused. He has denied the suggestion that he was deposing falsely.

89. PW15 Shri Rajesh Jogender Khanna had identified his signatures on the letter Ex.PW5/G and Ex.PW15/A and B. He has identified the signatures of Shri Umesh Kalra on Ex.PW5/B. He further proved the call details Ex.PW11/DX3. During his cross examination, he denied the suggestion that the documents Ex.PW5/G, PW-15/A and B were manipulated and fabricated to implicate the accused.

90. PW16 Shri Vinod Kumar Khosla has proved the report sent to DRI, Ludhiana as Mark 16/A. During his cross examination, he has

denied the suggestion that a shadow investigation was carried out to implicate the accused.

91. PW17 Mr.P.V. George has proved the report as Mark C. During his cross examination, he has denied the suggestion that no investigation was carried out at the said guest house on or before 4.5.2005. He has further denied the suggestion that a false, bogus and fabricated report was made to implicate the accused.

92. PW18 Shri Amitesh Bharat Singh has also proved the intelligence report, Ex.PW3/A, office copy of letter sent to Ministry of External Affairs, Ex.PW11/DX-1, office copy of letter received from Shri P.V. George, Ex.PW11/DX-2, letter received from the High Commission of Nigeria as Ex.PW18/A, letter received from the office of Ministry of External Affairs as xh.PW-18/B and his signatures on the same, letter mark 16/A received from Shri V.K. Khosla, Leter dated 4.5.2005, Ex.PW11/DX-2 and document mark C dated 4.5.2005 which is photocopy of fax copy.

93. During cross examination, he denied the suggestion that the motive of the department and the officers was to conduct the proceedings and involve the innocent persons for the purpose of reward. He further denied the suggestion that the informer was accordingly arranged to give the colour of source of information for recovery. He also denied to the suggestion that the document Ex.PW3/A was not placed before him on 20.4.2005 at 11:00AM. He further denied the suggestion that the said document was manipulated and fabricated for the purpose of completing the paper formalities subsequently to implicate the accused. He denied the suggestion that documents Ex.PW3/A, Ex.PW11/DX-1, Ex.PW11/DX-2, Ex.PW18/A and B as were fabricated and manipulated to implicate the accused.

94. PW19 Shri Ashok Kumar Singh admitted his statement, Ex.PW2/P. He also admitted handing over his identity proof, Ex.PW2/P-1 and P-2. During his cross examination, he has denied the suggestion that telephone No.9818155531 belonged to him. He further denied the suggestion that he applied for the phone giving his identity proof and had the connection of the above mentioned mobile phone in his name. He further denied the suggestion that he under the coercion of DRI made the statement before the DRI. He also denied the suggestion that he intentionally disown the telephone under the coercion of DRI. He further denied the

suggestion that the statement, Ex.PW2/P was given by him under the pressure of DRI officers.

95. PW20 Shri Dhananjay Rawat, talked about the visit of Shri Arvind Kumar Sharma to Tihar Jail alongwith Court orders for making further enquiries from accused and having shown some photocopies of the documents to the accused and signatures of accused and refusal of the accused to make any statement and documents prepared in that regard, Ex.PW2/P, identification of photocopies of five documents as Colly. PW-20/A. During his cross examination, he has denied the suggestion that the document Ex.PW2/V was manipulated and fabricated to implicate the accused. He also denied the suggestion that signatures of the accused were not obtained in his presence.

96. The appellant, in his statement dated 06.01.2009, tendered under Section 313 Cr.P.C. had denied the allegations. As regards to his statement, he talked of some retractions Ex.DXZ and Ex.DXZ-1. According to him, he had retracted the statement when he was produced before the Court. This is contrary to judicial record. It is also not understood as to how the alleged retractions were exhibited. No document can be exhibited unless the maker thereof enters the witness box and faces the cross examination. He also stated that he has been falsely implicated but she has not given the reasons and motive for false implication, except "racial discrimination". In defence, the appellant produced Ajay Kumar Singh as defence witness, whose deposition does not come to his rescue by any stretch of imagination.

97. Learned counsel appearing on behalf of the respondent/DRI invited the attention of this Court to the law laid down in the two latest judgments of Hon'ble Supreme Court - **State of Punjab Vs. Lakhwinder Singh & Anr.** –Crl. Appeal No.32 of 2009 (SC) and **Ajmer Singh Vs. State of Haryana** – Crl. Appeal No. 436 of 2009 – 2010(2) SCR 785, and in the appeals filed by Vimal Behl & Surinder Raj Singh by Delhi High Court. He submitted that after dismissal of their appeals by Delhi High Court against the judgment of conviction, both the appellants filed Special Leave Petitions in the Supreme Court which were also dismissed.

98. The samples and the case property when produced in the court were in sealed condition and there was no possibility of tampering with the same. He referred **Lakhwinder Singh & Anr.** (supra).

99. While refuting the submission of petitioner, Mr.Satish Aggarwala, learned counsel submitted that at the outset, it is pointed out that the facts of the case and the evidence on record irresistibly towards the guilt of the appellant. Most of the submissions of the appellant are covered by judgments of the Apex Court and Delhi High Court and have been held to be devoid of force. Further submitted, that the facts of the instant case are similar to the case decided by the Supreme Court in **M. Prabhulal v. Asstt. Director,** DRI, 2003 (3) JCC 1631. In that case also, search and seizures were made in the presence of a Gazetted Officer, and the Supreme Court held that the provisions of Section 42 were inapplicable. Similarly, the independent witnesses were not examined by the prosecution. Also, in that case, recovery of heroin was from two vehicles, a truck and a car, which were apprehended at a public place and then escorted to the Customs House, which was 20 kms away from the place of interception, for search and seizure. The accused person therein had contended that their statements under Section 67 of the NDPS Act were involuntary and obtained by torture and harassment. Yet, the Supreme Court relied upon the statement of accused under Section 67 and testimony of official witnesses to uphold conviction.

100. On Panchnama being tainted, it is submitted that this argument lacks force and is devoid of logic and common sense. The panchnama, also known as 'seizure memo', as the name suggests, is prepared to record the factum and proceedings of seizure and not of interception. Since the seizure took place at the Paryavaran Bhawan where DRI office is situated, it is obvious that the seizure memo / panchnama would have been prepared there only. It is immaterial that the area is a restricted one. There is no requirement of law that panchnama shall be prepared at a public place. The reason for escorting the car to the office of DRI for search, was that the place of interception was not safe, particularly where such a large quantity of narcotic drugs were suspected to be concealed. No prejudice caused to the appellant by merely conducting the seizure at the DRI office. There is no infirmity in the panchnama as the same is signed by the appellant and the independent witnesses in token of having seen and accepted it. The panchnama is also corroborated by the statements of the appellant and panch witnesses, tendered under Section 67 of NDPS Act, 1985, sworn in testimony of the witnesses.

101. One panch witness Ram Sharan Verma has appeared as PW-13. Though he was declared hostile, yet he admitted certain material

facts. As regards the other panch witness Shiv Mangal, he was dropped on 16.12.2008 in view of the report received.

102. It is humbly submitted that non-examination of panch witnesses or any other witness including companions of the appellant does not adversely affect the case of the prosecution. It is nobody's case that panch witnesses were not joined. The fact is that one of them has not been examined in view of the report filed on 16.12.2008. As regards the other witnesses, such as Joginder Singh, Anjela Juli, Sujana and Venkatsana, reports are available on record and is reflected in the order-sheet dated 16.12.2008. As regards, B.K. Beri and Ved Prakash, they were dropped on 12.12.2008. It cannot be inferred from this fact that the department did not examine the witnesses due to ulterior motives. The contention of appellant that the addresses were bogus or fictitious, not borne from the record. The report in respect of panch witnesses is on judicial file.

103. He further submitted, if the appellant was of the view that the panch witnesses and other witnesses, would have deposed something to the contrary, he was to lead them to the witness box.

104. Learned counsel further submitted that in any event, even if there was some defect in investigation and that will of any assistance to the appellant. Does the contention of the appellant lead to the conclusion of false implication of the appellant in the present case? The irresistible answer is "No".

105. With reference to contention of the appellant with regards the weight, the admitted case is that the four samples A-1, A-2, A-3 and A-4 were of 5 grams each. The contention of the appellant that as per PW-2/N the weight of the samples was more than 5 grams each. There is no discrepancy. This is clear from column No.1 of Section 2 of Ex.PW2/N i.e. column 1 of Ex.PW1/B where the weight is Gross of each sample. Thus, there is no difference in the weight which is clear from column No.3 of Section F and column No.1 of Section 2 of Ex.PW2/N i.e. test memo. In any event, even in Nor Agha Vs. State of Punjab heavily relied upon by the appellant in his written submissions, it has been observed "We are not oblivious of the fact that a slight difference in the weight of the sample may not be held to be so crucial as to disregard the entire prosecution case as ordinarily an officer in a public place would not be carrying a good scale with him".

106. As regards the colour, there is no difference in the colour. Even if in the question under Section 313 Cr.P.C, the Special Judge inadvertently has used the white colour, it has not prejudiced the appellant. It is reiterated that the case property was received in the godown in intact condition. The samples when received in the laboratory were also in sealed condition and tallied with the facsimile of the seal affixed on the test memo.

107. He further submitted, there is no requirement of law or even caution of handing over the seal to any public witness, particularly in the cases booked by DRI, Customs and NCB, wherein the procedure of sealing is entirely different, which has been recognized right upto Apex Court. Availability of the paper slips on the samples as well as the case property inter-alia duly signed by the appellant guarantee that the samples were not tampered with, at any point of time, as alleged by the appellant. The appellant is misreading the deposition of PW8 Shri C.B. Singh.

108. Learned counsel appearing on behalf of DRI submitted that there is no requirement of Section 50 NDPS Act in the present case. The appellant is totally wrong in saying that provisions of Section 42 NDPS Act had not been complied with.

109. Regarding procurement of panch/public witnesses, he submitted that the officers of the department did not know the background of the panch witnesses, establishes the independent nature of investigation. It corroborates the fact that these panch witnesses were not earlier known to the officers and therefore, could not have been tutored. The absence of the panch witnesses for examination does not help the appellant since there statements duly proved on the judicial file, which were exhibited without any objection from the accused. It is also submitted that the fact of search and recovery from the accused persons has already been established beyond reasonable doubt by testimony of official witnesses and there is no need to repeat the same evidence by way of examination of panch witnesses.

110. Regarding Section 67 of the NDPS Act, learned counsel submitted that appellant has tendered his voluntary statements under Section 67 of the NDPS Act, wherein he has admitted their involvement in the offence. It is submitted that statements are admissible in evidence and conviction can be based only on the basis of the statements, tendered under Section 67 of NDPS Act, 1985. In support of this contention,

attention is invited to the following judgments:

Ravinder Singh @ Bittu Vs. State of Maharashtra – 2002(2) JCC 1059 (SC)

"The confessional statement of the accused, if found voluntary and truthful, requires no corroboration for conviction".

Kalema Tumba Vs. State of Maharashtra – JT 1999 (8) SC 293

"It was then urged that no reliance should have been placed upon the statement recorded under Section 108 of the Customs Accused, as it was not made by the appellant voluntarily and he did not know what was written in it when he had signed it. The submission was that the appellant does not know English language. He knows only French language. In his examination under Section 313 Cr.P.C. he had stated that the statement was obtained by force and that he was beaten by the officers of Narcotics Control Bureau. He had not stated at that time that he did not know English. Apart from the evidence of the officers of the Narcotics Department there is evidence of an employee of the Jewel Hotel, where the appellant had stayed from 16th November, 1990, who was proved some of the entries made in English by the appellant himself in the register maintained by the hotel. The panchnama, also contains words 'received copy' written by the appellant. The said statement of the appellant was recorded in 1990. He retracted it in 1994. Till then he had not complained against any officer as regards the alleged beating or use of force nor h had stated that he did not know English. Therefore, this contention also cannot be accepted".

Raj Kumar Karwal Vs. UOI & Ors. – 1991 Cr.L.J. 97 (SC)

"The High Court held that a confessional or self incriminating statement made by a person accused of having committed a crime under the Act to an officer invested with the power of investigation under Section 53 of the Act was not hit by Section 25 of the Evidence Act..... Powers under Section 53 of NDPS Act with the powers of officer incharge of police station – does not have the power to submit report under Section 173 Cr.P.C. – not therefore, Police Officer within Section 25 of the Evidence

Act".

111. As far as the retraction statement, learned counsel submitted that the retraction if filed subsequently before the Trial Court is nothing but waste papers. In any event, reply to the alleged retraction application was filed. The Ld. Trial Court has dealt with this aspect in detail. The appellant has not entered the witness box to say that his statement was involuntary. Mere retraction is of no consequences and help to the appellant. He had to establish by evidence that he was forced to make statement. There is nothing to this effect on the judicial file. The appellant was medically examined, immediately after recording of his statements and his arrest and before production in the Court. The medical report does not indicate any use of force. Attention is invited to the following judgments:-

Surjeet Singh Vs. UOI – AIR 1997 SC 256

"Accused retracting confession – Immaterial - Confession though retracted binds accused – Plea of articles being exempted. Accused, in view of the admission that he purchases gold and converted and brought accused is not entitled to benefit of exemption".

K.T.M.S. Mohd. & Anr. Vs. UOI – 1992 SCC (Cr) 572

"Statement obtained under, must be voluntary – Statement retracted by its maker alleging that it was obtained by inducement, coercion, threat promise or any other improper means – It is for the maker of the statement to establish that it was involuntary and extracted by such illegal means".

Shankaria Vs. State of Rajasthan – AIR 1978 Supreme Court 1248 (para 49).

"Where the confession was not retracted at the earliest opportunity ....the circumstance reinforces the conclusion that confession was voluntary".

Hem Raj Devi Lal Vs. State of Ajmer – AIR 1954 SC 462 (SC) "But a mere bald assertion by the prisoner that he was threatened, tutored or that inducement was offered to him, cannot be accepted as true without more".

K.I. Pavunny Vs. Asstt. Collector (1997) 3 SCC 721

"However, a confessional statement recorded by reasons of statutory compulsion or given voluntarily by the accused pursuant to his appearing against summons or on surrender, held, cannot be said to have obtained by inducement or promise. Hence, is admissible in evidence for prosecution under S.135 of the Customs Act or other relevant statutes. Such a confessional statement although subsequently retracted, if on facts found voluntary and truthful, can form the exclusive basis for conviction – Not necessary that each detail in the retracted confession be corroborated by independent evidence."

Narcotics Control Bureau – Allauddin @ Mir @ Malik & Anr. – Crl. Appeal No.111/1997 decided on 16.12.2010 by Delhi High Court.

112. Regarding conviction on the basis of testimony of official witnesses, he submitted that in addition to the statement tendered under Section 67 of NDPS Act, 1985, there is panchnama, inter-alia, signed by the appellant to establish recovery of 4.244 kgs. heroin. The panch witnesses in their statements tendered under Section 67 of NDPS Act, 1985, have also deposed about recovery and seizure. The appellant was intercepted at the spot. There is no reason for the officers to falsely implicate the appellant. Conviction can be based upon the solitary statement of official witnesses, who are presumed to be trustworthy and disinterested. Statutory presumption of correctness of official acts is in their favour.

113. Reliance has been placed on the decisions; in **T. Shankar Prasad V. State of Andhra Pradesh** – Crl. Appeal No.909 of 1997, decided by Hon'ble Supreme Court on 12.1.2004 "The Court may feel safe in accepting the prosecution version on the basis of the oral evidence of the complainant and the official witnesses even if the trap witnesses turn hostile or are found not to be independent".

Chander Bhan Ram Chand Vs. The State – 1971 Cr.L.J. 197 (P&H) "It is practically a rule of law that where independent witnesses are joined but do not support the prosecution, then conviction cannot be held on the statement of official witnesses alone".

114. Regarding quantity of contraband, learned counsel submitted

that this is a case of recovery of 4.244 kgs. of heroin. It is not possible to plant such huge quantity of heroin upon the appellant. Moreover, there is no reason to falsely implicate the appellant. Attention is invited to the following judgments:

Sanjiv Kumar Vs. State of H.P. – 2005(1) Crimes 358 (H.P) (D.B) "It is not believable that the police would implicate an innocent person in such a serious case by planting a huge quantity of charas on his person..... Police had no axe to grind in implicating the accused".

Gulam Rasool Vs. State of Punjab – 1994(3) RCR 750 (DB)(P&H)

"Contention of accused that he was falsely implicated and heroin was planted on him – Contention not tenable – It is not conceivable that Customs authorities would plant such a huge quantity of heroin with a view to falsely implicate the accused".

115. Regarding Section 35 & 45 of the NDPS Act, he submitted that there are two statutory presumptions in favour of the department. Under Section 35 of the NDPS Act, 1985, there is a presumption of culpable mental state. Under Section 54 of the Act ibid, it is presumed that the appellant has committed an offence in respect of the narcotic drugs or psychotropic substances found in his possession which he has not satisfactorily explained. Attention, in this behalf, is invited to:

State of Punjab Vs. Lakhwinder Singh & Anr. 2010 (3) JCC (Narcotics) 142

Madan Lal & Anr. Vs. State of Himachal Pradesh – 2003(3) JCC 1330

"Once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law and similar is the position in terms of Section 54, where also presumption is available to be drawn from possession of illicit articles".

Megh Singh v. State of Punjab – 2003 VIII AD (SC) 27

"Once possession is established the person who claim that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54, where also presumption is available to be drawn from possession of illicit articles.

Pawan Mehta Vs. State – 2002 Drugs Cases 183 (Delhi High Court)

"Culpable state of mind or the knowledge of the accused required to be proved under the Act, has to be presumed and it is for the accused to prove the he had no such 'knowledge or the mental state'. The appellant has not proved that the car in question was used for carrying the narcotic drugs without his knowledge".

Karam Singh & Ors. Vs. State – 1981 Cr.L.J. NOC 123 (Raj)

"Where contraband opium in large quantities was being transported in a truck, the drivers of the truck sitting in the driver's cabin and the person sleeping over the bags containing opium, in the cabin of the truck would be deemed to be connected with the opium transported in the truck and when they failed to furnish any explanation for the presence of the opium in the truck, they would all be guilty of an offence under Sec.9".

Birendra Rai & Ors. Vs. State of Bihar – 2005(1) CC Cases (SC) 61

"It was then submitted that the investigating officer was not examined in this case and that has resulted in prejudice to the accused. Having gone through the evidence of witnesses and other material on record, we do not find that any prejudice has been caused to the defence by non-examination of the investigating officer".

State of U.P. Vs. Anil Singh – AIR 1988 SC 1998

"It is also not proper to reject the case for want of corroboration by independent witnesses if the case made out is otherwise true and acceptable...The public are generally reluctant

to come forward to depose before the Court. It is, therefore, not correct to reject the prosecution version only on ground that all witnesses to occurrence have not been examined".

Dalbir Kaur & Ors. Vs. State of Punjab – 1977 Cr.L.J. 273 (SC)

"Omission to examine material witnesses, who were not deliberately withheld or unfairly kept back, in the circumstances, held, was not sufficient to throw doubt on the prosecution case".

Banti @ Guddu Vs. State of M.P. – (2004) 1 SCC 414,

"When the case reaches the stage as envisaged in Section 231 of the Code, the Sessions Judge is obliged "to take all such evidence as may be produced in support of the prosecution". It is clear from the said section that the Public Prosecutor is expected to produce evidence "in support of the prosecution" and not in derogation of the prosecution case. At the said stage, the Public Prosecutor would be in a position to take a decision as to which among the persons cited are to be examined. If there are too many witnesses on the same point, the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects. That principle applies when there are too many witnesses cited, if they all had sustained injuries at the occurrence. ...If he is satisfied by examining any two or three of them, it is open to him to inform the Court that he does not propose to examine the remaining persons in that category. This will help not only the prosecution in relieving itself of the strain of adducing repetitive evidence on the same point but also help the Court considerably in lessening the workload. The time has come to make every possible effort to lessen the workload, particularly of those Courts crammed with cases, but without impairing the cause of justice".

116. He further submitted that the alleged defects in the investigation it is also settled law that the accused should not be let off merely on account of defective investigation. Enquiry ought to be made into whether the lapses committed by the investigating agency cause prejudice to the appellant.

117. Reference is made to the case of **Khet Singh Vs. Union of India** AIR 2002 SC 1450, wherein it was held:-

"16. Law on the point is very clear that even if there is any sort of procedural illegality in conducting the search and seizure, the evidence collected thereby will not become inadmissible and the Court would consider all the circumstances and find out whether any serious prejudice had been caused to the accused. If the search and seizure was in complete defiance of the law and procedure and there was any possibility of the evidence collected likely to have been tampered with or interpolated during the course of such search or seizure, then, it could be said that the evidence is not liable to be admissible in evidence."

118. Also relied upon **Inder Singh & Anr. Vs. State (Delhi Administration)** – AIR 1978 SC 1091, wherein it has been held as under:-

"Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction..

119. In **Krishna Mochi & Ors. Vs. State of Bihar & Ors.** – 2002(2) CC Cases (SC) 58, it has been held that:-

"Now the maxim 'let hundred guilty persons be acquitted but not a single innocent be convicted' is in practice changing world over and Courts have been compelled to accept that society suffers by wrong convictions and it equally suffers by wrong acquittals".

In the same judgment, in para No.76, it has been held that:

"In a criminal trial credible evidence of even a solitary witness can form basis of conviction and that of even half a dozen witnesses may not form such a basis unless their evidence is

found to be trustworthy in as much as what matters in the matter of appreciation of evidence of witnesses is not the number of witnesses but the quality of their evidence".

In para No.93 of the same judgment, it has been held that:

"It is duty of the Court to separate grain from chaff – when chaff can be separated from grain, it would be open to the court to convict an accused notwithstanding that evidence found difficult to prove guilt of other accused persons – Falsehood of particular material witness or material particular would not seclude it from the beginning to and – The maxim Falsus in uno falsus in omnibus. has no application in India and the witnesses cannot be branded as liar".

120. In **Nallabothu Venkaiah Vs. State of Andhra Pradesh** – 2002 (3) JCC 1582, it has been held that:-

"Criminal justice System – Must be alive to the expectation of the people – The principle that no innocent man should be punished is equally applicable that no guilt man should be allowed to go unpunished – Wrong acquittal of the accused will send a wrong signal to the society".

121. Further in **CBI vs. Ashiq Hussain Faktoo & Ors.** – 2003(2) JCC 316, the last sentence of para No.9 reads as follows:-

"It is held that procedure is the hand-maid and not the mistress of law. It was held that procedures are intended to subserve and facilitate the cause of justice and not govern or obstruct it. It is held that minor deficiencies, if any, cannot be considered to be fatal for the prosecution".

122. While, in confrontation of decisions relied upon by petitioner, Mr.Aggarwala, learned counsel for respondent submitted that the judgments cited on behalf of the appellant, it is submitted that the facts of the said judgments are not applicable to the facts of the case in hand.

123. In **Ritesh Chakravorty Vs. State of Madhya Pradesh** – 2006(3) JCC (Narcotics) 150 – in para No.24 of this judgment, the Hon'ble Supreme Court has observed that PWs 1 and 2 could not be said to be independent. This is not the position in the present case. There is

nothing on the judicial file to hold that the panch witnesses in the present case are not independent. Thus, no adverse influence can be drawn in the present case, as has been drawn in the said case, as recorded in para No.27 thereof. In the said judgment, the Hon'ble Supreme Court had held that the appellant therein had been prejudiced by non examination of Ms. Sabia Khatoon and Bajpai. In the said case, the seizure witnesses has deposed that there signatures had been taken on blank papers. In view of this deposition, the Supreme Court had recorded that the seizure had become doubtful. In the said case, in para No.29, Supreme Court had reached the conclusion that PW-5 was not a reliable witness. The reason for recording such a finding are embodies in para No.29 of the judgment.

124. In the present case, there is no reason even to say that PW-2, the Seizing Officer and the officer before whom statement under Section 67 of NDPS Act was recorded, was not a reliable witness. What is important is that in para No.29 of this judgment itself, Supreme Court has held that there is no dispute that it is the quality of evidence and not the quantity thereof which would matter. It is submitted that in the present case, no material witness has been withheld from the Court and thus, no adverse inference can be drawn. In the case before the Supreme Court, in para No.23 it has been recorded that informer had given full particulars of the information to Ms. Sabiha Khatoon and she had not been examined by the department. In this judgment itself, it has been held that a document does not prove itself. The contents of the documents are required to be proved by the maker thereof. Will this judgment does not apply to the accused who has not enter the witness box to prove the contents of alleged retraction application. Thus, by no stretch of imagination, this judgment is of any help to the accused.

125. Learned counsel further submitted that in **Bahadur Singh Vs. State of Madhya Pradesh** – 2002(1) JCC 12 – The accused had been acquitted because of the reasons recorded in para No.8 – sole testimony of applicability of Section 35 – recovery was doubtful – the appellant had disputed the recovery; there were serious discrepancies in the recovery, seizure and deposit in the malkhana. Undisputedly this was a case booked by police. There was no statement under Section 67 of NDPS Act, 1985. In the present case, in addition to the sworn in testimony of the seizing officer, panchnama is duly signed by the accused and there is a confessional statement of the accused. There are other statements also which implicate the accused. It is unfortunate that the accused has chosen to place this

Judgment in this temple of justice. Again this was a case of recovery by the police, where the aid of statement under Section 67 of NDPS Act is not available. In the present case, the department has the testimony of the seizing officer, other officers as well as the statements under Section 67 of NDPS Act. In the case before the Supreme Court, the court had recorded "serious discrepancies in recovery, seizure and deposit in malkhana". There are no such allegations in the present case.

126. In **Parmananda Pegu Vs. State of Assam** – 2004 (4) RCR (Crl) 955 – This was a case under Indian Penal Code. This case did not discuss the validity of statement tendered under Section 67 of the NDPS Act. As has been repeatedly held by the Courts that the statements given in Cr.P.C. and the statements given under Section 67 of NDPS Act are entirely on different footings. Attention is also invited to the law laid down by Delhi High Court in the case of **Yudhister Kumar** – II 1992 CCR 1122.

127. In **Superintendent of Customs Vs. Bhana Bhai Khalap Bhai Patel** – 2004(1) JCC 198 – The facts of this judgment are entirely different. The Court had recorded in the judgment that there was no evidence or prove that cultivation of Ganja plants by the appellant. It was a case booked by local police, where no statement under Section 67 of NDPS Act was / could be recorded.

128. In **Jagdish Vs. State of Madhya Pradesh** – 2002(1) JCC 54 – This was also a case by the local police. There was no statement under Section 67 of NDPS Act, and the recovery was from the bus with there were 30-40 passengers. It was not a case of prior information but significantly enough, the I.O. had searched only the appellant.

129. In **Eze Val Okek Vs. NCB** 2005 (1) JCC (Narcotics) 57,- The facts of the said judgment are not applicable to the facts of the present case. Otherwise too, the judgment is contrary to the law laid down by the Supreme Court as regards non-production of public witnesses. In the said case the court had recorded a finding in para No.15 that the possibility of tampering with the recovered article was not ruled out. The court had also doubted the connection of the appellant therein with the premises from where the recovery had been affected. In the said case, no malkhana register had been produced.

130. In **UOI Vs. Shah Alam** – This was a case where there was

violation of Section 50 of NDPS Act and the recovery was from the shoulder bags. Undisputedly, Section 50 of NDPS Act is not applicable to the facts of the present case. It is not understood as to how this judgment has been cited by the appellant.

131. In **Karam Chand Vs. State** – This was a police case, where the procedure of sealing is entirely different and the aid of statements under Section 67 of NDPS Act is not available. Moreover, the facts are entirely different. The conviction had been set-aside because of non compliance of mandatory requirements of law. In the present case, the appellant has not even argued that there is non compliance of any mandatory requirement of law.

132. In **State of Punjab Vs. Hari Singh & Ors.** (2209) 2 SCC 198 Crl. – In the said case, the appellant had been acquitted on the ground that the essence of accusation was not brought to his notice, more particularly, the possession aspect. In the present case, the fact of recovery, statement and other entire material and evidences have been brought to the notice of the appellant, while recording his statement under Section 313 Cr.P.C.

133. As regards recovery, seizure, sealing, deposit in malkhana, handing over the seal, non-production of panch witnesses, value of the statement under Section 67 of NDPS Act, appreciation of evidence and standard of proof, attention is also invited to the following judgments:-

a) **Stephano Gianpiero Mancini Vs. NCB** – Crl. Appeal No.263 of 1994 decided on 17.10.2001 by Delhi High Court

b) **Gurminder Singh Vs. Directorate of Revenue Intelligence** – 2007 (1) JCC (Narcotics) 11

c) **Kulwant Singh Vs. Narcotics Control Bureau** – Crl. Appeal No.248/1997 decided on 18.01.2008 by Delhi High Court.

d) **Vinod Kumar Vs. Jaspal Singh @ Jassa** – Crl. Appeal No.703-4/2005 decided on 30.04.2008 by Delhi High Court.

e) **Siddiqua Vs. Narcotics Control Bureau** 2007 (1) JCC (Narcotics) 22 (Special Leave Petition as well as Review Petition were dismissed by the Hon'ble Supreme Court)

f) **Vimal Behl & Surinder Raj Singh** – Crl. Appeal No.694 of 2005 and 779 of 2005 – Special Leave Petitions dismissed right upto Supreme Court

g) **Kanhaiyalal Vs. UOI** 2008 1 AD(Crl.) S.C. 277.

h) Namdi Francis Nwazor VS NCB Vs. Crl. Appeal No. 122 of 1991, decided on 15.12.1993.

I) **Shesh Ram Vs. State H.P.** III (2001) CCR 36 (DB)

J) **Rangi ram Vs. State of Haryana** – 2002 (2) JCC 1041

K) **P.P.Fathima Vs. State of Kerla** – 2003(3) CC cases (SC)299

L) **Balbir Kaur Vs. State of Punjab** – 2009 (3) JCC (Naroctics) 143.

M) **Delias Christophe Gey Jeans vs. Customs** – 2004 (3) JCC 1747.

N) **Rehmaatullah Vs. NCB**-2008 (3) JCC (Narcotics) 174.

134. Additionally, learned counsel for respondent submitted that most of these judgments of this Court were carried to the Apex Court but of no avail.

135. I have heard learned counsels for the parties.

136. It is emerged, after going through the evidence on record and submissions of learned counsels that the appellant was apprehended at Mahipalpur Crossing on National Highway – 8 in Delhi. The DRI officials did not search the appellant and car as well there and escorted to DRI office at CGO Complex, Lodhi Road, New Delhi. Thereafter, notice also served upon him under Section 50 of the NDPS Act at DRI office. The appellant declined to require the presence of any Magistrate of any Gazetted Officer and similarly driver Rajesh Yadav, PW11 gave his consent for his search and of his car by any officer of DRI and also declined to require the presence of any Magistrate of Gazetted Officer.

137. The DRI agency received the secret information Ex.PW3/A regarding the alleged car carrying contraband before 11:00AM on 20.04.2005 and same information was transmitted to the senior officers for authorization, whereas in the statement of driver Rajesh Yadav, PW-11 recorded under Section 67 of the NDPS Act Ex.PW6/B, who

categorically stated that the call was made by the hotel staff to requisition the taxi, in which the appellant was apprehended. The department got specific information regarding the Taxi bearing registration No.RJ-027-TEP-56822 and exact description of the car even before the appellant availed its services at random.

138. PW-11 Rajesh Yadav has deposed that he had a fleet of six vehicles at that time. As per the prosecution version, the appellant received the delivery of the alleged heroin recovered from his possession from one Bajju Singh; however, there is no witness to this alleged transaction. The driver of the car, Rajesh Yadav, PW-11 has stated that he did not stop anywhere on their way at Mahipalpur crossing. Moreso, no efforts were made to identify or apprehend said Bajju Singh.

139. Investigating Officer of the case, PW2 Arvinder Kumar Sharma admitted in his cross-examination that the sealed packets of samples as well as those allegedly seized contraband, could be opened without tempering the seals. As per the test memo Ex.PW2/L, the weight of four samples received was 5 Grams each; whereas the report received from CFLS on four samples drawn from the seized material viz; A1 to A4 in Ex.PW2/N states that weight is about 6.6 Grams, 6.6 Grams, 6.7 Grams, & 7.5 Grams respectively. On the CFSL report, the word – 'Gross' has been overwritten on the word 'Net'. The CFSL report Ex.PW2/N and the questions put to the appellant under Section 313 Cr. P.C. talks of white colour substance; however the case property opened in the Court by PW2 i.e. IO of the case found of brown colour.

140. The case of the prosecution has not been supported by the public witnesses i.e. PW7 Shanmugum. He was declared hostile. Heroin in question was allegedly recovered from appellant. The Investigating Officer had made no attempt whatsoever to join any respectable witness of the locality in raiding party. Witness Ravi Tiwari, has not been examined in the Trial Court. The Investigating Officer had sufficient time and opportunity to go to other residents of the building or the neighbouring houses and would have made a request to them to join the raiding party.

141. The law has been settled in **Babuchkerverty** (Supra) that while examining the provisions of Act and the quality of the evidence required conviction of accused thereunder, it is observed, in the case where mandatory provisions are not complied with and where independent witnesses are not examined, the accused would be entitled to acquittal.

142. In the case in hand, the seal with which recovered articles and samples were sealed at the spot was not handed over to any public witness after the sealing process was over and instead it was handed over to official witness to PW8 only. This was highly improbable. To this effect, there is no plausible explanation as to why the seal was not handed over to the public witness, especially when he was available, to ensure that the recovered article was not tampered with, during the period case property remained with the Investigating Officer or with the authorized officer under Section 53 of the Act. In the context of seal, PW8 Sh. C.B. Singh, Superintendent, NCB deposed that this seal was handed over after the alleged recovery of articles then handed back the seal to PW12 – N.S. Ahlawat, Assistant Director on the same day.

143. If the seized article as well as the seal remained with PW2 only from the time of seizure till the time sample was sent to CRCL for analysis. Then, there is no guarantee that the samples were not tempered with during that period. Furthermore, the prosecution was under an obligation to establish on record as to who had taken the samples to CRCL.

144. The person who had taken the samples to CRCL was not examined before the Court. In the testimony of PW8 C.B.Singh, Superintendent, NCB stated that the seized articles could be taken out from the packets without disturbing the seals. It shows that the sealing process was not proper and as such possibility of tempering with the samples was there. Malkahana register has not been produced nor entries therein proved before the Court to show as to at what time and on what date, the articles and samples allegedly recovered from the appellant were deposited in the Malkhana on that date and time and by whom the samples were taken out for CRCL analysis.

145. It is emerged from the testimony of PW3 Chemical Examiner, who analyzed the case property was of 'off white' colour granules powder; whereas the prosecution case is that the case property recovered from the appellant was of 'brown' colour. It has also come in the testimony of PW3 Narender Singh, Chemical Examiner, CRCL that had the samples been of brown colour powder, the report would have been different. Therefore, his statement makes it very difficult for the Court to hold that the articles which were recovered from the appellant was the same, which was examined by the chemical examiner. It also shows that

there may be tempering of alleged article recovered from the appellant before it reached for CRCL analysis.

146. The law has been settled in **Valsala** (supra) that in view of the doubt in regard to the proper custody and sending of the sample article for analysis, the accused is entitled for the benefit of doubt.

147. The prosecution is under obligation to prove that the samples delivered to CRCL was in the same condition and there was no possibility of tempering with it. In view of the several doubts in the prosecution, in regard to the connection of the appellant with the premises in question, recovery of heroin from him, possibility of tempering with the recovered article during the period it remained with the investigating agency, the non-production of the public witness and non-joining of the neighbours, it proves the prosecution failed to prove its case beyond reasonable doubts.

148. Though, the Act lays down stringent punishment for the offence committed thereunder and as such casts a heavy duty upon the Courts to ensure that there remains no possibility of an innocent getting convicted. The officers concerned with the investigation of offences under the Act must produce best and unimpeachable evidence to satisfy the Courts that the accused is guilty because no chance can be taken with the liberty of a person. No doubt that the drug tracking is a serious matter but the investigations into such offences also have to be serious and not perfunctory.

149. There are major contradictions in the times of the alleged events. The appellant was allegedly intercepted by the arresting team at 02:30PM on 20.04.2005 and notices under Section 67 of the NDPS Act are alleged to have been served at 03:00PM, in which the quantity of the contraband was also mentioned. The bags allegedly containing the contraband were first time checked at 03:20 PM at the DRI office. The entire sequence of contradictions has been conveniently ignored by the Learned Special Judge, which in fact raises serious questions on the very recovery of the contraband from the possession of the appellant.

150. PW-18, then Deputy Director of the prosecuting agency deposed that he came to know about raid and interception at 02:50PM, which again is highly improbable as alleged interception itself took place at 02:30PM on 20.04.2005. He further went to depose that he knew the

weight of the seized contraband at 02:30PM, which again is highly contradictory as the weights of the material seized was known only after 03:20PM.

151. Learned Special Judge further glossed over the irregularities carried out by the department in effecting the alleged recovery of the contraband from the possession of the appellant. For instance, after apprehending the appellant was taken to DRI office in a DRI vehicle and keys of the allegedly apprehended car was taken by the DRI officials and the same was also driven to the DRI office and was further searched in absence of the appellant. Hence, there arises no question of conscious possession of contraband by the appellant as the entire process of recovery is jeopardised by the mere fact that there has been no authentic witness to the alleged recovery of the contraband from the possession of the appellant.

152. On perusal of the statement under Section 313 Cr. P.C., reveal that no incriminating evidence was put to the appellant with respect to the case property. The question No.14 put to the appellant with respect to the 'off white' powder and granules substance recovered is different from the 'brown colour' powder which was opened in the Court by the Investigating Officer when the case property was opened.

153. Learned Special Judge also failed to appreciate that the prosecution case could not stand on its feet in view of the material contradictions in the testimony of prosecution witnesses. PW8 deposed that the seal was obtained at 01:15PM on 20.04.2005 while PW2 IO has stated that the arresting team left the DRI office at 11:50AM. This witness further states that test memos were prepared at the spot and the arrest which allegedly happened on 20.04.2005 whereas the date on the test memo Ex.PW2/L is 21.04.2005 further creating doubts on the entire prosecution case.

154. Even there are interpolations of date which proves that the prosecution has tempered with the evidence.

155. In case of **Ramdass** (supra) it is held that the author or signatory of the document is always likely to append the date proceeding to the actual date on the document.

156. Learned Trial Judge has also completely oversight the testimony of PW13, panch witness who stated that there were only five persons

in all in the alleged interception team i.e. himself, one driver and three officers including the IO Arvind Kumar Sharma; whereas, PW2 the IO himself deposed that there were seven persons in the arresting party consisting of five officers and two panch witnesses. Statement of PW13 further creates the doubt that he was absent from his office from 12:00 Noon to 02:00PM only on 20.04.2005, the alleged date of arrest of the appellant and he returned to his office at CGO Complex, New Delhi at 02:00PM on that date. This clearly indicates that the alleged interception and seizure from the appellant which is said to have happened at 02:30 PM. Therefore, either the event did not happen at all or happened in the absence of PW 13, the alleged panch witness, which in itself is a grave irregularity and is sufficient to absolve the appellant from the allegations.

157. Learned Special Judge has ignored the fundamental principal of criminal jurisprudence that benefit of doubt would go in favour of the accused only and not otherwise. The impugned judgment is based on extremely flimsy trial of evidence wherein just only one officer was examined from the arresting party by the prosecution. Moreso, there are only four statements under Section 67 of the NDPS Act on record which included the appellant, the driver of allegedly apprehended car, and two ladies, who were allegedly travelling with the appellant in the said car. Ironically, these two ladies were not examined during trial, therefore, depriving the prosecution of any weight or gain from the statements of both ladies recorded under Section 67 NDPS Act, Ex.PW7/C and Ex.PW7/D. It goes all against the tenets of criminal jurisprudence when the conviction is based on unreasonable and weak piece of evidence where just one officer i.e. the IO/complainant has been examined to prove the entire case.

158. The instant case has been dealt with in a casual approach. This fact proves from the MLC conduct on the appellant by the Doctor of Ram Manohar Lohia Hospital, wherein it does not bear the name and the stamp of the doctor concerned who have prepared the MLC. More interestingly, against the column of the Blood Pressure - Pulse of the appellant is recorded and against the column of Pulse – Blood Pressure is recorded, which is highly improbably on the part of any doctor of such a prestigious hospital, which casts serious doubt on the authenticity of MLC.

159. I am also conscious to the fact that the provisions of NDPS

Act, 1985 were amended by the Amending Act 9 of 2001, which rationalised the structure of punishment under the Act by providing graded sentences linked to the quantity of narcotic drug or psychotropic substance in relation to which the offence was committed. The application of strict bail provisions was also restricted only to those offenders who indulged in serious offences. The Statement of Objects and Reasons appended to the Bill declares this intention thus:-

> "Statement of Objects and Reasons:- Amendment Act 9 of 2001:- The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishment for various offences relating to illicit trafficking in narcotic drugs and psychotropic substances. Most of the offences invite uniform punishment of minimum ten years rigorous imprisonment which may extend up to twenty years. While the Act envisages severe punishments for drug traffickers, it envisages reformative approach towards addicts. In view of the general delay in trial it has been found that the addicts prefer not to invoke the provisions of the Act. The strict bail provisions under the Act add to their misery. Therefore, it is proposed to rationalise the sentence structure so as to ensure that while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment. This requires rationalization of the sentence structure provided under the Act. It is also proposed to restrict the application of strict bail provisions to those offenders who indulge in serious offences."

160. However, in view of the discussion above, legal position, and submissions of learned counsels for parties, I am of the view that learned Trial Judge has ignored the material which emerged in favour of the appellant. The Court has to clear the chaff from grain and has to weigh what is in favour of accused and what is against. Only thereafter, conviction or acquittal has to be recorded.

161. In the present case, the material contradictions are there, as discussed above. Keeping them into view, the appellant is entitled for the benefit of doubt. Therefore, the impugned judgment of conviction dated 22.03.2009 and order on sentence dated 25.03.2009 respectively are hereby set aside.

162. Appellant is in custody since the date of his arrest i.e. 20.04.2005. Consequent to his acquittal, Jail authorities are directed to set him free forthwith, if not required in any other case.

163. Accordingly, instant appeal is allowed.

164. Copy of order be sent to Jail Superintendent for compliance.

165. No order as to costs.

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OMP

ANSAL HOUSING & CONSTRUCTION LTD. ....PETITIONER

VERSUS

AJB DEVELOPERS (P) LTD. ....RESPONDENT

(V.K. SHALI, J.)

OMP NO. : 341/2009 & ARBITRATION APPLICATION NO. 47/2010 **DATE OF DECISION: 29.05.2012**

Arbitration and Conciliation Act, 1996—Section 9 & 11—Code of Civil Procedure, 1908—Section 16 & 20—Petitioner & Respondent entered into MOU/Agreement whereby Respondent company agreed to transfer its rights, title and interest in contiguous agricultural land measuring 150 acres to petitioner for total consideration of Rs. 102 Crores—Petitioner Company agreed for a value derived after reducing liabilities of Respondent Company—Separated detailed agreement covering all aspects of transaction had to be executed within 30 days from date of MOU—Land was situated on By Pass Road, Village Valla & Village Verka, District Amritsar, Punjab, approved by Government of Punjab for development of residential colony—However, due

to failure of respondent Company in giving specific details of complete contiguous land and its revenue records, measurement, interest etc. for purpose of ascertaining value of shares, separate detailed agreement for transfer of shares never got executed—According to petitioner, it came to know that respondent was only having 80 acres of clear and developable contiguous land as against false representation of having approximately 150 acres of clear land—Said fact was deliberately suppressed by respondent company at the time of execution of MOU whereas petitioner duly acted upon MOU and made various payments to respondent company from time to time—Subsequently, petitioner company learnt that promoters of respondent Company were already in process of transferring share holding of Company and immovable assets to third party, therefore they filed petition seeking restraint orders against respondent Company from transferring, mortgaging creating any charge or lien on share holding of Company etc. and also prayed for appointment of Indian arbitrator to adjudicate dispute between parties—However, Respondent challenged jurisdiction of Delhi courts alleging land was situated in Amritsar and MOU executed between parties was essentially agreement for transfer of said land and purchase of share holding of respondent Company was only a method for transfer of land—Therefore, petition was hit by proviso of Section 16 (d) of Code—On behalf of petitioner, it was urged that they were not claiming specific performance of MOU or possession of land—Also, respondent Company had its registered office in Delhi—Petitioner was also in New Delhi, agreement was executed in New Delhi, meetings of two representatives, both pre and post MOU, took place in Delhi and shares of respondent Company were agreed to be transferred in Delhi; therefore, Delhi Courts had jurisdiction—Held:- If an agreement is for sale and purchase of immovable property then Delhi Court does not has

jurisdiction and petition will be required to be filed at a place where land is situated—Whereas, if it was an agreement to sale and purchase of shares, compliance of which can be obtained by personal obedience then Delhi Court has jurisdiction—Relief claimed by petitioner does not simply involve transfer of shares in books or in office of Registrar of Companies, but it would also involve transfer of possession of land in question—Therefore, Delhi Courts lack jurisdiction over subject matter.

The aforesaid judgment also reinforces the view that this court does not have the territorial jurisdiction to entertain the present petition. The present petition relates to a relief in respect of an immovable property situated in Amritsar i.e. outside Delhi and therefore, it is covered by section 16 (d) of CPC and the proviso to section 16 has no application, nor section 20 would apply as a residuary section and Delhi Court has no jurisdiction. Clause 16(d) of CPC provides that for determination of any right or interest for immovable property, the suit has to be instituted in the Court within the local limits of whose jurisdiction the immovable property is situated. The proviso cannot be explained in a manner that for every relief under Section 16 CPC personal obedience is pleaded. Personal obedience cannot be stretched to such an extent that Section 16 of CPC itself becomes redundant. Moreover, this MOU in my opinion was essentially an agreement for sale and purchase of property between the parties. It was only camouflaged as an agreement or MOU to sell and purchase shares of a company so that the property changes the hands by changing the management. This was only done in my opinion to avoid the payment of various duties or levies which have to be paid normally on such transactions therefore, if seen in its proper prospective, it was essentially an agreement of purchase of immoveable property though with a different modality which will be governed by Section 16(d) CPC. **(Para 33)**

Important Issue Involved: If an agreement is for sale and purchase of immovable property then Delhi Court does not has jurisdiction and petition will be required to be filed at a place where land is situated—Whereas, if it was an agreement to sale and purchase of shares, compliance of which can be obtained by personal obedience, then Delhi Court has jurisdiction.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. A.S. Chandhiok and Mr. Suhail Dutt, Sr. Advocates with Mr. Vikas Tiwari and Mr. Ritesh Kumar, Advocates.

FOR THE RESPONDENT : Mr. Sandeep Sethi, Sr. Advocate with Mr. Gurmehar Sistani, Advocate.

CASES REFERRED TO:

1. *Splendor Landbase Limited* vs. *M/s. Mirage Infra Ltd. & Anr.* 2010 (116) DRJ 702 (DB).
2. *Zoom Motels Pvt. Ltd.* vs. *Sheranwali Hotels and Resorts* in OMP 28/2008 (Delhi High Court), decided on 25.9.2009.
3. *Vipul Infrastructure Developers Ltd. & Anr.* vs. *Rohit Kochhar;* 2008 (102) DRJ 178 (DB).
4. *Bhawna Seth* vs. *DLF Universal Ltd. & Anr.* 138 (2007) DLT 639.
5. *Rohit Kochhar* vs. *Vipul Infrastructure Developers Ltd.* 122 (2005) DLT 480.
6. *Harshad Chimanlal Modi* vs. *DLF Universal Ltd.* (2005) 7 SCC 791.
7. *M/s Adcon Electronics Pvt. Ltd.* vs. *Daulat & Anr.* 2001 (7) SCC 698.
8. *Faqir Chand* vs. *Rattan Rattan,* AIR 1973 SC 921.
9. *Hiralal Patni* vs. *Sri Kali Nath,* AIR 1962 SC 199.

10. *Bahrein Petroleum Co. Ltd.* vs. *P.J. Pappu & Anr,* AIR 1966 SC 634.
11. *Kiran Singh* vs. *Chaman Paswan & others,* [1955] 1 SCR 117.

RESULT: Petitions dismissed.

V.K. SHALI, J.

1. These are two petitions filed by the petitioner u/S 9 and Section 11 of the Arbitration and Conciliation Act, 1996 seeking a direction restraining the respondent company from transferring, mortgaging, creating any charge or lien on the share holding of the company and/or registering any transfer of shares or causing the same to be registered by the respondent company and from alienating, transferring, creating any third party right or interest, parting possession with and/or encumbering in any manner whatsoever with any of the immovable assets of the respondent company, as per and in accordance of MOU dated 7.12.2006 pending resolution of disputes or claims of the petitioner company in arbitration. So far as the petition u/S 11 is concerned, that is for appointment of an independent Arbitrator to adjudicate the dispute between the parties.

2. Briefly stated, the facts of the case are that in November 2006 the respondent company is alleged to have made a representation to the petitioner company that it had acquired contiguous agricultural land measuring 150 acres situated on the By Pass Road, Village Valla & Village Verka, District Amritsar, Punjab, duly approved under the Mega Project Schemes by the Govt. of Punjab for the development of residential colony. The petitioner and the respondent company entered into a MOU/ Agreement dated 7.12.2006, whereby, the respondent company agreed to transfer its rights, title and interest in the said land/ project by causing its promoters to transfer all their shares to the petitioner company at a value derived after reducing the liabilities of the respondent company, for a total consideration calculated @ Rs. 68 Lac per acre amounting to almost Rs. 102 Crores. A separate detailed agreement covering all the aspects of the transaction had to be executed within 30 days from the date of MOU. However, due to failure of the respondent company in giving specific details of complete contiguous land and its revenue records, measurement, interest etc. for the purpose of ascertaining the value of shares, the separate detailed agreement for the transfer of shares never got executed.

3. The petitioner alleges that in the beginning of the year 2008, the petitioner company while carrying out the due diligence of the respondent company came to know that the respondent was only having approx. 80 acres of clear and developable contiguous land as against the false representation of having approx. 150 acres of clear land. Petitioner also learnt that the respondent had further about 60 acres of land which is not contiguous and approx 38 acres of land falls in 'No Construction Zone' being within 1000 yards of the Vallah Army Ammunition Dump.

4. It is further alleged that the said fact had been deliberately suppressed by the respondent company at the time of execution of MOU whereas the petitioner duly acted upon the MOU and made various payments to the respondent company from time to time totaling to a sum of approx. 34 Crores till date. Despite the receipt of the aforesaid amount, the respondent company is alleged to have still persisted in its breaches and defaults.

5. It is alleged that till date the respondent company does not have contiguous land as represented which was vital for the development of the project and for obtaining the sanction from the competent authority. In addition to this till date, the respondent company has been unable to acquire clear/ licensable title for approx. 54 acres of land.

6. It is averred by the petitioner that on 26.7.2009, the petitioner company learnt that the promoters of the respondent company are already in process of transferring the share holding of the company and immovable assets to the third party and therefore they were constrained to file the present petition.

7. It was also stated that the petitioner company has already paid the substantial amount of money and it was ready and willing to pay the balance amount to the respondent as and when the later would agree to transfer the shares at the agreed rate in favour of the petitioner.

8. So far as the question of jurisdiction of Delhi Courts is concerned, it was averred that the respondent company has its Registered Office in Delhi. The petitioner is also in New Delhi. The Agreement was executed in New Delhi. The meeting between the representatives of two groups both at pre and post MOU are stated to have taken place in Delhi. The shares of the respondent company are allegedly being agreed to be transferred in Delhi and, therefore, the Delhi Court is stated to have the jurisdiction.

9. Apart from disputing the correctness of the allegations of the petitioner on merits, the respondent has raised preliminary objection as to the jurisdiction of this court to entertain the present petition, since the claim of the petitioner is in respect of the land situated in Amritsar. The plea of the respondent is that since the present MOU is essentially an agreement for the transfer of land situated in Amritsar and the purchase of share holding of the respondent company is only a method for transfer of the land, the present petition is hit by the proviso of Section 16(d) of Code of Civil Procedure, and therefore liable to be rejected for the want of jurisdiction.

10. It was contended by the petitioners that they are not claiming the specific performance of the MOU or possession of the land in question. It is stated that the land is owned by the company and it will remain with the company. Thus, the provisions applicable are Section 20 and proviso to Section 16 of CPC and not Section 16 (d) of CPC for determining the question of territorial jurisdiction.

11. It was further contended by the learned counsel for the petitioner that the respondent has expressly admitted that the respondent has office in Delhi and the agreement was executed in Delhi and, therefore, the Delhi Court has got the territorial jurisdiction to entertain the present petition. Therefore, now they can not dispute the same.

12. I have heard the learned senior counsel Mr. A.S. Chandhiok and Mr. Suhail Dutt for the petitioners and Mr. Mukul Rohtagi and Mr. Sandeep Sethi, the learned senior counsel for the respondent.

13. The question of territorial jurisdiction is going to the root of the matter and will have to be decided first. This question is fundamental for deciding the maintainability of the relief of the petitioner. For deciding this question, it will have to be decided whether this was an Agreement to Sell and Purchase the shares simplicitor or immoveable property? If the Court holds that it was essentially an Agreement for Sale and Purchase of the immovable property, then perhaps this Court may not have the jurisdiction and the petitioner will be required to file the petition at a place where the land is situated. If it is held that it was an agreement to sell and purchase of shares, the compliance of which can be obtained by personal obedience then this Court will have jurisdiction.

14. The learned counsel for the petitioner has contended that all the acts in relation of performance and discharging the respective contractual

obligations of the parties were performed within the territorial jurisdiction of this Hon'ble Court. The MOU was executed in Delhi, payments were made and received in Delhi, both the parties to the MOU have their registered offices in Delhi and they work for gain in Delhi and most importantly, the talks of settlement, pre and post filing of the present petitions, were also held in Delhi and, therefore, this court has the jurisdiction to adjudicate the petitions filed by the petitioner.

15. It was contended that the petitioners were seeking only enforcement of MOU from the Arbitrator with a direction against the respondent to cause the transfer of entire share holding in favour of the petitioners and also a direction against the respondent company to do or cause to do all necessary transfers in the books of the respondent company and also before the office of the Registrar of Companies and thus, provisions of Section 20 of the CPC would apply for the purpose of determination of territorial jurisdiction and not Section 16 (d) of CPC as is sought to be urged by the respondent. In this regard, the petitioners in paragraph 6 of the OMP has urged as under :- "then the petitioner has always been ready and willing to perform his obligation to produce the entire share holding of the respondent company"

16. It was also contended by the petitioners that the respondent had, in its written statement to the petition, admitted the factum of the jurisdiction of Delhi Courts by admitting all the averments with regard to payment, office of the parties being in Delhi and the MOU having been executed in Delhi. It was contended that the petitioner had belatedly, only at the stage of hearing for the first time on 28.3.2011, orally raised this question of jurisdiction after a lapse of almost two years. It was contended that the petitioner by its conduct was estopped from raising the question of preliminary objection with regard to jurisdiction, as the averments in the written statement by the respondent tantamounted to waiver of this question of jurisdiction apart from the principles of estoppel.

17. So far as the application of principles of jurisdiction initiated under Section 20 and not Section 16 (1) (d) are concerned, the petitioners have placed reliance on the following judgments :-

1. **M/s Adcon Electronics Pvt. Ltd. vs Daulat & Anr.,** 2001 (7) SCC 698
2. **Rohit Kochhar vs Vipul Infrastructure Developers Ltd.,** 122 (2005) DLT 480

3. **Bhawna Seth vs DLF Universal Ltd. & Anr.,** 138 (2007) DLT 639
4. **Zoom Motels Pvt. Ltd. vs. Sheranwali Hotels and Resorts** in OMP 28/2008 (Delhi High Court), decided on 25.9.2009.

18. It was also contended that so far as the judgment of **Harshad Chiman Lal Modi vs DLF Universal & Anr.;** (2005) 7 SCC 791 is concerned, the same is not applicable to the facts of the present case because no relief qua that land is sought.

19. With regard to the principles of waiver and estoppels, it was contended that Section 21 of the CPC also lays down that if there is any objection with regard to the territorial jurisdiction, it must be raised at the first available opportunity and this provision was also not adhered to by the respondents and therefore, Delhi Courts have the jurisdiction. Reliance in this regard was placed on **Bahrein Petroleum Co. Ltd. vs P.J. Pappu & Anr.;** AIR 1966 SC 634 and **Hiralal Patni vs Sri Kali Nath;** AIR 1962 SC 199 etc.

20. As against this, the respondent had essentially contended that the judgments which have been relied upon by the petitioners are not applicable to the facts of the present case. It was contended that the principles of law laid down in **Harshad Chimanlal Modi's** (supra) case is applicable to the facts of the present case inasmuch as in effect, the petitioners were seeking specific enforcement of the MOU. It was contended that the transfer of shares was only a modality to be adopted by the petitioners and the respondent for actual transfer of right, title or interest in the immovable property which was not situated within the jurisdiction of this court. It was contended that assuming, though not admitting, that the Arbitrator decides the matter and grants the relief to the petitioners, viz. a restraint against the transfer of mortgaging, transferring of shares to a third party still that would not be the complete relief to the petitioners because ultimately the possession of the land in question is with the respondent company and its officials. The company, though being in possession of the property on papers, but actually the possession of the land is with the individuals and unless and until a suit for specific performance is filed, the possession of the land could not be transferred.

21. I have carefully considered the respective submissions made by

the parties. Before embarking on the examination of the respective contentions of the parties, it would be worthwhile to reproduce Sections 16 and 20 of the CPC, which reads as under:-

"16. Suits to be instituted where subject-matter situate, subject to the pecuniary or other limitations prescribed: suits,

(a) for the recovery of immovable property with or without rent or profits,

(b) for the partition of immovable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant, may where the relief sought can be entirely obtained through his personal obedience be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain. Explanation.- In this section "property" means property situate in [India].

20. Other suits to be instituted where defendants reside or cause of action arises, Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises."

22. In **Harshad Chimanlal Modi Vs. DLF Universal Ltd.** (2005) 7 SCC 791, wherein it has been observed by the Apex Court as under:

"16. Section 16 thus recognizes a well established principle that actions against rest or property should be brought in the forum where such rest is situate. A court within whose territorial jurisdiction the property is not situated has no power to deal with and decide the rights or interests in such property. In other words, a court has no jurisdiction over a dispute in which it cannot give an effective judgment. Proviso to Section 16, no doubt, states that though the court cannot, in case of immovable property situate beyond jurisdiction, grant a relief in rem still it can entertain a suit where relief sought can be obtained through the personal obedience of the defendant. The proviso is based on well known maxim "equity acts in personam", recognized by Chancery Courts in England. Equity Courts had jurisdiction to entertain certain suits respecting immovable properties situated abroad through personal obedience of the defendant. The principle on which the maxim was based was that courts could grant relief in suits respecting immovable property situate abroad by enforcing their judgments by process in personam, i.e. by arrest of defendant or by attachment of his property.

.....

18. The proviso is thus an exception to the main part of the section which in our considered opinion, cannot be interpreted or construed to enlarge the scope of the principal provision. It would apply only if the suit falls within one of the categories specified in the main part of the section and the relief sought could entirely be obtained by personal obedience of the defendant.

19. In the instant case, the proviso has no application. The relief

sought by the plaintiff is for specific performance of agreement respecting immovable property by directing the defendant No. 1 to execute sale-deed in favor of the plaintiff and to deliver possession to him. The trial court was, Therefore, right in holding that the suit was covered by Clause (d) of Section 16 of the Code and the proviso had no application.

.....

21. Plain reading of Section 20 of the Code leaves no room of doubt that it is a residuary provision and covers those cases not falling within the limitations of Sections 15 to 19. The opening words of the section "Subject to the limitations aforesaid" are significant and make it abundantly clear that the section takes within its sweep all personal actions. A suit falling under Section 20 thus may be instituted in a court within whose jurisdiction the defendant resides, or carries on business, or personally works for gain or cause of action wholly or partly arises."

23. A perusal of the aforesaid judgment makes it abundantly clear that a Court within whose jurisdiction the property is not situated cannot decide the rights of the parties in respect of land or any other immoveable property and give effective judgment ruling on the same. The only exception to this is provided in the provision that is if the relief which is sought is of such a nature that it can be obtained simply by the personal obedience then that Court may entertain such a suit as an exception to Section 16(d).

24. In **Vipul Infrastructure Developers Ltd. & Anr. vs Rohit Kochhar;** 2008 (102) DRJ 178 (DB), a suit for specific performance relating to a property situated in Gurgaon was filed in Delhi on the ground that the agreement was executed at Delhi and the defendants also carried on business at Delhi. The learned Single judge held the suit to be maintainable on the ground that only a declaration of right and title in the property was sought and not the delivery of possession. The Division Bench overruled this judgment holding that Delhi Court had no jurisdiction to entertain and try the suit. The relevant paras of the judgment are reproduced as under:

"19. Accordingly, we are of the considered opinion that the submissions of the learned Counsel for the Respondent and the findings recorded by the learned Single Judge that the present

case is covered by the proviso of Section 16 of the Code of Civil Procedure are misplaced. In the facts and circumstances of the case as delineated, the relief in the present suit cannot be entirely obtained through the personal obedience of the Defendants. The proviso to Section 16 of the Code of Civil Procedure would be applicable to a case where the relief sought for by the Plaintiff was entirely obtainable through the personal obedience of the Defendant, i.e., the Defendant has not at all to go out of the jurisdiction of the Court for the aforesaid purpose. The present case is not a case of the aforesaid nature. In the present case for execution of the sale deed the Defendants will have to go out of the jurisdiction of this Court and get the same executed and registered in Gurgaon.

20. In the present case also it is an admitted position that possession of the said property was with the seller and, therefore, in terms of the provisions of Section 55(1) of the Transfer of Property Act, 1882, the relief of possession is inherent in the relief of specific performance of the contract. In our considered opinion the ratio of the decision of the Supreme Court in Babu Lal (supra) and the principles laid down in the case of Harshad Chiman Lal Modi(supra) are applicable to the facts of the present case. In Harshad Chiman Lal Modi (supra) it was found that in addition to passing decree, the court was also required to deliver possession of the property. It was held that such a relief can be granted only by sending the concerned person responsible for delivery of possession to Gurgaon and the court at Delhi does not have the jurisdiction to get the aforesaid decree enforced for the property situate outside territorial jurisdiction of Delhi High Court. The Court while referring to the provisions of Section 16 of the Code of Civil Procedure held that the location of institution of a suit would be guided by the location of the property in respect of which and for determination of any right or interest whereof the suit is instituted. The proviso to Section 16 Code of Civil Procedure is also not applicable to the case, as the relief sought for cannot be entirely granted or obtained through the personal obedience of the Respondent.

25. Similar view was taken by this Court in **Splendor Landbase Limited vs M/s. Mirage Infra Ltd. & Anr.** 2010 (116) DRJ 702 (DB).

In this case, a suit for declaration and permanent injunction relating to a property situated at Chandigarh was filed at Delhi on the ground that the agreement was executed at New Delhi and payments were also made at New Delhi. The Division Bench of this Court following the judgments of the Supreme Court in **Harshad Chiman Lal Modi** (supra) and of Division Bench of this Court in **Vipul Infrastructure Developers Ltd.** (supra) held that this Court has no jurisdiction to entertain and try the suit. The relevant paragraph is as under:

> "25. Having considered the decisions referred by the parties and on a plain reading of the plaint as a whole, it is clear as we have indicated above that the present suit is one which comes within the purview of Section 16 (d) of the Code of Civil Procedure and the proviso of Section 16 of Code of Civil Procedure is not applicable under the circumstances as the proviso of Section 16 of Code of Civil Procedure is an exception to the main part of the Section which cannot be construed to enlarge the scope of the main provision. If the suit comes within Section 16(d) of the Code of Civil Procedure, it has been held by the Apex Court in Harshad Chiman Lal Modi's case (supra) that Section 20 of the Code would have No. application in view of the opening words of Section 20 "subject to limitations aforesaid". The Apex Court has held that the proviso to Section 16 would apply only if the relief sought could entirely be obtained by personal obedience of the Defendant. The proviso we feel will only apply if the suit falls within one of the categories specified in the main part of the Section. In the present case, although specifically the relief for possession of the property has not been claimed by the Appellant in the prayer for the purpose of development, however, it is settled law that by clever drafting a party cannot be permitted to come within different meaning of relief claimed. Hence, No. benefit can be derived by the Appellant either from the proviso of Section 16 or Section 20 of the Code of Civil Procedure.

26. Learned counsel for the respondent submitted that in view of the aforesaid decisions, since the petition filed by the petitioner essentially pertains to a property situated in Amritsar, in view of the provisions of section 16 (d) CPC, this court will have no jurisdiction to try and entertain the same.

27. Learned counsel for the petitioner has contended that all the

acts in relation to performing and discharging of the respective contractual obligations were to be done in Delhi and, therefore, Delhi Court had jurisdiction. Reliance has placed reliance on the following judgments:

(i) **M/s Adcon Electronics Pvt. Ltd. vs Daulat & Anr.** 2001 (7) SCC 698

(ii) **Rohit Kochhar vs Vipul Infrastructure Developers Ltd.** 122 (2005) DLT 480

(iii) **Bhawna Seth vs DLF Universal Ltd. & Anr.** 138 (2007) DLT 639

28. The decisions relied upon by the petitioner have been discussed by the learned Single Judge of our own High Court in **Bhawna Seth's** case (supra), including the judgment in **Harshad Chiman Lal's** case (supra). A distinction between a suit for specific performance simplicitor and a suit for specific performance coupled with delivery of possession has been drawn, it has been held that the court has no jurisdiction to try the case if the property in question is not situated within its jurisdiction though in former case the legal position is different and the judgment in **Adcon Enterprises** (supra) squarely applies. It would be relevant to reproduce the relevant paragraphs of the said judgment:

> "20. On consideration of the aforesaid judgments, I am of the view, that there can be no doubt that where in a suit for specific performance possession is also claimed as a relief, the competent court to deal with the matter is the court where the property is located in view of Section 16 of the said Code. The judgment in **Harshad Chiman Lal Modi** case (supra) clearly lays down the said proposition. However, what cannot be lost sight of is that the judgment is in the facts of the case where the relief of possession was specifically claimed. The question as to what would happen where the relief for possession is not claimed does not form subject matter of a relief in **Harshad Chiman Lal Modi** case (supra).
>
> .....
>
> 22. M/s. Adcon Electronics Pvt. Ltd. case (supra) deals with the distinction in a case simplicities for specific performance as against a case where possession is also prayed. This issue is not discussed in **Harshad Chiman Lal Modi** case (supra) nor has the judgment in **Adcon Electronics Pvt. Ltd.** case (supra) been

apparently cited in the proceedings in **Harshad Chiman Lal Modi** case (supra). Thus, both the judgments would operate in their respective areas. **M/s. Adcon Electronics Pvt. Ltd.** case (supra) clearly sets down that in a suit for simplicities specific performance the same does not amount to a suit for land. If it is a simplicities suit for specific performance, i.e. for enforcement of Contract for Sale and for execution of sale, in that event there can be no good ground for holding that such a suit is for determination of title to the land or that the decree in it would operate on the land. The observations made in the judgment in **Moolji Jaitha & Co. v. The Khandesh Spinning & Weaving Mills Co. Ltd.** referred to in the said judgment being a judgment of the Federal Court was approved by the Supreme Court, as noted in paragraph 15 of the **Adcon Electronics Pvt. Ltd.** case (supra). Thus a distinction has been carved out in respect of a suit where no possession has been claimed of the land in question.

.....

25. I am thus of the view that since the plaintiff is not claiming possession of the suit property and has specifically stated so and the relief is confined to specific performance of the Agreement in question without the relief of possession, the judgment in Adcon Electronics Pvt. Ltd. case (supra) would squarely apply to the facts of the present case and thus this Court would have territorial jurisdiction to try and entertain the present suit. The issue is accordingly answered in favor of the plaintiff and against the defendants." 29. The case of the petitioner is that the relief sought by the petitioner in the present petition does not involve determination of any right or title in the immovable property, the petitioner has only sought relief to the extent of restraining the respondent from alienating, transferring or creating any third party interest in the immovable assets of the respondent company & the relief sought is such which can be obtained through personal obedience of the respondent, and therefore, proviso to section 16 and section 20 CPC are applicable.

30. The examination of the aforesaid decisions relied upon by the parties, In my considered opinion the decisions relied upon by the petitioner in **Bhawna Seth's** case (supra) and **Adcon Electronics Pvt. Ltd** case (supra) are not applicable to the present petition as herein the petitioner

has approached this Court under Section 9 of the Arbitration & Conciliation Act, 1996 (in short the 'Act') & these judgments have not addressed and dealt with the issue of jurisdiction under Section 9 of the Act. In order to decide a petition under section 9 of Arbitration and Conciliation Act, the court where petition is filed must have the jurisdiction taking into account the subject matter of the petition. Section 2 (1) (e) read with section 9 of the Arbitration and Conciliation Act makes it clear that in order to have jurisdiction to decide an application under section 9, the court entertaining the petition should be one which has power to entertain the suit on the same facts.

31. To illustrate the fact, the relief claimed by the petitioner does not simply involve the transfer of shares in the books or in the office of the Registrar of Companies, but it would also involve the transfer of the possession of the land in question because this transfer of shares has no meaning. The petitioner's reasoning is that once the transfer of shares takes place, the land being in the name of the Company, therefore, they also get the possession of the land. I feel that the petitioner is deliberately expressing ignorance in the sense that even if shares are transferred, that does not solve the problem or get the complete relief to the petitioner, which in Harshad Chiman Lal's case is called effective judgment or adjudication of the dispute between the parties. This is because, no doubt, the company is in possession of the land but being a juristic person, it has to be in possession through some individual office bearer or the employee. Suppose, despite transfer of these shares, these employees, individuals or the office bearers do not give the possession to the petitioner, the only remedy available to the petitioner is to rush to the Court to file a suit for possession or suit for specific performance because the complete relief cannot be obtained by simply passing order, it has to be implemented also. Therefore, what would be applicable is not only the personal obedience but also actual specific performance and hence the petitioner would be barred by Section 16(d) of the CPC.

32. In **Trehan Promoters and Builders Pvt. Ltd. vs Welldone Technology Parks Development Pvt. Ltd.,** the learned Single Judge of this court observed as under:

> "Section 9 is applicable only where a party has invoked the arbitration clause or has intention to invoke the arbitration clause. Section 9 is not in the nature of provisions of Specific Relief Act where a party can come to the Court and pray for a relief of

performance of the contract and ask the Court to compel the other party to abide by the terms and conditions of the contract and seek an injunction from the Court that the party should be restrained from violating the terms and conditions of the contract. In fact, Section 9 of the Act envisages existence of an arbitration clause whereunder the disputes resolution mechanism is provided and the parties had chosen the arbitration as a dispute resolution mechanism instead of choosing the Court to resolve their disputes. Resort to the Court under Section 9 of the Act is for limited purpose of preserving the property which is the subject matter of dispute so that by the time the arbitrator decides the dispute, the property itself is either sold away or disposed of by the opposite side, or being of perishable nature is likely to perish or where there is need to appoint a receiver, the Court passes an order for appointing a receiver. The extent and scope of relief under Section 9 of the Act cannot extend so as the Court directs a party to specifically perform the contract so that the party approaching the Court has not to go to the arbitrator for breach of contract. Section 9 does not envisage a situation where the order of the Court under Section 9 itself settles the disputes between the parties. Neither by the instrumentalities of Section 9, the Court can put the party back into pre-dispute situation and ask the party to comply with the contract. If the Court could direct specific performance of the contract under Section 9 of the Arbitration & Conciliation Act, and could place the parties in the position prior to rising of dispute, no dispute would ever go to the arbitrator and by an interim relief itself, the Court would be finally disposing of all the disputes between the contracting parties by just directing specific performance of the contract, irrespective of the breach on the part of one or the other."

33. The aforesaid judgment also reinforces the view that this court does not have the territorial jurisdiction to entertain the present petition. The present petition relates to a relief in respect of an immovable property situated in Amritsar i.e. outside Delhi and therefore, it is covered by section 16 (d) of CPC and the proviso to section 16 has no application, nor section 20 would apply as a residuary section and Delhi Court has no jurisdiction. Clause 16(d) of CPC provides that for determination of any right or interest for immovable property, the suit has to be instituted in the Court within the local limits of whose jurisdiction the immovable

property is situated. The proviso cannot be explained in a manner that for every relief under Section 16 CPC personal obedience is pleaded. Personal obedience cannot be stretched to such an extent that Section 16 of CPC itself becomes redundant. Moreover, this MOU in my opinion was essentially an agreement for sale and purchase of property between the parties. It was only camouflaged as an agreement or MOU to sell and purchase shares of a company so that the property changes the hands by changing the management. This was only done in my opinion to avoid the payment of various duties or levies which have to be paid normally on such transactions therefore, if seen in its proper prospective, it was essentially an agreement of purchase of immoveable property though with a different modality which will be governed by Section 16(d) CPC.

34. The second contention of the learned counsel for the petitioner is that the respondent in their reply to the petition has expressly admitted/ stated that *'this court has got the territorial jurisdiction to entertain the petition'* and therefore, the respondent cannot challenge the territorial jurisdiction of this court after having admitted the same in the pleadings and participating without any objection for almost 2 years. This belated stage of objection is hit by section 21 of the code of Civil Procedure. Section 21 of CPC reads as under:

> "No objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice."

35. The learned counsel for the petitioner has placed reliance on a full bench judgment of the Apex court in case titled **Bahrein Petroleum Co. Ltd. vs P.J. Pappu & Anr,** AIR 1966 SC 634 where Apex court relying upon a constitution bench judgment **Hiralal Patni vs Sri Kali Nath,** AIR 1962 SC 199 held that:

> "As a general rule, neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, otherwise incompetent to try the suit. But Section 21of the Code provides an exception, and a defeat as to the place of suing, that is to say the local venue for suits cognizable by the Courts under the Code, may be waived under this section. The waiver under Section 21 is limited to objections in the appellate and revisional Courts. But Section 21 is a statutory recognition of the Principle that the

defeat as to the place of suing under Ss. 15 to 20 may be waived Independently of this section, the defendant may waive the objection and may be subsequently precluded from taking it."

36. However, in Harshad Chiman Lal's case Supreme Court has held as under:

The jurisdiction of a court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity.

In Halsbury's Laws of England, (4th edn.), Reissue, Vol. 10; para 317; it is stated;

317. Consent and waiver. Where, by reason of any limitation imposed by statute, charter or commission, a court is without jurisdiction to entertain any particular claim or matter, neither the acquiescence nor the express consent of the parties can confer jurisdiction upon the court, nor can consent give a court jurisdiction if a condition which goes to the jurisdiction has not been performed or fulfilled. Where the court has jurisdiction over the particular subject matter of the claim or the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a defendant by entering an appearance without protest, or by taking steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No appearance or answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. A statute limiting the jurisdiction of a

court may contain provisions enabling the parties to extend the jurisdiction by consent." In *Bahrein Petroleum Co.,* this Court also held that neither consent nor waiver nor acquiescence can confer jurisdiction upon a court, otherwise incompetent to try the suit. It is well-settled and needs no authority that 'where a court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing.' A decree passed by a court having no jurisdiction is non-est and its validity can be set up whenever it is sought to be enforced as a foundation for a right, even at the stage of execution or in collateral proceedings. A decree passed by a court without jurisdiction is *acoram non judice*.

The case on hand relates to specific performance of a contract and possession of immovable property. Section 16 deals with such cases and jurisdiction of competent court where such suits can be instituted. Under the said provision, a suit can be instituted where the property is situate. No court other than the court where the property is situate can entertain such suit. Hence, even if there is an agreement between the parties to the contract, it has no effect and cannot be enforced.

37. Also in **Kiran Singh vs Chaman Paswan & others,** [1955] 1 SCR 117, this Court declared as under:

"It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up whenever and it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction ... strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

38. Moreover, so far as the decision of Apex Court, relied upon by the petitioner, in **Bahrein Petroleum's** case (supra) is concerned even that does not support the contention of the petitioner inasmuch as in the said case the Apex court has held that unless there has been a 'consequent failure of justice' the objection to jurisdiction under section 21 CPC cannot be raised. The relevant paragraph reads as under:

7. Counsel for the plaintiff also submitted that the defendants having neither alleged nor proved that there has been a failure of

justice in consequence of the order of the High Court, they are precluded by Section 21 of the Code from raising this objection in this Court. We think that this contention has no force. The suit has not yet been tried on the merits. So far, only the preliminary issue as to jurisdiction has been tried. That issue was decided in favour of the defendants by the trial Court and the District Court and against them by the High Court, and from the order of the High Court, this appeal has been filed. There cannot be a consequent failure of justice at this stage. The condition "unless there has been a consequent failure of justice" implies that at the time when the objection is taken in the appellate or revisional Court, the suit has already been tried on the merits. The section does not preclude the objection as to the place of suing, if the trial Court has not given a verdict on the merits at the time when the objection is taken in the appellate or revisional Court

39. Section 21 of the Code, requires that the objection to the jurisdiction must be taken by the party at the earliest possible opportunity and in any case where the issues are settled at or before settlement of such issues and in case there is consequent failure of justice. Though the petitioner is right in submitting that the respondent had agreed to the jurisdiction of Delhi Court and in their written statement, they had expressly admitted that Delhi court has jurisdiction, yet it cannot take away the right of the respondent to challenge the jurisdiction of the court nor it can confer jurisdiction on Delhi Court, which it did not possess. Moreover, in the present case the issue has still not been settled and the objection to the jurisdiction is only a preliminary objection and also there is no consequent failure of justice, thus the requirements of section 21 CPC are not made out and therefore the respondent cannot be said to have waived there right to raise the objection to the jurisdiction. Moreover, Section 21 CPC restrains a party from raising the question of jurisdiction before the Appellate or the Revisional Court unless and until it is not raised before the Trial Court. In the present case, the petition u/s 9 is not before the Appellate or the Revisional Forum, therefore, in my view, Section 21 would not be applicable.

40. There is another aspect of the matter to illustrate that the question of jurisdiction in the instant case is not a question of territorial or pecuniary jurisdiction which may be waived or given up but, is one

pertaining to subject matter, that is to say, it is related to the immovable property or the land which is not situated within the jurisdiction of this Court. In terms of Section 16(d) lays down that in such cases, suit has to be filed at a place where the land is situated. If that be the legal position, then even if the respondent has admitted that Delhi Courts have the jurisdiction, it does not estop the petitioner from turning around and disputing the jurisdiction of Delhi Courts because there is no estoppel against a law passed by a competent legislature. Reliance in this regard is placed on **Faqir Chand vs. Rattan Rattan,** AIR 1973 SC 921.

41. For the reasons mentioned above, I am of the considered opinion that the present petitions under Section 9 for interim relief and Section 11 for appointment are not maintainable in Delhi Courts on account of lack of jurisdiction over the subject matter because the petitioners in effect are seeking a relief which cannot be given simply by personal obedience of the respondents. It will require the transfer of possession of the land in question also which is admittedly situated in Amritsar, which is beyond the jurisdiction of this court. I also do not agree with the contention of the learned counsel for the petitioners that the respondents are estopped from raising the question of jurisdiction of Delhi Courts having admitted by way of an averment in their written statement originally the Delhi Court as the jurisdiction because there is no estoppel against law. Both the petitions are accordingly dismissed. Interim order dated 03.7.2009 stands vacated.